

A Tale of Political Alienation of Our Youth: An Examination of the Potential Threats on Democracy Posed by Incomplete “Community Policing” Programs

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Introduction

Lesean is a sixteen-year-old high school student in Brooklyn. Having grown up in one of the nation’s toughest housing projects, he was delighted to find out that he was going to be spending most of his free time during the 2000-2001 school year talking about privacy rights and police-citizen interactions. I know Lesean because he was a member of his high school debate team, which is sponsored by the Open Society Institute, and for which I was a volunteer coach. He performed hours of research on privacy rights to supplement his own knowledge about the justice system—knowledge from his own experiences as an impoverished young African American who had been arrested several times and stopped by police officers on countless

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other occasions. After weeks of research, Lesean decided to develop a “case” about police profiling. As I shared my background in Fourth and Fifth Amendment doctrine with him, he provided me endless insight into my own work on community policing, police officer interaction with youth, and the potential for future improvement on the relationships between police officers and youth of color.

The image conjured by “community policing” is an idyllic one: Officer Fife walking the streets of his “beat” with a friendly wave to each person he passes on the street. A 1950’s image of a friendly neighborhood organization—a time when children were still considered children and where communities felt united in “moral values”. Indeed, many officers designing and/or participating in such programs speak of policing models from the 1950’s, a time “when police officers were widely respected and trusted.”¹

Community policing in itself is a noble idea. The responsiveness of the police to the concerns of *united* inner-city communities is critical in providing protection to communities that need it most. In fact, some community policing programs have shown preliminary success in connecting with and working with the community to best meet its needs. However, efforts at community policing which fail to recognize the intricacies of diverse, impoverished communities pose a great risk of disenfranchising young people. Rather than focusing on the needs of the entire community, many community policing programs currently cater to the vocal members of the community, those who are politically organized and exert political influence and voting power. Thus, community policing often fails to address the concerns and protect the rights of young people even though more officers are out on the streets interacting with these

¹ See Community Policing Consortium, at www.communitypolicing.org (last visited on Jan. 15, 2002) (a database designed as a reference to local law enforcement initiatives to begin community policing programs).

young people. Such a system threatens to create a generation of youth with little incentive to believe in or endorse the American justice system. The disenfranchisement of youth has serious democratic implications for the nation as a whole in the development of representative policy. But the greatest impact of harm is on individual children who grow up with few monetary resources and live without hope that they can control their futures.

This article examines the social realities of developing youth in light of an increased level of anti-juvenile rhetoric, legislation, and policing structures that put more officers on the street and often place more discretion in their hands. Part I provides a background for examining policing models. Part I.A outlines the state's primary goal in setting juvenile policy: to create well-transitioned adults engaged in the political process. Part I.B examines the developmental realities of adolescents and attempts to provide insight into how youth are affected by community policing regimes. Part II explores and critiques community policing programs as they are most commonly implemented. This section looks at the program's basic premises, the reality of police tactics in interactions with citizens and current attitudes toward youth crime. The author argues that community policing models that do not meaningfully involve young people pose three distinct threats: (1) greater numbers of juveniles are exposed to political disenfranchisement and criminal liability; (2) racism and antagonistic views toward police officers are reinforced, and; (3) "at risk" communities are divided rather than united. Finally, Part III offers ways to improve community policing models. Essential for improvement are models which nurture and encourage young people.

I. The Juvenile in the Community: A Developmental Perspective

A. Youth in the American Legal Spectrum: Developing Democratic Actors

American jurisprudence regarding youth began with the premise that youth remained the property of their parents until the age of majority. Parents were most equipped to nurture children to adulthood.² However, as the legal system began to take a more developed interest in the successful creation of a true democracy, legal doctrine began to recognize that conflict may develop between what parents want for their children and what may best prepare the child for successful transition into American adult life.³

The civil rights movement marked a period in jurisprudential development that recognized young people as developing democratic actors, and the courts began to view young people as individuals with rights apart from their parents.⁴ This notion, a desire for full participation regardless

² See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (“The child is not a mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty to recognize and prepare him for additional obligations.”); *Meyer v. Nebraska*, 262 U.S. 390, 397-99 (1923) (finding that a parent’s right to direct the education of their children trumped legislative will to impose curricular requirements); see also Barbara Woodhouse, “*Who Owns the Child?*” *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992) (explaining that the foundations of the law as it related to children is consistent with a view by the courts that children existed as the property of their parents).

³ See *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944) (“The state’s authority over children’s activities is broader than over like actions of adults A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies.”). *But see* *Wisconsin v. Yoder*, 406 U.S. 205, 213-17 (1972) (emphasizing that limits on parental control must be grounded in strong reason for concern for the youth’s well-being).

⁴ See *Bellotti v. Baird*, 443 U.S. 622, 633-40 (1979) (providing a lengthy discussion of the relationship between child, parent, and state in the development of a responsible citizenry); *Tinker v. Des Moines Indep.*

of class, social stature, race or gender, is a cornerstone of American political philosophy. In theory, this philosophy is what separates our system from those before it.⁵

Recent Supreme Court decisions have scaled back from treating young people as potential voters with recognized legal autonomy.⁶ Even so, the goal of creating future political actors remains central in formal legal doctrine. Assuming that the development of democratic actors is the primary goal of the American system and the most efficient way to effectuate social justice, community policing regimes fail to recognize and accommodate the developmental reality of young people.

*B. The Adolescent as a Developing Human:
An Examination of the Intersection of Legal Doctrine and
Developmental Psychology*

Doctors and psychologists have long understood that the development of social and moral understandings is a gradual process that spans the early years of human life.⁷ Jean Piaget developed one of the most famous models for moral

Cnty. Sch. Dist., 393 U.S. 503, 506 (1969) (“It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”); *In re Gault*, 387 U.S. 1, 13 (1967) (“Whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.”).

⁵ See U.S. CONST. pmbl. and amends. I-XIX.

⁶ See generally *Bd. of Educ. v. Earls*, 122 S. Ct. 2559 (2002). The *Earls* decision provides that a school district may administer random drug tests on any student involved in extra-curricular activities, from band to 4-H clubs, regardless of the lack of individualized suspicion. *Id.* at 2566-71. It is a powerful antidote to the principle extended in this article, that by disenfranchising youth, the government will destroy all desire for youth to participate in outside activities, whether those activities are after school clubs or exercising their right to vote upon reaching the age of majority.

⁷ I would be deeply remiss not to mention that studying primarily white, middle class boys resulted in the developmental models highlighted in this article. Accordingly, they are inadequate in completely explaining the dynamics of the developing brain of the youth most effected by the policies questioned in this article. That said, the developmental models explored might serve as a baseline, as well as a call for further research, in highlighting essential reasoning flaws of contemporary juvenile policy.

development. That model relies on three distinct areas of knowledge⁸ which humans acquire during a four-stage process.⁹ Other social scientists have demonstrated that moral development is gradual, with understandings of the legal system, social morality, and complex social structures occurring at late stages of an individual's developmental cognitive cycle.¹⁰ Further, one's understanding of the world is

⁸ See JOHN H. FLAVELL, *THE DEVELOPMENTAL PSYCHOLOGY OF JEAN PIAGET* 1-126 (1963). Piaget describes three types of knowledge that children acquire: (1) physical knowledge, as "knowledge about objects in the world, which can be gained through their perceptual properties"; (2) logical-mathematical knowledge, as "abstract knowledge that must be invented"; and (3) social-arbitrary knowledge, as "culture-specific knowledge learned from people within one's culture-group." *Id.* at 25. "These form a hierarchy: The base of which is physical and the peak social-arbitrary." *Id.* at 26-27.

⁹ *Id.* at 25-63. The four stages are sensorimotor (birth to age two), preoperational (two to seven years), concrete operational (seven to eleven years), and formal (eleven years on). *Id.* at 25. Each stage is represented by various characteristics representative of that stage. *Id.* at 25-65. Children pass through these stages in the same order; each child is expected to exhibit the characteristics of every stage at some point and to ultimately reach the fourth stage. *Id.* at 50. Central to the four stages are the criteria on which they are based. *Id.* at 45-65. The criteria are as follows: (1) Each stage must represent a qualitative change in the children's cognition; (2) Children must progress through the stages in a culturally invariant sequence; (3) Each stage includes the cognitive structures and abilities of the preceding stage; and (4) At each stage, the child's schemes and operations form an integrated whole. *Id.* at 40.

¹⁰ See Lawrence Kohlberg & Elliot Turiel, *Moral Development and Moral Education*, in *PSYCHOLOGY & EDUCATIONAL PRACTICE* 410 (1971). Kohlberg focused on purely moral concepts. His approach involved assessing a person's ability to give a detailed account of the reasons for judging right or wrong decisions involving justice, fairness and welfare. *Id.* at 412. Kohlberg formulated a culturally universal, invariant sequence of six stages outlining the origins of moral judgment. *Id.* at 412-40. He established three levels accommodating the six stages, each level being characterized by a certain kind of morality that differs only slightly between the two relevant stages, but widely across the levels. *Id.* at 415-40. At the first level, the Preconventional Level, "subjectivism" controls the thought processes of four to ten-year olds. *Id.* at 415-20. Right is what the subject likes, and at Stage One she likes what brings rewards or avoids punishment (as a sign of "wrongness"). *Id.* Rules that are externally imposed and unchangeable are strictly observed. *Id.* According to Kohlberg, this punishment orientation is caused by the unequal power structure between adults, the main socializing agents at that age. *Id.* at

420. At Stage Two, punishment is viewed as a risk best avoided. *Id.* Children begin to question the existence of “collective” authority, and to recognize and acknowledge self-interest in other individuals, too. *Id.* at 425-30. This stage is labeled by Kohlberg as Level Two, the Conventional Level, and covers ages ten through thirteen. *Id.* Kohlberg attributes the advance to increased peer interaction and frequent exposure to conflict, creating the need to make oneself understood without the help of adult prompting or guessing. *Id.* at 430. The “solipsistic subjectivity” of Level One is being replaced by group interest. In Stage Three, children strive to live up to the expectations of those close to themselves in order to meet their approval, whereas in Stage Four, they equate “rightness” with conformity to the demands of some higher authority, i.e., the society as a whole or the state. *Id.* at 431. They begin to outgrow their law-and-order morality, leading to a stage of transcendent objectivity, when adolescents and adults contemplate the values an ideal society should be based on irrespective of individual or collective interests. *Id.* at 432-45. Attaining Piaget’s stage of Formal Operational Thinking (beginning at the age of eleven or twelve), allows adolescents and adults to reason at the Post-conventional Level Three, i.e. not referring to the society of their reality. *Id.* Stage Five thinkers value decisions that are based on humanistic and democratic principles. *Id.* at 445. However, even these do not guarantee freedom from injustice, for example. So, Stage Six respondents try to formulate truly universal values, such as justice, that would require a decision to be based on equal respect for all in order to be deemed morally right. *Id.* at 450. Jerome Bruner divided learning into three phases: the enactive (activity-based learning), the iconic (picture-based learning), and the symbolic (language-based learning). JEROME S. BRUNER, TOWARD A THEORY OF INSTRUCTION 44-45 (1966) (recognizing the interplay between instruction and interaction in the learning process). Bruner suggested that learning progress through these stages, moving from the concrete to the more abstract. *Id.*; see LEV V. VYGOTSKY, MIND IN SOCIETY: THE DEVELOPMENT OF HIGHER PSYCHOLOGICAL PROCESSES 56-58, 84-91 (1978). Vygotsky’s work also adds significant insight to the developing mind. *Id.* Vygotsky argued that a child’s interaction with his or her social world and culture forms the basis of the child’s cognitive development. *Id.* at 55-58. By interacting and collaborating with adult role models, children acquire social knowledge that is converted to individual knowledge about the concept and attitudes that are relevant to their culture. *Id.* Vygotsky’s work is credited with providing new insight into the social context of learning and the active role that adults play in furthering children’s intellectual development. See Emily Buss, *You’re My What?: The Problem of Children’s Misperceptions of Their Lawyers’ Roles*, 64 FORDHAM L. REV. 1699, 1753-56 (1996) (for a more comprehensive review of the interaction between the work of these developmental experts); see also, DAVID WOOD, HOW CHILDREN THINK AND LEARN 38-54 (1988) (summarizing developmental theorists).

developed at a young age and is deeply dependent upon gender, race, and social class.¹¹

Recent studies of the human brain have helped developmental psychologists reevaluate the development of “moral character” in children and adolescents. The development of the brain continues through adolescence as does the development of moral and social understandings. Lack of basic needs,¹² abuse, violence in the community, and lack of education and nurturing¹³ can retard the brain’s development. As lawyers for children have observed for decades, children are often unable to understand the consequences of their actions or their potential role in the criminal justice system.¹⁴ Further, the surrounding community often deems children who suffer from developmental disorders “delinquent.”¹⁵

¹¹ See SHELDON BURMAN, CHILDREN’S SOCIAL CONSCIOUSNESS AND THE DEVELOPMENT OF SOCIAL RESPONSIBILITY 27-30 (1997) (demonstrating that children can have a sophisticated sense of the legal system at a very young age). They are capable of affective conceptions of politics at a young age. *Id.* at 27. While white middle class kids think of political leaders as benevolent, there is little comprehensive study of less privileged youth. *Id.* at 28. Affective and affiliate component of children’s political conceptions begin to frame the way they see their relationship to the political and social world as young as seven years old. *Id.* at 27-29.

¹² See CAROL GILLIGAN & GRANT WIGGINS, MAPPING THE MORAL DOMAIN 111-38 (1988) (moral immaturity may consist not in absence of general moral knowledge but in an absence of the attachments necessary for making moral notions moral insights).

¹³ Elizabeth Cauffman, Jennifer Woolard & N. Dickon Reppucci, *Justice for Juveniles: New Perspectives on Adolescents’ Competence and Culpability*, 18 QUINNIPIAC L. REV. 403, 412-14 (1999) (“Grisso suggests that cultural, intellectual and social disadvantages can have a negative impact on the completion of cognitive and moral developmental stages When one expands the definition of mature judgment to include the many non-cognitive factors that influence the decision-making process, one finds that there is considerable evidence suggesting that individuals do not achieve adult-like levels of maturity until late in adolescence.”).

¹⁴ See Buss, *supra* note 10, at 1757-69.

¹⁵ See Thomas Grisso, *The Changing Face of Juvenile Justice*, 51 PSYCHIATRIC SERVS. 4, 99 (Apr. 2000) (“Even if conduct disorders and substance use disorders are excluded, the prevalence of depressive, anxiety,

The ideal of “juvenile rights,” the area of law dealing with the rights of young people, is to develop future participants in a political democracy.¹⁶ Social scientists know that the development of political participation and social responsibility is crucial to social development.¹⁷ An individual must feel like a valuable part of a community designed to meet his or her needs.¹⁸ However, failure to engage in the political process is not a failure of an individual child. Rather, lack of political participation may indicate that the community failed to nurture the youth’s needs and provide

attention and thought disorders suggests that mental disorders are at least twice as common among youths in juvenile justice settings as the 19 to 22 percent prevalence reported for adolescents in general.”).

¹⁶ See JONATHAN DEWEY, *MORAL PRINCIPLES ON EDUCATION* 10 (1909) (“The society of which the child is to be a member is, in the United States, a democratic and progressive society. The child must be educated for leadership as well as for obedience. He must have power of self-direction and power of directing others, power of administration, ability to assume positions of responsibility.”); see also R.F. BUTTS, *THE REVIVAL OF CIVIC LEARNING* 58 (1980) (“I believe that the prime purpose, the highest priority, for a genuinely public education is the political goal of empowering the whole population to exercise its rights and to cope with the responsibilities of a genuinely democratic citizenship.”).

¹⁷ See BURMAN, *supra* note 11, at 18 (“Yet, this interactional approach to development remains inadequate as a model of social and political development and of the development of social responsibility. Not only are people making sense of their environment and developing within the context of an interactive social process, but there is an emotional and affiliate process going on as well. People are not only interacting with the social and political environment, they are in a relationship with that environment Furthermore, the way that they give meaning to this relationship determines the nature of their participation in the social and political world.”).

¹⁸ ROBERTA S. SIGEL & MARILYN B. HOSKIN, *THE POLITICAL INVOLVEMENT OF ADOLESCENTS* 40-42 (1981) (“What is important is not the form the involvement takes but that the individual considers himself to be part of the body politic, that it is not a remote and irrelevant entity but one which is relevant to daily life and long-range security. Political involvement is the very opposite of political isolation”). Further, relatedness and relationship are critical factors in social and moral development. The child does not move toward autonomy as the epitome of development but rather remains in relationships that are renegotiated as he or she develops. BURMAN, *supra* note 11, at 20-21 (the individual does not then simply drop relationship to become a separate entity but remains in relationship albeit in multiple as well as transformed ways).

the youth with a sense of individual importance. Not surprisingly, children who are left behind developmentally or marginalized by the community are also the least likely to participate in the political process.¹⁹ Against this backdrop of the realities of the developing adolescent, community policing can be evaluated more critically.

II. Examining Community Policing Models as an Advocate for Juveniles

A. *The Paradigm: The Promises and Realities of Community Policing*

The major national consortium leading the community policing movement states that its goal is to create a collaborative effort “between the police and the community that identifies problems of crime and disorder and involves all elements of the community in the search for solutions to these problems.”²⁰ These are the same goals many poverty lawyers and community activists envision: community empowerment,

¹⁹ See BURMAN, *supra* note 11, at 33-37 (establishing that education and socio-economic status are the clearest predictors of political participation).

[W]hat we also see is that the social and political inequalities relating to gender, race, and class have already made an impact on children’s ability to enter and feel a part of the social and political world. Further, there is significant evidence to demonstrate that the political process is silencing the voices of young women and of children of color, despite the few studies and little knowledge of children not of a white middle class background. The traditional view of development has mistakenly interpreted adolescents’ renegotiating of relationship as the drive toward autonomy rather than the drive to maintain attachment. The lack of political participation of young women and youth of color is consistent with adolescent views of authoritarian relationships: thinking rigidly and little understanding of how the law can actually be changed.

Id. at 34-37. There is a large degree of political cynicism amongst American high school kids. *Id.* at 167.

²⁰ See Community Policing Consortium, *supra* note 1.

addressing local crime concerns, and providing services for youth.²¹ Several major policing organizations, community groups,²² and academics support this movement.²³

However, those concerned about youth in communities that are battling poverty, racism and high incarceration rates may need to take a second look at community policing models.²⁴ Why? Community policing means different things in different cities.²⁵ In practice, community policing usually means an increase in foot patrols in high crime areas. The first priority of many models across the country has been to put

²¹ Community policing efforts are often based on the “broken windows” theory of deterrence that claims that by focusing criminal justice resources on minor quality of life offenses such as graffiti and panhandling, society can avoid the deterioration that leads to violent crime. *See generally* WESLEY G. SKOGAN, *DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS* (1990) (further discussing premise of movement); James Q. Wilson & George L. Kelling, *Broken Windows*, *ATLANTIC MONTHLY*, Mar. 1982, at 29 (for the article that has been heralded as shepherding this movement).

²² *See* Community Policing Consortium, *supra* note 1 (providing a resource for community policing and demonstrating nationwide support for community policing efforts). This website is sponsored and endorsed by the International Association of Chiefs of Police (IACP), the National Organization of Black Law Enforcement Executives (NOBLE), the National Sheriffs’ Association (NSA), the Police Executive Research Forum (PERF) and the Police Foundation.

²³ *See, e.g.*, Robert Ellickson, *Controlling Chronic Misconduct in City Spaces: of Panhandlers, Skid Rows, and Public Space Zoning*, 105 *YALE L.J.* 1165, 1171-73, 1177-79 (1996) (endorsing significant discretion given to police officers to govern public spaces).

²⁴ *See, e.g.*, Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 *MICH. L. REV.* 291, 377-84 (1998) (challenging the community policing initiative as applied in New York by demonstrating that while arrests have greatly increased crime statistics, community policing is actually leading to a decrease in crime and creates a class of “disorderly” who are routinely targeted by police action).

²⁵ *See, e.g.*, Tracey L. Meares, *Praying for Community Policing*, 90 *CAL. L. REV.* 1593, 1597-1600 (2002) (noting wide variations in models of community policing as implemented nation-wide and observing that there is little knowledge of the variations from model to model or the amount of community collaboration or training involved in program implementation).

more officers on the streets, thus dramatically increasing the number of one-on-one interactions between officers and citizens.²⁶ Programs that have not actually increased the total number of officers, have instead increased foot patrols, the officers who are most likely to interact with youth.²⁷ In addition, most models include a limited collaboration with established community groups but virtually no outreach to adolescent youth.

An examination of several programs raises serious concerns.²⁸ First, the trust necessary in community policing models is impossible, because police officers lack the training and experience required to deal with challenged youth. In addition, the interactions between the police officer and the youth is driven by a number of invalid assumptions. Second, community policing programs are based on increased interactions between youth and officers, a disturbing premise given the current political and legal climate which is slanted

²⁶ See, e.g., Press Release, Department of Justice, U.S. Department of Justice Announces \$38.9 Million in Grants to Re-deploy 1,580 Law Enforcement Officers (Sept. 13, 2000) (on file with author).

²⁷ See Robert C Trojanowicz, *The Impact of Foot Patrol on Black and White Perceptions of Policing*, at <http://www.ssc.msu.edu/~cj/cp/cptoc.html> (arguing that placing more officers on foot patrol lies at the heart of community policing efforts) (last modified Jan. 10, 2001).

²⁸ In examining programs for this article, I spoke with police chiefs and/or reviewed training manuals in the fall of 2000 of twelve different jurisdictions brought to my attention through their involvement in the national Community Policing Consortium. The jurisdictions that I focused on included: Alexandria, Va.; Athens, Ga.; Baltimore, Md.; Bloomington, Ind.; South Boston, Mass.; Cleveland, Ohio; Detroit, Mich.; Louisville, Ky.; New York, N.Y. (Bronx Revitalization Project); Providence, R.I.; Tempe, Ariz. and Olympia, Wash. The interviews that I conducted included: interview with Captain Kenneth Howard, The Residential Officer Program, Alexandria, Va. (Nov. 20, 2000); interview with Sergeant Greg Paul, Revitalization Plan Program, Athens, Ga. (Nov. 16, 2000); interview with Cynthia Shain, Commander, Impact Mobilization of Police and Citizen Teamwork (IMPACT), Louisville, Ky. (Nov. 16, 2000); interview with Officer K. Riley, Bronx Revitalization Project, New York, N.Y. (Nov. 30, 2000). In the remainder of the examined jurisdictions I was informed that the training manuals fully outlined the programs and service available.

against the juvenile “offender.” Accordingly, the increase in interactions threatens to increase juvenile exposure to the criminal justice system. Finally, few community policing models meaningfully consider the concerns of youth. Instead, the models focus primarily on the concerns of community elders and serve to divide fragile community structures and increase the chasm between young and old in poor communities. This may further entrench assumptions by young people that their voices do not matter, not even in their own communities. By dividing disempowered communities, community policing models threaten to decrease social discourse and retard the success of social justice movements that result from united communities.

B. The Threats Posed by Community Policing Models That Do Not Incorporate the Concerns of Youth

Threat Number One:

Increased Police Interaction with Youth May Lead to Their Disenfranchisement Through Increased Exposure to the Punitive Juvenile Justice System

a. Police and Youth as Antagonists

Some community policing models boast that officers receive additional training before being assigned to foot patrol. A survey of programs, however, did not reveal a single model that regularly trained beat officers in developmental psychology or youth education.²⁹ This leaves the interactions between officers and youth to be dictated only by the law, which often ignores the reality of adolescents and their assumptions about law enforcement. But any program seeking to increase interactions between officers and youth and to rely

²⁹ In speaking to police chiefs for over twenty nationwide community policing programs, none of the officers were aware of youth educational training for any of the officers. While several pointed to mentoring programs, none required background in child development or specific training designed at decoding youth behavior.

on trust to solve community programs must recognize the role the adolescent plays in the interactions.³⁰

The Fourth³¹ and Fifth³² Amendments, along with their respective common law doctrine, provide the only governance of police-citizen interactions in most jurisdictions.³³ Both of these doctrines are founded upon a number of assumptions about the civilian individual. Clearly stating those assumptions will help to determine if increased interactions between officers and adolescents in the current political climate is wise. These assumptions include: (1) The individual is aware of the right to refuse to consent to search and sees this right as a viable choice;³⁴ (2) The individual will exercise the right to refuse consent without fear of police

³⁰ The Community Policing Consortium recognizes that trust lies as a cornerstone to effective community policing. Community Policing Consortium, *supra* note 1 (“Establishing and maintaining mutual trust is the central goal of community partnership. Trust will give the police greater access to the valuable information that can lead to the prevention and solution of crimes.”).

³¹ U.S. CONST. amend. IV. The Fourth Amendment provides:

The right of 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.

³² U.S. CONST. amend. V (“No person . . . shall be compelled in any criminal case to be a witness against himself . . .”).

³³ See Donald Dripps, *The Case for the Contingent Exclusionary Rule*, AM. CRIM. L. REV. 1, 21-23 (2001) (providing that economic principles of public choice create a strong disincentive for legislatures to act regarding constitutional rights of the criminally accused). This lack of motivation, coupled with the courts’ active participation in shaping both Fourth and Fifth Amendment doctrine, has created the end result of very little legislative action addressing the nature of the protections that should be afforded to the accused. *Id.*; see also *Weeks v. United States*, 232 U.S. 383, 391-393 (1914) (recognizing that the judicially-fashioned exclusionary rule of the Fourth Amendment is “the principle mode of discouraging lawless police conduct”).

³⁴ See, e.g., *Florida v. Bostick*, 501 U.S. 429, 433-38 (1991).

retaliation;³⁵ (3) The individual is aware that he or she need not answer simple questions posed by officers and that refusal to answer such questions cannot be used against the individual;³⁶ (4) The individual understands that if he or she consents to speaking with or being searched by the police, the police can use information gained from that interaction against the individual, even if the individual is not in fact guilty of the crime in question;³⁷ (5) The individual will not feel so afraid of the officer that the individual will lie to please the officer;³⁸ and (6) The individual does not suffer from a conduct disorder or severe trauma that may impede the ability to understand the interaction with the officer.³⁹ These assumptions, drawn from a hypothetical “reasonable person” standard that lies at the center of both Fourth and Fifth Amendment doctrine,⁴⁰

³⁵ *Id.* at 436-38.

³⁶ *See, e.g., Terry v. Ohio*, 392 U.S. 1, 21-23 (1968) (arguing that a reasonable person would not feel compelled to answer questions posed to them by police officers in a street encounter).

³⁷ *See, e.g., Colorado v. Spring*, 479 U.S. 564, 572-77 (1987) (holding that the Fifth Amendment does not require that the accused fully understand why the police need the requested information in order for waiver to be voluntary and for the statements to be admissible against the accused).

³⁸ *See, e.g., FED. R. EVID.* 801(d)(2) (providing that statements against a party’s interest are admissible because of the presumption of reliability). While the *Miranda* requirement and other Fifth Amendment protections may negate this presumption, the overwhelming view of courts is that admissions not physically coerced are not untruthful. *See, e.g., Colorado v. Connelly*, 479 U.S. 157, 166-68 (1986) (recognizing confessions as probative of guilt or innocence and cautioning courts from creating rules that delve too deeply into the thought process of the accused at the time of the statement if they will serve to keep confessions from being admissible at trial); *Miranda v. Arizona*, 384 U.S. 436, 507 (1966) (evidencing the court’s desire to take a wholesale approach to Fifth Amendment determinations by adopting a prophylactic rule of rights recitation to meet Fifth Amendment requirements of a voluntary statement).

³⁹ Consent to search and waiver of right to remain silent tend to rely on bright-line rules rather than on the particularized characteristics of the individual. *See, e.g., Bostick*, 501 U.S. at 433-38 (indicating that the proper standard relies upon the “reasonable man”).

⁴⁰ *See, e.g., id.* (articulating the central role the perceptions of the “reasonable man” plays in carving the parameters of Fourth Amendment protections); *see Schneckloth v. Bustamonte*, 412 U.S. 218, 224 (1973)

contrast directly with the adolescent's understandings of the world.

Assumption One:

The individual is aware of the right to refuse consent to a search and sees the right to refuse as a viable choice.

While Fourth Amendment doctrine assumes that a suspect is aware of the right to refuse consent to search and that such refusal is a viable choice, developmental psychologists find this is not the case with juveniles. Most juveniles believe that when a police officer asks to search them, the consequence of refusal is arrest.⁴¹ Further, a study of hundreds of adolescents revealed that juveniles do not always know the difference between a question and a command.⁴² This lack of understanding increases when a youth is placed in fear.

Assumption Two:

The individual will exercise that right without fear of police retaliation.

Despite numerous pleas by community activists and victims of police brutality, Fourth Amendment doctrine fails to consider the different assumptions that communities of color bring to their interactions with police officers. The reality of police profiling and the recent highly publicized cases of police brutality have fueled the fears of minority

(recognizing that the Fifth Amendment required the courts to examine not only the facts relating to the will of the individual giving the confession, but must also determine if police action would have overborne the will of a reasonable person in the particular factual scenario); *see also* Dickerson v. United States, 530 U.S. 428, 431-44 (2000) (finding the warnings-based approach of *Miranda* to be constitutionally based); *Miranda*, 384 U.S. at 507.

⁴¹ *See generally* Stephen J. Ceci, *Why Minors Accused of Serious Crimes Cannot Waive Counsel*, CT. REV., 296-97 (Winter 1999) (failure of youth to comprehend *Miranda* warnings or the use of evidence obtained at trial has been explored by numerous child developmental psychologists).

⁴² *See id.*

communities across the nation.⁴³ As a dramatic example of distrust of police officers, the conviction rate in cases in which officers testify are significantly lower in the Bronx, the borough with the highest concentration of poor communities of color, than in other boroughs of New York.⁴⁴ People of color are often reticent to interact with officers when they are the victims of crime. While community policing is aimed at building bridges between citizens and communities, statistical proof of such an alliance has not borne out.⁴⁵ Rather, recent research on the public perception of police officers in communities of color demonstrates that communities of color possess a significant fear of police retaliation.⁴⁶

Assumption Three:

The individual is aware that he or she need not answer simple questions posed by officers and that refusal to answer such questions cannot be used against the individual.

In a recent study examining both adolescents and adult males awaiting trial, the number of respondents who reported that they would waive their right to silence in a police vignette decreased significantly with age, finding that young juveniles were twice as likely as adults to waive their rights.⁴⁷ This observed willingness to waive *Miranda* rights, warnings designed to inform the accused of their constitutional protections, demonstrates an unsophisticated understanding of the consequences of the waiver that is consistent with the still-

⁴³ See, e.g., Ronald Wietzer, *Racialized Policing: Residents' Perceptions in Three Neighborhoods*, 34 L. & SOC'Y REV. 1 (2000) (examining citizens' perceptions of police officers in different communities of different racial and socio-economic composition).

⁴⁴ See Martin Mbugua, *Bronx Conviction Rates Reflect Police Distrust*, N.Y. DAILY NEWS, July 11, 1998, at B4.

⁴⁵ See Harcourt, *supra* note 24.

⁴⁶ See Norman Siegel & Robert Perry, *Five Years of Civilian Review: A Mandate Unfulfilled*, NEW YORK CIVIL LIBERTIES UNION REP., Nov. 15, 1998, at 1-23, available at www.nyclu.org/fiveyears.html (last visited Jan. 26, 2003).

⁴⁷ See Ceci, *supra* note 41, at 297.

developing adolescent mind.⁴⁸ Young children and adolescents are simply not equipped to comprehend the gravity of the decision to forgo the assistance of counsel.⁴⁹ Marty Beyer conducted a study of seventeen juveniles facing charges either in juvenile or adult court. She observed that ten of the seventeen young people were unable to comprehend *Miranda* warnings.⁵⁰ She describes the following interview: “A 14-year-old was asked to explain ‘you have the right to remain silent.’ He answered: ‘Don’t make noise.’ Asked to explain ‘Anything you say can be used against you,’ he said ‘You better talk to the police or they’re gonna beat you up.’”⁵¹ In addition, most jurisdictions do not have station-house counsel, and juveniles have no way to understand the gravity of the decision to volunteer information that may lead to criminal prosecution.

Assumption Four:

*The individual understands that if he or she consents to speaking with or being searched by the police, the police can use information gained from that interaction against the individual, even if the individual is not in fact guilty of the crime in question.*⁵²

One clear distinguishing characteristic between juvenile and adult understandings of the criminal justice system relates

⁴⁸ See *Miranda v. Arizona*, 384 U.S. 436, 507 (1966) (evidencing the court’s desire to take a wholesale approach to Fifth Amendment determinations by adopting a prophylactic rule of rights recitation to meet Fifth Amendment requirements of a voluntary statement).

⁴⁹ See *id.*

⁵⁰ See Marty Beyer, *Immaturity, Culpability, & Competency in Juvenile Cases: A Study of 17 Cases*, A.B.A. CRIM. JUST. MAG. 89-96 (Summer 2000).

⁵¹ See *id.* at 91.

⁵² See also FED. R. EVID. 801(d)(2) (allowing for the admission of statements against interest). The entire doctrine regarding whether a statement was made “in custody” (therefore subjecting the statement to challenge under Fifth Amendment doctrine) lies on a foundational assumption that those statements which are made by defendants before they are officially “in custody” are per se admissible as evidence against them.

to the use of obtained evidence and statements. Without a fully developed sense of contextualized moral thoughts, juveniles, particularly females, see the world in much more “black and white” terms.⁵³ The ultimate goal of the justice system, in their minds, is to achieve fairness and to find bad people. Therefore, juveniles are far less likely to understand any harm of talking to officers when they feel that they did not commit a legal wrong, or alternately when they feel someone else was morally to blame.⁵⁴ Juveniles also tend to place more faith in the trial system to exonerate the innocent and are more resistant to accepting a plea agreement when they feel they are innocent of wrongdoing.⁵⁵ Raised in a culture of lawyer television dramas, they often fail to understand the reality of the system until long after they have been found delinquent.⁵⁶

⁵³ See Beyer, *supra* note 50, at 96.

⁵⁴ *Id.* (“In seven cases, young people felt so threatened they did something they considered wrong in order to protect themselves.”). Because these actions were not motivated by their own wrongdoing many of the adolescents felt that they should not be held legally responsible. *Id.* at 97.

⁵⁵ See *id.* at 96-97. This phenomenon is something I have witnessed in countless interactions with clients in the juvenile justice system as an intern in the Juvenile Rights division of the Legal Aid Society in Manhattan. The teens are often unable to comprehend why a trial will not lead to their exoneration when they felt justified in their actions at the time of the offense. This problem is magnified in kid on kid fights where the respondent may not have been the primary aggressor but a self-defense claim is legally difficult.

⁵⁶ See *id.*

Assumption Five:

The individual will not feel so afraid of the officer that the individual will lie to please the officer.⁵⁷

The belief that individuals who are innocent will not confess lies at the core of the criminal justice system, and serves to dictate police-citizen interactions. Trickery and manipulation by officers, with an end goal of procuring a confession, is endorsed by law control officials⁵⁸ and approved by the court.⁵⁹ Perhaps the most striking example of false confessions that attracted national media attention occurred in the Ryan Harris case.⁶⁰ Two young boys were held for over six months based on their confessions. They were only released when the actual perpetrator, implicated by DNA evidence at the scene, was caught.⁶¹ This story is

⁵⁷ The overwhelming power of this presumption was borne out on a public stage with the recent developments in the “Central Park Jogger” case. Five juveniles all gave entirely inconsistent “confessions” that were used to secure their convictions. The invalidity of the confessions was not brought to light until DNA evidence exonerated the juveniles over five years after their convictions. See Susan Saulny, *Jogger Case Reversal*, N.Y. TIMES, Dec. 22, 2002, at 2. This case helps highlight the risk of placing too much faith in the confessions of young people. See Susan Saulny, *Ideas & Trends: Why Confess to What You Didn't Do?*, N.Y. TIMES, Dec. 8, 2002, at Sec. 4, p.1.

⁵⁸ See, e.g., NEW YORK CITY POLICE DEPARTMENT TRAINING MANUAL (2000) (encouraging officers to procure confessions pursuant to “effective psychological methods used to talk to crime suspects”); see also Ceci, *supra* note 41, at 297.

⁵⁹ Officers are legally sanctioned to use trickery in order to obtain confessions with the only limitation on that confession being actual Fifth Amendment coercion, which is a difficult standard to prove as a defendant. See, e.g., *Jones v. State*, 380 A.2d 659, 661 (Ma. App. 1977) (police officer’s creation of false impression that the accused footprints had been found at the scene approved by the court); *Wagner v. State*, 277 N.W.2d 849, 851 (Wisc. 1979) (recognizing that police officers may lie to suspects about evidence in order to secure a confession). See generally 29 AM. JUR. 2D *Evidence* § 571 (2001) (summarizing the Fifth Amendment doctrine relating to police tactics used in obtaining confessions).

⁶⁰ See Alan Kotlowitz, *The Unprotected*, NEW YORKER, Feb. 8, 1999, at 42 (for further details on the Ryan Harris case).

⁶¹ See *id.*

clearly not the only time that children have lied to officers in order to make them happy.

Fear of police violence, both verbal and physical, combined with a strong desire to return to familiar surrounds lends serious doubt to the reliability of “confessions” made by juveniles.⁶² While some states have laws that allow for the challenge of these pre-trial statements, there is no such protection in the day-to-day interactions between officers and *youth who are never charged*. Community policing efforts are premised on trust and understanding between the police officer and the community members. In reality, communal understanding does not exist on the streets of America, particularly in indigent communities of color.

Assumption Six:

*The individual does not suffer from a conduct disorder or severe trauma that may impede the ability to understand the interaction with the officer.*⁶³

Recent medical findings suggest that children who have experienced severe trauma or neglect may be further impaired in understanding the world around them or relating to the mandates of the criminal justice system.⁶⁴ Moral development, which occurs late in human brain development,

⁶² See Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 430-46 (1998) (for a further commentary on the questionable reliability of youth statements).

⁶³ Consent to search and waiver of right to remain silent tend to rely on bright line rules rather than on the particularized characteristics of the individual. See, e.g., *Florida v. Bostick*, 501 U.S. 429, 437 (1991) (quoting *Michigan v. Chesternut*, 487 U.S. 567, 569 (1988)) (“The crucial test is whether, taking account all of the circumstances of the encounter, the police conduct would ‘have communicated to a reasonable person that he was not at liberty to ignore the police presence.’”).

⁶⁴ See BRUCE PERRY, *NEURODEVELOPMENTAL ADAPTATIONS TO VIOLENCE: HOW CHILDREN SURVIVE THE INTRAGENERATIONAL VORTEX OF VIOLENCE* (1996) (paper on file with author).

is greatly impaired by a child's inability to trust.⁶⁵ Further, moral and social development of young people is largely relational in its nature, particularly for young girls.⁶⁶ Hence, a child's ability to understand a system of rules and regulations, such as the criminal justice system, is highly dependent upon the child's past experience in the development of relationships and the child's perceptions about trust and intimacy.⁶⁷

Youth in "at risk" populations may face increased challenges in forming trusting relationships with police officers and may not understand that the relationship is different than the relationships with other community adults. Officers, unlike clergy or teachers,⁶⁸ remain primarily charged with the duty to control crime. Hence, complete trust between police and individual is not a social reality and likely inadvisable for most children. The increased criminalization of activities commonly associated with "just being a kid" threatens to place children who do confide in police officers in jeopardy of being labeled "delinquent" and being removed from their community to be placed in a youth correctional facility.

Without having undergone sufficient moral and social development, children are often unable to understand the

⁶⁵ *See id.*

⁶⁶ *See* CAROL GILLIGAN, IN A DIFFERENT VOICE 24-102 (1982) (demonstrating that moral development in girls occurs relationally; girls develop as moral actors within the context of the relationships in their lives rather than taking the much more autonomous journey previously recognized in boys). This difference is critical to note given the observations made about current assumptions as well as the fact that girls are the largest growing group in the juvenile justice system statistically. *Id.*

⁶⁷ *See id.*

⁶⁸ *See* ADVANCEMENT PROJECT AND CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE POLICIES (June 2000), available at http://www.civilrightsproject.harvard.edu/research/discipline/call_opport.php (unfortunately, new zero-tolerance policies in schools seriously call into question the role of teachers as guides and support systems for youth and may make them much closer to agents of "crime control," particularly in impoverished under-served communities).

varying professional roles of members of the community.⁶⁹ This becomes particularly problematic when understanding those roles has profound implications on their own ability to thrive within the community. The prevalence of abuse and neglect victims within the juvenile justice system is further evidence of this problem.⁷⁰ The criminal justice system and the juvenile justice system have become a net to capture and punish, rather than places for the treatment of abuse victims who act in a manner consistent with their unaddressed pain or rage, along with the mentally ill.⁷¹ The assumptions of the law of the Fourth and Fifth Amendments become even more disconnected from the actual understandings of juvenile “offenders” in this context. Accordingly, reality indicates that the assumptions that have set the parameters of the Fourth and Fifth Amendment doctrines fail to protect youth.

b. The Current Political Reality for Juvenile “Offenders”

The legal context provides additional reason to be skeptical of a program which increases beat officers and the discretion given to them. Youth activity is becoming increasingly criminalized, and more punitive policies are being developed to deal with young offenders. Current legislative initiatives addressing youth crime demonstrate the need to be concerned. Quality of life offenses, those offenses that are essentially indications of poverty such as vagrancy, public urination, and peddling, have been increasingly criminalized in many metropolitan areas.⁷² Many quality of life offenses

⁶⁹ See Beyer, *supra* note 50, at 99.

⁷⁰ See, e.g., David J. Steinhart, *Status Offenses*, 3 JUV. CT. 6, 8 (1996) (experts estimate the percentage of young girls in the juvenile justice system who have suffered emotional and sexual abuse is much greater than that of their male counterparts and that they may use the system as a cry for help rather than any “criminal” desire); see also Beyer, *supra* note 50, at 93-97.

⁷¹ See Grisso, *supra* note 15, at 6.

⁷² See, e.g., *Computers to Track ‘Quality of Life’ Crime, Giuliani Says*, N. Y. TIMES, Nov. 15, 2000, at B3 (New York Mayor Rudolph Giuliani’s

target youth activity,⁷³ and the increasing criminalization of these offenses poses its greatest risk to youth of color living in impoverished communities.

Despite very little youth involvement in violent crime,⁷⁴ and a significant decrease in youth crime over the past decade,⁷⁵ the press and the legislature send the singular message that America's youth today are "violent criminals."⁷⁶ This message continues to pervade current discussions about Generation '00 and impassions youth groups, religious communities, school administrators, and policy-makers at

promise to buckle down on transients, "squeegee guys," and graffiti artists).

⁷³ See William Ruefle & Kenneth Mike Reynolds, *Curfews and Delinquency in Major American Cities*, 41 CRIME & DELINQ. 347, 353 (1995) (one example of increased criminalization of youth activity is the proliferation of curfew laws since 1990); see also *U. S. Conference of Mayors, A Status Report on Youth Curfews in America's Cities: A 347 City Survey 1* (1997), available at <http://www.usmayors.org/uscm/news/publications/curfew.htm>.

⁷⁴ Howard N. Snyder et al., U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Offenders and Victims: 1996 Update on Violence* (1996). Ninety-four percent of American juveniles are arrest-free. *Id.* at 1. Of the six percent who were arrested in 1994, only about seven percent (i.e., less than one-half of one percent of juveniles in the U.S.) were arrested for a Violent Crime Index offense in 1994. *Id.* at 5. Although there was a sharp increase in recent years in the homicide arrest rate for juveniles—which has been largely attributed to the increased availability of handguns—the homicide arrest rate for youth has fallen 22.8 percent since 1993, according to the most recent figures from the Federal Bureau of Investigation. *Id.* The overwhelming majority of juvenile arrests have nothing to do with violence. See *id.*

⁷⁵ *Commentary*, CHI. TRIB., Dec. 21, 2001, at 27 ("So it should have been grounds for national celebration when the Justice Department reported this week that juvenile crime has not been rising but falling—and falling fast. In the last six years, the rate of homicide arrests in the 10-to-17 age group has dropped by a stunning sixty-eight percent, reaching the lowest level since 1966. The juvenile arrest rate for the most serious violent crimes—murder, rape, robbery and aggravated assault—is off by 36 percent.").

⁷⁶ See, e.g., Arlo Wagner, *Young Criminals Show No Mercy: 'Superpredators' Leave a Trail of Ruthless Violence*, WASH. TIMES, Feb. 13, 2000, at C1.

every level.⁷⁷ Incidents such as Columbine and Arkansas drew national attention and created an image of the young “super-predator.”⁷⁸ This image persists long after these tragic incidents, because the press continues to sensationalize discrete incidents of violent youth crime. Resulting legislation, from increasing the number of juvenile cases that are automatically transferred to adult courts⁷⁹ to the imposition of juvenile curfew laws in almost all major American cities,⁸⁰ indicates that increasingly, in the eyes of the law, there are no children anymore. The U.S. is the only country in the world since 1997 to still allow the death penalty for a juvenile

⁷⁷ See Vivian Berger, *The Youth-Crime Scare*, NAT’L L. J., June 19, 2000, at A19 (arguing that the press and politicians are still overreacting to the early 1990’s juvenile crime scare, relying on rhetoric like super-predator and “adult time for adult crime”); see also Maya Bell, *A Child, A Crime—An Adult Punishment; Florida Toughest in Treating Kids to Grown-Up Justice*, ORLANDO SENTINEL TRIB., Oct. 21, 1999, at A1 (explaining that juvenile policy seems to derive more from political catch phrases than sound policy decisions).

⁷⁸ See *id.* (Princeton professor John DiIulio beginning in the mid 1990’s describing what he called a new breed of “remorseless and morally impoverished” juveniles and coined the phrase “super-predator”).

⁷⁹ See Margaret Talbot, *What’s Become of the Juvenile Delinquent?*, N.Y. TIMES MAG., Sept. 10, 2000, 40-62. Nearly every state in the country has been moving greater numbers of juvenile offenders into adult criminal court via “transfer.” *Id.* at 43. Further, states have made transfer criteria much more lenient. *Id.* For example, in Illinois, when automatic transfer was enacted in 1982, it was initially only used for juveniles charged with violent crimes. *Id.* By 1995, automatic transfer had been expanded to include drug violations committed within 1,000 feet of a school, felonies committed in “furtherance of gang activity,” and drug offenses committed within 1,000 feet of public housing property. *Id.* at 44.

⁸⁰ William Ruefle & Kenneth M. Reynolds, *Keep Them at Home: Juvenile Curfew Ordinances in 200 American Cities*, AM. J. OF POLICE (1996); U.S. Dep’t of Justice, Office of Juvenile Justice and Delinquency Prevention, *Curfew: An Answer to Juvenile Delinquency and Victimization*, JUV. JUST. BULL. (Apr. 1996). In recent years, teen curfews have become increasingly popular with localities as a means of combating increased juvenile delinquency, decreased parental supervision, and other social trends. *Id.* at 1. In the two-hundred largest U.S. cities (population of 100,000 or greater) there was a dramatic surge in curfews in the first half of the 1990’s, with seventy-three percent having curfews in effect. *Id.* at 2; see also *Qutb v. Strauss*, 11 F.3d 488, 492 (5th Cir. 1993) (noting statistic).

offender.⁸¹ The concept that youth are different is lost in modern American culture.

At the same time that we impose “adult time for adult crimes,” we fail to extend constitutional protections to children. The rhetoric of the “search for truth” and “protection of youth” is inconsistent with the message we send to young people daily about their place in society.⁸² One strong effect of this push toward tougher juvenile policy has been the criminalization of what has historically been considered youth play-behavior associated with the limited judgment of adolescence. Schoolhouse scuffles are increasingly prosecuted as aggravated assaults.⁸³ Thefts of small items, such as pencils, are leading to delinquency charges.⁸⁴ Young girls are being prosecuted for pushing their mothers or lying to police officers about their names.⁸⁵ In addition, school and community officials are being encouraged to call police in response to actions that in the past were viewed as inconsequential rule infractions.⁸⁶

⁸¹ See *In re Stanford*, 123 S. Ct. 472 (2002) (mem.) (Stevens, J., dissenting) (finding that the Court failed to recognize the evolving standards of decency by hearing a case regarding the execution of persons who were juveniles at the time they committed the offense for which they are now subject to the death penalty); see also Jeff Glasser, *Death Be Not Proud*, U.S. NEWS & WORLD REP., Jan. 12, 2000, at 26 (explaining that United States is one of only six countries in world to execute juveniles and has refused to sign several International Human Rights treaties that prohibit the practice).

⁸² Much of the concern for the well-being of children is grounded in the history of the juvenile court and has been reinforced by the “best interest” model in custody cases, particularly because most judges who hear delinquency cases have a docket primarily controlled by custody and/or abuse and neglect cases where “best interest” is the framework. See Gordon Bazemore, *Will the Juvenile Court System Survive?: The Fork in the Road of Juvenile Court Reform*, 564 ANNALS 81, 81-123 (1999) (summarizing the history of juvenile court).

⁸³ See ZERO TOLERANCE 3-87 (William Ayers et al. eds. 2001).

⁸⁴ See *id.* at 93-95.

⁸⁵ See Marty Beyer, *Delinquent Girls: A Developmental Perspective*, 9 KY. CHILD. RTS. J. 1, 5-16 (2001).

⁸⁶ See Robert Schwarz & Len Reiser, *Zero Tolerance as Mandatory Sentencing*, in ZERO TOLERANCE, *supra* note 83, at 126-35.

*c. A Doctrinal Antidote:
Examining the Analysis of Juvenile Curfew Legislation*

One effect of recent attention on juvenile crime has been the institution of curfew ordinances in almost every major United States city, ordinances that have for the most part withstood Constitutional challenge.⁸⁷ The ordinances have successfully withstood constitutional challenge because, outside of the Ninth Circuit, courts have primarily held curfew ordinances to be subject to intermediate rather than strict scrutiny when challenged on equal protection grounds.⁸⁸ Because age has not been held to be a suspect class, laws such as curfews which base their classification on age need only have a rational relationship with their stated goal of reducing violence by and against youth.⁸⁹ With limited consideration given to the constitutional rights of youths (the limits of which remain doctrinally unclear), municipalities need only demonstrate that there is a particular threat to youth or by youth after dark.

Curfews undoubtedly suppress innocent conduct; many juveniles out past a given hour are not engaged in violent activity.⁹⁰ While approved ordinances generally allow for

⁸⁷ See *Hutchins v. District of Columbia*, 188 F.3d 531, 536-39 (D.C. Cir. 1999); *Schleifer v. City of Charlottesville*, 159 F.3d 843, 847-53 (4th Cir. 1998); *Qutb v. Strauss*, 11 F.3d 488, 498 (5th Cir. 1993). But see *Nunez v. City of San Diego*, 114 F.3d 935, 951 (9th Cir. 1997) (holding that San Diego juvenile curfew ordinance was unconstitutional on three grounds: (1) vagueness in violation of the First Amendment; (2) not narrowly tailored enough to satisfy a strict scrutiny equal protection analysis; and (3) violative of a parents' fundamental right to rear their children absent undue government interference).

⁸⁸ See *Hutchins*, 188 F.3d at 536; *Schleifer*, 159 F.3d at 847-48; *Qutb*, 11 F.3d at 498.

⁸⁹ See, e.g., *Hutchins*, 188 F.3d at 536-39.

⁹⁰ For example, many youth are involved in school activities such as athletics or marching band that may keep them away from home into the evening. Violent crime committed by youth is currently at its lowest rates since 1980, indicating that the proliferation of curfew laws is not justified solely by crime statistics. See Howard Snyder, *Juvenile Court Statistics 1999*, (Office of Juvenile Justice and Delinquency Prevention 2002) (forthcoming).

emergency exceptions, these exceptions are limited in their reach. Curfew ordinances that target “high crime areas,” a phrase often associated with poor neighborhoods inhabited largely by youth of color, have been held to be constitutionally valid by lower federal courts.⁹¹ In addition, enforcement of a curfew ordinance may depend on a particular officer’s assessment of a given situation and certainly depends on police presence in a neighborhood.

The Supreme Court has repeatedly denied certiorari on curfew case petitions.⁹² These decisions seem to contradict the Supreme Court’s opinion in *Chicago v. Morales*.⁹³ In *Morales*, the Supreme Court reviewed the Chicago Gang Loitering Ordinance and invalidated it on vagueness grounds. The ordinance was clear on its face, but the Court found it to be constitutionally infirm because it placed too much discretion to enforce the law in the hands of any individual beat officer.⁹⁴ The Court indicated that when legislation is vague, it fails to provide meaningful guidelines to officers on the street. This lack of guidance may threaten constitutionally protected activity. Therefore, vagueness was a proper basis for a constitutional analysis. The Court was concerned with unequal enforcement, the capture of innocent conduct, and the targeting of a group based on its status (as “known gang member”).⁹⁵ Juvenile curfew laws invoke identical concerns yet have not been successfully challenged in federal courts on vagueness grounds, largely because of the unclear

⁹¹ *See id.*

⁹² *See, e.g., Schleifer*, 159 F.3d 843, *cert. denied*, 526 U.S. 1018 (1999) (denying review of Fourth Circuit’s decision to uphold the Charlottesville ordinance); *Qutb*, 11 F.3d 488, *cert. denied*, 511 U.S. 1127 (1994) (denying review of Fifth Circuit’s decision to uphold a curfew ordinance in Dallas).

⁹³ 527 U.S. 41 (1999).

⁹⁴ *See id.*

⁹⁵ *See id.*

differentiation between the constitutional rights of youth versus those of adults.⁹⁶

d. Potential Effects of the Current Climate

Because of increased suspicion toward youth, placing more discretion in the hands of officers and limiting constitutional protections threaten to lead to the increased removal of young people from their communities, via out-of-home placements. Juveniles may be stopped more frequently by police. They do not have the proper tools to challenge invalid police procedures. In addition, they face greater antagonistic attitudes from their communities. All of these factors point toward the possibility of an increased number of youth being adjudicated delinquent and being placed away from their homes. This may serve to demobilize community movements and to increase the chasm between young and old in these neighborhoods. Not to mention that the damage done to an individual child removed from his or her home, school, and neighborhood may be irreversible, forever alienating the child's voice in American political discourse.

Threat Number Two:

Increased Skepticism of Law Enforcement and Entrenchment of Racial Stereotypes

The history of the destruction of liberty, one may add, has largely been the history of the relaxation of those safeguards in the face of plausible-sounding governmental claims of a need to deal with widely frightening and

⁹⁶ See, e.g., *Hutchins v. District of Columbia*, 188 F.3d 531, 536-39 (D.C. Cir. 1999) (discussing the limited constitutional rights of youth vis-à-vis adults).

emotion freighted threats to the good order of society.⁹⁷

Any “suspect group,” a label that unfortunately describes youth of color, should be wary of endorsing models of policing that increase individual officer discretion. Giving legal entities greater discretion with young people is an increasing reality of American society. As Justice Rehnquist asserted, “children are always in custody.”⁹⁸ The justification for this discretion has been the desire to nurture and protect young people so that they may later become valuable members of a political democracy.⁹⁹ However, giving individual police officers more discretion on the streets does not intuitively meet these goals. Officers simply do not have the same training and experience with children that parents or school officials do.¹⁰⁰

More importantly, the reality is that increased police discretion means racial injustice.¹⁰¹ From personal biases on the part of individual officers to systematic profiling, racial

⁹⁷ See *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 (1980) (citing Anthony Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 80-81 (1960)).

⁹⁸ *Schall v. Martin*, 467 U.S. 253, 265 (1984).

⁹⁹ *Meyer v. Nebraska*, 262 U.S. 390, 399-403 (1923) (developing youth for future participation in democracy lies at the core of law addressing youth: a state can’t “standardize its children”); see also *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944) (explaining that democracy rests on well rounded young people, hence the state possesses the right to keep children from the evils of the streets and labor within the police power). The *Prince* court again emphasized the important role of democratic training in the eloquent opinion of Justice Jackson in *W. Va. Bd. of Educ. v. Barnette*, 319 US 624 (1943). *Id.* In *Barnette*, the Court addressed the constitutionality of requiring children to state the pledge of allegiance, and Justice Jackson emphasized that state compulsion must be limited when it restrains democratic principles. *Barnette*, 391 U.S. at 640.

¹⁰⁰ Training varies dramatically from model to model, as can be determined by examining the variety of action plans for community policing programs. Community Policing Consortium, *supra* note 1.

¹⁰¹ See Tracey Macklin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 336-50 (1998) (explaining how a systematic evaluation of discretionary police practices leads to the conclusion that discretion is not exercised in a race-neutral fashion).

injustice pervades police-citizen interactions.¹⁰² The Court has declared the subjective intentions of police officers irrelevant to finding a Fourth Amendment violation.¹⁰³ Empirically, this has led to clearly-documented, disparate treatment of minorities in a variety of contexts.¹⁰⁴ Focusing on whether probable cause exists does not solve the problem in a situation where the crux of the discrimination occurs when the decision to stop an individual is made. For example, some police officers conduct traffic stops at their whim, often resulting in discrimination against motorists of color.¹⁰⁵ When prejudice is so intertwined with the officer's discretion, other serious implications are bound to result, such as the decision to use deadly force.¹⁰⁶ The effects of increased police discretion are pointedly observed by Tracy Macklin: "[N]othing opens the door to arbitrary action so effectively as to allow government officials to pick and choose only a few to whom they will apply legislation"¹⁰⁷

This discrimination also plays out in the territory that minority youth know best: the streets of their neighborhoods. Pursuant to the authority of *Terry v. Ohio*,¹⁰⁸ police officers may stop individuals on the street and request basic information from them without probable cause that the individual was engaging in any illegal behavior.¹⁰⁹ Post-*Terry*

¹⁰² See *id.* at 338.

¹⁰³ See *id.* at 336.

¹⁰⁴ See *id.*

¹⁰⁵ See also *State v. Soto*, 734 A.2d 350, 352-55 (N.J. Super. Ct. 1996) (providing evidence of systematic racial discrimination in police stops); Macklin, *supra* note 101, at 338 (explaining that objective and comprehensive studies show routine discrimination against minority motorists and that officers are using traffic violations in order to intercept narcotics).

¹⁰⁶ See Anthony Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 963 (1999) (providing statistical proof that police are more likely to use deadly force against African American men).

¹⁰⁷ Macklin, *supra* note 101, at 353.

¹⁰⁸ 392 U.S. 1 (1968).

¹⁰⁹ See *id.* at 21-23.

stop and frisk policy has led to the harassment of urban men of color and poses a particular danger to youth of color. As a group most likely to be misunderstood, from style of dress to mannerisms, youth are repeatedly characterized as the single largest threat to individual police officers.¹¹⁰

Proponents of *Terry* argue that officer discretion is necessary in order to control crime in dangerous areas. Inherent in this argument is the logical fallacy that if minority men are more often stopped on the street and frisked, it must be because they are more often the perpetrators of crime.¹¹¹

¹¹⁰ See David Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 661-80 (1994) (arguing that there are huge numbers of innocent frisks, and minorities who are stopped more and are more subject to harassing treatment, are likely to fear abuse from cops more than whites). Harris demonstrates that this fact widens the racial divide and feeds mistrust and marginalization. *Id.* at 680; see also Thompson, *supra* note 106, at 958 (stating New York street crimes unit targeted minorities and turned up thousands of fruitless stops, with blacks much more likely to be stopped and frisked: “many thousands of our citizens who have or may have been stopped and interrogated yearly, only to be released when the police find them innocent of any crime”).

¹¹¹ Many crimes committed by minorities are not discovered until contraband is discovered pursuant to a *Terry* stop. Because individuals who are not arrested have virtually no basis to sue under the Fourth Amendment, and any lawsuit will likely be met by a successful defense of qualified immunity, it is impossible to accurately measure the number of times that fruitless searches are initiated. See Macklin, *supra* note 101, at 336-40. Furthermore, many individuals who are wrongful subjects of Fourth Amendment abuses may be deterred from suit under § 1983 because of the low likelihood of success combined with the high cost of litigation. Both 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) allow a plaintiff to seek money damages from government officials who have violated her Fourth Amendment rights. See 42 U.S.C. § 1983 (2002) (permitting private suits against government officials who violate individuals’ constitutional rights); *Bivens*, 403 U.S. at 393-97 (providing civil damage actions against federal government officials analogous to § 1983 actions against state officers). But see *Wilson v. Layne*, 526 U.S. 603, 609 (1999) (“But government officials performing discretionary functions generally are granted a qualified immunity and are ‘shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’”) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

The notion that the individual protections guaranteed by the Bill of Rights should be disregarded to facilitate law enforcement goals seems short-sighted at best.¹¹² To the contrary, the language and history of the Fourth Amendment is aimed at protecting the individual against discretionary police power.¹¹³ Yet, the problem of the modern police force remains: how do police officers connect with communities which do not mirror the racial and ethnic composition of the force?¹¹⁴ To exacerbate the matter, there is little evidence that police departments are pushing for equal racial proportions between the department and the communities in which they work.¹¹⁵

Critics have urged the courts to consider the true “totality of the circumstances” when considering the bounds of Fourth Amendment protections, but a true evaluation cannot be made until racial implications are taken into

¹¹² See Macklin, *supra* note 101, at 348 (arguing that the Court’s decision to focus on law enforcement goals seems to eliminate the inquiry on degree of individual intrusion, i.e., *United States v. Martinez-Fuerte*, 428 U.S. 543, 545-62 (1976)); Thompson, *supra* note 106, at 962 (arguing that hydraulic pressures lead to a new totalitarian regime and create a narrative theory with the police officer as expert); see also Harris, *supra* note 110, at 665-68 (bringing into question the idea of fairness in society in general).

¹¹³ See Macklin, *supra* note 101, at 348-50.

¹¹⁴ See Thompson, *supra* note 106, at 963-70 (examining social science data to demonstrate police officers are most likely to search those who are different than themselves; the mind draws upon culturally imbedded understandings in order to evaluate behavior). The author further demonstrates that the stereotype-driven nature of police work fosters an adversarial relationship between officers and specific ethnic groups that is reinforced in police practice. *Id.* at 969-70.

¹¹⁵ In speaking to several police officers in command of some of the nation’s most comprehensive community policing programs, I was informed that racial disparities were a reality and many of the officers on community patrol in communities of color were Caucasian. Interview with Captain Kenneth Howard, The Residential Officer Program, Alexandria, Va. (Nov. 20, 2000); Interview with Sergeant Greg Paul, Revitalization Plan Program, Athens, Ga. (Nov. 16, 2000); Interview with Cynthia Shain, Commander, Impact Mobilization of Police and Citizen Teamwork (IMPACT), Louisville, Ky. (Nov. 16, 2000).

account.¹¹⁶ The impact of police discretion on minority communities extends far beyond the general harm of abridging individual privacy rights. Institutionalized racism can lead to increased street violence and rioting,¹¹⁷ antagonistic views of law enforcement officials,¹¹⁸ under-reporting of violent crime in minority communities,¹¹⁹ and political disenfranchisement.¹²⁰

¹¹⁶ Given the racialized nature of policing it is clear that any “objective standard” that shows no sensitivity to social station does not provide the true “totality of circumstances” or allow the court to consider the “whole picture.” Macklin argues that the degree of community resentment of police practices should be considered in assessing the quality of intrusion upon reasonable expectations of personal security. See Mackin, *supra* note 101, at 245.

¹¹⁷ *Id.* at 250.

¹¹⁸ *Id.* at 257-63 (African American communities view police as antagonists and many see current policing as a throwback to the slave age when blacks had no rights a white man was bound to respect); see Thompson, *supra* note 106, at 965 (“We cannot ignore the complex history and politics of race in the United States.”); see also Harris, *supra* note 110, at 670 (“This begins and perpetuates a cycle of mistrust and suspicion, a feeling that law enforcement harasses African Americans and Hispanic Americans with *Terry* stops as a way of controlling their communities.”); Nat Hentoff, *New York as a Jim Crow Disgrace: In Giuliani’s Time, Black Parents Teach Kids to Fear Cops*, VILLAGE VOICE, May 13-19, 1998, at 13 (“Black and Hispanic parents say they talk to their children about dealing with the police. It is just a matter of time, they tell them, before [their children] encounter a police officer who sees dark skin as synonymous with crime. Most said they began the lessons when their children were nine or ten, as part of a conversation about differences and prejudice. . . . It is a way to cushion the emotional trauma that comes with discrimination.”); Felicia R. Lee, *Bronx Attitude That Cops are an Occupying Force*, N.Y. TIMES, Aug. 27, 1997, at C3.

¹¹⁹ See JANE PARKERS, DOMESTIC VIOLENCE IN A COLOR SOCIETY 25-63 (1999) (women of color are more likely to underreport domestic violence and sexual assault because of the antagonist views toward police officers and the community scorn targeted toward women who bring law enforcement into their neighborhoods).

¹²⁰ See, e.g., Miles Rapoport & Jason Tarriconne, *Election Reform’s Next Phase: A Broad Democracy Agenda and the Need for a Movement*, 9 GEO. J. ON POVERTY L. & POL’Y 378, 380-95 (2002) (discussing the history of political disenfranchisement of minority communities based upon racism and a perceived inability to effectuate political change, also noting the large scale legal disenfranchisement of African American men caused by felony disqualification laws). This is arguably also related to increased

In *Morales*, the Supreme Court recognized the constitutional threat posed when police officers are given more individual discretion¹²¹ and invalidated the challenged ordinance, which placed more discretion in the hands of officers, based upon the void for vagueness doctrine. However, because the Court used vagueness rather than the Fourth Amendment, as alluded to in *Kolender v. Lawson*,¹²² the applicability of the *Morales* doctrine is limited and the constitutional mandate is unclear.¹²³ Because a vagueness challenge is a legislative attack, the doctrine is inapplicable to police procedures during regular patrol. Some department-wide police practices have recently been invalidated as violative of the Fourth Amendment,¹²⁴ particularly given an officer's propensity to use such practices discriminatorily, but both vagueness and Fourth Amendment doctrine fail to protect the majority of young people.

The place where inner-city youth most directly interact with the justice system is in their own neighborhoods, on America's city streets. The increase of police presence in "high crime areas" has been driven, in large part by the "War on Drugs."¹²⁵ The number of foot officers in most of America's large cities has almost doubled in the last twenty

police discretion and the role that race plays in decisions throughout the criminal justice system.

¹²¹ See *Chicago v. Morales*, 527 U.S. 41, 45-68 (1999) (focusing on what the majority describes as a two-prong vagueness analysis: notice and unfettered discretion).

¹²² 461 U.S. 352, 362-63 (1983) (Brennan, J., concurring).

¹²³ See *Amsterdam*, *supra* note 97, at 70-80.

¹²⁴ *Indianapolis v. Edmond*, 531 U.S. 32, 37-42 (2000) (invalidating roadblocks designed to stop drug traffic because of potential discriminatory application and the general lack of suspicion required before government intervention was occurring).

¹²⁵ See, e.g., Andrew Cohen, *Shoot-out in Downtown USA*, NEW INTERNATIONALIST, Issue 224, (Oct. 1991) (countless news reports and outside studies have been written examining the War on Drugs and the degree to which it has altered the climate in America's poorest neighborhoods).

years¹²⁶ with localities greatly increasing youth patrols in schools and poor neighborhoods. This police presence sends a strong message to American youth. In neighborhoods where police officers are viewed antagonistically, the message sent is one of subordination and police control. Community policing models further increase the number of beat officers while at the same time creating a system of repeat players. Officers are suspicious of youth who have caused past disturbances, and the same youth are constantly monitored by the same police officers.¹²⁷ Youth feel that they are living under a microscope. The feeling is a realistic one given the proliferation of childhood activities that have been criminalized in many states, such as the institution of “zero tolerance” policies regarding school discipline stemming from the passage of the 1995 Gun Free Schools Act.¹²⁸

The importance of this “feeling” lies at the core of the juvenile justice dilemma. Youth who are consistently being stopped by police officers for questioning and searching when engaged in innocent behavior are left feeling that they are not a part of a community that cares about them.¹²⁹ This feeling, in turn, leads youth to emotionally disengage from the political arena. Once they decide that the system fails to recognize their personhood, they are unlikely to vote upon reaching the age of majority.¹³⁰ This leads directly to political disenfranchisement, thus perpetuating a cycle of under-representation of voters of color from communities perhaps

¹²⁶ See *id.*; see also www.usdoj.gov/dea/stats/lawstats (statistics regarding increases in DEA agents and budgeting since 1973) (last visited Jan. 30 2003).

¹²⁷ See, e.g., Community Policing Consortium, *supra* note 1.

¹²⁸ See Gun Free Schools Act, 20 U.S.C. § 7151 (1994) (requiring states receiving federal funding for education to expel students who bring firearms to school or possess firearms on school grounds).

¹²⁹ See PARKERS, *supra* note 119.

¹³⁰ See BURMAN, *supra* note 11, at 28-29.

most dependent upon the whims of public policy initiatives.¹³¹

Threat Number Three:
Dividing “At Risk” Communities

Officers listen to organized community groups rather than individual youth in the community. What often results is a pitting of the older generation against the young.¹³² In light of the social development of young people, this exclusion may serve to retard their ability to identify a place in the larger community.¹³³ Additionally, it threatens to undermine all of the goals that “community policing” promises to achieve: uniting communities and strengthening them for future generations. When community policing is plugged into a system that relies upon adjudication in the formal criminal justice system, the final decision regarding youth arrested in community policing programs is not made by the community. Accordingly, efforts to stem graffiti or keep youth from congregating on the streets, that may be motivated in part by a desire to assist youth, could increase the influx of youth of

¹³¹ *Id.*

¹³² *See, e.g.*, DAYTON OHIO’S COMMUNITY BASED POLICING PROGRAM MANUAL (“Officers are encouraged to talk to groups in the community about their crime control concerns . . . the elderly population have unique and important concerns.”). A powerful example of this is the “gang loitering ordinance” devised by organized community groups comprised largely of elderly Chicago citizens with the assistance of Chicago law enforcement. *See* Albert W. Alschuler & Stephen J. Schulhofer, *Antiquated Procedures or Bedrock Rights?: A Response to Professors Mearns and Kahan*, 1998 U. CHI. LEGAL F. 215, 219, 242 (1998) (discussing how this ordinance increased the disenfranchisement of youth of color and led to a skyrocket of juvenile arrest rates). Additionally, community policing efforts in many communities have relied only on the word of pre-existing organized groups, comprised largely of local business owners and agency personnel, and have enacted primarily ordinances which restrict juveniles, with little input from the juveniles. *See, e.g.*, the Community Crime Control Collaborative (CCCC) of Savannah, GA (1999) (on file with author) (“This group meets monthly and consists of selective personnel from public and private agencies . . . the collaborative was instrumental in having a juvenile curfew established in the city”).

¹³³ *See* Beyer, *supra* note 85, at 90-96.

color into the criminal justice system, a system that does not use community standards¹³⁴ in meting out appropriate punishment for the “crimes” committed.

Because few community policing models have been closely examined from this perspective, it is hard to know the cost of dividing communities. However, developmental theory indicates that youth grow and flourish when they feel they are around people whom they can trust and who have proven they have the youth’s best interest at heart.¹³⁵ Further, the courts often note that parents and communities possess the strongest ability to prepare youth for future obligations.¹³⁶ The state’s failure to nurture individual children and to provide them with adequate support systems is a constant reminder of the necessity of building and maintaining strong families.¹³⁷

¹³⁴ Community standards would not be derived from a “one size fits all” model. Instead, they would allow for true treatment of youth based upon the needs of the community. Such a system can provide the child with continuity throughout childhood and allow for a more introspective look at what communities have to offer and where they may need to mobilize in order to participate in a wider political dialogue. See Theresa Hughes, *Juvenile Delinquent Rehabilitation: Placement of Juveniles Beyond their Communities as a Detriment to Inner-City Youths*, 36 NEW. ENG. L. REV. 153, 157-62 (2001).

¹³⁵ See SIGEL & HOSKINS, *supra* note 18, at 175-200 (explaining that the development of trusting individual relationships lies at the foundation of future development of autonomy and political ideation).

¹³⁶ See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 210-15 (1972) (explaining the vital role that parents and community morals place in shaping the future democratic body politic).

¹³⁷ Failures in child welfare systems are not limited to the orphanages of ages past. Just recently, news coverage concerning the continued abuse of three young African American boys under the care of the New Jersey Department of Child Welfare reminds us that the state is simply unable to provide the kind of control and support necessary to successfully nurture young people to adulthood. See David Kocieniewski & Leslie Kaufman, *Years of Chaos Piled into Newark Child Care Office*, N.Y. TIMES, Jan. 22, 2003, at C1.

III. Suggestions for a New Model: A True Focus on Community

A. Clear Limitations

Dissatisfaction with the state of juvenile justice has been a long-standing concern, with advocates requesting reform at every level. Combining the pitfalls of the juvenile justice system, anti-youth rhetoric, and the perils of Fourth Amendment doctrine creates a variety of concerns. However, using current modern developmental theory to help design a juvenile justice system will provide communities with a chance to create a promising future. The following proposals would place the decisions for raising youth in the hands of the communities rather than in the discretion of police officers.

B. Street Law Programs

At the core of many of the misunderstandings between youth and police officers is lack of education. When youth engage in “friendly conversation” with a community officer, the youth could expose themselves to loss of liberty in a way that is counterintuitive to their understandings of how the world works. Much of Fourth Amendment and Fifth Amendment doctrine is elusive or counterintuitive to adults, but for youth of color, who will be exposed to frequent interactions with officers under new policing models, this lack of knowledge could ruin their young lives.

A simple, although incomplete answer, is to educate our youth about the law: their rights and responsibilities and how they can effectuate change. Street law programs in public schools and in juvenile detention facilities¹³⁸ will best carry

¹³⁸ See Craig Haney, *Making Law Modern: Toward a Contextual Model of Justice*, 3 PSYCHOLOGY, PUB. POL’Y & L. 3, 11 (Mar. 2002) (explaining the utility of street-law programs); see also Street Law, at <http://www.streetlaw.com> (providing a curriculum for a school-based street law initiative) (last visited Jan. 30, 2003); Street Law Juvenile Justice Re-Entry Program, at <http://www.streetlaw.org/reentry.html> (discussing street

out the values purportedly underlying “juvenile rights.” Street law programs should be designed to inform students of the realities of the system, what it means to live in a community under constant surveillance, what the penal law or juvenile law of the jurisdiction considers criminal activity, and why law enforcement exists. Further, an ideal street law program would also provide youth with connections to community groups, resources for the youth to organize as a political voice to express their viewpoints on issues that impact their lives,¹³⁹ and facilitate connections to places where they can be heard.

The success of street law programs has been remarkable. Youth report feeling more connected to their communities and more aware of their rights.¹⁴⁰ This feeling of connection and awareness is critical in creating participants in a future democracy. Additionally, if the legacy of *Gault* is to be enforced and children have true due process rights, their ability to understand and play an active role in the system is paramount.

C. True Restorative Justice:

Bringing the Entire Decisionmaking Process to the Community

The principles underlying many community policing models express the need for critical systematic reform. However, given the climate of police-citizen interactions and the current anti-juvenile rhetoric, allowing police officers the power and funding to work in the community is short-sighted.

law programs for youth in placement facilities or on probation) (last visited Jan. 30, 2003).

¹³⁹ Youth can participate in the political process despite their lack of voting power by making themselves heard through collective organizing, rallies, and meaningful articulation of their views to the voting population around them. See Barbara Riepl, *Political Participation of Youth Below Voting Age*, EUROSOCIAL REP. NO. 66, European Center for Policy and Research, 2002, at 17-45 (describing methods of youth participation and indicating that early participation increases the likelihood that youth will remain engaged politically).

¹⁴⁰ See, e.g., Derek Simonsen, *The High Court in High School*, LEGAL TIMES, May 29, 2000, at 26-28.

Without full-scale reform the underlying principles of community policing are vacuous. Restorative justice tries to fill that gap by using community members rather than “outside experts,” such as police officers, formal courts, social workers and lawyers, to fix community crises.

The focus of restorative justice begins within the family. Rather than encouraging families to turn to law enforcement or judicial intervention when they are facing parenting problems, funding should be provided for parenting classes and family education in communities.¹⁴¹ Further, by educating youth about familial roles and responsibilities through counseling, group work, and other educational strategies, youth can better understand their importance in a larger collaborative environment.¹⁴² The breakup of families of color exacts extreme costs not only on the children themselves but also on communities of color and the American body politic as a whole.

¹⁴¹ During my short tenure with the New York Legal Aid Society as a clinical student in 2000-2001, I observed that throughout the New York area, parents with “unruly” children are encouraged by many social workers, guidance counselors, and teachers to initiate “PINS” (Persons in Need of Supervision) proceedings. *See* N.Y. FAM. CT. ACT § 782 (1998) (providing parents with an opportunity to seek court supervision of their “unruly” children). These adversarial proceedings occur in centralized courts and place parents and children as adversaries, with counsel provided for both parties. Outside of being tremendously costly and draining on court resources, PINS petitions often lead to children being removed from their communities or sent to group homes or other state facilities against their will. *See, e.g.*, N.Y. COUNTY § 218-a (2001) (providing for out-of-home placements for PINS adjudicated youth, placing them alongside adjudicated delinquents). Additionally, children become a part of the “system,” a process that has serious developmental consequences. *See* Beyer, *supra* note 85, at 99.

¹⁴² One example of this type of program, I have personally worked with, is the Girl Talk program in the Cook County Jail facility. This program, which provides young female offenders with education and a forum to discuss the juvenile justice system, has shown remarkable success. It is popular with inmates and succeeds in fostering interest in political issues. *See* Gail Smith, CHICAGO LEGAL AID TO INCARCERATED MOTHERS (CLAIM) PROGRAM HANDBOOK 5-7 (Summer 1999) (on file with author).

Restorative justice programs also work to move community focus away from criminal justice, which emphasized individual rights, and more toward collaboration.¹⁴³ While many advocates for children may fear limiting individual liberties, it is critical to remember that the strong push for juvenile “rights” was developed because youth were being ripped from their communities, provided little meaningful process, and channeled into a deeply flawed system.¹⁴⁴ A restorative justice program should place its top priority, in regard to juvenile crime, on diverting youth from the traditional “juvenile justice system.” Some ways that communities could avoid losing their youth or leaving their elderly in fear include mediation between the accused and the victim, and community courts or arbitration that can impose community youth curfews or community service projects. In restorative justice programs, youth and victims are placed face to face in a variety of contexts. Such encounters work to eradicate the underlying cause of the “crime” by allowing the child to better understand the impact they had on the victim, while allowing victims to better understand young people and the emotions motivating their conduct.¹⁴⁵ Given that most juvenile “crime” is more symptomatic of immaturity than a desire to harm, this approach will help juveniles learn from their mistakes rather than become condemned by them.

¹⁴³ The use of a “rights” and “autonomy” based system concerning juveniles is an interesting phenomenon in American society. With social progressives such as Jane Adams at the forefront, the juvenile justice field has always been, and still remains largely a product of the efforts of women, a group of people many believe are less predisposed to think of individual rights and more inclined to think about interrelationships. See, e.g., Adam D. Kanenstein, Note, *The Inner-morality of Juvenile Justice: The Case for Consistency and Legality*, 18 CARDOZO L. REV. 2105, 2106-19 (1997).

¹⁴⁴ See Bazemore, *supra* note 82, at 81-90.

¹⁴⁵ See Jennifer Michelle Cunha, Comment, *Family Group Conferences: Healing the Wounds of Juvenile Property Crime in New Zealand and the United States*, 13 EMORY INT'L L. REV. 283, 283-87 (1999) (describing the community benefits of restorative justice initiatives).

Restorative justice initiatives should also provide meaningful aftercare for prisoners returning to the community. The current system in most states uses probation to monitor youth with an unspoken assumption that the youth will be unable to actually complete the probationary period successfully. Probationary programs, which may include classes or group therapy, are rarely tailored to the specific needs of an individual youth.¹⁴⁶ Further, the probation officers and social workers or other professionals administering the programs most often have very little personalized knowledge about the young person, making the “completion” of “aftercare” primarily contingent upon attendance rather than actually addressing the youth’s needs.¹⁴⁷

By placing aftercare programs in a youth’s neighborhood, with a focus upon the particularized needs of members of that community, the chances of useful and successful aftercare increase. Not only will base level attendance concerns be largely alleviated by eliminating the problems caused by lack of transportation, but also community members may bring in valuable background knowledge of what it is like to live in their community and assist youth on an individual basis.¹⁴⁸ Further, community programs may be better able to tailor themselves to the true needs of modern youth.

¹⁴⁶ See Hughes, *supra* note 134, at 168-70 (explaining that a push toward retribution rather than rehabilitation in the juvenile justice arena has left youth without community-based options tailored to individualized needs).

¹⁴⁷ *Id.*

¹⁴⁸ See *id.* at 169-78.

D. The Decriminalization of Immaturity

In the 1970's there was a vast movement to decriminalize "status offenses," crimes that are only a crime because the offender is a child.¹⁴⁹ However, recent legislation has pushed for re-criminalization of these offenses, often under the rhetoric that they are symptoms of larger criminal tendencies.¹⁵⁰ However, many newly criminalized activities, such as lying, running away, bullying, and touching other children's "private areas," are much more symptomatic of being a child than having a criminal predisposition. As a result, youth in communities constantly monitored by police officers, are more often prosecuted for these "crimes" than middle class youth who are monitored primarily by their parents.

The desire to identify "signs" of future criminal behavior is understandable. Casting a wide net appears as if it will prevent tragedies such as Columbine and Paducah. However, the youth involved in both of these shootings were not of the same race or class as the children who are actually subject to this wide net and dragged into the juvenile system. A "better safe than sorry" approach does not solve the problem intended to be addressed, and it serves to demoralize youth of color, reinforce class structures, and ruin rather than protect the lives of youth.

Community centered programs and specialized neighborhood courts could help eradicate the wholesale approach of recent legislative action for "youth protection." However, these programs would be most effective if they were

¹⁴⁹ See Steinhart, *supra* note 70, at 9.

¹⁵⁰ One powerful example of this principle is the "false personation" statute in New York. N.Y. PENAL § 190.23 (2002). This law makes it a misdemeanor to provide false pedigree information to a police officer. *Id.* The statute was designed to stop runaways and youth suspected to be engaged in prostitution near the Port Authority bus terminal by making their arguably innocent conduct "criminal." See 1997 McKinney's Session Laws, at 2071 (providing legislative history).

allowed to focus on truly disruptive behavior, rather than offense of pure immaturity.¹⁵¹ Hence, legislators, community groups, and prosecutors' offices should push for the decriminalization of these offenses in order to focus resources.

IV. Conclusion

The principle "look before you leap" is especially poignant when evaluating new approaches to juvenile justice reform. Perhaps we have become a society so obsessed with crime that we are willing to sacrifice the future generation. But we must take a step back to examine the impact policing techniques have on our children, especially disproportionate children of color. Short-sighted reform efforts subject youth to further harassment despite any good underlying intentions. In a society built upon the ideals of political participation and the perpetuation of democracy, we should constantly reevaluate whether our means are getting us closer to the ends. Placing more police officers on the streets and more discretion in the hands of individual officers does not get us closer to the ideal.

Instead, a thorough examination of the teachings of developmental psychology can provide critical insight into our reform efforts. Street law programs, decriminalization of many juvenile acts, and adopting neighborhood centered restorative justice programs may take us closer to really helping our youth flourish. Perhaps we can best address juvenile justice reform by listening to our youth talk about the challenges and concerns of being a youth in the United States. Conversations like the one I had with Lesean as he prepared for his high school debate may enlighten us all, both young and old, and lead to policy change that truly develops communities without leaving children behind.

¹⁵¹ See Beyer, *supra* note 85, at 93-96.

