

SMELLS LIKE TEEN SURVEILLANCE: GANG DATABASES AND THE NEED FOR ENHANCED FOURTH AMENDMENT PROTECTION FOR CHILDREN

Abstract: As they exist today, law enforcement’s gang databases inaccurately and disproportionately record information about young Black and Brown people. Often, the kind of information included exceeds what is allowed by federal regulation. This manner of policing and surveillance used to facilitate the creation of gang databases has been present since America’s founding. Young people and children are especially susceptible to these practices because of their incomplete psychological development, limited control over their own lives and whereabouts, and imbalanced power dynamics when interacting with adult police officers. Furthermore, in most jurisdictions, children and their families are not notified of their inclusion in a gang database. This is concerning because gang database inclusion can result in harsher treatment from police, bias in sentencing, and, in immigration proceedings where gang database inclusion can be admitted into evidence, deportation. This Note argues, however, that eliminating gang databases alone is not the solution. Law enforcement has historically adapted to such changes to achieve the same result: surveillance of young people of color. Thus, this Note argues that young people need procedural safeguards to protect them from the law enforcement stops that comprise the information in gang databases. To do this, this Note looks to learn from the largely failed procedural safeguards for youth under *Miranda* in order to develop a solution in the Fourth Amendment context that works to stop the cycle of surveillance of minors.

INTRODUCTION

In September of 2023, Chicago’s Community Commission for Public Safety and Accountability voted to end the Chicago Police Department’s use of its gang database.¹ In 2019, the Chicago Inspector General investigated Chicago’s gang database and found that Black and Latinx people made up ninety-

¹ Heather Charone & Nick Blumberg, *Police Oversight Board Votes to Permanently Scrap New Chicago Gang Database*, WTTW (Sept. 7, 2023), <https://news.wttw.com/2023/09/07/police-oversight-board-votes-permanently-scrap-new-chicago-gang-database> [<https://perma.cc/8VN5-NP45>]. The Chicago City Council created the Community Commission for Public Safety and Accountability in 2022. *Community Commission for Public Safety and Accountability*, CHICAGO.GOV, https://www.chicago.gov/city/en/depts/ccpsa/supp_info/community-commission.html [<https://perma.cc/J2UT-YWDS>]. Among other things, the Community Commission for Public Safety and Accountability is responsible for overseeing and working on the Chicago Police Department’s internal policies, community programs, and budget, with an additional focus on identifying viable non-policing solutions to violence. *Id.*

five percent of the people included.² The youngest alleged gang member in the database was nine years old and the oldest was seventy-five years old.³ Overall, the Chicago Inspector General determined that the database did not have enough controls to accurately generate and maintain its information.⁴ Further, the Chicago Inspector General found that people in the database were deprived of procedural fairness because they did not receive notice of their inclusion.⁵

Following the Chicago Inspector General's report, several organizations filed a class action lawsuit against the city and the police department, asking for changes to the way the database is maintained and shared.⁶ The plaintiffs moved to voluntarily dismiss the case in 2020 because the Chicago Police Department promised to update its policies and create a new, better database.⁷ Yet, a follow-up audit showed that the new database still used the same flawed

² CITY OF CHI. OFF. OF THE INSPECTOR GEN., REVIEW OF THE CHICAGO POLICE DEPARTMENT'S GANG DATABASE 4 (2019), <https://igchicago.org/wp-content/uploads/2023/08/OIG-CPD-Gang-Database-Review.pdf> [<https://perma.cc/K4CK-2DKW>]. Over eleven percent of people in Chicago's gang database have no reason listed for their inclusion. *Id.* Unfortunately, over-representation of Black and Latinx people in gang databases is not unique to Chicago—New York City's gang database, operated by the New York Police Department (NYPD), is ninety-nine percent Black and Hispanic. OFF. INSPECTOR GEN. FOR THE NYPD, AN INVESTIGATION INTO NYPD'S CRIMINAL GROUP DATABASE 34 (2023), <https://www.nyc.gov/assets/doi/reports/pdf/2023/16CGDRpt.Release04.18.2023.pdf> [<https://perma.cc/3DTP-5FJG>]. Similarly, there is only one white person in the District of Columbia's gang database of 1,951 individuals. WASH. LAWS.' COMM. FOR CIV. RTS. & URB. AFFS., TARGETED, LABELED, CRIMINALIZED: EARLY FINDINGS ON THE DISTRICT OF COLUMBIA'S GANG DATABASE 4 (2024), <https://www.washlaw.org/wp-content/uploads/2024/01/Edited-TARGETED^J-LABELED^J-CRIMINALIZED-Final-Conforming-Edits-01-11-24.pdf> [<https://perma.cc/25EQ-ZKHH>].

³ CITY OF CHI. OFF. OF THE INSPECTOR GEN., *supra* note 2, at 5. Black and Latinx people were identified as gang members by Chicago Police at older and younger ages than white people. *Id.* at 37.

⁴ *Id.* at 4–5 (explaining inconsistencies, contradictions, and impossibilities in the data).

⁵ *Id.* at 5. Other jurisdictions with gang databases, such as Boston, also do not notify individuals of their inclusion in a gang database. *See* Diaz Ortiz v. Garland, 23 F.4th 1, 21 (1st Cir. 2022) (acknowledging that Boston does not notify people if they are in Boston's gang database). *But see* POLICE COMM'R & GREGORY LONG, SPECIAL ORDER, SUBJECT: RULE 335, GANG ASSESSMENT DATABASE § 10 (2021) [hereinafter SPECIAL ORDER, SUBJECT: RULE 335], <https://www.ca1.uscourts.gov/sites/ca1/files/citations/Rule335%20Gang%20Assessment%20Database.pdf> [<https://perma.cc/3R7F-7VU7>] (indicating that Boston Police would sometimes change its policy and notify Boston's Safe and Successful Youth Initiative of minors in the gang database to help connect the minor with services to transition out of gangs). Activist groups in Chicago helped the public file requests pursuant to the Freedom of Information Act to inquire about an individual's inclusion in the city's gang database. FOIA: Find Out if You're in Chicago's Gang Database, ERASE THE GANG DATABASE COAL., <http://erasethedatabase.com/foia/> [<https://perma.cc/8ZEW-3R25>] (Dec. 2, 2019).

⁶ Class Action Complaint at 1, 56–58, *Chicagoans for an End to the Gang Database v. City of Chicago*, No. 1:18-cv-04242 (N.D. Ill. June 19, 2018). Specifically, the parties requested a higher bar for individuals to be included in the database, a written notice to individuals if they were included, an opportunity for individuals to appeal their inclusion, and a restriction on the Chicago Police Department's ability to share data from the database. *Id.* at 56–58.

⁷ Notice of Voluntary Dismissal of Organizational Plaintiffs, at 2–3, *Chicagoans for an End to the Gang Database v. City of Chicago*, No. 1:18-cv-04242 (N.D. Ill. Sept. 2, 2020). The plaintiffs stated that they also moved to dismiss to allow them to focus on eliminating the gang database completely. *Id.* at 3.

data and, in 2023, the Community Commission for Public Safety and Accountability voted to end the database's use permanently.⁸

Chicago is not the only jurisdiction to acknowledge racism and bias in its gang database and subsequently amend it or end its use—Boston updated its criteria for an individual's entry into its gang database in 2021, and police departments in Portland, Oregon, and the state of Virginia ended the use of their databases in 2017 and 2021, respectively.⁹ Scholars have criticized gang databases for infringing on freedom of association and argued that they result in police harassment, deportation, and general bias.¹⁰ As was the case in Chicago, these gang databases tend to include young people of color at disproportionately high rates, making gang databases an issue intrinsically tied to children's rights and juvenile justice.¹¹

⁸ Charone & Blumberg, *supra* note 1; see CITY OF CHI. OFF. OF THE INSPECTOR GEN., FOLLOW-UP INQUIRY ON THE CHICAGO POLICE DEPARTMENT'S "GANG DATABASE" 6, 26 (2021), <https://ig.chicago.org/wp-content/uploads/2023/08/OIG-Follow-Up-Inquiry-on-the-Chicago-Police-Departments-Gang-Database.pdf> [<https://perma.cc/YEQ8-GWT4>] (explaining the ways that the Chicago Police Department did not deliver on its promise to implement suggestions from the 2019 report, including how the department continues to use old and flawed data).

⁹ SPECIAL ORDER, SUBJECT: RULE 335, *supra* note 5; Josh Saul, *In a First for the Nation, Portland Police End Gang List to Improve Relations with Blacks and Latinos*, NEWSWEEK (Sept. 15, 2017), <https://www.newsweek.com/2017/10/06/gang-violence-portland-police-tear-gang-member-list-effort-rebuild-community-665374.html> [<https://perma.cc/ZW8Z-JCX4>]; Justin Jouvenal, *Virginia Police Task Force Drops Use of Controversial Gang Database*, WASH. POST (Jan. 28, 2021), https://www.washingtonpost.com/local/public-safety/gangnet-database-controversy/2021/01/27/0dec3d4-5bfd-11eb-b8bd-ce36b1cd18bf_story.html [<https://perma.cc/T88P-W55Z>].

¹⁰ See Victor M. Forest, Note, *Challenging Guilt by Association: Rethinking Youths' First Amendment Right to Associate and Their Protection from Gang Databases*, 107 CORNELL L. REV. 847, 850–52 (2022) (discussing how gang databases can prevent young people from associating and building relationships due to fear of police surveillance and of inclusion in a gang database); Faiza Patel & Ivey Dyson, *Opinion: The NYPD's Inspector General Has Lost Its Potency*, CITY & STATE N.Y. (May 10, 2023), <https://www.cityandstateny.com/opinion/2023/05/opinion-nypds-inspector-general-has-lost-its-potency/386149/> [<https://perma.cc/FK8E-DZVR>] (showing that identification in a gang database can lead to harassment from police and arrests); Mary Holper, *Gang Accusations: The Beast That Burdens Noncitizens*, 89 BROOK. L. REV. 119, 120 (2023) (drawing connections between gang verification in a gang database and the school-to-deportation pipeline). *But see* OFF. INSPECTOR GEN. FOR THE NYPD, *supra* note 2, at 3 (finding no harm resulting from New York City's gang database, but indicating that apprehension about being included in the database could cause a lack of trust in the police). Additionally, law enforcement has wrongfully arrested individuals because of gang databases, and those arrests subsequently led to wrongful convictions. See Carlos Andino, NAT. REGISTRY OF EXONERATIONS (Sept. 23, 2023), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=6381> [<https://perma.cc/4M7J-FKC9>] (showing that a police officer found Carlos Andino in a gang database after receiving his name through a tip and telling the story of Mr. Andino's subsequent wrongful conviction and twenty-five-year incarceration).

¹¹ See CITY OF CHI. OFF. OF THE INSPECTOR GEN., *supra* note 2, at 36, 47 (demonstrating that most of the people in Chicago's database are between fifteen and twenty years old, but also explaining that the Inspector General found ninety instances of individuals over 117 years old, and eighty instances of individuals listed as being zero years old); OFF. INSPECTOR GEN. FOR THE NYPD, *supra* note 2, at 35 (showing that, when they were added, ten percent of those in the New York City Gang

This Note argues that, because this kind of policing and surveillance has existed throughout American history, eliminating gang databases without addressing the underlying doctrine and practices that enable them to exist is insufficient to protect the rights of young people.¹² Accordingly, this Note focuses on interactions between police and the young people identified in the databases and the admissibility of database-related information in court.¹³

Part I of this Note provides a background on the history of surveillance of people of color in America, the laws that control gang database use, and the kinds of stops police use in gang-related policing.¹⁴ Part II of this Note compares the procedural safeguards for children under the Fifth Amendment and the *Miranda* doctrine to those given to children under the Fourth Amendment.¹⁵ Finally, Part III of this Note proposes a solution by combining critiques of the *Miranda* doctrine's adaptations for children with suggested enforceability measures for existing federal gang database regulations.¹⁶

I. BACKGROUND: THE HISTORY, LAW, AND POLICIES OF MODERN-DAY GANG DATABASES AND POLICING

Modern police practices used to surveil youth in gang databases are not new, and, occasionally, are also not compliant with federal regulations.¹⁷ Section A of this Part gives a brief history of surveillance of young people of color in the United States.¹⁸ Section B of this Part explains the regulations imposed on feder-

Databases were minors and almost thirty-nine percent were between the ages of eighteen and twenty-two years old).

¹² See *infra* notes 21–44 and accompanying text (explaining the history of surveillance of young people of color in the United States); K. Babe Howell, *Gang Policing: The Post Stop-And-Frisk Justification for Profile-Based Policing*, 5 U. DENVER CRIM. L. REV. 1, 11–12 (2015) (arguing that after New York courts held that the NYPD was violating the Fourth Amendment with its stop-and-frisk tactics, the NYPD focused on gang policing and used similar unconstitutional policing practices).

¹³ See *infra* notes 88–124, 231–268 and accompanying text.

¹⁴ See *infra* notes 21–124 and accompanying text.

¹⁵ See *infra* notes 125–230 and accompanying text.

¹⁶ See *infra* notes 231–268 and accompanying text.

¹⁷ See Claudia Garcia-Rojas, *The Surveillance of Blackness: From the Trans-Atlantic Slave Trade to Contemporary Surveillance Technologies*, TRUTHOUT (Mar. 3, 2016), <https://truthout.org/articles/the-surveillance-of-blackness-from-the-slave-trade-to-the-police/> [<https://perma.cc/5VJ7-L597>] (interviewing the author Simone Brown on how some modern surveillance tactics are based on policies and practices used in the seventeenth century); *infra* notes 21–43 and accompanying text (describing the evolution of surveillance and gang policing laws and comparing eighteenth century law enforcement stops to modern practices); Thomas Nolan, *The Trouble with So-Called "Gang Databases": No Refuge in the "Sanctuary,"* AM. CONST. SOC'Y (June 27, 2018), <https://www.acslaw.org/expertforum/the-trouble-with-so-called-gang-databases-no-refuge-in-the-sanctuary/> [<https://perma.cc/N8G3-3K3V>] (explaining that several jurisdictions include information in their gang databases that violates federal regulations).

¹⁸ See *infra* notes 21–43 and accompanying text.

ally-funded gang databases and the failure of several jurisdictions to comply with them.¹⁹ Section C of this Part compares *Terry* stops to consensual stops.²⁰

A. From Slavery to Superpredator: A History of American Surveillance

White Americans and the American government have surveilled people of color since the seventeenth century.²¹ In the 1690s, South Carolina created laws requiring Black enslaved people²² to carry a pass or ticket whenever they were not on their enslaver's plantation.²³ If an enslaved person resisted when a white person asked for their ticket, they could be subjected to physical abuse or even death.²⁴ In the eighteenth century, New York enacted similar laws—known as “lantern laws”—requiring enslaved people walking after sunset to carry lan-

¹⁹ See *infra* notes 42–87 and accompanying text.

²⁰ See *infra* notes 88–124 and accompanying text.

²¹ Andrea Dennis, *Mass Surveillance and Black Legal History*, AM. CONST. SOC'Y (Feb. 18, 2020), <https://www.acslaw.org/expertforum/mass-surveillance-and-black-legal-history/> [<https://perma.cc/8P8G-VWYG>] (stating that white people surveilled enslaved Black people—as well as free Black people—partially to prevent Black people from organizing or rebelling). Scholars have claimed that modern police surveillance practices stemmed from this history. *Id.* White people have historically outsourced this work; yet the first slave hunting and surveilling groups in America were often white enslavers themselves. SALLY E. HADDEN, *SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS* 10 (2001). Eventually, enslavers paid slave hunters, Native Americans, free Black people, or enslaved people—who were sometimes offered their freedom in return—to capture escaped enslaved people for them. *Id.*

²² See *The Vocabulary of Freedom*, UNDERGROUND R.R. EDUC. CTR., <https://undergroundrailroadhistory.org/the-vocabulary-of-freedom/> [<https://perma.cc/XL78-TF25>] (explaining the significance of language when discussing the institution of slavery). For the purposes of this Note, “enslaved person” will be used as opposed to “slave” to preserve the humanity of those people. *Id.* Similarly, “enslaver” will be used instead of “master” or “owner” because the latter terms imply a passive hierarchy that is not reflective of the enslaver's active role in enslaved people's oppression. *Id.*

²³ HADDEN, *supra* note 21, at 18. White enslavers in seventeenth century Virginia and North Carolina adopted much of English law as they formed structures of governance. *Id.* at 8. England, however, did not acknowledge slavery within its own country, so the colonial system for slave regulation and patrol was modeled on Caribbean practices. *Id.* at 8–9.

²⁴ *Id.* at 18. The slave laws enacted during this time in South Carolina imposed a duty on everyone to capture and return enslaved people, thus enlisting entire communities to police and surveil Black people. *Id.* at 17. These laws also required enslavers to closely monitor enslaved people by regularly inspecting their living area and employing white chaperones for groups of enslaved people laboring on plantations over six miles apart. *Id.* at 18–19.

terns in order to be identified quickly.²⁵ After emancipation, Black Codes²⁶ and Jim Crow Laws²⁷ continued to control and surveil people of color.²⁸

Today, people of color are still heavily surveilled, especially if they attempt to organize within political or liberation movements.²⁹ During the civil rights movement, the Federal Bureau of Intelligence (FBI) used the Counterintelligence Program—also known as “COINTELPRO”—to surveil civil rights leaders like Malcolm X and Martin Luther King, Jr.³⁰ Through the “War on Drugs,”³¹ and the “War on Crime,”³² more police entered Black neighborhoods

²⁵ Garcia-Rojas, *supra* note 17. Scholars have equated lantern laws with modern police departments’ use of flood lights. *Id.*

²⁶ The Black Codes were laws passed by some states, including Mississippi and South Carolina, after emancipation. *Black Codes (1865)*, NAT’L CONST. CTR., <https://constitutioncenter.org/the-constitution/historic-document-library/detail/mississippi-south-carolina-black-codes-1865> [<https://perma.cc/7XJF-JVH2>]. The purpose of Black Codes was to keep formerly enslaved people from gaining real financial and social freedom, often criminalizing Black people for trivial things such as quitting a job or moving states. *Id.*

²⁷ In 1867, Congress passed the Reconstruction Act, weakening Black Codes. *The Black Codes and Jim Crow Laws*, NAT’L GEOGRAPHIC, <https://education.nationalgeographic.org/resource/black-codes-and-jim-crow-laws/> [<https://perma.cc/C7RK-6R73>] (Oct. 30, 2024). Jurisdictions then replaced Black Codes with Jim Crow laws that created segregation and implemented other discriminatory laws that made it difficult or often impossible for Black men at the time to exercise their right to vote. *Id.*

²⁸ Dennis, *supra* note 21. For example, Mississippi’s Black Codes contained vagrancy laws that required freed Black people to carry proof of employment and prohibited Black people from assembling. *Black Codes of Mississippi*, TEACHING AM. HIST., <https://teachingamericanhistory.org/document/black-codes-of-mississippi> [<https://perma.cc/2XAH-8RFR>].

²⁹ Dennis, *supra* note 21. At the beginning of the twentieth century, law enforcement surveilled individuals who were deemed to be “race agitators” such as Ida B. Wells or Marcus Garvey. Nusrat Choudhury & Malkia Cyril, *The FBI Won’t Hand Over Its Surveillance Records on ‘Black Identity Extremists,’ so We’re Suing*, ACLU (Mar. 21, 2019), <https://www.aclu.org/news/racial-justice/fbi-wont-hand-over-its-surveillance-records-black> [<https://perma.cc/FP78-LUWY>].

³⁰ Choudhury & Cyril, *supra* note 29. The Federal Bureau of Investigation (FBI) purportedly created the Counterintelligence Program (COINTELPRO) in 1956 to interfere with the plans of the Communist Party of the United States. *FBI Records: The Vault*, FBI, <https://vault.fbi.gov/cointel-pro> [<https://perma.cc/37EG-DHWS>]. It later surveilled groups including the Black Panther Party, “Black Extremists,” and white supremacist groups like the Ku Klux Klan, before its end in 1971. *Id.* Chief Judge Gilbert S. Merritt of the Sixth Circuit described COINTELPRO’s purpose “[s]een in its best light” to be to survey dangerous people and groups, and “in [its] worse light” to target Black civil rights leaders. *Jones v. FBI*, 41 F.3d 238, 240 (6th Cir. 1994). Law enforcement subjected Muslim people in America to similar surveillance tactics after the 9/11 terrorist attacks. See Sabrina Ali-mahomed-Wilson, *When the FBI Knocks: Racialized State Surveillance of Muslims*, 45 CRITICAL SOC. 871, 876 (2018) (explaining the stereotyping of Muslims by white Americans and stating that after 9/11, the FBI interviewed thousands of Muslim and Arab men and required fingerprinting from anyone visiting from certain countries in Southwest Asia and North Africa).

³¹ The “War on Drugs” is a term for the government initiative begun under President Richard Nixon in the early 1970s that purportedly aimed to end the use and abuse of drugs in the United States. *War on Drugs*, HISTORY, <https://www.history.com/topics/crime/the-war-on-drugs> [<https://perma.cc/W8XQ-REEV>] (Dec. 17, 2019). Drug laws in the United States have historically been used to discriminate against and criminalize people of color—especially low-income Black and Latinx men. See Jamila Hodge & Nazizh Dholaka, *Fifty Years Ago Today, President Nixon Declared the War on Drugs*, VERA (June 17, 2021), [https://www.vera.org/news/fifty-years-ago-today-president-nixon-declared-the-war-on-drugs#:~:text=As%20John%20Ehrlichman%2C%20a%20top,antiwar%20left%](https://www.vera.org/news/fifty-years-ago-today-president-nixon-declared-the-war-on-drugs#:~:text=As%20John%20Ehrlichman%2C%20a%20top,antiwar%20left%20)

with the intention of surveilling and disrupting life.³³ By the 1980s, fear-mongering by political parties and the media led candidates to run on “tough-on-crime” platforms, causing the prison population in the United States to double over an eight year span.³⁴

In the 1990s, tough-on-crime policies and rhetoric started to be aimed at young people of color because of an increase in the number of homicides committed by juveniles.³⁵ A professor at Princeton University coined the term “superpredator” to describe these young people, characterizing them as amoral, fearless, and dangerous sociopaths.³⁶ The media and politicians used the term to stoke fear and promote tough-on-crime policies at the state and federal levels.³⁷ Indeed, Hillary Clinton used the term when promoting the Violent Crime

20and%20black%20people [https://perma.cc/55R3-WXGM]. (describing the effect of the war on drugs on people of color). These groups still suffer harsher drug-related policing and sentencing today. *Id.*

³² President Lyndon B. Johnson officially declared the “War on Crime” in 1965—a time when street crime was an important election issue and campaigns ran on “tough-on-crime” platforms. Michael W. Flamm, *From Harlem to Ferguson: LBJ’s War on Crime and America’s Prison Crisis*, OHIO STATE UNIV. (Feb. 2015), https://origins.osu.edu/article/harlem-ferguson-lbjs-war-crime-and-americas-prison-crisis?language_content_entity=en [https://perma.cc/5CH9-P97C].

³³ See Hodge & Dholaka, *supra* note 31 (quoting an aide to President Nixon who stated that the purpose of the War on Drugs was to disrupt Black communities and cause white America to continue associating Black people with criminality). Despite studies that show drug use and abuse rates to be the same across races, anti-drug laws have historically been used to target communities of color, starting with anti-opium laws that targeted Chinese immigrants in the 1800s. *Id.*

³⁴ James Cullen, *The History of Mass Incarceration*, BRENNAN CTR. FOR JUST. (July 20, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration> [https://perma.cc/FC6J-Z9Z4].

³⁵ See Brief of Jeffrey Fagan et al. as Amici Curiae In Support of Petitioners at 10–12, 14–15, *Miller v. Alabama*, 567 U.S. 460 (2012) (No. 10-9647), 2012 WL 174240 [hereinafter *Amicus Brief in Support of Petitioners*] (explaining an increase of homicides committed by young people starting in 1985 and peaking in 1993, the cultural factors that led to the increase, and the mistaken theory by social scientists that there was a large shift in child development at the time that caused children to lack empathy or morality).

³⁶ See *id.* at 12 (stating that the Professor John DiIulio, Jr., one of the authors of the amicus brief, is credited with coming up with the term). Dr. DiIulio, the creator of the term, predicted that the number of violent youth, or superpredators, would increase steadily and create a generation of criminals. *Id.* at 14. In 2012, in an amicus brief filed in a U.S. Supreme Court case that found mandatory life without parole for juveniles to violate the Eighth Amendment, Dr. DiIulio expressed regret for coining the term and admitted that it was incorrect and not based in science. *Id.* at 18–20; see *Miller v. Alabama*, 567 U.S. 460, 465 (2012) (finding laws creating mandatory life without parole for juvenile offenders to violate the Eighth Amendment’s cruel and unusual punishment provision and to contradict case law that allows a youth’s “capacity for change” to be factored into sentencing). Indeed, when Dr. DiIulio created the term, the number of youth-committed homicides had already begun to decline. See *Amicus Brief in Support of Petitioners*, *supra* note 35, at 11, 12 n.9 (showing that the rate of juvenile-committed homicides peaked in 1993 and Dr. DiIulio coined “superpredator” in 1995).

³⁷ See *Amicus Brief in Support of Petitioners*, *supra* note 35, at 14–15 (stating that after Dr. DiIulio created the term, it was used by other criminologists, and became popular in the media because of its resonance with “hidden stereotypes” held by the public that young offenders do not deserve empathy). When Dr. DiIulio created the term, he advocated for preventative community approaches, not longer or harsher sentencing for juveniles. *Id.* at 19 n.26. Other scholars who used

Control and Law Enforcement Act of 1994—also known as the 1994 Crime Bill—by saying “they are not just gangs of kids They are often the kinds of kids that are called super predators. No conscious, no empathy.”³⁸

The 1994 Crime Bill was the furthest-reaching crime bill to date.³⁹ It reduced the age that a child may be tried as an adult from fifteen years old to thirteen years old.⁴⁰ The 1994 Crime Bill also provided more funding for School Resource Officers—police officers who are placed in public schools.⁴¹ Studies have shown that these officers are more likely to be placed in schools with higher concentrations of Black and Latinx students and their presence

DiIulio’s predictions to advocate for such harsher sentencing have since expressed that they were also wrong. *Id.* In fact, legal scholars have found that the decrease in juvenile homicides was not due to harsher sentencing or the deterrence that may have come from those sentences. *See id.* at 29–33 (showing no difference in youth-committed homicide rates in states with or without mandatory life without parole laws).

³⁸ See Chelsey Cox, *Fact Check: Hillary Clinton, Not Joe Biden, Used the Phrase ‘Super Predators,’* USA TODAY, <https://www.usatoday.com/story/news/factcheck/2020/10/24/fact-check-hillary-clinton-called-some-criminals-super-predators/6021383002/> [<https://perma.cc/37K8-R2V7>] (Nov. 4, 2020) (quoting Hillary Clinton in a presidential campaign speech for her husband, President Bill Clinton, in 1996).

³⁹ See Lauren-Brooke Eisen, *The 1994 Crime Bill and Beyond: How Federal Funding Shapes the Criminal Justice System*, BRENNAN CTR. FOR JUST. (Sept. 9, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/1994-crime-bill-and-beyond-how-federal-funding-shapes-criminal-justice> [<https://perma.cc/RD5S-95QH>] (explaining the ideological shift that caused policies focusing on rehabilitation of criminals to be replaced by those only concerned with retribution, such as the 1994 Crime Bill). *See generally* Violent Crime Control and Law Enforcement Act of 1994 (1994 Crime Bill), Pub. L. No. 103-322, § 60002 (codified in scattered sections of 18 & 42 U.S.C.) (creating a new chapter of the U.S. Code that increases the types of crimes that are punishable by death). President Bill Clinton signed the 1994 Crime Bill into law, and it is often cited as a major cause of modern American mass incarceration. Eisen, *supra*. It expanded the kinds of crimes that could be punished by the death penalty and helped to create and popularize “three strikes and you’re out” sentencing structures, where someone convicted of their third felony is mandated to serve a life term. *Id.* These sentencing schemes proved not to be effective—data from California before and after implementing three-strikes rules shows that the harsher sentencing did not impact crime rates and there was even an increase in homicide rates and instances of assault against police officers. Matthew R. Hassett, *Tough on Crime Policies Have “Struck Out”: Moving Away from Three Strikes and Towards Rehabilitative Approaches with the Second Chance Act*, EBP SOCIETY (Apr. 4, 2016), <https://www.ebpsociety.org/blog/education/205-tough-crime-policies-have-struck-out> [<https://perma.cc/KFC5-BLHH>].

⁴⁰ 1994 Crime Bill § 140001, 18 U.S.C. § 5032 (showing that the language of the statute continues to state that juvenile offenders accused of a violent felony, or who committed a crime while carrying a firearm, may be removed to criminal court if they allegedly committed the act after their thirteenth birthday); *see also* *Miller*, 567 U.S. at 465 (holding in 2012 that mandatory juvenile sentences of life without parole are unconstitutional). States around the country at the time also enacted laws that lowered the age juveniles may be tried as an adult in state court, with some states making it as low as ten years old. Amicus Brief in Support of Petitioners, *supra* note 35, at 15–17. Some states also created mandatory transfer provisions or new mandatory minimums for certain offenses committed by juveniles. *Id.*

⁴¹ Ranya Shannon, *3 Ways the 1994 Crime Bill Continues to Hurt Communities of Color*, CTR. FOR AM. PROGRESS (May 10, 2019), [https://www.americanprogress.org/article/3-ways-1994-crime-bill-continues-hurt-communities-color/#:~:text=\[https://perma.cc/25LR-LDY9\]](https://www.americanprogress.org/article/3-ways-1994-crime-bill-continues-hurt-communities-color/#:~:text=[https://perma.cc/25LR-LDY9]).

results in more arrests for “disorderly conduct.”⁴² The 1994 Crime Bill also created sentencing enhancements for certain felonies committed by gang members and provided funding for “multijurisdictional gang task forces.”⁴³

B. Regulation of Federally Funded Gang Databases and Noncompliance

Although the federal government officially granted funding for multi-jurisdictional gang task forces in the 1994 Crime Bill, specialized gang units existed in the United States since at least 1975.⁴⁴ Such units worked to enforce anti-gang-violence laws.⁴⁵ These laws, however, can run the risk of criminalizing legal activities.⁴⁶ For example, in 1999, in *City of Chicago v. Morales*, the

⁴² See Wendy Gomez, *Abolishing School Resource Officers Amidst the Black Lives Matter Movement: A History and Case Study in Oakland and Los Angeles*, J. PUB. & INT’L AFFS. (May 5, 2021), <https://jpia.princeton.edu/news/abolishing-school-resource-officers-amidst-black-lives-matter-movement-history-and-case-0> [https://perma.cc/P56X-W6MD] (stating that fifty-one percent of high schools where Latinx and Black students make up more than three quarters of the student population have School Resource Officers (SROs), whereas SROs are present in less than thirty-five percent of predominantly white schools); Maya Lindberg, *False Sense of Security: Police Make Schools Safer—Right?*, TEACHING TOLERANCE, 2015, at 22, <https://www.learningforjustice.org/sites/default/files/general/False%20Sense%20of%20Security%20-%20TT50.pdf> [https://perma.cc/XH2Q-LNX2] (stating that in the southeast region of the United States, students in schools with SROs are five times more likely to be arrested for “disorderly conduct” than their counterparts in schools without SROs).

⁴³ 1994 Crime Bill §§ 150001(a), 150009; see *Fusion Centers*, U.S. DEP’T HOMELAND SEC., <https://www.dhs.gov/fusion-centers> [https://perma.cc/LJ5C-GEVY] (Oct. 17, 2022) (defining “multijurisdictional gang tasks forces,” also known as fusion centers, as being state-operated centers that obtain and share “threat-related information” to various levels of government as well as private partners). Section 150001 of the 1994 Crime Bill created Title 18, chapter 26 of the U.S. Code, titled “Criminal Street Gangs.” 1994 Crime Bill § 150001(a), 18 U.S.C. § 521. The Section defines a gang as a group of five or more people with the purpose of committing one or several federal felonies involving controlled substances or violence. *Id.* It goes on to specify that a gang or its members must have engaged in these activities within the last five years, and that the activities must have an impact on interstate commerce. *Id.* Aside from Congress’s addition of human trafficking, sexual abuse, and other sex crimes to eligible offenses, the statute has remained mostly unchanged since its creation in the 1994 Crime Bill. Compare 1994 Crime Bill § 150001(c) (including crimes of violence and conspiracy), with 18 U.S.C. § 521(c) (showing that the only change in the statute is the addition of human trafficking and sex crimes to the list of offenses).

⁴⁴ LYNN LANGTON, U.S. DEP’T OF JUST. BUREAU OF JUST. STAT., SPECIAL REPORT: GANG UNITS IN LARGE LOCAL LAW ENFORCEMENT AGENCIES, 2007, at 1 (2010), <https://bjs.ojp.gov/content/pub/pdf/gulllea07.pdf> [https://perma.cc/W4TW-8DKQ]; see Charles M. Katz, Edward R. Maguire & Dennis W. Roncek, *The Creation of Specialized Gang Units*, 25 POLICING: INT’L J. POLICE STRATEGY & MGMT. 472, 472 (2002) (explaining that although they existed in the 1970s, gang units became much more popular in the 1990s). Prosecutors also created specialized gang units in their respective offices, where unit members only handle gang-related matters and follow cases vertically through the appeals process. SCOTT H. DECKER, DAVID C. PYROOZ & JAMES A. DENSLEY, ON GANGS 356–57 (2022).

⁴⁵ See *City of Chicago v. Morales*, 527 U.S. 41, 41 (1999) (describing an anti-gang ordinance in Chicago that allowed police officers to arrest individuals who did not disperse when asked by police because of suspected gang membership).

⁴⁶ See *id.* at 55 (finding that the ordinance was overly vague because it could prohibit legal activity). A theory sometimes used to defend this kind of policing is called “focused deterrence.” Holper,

U.S. Supreme Court held that a Chicago anti-gang loitering ordinance was unconstitutionally vague because it criminalized “loitering” without any act or evidence of criminal intent.⁴⁷

The *Morales* decision was in line with the spirit of the Department of Justice’s 1980 decision to create the Criminal Intelligence Systems Operating Policies.⁴⁸ These policies aim to promote the exchange of criminal data between various levels of law enforcement while protecting the privacy and constitutional rights of the individuals whose information is being collected and shared.⁴⁹ The policies—which were codified in 28 C.F.R. § 23 (the Regulation)—apply to any criminal intelligence system or database receiving funding through the Omnibus Crime Control and Safe Streets Act of 1968.⁵⁰

The Regulation requires that a “project” only contain information about an individual if there is reasonable suspicion that they are participating in criminal acts.⁵¹ Further, the Regulation only allows law enforcement to collect information that is relevant to the criminal activity or conduct of concern.⁵² Thus, information about an individual’s religious or political beliefs are not admissible into a database governed by the Regulation unless they relate directly to the alleged criminal activity.⁵³ The Regulation does not require that individuals in databases be notified, nor does it require an appeal or expungement process to get one’s name removed.⁵⁴

supra note 10, at 125. Focused deterrence is the idea that police should focus on a small group of possible criminals instead of spreading their efforts over a whole community. *Id.*

⁴⁷ See *Morales*, 527 U.S. at 57 (explaining that many states had passed anti-loitering laws that were permissible because they also required some evidence of a criminal act to be triggered). The Court explained that freedom to loiter innocently is protected by principles of due process. *Id.* at 53.

⁴⁸ See 28 C.F.R. § 23.2 (2024) (stating that although criminal activity such as drug trafficking and gambling is a problem, databases that record such activity pose privacy risks to vulnerable individuals such that guidelines are required).

⁴⁹ *Id.*

⁵⁰ *Id.* § 23.1. The Omnibus Crime Control and Safe Streets Act sought to reduce crime through increased coordination between law enforcement at all levels of government. Omnibus Crime Control and Safe Streets Act, Pub. L. No. 90-351, Title I (1968). Although it was a federal act, the Omnibus Crime Control and Safety Act originally funded state and local law enforcement because of the belief that crime was largely a local issue best handled by local actors. *Id.* The 1994 Crime Bill made multi-jurisdictional projects and intelligence systems eligible for funding from the Omnibus Crime Control and Safe Streets Act. 1994 Crime Bill § 150009.

⁵¹ 28 C.F.R. §§ 23.3(b)(5), 23.20(a) (defining a “project” as the organization that operates and maintains an intelligence database or system). Reasonable suspicion is also the standard required for law enforcement to be able to stop someone on the street. *Suspicion*, BLACK’S LAW DICTIONARY (12th ed. 2024).

⁵² 28 C.F.R. § 23.3(b).

⁵³ *Id.*

⁵⁴ See *id.* (providing no mechanism for appeals or notice); Lauren M. Pittman, Note, *Constructing a Compromise: The Current State of Gang Database Legislation and How to Effectuate Nationwide Reform*, 106 IOWA L. REV. 1513, 1520–21 (2021) (explaining that there is no process to expunge one’s name in a gang database and most states do not have laws to appeal inclusion in a gang database, meaning someone could be in the database forever if there is no regular maintenance).

1. Noncompliance: A Boston Case Study

Experts have critiqued databases such as Boston's Gang Assessment Database (GAD) for noncompliance with the Regulation.⁵⁵ GAD is maintained by the Boston Regional Intelligence Center (BRIC)—a so called “fusion center”—and therefore governed by the Regulation.⁵⁶ BRIC uses a point system to verify gang members, and individuals with ten or more points are deemed “verified” gang associates.⁵⁷ Points are given based on criteria such as having certain hats or tattoos, being seen with other verified gang members, being in or near a “known” gang hang out location, or being a victim of violence at the hands of a verified gang member.⁵⁸ Scholars find—and courts agree—that point systems like the one used by BRIC can cause false positives because of young people's inability to avoid locations in their own neighborhoods.⁵⁹ Additionally, although BRIC's point system assigns a certain number of points to specific conduct, there is evidence of law enforcement applying points in an inconsistent manner.⁶⁰ In Immigration Court, such false positives pose a particular threat because the Federal Rules of Evidence do not apply, thus gang verification from a database may be admitted as evidence to prove gang membership, regardless of its highly prejudicial effect.⁶¹

⁵⁵ Nolan, *supra* note 17 (stating that other cities' databases, including those of New York and Los Angeles, are also noncompliant).

⁵⁶ *Id.*; see *supra* note 43 and accompanying text (defining and explaining fusion centers).

⁵⁷ Nolan, *supra* note 17.

⁵⁸ *Id.* Someone with six or more points in Boston's Gang Assessment Database (GAD) is categorized as having a “secondary affiliation.” BOS. POLICE DEP'T, RULES & PROCEDURES, RULE 335: GANG ASSESSMENT DATABASE § 4.2 (2021) [hereinafter BPD Rule 335], <https://police.boston.gov/rules-procedures/> [<https://perma.cc/7K2C-PVB5>]. Being a victim of a gang crime in Boston gives an individual eight points—almost the maximum that the rules allow for one offense. *Id.* Presumably, the high point allocation for being a victim of a gang-related crime is based on the idea that gang members are more likely to attack rival gang members. See Note, *Unmasking the Boston Police Department's Gang Database: How an Arbitrary System Criminalizes Innocent Conduct*, 137 HARV. L. REV. 1381, 1391 (2024) (stating that although this is likely the reasoning behind this point allocation, there are no safeguards in place to exclude innocent victims of gang violence from receiving points in the database). Additionally, Boston law enforcement does not need to prove that a fight between young people was gang-related to include it in the database. *Id.* at 1392.

⁵⁹ See Diaz Ortiz v. Garland, 23 F.4th 1, 17–18 (1st Cir. 2022) (citing Kevin Lapp, *Databasing Delinquency*, 67 HASTINGS L.J. 195, 210 (2015)) (agreeing with scholars who point out that young people do not have the freedom to move from one community to another, and thus may have difficulty avoiding high gang areas if that is where their family lives).

⁶⁰ See Nolan, *supra* note 17 (stating the number of points given for various events or qualifications); Diaz Ortiz, 23 F.4th at 18 (asserting that the Boston Regional Intelligence Center (BRIC) allocated points to Diaz Ortiz haphazardly). BPD Rule 335 assigns criteria to certain number of points, but some criteria, such as possession of gang documents—eight points—and possession of gang publications—two points—overlap. BPD Rule 335, *supra* note 58, § 5.

⁶¹ Nolan, *supra* note 17; see Holper, *supra* note 10, at 121 (explaining that Immigration Judges (IJs) are given gang database evidence, the evidence confirms their biases, and then, because IJs have a lot of discretion, those biases go unchecked).

Criminal intelligence database experts claim that much of the information that BRIC collects does not meet the Regulation's "reasonable suspicion or criminal predicate" prong.⁶² Reasonable suspicion or criminal predicate exists when a trained law enforcement professional believes there is a "reasonable possibility" that an individual is part of a criminal act or enterprise based on sufficient evidence.⁶³ Experts argue that many of the criteria used to verify gang members in GAD do not rise to this standard.⁶⁴

In 2022, in *Diaz Ortiz v. Garland*, the U.S. Court of Appeals for the First Circuit held in an en banc decision that the Immigration Judge (IJ) and the Board of Immigration Appeals (BIA) overly relied on Boston's GAD to deny asylum to an individual.⁶⁵ In 2015, Cristian Diaz Ortiz came to the United States from El Salvador at sixteen years old.⁶⁶ In 2018, he was arrested by Homeland Security and Enforcement Removal Operations as part of an effort to arrest members of the Mara Salvatrucha (MS-13) gang.⁶⁷ Immigration and Customs Enforcement (ICE) detained him, and he subsequently filed an appeal for asylum, withholding of removal, and protection under the Convention Against Torture, partially based on his religious beliefs.⁶⁸

⁶² Nolan, *supra* note 17.

⁶³ 28 C.F.R. § 23.20(c) (2024). Section 23 of Title 28 of the *Code of Federal Regulations* (the Regulation) also specifies that interjurisdictional systems must ensure that law enforcement adhere to local, state, and federal laws while obtaining data. *Id.* at § 23.20(d).

⁶⁴ See Nolan, *supra* note 17 (stating that criteria such as having certain hats or clothing, or being seen with a friend who is "verified" in the system, do not reach this standard). Scholars have also raised concerns about the circular logic that comes from assigning points based on being seen with "verified" gang members. See Mary Holper & Claire Valentin, *Boston Police Has a Secret Point System That Turns Normal Teenage Behavior into Gang Membership*, ACLU (Nov. 21, 2018), <https://www.aclu.org/news/immigrants-rights/boston-police-has-secret-point-system-turns-normal-teenage-behavior-gang> [<https://perma.cc/E4SC-Z2X6>] (expressing concern over giving points to individuals seen with "verified" gang members who may have been verified on arbitrary factors that are noncompliant with the Regulation).

⁶⁵ 23 F.4th at 17.

⁶⁶ *Id.* at 3. In 2015, immigration officials arrested Diaz Ortiz shortly after he crossed the Texas border. *Id.* Officials then released Diaz Ortiz into the custody of his uncle in East Boston. *Id.*

⁶⁷ *Id.* Two others were arrested with Diaz Ortiz. *Id.* Mara Salvatrucha (MS-13) is made up of primarily Salvadorian refugees. Johnathan Blitzer, *The Teens Trapped Between a Gang and the Law*, NEW YORKER (Dec. 25, 2017), <https://www.newyorker.com/magazine/2018/01/01/the-teens-trapped-between-a-gang-and-the-law> [<https://perma.cc/3T5T-3MVL>]. A memorandum submitted by the government against Diaz Ortiz, defined MS-13 as one of the most violent street gangs in the United States, and explained that it functions in several cities in Massachusetts. *Diaz Ortiz*, 23 F.4th at 7. Some scholars propose that, like many other gangs, MS-13 originally formed to protect members from American law enforcement and other gangs. Blitzer, *supra*.

⁶⁸ *Diaz Ortiz*, 23 F.4th at 3–4. The United Nations adopted the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1984. Hans Danelius, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNITED NATIONS AUDIOVISUAL LIBR. OF INT'L L. 1 (2008), https://legal.un.org/avl/pdf/ha/catcidtp/catcidtp_e.pdf [<https://perma.cc/52RD-E9NK>]. Each United Nations Member State is obligated to hear cases alleging torture. *Id.*

In Diaz Ortiz's merit hearing in front of the IJ, the government introduced a packet of information and documents from GAD—hereinafter referred to as the Gang Packet.⁶⁹ The Gang Packet showed that Diaz Ortiz was a “verified” MS-13 member, with twenty-one points against him.⁷⁰ Diaz Ortiz received seven points for two instances of being seen with “known” MS-13 members; six points for two instances of being seen in a location suspected to be a gang hang-out spot—including a stadium in Boston; six points for three instances of smoking marijuana—a civil offense in Massachusetts; and two points for being found carrying a bike lock—an allegedly common weapon for MS-13 members.⁷¹ Law enforcement gathered the information contained in the database through conducting “field interrogation observations” (FIOs).⁷² Massachusetts defines FIOs as consensual interactions between law enforcement and an individual where law enforcement finds out why the individual is in a certain area.⁷³ Before the hearing, Diaz Ortiz submitted an affidavit from a professor and former Boston police officer stating that GAD should not have labeled Diaz Ortiz as a verified gang member because the information about him in GAD is not compliant with the Regulation.⁷⁴

The IJ did not address the affidavit, found that Diaz Ortiz was not credible based on the evidence in the Gang Packet, and subsequently denied relief.⁷⁵

⁶⁹ *Diaz Ortiz*, 23 F.4th at 6.

⁷⁰ *Id.* at 9.

⁷¹ *Id.* at 10–11. These events all took place between March of 2017 and August of 2018. *Id.* This means that Diaz Ortiz could have been between seventeen and nineteen years old for each incident. See *id.* at 3, 10–11 (saying that Diaz Ortiz was sixteen years old in July of 2015 when he came to the United States).

⁷² *Id.* at 8. Boston Police have used both “FIO” and the acronym “FIOE” to stand for “Field Interaction/Observation/Encounters” to describe these interactions. *Id.* at 8 n.6; see *Boston Police Accountability and Transparency Data*, CITY OF BOS., <https://www.boston.gov/civic-engagement/boston-police-accountability-and-transparency-data> [https://perma.cc/D2LL-W3PD] (May 30, 2024) (listing annual Field Interaction/Observation/Encounter reports and using “FIO” in the 2014 report title and “FIOE” in the 2016 report title). For the purposes of this Note, the acronym “FIO” will be used.

⁷³ *Diaz Ortiz*, 23 F.4th at 8; see *Commonwealth v. Warren*, 58 N.E.3d 333, 337 n.5 (Mass. 2016) (defining FIO and stating that they are consensual because the individual can end the interaction at any time); *Commonwealth v. Narcisse*, 927 N.E.2d 439, 443 (Mass. 2010) (explaining that FIOs are consensual and “constitutionally insignificant”). For a discussion on the legality of FIOs, see *infra* notes 102–124 and accompanying text.

⁷⁴ *Diaz Ortiz*, 23 F.4th at 11.

⁷⁵ *Id.* at 12–13. The IJ also based the decision on two things that Diaz Ortiz said during questioning in court. *Id.* at 12. First, the IJ suggested that during questioning Diaz Ortiz initially said that he owned a store in El Salvador that sold religious items, and that the store contributed to the likelihood that he would be persecuted there because of his religion. *Id.* The IJ claimed that Diaz Ortiz then changed his story to say that his family owned the store as opposed to him. *Id.* (providing no explanation of why the IJ would have thought that someone sixteen years old or younger could have owned a store). Second, during questioning, the IJ asked Diaz Ortiz about his mode of transportation. *Id.* at 5. Diaz Ortiz answered that he took the train and did not have a car. *Id.* (showing that Diaz Ortiz had difficulty understanding the question). The IJ later referred to the FIO that described a police officer finding a bike lock—a supposedly commonly used as a weapon in gang-related crimes—in Diaz

Diaz Ortiz argued in his appeal to the BIA that the IJ's reliance on the Gang Packet violated his due process rights.⁷⁶ The BIA affirmed the IJ's decision, finding that Diaz Ortiz's assertion that he could not be in a gang because of his religion conflicted with the evidence from the Gang Packet showing that he was a verified gang member.⁷⁷ The BIA also suggested that it was "significant" that Diaz Ortiz had not shown that he attempted to be or was removed from GAD because of his unlawful inclusion.⁷⁸

On appeal, Diaz Ortiz argued that GAD's verification of his gang membership was incorrect and that the FIOs did not constitute reliable evidence to prove that he was involved in a gang.⁷⁹ In an en banc opinion written by Judge Kermit V. Lipez, the U.S. Court of Appeals for the First Circuit agreed with Diaz Ortiz and remanded.⁸⁰ The court criticized the IJ and BIA for not considering whether the incidents described in the Gang Packet's FIOs were reliable indications of Diaz Ortiz's gang status.⁸¹ The court stated that the IJ and BIA should have been skeptical of the Gang Packet's reliability when it did not include an explanation of the point system.⁸² Further, the court indicated that law enforcement's "haphazard" and inconsistent allocation of points for similar activities should have also raised suspicion.⁸³ The court then outlined the cir-

Ortiz's backpack. *Id.* at 5, 13. The IJ questioned why Diaz Ortiz had a lock if, according to his testimony stating that he only travels by train, he does not use a bike. *Id.* at 5–6. Diaz Ortiz's attorney argued that the questioning was a mischaracterization of the evidence, but the IJ overruled the objection. *Id.* at 6. During redirect, Diaz Ortiz's attorney asked him why he had a bike lock but no bike during the interaction described in the FIO. *Id.* Diaz Ortiz said he had loaned his bike to a friend who had used their own lock. *Id.* Diaz Ortiz further explained that he had been stopped by police many times before when he had his bike and bike lock with him. *Id.*

⁷⁶ *Id.* at 13.

⁷⁷ *Id.*

⁷⁸ *Id.* at 21. The Board of Immigration Appeals (BIA) acknowledged that there is no notice given or formal appeal process for people documented in GAD. *Id.* The BIA suggested that Diaz Ortiz should have filed a 42 U.S.C. § 1983 civil rights claim to be removed. *Id.* at 21–22. The U.S. Court of Appeals for the First Circuit explained that not only is it unrealistic for someone who is a respondent in an immigration proceeding to file an expensive and time intensive civil rights claim, it is also not logical that his failure to do so would indicate that the information in the database is somehow more reliable. *Id.* at 22.

⁷⁹ *Id.* at 15.

⁸⁰ *Id.* at 3. On the initial review of the case by the First Circuit, the majority of the panel found that Diaz Ortiz's arguments did not have merit, and, thus, denied review. *Diaz Ortiz v. Barr*, 959 F.3d 10, 12 (1st Cir.), *vacated*, 982 F.3d 851 (1st Cir. 2020). Diaz Ortiz filed a request for a hearing en banc, which was granted by the First Circuit and the decision of the panel was vacated. *Diaz Ortiz*, 23 F.4th at 14.

⁸¹ *Diaz Ortiz*, 23 F.4th at 17. The IJ's adverse credibility finding must meet a substantial evidence standard. *Id.* at 14. The First Circuit must affirm a credibility ruling if the IJ gave "reasoned consideration" to presented evidence and provided a "cogent explanation" for the ruling. *Id.* at 15.

⁸² *Id.* at 17 (stating that concern should have been raised by the broad range of activities that could result in law enforcement assigning points to an individual in GAD).

⁸³ *Id.* at 18; *see* BPD Rule 335, *supra* note 58, § 5 (allocating a specific number of points for certain conduct). Specifically, the court highlighted the fact that law enforcement only allocated points for certain interactions that Diaz Ortiz had with alleged members of MS-13. *Diaz Ortiz*, 23 F.4th at

cular logic of GAD: Diaz Ortiz received points in the database for being seen with other verified gang members whose verification was based on the same flawed system.⁸⁴ The court claimed that the FIOs simply showed “quintessential teenage behavior,” especially because the verifications of the other people referenced were unsubstantiated.⁸⁵ The court stated that Diaz Ortiz’s verification in the Gang Packet and the assumption that the people he was seen with were gang members “necessarily colored” the IJ and BIA’s interpretation of the remaining evidence.⁸⁶ Finally, the court agreed with the expert affidavit submitted by Diaz Ortiz and held that all of the FIOs provided in the Gang Packet violated the Regulation.⁸⁷

C. FIOs, Stop-and-Frisks, and Children

Diaz Ortiz’s Gang Packet included information from FIOs—interactions between law enforcement and individuals that Massachusetts defines as consensual.⁸⁸ These interactions do not need to rise to the level of a “stop-and-frisk” or a *Terry* stop to be recorded by law enforcement.⁸⁹ These kinds of stops are legal because the individual being questioned is free to go and not

18. Additionally, law enforcement gave a different amount of points to seemingly identical interactions between Diaz Ortiz and purported MS-13 members. *Id.* The court pointed out that the varying amount of points for similar conduct shows that Diaz-Ortiz’s verification as a gang member is not reliable. *Id.*

⁸⁴ *Diaz Ortiz*, 23 F.4th at 19.

⁸⁵ *Id.* In highlighting the apparent bias in the FIOs, the court also noted that the FIOs indicated that all of the other teenagers Diaz Ortiz was seen with were Hispanic. *Id.* The court stated that the young men’s ethnicity cannot create an inference of gang membership. *Id.* Other Boston teenagers verified as gang members by BRIC have also suffered devastating consequences. *See* Complaint at 9, *ACLU of Mass., Inc. v. Bos. Police Dep’t*, No. 1884CV3561 (Mass. Sup. Ct. Nov. 15, 2018) (giving several examples of law enforcement using the database to record incidents that happened to young people at school and then subsequently using that information against them in immigration contexts). For example, Immigration and Customs Enforcement (ICE) detained a teenager from El Salvador living in South Boston after he was assaulted in school and seen socializing with other purported gang members. *Id.* Unlike Diaz Ortiz, Boston Police have not allowed that teenager or his counsel to access the FIOs pertaining to him. *Id.* ICE detained another teenager from Central America living in Boston after law enforcement and school police saw him associating with alleged gang members. *Id.* The government also threatened to deport a third young person who was on the cusp of receiving their Green Card because of a school police officer’s allegation from five years prior that the individual was a gang member. *Id.*

⁸⁶ *Diaz Ortiz*, 23 F.4th at 20.

⁸⁷ *Id.* The court indicated that these FIOs should have never been included in GAD. *Id.* at 21. For some individuals included in GAD, court remedial measures may come too late. *See* Complaint, *ACLU of Mass., Inc. v. Bos. Police Dep’t*, *supra* note 85, at 9 (giving two examples of young people who had valid claims to be in the United States but were detained by ICE because of their inclusion in GAD).

⁸⁸ *See Diaz Ortiz*, 23 F.4th at 8 (defining FIOs according to Massachusetts case law).

⁸⁹ BOS. POLICE DEP’T, RULES & PROCEDURES, RULE 323: GANG ASSESSMENT DATABASE § 1 (2015) [hereinafter BPD Rule 323], <https://police.boston.gov/rules-procedures/> [<https://perma.cc/UM4W-5FEE>].

required to answer the officer's questioning.⁹⁰ Courts and scholars, however, often admit that the power dynamics between police and individuals make it so the average person is still likely to feel obligated to cooperate.⁹¹ Courts have acknowledged in other instances that the power discrepancy between law enforcement and minors is often even larger than that between law enforcement and adults, such that law enforcement must adjust their behavior to protect a juvenile's rights.⁹² In cases where a child allegedly consents to a search, courts have held them to the same reasonable person standard as adults.⁹³ Subsection One of this Section defines a *Terry* stop and its applicability to juveniles.⁹⁴ Subsection Two of this Section then explains consensual stops, like those in FIOs, and the applicable standard for juveniles.⁹⁵

1. *Terry* and "Stop-and-Frisk"

The Fourth Amendment protects against unreasonable searches and seizures.⁹⁶ In 1968, in *Terry v. Ohio*, the Supreme Court outlined what makes certain warrantless stops—now known as *Terry* stops—reasonable and not a violation of the Fourth Amendment.⁹⁷ First, the Court defined a "seizure" under

⁹⁰ Holper, *supra* note 10, at 125.

⁹¹ See MICHELLE ALEXANDER, *THE NEW JIM CROW* 66 (2010) (explaining that common sense would make an average person cooperate with police and indicating that courts once thought that this kind of policing would lead to racial discrimination). Indeed, studies have shown that most people comply when police stop them and ask them questions. *Id.* Not answering or giving unsatisfactory answers to police could still result in an FIO, and BPD Rule 323 states that police have probable cause if someone they are questioning gives an evasive answer. BPD Rule 323, *supra* note 89, § 3.6. Probable cause is all that is necessary for an officer to be able to conduct a search. *Id.* § 3.8.

⁹² See Naomi E.S. Goldstein, Emily Haney-Caron, Marsha Levick & Danielle Whiteman, *Waving Good-Bye to Waiver: A Developmental Argument Against Youths' Waiver of Miranda Rights*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 4 (2018) (explaining that a child's age is relevant in determining whether they were entitled to *Miranda* warnings).

⁹³ See *In re J.M.*, 619 A.2d 497, 502–03 (D.C. 1993) (holding that being a minor does not mean that an individual is unable to consent).

⁹⁴ See *infra* notes 96–109 and accompanying text.

⁹⁵ See *infra* notes 110–124 and accompanying text.

⁹⁶ See *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (quoting *Elkins v. United States*, 364 U.S. 206, 222 (1960)). The Fourth Amendment, made applicable to the states through the Due Process Clause of the Fourteenth Amendment, also applies to unreasonable searches by state government actors. See *id.* at 8 (citing *Mapp v. Ohio*, 367 U.S. 643 (1961)).

⁹⁷ *Id.* at 20–21. In *Terry v. Ohio*, the defendant was convicted of carrying a concealed weapon in violation of Ohio law. *Id.* at 4 & n.1. During his regular routine, an officer saw Terry and others walking back and forth in front of a store and looking in the window one at a time. *Id.* at 5–6. The officer claimed that he was suspicious of the men's repetitive and seemingly deliberately casual behavior and suspected they were planning to rob the store. *Id.* at 6. He also suspected that they were armed. *Id.* The officer subsequently identified himself and asked the men for their names. *Id.* at 6–7. The men mumbled in response, and the officer grabbed Terry, turned him around, pat down the outside of his clothes, and felt a pistol in his breast pocket. *Id.* at 7. In a similar manner, the officer found another revolver on one of the other men. *Id.* At trial, the judge denied the defendant's motion to suppress the weapons. *Id.* at 8. Although the Cuyahoga County Common Pleas Court did not adopt the prosecu-

the Fourth Amendment as when a law enforcement officer “accosts” another person and prohibits their ability to leave.⁹⁸ Second, the Court clarified that patting the outside of someone’s clothing to look for a weapon counts as a search under the Fourth Amendment.⁹⁹ For a court to issue a warrant for a search, the Fourth Amendment requires probable cause that the individual violated the law.¹⁰⁰ When a police officer is responding quickly to some activity that they observed, as was the case in *Terry*, the Court held that the Fourth Amendment only requires that the officer have reasonable cause to search an individual.¹⁰¹ The officer, however, must be able to articulate facts from their observation that prove the reasonability of a seizure or search.¹⁰² Further, for a search to be reasonable, it must be limited only to what is necessary for the instant situation.¹⁰³ Judges evaluate reasonableness on a case-by-case basis and in light of the particular facts and circumstances.¹⁰⁴

In 1985, in *New Jersey v. T.L.O.*, the Supreme Court held that the Fourth Amendment also applies to searches and seizures carried out by public school officials on students.¹⁰⁵ When evaluating Fourth Amendment protections in the school setting, the Court noted that a student’s privacy expectations must be weighed against the school’s interest in maintaining a productive learning en-

tion’s argument that the weapons had been seized during a lawful arrest—the officer lacked probable cause for an arrest before patting the defendant down—it still denied the motion because the officer had *reasonable* cause to believe the men were armed. *Id.* at 7–8 (emphasis added). The district court convicted Terry and the appellate court affirmed. *Id.* at 8. The Supreme Court of Ohio dismissed a further appeal because they found there to be no constitutional question before the U.S. Supreme Court granted certiorari. *Id.*

⁹⁸ *Id.* at 16. *Black’s Law Dictionary* defines “accost” as attacking or assailing another with words or actions. *Accost*, BLACK’S LAW DICTIONARY, *supra* note 51. The Court acknowledged that warrants should be obtained whenever possible, but law enforcement officers must be able to act quickly when they observe behavior that indicates someone may be dangerous. *Terry*, 392 U.S. at 20. Still, the Court underlined that the initial interaction between law enforcement and individuals in such interactions are subject to the protection of the Fourth Amendment. *Id.* The Court later explained that a seizure only occurs when the actions of law enforcement would cause a reasonable person to believe that they could not leave. *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988).

⁹⁹ *Terry*, 392 U.S. at 16.

¹⁰⁰ *Id.* at 20.

¹⁰¹ *Id.* at 21–22.

¹⁰² *Id.* at 21.

¹⁰³ *Id.* at 29. The Court held that the officer’s search of Terry was reasonable because the officer patting down the defendant outside of his clothes was the minimum action needed in the situation. *Id.* at 29–30. In 1993, in *Minnesota v. Dickerson*, the Supreme Court refined this standard and held that law enforcement officers conducting a search under *Terry* using the minimum action needed may seize contraband when it is clear, either visually or immediately upon touch, that the item is contraband. 508 U.S. 366, 375–76 (1993). An officer may not, however, manipulate something they do not immediately identify as contraband, or conduct a further search than necessary to fulfill the reason for the stop or ensure officer safety. *Id.* at 379. To do so would be to violate *Terry*. *Id.*

¹⁰⁴ *Terry*, 392 U.S. at 21.

¹⁰⁵ 469 U.S. 325, 333 (1985). Public school officials act as “representatives of the state” when conducting a search. *Id.* at 336–37. Thus, public school officials must adhere to the same reasonability standard that the Supreme Court described in *Terry*. *Id.* at 341.

vironment.¹⁰⁶ Accordingly, the Court held in *T.L.O.* that the reasonable cause standard that applies to warrantless searches conducted by police also applies to searches conducted by public school officials.¹⁰⁷ Just like a *Terry* stop, the public school official must reasonably believe that the search will produce proof that the student violated a law or school rule.¹⁰⁸ Like in *Terry*, the Court stated that the scope of the search should be evaluated in light of the circumstances, and, in cases that occur in public schools, that process of evaluation should include the student's age and sex.¹⁰⁹

2. Non-*Terry* Stops and Consent

A stop by law enforcement is only a seizure—and thus protected under the Fourth Amendment—if the actions of the officer would communicate to a reasonable person that they could not leave.¹¹⁰ When a stop does not rise to that level, law enforcement may talk to or search an individual only with their consent.¹¹¹ As the Supreme Court described in *Terry*, the Fourth Amendment prohibits any item seized unlawfully from being admitted as evidence into court.¹¹² If an individual consents to be searched before a seizure occurs, however, the Fourth Amendment does not prohibit the admission of items found in the search.¹¹³

When addressing these kinds of stops, courts must ask two questions: first, did the officer's conduct rise to a Fourth Amendment seizure; and, second, did the person being searched voluntarily consent?¹¹⁴ Courts use an objective standard of review to determine whether law enforcement seized an indi-

¹⁰⁶ *Id.* at 340.

¹⁰⁷ *Id.* at 341.

¹⁰⁸ *Id.* at 341–42.

¹⁰⁹ *Id.* at 342. For example, in 2009, in *Redding v. Safford Unified School District Number 1*, the Supreme Court held that school officials' strip search of a thirteen-year-old girl to look for prescription grade ibuprofen was unreasonable in scope. 557 U.S. 364, 368–69, 379 (2009). Despite the unreasonable search, the school officials' qualified immunity protected them from liability. *Id.* at 368.

¹¹⁰ See *Terry v. Ohio*, 392 U.S. 1, 16 (1968) (explaining that a seizure only occurs if the law enforcement officer accosts the individual such that they would believe that they are not free to go). Over ten years after *Terry*, in 1980, in *United States v. Mendenhall*, the Supreme Court reaffirmed the objective reasonable person seizure standard and clarified that some factors—including the presence of multiple police officers, the officer showing or using a weapon, the officer touching the individual, or the use of certain words or tone—are especially indicative of a seizure. 446 U.S. 544, 554 (1980).

¹¹¹ See *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988) (explaining the objective standard to use when determining if a seizure occurred); *Schneekloth v. Bustamonte*, 412 U.S. 218, 229 (1973) (laying out the factors that courts use to evaluate whether an interaction between law enforcement and an individual is consensual).

¹¹² 392 U.S. at 12.

¹¹³ See *id.* at 13 (stating that the exclusionary rule cannot be used to keep evidence out of court if law enforcement acted lawfully in their interaction with the individual).

¹¹⁴ *In re J.M.*, 619 A.2d 497, 499 (D.C. 1994) (explaining that occasionally the two issues are linked, but most of the time they should be analyzed separately).

vidual by asking whether a reasonable person in the same circumstances would believe that they were not free to leave or ignore the officer.¹¹⁵ The consent prong, however, may be evaluated in the context of the interaction and the subjective vulnerability of the person consenting.¹¹⁶ Some courts have held that this means that a person's age may be factored in to decide whether an individual actually consented to a search.¹¹⁷

The Supreme Court has stated that there is no requirement that a person who was stopped by police know about their right to consent.¹¹⁸ The Court explained that case law does not demand knowing and intelligent waiver whenever someone waives a constitutional right not related to a fair trial.¹¹⁹ The interests protected by the Fourth Amendment, according to the Court, are about privacy against unwanted intrusion and do not have anything to do with a fair trial.¹²⁰

BRIC bases its FIOs on a similar legal framework of stops and observations that do not usually rise to the level of a *Terry* stop.¹²¹ The Massachusetts Supreme Judicial Court (SJC) has stated that officers may initiate FIOs without any indication that the person they interact with is engaged in criminal activity of any kind.¹²² Indeed, under Massachusetts law, an officer may initiate an FIO

¹¹⁵ *Chesternut*, 486 U.S. at 569.

¹¹⁶ *Schneckloth*, 412 U.S. at 229 (stating that factors to consider include the consenting person's subjective vulnerability and any coercive practices or questions by police). In 1973, in *Schneckloth v. Bustamonte*, the Supreme Court held that there is no requirement that civilians know of their right to refuse to consent to a law enforcement officer's request to search them. *Id.* at 232–33. There, the defendant and others in a car with him consented to a search of the vehicle after police pulled them over for driving with a burnt-out headlight. *Id.* at 220. One of the passengers consented to a search of the car and law enforcement found recently stolen checks. *Id.* The Court stated that law enforcement should consider the subjective vulnerability of the consenting individual but did not provide any specific traits that would render one person more vulnerable than another. *Id.* at 229.

¹¹⁷ *See In re J.M.*, 619 A.2d at 502–03 (stating that although an individual's youth does not automatically mean that consent was not given, a court should explicitly indicate that it considered a young person's age when determining whether they willingly consented).

¹¹⁸ *Schneckloth*, 412 U.S. at 232–33. In 1973, in *Schneckloth*, the Court held that this requirement, or a requirement that law enforcement inform people of this right, would go against the casual and spontaneous nature of interactions that do not meet the *Terry* standard of seizure. *Id.* at 231–32.

¹¹⁹ *Id.* at 235, 241–42. Justices Brennan and Marshall both vehemently disagreed with this idea. *See id.* at 277 (Brennan, J., dissenting) (indicating that waiver cannot be meaningful if the individual is ignorant of their rights and finding no textual, logical, or historical basis for the majority's reasoning); *id.* at 284–85 (Marshall, J., dissenting) (finding that consent cannot be considered a meaningful choice if the individual did not know what their options were and suggesting that the burden of whether the defendant knew of their right to deny consent should be on the prosecution). Justice Marshall criticized the Court for trying to minimize the reality of the power dynamics at play in an interaction between law enforcement and civilians. *Id.* at 289 (Marshall, J., dissenting).

¹²⁰ *Id.* at 242 (majority opinion). In his dissent, Justice Brennan declined to distinguish between rights related to a fair trial and other rights. *Id.* at 277 (Brennan, J., dissenting).

¹²¹ *See Holper*, *supra* note 10, at 125 (explaining that FIOs do not implicate the Fourth Amendment because they are consensual and those who the police question are free to go at any time).

¹²² *Commonwealth v. Narcisse*, 924 N.E.2d 439, 443 (Mass. 2010). The Massachusetts Supreme Judicial Court (SJC) has indicated that FIO stops that fall short of *Terry* stops do not implicate Fourth

simply to inquire about why someone is in a certain location.¹²³ Further, Boston Police officers may, according to police rules, record both *Terry* stops and observations and encounters lacking reasonable suspicion in GAD.¹²⁴

II. KIDS WILL BE KIDS: FOURTH AMENDMENT VERSUS FIFTH AMENDMENT PROTECTION FOR JUVENILES

Unlike the Fourth Amendment's seizure analysis, age is factored into Fifth Amendment's custody analysis.¹²⁵ Courts justify this extra protection because of juveniles' heightened risk of coercion and their inability to comprehend the consequences associated with waiving the right to remain silent.¹²⁶ Some courts have held that similar considerations should be given to young people and people of color in the Fourth Amendment context.¹²⁷ This Note agrees with that notion, but argues that such jurisdictions still fail to meaningfully protect children from the Fourth Amendment's objective standard of review.¹²⁸

Section A of this Part outlines the history of Fifth Amendment jurisprudence as it relates to children.¹²⁹ Section B of this Part discusses scholars' critiques of the protections given to children under the Fifth Amendment.¹³⁰ Finally, Section C of this Part evaluates the effectiveness of courts cracking down on police misconduct in stop-and-frisks or requiring that age be included in Fourth Amendment seizure analysis.¹³¹

Amendment protection. *Id.* An interaction can start out consensual, however, and turn into a *Terry* stop later. *Id.* In 2010, in *Commonwealth v. Narcisse*, the SJC found that in such a case, if the stop violated the Fourth Amendment after the *Terry* seizure occurred, evidence found thereafter is not admissible. *Id.* at 443, 448.

¹²³ *Commonwealth v. Warren*, 58 N.E.3d 333, 337 n.5 (Mass. 2016).

¹²⁴ See Holper, *supra* note 10, at 125 n.37 (explaining how the Boston Police Rules allow for law enforcement to record *Terry* stops and stops that do not amount to a *Terry* stop).

¹²⁵ See *infra* notes 168–178 and accompanying text (explaining how a custodial analysis for *Miranda* must consider the individual's age).

¹²⁶ See *J.D.B. v. North Carolina*, 564 U.S. 261, 264–65, 275 (2011) (holding that age must be considered in a custody analysis because children are more vulnerable to pressure from adults and feel that they are not free to leave in situations where an adult would think they are free to leave).

¹²⁷ See *Commonwealth v. Evelyn*, 152 N.E.3d 108, 118, 120 (Mass. 2020) (finding that age should be included in seizure analyses in Massachusetts and discussing the consideration of race in a seizure analysis).

¹²⁸ See *id.* at 119 (finding that, although age should be considered in a seizure analysis, a seventeen-year-old defendant did not appear to be a minor to police, so his age should not be considered in said analysis).

¹²⁹ See *infra* notes 132–178 and accompanying text.

¹³⁰ See *infra* notes 179–205 and accompanying text.

¹³¹ See *infra* notes 206–235 and accompanying text.

A. The Fifth Amendment and Miranda Rights for Children

The Fifth Amendment protects individuals from incriminating themselves at the request of a state actor.¹³² In 1966, in *Miranda v. Arizona*, the U.S. Supreme Court held that law enforcement must inform an individual of their Fifth Amendment Rights—commonly referred to as *Miranda* warnings¹³³—when they are deprived of their freedom or taken into custody.¹³⁴ *Miranda* warnings must inform the individual of three things: they have a right to remain silent, anything they say may be used against them in court, and they have a right to

¹³² U.S. CONST. amend. V. In 2003, in *Chavez v. Martinez*, the Supreme Court held that the Fifth Amendment is not violated when law enforcement uses coercive tactics to compel individuals to make self-incriminating statements if those statements are never used in a criminal trial against the individual. 538 U.S. 760, 766–67 (2003); see Tracy Maclin, *The Prophylactic Fifth Amendment*, 97 B.U. L. REV. 1047, 1051–52 (2017) (explaining the significance and impact of *Chavez*). Thus, the Fifth Amendment protects individuals from the admission of compelled-self-incriminating statements in a criminal case but not from the coercive law enforcement conduct that induced the statements. *Chavez*, 538 U.S. at 766–67.

¹³³ Elizabeth Nix, *Who Is the Miranda Warning Named After?*, HISTORY, <https://www.history.com/news/who-is-the-miranda-warning-named-for> [<https://perma.cc/JW6K-VTA5>] (Oct. 29, 2018) (explaining that the warnings given by law enforcement that many people are familiar with because of crime television are called “Miranda Warning[s]” because of the *Miranda* case). *Miranda* warnings do not need to follow a specific script. *Duckworth v. Eagan*, 492 U.S. 195, 202 (1989). Any warning that includes the requirements of *Miranda*, regardless of its actual wording, is sufficient. *Id.* at 203.

¹³⁴ 384 U.S. 436, 478–79 (1966). *Miranda* was a consolidation of four cases that raised similar issues. *Id.* at 491–97. In the first case, an individual signed a confession admitting to rape and kidnapping without being advised of his right to counsel. *Id.* at 491–92. The Supreme Court of Arizona held that the confession was admissible because law enforcement did not violate his constitutional rights, but the Court reversed. *Id.* at 492. In the second case, the individual orally admitted to a robbery during investigation. *Id.* at 493. There was no evidence presented to show that law enforcement ever told the defendant about his right to counsel and the trial judge instructed the jury that no such warning was required. *Id.* at 493–94. The New York Court of Appeals affirmed the holding, but the Court reversed because the defendant was never told about his Fifth Amendment right to counsel. *Id.* at 494. In the third case, the individual was arrested in connection with two robberies in Kansas City. *Id.* He was also wanted for two California felonies. *Id.* Over the course of two days, local law enforcement interrogated him for more than fourteen hours. *Id.* at 495–96. He did not confess and there is no evidence that he was advised of his rights during that time. *Id.* at 496. Immediately after being questioned by local law enforcement, agents of the FBI told the individual of his rights and interrogated him. *Id.* In that interrogation, he signed confessions admitting to the two California charges. *Id.* at 495. The confessions contained a section stating that he understood that making a statement was not required, that the contents of the statement could be used in court, and that he knew of his right to counsel. *Id.* The U.S. District Court for the Northern District of California convicted the individual of the two crimes to which he confessed, and the U.S. Court of Appeals for the Ninth Circuit affirmed. *Id.* The Court reversed, finding that he did not waive his rights “knowingly and intelligently” because he had been interrogated for an extended amount of time and the late warnings were insufficient to protect his rights at that point. *Id.* at 495–96. In the fourth and final case, law enforcement interrogated an individual over nine different sessions. *Id.* at 497. He gave an oral confession in the final session. *Id.* The Superior Court of Los Angeles County convicted him. *Id.* at 498. The Supreme Court of California reversed because the evidence did not show that law enforcement ever let him know of his Fifth Amendment rights. *Id.* The U.S. Supreme Court affirmed the Supreme Court of California and held that there is no presumption that law enforcement has let a suspect know of their rights, or that the suspect waived their rights, if the record does not explicitly say so. *Id.* at 498–99.

counsel any time during the interrogation process, regardless of their ability to pay for a lawyer.¹³⁵ The Court in *Miranda* explained that the warnings are to ensure that any waiver of Fifth Amendment rights is voluntary, knowing, and intelligent.¹³⁶

In *Miranda*, the Court justified its creation of pre-interrogation warnings by emphasizing how the nature of police interrogation may impede voluntariness.¹³⁷ The Court found that several factors present during custodial interrogation—including isolation in an unfamiliar setting and the potentially coercive character of law enforcement questioning—create an environment conducive to involuntary confessions.¹³⁸ Due to the psychological disadvantage of individuals in law enforcement custody, the Court found that confessions made in those settings are only admissible in court if law enforcement actively informed the individual of their Fifth Amendment rights.¹³⁹

The Court also emphasized that a subject of law enforcement interrogation must fully understand the consequences of waiver to “intelligently” waive their Fifth Amendment rights.¹⁴⁰ The Court pointed out that such a warning would also alert the individual to the fact that law enforcement officers may not be acting in their best interest.¹⁴¹ This is especially important for more vulnerable individuals who may succumb to a police officer acting as a false friend.¹⁴²

Miranda held that law enforcement must “Mirandize”¹⁴³ everyone who is taken into custody, regardless of their background or understanding of the criminal legal system.¹⁴⁴ The Court did not indicate whether police should change the time, duration, or wording of their *Miranda* script depending on the

¹³⁵ *Id.* at 444.

¹³⁶ *Id.*

¹³⁷ *Id.* at 455–56. Law enforcement sometimes read *Miranda* warnings from a script to individuals who are taken into the custody, but they are not required to. *Duckworth*, 942 U.S. at 202. The Court stated in *Miranda* that other procedures that alert a suspect to their Fifth Amendment rights as effectively as a word-for-word recitation is also sufficient. *Id.* at 203; *Miranda*, 384 U.S. at 476.

¹³⁸ *Miranda*, 384 U.S. at 449–50, 455–56. *But see* Eve Brensike Primus, *The Future of Confession Law: Toward Rules for the Voluntariness Test*, 114 MICH. L. REV. 1, 19–20 (2015) (giving examples of courts finding that individuals did not invoke their Fifth Amendment right to counsel by saying thing like “I think I want a lawyer” or “could I call my lawyer?” because their wording was not clear or unambiguous enough).

¹³⁹ *Miranda*, 384 U.S. at 467–68.

¹⁴⁰ *Id.* at 469. In Fifth Amendment cases, if an individual waives their right to remain silent, any statement they make can be used against them in court. *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *See* *Mirandize*, BLACK’S LAW DICTIONARY, *supra* note 51 (defining the term as the act of reading the Fifth Amendment rights laid out in *Miranda* to an arrestee).

¹⁴⁴ *Miranda*, 384 U.S. at 468–69. The Court reasoned that to do otherwise would only benefit those who are legal professionals or recidivists. *Id.* at 470. Additionally, the Court explained that reminding an arrestee of their rights signals to them that law enforcement officers would respect the arrestee’s decision to exercise their rights. *Id.* at 468.

age or perceived intelligence of an arrestee.¹⁴⁵ Indeed, at the time of *Miranda*'s decision in 1966, the Fifth Amendment and its privileges did not apply to children.¹⁴⁶ Still, at that point, children had enjoyed some protection from self-incrimination for almost twenty years.¹⁴⁷ Subsection One of this Section gives a history of the custodial interrogation protections for children before *Miranda*.¹⁴⁸ Subsection Two of this Section describes the evolution of *Miranda* warnings for children after the Supreme Court officially extended Fifth Amendment privileges to juveniles.¹⁴⁹

1. The Special Care Doctrine Pre-*Miranda*

In 1967—a year after *Miranda*—in *In re Gault*, the Supreme Court held that the Fifth and Sixth Amendments apply to juveniles.¹⁵⁰ It was only after *In re Gault* that law enforcement was required to Mirandize juveniles.¹⁵¹ Still, since the 1940s, the Supreme Court has used the Fourteenth Amendment's Due Process Clause to grant protections to juveniles who confess during law enforcement interrogation through what is known as the "special care" doctrine.¹⁵²

In 1948, in *Haley v. Ohio*, the Supreme Court set the special care doctrine into motion by explaining that children may be more susceptible to the coercive nature of law enforcement interrogation than adults.¹⁵³ There, law enforcement arrested a Black fifteen-year-old boy close to midnight, questioned

¹⁴⁵ See *id.* at 468–69 (stating that several factors may impact someone's understanding of their rights but not expanding on whether law enforcement should alter the way they deliver *Miranda* warnings when these factors are present).

¹⁴⁶ See *In re Gault*, 387 U.S. 1, 55 (1967) (extending Fifth Amendment rights to juveniles a year after *Miranda* came into effect).

¹⁴⁷ See *infra* notes 150–165 and accompanying text (laying out the pre-*Miranda* voluntariness evaluation made by courts).

¹⁴⁸ See *infra* notes 150–165 and accompanying text.

¹⁴⁹ See *infra* notes 166–178 and accompanying text.

¹⁵⁰ *In re Gault*, 387 U.S. at 55.

¹⁵¹ See Goldstein et al., *supra* note 92, at 15 (explaining the impact of *In re Gault* on juvenile rights and the trends of juvenile defense cases in the decades following the decision).

¹⁵² See *Haley v. Ohio*, 332 U.S. 596, 599 (1948) (plurality opinion) (using the Fourteenth Amendment's Due Process Clause to justify giving more scrutiny to juvenile confessions). Over a decade after requiring additional scrutiny for juvenile confessions, the Supreme Court explained that the Fourteenth Amendment's Due Process Clause was appropriate for this because there is a procedural aspect of requiring law enforcement to notify arrestees of their rights, and the "compulsion" aspect of the Fifth Amendment warrants it. *Gallegos v. Colorado*, 370 U.S. 49, 51 (1962). "Special care" does not have a strict legal definition, with this lack of clarity leading to varying applications and impacts among courts. See Ben Gifford, *Defining "Special Care,"* 110 J. CRIM. L. & CRIMINOLOGY 15, 33–34 (2020) (explaining that courts often apply the special care doctrine incorrectly, or not at all, because of the unclear standard set by the Court).

¹⁵³ See 332 U.S. at 599–600 (explaining that the threshold of pressure required to coerce a child into involuntarily confessing is less than the pressure required to do the same to an adult). In that case, the defendant was a fifteen-year-old Black boy who was convicted of serving as a lookout during a robbery-turned-murder. *Id.* at 597.

him for several hours, physically assaulted him, and eventually solicited a written confession from him.¹⁵⁴ Law enforcement then held him for several days and prohibited his mother or lawyer from seeing him.¹⁵⁵ The trial judge found the child's confession to be voluntary and admitted it into evidence, but the Supreme Court reversed because the law enforcement's conduct violated the Fourteenth Amendment's Due Process Clause.¹⁵⁶ The Court explained that the voluntariness of juvenile confessions must be scrutinized with "special care" because young people in law enforcement custody are more likely to confess due to fear or panic—rather than of their own volition—than an adult in the same circumstances.¹⁵⁷ The Court did not provide specific considerations that should go into a special care analysis, but it did find convincing the defendant's age, the duration and timing of the interrogation, lack of counsel, and law enforcement's refusal to allow the child's attorney or family to see him in the days following his confession.¹⁵⁸

In 1962, in *Gallegos v. Colorado*, the Court explained that special care focuses on the totality of the circumstances—specifically the coercive environment or practices used, and the declarant's understanding of the consequences of waiver.¹⁵⁹ Gallegos was a fourteen-year-old boy who was convicted of first degree murder.¹⁶⁰ Law enforcement arrested him and held him for several days without allowing his mother to see him.¹⁶¹ On the fifth day, he signed a confession.¹⁶² Law enforcement alerted the child to his right to counsel, but he did not request a lawyer or parent.¹⁶³ In an opinion by Justice Douglas, the Court explained that mere notice of the right to counsel was insufficient in this case because no fourteen-year-old could possibly understand the consequences

¹⁵⁴ *Id.* at 597–98. (listing the evidence that law enforcement beat up the defendant). The defendant and his mother testified to the use of physical abuse at trial. *Id.* at 597. Still, the court did not consider the physical abuse in its analysis. *Id.* at 597–98.

¹⁵⁵ *Id.* at 597–98.

¹⁵⁶ *Id.* at 599–600. The trial judge instructed the jury to disregard the confession if they find that it was not made voluntarily. *Id.* at 599.

¹⁵⁷ *See id.* at 599–600 (explaining that courts must use special care when evaluating the voluntariness of juvenile confessions). Courts have applied the special care doctrine in varying and inconsistent ways, partially due its vagueness. *See* Megan Crane, *Principal Interrogator: A Call for Youth-Informed Analysis of Schoolhouse Interrogations*, 23 J. GENDER RACE & JUST. 77, 103, 107 (2020) (stating that although all courts must consider age as a part of the special care doctrine while determining whether a confession was voluntary, outcomes still vary).

¹⁵⁸ *Haley*, 332 U.S. at 600–01.

¹⁵⁹ 370 U.S. 49, 55 (1962).

¹⁶⁰ *Id.* at 49–50.

¹⁶¹ *Id.* at 50.

¹⁶² *Id.*

¹⁶³ *Id.* at 54.

of waiver.¹⁶⁴ Further, the Court explained that without assistance from an adult, even if a fourteen-year-old had some idea of their rights, they would likely not know how—or feel empowered enough—to assert them.¹⁶⁵

2. *Miranda* Warnings and Children's Custodial Analysis

In 1967, in *In re Gault*, the Supreme Court affirmed the special care doctrine laid out in *Haley* and *Gallegos* and officially extended Fifth Amendment rights to juveniles.¹⁶⁶ After *In re Gault*, juvenile self-incrimination issues could be decided based on *Miranda*.¹⁶⁷ Decades later, in 2011, in *J.D.B. v. North Carolina*, the Court held that courts and law enforcement must consider age in a custody analysis under *Miranda*.¹⁶⁸ A custody analysis determines if or when law enforcement is required to Mirandize an individual.¹⁶⁹ In her opinion for the ma-

¹⁶⁴ *Id.*; see *infra* notes 193–201 and accompanying text (explaining developmental capacities of youth and generally supporting the idea that young people are unable to make informed decisions in stressful environments that benefit them in the long-term).

¹⁶⁵ *Gallegos*, 370 U.S. at 54–55.

¹⁶⁶ *In re Gault*, 387 U.S. 1, 55 (1967) (extending the Fifth Amendment rights to juvenile cases and emphasizing the importance of voluntary confessions). The Court stressed that a juvenile confession made out of fear, misunderstanding of rights, or coercion is not voluntary. *Id.* *In re Gault* also extended the right to counsel to juveniles. *Id.* at 41. Prior to this, many states did not allow juveniles the right to counsel in delinquency hearings. Martin Guggenheim & Randy Hertz, *J.D.B. and the Maturing of Juvenile Confession Suppression Law*, 38 WASH. U. J.L. & POL'Y 109, 121 (2012).

¹⁶⁷ See Guggenheim & Hertz, *supra* note 166, at 131 (explaining that juvenile defenders challenged confessions under *Miranda* after *In re Gault* was decided). Over a decade later, in 1979, in *Fare v. Michael C.*, the Supreme Court ruled on one such juvenile *Miranda* claim, but declined to grant juveniles any additional protection. 442 U.S. 707, 725 (1979) (stating that *Miranda*'s totality of the circumstances approach should apply to juvenile confessions just as it does to adult confessions because age is just a "circumstance" that law enforcement considers). There, the defendant was a sixteen-year-old who requested to speak with his probation officer while law enforcement interrogated him. *Id.* at 710. The Court rejected the defense's argument that the request for his probation officer was a per se request to invoke his right to remain silent. *Id.* at 723. The Court explained that because of the defendant's experience in the criminal legal system, he likely knew his rights and could have asked for this probation officer as a request to speak with police, not an attorney. *Id.* at 726–27. However, children typically do not fully understand what the role of an attorney is, so the defendant in this case could have believed that he was asking for someone to fill a counsel-like function. See Guggenheim & Hertz, *supra*, at 165 (explaining a youth's confusion with the role of legal-system actors). Unlike the holding in *Gallegos*—that stated a juvenile would never be able to understand the implications of waiving their right to remain silent—the Court in *Michael C.* found that a sixteen-year-old with a criminal record has the experience necessary to fully comprehend the consequences of waiver. Compare *Gallegos*, 370 U.S. at 54 (holding that juveniles could never completely appreciate the consequences of waiver), with *Michael C.*, 442 U.S. at 726–27 (holding that a juvenile could understand waiver). The Court stated that *Miranda*'s totality test requires consideration of the defendant's experience with the criminal legal system—along with his age, intelligence, and education. *Michael C.*, 442 U.S. at 725. Thus, the Court held that the defendant's request to speak with his probation officer was not a request to speak to a lawyer and his subsequent confession was voluntary and admissible against him in court. *Id.* at 726–27.

¹⁶⁸ *J.D.B. v. North Carolina*, 564 U.S. 261, 264–65 (2011).

¹⁶⁹ See *id.* at 270 (explaining that law enforcement only needs to read *Miranda* rights to individuals when they are "in custody" because the goal of *Miranda* was to protect from coercion that occurs

jority, Justice Sotomayor explained that the custody analysis uses an objective standard.¹⁷⁰ Similar to the Fourth Amendment's seizure of a person analysis, an individual is considered to be in custody when a reasonable person in the same circumstances would feel that they were not able to end or leave the interrogation.¹⁷¹ Courts and law enforcement prioritize objectivity for these standards because they believe it provides clarity and allows law enforcement to carry out their work and make on-the-spot decisions.¹⁷² Justice Sotomayor held that taking the "known" or "objectively apparent" age of an individual into consideration does not impede the objectivity of the analysis.¹⁷³ She gave three reasons why age should be factored in as another, objective criterion.¹⁷⁴ First, she claimed that age would impact a reasonable person's perception of whether they are free to leave.¹⁷⁵ Second, law enforcement officers and judges, as former children themselves, are able to use these "objective conclusions"—or common sense—to adjust their conduct quickly and preserve children's rights.¹⁷⁶ Third, Justice Sotomayor explained that the voluntariness test set out in *Haley* and *Gallegos* is insufficient to protect children's rights during law enforcement interrogation.¹⁷⁷ Indeed, the Court stated that *Miranda* and *In re Gault* heightened the procedural requirements of law enforcement exactly for that reason.¹⁷⁸

specifically in custodial interrogations); *Miranda v. Arizona*, 384 U.S. 436, 478 (1966) (equating "custody" with deprivation of freedom).

¹⁷⁰ *J.D.B.*, 564 U.S. at 270.

¹⁷¹ *Id.* at 270–71; see *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968) (defining the seizure of a person analysis under the Fourth Amendment to be an objective standard concerned with whether law enforcement's action would convey to a reasonable person that they are not free to go).

¹⁷² *J.D.B.*, 564 U.S. at 271.

¹⁷³ *Id.* at 274–75.

¹⁷⁴ *Id.* at 271–72, 274–75, 280–81.

¹⁷⁵ *Id.* at 271–72. The Court reasoned that other areas of law that utilize a "reasonable person" standard, such as torts, consider age in that analysis. *Id.* at 274; see RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 10 (AM. L. INST. 2010) (considering age for children in a negligence analysis). The Court explained that, as a society, we draw objective conclusions about young people and their heightened vulnerability to adult pressure. *J.D.B.*, 564 U.S. at 275. Thus, there is no need for law enforcement to consider the subjective mind state of a child to understand whether they feel the freedom to leave the questioning. *Id.*

¹⁷⁶ *J.D.B.*, 564 U.S. at 274.

¹⁷⁷ *Id.* at 280–81. The Court explained that if law enforcement did not consider age in a *Miranda* custody analysis it would effectively deprive children of the rights and protections that adults receive. *Id.* at 281.

¹⁷⁸ *Id.* at 281. Justice Alito criticized the *J.D.B.* decision for arbitrarily singling out age as the only important characteristic to consider. *Id.* at 283 (Alito, J. dissenting). He pointed out that some juveniles who may be impacted by the decision are close to adulthood, that *Miranda* already considers location, thus accommodating in-school interrogations, and argued that the special care doctrine should be sufficient to protect younger children from their own incriminating remarks. *Id.*

B. Critiques of Custodial Interrogation Protections for Children

The special care doctrine and the custodial analysis set out in *J.D.B.* may aim to protect children, but they fall short because of unclear application and failure to truly account for developmental differences.¹⁷⁹ To better protect children included in gang databases under the Fourth Amendment, it is important to understand these shortcomings.¹⁸⁰ Subpart One of this Part discusses the ineffectiveness of the special care doctrine.¹⁸¹ Subpart Two of this Part looks at child psychologists' critiques of *Miranda* warnings under *J.D.B.*¹⁸²

1. Not-So-Special Care

Although *In re Gault* provided two routes—the Fifth Amendment and *Miranda*, or the Fourteenth Amendment's Due Process Clause and the special care doctrine—to challenge admissibility of juvenile confessions, most defense attorneys initially favored the *Miranda* approach.¹⁸³ Indeed, even a handbook for juvenile attorneys from the decade following *In re Gault* encouraged defense counsel to bring *Miranda* claims over special care voluntariness claims.¹⁸⁴ Scholars speculate that the Supreme Court's murky definition and application of special care caused this trend.¹⁸⁵ In *Haley* and *Gallegos*, the Supreme Court told lower courts to use special care in reviewing juvenile confessions, but did not tell them what special care entails.¹⁸⁶ Predictably, lower courts' application of special care is varied, and some courts ignore the doctrine entirely.¹⁸⁷ Thus, special care does little to protect juveniles in a meaningful way.¹⁸⁸

When a child is included in a gang database, they have a heightened risk of false confession because of the information the police are able to access about them.¹⁸⁹ A child is more likely than an adult to provide a false confes-

¹⁷⁹ See Goldstein et al., *supra* note 92, at 23–24 (discussing child psychology and how the courts do not account for it properly); Guggenheim & Hertz, *supra* note 166, at 132–33 (explaining how defense attorneys chose to pursue other claims because of the weak and unclear special care doctrine).

¹⁸⁰ See *infra* notes 189–192, 202–204 and accompanying text (explaining the significance of shortcomings in Fifth Amendment juvenile protections to a Fourth Amendment context).

¹⁸¹ See *infra* notes 183–188 and accompanying text.

¹⁸² See *infra* notes 193–201 and accompanying text.

¹⁸³ Guggenheim & Hertz, *supra* note 166, at 131–32.

¹⁸⁴ *Id.* at 132–33.

¹⁸⁵ *Id.* at 133.

¹⁸⁶ See *Haley v. Ohio*, 332 U.S. 596, 599 (1948) (plurality opinion) (describing special care as a kind of scrutiny, but not providing any guidance on how to apply it); *Gallegos v. Colorado*, 370 U.S. 49, 55 (1962) (stating vaguely that the application of the special care doctrine requires a “totality of circumstances” test but not providing additional information).

¹⁸⁷ Guggenheim & Hertz, *supra* note 166, at 122–23.

¹⁸⁸ *Id.*; see Crane, *supra* note 157, at 78 (explaining that special care has historically done little to help children who were interrogated in a school setting).

¹⁸⁹ See Claudine Constant, *No Child Should Be in Prison Because Police Lied to Them*, ACLU (Mar. 3, 2023), <https://www.acluct.org/en/news/no-child-should-be-prison-because-police-lied-them>

sion, especially if police feed them specific information about the crime during the interrogation.¹⁹⁰ A gang database with information about the child's friends, whereabouts, and other personal information could provide law enforcement with the basis to craft a convincing story with details from both the database and the crime.¹⁹¹ Thus, if courts consistently apply the special care doctrine incorrectly, the only way to protect these young people is to limit law enforcement access to gang database information.¹⁹²

2. Failure to Align with Child Psychology

Child psychologists have criticized the *J.D.B.* decision and the *Miranda* doctrine because children lack the cognitive, linguistic, and emotional capabilities to ever intelligently or knowingly waive their Fifth Amendment rights.¹⁹³ Courts acknowledge that children are more susceptible to coercion but have rarely cited to scientific sources to understand why that is the case.¹⁹⁴ Developmentally, children take risks and prioritize rewards more than adults do because their cognitive reasoning skills are not developed enough to curb their

[<https://perma.cc/8Y24-5QK4>] (explaining that law enforcement in Connecticut may lie about facts or incriminating evidence in interrogations and explaining how that tactic causes children to falsely confess); Saul M. Kassir et al., *Police-Induced Confessions, Risk Factors, and Recommendations: Looking Ahead*, 34 LAW & HUM. BEHAV. 49, 51 (2010) (stating that most false confessions from exonerees contain specific facts that officers told them during interrogation); *Diaz Ortiz v. Garland*, 23 F.4th 1, 10–11 (1st Cir. 2022) (showing that GAD had enough information on a teenager—including where he spent time and who his friends were—for law enforcement to convincingly weave in false facts of an alleged crime with real facts about the identified teenager's whereabouts in an interrogation).

¹⁹⁰ See Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 545 (2005) (showing that out of all exonerees, 42% of juveniles and 69% of mentally ill or disabled people falsely confessed, as opposed to just 8% of neuro-typical adult exonerees); Kassir et al., *supra* note 189, at 51 (explaining that many false confessions incorporate facts about the crime that officers told the confessor while they were in custody). Young people are also more likely than adults to provide false confessions in order to protect an actual perpetrator. Kassir et al., *supra* note 189, at 18. Thus, if a young person is arrested because they are in a gang database, and they are in fact in a gang but did not commit the crime, they may feel strong loyalty to a fellow gang member and be more likely to falsely admit to the crime. See *id.* (stating that young people are more likely to falsely confess to protect someone else).

¹⁹¹ See *Diaz Ortiz*, 23 F.4th at 10–11 (showing that based on his gang database information, police could have known *Diaz Ortiz*'s regular hang-out spots, groups of friends, and more); Kassir et al., *supra* note 189, at 51 (stating that confirmed false confessions often contain specifics from the crime).

¹⁹² See *supra* notes 183–188 and accompanying text (demonstrating the confusion among the courts on how to apply the special care doctrine).

¹⁹³ See Goldstein et al., *supra* note 92, at 24–27 (showing that a juvenile's brain development makes them unable to understand and exercise their Fifth Amendment rights knowingly and intelligently in a stressful interrogation environment).

¹⁹⁴ See *Haley v. Ohio*, 332 U.S. 596, 599–600 (1948) (explaining that a young person requires an adult to help them understand their rights and overcome pressures by police, but not discussing the developmental factors that make children more prone to coercion). But see *Commonwealth v. Mattis*, 224 N.E.3d 410, 421–23, 428 (Mass. 2024) (using psychology studies of emerging adults ages eighteen to twenty-one to decide that mandatory life without the possibility of parole for people under the age of twenty-one violates the Massachusetts Constitution).

impulses.¹⁹⁵ Children's decision-making skills are further impaired when they are in high-stress environments.¹⁹⁶ Aspects that make an environment "high stress" differ between adults and children.¹⁹⁷ For example, studies show that, unlike adults, children are worse at making decisions and more likely to take unjustified risks when friends are present.¹⁹⁸ Children are also more likely than adults to prioritize feeling good in the moment—such as saying whatever needs to be said for an interrogation to end—rather than thinking through what that immediate relief may mean for their long-term interests.¹⁹⁹ Additionally, experts point out that to knowingly waive their rights, children not only require developmentally-impossible decision-making skills, but also the attention span and vocabulary to understand the actual words of *Miranda* warnings.²⁰⁰ Even when young people are able to understand factually what waiver entails, the stressful interrogation environment prevents them from utilizing their decision-making skills at full capacity, thus prohibiting intelligent waiver.²⁰¹

Current psychology literature supports the idea that public interactions with law enforcement—such as those recorded in gang databases—may make children even worse at making decisions.²⁰² If a law enforcement officer stops a child while in the presence of their friends—a likely occurrence in gang polic-

¹⁹⁵ Goldstein et al., *supra* note 92, at 23–24. Children develop the cognitive system for regulating emotions and the system for logical thinking at different rates. *Id.* at 21–22. The emotional system develops before the logical system such that young people are not able to regulate their emotions and responses to those emotions in the same way that adults are. *Id.* Further, the emotional system is based on a kind of reward system that incentivizes children to prioritize feeling emotionally well in any given moment rather than consider future consequences. *Id.* at 23. This cognitive difference causes young people to evaluate the costs and benefits of a risk differently than adults would. *Id.* at 25. Young people are more prone to over-value the reward and discount the value of the consequences. *Id.* at 24.

¹⁹⁶ *Id.* at 26. Even older juveniles have less developed decision-making skills than adults when in stressful environments. *Id.*

¹⁹⁷ *Id.* at 24.

¹⁹⁸ See *id.* (stating that children perceive stress from social situations in cases when adults do not); Sarah-Jayne Blakemore & Trevor W. Robbins, *Decision-Making in the Adolescent Brain*, 15 NATURE NEUROSCIENCE 1184, 1188 (2012) (explaining that social factors cause children to take more risks than adults would in a similar situation). This behavior may be attributed to children's reward-driven nature, as approval from friends can function as a reward that is worth taking a risk for. Blakemore & Robbins, *supra*, at 1188; see *Mattis*, 224 N.E.3d at 422–23 (illustrating that this risk-taking behavior is also present in people who are eighteen to twenty years old).

¹⁹⁹ Goldstein et al., *supra* note 92, at 25.

²⁰⁰ *Id.* at 24, 28. There are no set words that must be included in *Miranda* warnings, but some jurisdictions have warnings that are written at a reading level appropriate for someone with a post-graduate education. *Id.* at 33–34. Even in a stress-free environment, children sixteen-years-old and younger struggle to understand *Miranda* warnings that have been simplified. *Id.* at 34. Further, studies show that even if a young person can understand the words in *Miranda* warnings, they do not possess the forward-thinking skills to fully grasp the implications of waiver. *Id.* at 31.

²⁰¹ *Id.* at 26.

²⁰² See Blakemore & Robbins, *supra* note 198, at 1188 (describing children's tendency to take more risks when in the presence of peers).

ing—the child may act more recklessly than they would while isolated in police custody.²⁰³ Thus, the logic used in *J.D.B.* is not able to accommodate youth’s developmental differences in either Fourth or Fifth Amendment settings.²⁰⁴

C. Existing Solutions

Lower courts have taken different, unsatisfying approaches to protecting children under the Fourth Amendment.²⁰⁵ Subpart One of this Part critiques Massachusetts’s unavailing attempt to protect children through considering age in a seizure analysis.²⁰⁶ Subpart Two of this Part discusses New York City’s attempt to eliminate the practice of stop-and-frisk entirely, and the New York Police Department’s (NYPD) adaptation that enables officers to continue similar, problematic practices.²⁰⁷

1. Considering Age in Fourth Amendment Protections

In 2020, in *Commonwealth v. Evelyn*, the SJC held that age should be considered in a seizure analysis.²⁰⁸ The SJC agreed with much of the reasoning in *J.D.B.* and found that age may be considered in an objective analysis.²⁰⁹ The court referenced the same developmental factors that Justice Sotomayor referenced in *J.D.B.*: children’s immaturity and susceptibility to law enforcement pressure.²¹⁰ The court also adopted *J.D.B.*’s language stating that the analysis turns on whether the age of the individual was “known to the officer at the time of the interview or, would have been objectively apparent to any reasona-

²⁰³ *Id.*; see *Diaz Ortiz v. Garland*, 23 F.4th 1, 10–11 (1st Cir. 2022) (showing that in every interaction that police recorded in Boston’s gang database related to Diaz Ortiz, one or more friends were with him); Sarah A. Kellogg, Note, *Just Grow Up Already: The Diminished Culpability of Juvenile Gang Members After Miller v. Alabama*, 55 B.C. L. REV. 265, 283–84 (2014) (arguing that factors present for youth involved in gangs—such as their brain development, low self-esteem, and susceptibility to influence—would likely impair the child’s ability to assess the severity of their risky behavior).

²⁰⁴ See *J.D.B. v. North Carolina*, 564 U.S. 261, 264–65 (2011) (finding that law enforcement should consider the age of an individual when doing a custodial analysis); Goldstein et al., *supra* note 92, at 24–25 (explaining that children lack the developmental capacity to understand their rights and make an informed and intelligent decision); Blakemore & Robbins, *supra* note 198, at 1188 (stating that children, unlike adults, are more stressed in the presence of peers and that stress compromises their already not-fully-developed decision-making skills).

²⁰⁵ See *Commonwealth v. Evelyn*, 152 N.E.3d 108, 119 (Mass. 2020) (finding that although age should be considered in a seizure analysis, there is no recourse for a juvenile who appears to police to be older); *Floyd v. City of New York*, 959 F. Supp. 2d, 540, 563 (2013) (ordering vague remedies to address unconstitutional police stop-and-frisk practices).

²⁰⁶ See *infra* notes 208–220 and accompanying text.

²⁰⁷ See *infra* notes 221–230 and accompanying text.

²⁰⁸ 152 N.E.3d at 118.

²⁰⁹ *Id.* The SJC explained that although the seizure and custody analyses are different, they are both objective standards that evaluate whether law enforcement used its power to convey that an individual was not free to leave. *Id.*

²¹⁰ *Id.*

ble officer.”²¹¹ This language was the downfall of the defendant in *Evelyn*—a six-foot-tall, seventeen-year-old Black boy.²¹² Despite the officers immediately knowing that Evelyn was younger than twenty-one, the court explained that the boy’s appearance and the dark atmosphere of the night-time encounter with law enforcement did not make it “objectively apparent” to the officers that he was a minor.²¹³ Thus, the court found that age should not be considered in the seizure analysis for this case.²¹⁴

Evelyn, as is apparent from the decision itself, fails to protect youth in a meaningful way.²¹⁵ The court admitted that developmental differences in young people make them more susceptible to police pressure, and thus more likely to feel that they are not free to leave a police interaction.²¹⁶ Yet, the failure to apply the standard to Evelyn himself implies that somehow the brain development of a young person is related to how they visually present.²¹⁷ This is especially troubling in light of numerous studies that find that people of all

²¹¹ *Id.*; see *J.D.B. v. North Carolina*, 564 U.S. 261, 274 (2011) (considering the age of an individual in a custody analysis when officers know the individual’s age, or if it is “objectively apparent”).

²¹² See 152 N.E.3d at 119 (declining to consider age in the seizure analysis because it was not apparent to the officers that Evelyn was a minor). In *Commonwealth v. Evelyn*, on a January evening, Boston police tried to talk with Evelyn thirteen minutes after a shooting occurred in the area where they found him walking. *Id.* at 113. The officers purported to observe that he seemed to be concealing a firearm as he walked. *Id.* at 115. The officers saw that he was Black and that he seemed “younger than twenty-one years old.” *Id.* The officers drove next to him as he walked and attempted to talk with him. *Id.* Eventually, one of the officers got out of the cruiser and Evelyn ran. *Id.* Officers ordered him to stop, he did, and then the officers found a firearm on the ground on the route that he had run. *Id.* Despite the officers’ concession that they believed Evelyn was less than twenty-one years old, the court found that there was not enough evidence to support that the officers should have known that he was under eighteen. *Id.* at 119.

²¹³ *Id.* at 115, 119. The officers stated that part of their suspicion of Evelyn stemmed from the fact that they knew he was under twenty-one years old, and thus too young to legally have a license to carry a firearm. *Id.* at 119.

²¹⁴ *Id.* at 119. In 2024, in *Commonwealth v. Mattis*, the SJC held that “emerging adults” ages eighteen to twenty could not be sentenced to life without the possibility of parole under the Massachusetts Constitution based on psychological research on the brain development of that group. 224 N.E.3d 410, 421–23, 428 (Mass. 2024). There, the court did not factor in the appearance of the young person. See *id.* at 421–23 (considering “impulse control,” “risk taking in pursuit of reward,” “peer influence,” and “capacity for change” for individuals eighteen to twenty years old as developmental factors, and not listing any physical characteristics). It is unclear whether, in light of the studies that the court relied upon in *Mattis*, if the *Evelyn* standard could be applied to young people up to twenty years old. See *id.* at 428 (finding that life without the possibility of parole for individuals twenty years and younger violates the Massachusetts constitution); *Evelyn*, 152 N.E.3d at 118–19 (holding that the minor status of an individual should be considered in a seizure analysis if it was objectively apparent to officers and stating that the officers could tell that Evelyn was under twenty-one years old).

²¹⁵ See *Evelyn*, 152 N.E.3d at 118–19 (failing to consider age in a seizure of a minor because the evidence did not support that the officers objectively perceived him to be under eighteen years old despite admitting that young people are more vulnerable than adults in police interactions).

²¹⁶ *Id.* at 118.

²¹⁷ See *id.* at 119 (explaining that not all minors are able to enjoy the consideration of age in a seizure analysis).

racers perceive Black boys to look older and more mature than non-Black boys of the same age.²¹⁸

The decision in *Evelyn* purports to champion a new progressive doctrine, but in reality supports the idea that constitutional rights should hinge on appearance and race.²¹⁹ Further, with no guidelines on how to determine what makes age “objectively apparent,” *Evelyn* runs the risk of falling into the same ambiguity trap as the special care doctrine—any officer could say that in the heat of the moment, they perceived the individual to be older than they really are and courts have no guidelines to use to review their claim.²²⁰

2. Eliminate Stop-and-Frisk

In 2013, in *Floyd v. City of New York*, the U.S. District Court for the Southern District of New York found that the NYPD had a custom of conducting stop-and-frisks that violated the Fourth and Fourteenth Amendments.²²¹ The court reviewed data that showed that the NYPD was more likely to stop Black and Hispanic people than white people.²²² Further, the data showed that law enforcement was more likely to conduct a stop with less suspicion if the

²¹⁸ See Philip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCH. 526, 529, 531 (2014) (showing that society views Black boys older than nine years old as less innocent than boys of other races and that study participants were more likely to over-estimate a Black boy’s age than a white boy’s age). Other studies show that people may not perceive Black children to be older but when they do, they also believe that the child is more anger prone. Alison N. Cooke & Amy G. Halberstadt, *Adultification, Anger Bias, and Adults’ Different Perceptions of Black and White Children*, 35 COGNITION & EMOTION 1416, 1419 (2021). Researchers found that the same phenomenon did not impact white children. *Id.* When law enforcement or school officials perceive Black children to be older and angrier than their white peers, it can cause interactions to be more escalated and increase the child’s likelihood of suspension or arrest. *Id.* at 1421.

²¹⁹ See *Evelyn*, 152 N.E.3d at 119 (stating that whether age should be considered depends on how old the juvenile looks). The court in *Evelyn* did not reach the issue of race because it found that the seizure analysis must be decided on the actions of police officers and not the state of mind of an individual. *Id.* at 120. The court gave no explanation as to why officers could objectively observe age but not race. See *id.* at 118, 120 (finding that police can often observe a child’s age but not race). Still, the court does delve into the Ninth and Tenth Circuits’ split on the issue of whether race may be considered in a seizure analysis. *Id.* at 120–21.

²²⁰ See *id.* at 119 (providing no guidelines for how someone’s appearance may inform perception of age); *supra* notes 183–188 and accompanying text (critiquing special care to be too amorphous for courts to apply in a meaningful and consistent way).

²²¹ 959 F. Supp. 2d 540, 560 (S.D.N.Y. 2013). The U.S. District Court for the Southern District of New York also found that, despite knowing some officers’ actions were unconstitutional, the NYPD acted with “deliberate indifference” and carried on its practices without change. *Id.* at 589–90.

²²² *Id.* at 560. The NYPD was more likely to stop Black and Hispanic people, even when controlling for other variables. *Id.* Although the data showed that, of the people stopped, the percentages of individuals found with weapons were the same across races—between one and two percent—officers were thirty percent more likely to arrest a Black person. *Id.* at 559–60.

individual was Black or Hispanic.²²³ This data came from a police-run database in which the NYPD officers recorded stops that they conduct.²²⁴ The court criticized the NYPD for not requiring officers to fill out a sufficiently comprehensive report for each stop.²²⁵ For remedies, the court mandated a change in NYPD policies, required certain NYPD divisions to conduct a trial of body camera use, and established an independent monitor to oversee the NYPD's compliance with the opinion and the constitution.²²⁶

Prior to the decision, the court granted class certification to anyone who was, or would be in the future, stopped and frisked by the NYPD without reasonable suspicion.²²⁷ Perhaps in anticipation of the decision to come in *Floyd*, the NYPD launched a new gang policing initiative shortly after the class certification.²²⁸ Scholars have pointed out that the new anti-gang initiative, along with lacking a clear definition for gang or criteria indicative of gang membership, functions similarly to the stop-and-frisk tactics that the court cracked

²²³ *Id.* at 560. Unfortunately, this problem is neither new, nor specific to New York City. See MASS. ATT'Y GEN. CIV. RTS. DIV., REPORT OF ATTORNEY GENERAL'S CIVIL RIGHTS DIVISION ON BOSTON POLICE DEPARTMENT PRACTICES 60 (1990), available at [https://perma.cc/SY7L-LWTR] (finding that Boston Police used unconstitutional stop-and-frisk tactics against minorities). In 1990, the Civil Rights Division of the Massachusetts Attorney General's office published a report finding that Boston Police regularly violated the rights of people of color through illegal stop-and-frisk practices. *Id.* Specifically, the report showed that Boston Police violated *Terry* by using improper or no justifications for stops and exceeding the scope of a proper frisk by requiring public strip searches. *Id.* at 60–61. Some Boston Police officers even made public statements insinuating that law enforcement would stop all suspected or known gang members even if there was no valid *Terry* justification to do so. *Id.* at 13.

²²⁴ *Floyd*, 959 F. Supp. 2d at 559. Before law enforcement's wide-spread use of such databases, findings of police misconduct relating to stop-and-frisk was entirely dependent on civilian complaints. See MASS. ATT'Y GEN. CIV. RTS. DIV., *supra* note 223, at 60 (explaining that the data used in the report is only from the point of view of civilians). Such data made lawsuits seem less desirable because civilians often did not want to testify against law enforcement. *Id.* at 63.

²²⁵ *Floyd*, 959 F. Supp. 2d at 559. The database provides officers with a checklist of reasons for a stop that officers may check off. *Id.* The court explained that many of the items in the checklist are intentionally vague and not necessarily indicative of reasonable suspicion. *Id.* The court also indicated that the database is likely incomplete because officers do not always record their stops. *Id.* Still, the court found that the NYPD had conducted over 200,000 stops without reasonable suspicion. *Id.*

²²⁶ *Id.* at 563. The Massachusetts Attorney General's Office has expressed that injunctive relief, such as the kind given in *Floyd*, is insufficient to fix the problem of police misconduct. MASS. ATT'Y GEN. CIV. RTS. DIV., *supra* note 223, at 63. Instead, the office advocated for leadership from law enforcement, the city, and the impacted communities to change and learn from the office's findings. *Id.*

²²⁷ *Floyd v. City of New York*, 283 F.R.D. 153, 160 (S.D.N.Y. 2012) (granting class certification).

²²⁸ See Howell, *supra* note 12, at 11–12 (explaining that Raymond Kelly, the NYPD commissioner, likely rolled out Operation Crew Cut—an anti-gang initiative—to stoke fear and justify the continuation of racial profiling by the NYPD in anticipation of an unfavorable outcome in *Floyd*). Indeed, the following year the NYPD's commissioner used the ban on the NYPD's old stop-and-frisk policies to justify the doubling of the NYPD's Gang Division. *Id.* at 14. Of course, other law enforcement departments around the country were forthright about using stop-and-frisk itself as a gang deterrence tactic. MASS. ATT'Y GEN. CIV. RTS. DIV., *supra* note 223, at 12, 61.

down on in *Floyd*.²²⁹ Thus, although *Floyd* aimed to curb police profiling in stop-and-frisk situations, the police adapted their approach to be able to continue the same, or worse, conduct.²³⁰

III. SUGGESTIONS TO PROTECT CHILDREN FROM GANG DATABASE INCLUSION

Inclusion in a gang database can subject a young person to police harassment, racial profiling, fear of association, embarrassment, bias, harsher sentencing, and deportation.²³¹ A meaningful solution, then, must address all of the harms that can occur between initial identification, database inclusion, and sentencing.²³² Section A of this Part explains why simply eliminating gang databases does not address the root of the problem.²³³ Section B of this Part suggests a multiple-intervention approach that uses the Fourth Amendment and federal gang database regulations to limit law enforcement's abuse of gang databases and curb the bias that database inclusion can cause in court.²³⁴

A. "Gang" By Any Other Name: Why Eliminating Gang Databases Is Insufficient to Protect Children's Rights

Places like Chicago have decided to end the use of their gang databases.²³⁵ Still, even the grass-roots organizations that advocate for database eradication acknowledge that the erasure of a gang database is not enough.²³⁶ Significantly, many jurisdictions have several databases that serve the same function as a gang database but do not have the word "gang" in the title.²³⁷ Indeed, the NYPD's adaptation after *Floyd* shows that without addressing the underlying forces that legitimize gang databases, law enforcement will evolve

²²⁹ See Howell, *supra* note 12, at 14 (explaining that the NYPD continued the profiling outlined in *Floyd* by using gang policing as pretext).

²³⁰ See *id.* (arguing that the secretive nature of gang policing and databases could allow for even harsher treatment of people of color in New York City).

²³¹ See *supra* notes 10–11 and accompanying text (explaining the various potential harms caused by gang databases).

²³² See *Diaz Ortiz v. Garland*, 23 F.4th 1, 25 (1st Cir. 2022) (explaining that both changes to the Boston gang database and reversal of the IJ's decision were necessary to ensure that justice was done for *Diaz Ortiz*).

²³³ See *infra* notes 235–239 and accompanying text.

²³⁴ See *infra* notes 240–268 and accompanying text.

²³⁵ See *supra* notes 1–8 and accompanying text (explaining the Chicago Community Commission for Public Safety and Accountability's decision to end the use of the Chicago gang database).

²³⁶ See *Erase the Gang Database*, ERASE THE GANG DATABASE COAL., <http://erasethedatabase.com/> [<https://perma.cc/X2LH-HMER>] (advocating for the erasure of the Chicago gang database, as well as a local ordinance to invest in Chicago communities, and a "peace book" to promote peace-keeping practices in the area).

²³⁷ See *id.* (explaining that Chicago had two gang databases); *Floyd v. City of New York*, 959 F. Supp. 2d 540, 559 (S.D.N.Y. 2013) (discussing the NYPD database that records stop-and-frisks).

to carry out the same practices.²³⁸ Thus, the only way to protect the youth of color who are overrepresented in gang databases is to get at the root of the issue: lack of Fourth Amendment protection for juveniles.²³⁹

B. Reimagining the Fourth Amendment's Role in Database Policing

To protect children from the various harms of gang database inclusion, there must be procedural safeguards in place at multiple stages of gang database use.²⁴⁰ This Section proceeds chronologically—from initial inclusion in a database to presentation of database information at trial—and explains how the Fourth Amendment and federal regulations can protect children at every step.²⁴¹

First, when law enforcement interacts with a young person, they should be able to adjust their own behavior as the SJC suggested in *Commonwealth v. Evelyn* in 2020.²⁴² *Evelyn* is flawed because it only requires police to consider the age of an individual if they know or it is readily apparent that the individual is under eighteen years old.²⁴³ Although flawed, *Evelyn* provides a floor of protection that may actually be more effective in gang policing than non-gang policing because gang unit officers are more likely to know personal information about who they are policing.²⁴⁴ Still, for first-time encounters, the willful ignorance that the court in *Evelyn* allows is dangerous and against the nature of the Fourth Amendment.²⁴⁵ The Fourth Amendment frequently requires law enforcement to do additional investigative steps before acting, such as gathering the requisite

²³⁸ See *supra* notes 227–230 and accompanying text (explaining that the NYPD only doubled-down on gang policing after its leadership feared restrictions on stop-and-frisk practices).

²³⁹ See *supra* notes 228–230 and accompanying text (demonstrating that when the courts cracked down on stop-and-frisk, the NYPD adapted its approach to be able to over-police the same populations as it did before *Floyd*).

²⁴⁰ See *Diaz Ortiz v. Garland*, 23 F.4th 1, 25 (1st Cir. 2022) (praising new amendments to Boston's gang database that implemented new safeguards).

²⁴¹ *Infra* notes 242–268 and accompanying text.

²⁴² See *Commonwealth v. Evelyn*, 152 N.E.3d 108, 118 (Mass. 2020) (stating that officers should be able to consider a person's age as an objective fact during a seizure).

²⁴³ See *supra* notes 215–220 and accompanying text (critiquing the SJC's failure to apply protection to the teenager in *Evelyn* simply because—despite his appearance conveying to police that he was under twenty-one years old—it was not obvious to police that he was a minor and explaining the racism that causes non-Black people to believe Black boys are older than they really are).

²⁴⁴ See *Evelyn*, 152 N.E.3d at 118–19 (finding that age should be considered in Fourth Amendment seizure analyses but indicating that the SJC is unsure of how exactly the age factor will impact seizures in the future); *Diaz Ortiz*, 23 F.4th at 10–11 (showing that *Diaz Ortiz* and the officer did not speak during some of the interactions that the police recorded in the gang database, implying that the officer knew *Diaz Ortiz* by name because the officer was able to put information about him in the database without asking his name).

²⁴⁵ See *supra* notes 215–220 and accompanying text (explaining that the doctrine set out in *Evelyn* was insufficient to help *Evelyn* himself); *Groh v. Ramirez*, 540 U.S. 551, 558–59 (2004) (requiring law enforcement to investigate in order to be specific in warrant applications).

information for a warrant application.²⁴⁶ Thus, it would be in line with the nature of the Fourth Amendment, under an *Evelyn* interpretation, to require law enforcement to ask an individual their age—especially in consensual interactions.²⁴⁷ Far from interfering with law enforcement’s ability to do their job effectively, this one simple question serves two purposes: first, whether the individual answers or not is an indication of consent in the interaction, and, second, it allows officers to adjust their own conduct without making any subjective inquiries.²⁴⁸ This low-effort requirement of law enforcement is practical, easy to implement, and in line with other Fourth Amendment standards.²⁴⁹

Second, once an officer knows that they are interacting with a minor, they should advise them of their right to leave the encounter at any time.²⁵⁰ The Supreme Court has expressed that, unlike the Fifth Amendment, Fourth Amendment rights do not warrant *Miranda*-like warnings because they do not have to do with a fair trial.²⁵¹ For immigrants, however, this is not the case because immigration courts do not abide by the Federal Rules of Evidence and may admit gang database information into consideration.²⁵² As the U.S. Court of Appeals for the First Circuit expressed in 2020, in *Diaz Ortiz v. Garland*, an individual’s inclusion in gang databases taints IJs’ perception and causes bias that dictates outcomes.²⁵³ Further, children—including child immigrants—may feel more compelled to speak with police in general and, when in the presence

²⁴⁶ See *Groh*, 540 U.S. at 558–59 (explaining that police must do more investigative and administrative work to include a particularized list of items to be seized in a warrant application).

²⁴⁷ See *Evelyn*, 152 N.E.3d at 119 (explaining that the court does not know how considering age in a seizure analysis will impact future cases). The court in *Evelyn* left the door open for how the consideration of age in a seizure analysis will apply in later cases. *Id.* Thus, requiring law enforcement to inquire about an individual’s age may be within the scope of the decision. *Id.* (stating the scope of how age should be factored into a seizure analysis under the Fourth Amendment and the Massachusetts Constitution is still undefined).

²⁴⁸ See *J.D.B. v. North Carolina*, 564 U.S. 261, 272–73 (2011) (explaining that because society makes generalizations about children in many other contexts, it should be common sense for law enforcement to adjust their behavior appropriately when interacting with a child); *Schneekloth v. Bustamonte*, 412 U.S. 218, 229 (1973) (listing factors used to determine voluntariness including the types of questions asked by police).

²⁴⁹ See *Groh*, 540 U.S. at 558 (requiring officers to put slightly more effort in to adhere to evidentiary standards under the Fourth Amendment).

²⁵⁰ *Schneekloth*, 412 U.S. at 241–42 (stating that only constitutional rights that have to do with a fair trial require knowing and voluntary waiver); *Diaz Ortiz v. Garland*, 23 F.4th 1, 20 (1st Cir. 2022) (showing how admittance of gang database information caused an unfair outcome at trial).

²⁵¹ *Schneekloth*, 412 U.S. at 241–42 (stating that the Fourth Amendment does not protect rights related to a fair trial and thus waiver does not need to be knowing and voluntary).

²⁵² See *Holper*, *supra* note 10, at 121 (explaining that the Federal Rules of Evidence do not apply in immigration court and thus hearsay and overly prejudicial information may be admissible).

²⁵³ See 23 F.4th at 20 (stating that the IJ’s understanding of the evidence in the case was “necessarily colored by” the determination that *Diaz Ortiz* was in a gang and that everyone that the gang database reported him to be with was also a gang member).

of peers, may act more recklessly than they would otherwise.²⁵⁴ *Diaz Ortiz* was the epitome of an unfair trial caused by lack of Fourth Amendment protections for children.²⁵⁵ Thus, in a world of database policing, requiring warnings of some kind for children in “consensual” interactions with officers could be necessary to ensure a fair trial.²⁵⁶

Third, procedural fairness requires law enforcement to notify a minor and their family if the minor is added to a gang database, and the family should be given the opportunity to appeal.²⁵⁷ If the young person is involved in gang activity, this approach would give the minor’s family an opportunity to intervene in their child’s behaviors before police do.²⁵⁸ If the young person is not involved in gang activity, of course, the appeal gives them an opportunity to clear their name.²⁵⁹

Fourth, the Fourth Amendment can be used to regulate when law enforcement is able to search a minor in a gang database.²⁶⁰ Some scholars have argued that searching for someone in a database is a Fourth Amendment search because the aggregate of available information is likely more than any one police officer could have known.²⁶¹ This is especially important when considering that officers often do not comply with the federal requirement to only record information that meets reasonable suspicion, such that a database search is likely to produce more information than is legally permitted by the Regula-

²⁵⁴ See *supra* notes 193–207 and accompanying text (explaining how a child’s psychology impacts the way children make decisions and interact with law enforcement).

²⁵⁵ See 23 F.4th at 20 (illustrating the flawed point system that labeled *Diaz Ortiz* as a gang member and explaining how that label unjustly changed the IJ’s perspective of the case). In that case, in every recorded interaction that *Diaz Ortiz* had with law enforcement, one or more other teenagers were present. *Id.* at 10–11. Having peers around increases a young person’s likelihood to act recklessly. Goldstein et al., *supra* note 92, at 24.

²⁵⁶ See *supra* notes 193–207 and accompanying text (explaining how children’s decision-making skills differ from adults and how in interactions that take place in schools or neighborhoods, children are likely to be around peers and thus have their decision-making abilities even further impaired); Holper, *supra* note 10, at 121, 161 (explaining that the Federal Rules of Evidence do not apply in Immigration Court and advocating for a presumption of unreliability for gang database information in immigration proceedings).

²⁵⁷ See *supra* note 5 and accompanying text (explaining that most gang databases do not provide notice and stating that the Chicago Inspector General found that it deprives people of procedural fairness). Boston currently notifies a youth initiative of minors included in the gang database but does not alert the minors themselves or their families. SPECIAL ORDER, SUBJECT: RULE 335, *supra* note 5, § 10.

²⁵⁸ See SPECIAL ORDER, SUBJECT: RULE 335, *supra* note 5, § 10 (showing that GAD notifies Boston’s Safe and Successful Youth Initiative of any minors in Boston’s gang database so that the organization may intervene, but not notifying the minor or their family).

²⁵⁹ See *supra* note 5 and accompanying text (showing the importance of an appeal procedure to ensure due process).

²⁶⁰ See Wayne A. Logan, *Policing Police Access to Criminal Justice Data*, 104 IOWA L. REV. 619, 664, 666–67 (2019) (stating that some scholars argue that searching a police database using personal information is a Fourth Amendment search).

²⁶¹ See *id.* at 666–68 (explaining the difference between privacy and anonymity and arguing that technological advances warrant a change in Fourth Amendment application to database searches).

tion.²⁶² It is dangerous and against the legislature's intent to allow officers to make decisions based on information that should not have been recorded in a gang database at all.²⁶³ Thus, requiring officers to have a warrant to search a database for a minor limits reliance on flawed and problematic data, and provides a clear indication of when an officer might have used that data to make a decision or arrest.²⁶⁴

Fifth, and finally, if prosecution wishes to admit gang database evidence in court, a magistrate judge should review each of the underlying police interactions for Fourth Amendment and Regulation compliance.²⁶⁵ Some scholars have argued that gang database information should be presumptively unreliable.²⁶⁶ Magistrates are particularly well suited to determine whether the information in a database is sufficient to overcome that presumption because they are often responsible for reviewing warrant applications for Fourth Amendment compliance.²⁶⁷ Further, in immigration and juvenile courts, there is no right to a jury, so allowing the magistrate to determine what evidence from a gang database is admissible shields the sitting judge from the bias that may taint their judgement and sentencing.²⁶⁸

CONCLUSION

Gang databases enhance the dangers that accompany a violation of the Fourth Amendment. Although the Supreme Court has held that a violation of the Fourth Amendment—unlike the Fifth Amendment—has nothing to do with a fair trial, the First Circuit case, *Diaz Ortiz*, proved that contention to be false. A stop that was recorded in a gang database has the potential to follow the person stopped for years to come—regardless of whether they engaged in any criminal activity. Children are particularly vulnerable because their developmental differences inhibit them from being able to resist pressure from police and meaningfully consent to the kinds of stops recorded in gang databases.

²⁶² See *supra* notes 51–87 and accompanying text (explaining the federal regulations that limit entries into gang databases to only those where there is reasonable suspicion and illustrating how police disregard that requirement and enter data that falls below the standard).

²⁶³ See *supra* notes 51–64 and accompanying text (stating the requirements of the Regulation and the legislature's reasons for implementing it).

²⁶⁴ See *supra* notes 51–87 and accompanying text (illustrating the Regulation's limits on what may be included in a gang database and explaining how law enforcement often fail to comply with those limits); Logan, *supra* note 260, at 666–67 (explaining how a database search is a Fourth Amendment search).

²⁶⁵ See *Coolidge v. New Hampshire*, 403 U.S. 443, 449 (1971) (explaining the importance of a “neutral and detached” magistrate for ensuring proper Fourth Amendment protection).

²⁶⁶ Holper, *supra* note 10, at 161.

²⁶⁷ See *Coolidge*, 403 U.S. at 449 (requiring that a magistrate who reviews warrants is “neutral and detached” from the investigation and the trial).

²⁶⁸ See *Diaz Ortiz v. Garland*, 23 F.4th 1, 20 (1st Cir. 2022) (illustrating how bringing gang database evidence directly to the trial judge can cause bias).

Although eliminating gang databases would help alleviate some of the stigma and harm that can follow named individuals, it does not address the underlying issue. To fully protect children from the numerous adverse effects of gang database inclusion, procedural safeguards are required at every step of the process.

EMILIA BALL

