

## **You're Only as "Free to Leave" as You Feel: Police Encounters with Juveniles and the Trouble with Differential Standards for Investigatory Stops Under *In re I.R.T.*\***

### INTRODUCTION

In a classic scene from the musical *West Side Story*, a gang of pugnacious teenagers called the Jets are clearly up to no good as they linger on the moonlit streets of New York City.<sup>1</sup> While the gang plans the night's mischief, a police officer unexpectedly approaches, blowing his whistle and calling out for the boys to "stop."<sup>2</sup> One young gangster grabs a novice compatriot and gives a whispered warning: "Last thing ever is to let a cop know you're scared or anythin'."<sup>3</sup> Once you're a Jet, you're Jet all the way<sup>4</sup>—calm, cool, and cocky, even in the face of police interrogation.

Off the Broadway stage, most of us likely lack such fortitude. Casual encounters with police invoke myriad reactions in different types of people, even among the blameless.<sup>5</sup> At one end of the spectrum are those who welcome the presence of police as an assurance of their safety and security.<sup>6</sup> At the opposite end are those who feel an immediate sense of intimidation and trepidation by casual police questioning.<sup>7</sup> Tempting as it may be to view an individual's response to the police as a function of their respective guilt or innocence, factors such as race,<sup>8</sup> geographic location,<sup>9</sup> immigration

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1. ARTHUR LAURENTS, *WEST SIDE STORY* act 2, sc. 2 (1957), available at <http://www.aellea.com/script/westside.txt>.

2. *Id.*

3. *Id.*

4. *Id.* at act 1, sc. 1 (referencing the musical number "Jet Song").

5. See CURT R. BARTOL & ANNE M. BARTOL, *PSYCHOLOGY AND LAW: RESEARCH AND APPLICATION* 59–60 (2d ed. 1994) (discussing public perceptions of law enforcement).

6. *Id.*

7. *Id.*; see also *United States v. Drayton*, 536 U.S. 194, 209–10 (2002) (Souter, J., dissenting) (exploring circumstances in which encounters with police invoke anxiety among citizens).

8. See, e.g., Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 983–92 (1999) (discussing social science research on a racial schema).

9. See, e.g., Andrew Guthrie Ferguson & Damien Bernache, *The "High Crime Area" Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment*

status,<sup>10</sup> and age<sup>11</sup> may influence the most upright citizen to react nervously to law enforcement. In the context of the Fourth Amendment, such visceral responses to police presence can take on constitutional significance.<sup>12</sup> If one is naturally inclined to react anxiously to police, one may feel unreasonably compelled to answer an officer's questions or consent to requests that would otherwise amount to a search or seizure implicating constitutional protections.<sup>13</sup>

In determining when a casual police-citizen encounter on the street escalates to an investigatory stop,<sup>14</sup> courts use an objective test: whether under the circumstances a reasonable person would feel "free to leave."<sup>15</sup> However, a central question lingers: to what extent

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*Reasonable Suspicion Analysis*, 57 AM. U. L. REV. 1587, 1588–89 (2008) (discussing propensity of police to make stops in poverty-stricken neighborhoods).

10. See, e.g., Jennifer Pelic, Note, *United States v. Arvizu: Investigatory Stops and the Fourth Amendment*, 93 J. CRIM. L. & CRIMINOLOGY 1033, 1034–36 (2003) (discussing police stops of illegal aliens along the United States border with Mexico).

11. See, e.g., Allison D. Redlich et al., *The Police Interrogation of Children and Adolescents*, in INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 107, 109 (G. Daniel Lassiter ed., 2004) (discussing interactions between juveniles and police officers and suggesting that juveniles are more easily intimidated than adults by the interactions).

12. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." U.S. CONST. amend. IV. The Fourth Amendment is applicable to the states through the Fourteenth Amendment. See, e.g., *State v. Sanders*, 327 N.C. 319, 330–31, 395 S.E.2d 412, 420 (1990). Similarly, the North Carolina Constitution guarantees that any search or seizure must be "supported by evidence." N.C. CONST. art. I, § 20. The Supreme Court of North Carolina has stated that courts "may not construe provisions of the North Carolina Constitution as according lesser rights than are guaranteed by the federal Constitution." *Jones v. Graham County Bd. of Educ.*, \_\_ N.C. App. \_\_, \_\_, 677 S.E.2d 171, 178 (2009). Thus, the Fourth Amendment "provides a constitutional floor of fundamental rights guaranteed all citizens of the United States, while the state constitutions frequently give citizens of individual states basic rights in addition to those guaranteed by the United States Constitution." *Virmani v. Presbyterian Health Serv. Corp.*, 350 N.C. 449, 475, 515 S.E.2d 675, 692 (1999) (quoting *State v. Jackson*, 348 N.C. 644, 648, 503 S.E.2d 101, 103 (1998)).

13. See *United States v. Drayton*, 536 U.S. 194, 201 (2002).

14. An "investigative stop" refers to the "seizure" of a person by police for a limited duration that does not amount to a full arrest. See *California v. Hodari D.*, 499 U.S. 621, 635 (1991) (Stevens, J., dissenting) (citing *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968)). A stop does not require full "probable cause" but a lesser finding of "reasonable suspicion." *Id.*

15. *United States v. Mendenhall*, 446 U.S. 544, 553–54 (1980). "We conclude that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* at 554; see also *Drayton*, 536 U.S. at 201 (explaining that under the objective test, a seizure of the person has not occurred "[i]f a reasonable person would feel free to terminate the encounter . . ."); *Hodari D.*, 499 U.S. at 627–28 (stating that under the free-to-leave test, a seizure occurs when police physically or by a show of force restrain a citizen's liberty so that he does not feel free to leave (citing *Mendenhall*, 446 U.S. at 554)); 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.4(a) (4th ed. 2004).

should an individual's subjective reaction to encounters with law enforcement affect Fourth Amendment analysis?

In *In re I.R.T.*,<sup>16</sup> the North Carolina Court of Appeals made a subtle yet significant break with precedent by holding that a juvenile's age is a relevant factor in determining whether a police encounter amounts to a seizure under the Fourth Amendment.<sup>17</sup> The aims of this Recent Development are to examine the consequences of the court's modification of the free-to-leave test and to argue that considering a defendant's age, though appropriate in other legal contexts, is inappropriate in the seizure analysis because it risks subjectifying a legal test that is meaningful only by virtue of its objectivity. The purposes of the Fourth Amendment are best served by providing law enforcement officers with a clear, consistent, and predictable measure of when their conduct or questioning will trigger constitutional protections.<sup>18</sup> Any legal standard for determining when an officer's actions will constitute a seizure of the person must remain objective if it is to provide practical guidance for police behavior in the field and ultimately deter the abuses of police power against which the Fourth Amendment was adopted to protect.<sup>19</sup> Imposing differential standards for juveniles in the context of investigatory stops risks subjectifying the seizure inquiry and most likely presents more problems than it resolves. As a result, the *In re I.R.T.* court's modification of the free-to-leave test to account for the defendant's age is ripe for reconsideration.

Analysis proceeds in four parts. Part I presents the factual background and central holding of the *In re I.R.T.* decision. Part II provides a brief overview of Fourth Amendment jurisprudence and outlines the analytic framework for assessing police-citizen encounters. Part III examines the logic underpinning the *In re I.R.T.* court's determination that age is relevant under the free-to-leave test and addresses the legal and common sense reasons age should not be considered in the seizure inquiry. Finally, Part IV catalogues three unintended consequences of requiring differential standards for juvenile stops: (1) transforming almost any police-juvenile encounter into an investigatory stop because age will inevitably prove determinative in the seizure inquiry; (2) fostering uncertainty in police investigation by forcing law enforcement to guess when their conduct will invoke constitutional protections; and (3) establishing a

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16. 184 N.C. App. 579, 647 S.E.2d 129 (2007).

17. *Id.* at 584, 647 S.E.2d at 134.

18. See 4 LAFAVE, *supra* note 15, § 9.4(a).

19. *Id.*

slippery slope precedent that encourages further subjectification of the free-to-leave test to account for other variations including race, gender, and economic status that may just as legitimately affect an individual's emotional reaction to police questioning, but if incorporated into the seizure analysis would render the free-to-leave test meaningless.

### I. *IN RE I.R.T.*

During an afternoon patrol, two police officers dressed in shirts embroidered with gang unit emblems observed a group of young people outside an apartment complex in Durham, North Carolina, where previous drug-related arrests had been made.<sup>20</sup> One officer approached a male juvenile ("I.R.T.") and began asking him questions.<sup>21</sup> The officer testified that I.R.T. acted evasively by turning his head away and by not moving his mouth as he spoke.<sup>22</sup> On previous occasions the officer had experienced drug dealers hiding crack cocaine in oral cavities and he therefore "requested" that I.R.T. spit out whatever was in his mouth.<sup>23</sup> I.R.T. spit out what was later determined to be crack cocaine and was promptly arrested for possession with intent to sell.<sup>24</sup> Following his conviction, I.R.T. appealed, arguing the evidence should have been suppressed because it was obtained as a result of an illegal search and seizure in violation of the Fourth Amendment.<sup>25</sup>

The North Carolina Court of Appeals first considered whether I.R.T. was "seized" within the meaning of the Fourth Amendment when questioned by the officers.<sup>26</sup> The court explained that a police encounter only qualifies as a seizure if "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave" and recounted the typical objective elements considered, including: "i) the threatening presence of several officers; ii) the display of a weapon by an officer; iii) some physical touching of the person of the citizen; or iv) the use of language or tone of voice indicating that compliance with the officer's

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20. *I.R.T.*, 184 N.C. App at 581, 647 S.E.2d at 132.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 582, 647 S.E.2d at 133.

26. *Id.*

request might be compelled.”<sup>27</sup> However, the court’s inquiry did not end there. Despite the absence of North Carolina case law on point, the court held that the age of the defendant was also a relevant factor in determining whether a reasonable person would feel free to leave, stating “the officer’s ‘request’ could have been construed by a reasonable person of juvenile’s age as an order, compliance with which was mandatory.”<sup>28</sup> Thus, the court held the officer’s questioning and request that the juvenile spit out the object in his mouth—a seemingly casual encounter—constituted an investigatory stop implicating the constitutional requirement that the officers have reasonable suspicion<sup>29</sup> before detaining the suspect.<sup>30</sup> Nonetheless, the court went on to find that the juvenile’s presence in a “high crime area,”<sup>31</sup> coupled with his evasive conduct in turning his head away as he spoke, supplied the officers with sufficient reasonable suspicion and the incriminating evidence obtained was ultimately upheld.<sup>32</sup>

On the surface, *In re I.R.T.* appears to take a hard-line approach to police investigation: conviction was based on evidence obtained via a warrantless search supported by little more than the juvenile’s presence in the wrong place, having turned his head away at the wrong time.<sup>33</sup> In a sharply worded dissent, Judge Calabria attacked the majority’s finding of reasonable suspicion and probable cause, arguing that the holding rested on the controversial basis of the

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27. *Id.* at 583–84, 647 S.E.2d at 134 (quoting *United States v. Mendenhall*, 446 U.S. 544, 553–54 (1980)) (internal quotations omitted).

28. *Id.* at 584–85, 647 S.E.2d at 134.

29. The court cited several factors to determine if the police had “reasonable suspicion to believe criminal activity was afoot:” (i) nervousness, (ii) presence in a “high crime area,” and (iii) unprovoked flight. *Id.* at 585, 647 S.E.2d at 134–35. Standing alone, these factors are insufficient. *Id.* However, in combination and viewed through the eyes of a police officer with training, they can furnish sufficient reasonable suspicion. *See id.*

30. *Id.* at 585, 647 S.E.2d at 134. Having established that the juvenile was seized, the court turned to question whether the seizure was constitutional. *Id.* For the seizure “to pass constitutional muster,” the officers were required to have reasonable suspicion before detaining I.R.T. because a person of the defendant’s age would not have felt free to disengage. *Id.* at 585, 647 S.E.2d at 134–35.

31. Reliance on evidence that a citizen was in a “high crime area” to establish reasonable suspicion is highly controversial. *See Ferguson & Bernache*, *supra* note 9, at 1589–90.

32. *I.R.T.*, 184 N.C. App. at 585–88, 647 S.E.2d at 134–36. In addition, those same factors were found to furnish the requisite “probable cause” for the officer to conduct a warrantless search of the juvenile. *Id.* at 586–88, 647 S.E.2d at 136. The court explained that “exigent circumstances” existed to justify the search and seizure because of the danger that I.R.T. could swallow the drugs, thereby destroying all evidence or posing severe risks to the juvenile’s health. *Id.* at 587, 647 S.E.2d at 136.

33. *Id.* at 586–87, 647 S.E.2d at 135–36.

defendant's presence in a high crime area.<sup>34</sup> Without mincing words, she stated that the majority opinion "eviscerates the protections of the Fourth Amendment."<sup>35</sup> Judge Calabria's criticism on this point may be meritorious,<sup>36</sup> but both the dissent and the majority failed to take a step back and recognize the subtle yet significant shift in approach that occurred in determining the threshold question of whether a seizure of the juvenile defendant occurred in the first place. Far from "eviscerating" Fourth Amendment protections, the court's novel approach to the free-to-leave test disproportionately expands those protections in the context of police-juvenile encounters. As explained below, looking to a defendant's age in assessing when a casual police encounter escalates to an investigatory stop may entail unintended consequences for law enforcement that cannot be so easily overlooked.

## II. THE FOURTH AMENDMENT AND SEIZURES OF THE PERSON

The Fourth Amendment's prohibition of unreasonable searches and seizures pinches a nerve at the core of any free society—the line dividing personal liberty and government control.<sup>37</sup> As long ago articulated by the United States Supreme Court, "[n]o right is held more sacred, or is more carefully guarded . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."<sup>38</sup> To ensure that the Fourth Amendment's mandates translate into more than mere "form of words,"<sup>39</sup> the Court developed the "exclusionary rule,"<sup>40</sup> which provides a sanction for government agents who violate the Fourth

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34. *Id.* at 592, 647 S.E.2d at 139 (Calabria, J., dissenting); *see also* Ferguson & Bernache, *supra* note 9, at 1588–91 (discussing the controversy surrounding the use of the high crime area designation to find reasonable suspicion for investigatory stops).

35. *I.R.T.*, 184 N.C. App. at 596, 647 S.E.2d at 141.

36. *See id.* at 592, 647 S.E.2d at 139 ("[T]he defendant's presence in an area characterized by law enforcement as 'high crime' does not alone justify his seizure." (citing *Brown v. Texas*, 443 U.S. 47, 52 (1979))). Judge Calabria is to be commended for pointing out the insufficiency of the evidence for reasonable suspicion justifying the defendant's seizure, but full treatment of this subject matter is outside the scope of this Recent Development.

37. *See, e.g.*, 1 LAFAVE, *supra* note 15, § 1.1(a)–(d) (discussing the origins of the Fourth Amendment and case law); Daniel J. Steinbock, *The Wrong Line Between Freedom and Restraint: The Unreality, Obscurity, and Incivility of the Fourth Amendment Consensual Encounter Doctrine*, 38 SAN DIEGO L. REV. 507, 508 (2001) (describing the constitutional nature of freedom).

38. *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

39. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

40. *See* 1 LAFAVE, *supra* note 15, § 1.1.

Amendment's prohibitions: the exclusion from trial any evidence obtained through an illegal search or seizure.<sup>41</sup> Thus, the protections of the Fourth Amendment in conjunction with the exclusionary rule serve an important public policy purpose: deterrence of unlawful police conduct.<sup>42</sup>

Although a central constitutional guarantee, the liberty and privacy protected by the Fourth Amendment do have limits.<sup>43</sup> The Constitution does not forbid "all searches and seizures, but [rather only] unreasonable searches and seizures."<sup>44</sup> Reasonableness is at the heart of the seizure inquiry, requiring a "balancing of the intrusion against the legitimacy and need of the police action."<sup>45</sup> Fourth Amendment analysis centers on the inevitable tension between liberty of the individual and restraint by the state—a tension that is most palpable during an unwelcome street encounter between a citizen and a law enforcement officer.<sup>46</sup> As discussed below, however, the protections of the Fourth Amendment do not extend to every instance in which an officer interrupts a citizen's daily routine.<sup>47</sup>

#### A. *Consensual Encounters, Investigatory Stops, and Arrests*

A survey of state and federal case law reveals that police-citizen encounters fall into three zones to which escalating levels of constitutional protections apply.<sup>48</sup> In the first zone, police casually engage a citizen in conversation in a public place by asking questions or making requests.<sup>49</sup> Such "consensual encounters" take place without the need for warrants, without probable cause, and without any reasonable suspicion.<sup>50</sup> As long as the citizen is at liberty to disengage, no constitutional interests are implicated.<sup>51</sup> As the Court in

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41. *See id.*; INGA L. PARSONS, *FOURTH AMENDMENT: PRACTICE AND PROCEDURE* 77–85 (Anthony J. Bocchino & Zeld Harris eds., 2005).

42. *See Terry v. Ohio*, 392 U.S. 1, 13 (1968); THOMAS K. CLANCY, *THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION* § 1.2.3 (2008); 1 LAFAVE, *supra* note 15, § 1.1(f).

43. *See* 4 LAFAVE, *supra* note 15, § 9.

44. *Terry*, 392 U.S. at 9 (quoting *Elkins v. United States*, 364 U.S. 206, 222 (1960)).

45. PARSONS, *supra* note 41, at 21.

46. *See Steinbock*, *supra* note 37, at 508–10.

47. *See* 1 LAFAVE, *supra* note 15, § 2.2(b).

48. *See Terry*, 392 U.S. at 16–31; *United States v. Saddler*, 445 F. Supp. 2d 862, 867–69 (S.D. Ohio 2006), *aff'd*, 2007 FED App. 0805N, 254 F. App'x 527 (6th Cir.); *State v. Farmer*, 333 N.C. 172, 186–89, 424 S.E.2d 120, 128–30 (1993); 4 LAFAVE, *supra* note 15, §§ 9.1–9.4; PARSONS, *supra* note 41, at 15–39.

49. *See* PARSONS, *supra* note 41, at 18–19.

50. *Id.* at 87; *see* 4 LAFAVE, *supra* note 15, § 9.4.

51. 4 LAFAVE, *supra* note 15, § 9.4; *see* PARSONS, *supra* note 41, at 18–19.

*INS v. Delgado*<sup>52</sup> explained, “[w]hile most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response.”<sup>53</sup> Importantly, encounters in the first zone permit an officer to request a citizen’s consent to a search or seizure.<sup>54</sup> If such consent is voluntarily given, any incriminating evidence revealed by the search is admissible against the citizen at trial.<sup>55</sup>

However, if the police questioning amounts to a coercive show of force or a restriction of the citizen’s liberty to disengage, the encounter enters the second zone: an investigatory stop.<sup>56</sup> Encounters in the second zone implicate the Fourth Amendment, thereby requiring that the officer first have reasonable suspicion before stopping the suspect.<sup>57</sup> In the second zone, the officer’s options are more limited. Absent a showing of reasonable suspicion, the stop amounts to an unreasonable seizure of the person and incriminating evidence obtained during such a stop will be suppressed from trial as “fruit of the poisonous tree.”<sup>58</sup> Moreover, during an unreasonable seizure, the officer’s ability to obtain the suspect’s voluntary consent to a search is foreclosed.<sup>59</sup> If an officer lacked suspicion to begin with and the citizen in acquiescence to the officer’s show of authority gives consent to a search, that consent is tainted by coercion and any incriminating evidence obtained is subject to suppression.<sup>60</sup>

Lastly, a full arrest shifts the encounter to the third zone, invoking the highest level of constitutional protections.<sup>61</sup> In the third zone, an officer may only effect an arrest, thereby seizing the

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52. 466 U.S. 210 (1984).

53. *Id.* at 216.

54. See *United States v. Drayton*, 536 U.S. 194, 201–06 (2002); *State v. Christie*, 96 N.C. App. 178, 185, 385 S.E.2d 181, 185 (1989); CLANCY, *supra* note 42, §§ 10.4.1–10.4.2.1; 4 LAFAVE, *supra* note 15, § 8.1.

55. See 4 LAFAVE, *supra* note 15, § 8.1.

56. See *Terry v. Ohio*, 392 U.S. 1, 26–31 (1968); *United States v. Saddler*, 445 F. Supp. 2d 862, 867–68 (S.D. Ohio 2006), *aff’d*, 2007 FED App. 0805N, 254 F. App’x 527 (6th Cir.); *State v. Farmer*, 333 N.C. 172, 187–88, 424 S.E.2d 120, 129 (1993) (quoting *United States v. Mendenhall*, 446 U.S. 544, 553–55 (1980)); 4 LAFAVE, *supra* note 15, §§ 9.1–9.2.

57. See *Terry*, 392 U.S. at 26–31; *Saddler*, 445 F. Supp. 2d at 867–68; *Farmer*, 333 N.C. at 186, 424 S.E.2d at 128; 4 LAFAVE, *supra* note 15, §§ 9.1–9.2.

58. See PARSONS, *supra* note 41, at 78 (quoting *Wong Sun v. United States*, 371 U.S. 471, 487–88 (1963)).

59. See CLANCY, *supra* note 42, §§ 10.4.1–10.4.2.1; 4 LAFAVE, *supra* note 15, §§ 8.1–8.2.

60. See *California v. Hodari D.*, 499 U.S. 621, 645 (1991) (Stevens, J., dissenting); CLANCY, *supra* note 42, §§ 10.4.1–10.4.2.1; PARSONS, *supra* note 41, at 105–11.

61. CLANCY, *supra* note 42, § 6.3; 3 LAFAVE, *supra* note 15, § 5.1; PARSONS, *supra* note 41, at 28–31.

individual indefinitely, if the arrest is supported by “probable cause.”<sup>62</sup> Similarly, if the officer cannot show such cause or procure a warrant prior to conducting the arrest, the exclusionary rule applies and any evidence obtained will be suppressed at trial.<sup>63</sup>

*B. The Free-to-Leave Test*

Distinguishing consensual encounters in the first zone from investigatory stops in the second zone is crucial in determining when constitutional protections are triggered.<sup>64</sup> As the line dividing casual police questioning from an investigatory stop is admittedly blurry, the Supreme Court has long recognized the necessity of an objective measure for distinguishing between the zones of police-citizen encounters.<sup>65</sup> Under the traditional free-to-leave test, a person is only “seized” within the meaning of the Fourth Amendment “if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.”<sup>66</sup> Courts have repeatedly emphasized that the free-to-leave test is an objective inquiry—the subjective intent motivating the officer to conduct the stop and the subjective perceptions of the suspect as to whether he or she felt free to disengage are irrelevant.<sup>67</sup> The focus of the test is on

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62. See *Farmer*, 333 N.C. at 189, 424 S.E.2d at 130 (citing *State v. Zuniga*, 312 N.C. 251, 259, 322 S.E.2d 140, 145 (1984)); CLANCY, *supra* note 42, § 6.1; PARSONS, *supra* note 41, at 28–30.

63. See CLANCY, *supra* note 42, § 6.3, at 220–21; PARSONS, *supra* note 41, at 28–31.

64. See *United States v. Drayton*, 536 U.S. 194, 208–10 (2002) (Souter, J., dissenting); PARSONS, *supra* note 41, at 87–97.

65. 4 LAFAVE, *supra* note 15, § 9.4(a) (citing *United States v. Mendenhall*, 446 U.S. 544, 574 (1980)); PARSONS, *supra* note 41, at 87–92.

66. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

67. See *INS v. Delgado*, 466 U.S. 210, 228 (1984) (Brennan, J., dissenting) (“This rule properly looks not to the subjective impressions of the person questioned but rather to the objective characteristics of the encounter which may suggest whether or not a reasonable person would believe that he remained free during the course of the questioning to disregard the questions and walk away.”); *Mendenhall*, 446 U.S. at 554 n.6 (“[T]he subjective intention of the DEA agent in this case to detain the respondent, had she attempted to leave, is irrelevant except insofar as that may have been conveyed to the respondent.”); *United States v. Hill*, 199 F.3d 1143, 1149 (10th Cir. 1999) (stating that suspect’s prior experiences with police officers were irrelevant); *United States v. Analla*, 975 F.2d 119, 124–25 (4th Cir. 1992) (stating that the seizure inquiry is “an objective test, not a subjective one” and holding it was irrelevant that the suspect’s previous experience with Moroccan police made him believe he could be tortured if he tried to leave the scene); *United States v. Gordon*, 895 F.2d 932, 937–38 (4th Cir. 1990) (stating that the seizure test is objective and finding it irrelevant that defendant’s father was a policeman “who taught him to respect and obey law enforcement personnel”); *Farmer*, 333 N.C. at 188, 424 S.E.2d at 129–30 (“[T]he defendant had no objective reason to believe that he was not free to end his encounter with the law enforcement officers and to proceed on his way.” (emphasis added)); *State v. Christie*, 96 N.C. App. 178, 184, 385 S.E.2d 181, 184

the coercive effect of the police officer's conduct and how that conduct would be interpreted by a hypothetical reasonable person under the circumstances.<sup>68</sup>

Even a cursory glance at the wording of the free-to-leave test invites skepticism and criticism.<sup>69</sup> First, any legal assessment of "feelings" seems ill-conceived as a judicial inquiry at the outset. Second, commentators point out that in reality very few reasonable people (let alone a criminal with something to hide) would feel free to walk away from an officer's questions without consequence.<sup>70</sup> Lastly, the test would seem to require the court to not only imagine a hypothetical reasonable person, but also to enter into this fictional person's mind, determine what that person believed at the time, and assess how that person would think, feel, and react under the circumstances.<sup>71</sup> That seems a tall order even for the most prescient of judges.

The free-to-leave test's usefulness, however, lies not in any realistic psychological assessment of reasonable people's beliefs.<sup>72</sup> Rather, its utility lies in the test's ability to set up predictable standards for police conduct that can be consistently applied *ex ante* by officers in the field, as well as consistently interpreted *ex post* by judges in the courtroom.<sup>73</sup> The test is a valuable tool only insofar as it

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(1989) ("The *Mendenhall* standard of whether a reasonable person would have believed that he was not free to leave is an objective standard, not subjective.").

68. See 4 LAFAVE, *supra* note 15, § 9.4(a); PARSONS, *supra* note 41, at 88–91.

69. See, e.g., Tracey Maclin, "Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?, 26 VAL. U. L. REV. 243, 250 (1991) (arguing that race should be considered in the seizure analysis because a police encounter with an African American male is "quite different . . . [from] an encounter between an officer and the so-called average, reasonable person"); Steinbock, *supra* note 37, at 523–27 (critiquing the reasonable person standard); Joseph P. D'Ambrosio, Note, *The Drug Courier Profile and Airport Stops: Reasonable Intrusions or Suspicionless Seizures?*, 12 NOVA L. REV. 273, 285 (1987) (recognizing the artificiality of the *Mendenhall* test); Lourdes M. Rosado, Note, *Minors and the Fourth Amendment: How Juvenile Status Should Invoke Different Standards for Searches and Seizures on the Street*, 71 N.Y.U. L. REV. 762, 793–96 (1996) (proposing that courts explicitly adopt a "reasonable juvenile" test).

70. See, e.g., *United States v. Notorianni*, 729 F.2d 520, 522 (7th Cir. 1984) ("[M]aybe this is a wrong guess about what the average person feels in this situation, but it is the law of this circuit."); PARSONS, *supra* note 41, at 88–89; Steinbock, *supra* note 37, at 523–27.

71. See David K. Kessler, *Free to Leave? An Empirical Look at the Fourth Amendment's Seizure Standard*, 99 J. CRIM. L. & CRIMINOLOGY 51, 73 (2009) (discussing the disconnect between the reality of how most people feel when confronted with police questioning and the assumption by the Supreme Court that reasonable people feel free to leave).

72. See *id.* at 60–62 (discussing psychological studies that conflict with the assumption that most people feel free to terminate an encounter with law enforcement).

73. See 4 LAFAVE, *supra* note 15, § 9.4(a).

gives an objective measure by which to gauge the reasonableness or unreasonableness of police behavior under the circumstances.<sup>74</sup> An objective test, focusing on the actions of the officer rather than the subjective reactions of the suspect, also comports with the underlying purpose of the Fourth Amendment's prohibition on unreasonable seizures: deterrence of abusive police conduct.<sup>75</sup> As Justice Stewart explained, the "purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but to 'prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" <sup>76</sup> Thus, any legal test designed to interpret what conduct by a police officer is oppressive or unreasonable "must be expressed in terms that can be understood and applied by the officer."<sup>77</sup> In contrast, if a subjective measure were employed and the reasonableness of police conduct varied depending on the particularities of the suspect, uniform standards of police behavior become impossible and abuses far more difficult to detect.<sup>78</sup>

Further, an objective seizure inquiry allows for more precise and effective law enforcement.<sup>79</sup> Police investigations in the field require quick decision making and flexibility.<sup>80</sup> Upon approaching a citizen on the street, an officer needs to know at the outset the constitutional boundaries of a casual police-citizen encounter both to effectively investigate potential criminal activity and to serve as a check on his own behavior.<sup>81</sup> The objectivity of the test allows police officers to predict in advance when their actions or requests will implicate

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74. *See id.*

75. *See id.*; Kit Kinports, *Criminal Procedure in Perspective*, 98 J. CRIM. L. & CRIMINOLOGY 71, 74 (2007) ("In its search and seizure decisions, the Supreme Court emphasizes the exclusionary rule's deterrent function, suggesting that the Fourth Amendment's primary purpose is to deter unconstitutional police behavior, and therefore focusing on the reasonable police officer.").

76. *United States v. Mendenhall*, 446 U.S. 544, 553-54 (1980) (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976)); *see State v. Farmer*, 333 N.C. 172, 187, 424 S.E.2d 120, 129 (1993) (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976)).

77. 4 LAFAVE, *supra* note 15, § 9.4(a).

78. *See id.*

79. *See Mendenhall*, 446 U.S. at 554 (noting the need for flexible investigation techniques and police questioning "as a tool in the effective enforcement of criminal laws").

80. *See Terry v. Ohio*, 392 U.S. 1, 10 (1968) (noting that law enforcement officers on the street need "an escalating set of flexible responses").

81. *See* 4 LAFAVE, *supra* note 15, § 9.4(a).

Fourth Amendment restrictions and protections.<sup>82</sup> As the Court has noted, “[t]his ‘reasonable person’ standard also ensures that the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached.”<sup>83</sup> Therefore, the free-to-leave test very well may be artificial in suggesting that reasonable people normally feel free to disengage from an encounter with law enforcement, but it provides a useful measure through which to gauge appropriate police behavior both fairly and consistently.<sup>84</sup>

### III. *IN RE I.R.T.* AND THE TROUBLE WITH CONSIDERING AGE IN THE “SEIZURE” ANALYSIS

In a significant modification of the free-to-leave test, the *In re I.R.T.* court held that a juvenile’s age is relevant in determining whether a defendant has been seized under the Fourth Amendment.<sup>85</sup> However, the court offered surprisingly little rationale for its shift in approach. The entirety of the court’s discussion spanned exactly one paragraph, which rather flatly concluded that the court saw “no legal or common sense reason” not to consider a juvenile’s age in the seizure analysis.<sup>86</sup> What follows strives to provide both.

#### A. “Legal” Reasons Age Should Not Be Considered in the Seizure Analysis

Critical analysis of *In re I.R.T.*’s approach to juvenile stops begins by probing the rather dubious legal analogies relied upon by the court to support a modification of the free-to-leave test to account for age. In considering whether age was relevant, the *In re I.R.T.* court correctly pointed out that there “has not been an explicit holding by the courts of this state as to whether the age of a defendant or juvenile is a relevant inquiry in determining whether a reasonable person would feel free to leave.”<sup>87</sup> Lacking clear authority under Fourth Amendment cases, the court turned to the Fifth

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82. *Michigan v. Chesternut*, 486 U.S. 567, 574 (1988) (“While the test is flexible enough to be applied to the whole range of police conduct in an equally broad range of settings, it calls for consistent application from one police encounter to the next, regardless of the particular individual’s response to the actions of the police. The test’s objective standard—looking to the reasonable man’s interpretation of the conduct in question—allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment.”).

83. *Id.*

84. *Id.*

85. *In re I.R.T.*, 184 N.C. App. 579, 584, 647 S.E.2d 129, 134 (2007).

86. *Id.*

87. *Id.*

Amendment for inspiration.<sup>88</sup> Though not directly equated, the standard for determining whether a defendant is “in custody,” thereby implicating *Miranda* warnings,<sup>89</sup> utilizes a test remarkably similar to the Fourth Amendment’s free-to-leave test.<sup>90</sup> The custody inquiry also involves an objective reasonable person test that asks “whether a reasonable person in the position of the defendant would believe himself to be in custody or that he had been deprived of his freedom of action in some significant way.”<sup>91</sup> Without directly citing authority on point, the *In re I.R.T.* court claimed that a “defendant’s age has been used to determine whether he was in custody.”<sup>92</sup> Supplying no further rationale, the court went on to hold that, by analogy, the age of a juvenile is thus relevant in determining whether a defendant was seized under the Fourth Amendment as well.<sup>93</sup>

Even assuming arguendo that a proper legal analogy can be drawn between the custody inquiry and the seizure inquiry, two recent decisions reviewing custodial interrogations have held that a defendant’s age is not a relevant factor in determining whether a suspect was restrained “to the degree associated with formal arrest.”<sup>94</sup> These cases cast considerable doubt on the authority relied upon and analogized by the *In re I.R.T.* court to support differential standards for investigatory stops of juveniles.

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88. *See id.*

89. *See* *Miranda v. Arizona*, 384 U.S. 436, 479 (1966) (holding that a suspect must be informed before being questioned that “he has the right to remain silent, that anything he says can be used against him,” and that he has a right to an attorney); *see also* FRED E. INBAU ET AL., *CRIMINAL INTERROGATION AND CONFESSIONS* 477–522 (4th ed. 2004) (discussing *Miranda* and the law of police interrogations generally). In North Carolina, *Miranda* warnings to juveniles are supplemented by certain additional statutory protections by mandate of the General Assembly. *See* N.C. GEN. STAT. § 7B-2101(a) (2009). The *In re I.R.T.* court seemed to overlook the fact that juveniles’ Fifth Amendment rights are supplemented and augmented by statute, whereas no such statutory provision exists for Fourth Amendment rights. *See I.R.T.*, 184 N.C. App. at 584, 647 S.E.2d at 134.

90. *See* PARSONS, *supra* note 41, at 19–20; Tara L. Curtis, Recent Development, *Yarborough v. Alvarado: Self-Incrimination Clause Does Not Require Consideration of Age and Inexperience in the Miranda Custody Context*, 40 HARV. C.R.-C.L. L. REV. 313, 313–14 (2005); *see also* *State v. Buchanan*, 353 N.C. 332, 338–41, 543 S.E.2d 823, 827–29 (2001) (discussing the various formulations of the test to determine when a suspect is “in custody” for *Miranda* purposes).

91. *State v. Greene*, 332 N.C. 565, 577, 422 S.E.2d 730, 737 (1992).

92. *I.R.T.*, 184 N.C. App. at 584, 647 S.E.2d at 134.

93. *Id.*

94. *In re J.D.B.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 674 S.E.2d 795, 799 (2009) (quoting *State v. Buchanan*, 353 N.C. 332, 338, 543 S.E.2d 823, 827 (2001)), *aff’d*, 363 N.C. 664, 686 S.E.2d 135 (2009); *see* *Yarborough v. Alvarado*, 541 U.S. 652, 666–69 (2004).

In *Yarborough v. Alvarado*,<sup>95</sup> the United States Supreme Court held that a seventeen-year-old defendant's age need not be considered in determining whether he was in custody for *Miranda* purposes.<sup>96</sup> Writing for the majority of the Court, Justice Kennedy noted, "the custody inquiry states an objective rule designed to give clear guidance to police, while consideration of a suspect's individual characteristics—including his age—could be viewed as creating a subjective inquiry."<sup>97</sup> The Court also pointed to the "conceptual difference" between necessarily objective tests like the *Miranda* custody inquiry and other inquiries that legitimately depend on the subjective state of mind of the defendant.<sup>98</sup> Justice Kennedy explained, "the objective *Miranda* custody inquiry could reasonably be viewed as different from doctrinal tests that depend on the actual mind-set of a particular suspect, where we do consider a suspect's age and experience."<sup>99</sup> Although *Yarborough* was decided three years before *In re I.R.T.*,<sup>100</sup> the North Carolina Court of Appeals made no mention of it in its *In re I.R.T.* opinion.

Even more surprisingly, the North Carolina Court of Appeals itself recently reexamined the role of age in the custody inquiry and explicitly adopted the *Yarborough* approach.<sup>101</sup> In *In re J.D.B.*,<sup>102</sup> the North Carolina Court of Appeals held that a fourteen-year-old middle school student was not "in custody" when questioned by an officer in the school principal's office and reiterated the necessity of an objective measure by which to judge the reasonableness of police conduct.<sup>103</sup> Citing *Yarborough*, the court of appeals explained that the "objective test furthers 'the clarity of [*Miranda*'s] rule,' ensuring that police do not need to 'gues[s] as to [the circumstances] at issue before

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95. 541 U.S. 652 (2004).

96. *Id.* at 666–69. The Court also explained that "[o]ur opinions applying the *Miranda* custody test have not mentioned the suspect's age, much less mandated its consideration." *Id.* at 666.

97. *Id.* at 668.

98. *Id.* at 667.

99. *Id.* Justice Kennedy went on to point out that the related inquiries into the voluntariness of a statement can logically depend on subjective qualities possessed by the accused, including the suspect's age, prior experience, education, etc. *Id.* at 667–68. For an excellent criticism of Justice Kennedy's opinion in *Yarborough* as well as a full discussion of Justice Breyer's dissent arguing that age should be a relevant consideration in the custody inquiry, see generally Curtis, *supra* note 90.

100. *Yarborough* was decided June 1, 2004. *Yarborough*, 541 U.S. at 652. *In re I.R.T.* was decided July 17, 2007. *In re I.R.T.*, 184 N.C. App. 579, 579, 647 S.E.2d 129, 129 (2007).

101. See *In re J.D.B.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 674 S.E.2d 795, 800 (2009), *aff'd*, 363 N.C. 664, 686 S.E.2d 135 (2009).

102. \_\_\_ N.C. App. \_\_\_, 674 S.E.2d 795 (2009), *aff'd*, 363 N.C. 664, 686 S.E.2d 135 (2009).

103. *Id.* at \_\_\_, 674 S.E.2d at 800.

deciding how they may interrogate the suspect.”<sup>104</sup> Further, in what appears to be either an outright repudiation of its previous reasoning under *In re I.R.T.* or a case of judicial amnesia, the court of appeals refused to consider the defendant’s age in the custody analysis, stating that an “individual’s mental capacity and age, standing alone, are not determinative . . . . In fact ‘consideration of a suspect’s individual characteristics—including age—could be viewed as creating a subjective inquiry.’ ”<sup>105</sup> One is hard pressed to find a better example of self-contradiction. Though the court was in conflict on this issue, it did not seem to realize it.

Only adding to the confusion, an amicus brief filed in support of the appeal of the *In re J.D.B.* decision to the Supreme Court of North Carolina directly cites *In re I.R.T.* to argue that if age is a relevant factor in the seizure inquiry then (by analogy) age should be considered in the custody inquiry as well.<sup>106</sup> Thus completes the vicious circle: age should be relevant in the seizure analysis because age is relevant in the custody analysis—yet age should be relevant in the custody analysis because age is relevant in the seizure analysis. Such circular reasoning was thankfully foreclosed, however, when the Supreme Court of North Carolina issued its most recent opinion affirming the application of *Yarborough* to the custody inquiry in *In re J.D.B.*, stating emphatically, “we decline to extend the test for custody to include consideration of the age and academic standing of an individual subjected to questioning by police.”<sup>107</sup> Thus, despite considerable confusion on the issue, it is now clear that age is not relevant in the custody inquiry under North Carolina law and the legal analogy drawn by the *In re I.R.T.* court to justify consideration of age in the seizure inquiry is no longer viable.

As indicated in *Yarborough*, the potential for confusion abounds in distinguishing between objective reasonable person standards (like the free-to-leave test) and other reasonable person paradigms that legitimately involve a more subjective inquiry.<sup>108</sup> The standard of a

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104. *Id.* (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 668 (2004)).

105. *Id.* (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 668 (2004)).

106. Brief of Amici Curiae in Support of Juvenile-Appellant at 10, *J.D.B.*, \_\_ N.C. App. \_\_, 674 S.E.2d 795 (2009) (No. 190A09).

107. *J.D.B.*, \_\_ N.C. at \_\_, 686 S.E.2d at 140 (2009). The court went on to state explicitly that it found the reasoning in *Yarborough* “persuasive.” *Id.* at n.1.

108. *Yarborough v. Alvarado*, 541 U.S. 652, 667–68 (2004) (“There is an important conceptual difference between the *Miranda* custody test and the line of cases from other contexts considering age and experience. The *Miranda* custody inquiry is an objective test . . . . The objective *Miranda* custody inquiry could reasonably be viewed as different from doctrinal tests that depend on the actual mindset of a particular suspect, where we do

reasonable person is nonetheless a familiar and ubiquitous legal construct.<sup>109</sup> Moreover, in other legal contexts the question of what a “reasonable person” would do under the circumstances does take account of certain personal characteristics including age.<sup>110</sup> In negligence actions, for example, the “reasonable person” standard is altered to account for a juvenile’s age under some circumstances.<sup>111</sup> Further, courts often consider subjective characteristics such as age, maturity, and inexperience to determine whether consent to a search was given voluntarily.<sup>112</sup> What makes the seizure analysis different?

Negligence and the seizure inquiry serve a common public policy goal: deterrence of unreasonable behavior.<sup>113</sup> However, an important distinction lies in *whose* behavior is being deterred. In negligence actions, the central question is whether the *defendant’s* behavior posed an unreasonable risk of harm to others.<sup>114</sup> The focus of the inquiry is on the conduct and mindset of the defendant. Since the law recognizes that young people need time to mature and develop, children are not held to the same standard of care as adults.<sup>115</sup> There is simply very little deterrent benefit in holding a child liable for conduct that he or she cannot be expected to foresee as risky or dangerous.<sup>116</sup> Thus, age and inexperience are legitimate factors to

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consider a suspect’s age and experience. For example, the voluntariness of a statement is often said to depend on whether ‘the defendant’s will was overborne,’ a question that logically can depend on ‘the characteristics of the accused.’” (internal citations omitted).

109. See Kinports, *supra* note 75, at 72.

110. See, e.g., RICHARD A. EPSTEIN, TORTS 117–22 (Aspen Publishers 1999) (discussing the consideration of personal characteristics such as infancy, old age, mental disability, and physical disability under tort law); Rosado, *supra* note 69, at 777–81 (discussing the courts’ consideration of age and inexperience in determining voluntary consent, waivers of rights, and abortion decisions).

111. See EPSTEIN, *supra* note 110, at 117–19.

112. See, e.g., *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973) (“In determining whether a defendant’s will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation. Some of the factors taken into account have included the youth of the accused . . .”); Ronald J. Bacigal, *Choosing Perspectives in Criminal Procedure*, 6 WM. & MARY BILL RTS. J. 677, 694 (1998); Rosado, *supra* note 69, at 765–71.

113. See EPSTEIN, *supra* note 110, at 129–32; Kinports, *supra* note 75, at 74.

114. See EPSTEIN, *supra* note 110, at 129–32.

115. *Id.* at 117–19; see also MARTIN R. GARDNER, UNDERSTANDING JUVENILE LAW 100–05 (3d ed. 2009) (discussing the tort liability of juveniles and the variable standard courts typically apply in measuring the juvenile’s conduct against that of a “reasonable person of like age, intelligence, and experience under like circumstances” (quoting RESTATEMENT (SECOND) OF TORTS § 283 (1977))).

116. See EPSTEIN, *supra* note 110, at 117–19; GARDNER, *supra* note 115, at 104–05.

consider in assessing whether a young person should be held liable in negligence for damages resulting from unreasonably risky behavior.<sup>117</sup>

The seizure analysis is also concerned with unreasonable behavior. However, the seizure inquiry centers not on the behavior of the defendant, but rather on the behavior of the police officer.<sup>118</sup> The goal is to deter abusive or unreasonable police conduct, not the conduct of the citizen with whom the officer interacts.<sup>119</sup> To determine whether a seizure of the person has occurred, courts turn to the free-to-leave test to gauge whether the police officer's questions or conduct would be interpreted under the circumstances as a show of force such that a reasonable person would not feel free to disengage.<sup>120</sup> Thus, the test focuses on the actions of the police officer as they would be objectively interpreted in order to provide guidance as to what police behavior will or will not implicate Fourth Amendment protections.<sup>121</sup> As the analysis should not vary with whom the officer approaches, the subjective mindset of the particular defendant is irrelevant and considering individual characteristics such as age is inappropriate.<sup>122</sup> A differential standard for juveniles simply misconstrues the purpose of the free-to-leave test and improperly shifts the focus of the seizure inquiry away from the police officer's conduct.<sup>123</sup>

The consent inquiry can be distinguished from the seizure inquiry for similar reasons. In the consent inquiry, the question is whether a defendant knowingly and voluntarily consented to a search by law enforcement.<sup>124</sup> The focus here is on the subjective mindset of the particular defendant, not a hypothetical person.<sup>125</sup> Thus, considerations of age and inexperience are legitimate factors in determining whether consent was voluntarily given by a particular

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117. GARDNER, *supra* note 115, at 97–101.

118. See 4 LAFAVE, *supra* note 15, § 9.4(a); Kinports, *supra* note 75, at 74–76.

119. See Kinports, *supra* note 75, at 74–76.

120. See 4 LAFAVE, *supra* note 15, § 9.4(a).

121. See *id.*

122. See CLANCY, *supra* note 42, § 5.1.4.1.3 n.68 (“Inserting individual characteristics such as age or race into the reasonable person test would suggest that the result in identical situations would change based on who the police are confronting. Such a mode of analysis and results seems inconsistent both with the purpose of the test . . . and with Supreme Court case law.” (citations omitted)).

123. See *id.*

124. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 226–31 (1973); CLANCY, *supra* note 42, § 10.4.1; Bacigal, *supra* note 112, at 693–99.

125. Bacigal, *supra* note 112, at 693–94.

defendant.<sup>126</sup> The subject of the seizure inquiry, however, is different. Under the free-to-leave test, the court is examining not the reasonableness of the defendant's mindset, but rather the reasonableness or coercive effect of the police officer's behavior.<sup>127</sup> The court is asking what a reasonable interpretation of the officer's outward conduct would be under the circumstances—an assessment that should not vary depending on the qualities or sensitivities of the particular defendant.<sup>128</sup>

An additional distinction is procedural, but of no less consequence. Under tort law, the reasonableness of a defendant's allegedly negligent action is a question of fact which is weighed by the jury viewing the defendant's conduct in light of the mores of the community.<sup>129</sup> The assessment of reasonableness in the seizure inquiry, however, is a question of law and therefore decided by the judge alone.<sup>130</sup> Thus, the incorporation of subjective personal characteristics such as age may be appropriate in the negligence context where the collective judgment of the community weighs in on the assessment.<sup>131</sup> However, consideration of age is not appropriate in the seizure analysis where the assessment is purely a judicial determination.

Despite the temptation to conflate the objective and subjective variations on the reasonable person standard, courts must be cautious in maintaining the conceptual distinctions between the objective free-to-leave test and the more subjective standards in the context of negligence and consent.<sup>132</sup> The utility of the free-to-leave test—providing uniform standards of police conduct—is undermined by incorporating too many subjective factors into the analysis that tend to shift focus away from the reasonableness of the police officer's

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126. See *Schneckloth*, 412 U.S. at 226; *United States v. Wilson*, 413 F.3d 382, 388 (3d Cir. 2005) (holding that the defendant's consent to search his bag was voluntarily given because nothing suggested that the defendant's age or intelligence prevented him from understanding the situation).

127. See *Kinports*, *supra* note 75, at 74–75.

128. See 4 *LAFAVE*, *supra* note 15, § 9.4(a); *Kinports*, *supra* note 75, at 74–75.

129. See *EPSTEIN*, *supra* note 110, at 163–71.

130. See *Steinbock*, *supra* note 37, at 524–25. Similarly, the determination of whether a defendant voluntarily consented to a search is held to be a question of fact, but that determination is made by the trial judge. See *Ohio v. Robinette*, 519 U.S. 33, 40 (1996); *State v. Early*, \_\_ N.C. App. \_\_, \_\_, 670 S.E.2d 594, 601 (2009); *CLANCY*, *supra* note 42, § 10.4.2.2.

131. See *CLANCY*, *supra* note 42, § 10.4.2.2; *EPSTEIN*, *supra* note 110, at 163–71.

132. See *Yarborough v. Alvarado*, 541 U.S. 652, 667–68 (2004).

conduct and focus instead on the sensitivities and vulnerabilities of the individual suspect.<sup>133</sup>

*B. “Common Sense” Reasons Age Should Not be Considered in the Seizure Analysis*

The *In re I.R.T.* approach to juvenile stops may be based on tenuous legal authority, but are there independent common sense reasons to treat juveniles differently in the seizure analysis? What follows addresses two common sense concerns with differential standards for investigatory stops of juveniles: (1) whether age is truly a “subjective” matter that should be excluded from an objective seizure inquiry, and (2) whether social science studies suggesting juveniles are more susceptible to influence by authority figures should affect the role of age in the seizure inquiry.

As explained above, courts describe the free-to-leave test as an objective inquiry focusing on how a hypothetical reasonable person would react to police under the circumstances of the encounter and excluding from consideration the subjective qualities and perceptions of the individual suspect.<sup>134</sup> But in deciding whether age is an appropriate factor under the free-to-leave test, merely reiterating that the seizure inquiry is “objective” only begs the question. The central query remains: Is age itself a subjective or objective factor?

In one sense, age is an objective determination. The number of years an individual has been alive is clearly quantifiable—a person is either seventeen years old or eighteen years old. Further, an individual’s age reflects certain societal assumptions about maturity, rationality, and emotional capacity.<sup>135</sup> However, the role of a suspect’s juvenile status in the context of a more or less random street encounter with law enforcement is a bit more complicated. First, a suspect’s age is only an objective fact under the circumstances of a police encounter if it is made known to the officer.<sup>136</sup> As an individual’s exact age is not readily apparent upon first approach, an officer may not have any reason to know of the individual’s juvenile status during a street encounter. When unknown to the officer, a suspect’s age hardly constitutes an objective element of the underlying circumstances surrounding the stop. Further, imposing

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133. See 4 LAFAVE, *supra* note 15, § 9.4(a).

134. See *supra* Part III.A.

135. See GARDNER, *supra* note 115, at 3–7.

136. See *In re J.M.*, 619 A.2d 497, 501 n.5 (D.C. 1992) (“The record provides no support for an argument that Detective Zattau should have recognized . . . him to be a juvenile rather than a young adult.”).

differential standards for what police conduct will implicate the Fourth Amendment in such a situation cannot serve the policy goal of deterrence of unreasonable police behavior: there is no way to deter an officer from conducting herself unreasonably with a juvenile suspect if the officer is unaware that the suspect was a juvenile at the outset.

Second, even if the officer has reason to believe a suspect is a juvenile, considering an individual's age in determining whether a seizure occurred inevitably invites a more subjective inquiry. For those untrained in psychology and human development, basic assumptions about the relative maturity of disparate age groups are often unscientific, arbitrary, and inconsistent.<sup>137</sup> If a judge must consider a suspect's age in the seizure inquiry, the temptation is to compensate for a lack of knowledge about a particular age group by looking instead to how this particular juvenile subjectively reacted to the police encounter.<sup>138</sup> The *In re I.R.T.* court's consideration of defendant's juvenile status is illustrative, as the court seemed to use age to reorient the seizure inquiry itself.<sup>139</sup> Rather than consider age as one factor subsumed in the circumstances, the court reexamined the facts of the encounter through the perspective of a juvenile—attempting to see all of the events as a juvenile would see them.<sup>140</sup> Thus, the officer's presence seemed more intimidating, the officer's gun appeared more ominous, and the officer's requests became far more authoritative and commanding. The court's approach shifted the focus of the inquiry away from the outward conduct of the police officer and centered instead on the perceptions of the juvenile suspect.<sup>141</sup> However, this is exactly the kind of subjective inquiry that is inappropriate under the free-to-leave test's objective reasonable person standard.<sup>142</sup> The policy goals underpinning the Fourth

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137. See Kessler, *supra* note 71, at 81–87 (discussing that Fourth Amendment jurisprudence needs to be supplemented by empirical research and psychological studies on human behavior because judges are often unrealistic in assessing reasonable people's beliefs in the context of police encounters).

138. See *id.*

139. See *In re I.R.T.*, 184 N.C. App. 579, 584–85, 647 S.E.2d 129, 134 (2007).

140. See *id.*

141. See *id.*

142. See *California v. Hodari D.*, 499 U.S. 621, 640 (1991) (Stevens, J., dissenting) (stating that the test governing seizures of the person “looks not to the subjective perceptions of the person questioned, but rather, to the objective characteristics of the encounter”); *United States v. Analla*, 975 F.2d 119, 124 (4th Cir. 1992) (stating that the seizure inquiry is “an objective test, not a subjective one”); *State v. Christie*, 96 N.C. App. 178, 184, 385 S.E.2d 181, 184 (1989) (“The *Mendenhall* standard of whether a reasonable

Amendment—deterrence of abusive police conduct and establishment of uniform standards of police behavior<sup>143</sup>—cannot be furthered by fantasizing about how individuals of different ages and various stages of maturation might interpret an encounter with law enforcement. Modifying the seizure inquiry to account for the defendant’s age only encourages judges to incorporate vague subjective elements into the analysis and to attempt psychological assessments of a juvenile’s reaction to police presence, which courts are simply ill-equipped to make.<sup>144</sup> In sum, although an individual’s age is in some sense an objective fact if made known to the officer, the use of age as a factor in the seizure inquiry inevitably invites other, potentially subjective factors naturally associated with a person of the defendant’s age to creep into the analysis, shifting focus away from the proper subject of the free-to-leave test—the conduct of the police officer under the circumstances.<sup>145</sup>

Apart from defining age as either subjective or objective, there is an additional common sense consideration in assessing whether the seizure inquiry should be modified for juveniles. For many years, courts have expressed concern that juveniles require additional protections to secure their constitutional rights.<sup>146</sup> Further, psychological studies suggest that juveniles may not share the same sense of autonomy or the decision-making acuity of adults and thus may be unduly influenced by authority figures.<sup>147</sup> These studies have proved persuasive in convincing several state legislatures to protect juveniles from aggressive police interrogation techniques that employ sophisticated methods of psychological coercion to wrestle confessions out of unsuspecting criminal suspects.<sup>148</sup> Although the spontaneity of street encounters with law enforcement ensures such

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person would have believed that he was not free to leave is an objective standard, not subjective.”).

143. See 4 LAFAVE, *supra* note 15, § 9.4(a).

144. See Kessler, *supra* note 71, at 81–87.

145. See 4 LAFAVE, *supra* note 15, § 9.4(a).

146. See *In re Gault*, 387 U.S. 1, 55 (1967) (“[T]he greatest care must be taken to assure that the admission [by a juvenile] was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.”); *Haley v. Ohio*, 332 U.S. 596, 598–601 (1948) (finding that a confession wrestled from a fifteen-year-old boy after five hours of police questioning violated due process rights).

147. See Rosado, *supra* note 69, at 781–95 (discussing various studies and psychological development theories that suggest that adolescents have less ability to understand the consequences of their actions and are more susceptible to coercion by authority figures).

148. See, e.g., N.C. GEN. STAT. § 7B-2101(a) (2009) (mandating heightened protections for juveniles under police interrogations); see also INBAU ET AL., *supra* note 89, at 521 (discussing similar juvenile interrogation statutes in several other jurisdictions).

psychological techniques are unlikely to be used in casual police questioning, the vulnerability of impressionable juveniles in the face of authority remains a potential concern.<sup>149</sup> If, as studies suggest, juveniles are naturally intimidated by police presence, they may not feel comfortable simply walking away from an officer's questions.<sup>150</sup> Does not this fact weigh in favor of differential standards for investigatory stops of juveniles as a matter of common sense?

Such an argument seems compelling, but for one problem: these studies also suggest that the courage to walk away from a police encounter simply does not increase with age.<sup>151</sup> Adults as well as juveniles rarely, if ever, feel truly free to leave.<sup>152</sup> As one commentator has opined, "empirical studies over the last several decades on the social psychology of compliance, conformity, social influence, and politeness have all converged on a single conclusion: the extent to which people feel free to refuse to comply is extremely limited under situationally induced pressures."<sup>153</sup>

Courts and scholars have repeatedly noted that the free-to-leave test is a highly unrealistic judicial construct that stretches credulity to

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149. See Rosado, *supra* note 69, at 781–94.

150. See *id.*

151. See Matthew Phillips, *Effective Warnings Before Consent Searches: Practical, Necessary and Desirable*, 45 AM. CRIM. L. REV. 1185, 1207–08 (2008) (discussing psychological studies that suggest the inherent coercive nature of a police-citizen encounter pressures the majority of adult citizens to acquiesce to demands by police). See generally John M. Burkoff, *Search Me?*, 39 TEX. TECH L. REV. 1109 (2007) (exploring cases and studies in depth and questioning whether citizens really ever give voluntary consent given the psychological and social pressures that accompany a police-citizen encounter).

152. See Denis J. Callahan, *The Long Distance Remand: Florida v. Bostick and the Re-Awakened Bus Search Battlefield in the War on Drugs*, 43 WM. & MARY L. REV. 365, 408 (2001) ("In Milgram's experiments . . . the principal finding was 'the extreme willingness of adults to go to almost any lengths on the command of an authority,' regardless of the ramifications." (citing STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW 5 (1969))); Kessler, *supra* note 71, at 73 (finding that most people do not feel free to leave when stopped and questioned by law enforcement on the street or on a bus and finding that women and adults under twenty-five feel even less free to leave); Daniel L. Rotenberg, *An Essay on Consent(less) Police Searches*, 69 WASH. U. L.Q. 175, 193 (1991) ("Both law and psychology point to the same conclusion—consent in reality is consentless."); Ric Simmons, *Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Search Doctrine*, 80 IND. L.J. 773, 800–17 (2005) (discussing psychological studies on obedience to authority and obedience to uniformed officials that demonstrate the compelling effect of the social authority most people associate with law enforcement) (citing Leonard Bickman, *The Social Power of a Uniform*, 4 J. APPLIED SOC. PSYCHOL. 47, 47 (1974)); see also Maclin, *supra* note 69, at 243–50 (discussing intimidation in police encounters with African American adult males).

153. Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 155–56 (2002) (discussing coerced consent during police encounters in connection with various psychological studies).

its limits in assuming that any reasonable person (young or old; guilty or innocent) would *literally* feel free to leave and ignore a police officer's questions without consequence.<sup>154</sup> But the free-to-leave test was never meant to be taken literally.<sup>155</sup> The test may be artificial, but it is useful insofar as it provides an objective means by which to measure the reasonableness of police conduct.<sup>156</sup> If the free-to-leave test is a fiction for juveniles and adults alike,<sup>157</sup> there is little common sense in interpreting the test literally for juvenile suspects while ignoring whether a suspect literally (or subjectively) felt free to leave in every other context. An officer's bullet is equally deadly to adults and juveniles alike. An officer's handcuffs work just as well to restrain the wrists of adults as well as adolescents. The sense of intimidation associated with an unwelcome encounter with law enforcement and the corresponding ignorance of the right to walk away plagues citizens of all ages.<sup>158</sup> Thus, the argument that juveniles require heightened protections during street encounters with police simply by virtue of psychological pressures or an ignorance of a right to disengage is severely undermined by the fact that most adults feel exactly the same way.<sup>159</sup>

#### IV. UNINTENDED CONSEQUENCES OF THE *IN RE I.R.T.* APPROACH TO JUVENILE STOPS

As explained above, *In re I.R.T.*'s approach to juvenile stops marked a significant departure from the traditional application of the

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154. See, e.g., 4 LAFAVE, *supra* note 15, § 9.4(a) ("Thus, if the ultimate issue is perceived as being whether the suspect 'would feel free to walk away,' then virtually all police-citizen encounters must in fact be deemed to involve a Fourth Amendment seizure. The *Mendenhall-Royer* standard should not be given such a literal reading as to produce such a result." (internal citations omitted)).

155. See *id.*; Kessler, *supra* note 71, at 81–83 (discussing the free-to-leave test and how it has been applied without regard to the reality of how defendants actually felt during the encounter). Further, asking whether a suspect literally felt free to leave requires a far more subjective inquiry into the suspect's state of mind than is called for under the seizure analysis. See *California v. Hodari D.*, 499 U.S. 621, 640 (1991) (Stevens, J., dissenting) (stating the test governing seizures of the person "looks not to the subjective perceptions of the person questioned, but rather, to the objective characteristics of the encounter"); *United States v. Analla*, 975 F.2d 119, 124 (4th Cir. 1992) (stating that the seizure inquiry is "an objective test, not a subjective one"); *State v. Christie*, 96 N.C. App. 178, 184, 385 S.E.2d 181, 184 (1989) ("The *Mendenhall* standard of whether a reasonable person would have believed that he was not free to leave is an objective standard, not subjective.").

156. See LAFAVE, *supra* note 15, § 9.4(a); Kinports, *supra* note 75, at 74.

157. See Kessler, *supra* note 71, at 73.

158. See *id.*; Nadler, *supra* note 153, at 155–56.

159. See Nadler, *supra* note 153, at 155–56. *But see* Rosado, *supra* note 69, at 770–96 (arguing that psychological studies of adolescents provide a basis for adjusting the reasonable person standard to account for age and immaturity).

free-to-leave test by considering the age of the defendant in the seizure inquiry.<sup>160</sup> The result was a reorientation of the seizure analysis that shifted focus away from an objective assessment of the officer's conduct to focus instead on the juvenile's subjective perceptions. Thus, the trigger for constitutional protections became not what the officer *did*, but *who* the officer approached. What follows catalogues some of the unintended consequences that flow from differential standards for stops of juveniles and concludes that *In re I.R.T.*'s modification of the free-to-leave test demands reconsideration.

A. *Age, If Considered, Will Almost Always Prove Determinative in the Seizure Inquiry*

First, the court's novel approach to investigative stops has the unintended consequence of expanding Fourth Amendment protections to almost any police-juvenile encounter because the suspect's age, if considered, will inevitably prove determinative in the seizure analysis. Although the free-to-leave test traditionally considers surrounding circumstances to determine if a reasonable person would feel free to leave,<sup>161</sup> *In re I.R.T.* held age to be a distinct factor, thereby reorienting the seizure analysis to take account of a juvenile's perspective.<sup>162</sup> However, the court offered no guidance on how officers should (or even could) adjust their conduct or questioning when approaching a juvenile suspect so as to avoid a coercive show of authority. It remains maddeningly unclear how an officer may rephrase her questions or requests to appropriately and reasonably interact with a juvenile suspect under *In re I.R.T.* without invoking the Fourth Amendment. Is "please remove the object from your mouth" too commanding for a juvenile? Will some other platitude suffice?

The result of this ambiguity is that age becomes a wild card in the seizure analysis. As a practical matter, age will only enter the seizure inquiry in close cases, because encounters in which an officer clearly displays physical force or makes coercive commands will be deemed a

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160. *See supra* Part I.

161. *See* *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) ("We conclude that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.").

162. *In re I.R.T.*, 184 N.C. App. 579, 584, 647 S.E.2d 129, 134 (2007) ("Thus, we hold that the age of a juvenile is a relevant factor in determining whether a seizure has occurred within the meaning of the Fourth Amendment.").

seizure regardless.<sup>163</sup> If the judge finds it necessary to consider a defendant's age in a particular case, it will inevitably prove determinative and thereby encourage a precedent that could transform virtually any police-juvenile encounter into an investigatory stop. If taken to its logical conclusion, therefore, *In re I.R.T.* would require police officers first to have reasonable suspicion of criminal activity before even casually questioning any juvenile on the street. As explained below, such sweeping changes to the pre-adjudicative process for juvenile defendants suggests that the modification of the free-to-leave test to account for age is a task that is best left to the legislature rather than the courts.

A careful reading of *In re I.R.T.*'s holding reveals that the defendant's age ultimately proved determinative in the court's seizure analysis. Apart from the defendant's age, the court pointed to only three other factors to support its finding that the officer's show of authority constituted an investigatory stop: (1) two officers arrived on the scene in marked cars; (2) one officer's holstered gun was visible; and (3) the officers wore shirts with a gang unit emblem.<sup>164</sup> However, each of these factors has been rejected by the United States Supreme Court and the Supreme Court of North Carolina as significant indicia of a seizure under the free-to-leave test.<sup>165</sup>

In *United States v. Drayton*,<sup>166</sup> the United States Supreme Court held that citizens were not seized when three armed police officers displayed their badges and requested in a nonthreatening tone that bus passengers consent to a search.<sup>167</sup> Further, the Court noted that even though the officers were visibly armed, that fact alone would not be given much weight in determining whether consent was coerced.<sup>168</sup> In fact, the Court went so far as to assert that the presence of uniformed, visibly armed officers "is cause for assurance, not discomfort."<sup>169</sup> As Justice Kennedy explained, "[t]hat most law enforcement officers are armed is a fact well known to the public. The presence of a holstered firearm thus is unlikely to contribute to the coerciveness of the encounter absent active brandishing of the

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163. See 4 LAFAVE, *supra* note 15, § 9.4(a).

164. *I.R.T.*, 184 N.C. App. at 584, 647 S.E.2d at 134.

165. *United States v. Drayton*, 536 U.S. 194, 204–05 (2002); *State v. Farmer*, 333 N.C. 172, 187, 424 S.E.2d 120, 129 (1993); see, e.g., *California v. Hodari D.*, 499 U.S. 621, 638 (1991) (Stevens, J., dissenting) (describing the limited examples in which the Court has found a seizure of the person).

166. 536 U.S. 194 (2002).

167. *Id.* at 203.

168. *Id.* at 204–05.

169. *Id.* at 204.

weapon.”<sup>170</sup> As the officer’s weapon was not removed from its holster or used to threaten the suspects, the Court concluded the encounter did not constitute a seizure under the free-to-leave test.<sup>171</sup>

*Drayton* helps to illuminate the dispositive weight the *In re I.R.T.* court placed on age.<sup>172</sup> In contrast to *Drayton*, *In re I.R.T.* involved only two officers who merely wore a gang emblem on their shirts rather than displaying a badge.<sup>173</sup> Further, no evidence suggests the officers brandished weapons or used a threatening tone when they requested that I.R.T. remove the object from his mouth.<sup>174</sup> Lastly, the officers encountered I.R.T. in an open space outside an apartment complex, rather than inside the confines of a bus.<sup>175</sup> As *Drayton* clearly holds that requests made by uniformed, armed police officers do not result in a seizure,<sup>176</sup> I.R.T.’s age emerges as the determinative factor since the other circumstances of the encounter would not otherwise suffice to invoke the Fourth Amendment. Had the officers approached a defendant just a few years older and proceeded to ask the exact same questions under the exact same circumstances, the constitutional protections afforded I.R.T. would disappear.

Similarly, in *State v. Farmer*<sup>177</sup> the Supreme Court of North Carolina held that no seizure occurred when two officers in a patrol car stopped a man walking along the side of the road and engaged him in conversation.<sup>178</sup> After a few minutes of questioning, the officers asked the defendant to sit and wait in the squad car until other investigators could join them, and the defendant complied.<sup>179</sup> The court determined there was no seizure despite the number of officers present at the scene, the arrival of the officers in a vehicle while the defendant was on foot, and the officers’ request that the defendant wait for a period of time in the police car.<sup>180</sup>

A comparison of the factors considered in *Farmer* and the factors considered in *In re I.R.T.* yet again reveals the dispositive weight the court attached to I.R.T.’s age. *Farmer* involved only one suspect

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170. *Id.* at 205.

171. *Id.*

172. *See In re I.R.T.*, 184 N.C. App. 579, 584, 647 S.E.2d 129, 134 (2007).

173. *Id.*

174. *Id.* at 581, 647 S.E.2d at 132. In *Drayton*, Justice Kennedy explained, “[i]t is beyond question that had this encounter occurred on the street, it would be constitutional.” *Drayton*, 536 U.S. at 204.

175. *I.R.T.*, 184 N.C. App. at 581, 647 S.E.2d at 132.

176. *Drayton*, 536 U.S. at 204–05.

177. 333 N.C. 172, 424 S.E.2d 120 (1993).

178. *Id.* at 180, 424 S.E.2d at 125.

179. *Id.* at 182, 424 S.E.2d at 126.

180. *Id.* at 187, 424 S.E.2d at 129.

outnumbered by multiple police officers,<sup>181</sup> whereas *In re I.R.T.* involved two officers who approached a group of teenagers.<sup>182</sup> Further, the requests made of the suspect in *Farmer* constituted a far greater intrusion on the suspect's freedom of movement than under *In re I.R.T.*, where the officer simply requested that the juvenile spit out what was in his mouth as he spoke.<sup>183</sup> Thus, consideration of the defendant's age in the seizure analysis ultimately proved dispositive and drastically changed the result.

The *In re I.R.T.* court's approach to juvenile stops is subtle, but has a significant effect: police conduct that otherwise would not constitute an investigative stop does when the defendant is a juvenile. Age inevitably proves determinative in the seizure inquiry because the same police conduct will have different constitutional consequences depending on the juvenile status of the defendant. Under the *In re I.R.T.* court's analysis, it would appear that whenever a minor is approached by more than one police officer possessing a holstered weapon and brandishing no more than questions or requests, the protections of the Fourth Amendment are immediately triggered.<sup>184</sup> As police often work in pairs, are often armed, and often wear uniforms,<sup>185</sup> the unintended consequence of the court's approach is to automatically transform almost any casual police encounter with a juvenile into an investigatory stop, as the officer's conduct will likely be construed as a show of authority.<sup>186</sup> However, if police approach a defendant who has reached the age of majority, those constitutional protections evaporate and the officer is permitted to ask the same questions, make the same requests, and obtain a consensual search free of coercion.<sup>187</sup> Thus, the court's approach disproportionately expands Fourth Amendment protections exclusively for juveniles despite the fact that minors are no less capable of criminal activities like drug trafficking than those who have reached the age of majority.<sup>188</sup>

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181. *Id.* at 180–84, 424 S.E.2d at 125–27.

182. *In re I.R.T.*, 184 N.C. App. 579, 581, 647 S.E.2d 129, 132 (2007).

183. *Id.*

184. *See id.* at 584–85, 647 S.E.2d at 134.

185. *See, e.g.*, *United States v. Drayton*, 536 U.S. 194, 204–05 (2002) (“Officers are often required to wear uniforms . . . . That most law enforcement officers are armed is a fact well known to the public.”).

186. *See* CLANCY, *supra* note 42, § 5.1.4.1.3 n.68.

187. *See id.*

188. *See, e.g.*, ARNOLD BINDER ET AL., *JUVENILE DELINQUENCY: HISTORICAL, CULTURAL AND LEGAL PERSPECTIVES* 10–23 (3d ed. 2001) (summarizing data on the extent of criminal activity by juveniles).

The potential for conflict between the *In re I.R.T.* court's novel approach to juvenile stops and the traditional presumption that not all police-juvenile encounters qualify as seizures<sup>189</sup> also suggests that the modification of the seizure analysis to account for age is a matter best left to the General Assembly, rather than the courts. At the close of the nineteenth century, state legislatures across the country (including North Carolina) began enacting statutory juvenile justice codes that established a nonadversarial, civil judicial proceeding that aimed at rehabilitation of juvenile offenders rather than punishment.<sup>190</sup> In keeping with the "protective rather than the punitive nature of the juvenile process,"<sup>191</sup> the role of law enforcement officers in handling juveniles has traditionally been seen as a paternalistic one in which police are encouraged to interact with juveniles to promote discipline and safety.<sup>192</sup> For example, the North Carolina Juvenile Code provides that a law enforcement officer may take a juvenile into "temporary custody" if the officer reasonably believes the individual is an "undisciplined juvenile."<sup>193</sup> The term "undisciplined juvenile" is broadly defined to include activities that are well outside the realm of the criminal law as applied to adults.<sup>194</sup> In particular, this provision permits law enforcement officers to temporarily detain juveniles who are "regularly disobedient" or who have simply run away from home.<sup>195</sup> Thus, the General Assembly's statutory scheme for juvenile offenders seems to contemplate and encourage a broader range of interactions between police officers and juveniles in an effort to promote the best interest of the child and preempt the social evils that lead to delinquency.<sup>196</sup>

As explained above, however, the *In re I.R.T.* court's modification of the free-to-leave test has the effect of increasing the frequency with which courts will find that a police encounter with a juvenile was so inherently coercive as to rise to the level of an investigatory stop.<sup>197</sup> Thus, the court's approach to juvenile stops

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189. See CLANCY, *supra* note 42, § 5.1.1.3.

190. See, e.g., SAMUEL M. DAVIS, RIGHTS OF JUVENILES 1–8 (2d ed. 2009). In North Carolina, a separate court system for juveniles was first created in 1915. Act of Mar. 9, 1915, ch. 222, § 2, 1915 N.C. Pub. Laws 294. The modern version of North Carolina's juvenile justice code was adopted in 1979. 1979 N.C. Sess. Laws 966.

191. DAVIS, *supra* note 190, at 60–68.

192. *Id.*

193. N.C. GEN. STAT. § 7B-1900 (2009).

194. *Id.*

195. N.C. GEN. STAT. § 7B-1501(27) (2009).

196. See, e.g., N.C. GEN. STAT. § 7B-1500 (2009); *In re Shue*, 63 N.C. App. 76, 81, 303 S.E.2d 636, 639 (1983); *In re Wichard*, 8 N.C. App. 154, 161, 174 S.E.2d 281, 285 (1970).

197. See *supra* notes 161–88 and accompanying text.

actually discourages rather than encourages casual police interactions with juveniles on the street—a result that seems at odds with the legislative policies underpinning the code that aimed at a less adversarial approach to juvenile justice.<sup>198</sup> As *In re I.R.T.* poses potential conflicts with the General Assembly’s carefully crafted statutory scheme for juvenile offenders, fundamental changes to the pre-adjudicative process of juvenile defendants—such as imposing differential standards for juvenile stops—are better left to the judgment of the legislature rather than the courts.<sup>199</sup>

*B. Fostering Uncertainty in Police Investigations*

A second unintended consequence of differential standards for juvenile stops is the fostering of uncertainty in police investigations. By giving dispositive weight to the defendant’s age, the court categorically lowers the threshold for the invocation of constitutional protections in only one context: the casual police questioning of juveniles. However, for police patrolling their beat it is not always possible to distinguish clearly between juveniles and young adults.<sup>200</sup> The effect is to infuse a dangerous level of doubt and hesitation in law enforcement, as police officers are forced to guess as to when their conduct will implicate Fourth Amendment protections.<sup>201</sup> As the work of police officers in the field becomes more difficult, the safety of all citizens is reduced.<sup>202</sup>

Under *In re I.R.T.’s* approach, officers will have to determine if an individual is a minor before approaching them on the street in order to effectively comply with the differential standards for juvenile

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198. See N.C. GEN. STAT. § 7B-1500 (2009); DAVIS, *supra* note 190, at 60–69, 77–85.

199. In fact, the juvenile code itself provides some support for the notion that establishing differential standards for juveniles under the seizure analysis is better conceived as a legislative rather than judicial task. For example, under § 7B-2101, the General Assembly specifically addressed mandatory procedures for police interrogations of juveniles. See N.C. GEN. STAT. § 7B-2101 (2009). This special legislative adjustment of the pre-adjudicative process requires that if a juvenile suspect is less than fourteen years of age, no confession may be admitted into evidence unless the juvenile’s parent or guardian was present during police interrogations. *Id.* As the General Assembly saw it as its prerogative to step in and provide specific mandates for juveniles in the interrogation context, it seems that other changes to the pre-adjudicative process of juvenile defendants (like differential standards for seizures of juveniles) are likewise better left to the General Assembly.

200. See, e.g., *In re J.M.*, 619 A.2d 497, 501 n.5 (D.C. 1992) (acknowledging that the officer was not even questioned whether he recognized the appellant to be a juvenile or young adult when he approached him and conversed with him).

201. See CLANCY, *supra* note 42, § 5.1.4.1, at 163 (quoting *Michigan v. Chesternut*, 486 U.S. 567, 575 (1988)).

202. See *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

stops. Although the age of young children is very apparent, it is unlikely officers would have a need to interrogate young children. Adolescents pose the biggest problem, as common sense suggests some adolescents will appear older while others will appear younger than they really are. As an officer cannot accurately gauge the age of a suspect upon first approach, the officer has no way of knowing whether her questions will constitute a display of coercive authority, thereby implicating the Fourth Amendment.<sup>203</sup> The officer is forced to guess and may guess wrong in either direction. For example, the officer may approach a citizen that easily passes for a male in his twenties and engage him in conversation. Yet, if the citizen is in reality a minor, a court following *In re I.R.T.* may be inclined to hold the encounter constituted an investigatory stop and exclude from trial the results of the officer's investigation.<sup>204</sup> On the other hand, an officer may wrongly guess that an adult is an adolescent and thereby avoid questioning that individual altogether or temper her questioning to such an extent that the investigation becomes ineffective. Such uncertainty and vacillation in law enforcement investigations could place at risk the safety and security of many communities.<sup>205</sup>

As courts and commentators have repeatedly emphasized, effective law enforcement needs clear, uniform standards to guide officers' conduct that are " 'consistent in application from one police encounter to the next' and permit[] police 'to determine in advance whether the conduct contemplated will implicate the Fourth Amendment.' "<sup>206</sup> The analysis must remain objective because a police officer must be able to predict in advance whether or not her actions will escalate the encounter into an investigative stop.<sup>207</sup> If the test loses its objectivity, it becomes meaningless as a gauge of what police conduct will or will not implicate those constitutional protections. The result is a lack of uniformity in police behavior in the field which renders police conduct far more difficult for courts to evaluate objectively. Thus, differential standards for investigatory stops only increase uncertainty among police and ambiguity for the

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203. See 4 LAFAVE, *supra* note 15, § 9.4(a).

204. See CLANCY, *supra* note 42, § 1.2.3.

205. See, e.g., *Mendenhall*, 446 U.S. at 554.

206. 4 LAFAVE, *supra* note 15, § 9.4(a), at 416 (citing *Michigan v. Chesternut*, 486 U.S. 567, 575 (1988)).

207. See *California v. Hodari D.*, 499 U.S. 621, 641 (1991) (Stevens, J., dissenting) (citing *Michigan v. Chesternut*, 486 U.S. 567, 574 (1988)).

courts interpreting their behavior, thereby decreasing effective deterrence of abusive police practices.<sup>208</sup>

Moreover, the *In re I.R.T.* court's approach dramatically limits law enforcement investigation of criminal activity by minors because valid consensual searches become more difficult in the wake of heightened ambiguity as to when police interactions with juveniles will constitute a show of authority.<sup>209</sup> Given the determinative weight the *In re I.R.T.* court placed on age, it is hard to imagine many scenarios where a uniformed police officer with a holstered gun may ask questions of a juvenile and not implicate constitutional protections.<sup>210</sup> Thus, *In re I.R.T.*'s approach threatens to eliminate one highly effective and heretofore frequently employed police investigation technique: eliciting cooperation by juveniles and their consent to a search.<sup>211</sup> If a street encounter between the police and a juvenile is as inherently coercive as the *In re I.R.T.* court suggests, there seem to be few opportunities for an officer to obtain a juvenile's voluntary consent to a search.<sup>212</sup> Moreover, should the encounter be deemed an investigatory stop for which the officer lacked reasonable suspicion, evidence obtained from what the officer believed to be a consensual search will likely be suppressed.<sup>213</sup> Thus, the modification of the free-to-leave test to account for age presents significant substantive and procedural obstacles to police investigation of crime by blurring the line between the legal formulae for consent to a search versus the seizure of the person.<sup>214</sup> Differential standards for juvenile stops increase uncertainty for officers in the field, thus decreasing our collective security.<sup>215</sup> Further, such a differential approach would make uniform standards of police behavior

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208. See 4 LAFAVE, *supra* note 15, § 9.4(a).

209. See CLANCY, *supra* note 42, § 5.1.4.1.2 n.68.

210. See *supra* Part IV.A.

211. See CLANCY, *supra* note 42, § 10.4.1 (noting that consensual searches are "one of the most common of all searches").

212. See *id.* ("The only situations where lack of consent has been found [based on the characteristics of the suspect] are those where some form of coercion or assertion of authority served to negate any 'consent.'").

213. Commentators have noted that "[t]he evidence subject to exclusion includes direct evidence and evidence obtained through the exploitation of the illegal conduct known as the 'fruit of the poisonous tree.'" PARSONS, *supra* note 41, at 77-86 (quoting *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963)).

214. The consent inquiry and the seizure inquiry are often confusingly intermingled because both inquiries often involve the very same set of facts. See CLANCY, *supra* note 42, § 10.4.2.1.

215. 4 LAFAVE, *supra* note 15, § 9.4(a).

impossible, thereby rendering police conduct more difficult to evaluate and abusive practices more difficult to deter.

C. *Establishing a “Slippery Slope” Precedent*

Lastly, the *In re I.R.T.* court’s approach to the free-to-leave test has the potential to lead Fourth Amendment jurisprudence in North Carolina down a slippery slope.<sup>216</sup> If age is assumed a relevant consideration in determining when a reasonable person would feel free to disengage from police questioning, the floodgates open for other individual characteristics to be explicitly incorporated into the analysis, such as race, gender, economic status, and intelligence quotient.<sup>217</sup> As Professor LaFave has stated, “use of a ‘reasonable youth’ test would doubtless prompt imaginative defense counsel to seek recognition in other cases of ‘reasonable woman,’ ‘reasonable black’ . . . and similar variations.”<sup>218</sup> Each of these minority groups can point to empirical evidence supporting an argument for differential treatment under the seizure analysis that is just as legitimate (if not more legitimate) than that of juveniles.<sup>219</sup> For example, commentators have suggested that police encounters with adult African American males often invoke measurably more anxiety, tension, and intimidation.<sup>220</sup> If adolescents are afforded differential treatment because they are more susceptible to police intimidation, there seems to be little reason not to extend differential standards to racial groups who similarly experience heightened pressures when questioned by police.<sup>221</sup> Further, it could be argued that women or the elderly may feel less free to leave when approached by uniformed police officers than would other reasonable people.<sup>222</sup> Should not their feelings be accounted for as well?

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216. *See id.* (questioning whether consideration of age in the seizure analysis would lead to a “slippery slope, necessitating attention to other varieties of special vulnerability”).

217. *Id.*

218. *Id.*

219. *See, e.g., id.* (citing cases regarding stops of minority groups); Maclin, *supra* note 69, at 250 (discussing police stops of African Americans). Even in ruling on the constitutionality of “stop and frisks” by police, the Supreme Court acknowledged that minority groups generally (and African Americans particularly) often complain of “wholesale harassment by certain elements of the police community.” *Terry v. Ohio*, 392 U.S. 1, 14 (1967).

220. *See, e.g.,* 4 LAFAVE, *supra* note 15, § 9.4(a); Maclin, *supra* note 69, at 250 (discussing whether race should matter in the seizure analysis); Thompson, *supra* note 8, at 983–93 (discussing racially motivated police stops and interpreting social science data).

221. *See* Maclin, *supra* note 69, at 250.

222. *See* 4 LAFAVE, *supra* note 15, § 9.4(a).

Although questions of social justice and fairness in law enforcement are of profound importance, little can be gained on that front by attempts to refashion the reasonable person standard as an instrument of political correctness. If all of these individual variations are taken into account in the seizure analysis, the free-to-leave test would be rendered essentially meaningless and unworkable as a gauge of appropriate police conduct.<sup>223</sup> By what measure can courts accurately and fairly differentiate between police questioning of suspects that are female rather than male, African American rather than Latino, or thirteen rather than sixteen years old? The benefits of an objective test that supplies uniform standards of police behavior to deter police abuses outweigh the cost of failing to recognize that individuals have disparate subjective reactions to police presence. Drawing a clear and consistent distinction between a consensual police-citizen encounter and an investigatory stop is essential if courts are to distinguish legitimate law enforcement practices necessary for effective criminal investigations from the unreasonable intrusions on our privacy and autonomy prohibited by the Fourth Amendment.<sup>224</sup> The over-subjectification of the free-to-leave test renders both the prevention of crime as well as the prevention of police abuse of the innocent more difficult by forcing law enforcement to guess as to whether their actions or questions on particular occasions with particular classes of citizens are constitutionally permissible.<sup>225</sup> As the Court in *Mendenhall* noted,

characterizing every street encounter between a citizen and the police as a “seizure,” while not enhancing any interest secured by the Fourth Amendment, would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices . . . “without such investigation, those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved. In short, the security of all would be diminished.”<sup>226</sup>

As police need flexibility to effectively investigate and deter crime in the field, an objective test remains a necessity to provide practical guidance as to what police conduct will or will not implicate

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223. See *United States v. Mendenhall*, 446 U.S. 544, 554 (1980); 4 LAFAVE, *supra* note 15, § 9.4(a).

224. See *California v. Hodari D.*, 499 U.S. 621, 635–36 (1991) (Stevens, J., dissenting).

225. See *id.* at 641 (citing *Michigan v. Chesternut*, 486 U.S. 567, 574 (1988)).

226. *Mendenhall*, 446 U.S. at 554 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973)).

constitutional protections.<sup>227</sup> Establishing differential standards for juveniles creates a slippery slope that risks subjectifying the free-to-leave test to such an extent that it would become a hollow measure of appropriate police behavior and far less effective as a tool to combat abuses of police power.

#### CONCLUSION

In sum, the court's decision in *In re I.R.T.* represents a subtle yet significant break with traditional Fourth Amendment analysis by considering a suspect's age to be relevant, if not determinative, in the seizure inquiry. The subjectification of the free-to-leave test to account for individual variations lingers as a tempting yet specious remedy for the admitted artificiality of a legal test that assumes any person would feel free to disengage from police questioning without consequence. Unexpected encounters with law enforcement are often a source of anxiety and intimidation. Further, the level of intimidation an individual experiences derives from multiple sources, some of which may very well reflect the greater evils of injustice and inequality in our society. However, courts must be cautious. The free-to-leave test is not and was never meant to be a platform for social justice concerns nor an accurate reflection of human psychology. Rather, it serves as a simple tool to gauge objectively the contours of appropriate police conduct. The problems that inevitably result from subjectifying the seizure inquiry are exemplified here: imposing differential standards for investigatory stops to account for age exponentially increases the circumstances in which a police-juvenile encounter will be deemed a seizure. Further, the court's approach fosters uncertainty by forcing police to guess when their conduct is reasonable under the Fourth Amendment thereby frustrating police investigatory techniques essential to effective deterrence of crime. Lastly, the court's approach to juvenile stops establishes a slippery slope precedent that encourages overreaching by judges to incorporate other individual variations into the seizure analysis that risk rendering the test meaningless as a gauge of proper police conduct and ineffective as a check on abusive police behavior. Given the unintended consequences resulting from the court's modification of the seizure analysis, a reconsideration of *In re I.R.T.*'s holding is already overdue.

JONATHAN S. CARTER

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227. See 4 LAFAYE, *supra* note 15, § 9.4(a).