

**THE REASONABLE BLACK PERSON STANDARD IN
CRIMINAL LAW: IMPARTIALITY, JUSTICE AND THE
SOCIAL SCIENCES**

BY:

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INTRODUCTION

The American judicial system ostensibly provides equal treatment of all citizens. The unfortunate reality is that African-Americans regularly face the possibility of false arrests, unfounded suspicion, biased juries, lengthy prison sentences, and other discriminatory practices; as a result, they have learned to fear the justice system rather than seek its protection. This fear of the judicial system perpetuates biases and continues the pattern of unfair treatment of black citizens.

One proposed method of abating this problem focuses on the standard courts use to determine whether a suspect's actions were indeed criminal. Specifically, this solution involves tweaking the reasonable person standard, long used by courts to analyze whether a suspect acted similarly to the way any other "reasonable person" would have acted under the given circumstances. While the standard is currently applied in an objective manner, it should instead consider the suspect's race, accounting for the idea that a reasonable white person and a reasonable black person would quite likely respond differently to any situation involving law enforcement. As such, it is necessary to apply a "reasonable black person" standard to cases involving a black suspect, in order to consider his or her

experiences with both the law and society in general and to attempt to minimize discrimination in the criminal justice system.

I. THE REASONABLE BLACK PERSON STANDARD

A. Reasonable Person Standard

i. History of the Reasonable Person Standard

The reasonable person standard, also known as *the reasonable man standard*, was introduced to our legal system in 1837 in *Vaughan v. Menlove*, a case arising out of a common law negligence claim.¹ Today, it continues to be used in the tort context, and it has been expanded to apply in the criminal context.² The standard considers what a reasonable person, mindful of the prevailing community beliefs and opinions, would do under the circumstances giving rise to the claim.³

ii. The Public Policy Behind the Reasonable Person Standard

Today, the reasonable person standard continues to play an integral role in legal analysis. Its design provides an objective standard of behavior, in light of community norms, that a fact finder can employ to consider a wide range of conduct.⁴ In applying the reasonable person standard, “the fact finder can consider the unique circumstances surrounding each situation but the peculiarities of the individual, such as the person's age, knowledge, or intelligence cannot be taken into account. This is an attempt to be objective, fair, unbiased, and create a uniform standard of care without regard to the idiosyncrasies

¹ (1837) 132 Eng. Rep. 490 (CP).

² See, e.g., *Nelson v. State*, 597 P.2d 977, 980 (Alaska 1979) (stating that consideration must be given to “harm reasonably foreseeable at the time, rather than the harm that actually occurs”); *People v. Stitely*, 108 P.3d 182, 208 (Cal. 2005) (holding that a person is not guilty of rape if he honestly and reasonably believes that the woman consented).

³ E.g., *Yarborough v. Alvarado*, 541 U.S. 652 (2004).

⁴ Makalika Naholowaa, *The Unreasonableness of the Reasonable Person Standard in Personal Torts*, LAW IN CONTEMPORARY SOCIETY (2008), http://moglen.law.columbia.edu/twiki/bin/view/LawContempSoc/MakalikaNaholowaa-FirstPaper#The_Unreasonableness_of_the_Reas.

of the defendant.”⁵ However, this tendency to cleave the person from the reasonableness standard often results in the fact finder forgetting that “the reasonable person is capable of making mistakes and error of judgment, of being selfish, of being afraid,” in favor of a more angelic (though paradoxically, less reasonable) view of humanity.⁶

B. The Need for the Reasonable Black Person Standard

i. The Reasonable Person Standard is Really the Reasonable White Person Standard

The primary problem with the reasonable person standard is that it often looks outward, rather than inward. It focuses on the objective circumstances of the situation itself, rather than on the experience of the individual involved. However, black and white Americans have drastically different life experiences, particularly in regard to law enforcement. As discussed below, a disproportionate number of blacks are stopped, arrested, and sentenced to lengthier prison terms. Thus, the black view of what is reasonable under certain circumstances may differ widely from the generally accepted white view.⁷ Therefore, it is imperative that a defendant’s unique qualities and experiences be considered by the court. A one-size-fits-all reasonable person standard simply cannot be race-neutral. Rather, “[i]n our criminal justice system, reasonable behavior is defined as White behavior.”⁸ This disconnect between the reasonable person considered by courts and the reasonable person considered by black citizens, who have “unique experiences with and within the U.S. criminal justice system[,]” requires “a new

⁵ *Id.*

⁶ John Gardner, *The Many Faces of the Reasonable Person*, 131 L.Q.R. 563 (2015); FOWLER V. HARPER & FLEMING JAMES, JR., *THE LAW OF TORTS*, 389 (Little, Brown & Co. 2d ed. 1986).

⁷ See generally, NAACP, *Criminal Justice Fact Sheet*, <https://www.naacp.org/criminal-justice-fact-sheet> (last visited November 30, 2018).

⁸ DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM*, 54–55 (1999).

standard . . . the reasonable black person standard [that] explicitly take[s] into account the perspective of a reasonable Black person.”⁹

ii. How Black People are Treated Differently Than Whites Within the Criminal Justice System

1. Treatment by Law Enforcement Officials

Black Americans’ experiences with the criminal justice system undermine their faith in the majority (white) perspective at almost every juncture. Black people reasonably see “the police as the face of a larger system of inequality in the justice system, employment, education, and housing.”¹⁰ For decades, black communities have suffered from police brutality and harassment:

For black Americans, policing has always been a mechanism for racial control; it is the most enduring aspect of the struggle for civil rights. In both the North and South, the police have defended and enforced racism and segregation, and its legacy means that young black men are 21 times more likely to be shot and killed by police than young white men.¹¹

Every day, people of color experience disrespect from police officers and face constant fear of falsified evidence and arrest.

Jennifer Eberhardt, a Stanford psychologist, studied police body camera footage during routine traffic stops in the racially diverse city of Oakland, California.¹² The officers’ language during 36,000 traffic stops was examined by a team of programmers and linguists.¹³ Ms. Eberhardt’s study concluded what most black people already knew to

⁹ Mia Carpiniello, *Striking a Sincere Balance: A Reasonable Black Person Standard for “Location Plus Evasion” Terry Stops*, 6 MICH. J. RACE & L. 355 (2001).

¹⁰ Nikole Hannah-Jones, *Taking Freedom: Yes, Black America Fears the Police. Here's Why.*, PACIFIC STANDARD (Apr. 10, 2018), psmag.com/social-justice/why-black-america-fears-the-police.

¹¹ See *id.*

¹² Nsikan Akpan, *Police respect whites more than blacks during traffic stops, language analysis finds*, PBS (June 5, 2017), <https://www.pbs.org/newshour/science/police-respect-whites-blacks-traffic-stops-language-analysis-finds>.

¹³ See *id.*

be true:

Police show more respect to whites than blacks during traffic stops. White community members were 57 percent more likely to have an exchange filled with a highest degree of respectful language, whereas black drivers were 61 percent more likely to experience an exchange that fell into the category of least respectful. Over the course of an entire traffic stop, the use of respectful language increased more quickly for whites than blacks.¹⁴

Put another way:

Today people of color continue to be disproportionately incarcerated, policed, and sentenced to death at significantly higher rates than their white counterparts. Further, racial disparities in the criminal-justice system threaten communities of color – disenfranchising thousands by limiting voting rights and denying equal access to employment, housing, public benefits, and education to millions more. In light of these disparities, it is imperative that criminal-justice reform evolves as the civil rights issue of the 21st century.¹⁵

The *Washington Post* collected data on police officers' use of lethal force in the year 2015.¹⁶ The results revealed that “relative to the portion of the population, blacks are over-represented among all those killed by police **under all circumstances**.”¹⁷ The U.S. Census Bureau estimates that blacks accounted for 26% of those killed by the police: “blacks were the victims of the lethal use of force by police at nearly twice their rate in the general population.”¹⁸

Given their propensity to become victims of state-sponsored violence, it is obvious why the black community is disinclined towards police contact. It follows that “a black person's decision to flee a crime scene to escape potential harm [is both] rational and

¹⁴ See *id.*

¹⁵ Sophia Kerby, *The Top 10 Most Startling Facts About People of Color and Criminal Justice in the United States*, CENTER FOR AMERICAN PROGRESS (Mar. 13, 2012), www.americanprogress.org/issues/race/news/2012/03/11351.

¹⁶ Todd Beer, *Police Killing of Blacks: Data for 2015, 2016, 2017, and first half of 2018*, THE SOCIETY PAGES (Mar. 1, 2018), thesocietypages.org/toolbox/police-killing-of-blacks.

¹⁷ See *id.*

¹⁸ See *id.*

innocent.”¹⁹ Put differently, what a reasonable *white* person may conclude was *de jure* evidence of guilt could be nothing more than rational self-preservation on the part of a member of the minority community. Asking the fact finder to consider the social experience of being black is nothing more than asking the fact finder to account for this real and demonstrable difference in experience between the two groups.

2. Treatment by the White Population at Large

People of color are more likely to be punished because they are more likely to be perceived as guilty, whether they committed a crime or not. Author Lisa Bloom observed in *Suspicion Nation* that the assumption that blacks are criminal is so ingrained in our society that in one study, 60 percent of viewers who viewed a crime story with no picture of the perpetrator falsely recalled seeing one, and of those, 70 percent believed he was African-American.²⁰ Bloom concluded, “[w]hen we think about crime, we see black, even when it’s not present at all.”²¹

As a result, black people are frequently the targets of unfounded suspicion. The following examples are both shocking and commonplace: a Yale student taking a nap in a common room in her dorm was interrogated by law enforcement because a white student thought she *looked out of place*²²; two black men were arrested for trespassing in a Starbucks restaurant while waiting for a business associate because they did not order anything²³; a black family barbecuing in a public park was approached by officers after a

¹⁹ See Carpiniello, *supra* note 15.

²⁰ Jessica S. Henry, *Race Matters, Even Though It Shouldn't*, HUFFINGTON POST, (Jan. 14, 2015), https://www.huffpost.com/entry/race-matters-even-though-it-shouldnt_b_6133242.

²¹ See *id.*

²² Christina Carson, *Black Yale Student Was Napping, and a White Student Called the Police*, NY TIMES (May 9, 2018), <https://www.nytimes.com/2018/05/09/nyregion/yale-black-student-nap.html>.

²³ Hilary Hanson, *Cops Arrest 2 Black Men Sitting In Starbucks For 'Trespassing': Video*, HUFFINGTON POST (April 4, 2018), https://www.huffingtonpost.com/entry/starbucks-philadelphia-black-men-arrests_us_5ad22073e4b077c89ce91c74.

white woman called because she believed they needed a permit²⁴; a white woman called the police on a kid for cutting grass a few inches on her property²⁵; the owner of a golf club called the police on a group of black women who were playing too slowly²⁶; employees at Nordstrom Rack called the police on three black men who were shopping for prom and accused them of shoplifting – and these are just a few illustrative examples from an impossibly long list.²⁷

These events highlight a crucial difference in perception (a difference that can radically alter subsequent behavior). “While white people see police as a force that will protect them, communities of color see the police as a force that they need protection *from*.”²⁸ Indeed, the facts that America's Constitution enshrines human bondage and that, until the middle of the twentieth century, Jim Crow laws endorsed everything short of such bondage, leave black Americans believing that society views them as less than their white counterparts. This belief, in turn, makes their attempts to avoid contact with white society an entirely rational choice. This insight among black Americans changes their behavior, meaning that a reasonable black response may not mirror a reasonable white response.

Additionally, Elijah Anderson, a Yale sociologist, took note of a difference

²⁴ Carla Herreria, *Woman Calls Police On Black Family For BBQing At A Lake In Oakland*, HUFFINGTON POST (May 11, 2018), https://www.huffingtonpost.com/entry/woman-calls-police-oakland-barbecue_us_5af50125e4b00d7e4c18f741.

²⁵ *Boy's Lawn Business Picks Up After Neighbors Call Police On Him*, FOX 2 DETROIT (June 29, 2018), www.fox2detroit.com/news/whats-hot/boy-s-lawn-business-picks-up-after-neighbors-call-police-on-him.

²⁶ Rache Siegel, *White Golf Course Owners Said Five African American Women Were Playing Too Slowly. Then They Called The Police*, WASHINGTON POST (April 25, 2018), https://www.washingtonpost.com/news/business/wp/2018/04/24/white-golf-course-owners-said-five-african-american-women-were-playing-too-slow-then-they-called-the-police/?utm_term=.a777be6bb633.

²⁷ Rachel Siegel, *Nordstrom Rack Apologizes After Calling the Police on Three Black Teens Who Were Shopping for Prom*, WASHINGTON POST (May 9, 2018), https://www.washingtonpost.com/news/business/wp/2018/05/08/nordstrom-rack-called-the-police-on-three-black-teens-who-were-shopping-for-prom/?noredirect=on&utm_term=.d95fe0228075.

²⁸ P.R. Lockhart, *White people keep calling the cops on black people for no reason. That's dangerous.*, VOX (May 11, 2018), www.vox.com/identities/2018/5/11/17340908/racial-profiling.

between what he calls “white spaces” and “black spaces.”²⁹ According to Anderson, white spaces are places where black people are often not present, or exist in a limited number, and black spaces are communities and spaces occupied by larger numbers of black people.³⁰ Anderson reasoned that:

Because so much of America remains divided along racial lines, black people who enter white spaces are often viewed with suspicion unless they are in a service position, like working as a store clerk or a waiter . . . as **gentrification increases** the number of these spaces, this can create huge difficulties.³¹ In addition, he emphasized that “part of this suspicion arises from commonly held stereotypes of black people as being criminal and black behavior as being deviant . . . black people in these “white spaces” are forced to justify their presence, and face consequences when that justification isn't accepted by others.”³²

3. Treatment by Members of the Jury

The prejudice faced by black suspects does not end with unfair treatment by the police or white citizens. When it's time for them to face a jury, they become victims of a system that judges them based on community standards to which they are not accustomed. As discussed above, the standards of rationality vary between races for legitimate reasons. Yet, a black person's jury is often skewed politically, demographically and racially. Again, ordinary citizens are bringing their own implicit biases. Many already have preconceived thoughts and views about people of different races, genders and economic backgrounds. The concept of a fair and impartial jury may be hard to achieve.

4. Unfair Sentencing Practices

Another reason that applying a reasonable black person standard is so important is that black Americans are more likely to be imprisoned, and for longer lengths of time, than their white counterparts. Sentencing biases start at the juvenile level. For example:

²⁹ *See id.*

³⁰ *See id.*

³¹ *Id.*

³² *Id.*

[S]tudents of color face harsher punishments in school than their white peers, leading to a higher number of youth of color incarcerated. Black and Hispanic students represent more than 70% of those involved in school-related arrests or referrals to law enforcement. According to recent data by the Department of Education, African-American students are arrested far more often than their white classmates. The data showed that 96,000 students were arrested and 242,000 referred to law enforcement by schools during the 2009-10 school year. Seventy percent of those students were black and Hispanic. Finally, African-American youth have higher rates of juvenile incarceration and are more likely to be sentenced to adult prison.³³

Such prejudices are equally applied to adult black Americans. According to an analysis by The Sentencing Project:

By increasing support for punitive policies, racial perceptions of crime have made sentencing more severe for all Americans. The United States now has the world's highest imprisonment rate, with one in nine prisoners serving life sentences. Racial perceptions of crime, combined with other factors, have led to the disparate punishment of people of color. Although blacks and Latinos together comprise just 30 percent of the general population, they account for 58 percent of the prison population.³⁴

Prosecutors have the discretion to decide what charges to bring against a defendant and how to pursue each charge, and unfortunately, “[w]hether done consciously or not, prosecutors are more likely to seek mandatory minimum sentence charges against African-Americans than whites.”³⁵ The result of a 2014 University of Michigan Law School study found that, “all other factors being equal, black offenders were 75 percent more likely to face a charge carrying a mandatory minimum sentence than a white offender who committed the same crime.”³⁶ Moreover, “[b]lack defendants were recommended to be

³³ Sophia Kerby, *The Top 10 Most Startling Facts About People of Color and Criminal Justice in the United States*, CENTER FOR AMERICAN PROGRESS (Mar. 13, 2012), www.americanprogress.org/issues/race/news/2012/03/11351.

³⁴ Nazgol Ghandnoosh, Ph.D., *Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies*, THE SENTENCING PROJECT (Sept. 2014), <https://www.sentencingproject.org/wp-content/uploads/2015/11/Race-and-Punishment.pdf>.

³⁵ Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, THE SENTENCING PROJECT (June 14, 2016), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

³⁶ See *id.*

denied bail more often, which contributed to worse case outcomes, and to have an eventual plea deal contain more time incarcerated than a similarly situated white defendant.”³⁷

Judges also possess implicit biases. A study of “bail judges in the Miami and Philadelphia areas suggests that both black and white judges show bias against black defendants.”³⁸ The study found that “black defendants are 2.4 percentage points more likely than white defendants to be detained with the average bail for black defendants being \$7,281 higher than for white defendants.”³⁹ The study concluded that bail judges rely on racial stereotypes to predict which defendants will commit another crime if released, despite the fact that white defendants are in fact much more likely than black defendants to get arrested again after their release.⁴⁰

Another study conducted by two Harvard law professors, Alma Cohen and Crystal S. Yange, examined the sentencing practices of federal trial judges over a 15-year period. They found that “judges appointed by Republican presidents gave longer sentences to black defendants and shorter ones to white women than judges appointed by Democrats.”⁴¹ The “Republican-appointed judges sentenced black defendants to three more months than similar non-black [defendants] and female defendants to two fewer months than similar males compared with Democratic-appointed judges.”⁴²

³⁷ Emily Graham, *Racial Bias and Prosecutorial Discretion*, Harvard Law School American Constitution Society (Feb. 8, 2016), <https://orgs.law.harvard.edu/acs/2016/02/08/racial-bias-and-prosecutorial-discretion/>.

³⁸ Denise-Marie Ordway, *Black and white bail judges show bias against black defendants*, JOURNALIST’S RESOURCE (July 16, 2014), <https://journalistsresource.org/studies/government/criminal-justice/bail-judges-racial-bias-research/>.

³⁹ *See id.*

⁴⁰ *See id.*

⁴¹ *See* Adam Liptak, *Black Defendants Get Longer Sentences From Republican-Appointed Judges, Study Finds*, NY TIMES (May 28, 2018), <https://www.nytimes.com/2018/05/28/us/politics/black-defendants-women-prison-terms-study.html>.

⁴² *See id.*

Part of this disparity may again hail from social biases. If blacks are more violence-prone – as 56% of Americans believe – and if the system is designed to protect and serve those who are not violent, it would make sense to take a hard line against violent actors.⁴³ The problem is that what is perceived by the judicial system as a potentially violent actor is a matter of inherent and unsupported social bias, as described above. The system, a product of white society, does not recognize the prejudice and circumstances the average black person faces; it labels as violence what are instead adequate survival and coping skills for the environment. Indeed, it appears that fact finders are asking whether a person of this character belongs on *their* block without also considering that the block itself dictates the character.

C. Recent Progress in the Judicial System

Fortunately, some progress has been made. The Massachusetts Supreme Judicial Court went so far as to recognize a defendant's rationality in deciding to flee from the police in *Commonwealth v. Jimmy Warren*,⁴⁴ where the Court vacated the defendant's conviction and ruled that the police lacked reasonable suspicion for an investigatory stop:

On December 18, 2011, Warren was arrested by police who were investigating a breaking and entering in Boston. After the police received the description of the suspects, Warren was spotted with another man walking near a park. When the officer approached the men, they ran into the park. After a scuffle with the pursuing officer, Warren was arrested and searched. No weapon or contraband was found on him, but police recovered an unlicensed .22 caliber firearm in a nearby yard. Warren was charged with unlawful possession of a firearm and later convicted.

On appeal, the Court vacated Warren's conviction, stating that the law enforcement officials' suspicion was not reasonable and that running away was not

⁴³ Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 787 (1994) (quoting Tom W. Smith, *Ethnic Images* 9, 16 (1990)).

⁴⁴ 58 N.E.3d 333, 335 (Mass. 2016).

probative of the defendant's guilt.⁴⁵

In reaching this decision, the Court considered the witnesses' description of the suspects and the defendant's flight, among other things. Since the witnesses' description of the break-in suspect's clothing was vague, it made it impossible for police to reasonably target Warren (or any other black man wearing dark clothing) as a suspect.⁴⁶ The Court determined that the ubiquitous clothing description coupled with the officer's hunch was not enough to justify the stop.⁴⁷

Additionally, the Court explored the probative value of a suspect's flight in determining whether an officer's suspicion was reasonable. The Court concluded that an individual's flight from a crime scene is not necessarily indicative of guilt.⁴⁸ The Court reasoned that flight should be given minimal weight when it is the only factor contributing to the suspicion of an individual.⁴⁹

This was a significant ruling for the criminal justice system, as it has the ability to change the way judges review police officers' determinations of reasonable suspicion. When discussing the Court's ruling, Matthew Segal, the legal director of the American Civil Liberties Union of Massachusetts (ACLU), stated that: "the state's highest court, in talking about the people of color, it's saying that their lives matter and under the law, their views matter."⁵⁰

Yet, these victories are few and far between, and blacks still face, as noted above, a substantially higher risk than whites of negative outcomes when dealing with law

⁴⁵ *Id* at 337.

⁴⁶ *Id* at 339.

⁴⁷ *Id.*

⁴⁸ *See id.* at 341-42.

⁴⁹ *See id.* at 337.

⁵⁰ Zeninor Enwemeka, *Mass. high court says black men may have legitimate reason to flee police*, WBUR News (Sept. 20, 2016), <https://www.wbur.org/news/2016/09/20/mass-high-court-black-men-may-have-legitimate-reason-to-flee-police>.

enforcement and the criminal justice system. Not only is this shown through data, but it is also imprinted into blacks' perception of their world. In February 2017, the Public Religion Research Institute conducted a poll on racial discrimination. It found that 87% of black Americans experience discrimination in the United States, compared to just 49% of white Americans.⁵¹ In other words, black Americans perceive themselves as living in a far more racist society, and they behave according to this reality – one of racism, unequal enforcement of the laws, and suspicion of the majority institutions, including the police.

D. Rejection of Alternative Solutions

Some may argue that systemic change, rather than the acknowledgment of racial inequality on a case-by-case basis via a reasonable black person standard, is preferable. Unfortunately, such a change is highly unlikely due to black Americans' current underrepresentation in the legislature. In 2018, the Supreme Court “upheld a batch of Republican-drawn legislative districts in Texas, including two in the U.S. House of Representatives, that had been thrown out by a lower court for diluting the power of black and Hispanic voters.”⁵² The Court’s “ruling was 5-4, with the conservative justices in the majority and the liberal justices dissenting.”⁵³ The justices also “threw out a lower court ruling that had struck down North Carolina’s Republican-drawn U.S. House districts, directing that the decision be revisited in light of its ruling in a Wisconsin gerrymandering case last week that also preserved a Republican-drawn electoral map.”⁵⁴

Justice Sotomayor, in her dissenting opinion, stated: “it means that, after years of

⁵¹ Alex Vandermaas-Peeler, *Diversity, Division, Discrimination: The State of Young America*, PRRI (Jan. 10, 2018), <https://www.prrri.org/research/mtv-culture-and-religion>.

⁵² Lawrence Hurley and Andrew Chung, *Supreme Court favors Republicans in gerrymandering cases*, REUTERS (June 25 2018), <https://www.reuters.com/article/us-usa-court-gerrymandering-wrap-idUSKBN1JL2KE>.

⁵³ *Id.*

⁵⁴ *Id.*

litigation and undeniable proof of intentional discrimination, minority voters in Texas – despite constituting a majority in the state – will continue to be underrepresented in the political process.”⁵⁵ In other words, black Americans cannot effectively vote for their interests, thus are at the mercy of a police and criminal justice apparatus that cares little for their welfare.

II. THE SOCIAL SCIENCES: THE STRENGTH OF THE IMPLICIT BIAS

It is not surprising that blacks are judged more harshly given the cultural biases that are present in our society. For one thing, the human mind is quite error-prone in general. A study by the U.S. National Research Council entitled *Identifying the Culprit: Assessing Eyewitness Identification* considered the fact that “the increasing number of people convicted with eyewitness testimony who have been subsequently exonerated by DNA evidence” suggested that eyewitness testimony may have some reliability issues.⁵⁶ Specifically, it observed that “[s]ome 75% of the wrongful convictions for rape and murder, including a number that led to people being scheduled for execution, were based on eyewitness testimony.”⁵⁷ According to one of the study’s psychologists, “the procedures of a criminal investigation can distort eyewitness recall . . . because someone says something confidently doesn't mean it's true.”⁵⁸

This is particularly troubling when considering that “[f]ifty-six percent of Americans perceive Blacks as violence prone,” according to a study.⁵⁹ Despite calling for a different pattern of behavior across races, society still assesses all conduct by reference

⁵⁵ *See id.*

⁵⁶ John Bohannon, *How Reliable is eyewitness testimony? Scientists weigh in*, SCIENCE MAGAZINE (Oct. 3, 2014), <https://www.sciencemag.org/news/2014/10/how-reliable-eyewitness-testimony-scientists-weigh>.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 787 (1994) (quoting Tom W. Smith, *Ethnic Images* 9, 16 (1990)).

to the majority race's perceptions. This creates substantial implicit bias in the justice system.

The perception of blacks as violent puts blacks in danger. It also helps explain what would otherwise seem discordant. For example, being perceived as dangerous is itself dangerous for African-Americans: according to the ProPublica analysis of federal data on fatal police shootings between 2010 and 2012, young black male civilians were 21 times more likely to be killed by police than young white male civilians.⁶⁰

Indeed, studies have shown that police officers “perceive black boys to be older and less innocent than white boys, and this 'adult like' quality made them appear to be appropriate candidates for greater use of police force [and] civilian and police officer participants perceived black youth to be older than they were.”⁶¹ Accordingly, “[i]f officers perceive Black male civilians as superhuman,” or at least older and more cunning than they are developmentally, the officers “may also more easily justify extreme physical acts against black male targets in alignment with a 'superhero' versus 'villain' narrative.”⁶²

Sadly, in a society where a resting black man is presumed a criminal, and a black man in a white neighborhood is presumed a burglar, it is no surprise that blacks will alter their behavior to account for this reality. This means that their actions, right down to their gaits, are influenced by a fear of white society. For instance, whereas a white person would likely give little thought to sprinting to his or her car when late for an appointment, a black man is less likely to do so in order to avoid being perceived as fleeing from a

⁶⁰ Ryan Gabrielson, Eriq S. Sagara and Ryan Grochowski Jones, *Deadly force, in Black and White*, PROPUBLICA (Oct. 10, 2014), www.propublica.org/article/deadly-force-in-black-and-white#update-note.

⁶¹ Alison V. Hall, Erika V. Hall & Jamie Perry, *Black and Blue: Exploring Racial Bias and Law Enforcement in the Killings of Unarmed Black Male Civilians*, 71 AMERICAN PSYCHOLOGIST 175 (2016), <https://scholarship.sha.cornell.edu/cgi/viewcontent.cgi?article=1882&context=articles>.

⁶² See *id.*

crime scene. Similarly, while a white person may venture into a restricted area of a store looking for a clerk, a black person might fear being suspected of shoplifting. While these differences are gross and unfair, it is the reality for black Americans. Often, in order to avoid the chance of creating suspicion, blacks will simply attempt to avoid contact with the white majority altogether. This avoidance, while completely understandable, unfortunately serves to arouse suspicion in itself, perpetuating the cycle of racial prejudice.

Accordingly, it is important to acknowledge these implicit biases and make fact finders aware of them as they come to their conclusion. The reasonable black person standard, which takes into account the unique relationship between black Americans and the legal system, can achieve this.

CONCLUSION

Evaluating a suspect's actions against a reasonable black person standard is no more complicated, subjective or idiosyncratic than evaluating a suspect's actions against a reasonable person standard. In determining what a reasonable person would do in a given situation, each part of the system makes certain assumptions about that person's characteristics – all of which are often subconscious. Adopting a reasonable black person standard simply reminds those applying the standard that they must consider the social impact of the suspect's race when evaluating his or her actions. Just as it would be appropriate to consider the personal history (e.g., a history of domestic violence) of a suspect in assessing the reasonability of the act in question, so too should the fact finder consider the social history of the suspect. The reasonable person standard has always been a flexible balancing test, and it would remain so. That said, given the indisputable and

inherent bias in the system, there is no reason not to encourage these facts to be considered.

Introducing the reasonable black person standard seeks to overcome implicit biases and place people of color on an equal level with their white counterparts when it comes to dealing with the criminal justice system. The reasonable black person standard is not a catch-all solution to the significant and deeply-embedded problems of racial disparities within the system, but it will potentially lead to the discovery of other ways to overcome these racial barriers.

