

# THE HIDDEN PSYCHOLOGY OF CONSTITUTIONAL CRIMINAL PROCEDURE

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*There is extensive empirical evidence establishing the difference in men’s and women’s speech patterns, conduct, and perceptions of, and responses to, police authority. Yet these differences are rarely reflected in constitutional criminal procedure law, despite many of its rules hinging on a person’s manner of expression or subtleties of behavior. Similar evidence exists for the systematic impact of juvenile status and intellectual disability, but only modest and ad hoc consideration has been given to these factors. The result is that the “reasonable person” is actually implicitly white, male, adult, and able-minded. His speech and conduct are treated as normal, and the different speech and conduct of women, juveniles, and the intellectually disabled is not incorporated into the doctrine. Consequently, those individuals have diminished rights under the law. The solution is simple yet profound: courts should account for apparent and relevant subjective characteristics in their reasonable person and totality of the circumstances analyses. Applied consistently, this solution would not only improve equity, but also would bring clarity to the doctrinal chaos that has resulted from the Supreme Court’s and lower courts’ erratic consideration of subjectivity throughout constitutional criminal procedure law.*

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## INTRODUCTION

The law of constitutional criminal procedure, which treats men and women as the same, is at odds with the extensive empirical psychological evidence showing that men and women behave and express themselves differently from one another. Studies show that women and men have developed different verbal lexicons, wherein “women’s speech” is indirect and polite.<sup>1</sup> In general,<sup>2</sup> women—along with other less powerful groups—tend to employ more hedging<sup>3</sup> and modal language<sup>4</sup> that qualifies rather than strengthens their sentiments,

<sup>1</sup> Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259, 263, 271 n.30 (1993). This female register is also sometimes termed “powerless speech” because of its prevalence among the weaker positioned individual in gender-neutral confrontations. See discussion *infra* Section I.A.1.

<sup>2</sup> Studies have shown systematic differences between men and women, but there is, of course, significant variation within each group. For example, some of these differences co-vary with class differences. See discussion *infra* Section I.A.

<sup>3</sup> Hedging takes the form of pauses in speech and qualified language, such as “kind of” or “sort of.” Ainsworth, *supra* note 1, at 275–76.

<sup>4</sup> Modal language consists of conditional language, such as “may” and “ought,” which work to soften assertions. *Id.* at 280.

use tag questions<sup>5</sup> that request validation rather than express certainty, and adopt intonations<sup>6</sup> that infuses doubt and politeness into their statements. For many men, the opposite is true: they tend towards assertive, bold language that manifests in imperative commands and direct statements or questions.<sup>7</sup> Differences between genders also manifest in nonverbal conduct: psychological differences affect men and women's abilities or tendencies to physically assert themselves in the face of authority. Studies in psychological reactance—a measure of people's responses to threats to their liberty—as well as studies on confidence and risk-taking, confirm that gender contributes to an individual's compliance with or defiance of authority.<sup>8</sup> These studies suggest that men may be more willing to challenge authority and terminate a police-citizen encounter, whereas women are more likely to feel compelled to submit to authority and to continue participating in the interaction even when it is against their best interests.

This creates a problem in constitutional criminal procedure law because the doctrinal tests ignore these empirically established gendered predispositions, and, in doing so, embrace a male approach. For example, a female under interrogation is likely to phrase her request for counsel as “Maybe I should have a lawyer present” or “I ought to have an attorney here, right?” But Supreme Court precedent requires that a request to speak to an attorney be “unambiguous.”<sup>9</sup> Without an unambiguous invocation, interrogations continue, and a woman's statements can be admitted into evidence. Similarly, when physical rights-assertions are legally relevant, such as when assessing seizures and consent under the Fourth Amendment, the Court does not consider any subjective characteristics<sup>10</sup> relevant to an individual's self-advocacy.

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<sup>5</sup> Tag questions are not so much questions as they are statements that tack on a request for validation at the end: “The bus is yellow, isn't it?” *Id.* at 277–79.

<sup>6</sup> An example of this kind of intonation is the rising of the tone of voice at the end of a statement, which makes the statement sound like a question. *Id.* at 282.

<sup>7</sup> *Id.* at 262.

<sup>8</sup> See Hannah Riley Bowles, *Psychological Perspectives on Gender in Negotiation*, in THE SAGE HANDBOOK OF GENDER AND PSYCHOLOGY 465, 466 (Michelle K. Ryan & Nyla R. Branscombe eds., 2013) (finding that women are less likely to advocate for their interests under the stress of a third-party evaluator); Kevin M.P. Woller et al., *Psychological Reactance: Examination Across Age, Ethnicity, and Gender*, 120 AM. J. PSYCHOL. 15, 16 (2007) (finding that men have higher reactance levels than women, which directly influences “how people handle rules and comply with requests”).

<sup>9</sup> See *Davis v. United States*, 512 U.S. 452, 459–62 (1994) (holding that to invoke the right to counsel, the detainee must make an “unambiguous or unequivocal request”). For a discussion of problems with this and similar tests that arise even from the perspective of the white, adult, fully able male, see Tonja Jacobi, *Miranda 2.0*, 50 U.C. DAVIS L. REV. (forthcoming Nov. 2016).

<sup>10</sup> Subjective characteristics can in fact be objectively true or false. For instance, a person's age is an objective fact, but this kind of characteristic is nonetheless ordinarily called

Instead, the Court looks to the objective circumstances of the police-citizen interaction and asks whether the reasonable person, standing in for the citizen-subject, would have felt free to terminate the encounter under the circumstances.<sup>11</sup> However, when a police officer confronts a female citizen on the street, she is more likely to remain engaged with the officer because she believes she is obligated to do so. A male citizen, on the other hand, would typically feel more confident to refuse to answer the officer's questions, ask if he is required to answer, walk away from the officer, or otherwise end the encounter.

The consent, seizure, invocation, and waiver doctrines depend upon verbal rights-assertions, and the seizure and consent doctrines depend on physical (or verbal) rights-assertions. The differences between genders that manifest in different verbal and physical conduct thus affect individuals' interactions with law enforcement and sometimes even affect the outcome of a case.

Equivalent differences between the responses of people of different races have been convincingly established, and the impact of racial divergences on police-citizen interactions has been well canvassed.<sup>12</sup> Yet, the same analysis has not been applied to gender, despite its strong similarities to race. Differences between the genders' speech and psychological tendencies, and how those differences affect responses to authority, has been well documented in the psychology literature,<sup>13</sup> but the legal literature has given almost no consideration to the effect of these differences on police-citizen interactions.<sup>14</sup> For this reason, this Article focuses on gender and other like characteristics, and not on the impact of race. However, the proposal in this Article can provide as much of a solution to the divergent impact of race as it can for gender. This is because there is a more generalized disconnect within constitutional criminal procedure jurisprudence: its doctrines hinge upon individuals' attitudes and behaviors, which are dramatically shaped by characteristics to which the jurisprudence is designedly blind.

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"subjective" because it refers to the specific characteristics of the individual, which can influence the presumed action of the objective reasonable person.

<sup>11</sup> See *Florida v. Bostick*, 501 U.S. 429, 436 (1991) (formulating the "free to decline the officers' requests or otherwise terminate the encounter" seizure standard); *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (plurality opinion) (crafting the "free to leave" seizure standard).

<sup>12</sup> See, e.g., Devon W. Carbado, (*E*)racing the Fourth Amendment, 100 MICH. L. REV. 946, 1013-14 (2002) ("[P]eople of color are less likely than whites to assert their constitutional rights. Part of their racial socialization will include the idea that, in the context of encounters with the police, they should comport themselves (a) to signal racial respectability and (b) to make the officers racially comfortable.").

<sup>13</sup> See *infra* Section I.A.

<sup>14</sup> See, e.g., David K. Kessler, *Free to Leave? An Empirical Look at the Fourth Amendment's Seizure Standard*, 99 J. CRIM. L. & CRIMINOLOGY 51 (2009).

The doctrinal tests strip away the citizen's relevant subjectivity by using an objective ruler—either the “reasonable person” or a reasonableness-infused “totality of the circumstances” inquiry<sup>15</sup>—to measure whether a constitutional violation has occurred.

The current approach of the Supreme Court is to refuse to recognize the effect of gender in the operation of these doctrines.<sup>16</sup> Simultaneously, it gives variable consideration to other relevant subjective characteristics, but only in a limited number of ad hoc circumstances. Empirical analysis of the psychological effect of age and intellectual disability has led the Court to consider those factors in its death penalty analysis,<sup>17</sup> to require consideration of a juvenile suspect's age in an in-custody determination,<sup>18</sup> and to require consideration of the juvenile suspect's age in its warrantless search-in-school analysis.<sup>19</sup> But when it comes to seizures, requests for consent, and in-custody waiver and invocation, neither age nor intellectual ability are considered,<sup>20</sup> despite their equivalent relevance. Moreover, gender's effect on the police-citizen dynamic closely mirrors the effects of age and intellectual ability,<sup>21</sup> but the Court has failed to recognize the doctrinal parallel. This failure to account for the subjective characteristics that affect the police-citizen dynamic when analyzing a particular police-citizen interaction effectively conditions rights on conformity with male, adult, able-minded modes of behavior. Women, youth, and the intellectually disabled have constitutional rights only to the extent that they act like adult, able-minded men.

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<sup>15</sup> See, e.g., *Mendenhall*, 446 U.S. at 554 (using the reasonable person and totality of the circumstances inquiry in a seizure case); *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973) (using the totality of the circumstances inquiry in a consent case); *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968) (using the reasonable person inquiry in a seizure case).

<sup>16</sup> See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); see also discussion *infra* Part II (collecting and discussing the jurisprudence). Some lower courts have agreed that gender is relevant in the employment discrimination context. See discussion *infra* Section II.A.5.

<sup>17</sup> See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002).

<sup>18</sup> See, e.g., *J.D.B. v. North Carolina*, 564 U.S. 261 (2011).

<sup>19</sup> See, e.g., *T.L.O.*, 469 U.S. at 342. The Court also specified consideration of the student's sex in assessing the degree of intrusiveness of the search, *id.*, but this consideration has limits. *Id.* at 381–82 (Stevens, J., concurring in part and dissenting in part) (stating about the application of the reasonableness standard that “to permit a male administrator to rummage through the purse of a female high school student in order to obtain evidence that she was smoking in a bathroom[ ] raises grave doubts in my mind”).

<sup>20</sup> See sources cited *supra* note 11.

<sup>21</sup> This Article does not compare gender, age, and intellectual ability to lump these categories together for psychological purposes. Rather, it looks to the psychological similarities between these groups in terms of how members of each group assert their rights—or don't—in the face of authority, specifically law enforcement, to reveal the doctrinal inconsistency in constitutional criminal procedure, and to show how unnecessary the doctrinal eschewal of gender consideration is.

This Article provides an in-depth analysis of how gender affects individuals' responses in ways that are central to, yet ignored by, the jurisprudence.<sup>22</sup> It then shows how a similar analysis can also be undertaken for juvenile status and intellectual disability, and illustrates how the Supreme Court has been highly inconsistent in considering these characteristics. Ultimately, we present a generalized solution, with a hybrid objective-subjective standard that applies consistently across a range of doctrines that currently constitute an absurdly motley collection of tests. The Article also shows how characteristics can be assessed to determine whether they ought to be included in the objective-subjective standard.

This proposed new standard incorporates the objective measure from the courts' current reasonableness inquiries, but considers relevant subjective characteristics apparent to the officer at the time of the police-citizen interaction, and for which substantial evidence exists of having a systematic effect on individuals' perceptions and behavior. In other words, our proposal envisions that these tests must account for a defendant's apparent, relevant subjective characteristics when evaluating the constitutionality of police-citizen interactions.<sup>23</sup> This will fix both the gender inconsistency at the center of our analysis and a much larger lack-of-uniformity problem affecting constitutional criminal procedure doctrines as a whole.

Currently, constitutional criminal procedure consists of a multitude of subjective, objective, and mixed subjective-objective tests (from both a defendant's and an officer's perspective). This makes the law as a whole appear arbitrary and illogical because the instances of subjective considerations are scattered and inconsistent. It also makes the Court's primary justification for disregarding subjective characteristics—not wanting to shackle the police<sup>24</sup>—all the more inappropriate, as the Court has already introduced enormous variation.<sup>25</sup> Our proposed standard calls for subjective variation when

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<sup>22</sup> Significantly, our discussion of gender differences relies in large part on central tendencies, or "majority" results, and we recognize that the studies cited and the solution proposed cannot account for the entire female experience, which is discussed more in-depth in Parts I and III, *infra*.

<sup>23</sup> Although research on gender differences reports central tendencies, making the proposed solution apply to the majority of (but not all) women, *see* discussion *infra* Section I.A, a completely subjective, case-by-case standard is unrealistic given the Court's preferences when and hesitation in introducing variance. *See* discussion *infra* Part III.

<sup>24</sup> *J.D.B. v. North Carolina*, 564 U.S. 261, 270–71 (2011). This case is discussed further in Sections II.B and III.B, *infra*.

<sup>25</sup> *See, e.g., J.D.B.*, 564 U.S. at 274–77 (holding that in-custody determination depends on the age of the child so long as the age was known to the officer at the time of questioning); *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that the Eighth Amendment prohibits the imposition of the death penalty on a minor, and reasoning that the developmental limitations caused by youth affect the legal culpability analysis); *Atkins v. Virginia*, 536 U.S. 304 (2002)

the characteristic has been shown to be relevant, as in the examples above, but it does not open the floodgates to subjectivity. It actually provides a mechanism for cutting back on the morass of tests that plague this area of law. Our proposed test calls for difference-based rather than sameness-based treatment, but it also provides a straightforward means of determining what characteristics are relevantly “different.” As such, it provides an outer boundary of what characteristics should be considered by courts. This solution also simplifies the variety of tests into one cohesive approach: a standard test combining objective and well-established subjective characteristics.

Part I of this Article reviews the psychological findings relevant to constitutional criminal procedure doctrines as they relate to gender, adolescence, and intellectual disability. It shows that significant differences exist between the genders in speech, reactance theory, confidence, and risk-aversion, and between adolescents and adults with regard to decisionmaking and vulnerability to coercion. Part I also analyzes the similarities among juveniles and the intellectually disabled insofar as each group’s development affects their ability or willingness to act in their own best interests. Part II discusses these subjective characteristics and their development in the law, focusing on the specific constitutional criminal procedure doctrines each characteristic affects or calls into question. It also catalogues the judiciary’s acknowledgment and variable treatment of these characteristics. Part III introduces our solution and discusses how it applies to the relevant doctrines discussed in Parts I and II, cleaning up the doctrinal chaos within, and revealing the currently hidden but relevant psychology of constitutional criminal procedure.

## I. THE PSYCHOLOGY OF CONSTITUTIONAL CRIMINAL PROCEDURE

### A. *Gendered Responses*

Recognizing the Supreme Court’s failure to consider empirical evidence in its stop-and-seizure jurisprudence, a Harvard Law student set out to determine the accuracy of the Court’s “free to leave” standard.<sup>26</sup> On four different days in 2007 and 2008, he presented

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(holding the same with respect to the intellectually disabled, for largely the same reasoning); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (holding that the constitutionality of warrantless searches conducted in school by school officials depends on the reasonableness of the search, measured in part based on the student’s age and gender).

<sup>26</sup> Kessler, *supra* note 14. When a police officer approaches a civilian in a public place, that person has been “seized” for purposes of the Fourth Amendment when a reasonable person in the same circumstances would not feel free to leave or otherwise terminate the encounter. *See*

questionnaires to randomly selected individuals in Boston, Massachusetts.<sup>27</sup> Respondents were asked to indicate, on a scale from 1 to 5, how free they would feel to leave during two different police-citizen encounters—one scenario on the sidewalk, another on a bus—where 1 signified “not” free and 5 signified “completely” free.<sup>28</sup> Respondents on average reported a free-to-leave score of 2.61 in the sidewalk scenario and 2.52 in the bus scenario.<sup>29</sup>

Women not only reported that they felt less free to leave more often than men, but also that they felt less free to leave to a greater degree than men.<sup>30</sup> Although the study’s author did not delve into this gender disparity in responses to authority, he drew the reasonable conclusion that women “feel the coercive pressure of police encounters more than others.”<sup>31</sup>

Extensive social science, from both linguistics and psychology, supports this conclusion. It is important to make two clarifications before discussing the evidence—one regarding causation and one regarding variation. First, in discussing women’s tendencies in speech and behavior, we do not imply that these effects are “natural” rather than trained. Men and women differ in a host of physical, biological, and psychological ways: we develop differently biologically and psychologically,<sup>32</sup> we mature at different rates,<sup>33</sup> and we use our emotions in different ways.<sup>34</sup> There is also considerable social engineering of responses along gender lines: expectations of “appropriate” female behavior shape women’s reactions to various

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United States v. Mendenhall, 446 U.S. 544 (1980). This jurisprudence is analyzed in Section II.A.2, *infra*.

<sup>27</sup> Kessler, *supra* note 26, at 68. Notably, this is the only empirical study to examine gender and the Fourth Amendment seizure standard.

<sup>28</sup> *Id.* at 69.

<sup>29</sup> *Id.* at 74.

<sup>30</sup> *Id.* at 75–76.

<sup>31</sup> *Id.* at 77.

<sup>32</sup> See, e.g., Doreen Kimura, *Are Men’s and Women’s Brains Really Different?*, 28 CANADIAN PSYCHOL. 133 (1987); Thomas F. Lang, *The Bone-Muscle Relationship in Men and Women*, J. OSTEOPOROSIS, Aug. 10, 2011, at 1.

<sup>33</sup> See, e.g., Christopher Bergland, *Scientists Identify Why Girls Often Mature Faster than Boys*, PSYCHOL. TODAY (Dec. 20, 2013), <https://www.psychologytoday.com/blog/the-athletes-way/201312/scientists-identify-why-girls-often-mature-faster-boys>; Leonard Sax, *Gender Differences in the Sequence of Brain Development*, EDUCATION.COM (May 17, 2010), [http://www.education.com/reference/article/Ref\\_Boys\\_Girls](http://www.education.com/reference/article/Ref_Boys_Girls) [[https://web.archive.org/web/20140903055039/http://www.education.com/reference/article/Ref\\_Boys\\_Girls](https://web.archive.org/web/20140903055039/http://www.education.com/reference/article/Ref_Boys_Girls)].

<sup>34</sup> See, e.g., Orly Turgeman Goldshmidt & Leonard Weller, “Talking Emotions”: *Gender Differences in a Variety of Conversational Contexts*, 23 SYMBOLIC INTERACTION 117 (2000); Klara Spalek et al., *Sex-Dependent Dissociation Between Emotional Appraisal and Memory: A Large-Scale Behavioral and fMRI Study*, 35 J. NEUROSCIENCE 920 (2015) (showing that males and females process emotions differently).



stimuli.<sup>35</sup> Part II explores how judicial rules and police interrogations help to reinforce those expectations, thus furthering the “nurture” side of the nature-nurture debate of causation.<sup>36</sup> Whatever the cause, however, of importance for this Article is the existence of meaningful difference between genders.

Second, that difference is one of tendency, and it is quite variable. This Part shows that, on average, in speech, reactance, and negotiation, men and women exhibit marked differences in the ways that they respond—and their mere willingness to respond—to authority figures. But many men are passive and ambiguous in their language, and many women are not. One factor that can account for this variation is the role of power differentials, as discussed below. Another is the interplay between cultural stereotypes and self-identification, which affects differences between not only women of different racial and ethnic identities, but also men of different racial and ethnic identities.<sup>37</sup> Importantly, despite this variation, the differences between the genders are statistically significant, and these different responses to authority and other stress-laden, rights-based confrontations can potentially affect whether women wind up as defendants or uncharged citizens.

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<sup>35</sup> E.g., Andrea L. Lewis & Sara L. Sommervold, *Death, But Is it Murder? The Role of Stereotypes and Cultural Perceptions in the Wrongful Convictions of Women*, 78 ALB. L. REV. 1035, 1040 (2015) (“In addition to the assumption that women are nurturers, society typically regards women as passive, cooperative, and nonthreatening. People look favorably upon women who behave consistently with these stereotypes, and shun those who do not.” (footnote omitted)).

<sup>36</sup> The differences this Article identifies between how men and women are treated by police procedure are mirrored in patterns of wrongful conviction. For example, Lewis and Sommervold found that in “[64%] of women’s wrongful conviction cases, the evidence at the time of exoneration suggested that no crime took place at all. In contrast, evidence showed no crime occurred in only 23.2% of male cases.” *Id.* at 1039 (footnote omitted). They argue that these differences are a product of gender differences in how police structure interrogations, and the effect of idealized gender roles on conceptions of whether a crime took place at all—for instance, whether a woman fails in her role as a good mother. *Id.* at 1046.

<sup>37</sup> See Signithia Fordham, “*Those Loud Black Girls*”: (Black) Women, Silence, and Gender “Passing” in the Academy, 24 ANTHROPOLOGY & EDUC. Q. 3 (1993) (conducting a study that examined racial identity and academic achievement, and documenting the “silent” persona many successful black women adopt in academia to avoid a stereotypical characterization of female blackness); Joy L. Lei, (Un)Necessary Toughness?: *Those “Loud Black Girls” and Those “Quiet Asian Boys”*, 34 ANTHROPOLOGY & EDUC. Q. 158 (2003) (studying black female and Southeast Asian male students identity construction; analyzing the interaction of stereotypes, performance, and self-identification; and exploring the “loud black girl” stereotype); Menthia P. Clark, *Say it Loud! I’m Black and I’m Proud! A Study of Successful Black Female Students Educated in an Urban Middle School* (May 2006) (unpublished Ph.D. dissertation, Louisiana State University and Agricultural and Mechanical College) (on file with author) (conducting a study of academically successful black females in an urban middle school to evaluate positive racial identity and positive academic achievement, and cataloguing previous studies on race, academic achievement, and “loudness”).

## 1. Speech

Sociolinguistic research shows that women and men use different speech patterns, which both reflects and reinforces gendered structural relationships of power and dominance in live human interaction.<sup>38</sup> Although these are only tendencies, and both women and men vary considerably within their group, empirical studies confirm that this finding is systematic.<sup>39</sup> Men tend to use direct, assertive language, whereas women incline to more indirect, deferential speech.<sup>40</sup> The direct, assertive language takes the form of imperative sentences (rather than declarative or interrogatory form) and direct (as opposed to conditional) verb usage, and it lacks indicators of hyperpoliteness, such as “please,” “excuse me,” “okay,” and “thank you.”<sup>41</sup> Even in question form, the “male register” consists of direct, easily identifiable inquiries, such as “Where is Room 400?” instead of “Do you know where Room 400 is?” or “Where might Room 400 be?”<sup>42</sup> The indirect speech, dubbed “women’s language,”<sup>43</sup> consists of five specific speech characteristics: (1) hedges (pauses and qualifiers, such as “kind of” and “sort of”); (2) tag questions (a statement followed by a question of validation, such as “The bus is yellow, isn’t it?”); (3) modal verb usage (frequent use of words such as “may,” “must,” “should,” and “ought,” which work to soften assertive statements); (4) absence of imperatives (directions that are spoken in a less assertive or more inviting way, such as “would you be quiet?” instead of “be quiet”); and (5) rising intonation (heightening

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<sup>38</sup> Ainsworth, *supra* note 1, at 263. This is true across cultures: research on both American and Japanese women produce similar results. *Id.* at 283–84 (citing JANET S. SHIBAMOTO, *JAPANESE WOMEN’S LANGUAGE* (1985); Chisato Kitagawa, *A Source of Femininity in Japanese: In Defense of Robin Lakoff’s ‘Language and Woman’s Place’*, 10 *PAPER IN LINGUISTICS* 275, 275–80 (1977)).

<sup>39</sup> *E.g.*, Faye Crosby & Linda Nyquist, *The Female Register: An Empirical Study of Lakoff’s Hypotheses*, 6 *LANGUAGE IN SOC’Y* 313, 314–15, 317 (1977); Kriss A. Drass, *The Effect of Gender Identity on Conversation*, 49 *SOC. PSYCHOL. Q.* 294 (1986); *see also, e.g.*, Ainsworth, *supra* note 1, at 271 nn.30–35. For a discussion on the variation of the effect of gender by class, see *infra* text accompanying note 58. As mentioned, however, race—or rather, the perception and resulting self-perpetuation of racial stereotypes—produces different results with regard to women and men’s speech patterns. *See* sources cited *supra* note 37.

<sup>40</sup> *See* ROBIN LAKOFF, *LANGUAGE AND WOMAN’S PLACE* 9–19 (1975) (explaining women’s distinct “language” that contrasts with male speech patterns, and also considering that in many cases women will not speak *at all*, when men would in the same situation); Linda Babcock et al., *Nice Girls Don’t Ask*, *HARV. BUS. REV.*, Oct. 2003, at 14, 15–16 (advising managers “that the person requesting an assignment (often a male)” does not necessarily “want[] it the most” because “[w]omen are less likely than men to negotiate for themselves”). For a more in depth discussion on the effects of this issue, see *infra* Section II.A.

<sup>41</sup> Crosby & Nyquist, *supra* note 39.

<sup>42</sup> *Id.* at 317.

<sup>43</sup> Ainsworth, *supra* note 1, at 271 (quoting LAKOFF, *supra* note 40).

the tone of voice for the last word or syllable to create a question-sounding statement).<sup>44</sup>

Hedging “implicitly involves fuzziness” and works to make language less definite.<sup>45</sup> The function of hedging is to expand the “truth value of the proposition,” or to “make[] it less susceptible to falsification,” which in turn lessens the speaker’s perceived commitment to the stated proposition and “diminish[es] the author’s presence in the [statement] rather than increase[s] the precision of the claims.”<sup>46</sup> Thus, when a woman hedges, she appears polite, evasive, vague, or even equivocal.<sup>47</sup> By virtue of her word choice and vocal patterns, the hedging woman disappears behind her statements. In theory, she intends to be helpful by “giving the right amount of information[,] saying what [she doesn’t] know how to say[,] covering for lack of specific information[,] . . . [or] protecting [her]self against making mistakes.”<sup>48</sup> But in reality, she comes across as less sure of herself, less forthcoming, and less credible.<sup>49</sup>

The catch-22 is that when women *fail* to adopt the so-called female register, they often are subject to gender-specific criticism. For instance, research shows that when girls and young adult women adopt the direct and assertive speech patterns associated with men, they are labeled as “bossy,” a term that is seldom applied to boys or men.<sup>50</sup> Similarly, a recent study on feedback in the workplace confirms that high-performing women receive critical advice suggesting that they should “pay attention to [their] tone,” “step back to let others shine,” and “be[]

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<sup>44</sup> *Id.* at 275–82.

<sup>45</sup> Rachael K. Hinkle et al., *A Positive Theory and Empirical Analysis of Strategic Word Choice in District Court Opinions*, 4 J. LEGAL ANALYSIS 407, 414–15 (2012).

<sup>46</sup> *Id.* at 415, 417 (emphasis omitted) (quoting KEN HYLAND, *HEDGING IN SCIENTIFIC RESEARCH ARTICLES* 170 (1998)); see also Ainsworth, *supra* note 1, at 276; Bonnie Erickson et al., *Speech Style and Impression Formation in a Court Setting: The Effects of “Powerful” and “Powerless” Speech*, 14 J. EXPERIMENTAL SOC. PSYCHOL. 266, 268, 274 (1978). For a critique of whether this interpretation necessarily follows from this tendency, see Deborah Cameron et al., *Lakoff in Context: The Social and Linguistic Functions of Tag Questions*, in *WOMEN IN THEIR SPEECH COMMUNITIES: NEW PERSPECTIVES ON LANGUAGE AND SEX* 74, 82–83 (Jennifer Coates & Deborah Cameron eds., 1988) (arguing that tags serve multiple functions, including softening the baldness of the directives, such as “open the door for me, would you,” or facilitating conversation, though acknowledging that ultimately this reflects women being expected to carry the drudge work of conversation). This study nevertheless ultimately confirmed the empirical finding of gender difference, *id.* at 85, and also found that different *types* of tags are used more by the powerful in unequal power arrangements, such as doctor-patient interactions, to gain additional information. *Id.* at 89.

<sup>47</sup> Hinkle et al., *supra* note 45, at 416; see also Janet Holmes, *Hedging Your Bets and Sitting on the Fence: Some Evidence for Hedges as Support Structures*, TE REO, Jan. 1984, at 59.

<sup>48</sup> Hinkle et al., *supra* note 45, at 416.

<sup>49</sup> Erickson et al., *supra* note 46, at 268, 274.

<sup>50</sup> See Nic Subtirelu, *Some Data to Support the Gendered Nature of “Bossy”*, LINGUISTIC PULSE (Mar. 10, 2014), <http://linguisticpulse.com/2014/03/10/some-data-to-support-the-gendered-nature-of-bossy>; see also Babcock et al., *supra* note 40, at 14–15.

less judgmental about [fellow workers'] contributions," whereas similarly situated high-performing men receive constructive criticism that lacks such personality-focused critiques.<sup>51</sup> Even when female managers conducted the reviews, "[w]ords like *bossy*, *abrasive*, *strident*, and *aggressive* [we]re used to describe women's behaviors when they lead; words like *emotional* and *irrational* describe[d] their behaviors when they object."<sup>52</sup> Of these words, only "aggressive" appeared in the reviews of male workers, but far less often and usually as encouragement.<sup>53</sup>

This linguistic phenomenon need not be biological;<sup>54</sup> it is socially enforced: American culture promotes and perpetuates a double standard in which women should be polite, hesitant, and less assertive when speaking.<sup>55</sup> This speech pattern, in turn, leaves women—and other stereotypically and socially "powerless" identities<sup>56</sup>—vulnerable to the male-centric psychology of the court, which claims to maintain an objective voice of reason but which really imposes and furthers a legal fiction of the "objective, reasonable person." This conundrum is discussed in more detail in Part II.

It is important to reiterate that neither all women nor all men exhibit this dichotomy. Many women will never use indirect speech, and many men will.<sup>57</sup> But this research reflects the exhibited speech patterns

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<sup>51</sup> See Kieran Snyder, *The Abrasiveness Trap: High-Achieving Men and Women Are Described Differently in Reviews*, FORTUNE (Aug. 26, 2014, 5:00 AM), <http://fortune.com/2014/08/26/performance-review-gender-bias> (describing the author's study).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* Additionally, when women appear—as opposed to sound—"gender inappropriate," there are similarly negative results. Lewis & Sommervold, *supra* note 35, at 1048 ("Studies show that women who are perceived as gender inappropriate in court receive harsher sentences than women who appear more feminine in court.").

<sup>54</sup> See Cameron et al., *supra* note 46, at 78 (asking whether "'women's language' [is] a consequence of being female, or of being subordinate, or some mixture of the two").

<sup>55</sup> Such societal enforcement of gender stereotypes is demonstrated in the law most often in the context of employment discrimination. Consider sex stereotyping and Title VII. *E.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51 (1989) (plurality opinion) ("An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not."), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 107(a), 105 Stat. 1071, 1075 (codified as amended at 42 U.S.C. § 2000e-2(m) (2012)), *as recognized in* *Burrage v. United States*, 134 S. Ct. 881, 889 n.4 (2014).

<sup>56</sup> Ainsworth, *supra* note 1, at 261, 263.

<sup>57</sup> As highlighted, *supra* note 37, the evidence of gendered speech patterns applies differently among people of the same gender who are of different racial or ethnic identity. Although this Article does not explore such factioning, it is relevant, and it affects other areas of the law. See Rosalio Castro & Lucia Corral, Comment, *Women of Color and Employment Discrimination: Race and Gender Combined in Title VII Claims*, 6 LA RAZA L.J. 159 (1993) (employment discrimination); Laura M. Padilla, *Intersectionality and Positionality: Situating Women of Color in the Affirmative Action Dialogue*, 66 FORDHAM L. REV. 843 (1997) (affirmative action). Indeed, in the context of Title VII, every circuit court to consider discrimination on the basis of race and sex (called "sex plus" claims) has held that "when a

among the majority, and it is not random: the linguistic phenomenon correlates with women's subordinate social positions in relation to men's, as well as the pervasive perception of women as being submissive, polite, docile, and compliant, in contrast with men.<sup>58</sup> Scholars of male and female speech have argued that gendered language reflects not only the speaker's gender, but also the speaker's *social position*.<sup>59</sup>

In fact, some research shows that there is a stronger correlation between powerlessness and female speech than between gender and female speech.<sup>60</sup> One study captured this in the context of judicial opinions. Looking to find a relationship between district court judges' hedging and ideological distance from the reviewing circuit court, Hinkle et al. found that a positive correlation exists between a judge's education, intelligence, sex, and race, and the judge's linguistic patterns.<sup>61</sup> Not only did black and female lower court judges use more hedges, but the district judges that stood in ideological opposition to the reviewing court also employed more vague, indirect, and hedging language to survive scrutiny.<sup>62</sup> In contrast, the more experienced judges

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plaintiff is claiming race *and* sex bias, it is necessary to determine whether the employer discriminates on the basis of that *combination* of factors, not just whether it discriminates against people of the same race or of the same sex." See, e.g., *Lam v. Univ. of Haw.*, 40 F.3d 1551, 1562 (9th Cir. 1994); *accord Shazor v. Prof'l Transit Mgmt., Ltd.*, 744 F.3d 948, 958 (6th Cir. 2014); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1416–17 (10th Cir. 1987); *Jefferies v. Harris Cty. Cmty. Action Ass'n*, 615 F.2d 1025, 1032–34 (5th Cir. 1980).

<sup>58</sup> See LAKOFF, *supra* note 40; Ainsworth, *supra* note 1, at 271, 281. Consider also how the social perception of femaleness affects and perpetuates these speech patterns among women, albeit differently among women of color. See *supra* note 37 and accompanying text.

<sup>59</sup> Ainsworth, *supra* note 1, at 284 ("Men's language is the language of the powerful. It is meant to be direct, clear, succinct, as would be expected of those who need not fear giving offense, who need not worry about the risks of responsibility . . . Women's language developed as a way of surviving and even flourishing without control over economic, physical, or social reality. Then it is necessary to listen more than speak, agree more than confront, be delicate, be indirect, say dangerous things in such a way that their impact will be felt after the speaker is out of range of the hearer's retaliation." (alteration in original) (quoting ROBIN TOLMACH LAKOFF, *TALKING POWER: THE POLITICS OF LANGUAGE IN OUR LIVES* 172–78 (1990))); see also, e.g., ROBIN TOLMACH LAKOFF, *LANGUAGE AND WOMAN'S PLACE* 66–67 (2004).

<sup>60</sup> Ainsworth, *supra* note 1, at 263, 284–86 ("Empirical research on the female register suggests that the greater the imbalance of power in the communicative relationship, the more likely the powerless speaker is to use features associated with the female register."); William M. O'Barr & Bowman K. Atkins, "Women's Language" or "Powerless Language"?, in *WOMEN AND LANGUAGE IN LITERATURE AND SOCIETY* 93, 94 (Sally McConnell-Ginet et al. eds., 1980) (arguing that "women's language is in large part the language of powerlessness, a condition that can apply to men as well as women" and that the reason it is referred to as "women's language" is because of the "powerless position of many women in American society"). Importantly, the standard proposed in this Article will and should apply equally to other powerless groups. See *supra* notes 12–13 and accompanying text; *infra* Parts III, Conclusion.

<sup>61</sup> Hinkle et al., *supra* note 45, at 432.

<sup>62</sup> *Id.* at 418–19, 432.

employed that language less often.<sup>63</sup> These findings support the proposition that the “female register” is consistently associated with the powerless, dominated position rather than just with the gender of the speaker.

Powerlessness in this form is also correlated with class differences, which interacts with gender differences. A study of witnesses in courtrooms by William O’Barr and Bowman Atkins confirmed that women more commonly hedged than men, but this was less so among women of either higher social status—particularly well-educated professional women—or women who were experienced in giving evidence in the courtroom—typically expert witnesses.<sup>64</sup> This translated to finding those witnesses considerably less persuasive, and jurors had less confidence and trust in the witness, when a witness used the female register.<sup>65</sup> O’Barr and Atkins argued that the propensity of women to use the female register probably arises because women tend to be in positions of lowered power in society.<sup>66</sup>

This raises the hope that gender may become less relevant over time, as women’s position within society continues to improve. But for now, the effect of gender is pervasive. Even in same-sex conversations, similar results abound. Professor Kriss Drass used questionnaires and role-playing exercises to assess whether, when two people of the same sex converse, there is still a gendered language dynamic that reflects a similar power dynamic.<sup>67</sup> The questionnaire asked respondents to finish a prompted statement using twenty-four “adjective pairs thought to be relevant for distinguishing ‘maleness’ from ‘femaleness,’” such as emotional–unemotional, timid–bold, smooth–rough.<sup>68</sup> The statements were, “Usually, men are [\_\_\_\_]” and “Usually, women are [\_\_\_\_].” To identify the gender self-definitions, Drass also asked respondents to finish the following sentence using the same twenty-four adjectives: “As a man/woman, I usually am [\_\_\_\_].”<sup>69</sup> This enabled Drass to evaluate the so-called maleness or femaleness of each respondent, both as the respondent saw him or herself and as the respondent saw gender identity generally. After completing the questionnaires, pairs of same-sex students were recorded having a conversation to decide which of the two was most deserving of a fictional accolade.<sup>70</sup> The transcripts of the conversations were analyzed for “overlaps,” a minor violation where one

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<sup>63</sup> *Id.* at 434–35.

<sup>64</sup> O’Barr & Atkins, *supra* note 60, at 102–03.

<sup>65</sup> *Id.* at 107.

<sup>66</sup> *Id.* at 104.

<sup>67</sup> Drass, *supra* note 39, at 296.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 297.

speaker begins speaking at an appropriate transition point but slightly early, and “interruptions,” a more serious violation where one person begins to speak before the other person has reached a transition point.<sup>71</sup> Both overlaps and interruptions signify attempts at exerting dominance and control in conversation, and research shows that in cross-sex conversations, men overlap and interrupt more often than women.<sup>72</sup>

The results mirrored studies focusing on cross-sex conversations. In same-sex conversations, as in cross-sex conversations, the “more male” identifying actor exhibited speech patterns and conversation tactics that indicate dominance, aggression, and assertiveness; the “less male” identifying actor, on the other hand, exhibited speech and conversation patterns of submission, sympathy, timidity, and emotionality.<sup>73</sup> Thus even within same-sex conversations, an association between dominance and male identity, and submission and female identity, arose as a clear pattern.

## 2. Reactance Theory

Just as women tend to use indirect, vague speech patterns when interacting with people of authority, they also tend to submit and comply with authority even when their freedom is being curtailed. Psychological reactance theory evaluates a person’s physical and psychological responses to real and perceived threats to their freedom, to better understand resistance to social influence.<sup>74</sup> Psychological reactance is now recognized as a significant factor in interpersonal relationships and in determining and evaluating “how people handle rules and comply with requests.”<sup>75</sup> It provides the clearest measure of a person’s verbal and behavioral aversion to authority, which is of obvious relevance in police-citizen interactions.

Psychological reactance is a “motivational state” that arises when someone’s “real or perceived personal freedoms are threatened, reduced, or eliminated,” and the motivation to reestablish those freedoms.<sup>76</sup> The level of reactance generated in response to a perceived threat depends on: (1) the importance of the freedom threatened, (2) the individual’s subjective belief that he or she possessed that freedom in the first place, (3) the magnitude of the threat, and (4) the threat’s implication for other

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<sup>71</sup> *Id.* at 297–98.

<sup>72</sup> *Id.* at 298.

<sup>73</sup> *See id.* at 300.

<sup>74</sup> *See* Paul J. Silvia, *A Skeptical Look at Dispositional Reactance*, 40 *PERSONALITY & INDIVIDUAL DIFFERENCES* 1291 (2006).

<sup>75</sup> Woller et al., *supra* note 8, at 16.

<sup>76</sup> *Id.* at 15.

freedoms.<sup>77</sup> Originally, reactance was proposed as a “situation-specific”<sup>78</sup> variable, where “reactance arousal” was determined not by individual differences in the actor but by “characteristics of the situation.”<sup>79</sup> It is now advanced as an individual trait—but one that may change and develop over time.<sup>80</sup> This motivational state may be expressed in a variety of ways, both behaviorally and verbally.<sup>81</sup> Some of the general behaviors include acting “less socially acquiescent” or “interpersonally aggressive” and territorial.<sup>82</sup> But it may also manifest in a direct reassertion of the freedom through oppositional behavior or by engaging in a related behavior.<sup>83</sup> As such, psychological reactance may explain an individual’s likely compliance with or defiance of authority when confronted by the police. Studies show that men have higher reactance levels than women, meaning that men would be more likely to defy police authority, and women would be more likely to comply with it.<sup>84</sup>

Studies that evaluate reactance levels provide participants with the Therapeutic Reactance Scale (TRS), or one of its sister surveys, and analyze the results.<sup>85</sup> The TRS presents statements, such as “I find that I often have to question authority” and “I resent authority figures who tell me what to do.”<sup>86</sup> The respondents rate the statements on a four-point “scale ranging from 1 (strongly disagree) to 4 (strongly agree).”<sup>87</sup> The sum of the scores creates the respondent’s total reactance level. One group of authors recently set out to explore verbal, behavioral, and mixed verbal and behavioral reactance as it relates to age, ethnicity, and gender.<sup>88</sup> The TRS was provided to 3475 university students along with a demographic questionnaire.<sup>89</sup> Across all categories, men’s scores were significantly higher than women’s.<sup>90</sup>

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<sup>77</sup> E. Thomas Dowd et al., *The Therapeutic Reactance Scale: A Measure of Psychological Reactance*, 69 J. COUNSELING & DEV. 541, 541 (1991) [hereinafter Dowd et al., *Therapeutic Reactance Scale*].

<sup>78</sup> Edmund Thomas Dowd et al., *Psychological Reactance and Its Relationship to Normal Personality Variables*, 18 COGNITIVE THERAPY & RES. 601, 602 (1994).

<sup>79</sup> Dowd et al., *Therapeutic Reactance Scale*, *supra* note 77 at 541.

<sup>80</sup> See Woller et al., *supra* note 8, at 15–16.

<sup>81</sup> Dowd et al., *Therapeutic Reactance Scale*, *supra* note 77, at 541.

<sup>82</sup> Woller et al., *supra* note 8, at 16.

<sup>83</sup> Dowd et al., *Therapeutic Reactance Scale*, *supra* note 77, at 541.

<sup>84</sup> Woller et al., *supra* note 8, at 16. Studies on the relationship between reactance and ethnicity also show that minorities tend to “develop high levels of reactance . . . because they must constantly defend personal freedoms within a majority-oriented society.” *Id.*

<sup>85</sup> See Dowd et al., *Therapeutic Reactance Scale*, *supra* note 77, at 542; Silvia, *supra* note 74, at 1291–92; Woller et al., *supra* note 8, at 17.

<sup>86</sup> Woller et al., *supra* note 8, at 17.

<sup>87</sup> *Id.* (emphasis omitted).

<sup>88</sup> See *id.*

<sup>89</sup> *Id.* at 17–18.

<sup>90</sup> *Id.* at 18.



Moreover, past studies suggest that gendered differences in “personality”—such as assertiveness and anxiety—significantly affect reactance.<sup>91</sup> This is key to evaluating gender dynamics in police-citizen interactions: from a reactance theory perspective, the more stressful the situation, the less likely women are to assert themselves and their rights. Men, on the other hand, will be more likely to be assertive and less anxious in such a situation. The doctrinal significance of these differences are discussed in more detail in Section II.A.

### 3. Negotiation, Confidence, and Risk-Aversion

Psychological studies have made significant findings with regard to the relationship between gender and negotiation styles.<sup>92</sup> In negotiations, women tend to prioritize cooperation over advocacy and submit to a less-than-ideal outcome to avoid conflict or risk.<sup>93</sup> Women are also particularly likely to submit or acquiesce to their opponent when confronted by a dominant, powerful, or even manipulative adversary.<sup>94</sup> Such findings are telling on the effects of gender during police-citizen encounters, and courts should take notice.

Indeed, studies show that women are more risk-averse<sup>95</sup> and less confident than men,<sup>96</sup> and this translates into women’s more reticent

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<sup>91</sup> *Id.* at 21; *see also* Babcock et al., *supra* note 40, at 14.

<sup>92</sup> Although the empirical findings on gender and negotiation, as with speech and reactance theory, reflect general tendencies of the majority of women, the takeaways are likely the most variable among our explored categories of gendered psychology. In large part this is because female negotiation styles, confidence, and risk-aversion levels are closely related to the acculturation process for males and females—or, in other words, have more to do with “nurture” than “nature.” *See* LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON’T ASK: NEGOTIATION AND THE GENDER DIVIDE passim* (2003).

<sup>93</sup> *Id.* at 106, 116–20.

<sup>94</sup> *See id.* at 97–98 (describing how women display two and one-half times the anxiety surrounding negotiation compared to men, and that a twenty-five percent increase in anxiety will lead women to be almost four times as likely to fail to negotiate); Babcock et al., *supra* note 40, at 14 (explaining one study’s results regarding compensation in which female participants accepted from the study’s facilitator the proffered low payment, after being provided a potential compensation range, even when asked if it was “OK,” whereas men would say it was not and would request more money). *But see* Bowles, *supra* note 8, at 3.

<sup>95</sup> Babcock et al., *supra* note 40, at 14 (explaining that three studies showed “that men are more likely than women to negotiate for what they want” because women “don’t ask for” what they want (emphasis added)); Tommy Gärling et al., *Psychology, Financial Decision Making, and Financial Crises*, *PSYCHOL. SCI. PUB. INT.*, Jan. 1, 2009, at 4 (“[W]omen are less risk taking than men. . . . [W]omen are more risk averse in making financial decisions than are men . . . . [and they] also tend to own less risky assets than single men or married couples . . . .”); Diane Klein, *Distorted Reasoning: Gender, Risk-Aversion and Negligence Law*, 30 *SUFFOLK U. L. REV.* 629, 644–51 (1997); Amy J. Schmitz, *Sex Matters: Considering Gender in Consumer Contracting*, 19 *CARDOZO J.L. & GENDER* 437, 447 (2013); *see also* Elke U. Weber et al., *A Domain-Specific Risk-Attitude Scale: Measuring Risk Perceptions and Risk Behaviors*, 15 *J. BEHAV. DECISION MAKING* 263 (2002) (finding that women and men’s perceptions of risk categories differed

behavior during negotiations.<sup>97</sup> Women are less likely than men to assert themselves and their interests, demonstrating better advocacy when negotiating on behalf of others than they do when negotiating on behalf of themselves.<sup>98</sup>

Consistently, women tend to be more concerned than men with other people's impressions of them,<sup>99</sup> and this, too, translates into exhibited behavioral differences between men and women during negotiations. One 2001 study demonstrates this phenomenon. Mixed-gender pairs were told to negotiate a simulated acquisition. Some groups were told the simulation was merely a learning exercise, and others were told it was a diagnostic of their actual negotiating skills.<sup>100</sup> In the "diagnostic" group, women performed more poorly than the women in the "learning" group.<sup>101</sup> In fact, when negotiators believed that their performance had no bearing on their negotiation abilities, the gender effects disappeared altogether.<sup>102</sup> The resulting inference is that, in the stressful scenario where a woman believes an evaluator—a police officer, for example—is forming an outcome-determinative opinion about her, she is less likely to advocate for herself as effectively as when those stress-inducing factors are removed.

There are no available studies that directly evaluate gender effects of negotiation, confidence, and risk-aversion in the police-citizen scenario. And it may seem at first read that a police-citizen encounter is many degrees away from a simulated negotiation, but there are many significant parallels between the two: the stress-inducing environment, the importance of outcome, and the effect of that importance on the negotiation itself.<sup>103</sup> In fact, in a negotiation, those characteristics may be softened by the amount of preparation that takes place beforehand, the theoretical "even ground" between the adversaries, and the ability

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significantly in recreational, ethics, and health and safety scenarios, but not in social situations, in which women perceived risks to be greater, but not significantly greater).

<sup>96</sup> Deborah M. Weiss, *All Work Cultures Discriminate*, 24 HASTINGS WOMEN'S L.J. 247, 268 (2013).

<sup>97</sup> See BABCOCK & LASCHEVER, *supra* note 92, at 106, 116–20; Bowles, *supra* note 8, *passim*.

<sup>98</sup> Emily T. Amanatullah & Michael W. Morris, *Negotiating Gender Roles: Gender Differences in Assertive Negotiating Are Mediated by Women's Fear of Backlash and Attenuated When Negotiating on Behalf of Others*, 98 J. PERSONALITY & SOC. PSYCHOL. 256, 263 (2010); see also Deborah A. Small et al., *Who Goes to the Bargaining Table? The Influence of Gender and Framing on the Initiation of Negotiation*, 93 J. PERSONALITY & SOC. PSYCHOL. 600, 610–11 (2007).

<sup>99</sup> Harold G. Grasmick et al., *Changes in the Sex Patterning of Perceived Threats of Sanctions*, 27 LAW & SOC'Y REV. 679, 685 (1993).

<sup>100</sup> See Bowles, *supra* note 8, at 9–10.

<sup>101</sup> See *id.*

<sup>102</sup> See *id.*

<sup>103</sup> See Babcock et al., *supra* note 40, at 14 (explaining one study's results in which female participants accepted from the study's facilitator the proffered low payment after being provided a potential compensation range, even when asked if it was "OK").

for negotiators to manage their own expectations.<sup>104</sup> An encounter with the police, on the other hand, usually happens suddenly, without the citizen's ability to prepare. Moreover, few would propose that the citizen and police officer stand on equal footing. Thus we can expect that the gender difference identified in the negotiation context would be exacerbated in a police-citizen interaction.

Despite all this evidence, courts continue to treat men and women alike, even though they are palpably different. Numerous doctrines require verbal assertiveness for constitutional criminal rights to be respected,<sup>105</sup> or hinge on characterizations of a person's expected reactions to stimuli.<sup>106</sup> Thus, the law not only refuses to recognize differences between men and women, but it actually preferences typically male reactions. The next Section begins to introduce how these differences in gender speech and behavior patterns further disempower women through their effect on police-citizen interactions.

#### 4. Gender and the Cycle of Suspicion

Mere police questioning, no matter where it takes place, does not constitute a seizure under the Fourth Amendment.<sup>107</sup> Rather, a seizure only occurs when the officers "convey a message that compliance with their requests is required," or when the citizen feels obligated to interact with the officer.<sup>108</sup> On the street or in another open area, police-initiated questioning absent reasonable suspicion does not constitute a seizure so long as the citizen feels "free to leave."<sup>109</sup> On a bus or in another confined space, because a person seated on a bus has no desire to exit the confined area, "the degree to which a reasonable person would feel that he or she could *leave* is not an accurate measure of the coercive effect of the encounter."<sup>110</sup> Instead, there is no seizure so long as the "reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter."<sup>111</sup> In this Section, we provide a

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<sup>104</sup> *Id.* at 15 ("Our studies found that women respond immediately and powerfully to advising [feedback] and rapidly begin to see the world as a much more negotiable place.").

<sup>105</sup> See *infra* Section II.3-4.

<sup>106</sup> See *infra* Section II.1-2.

<sup>107</sup> *Florida v. Bostick*, 501 U.S. 429, 434 (1991) ("[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions." (quoting *Florida v. Royer*, 460 U.S. 491, 497 (1983))).

<sup>108</sup> *Id.* at 437.

<sup>109</sup> *United States v. Mendenhall*, 446 U.S. 544, 554-55 (1980).

<sup>110</sup> *Bostick*, 501 U.S. at 435-36 (emphasis added).

<sup>111</sup> *Id.* at 436.

glimpse into how this “free to leave” concept is affected by gendered responses to authority in order to shed light on how the psychological differences between genders described in the previous Sections are relevant to the doctrine, in part due to implicit bias and the cycle of suspicion. The courts’ actual treatment of the seizure standard—and other doctrines—as applied to female suspects is discussed in depth in Part II.

Imagine a scenario in which a male police officer randomly confronts a female passenger of an interstate train and asks to search her belongings. The psychology literature, as previously discussed, suggests that in this situation a woman would be more likely than a man to feel that she should be compliant and helpful, even if she does not want to submit to a search. Consequently, she is likely to respond hesitantly, employing hedging speech patterns, including indirect answers or tag questions, such as “Oh, I haven’t done anything wrong, have I?” But police officers likely also recognize such hedging speech as common avoidance patterns associated with guilt, and so the officer is more likely to ask the woman additional pointed questions, such as about her travel plans. Because as a woman she is likely to find this questioning more anxiety-producing than a typical man may, in an effort to protect herself and placate the officer, she provides an overly lengthy answer to his questions, saying more than is necessary, though not being particularly direct. In turn, the officer finds the woman less credible and more suspicious. Before she knows it, she is no longer “free to leave”; she has been seized.<sup>112</sup>

Even if the woman had not initially responded in the “powerless” linguistic register, research shows that she is likely to adopt that lexicon as the dialogue evolves.<sup>113</sup> Because police are trained to control the dialogue in both prearrest and postarrest interrogations, the woman is more likely to *become* powerless and adopt such a register in the middle of the interaction.<sup>114</sup> This is not a far-fetched hypothetical; women have different experiences and perspectives regarding legal rights and police confrontations.<sup>115</sup> Combined with risk-aversion, a general reluctance to assert their rights, and the inclination to please, these tendencies push

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<sup>112</sup> See *Terry v. Ohio*, 392 U.S. 1, 16 (1968) (“It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person.”).

<sup>113</sup> See Ainsworth, *supra* note 1, at 286.

<sup>114</sup> *Id.* at 287.

<sup>115</sup> *Id.* at 262.

women to respond—unbeknownst even to themselves—in a manner against their interests.<sup>116</sup>

In the same train scenario, imagine that, rather than responding immediately with language that employs hedging and vagueness, the woman, knowing she has done nothing wrong and knowing that she has the freedom to end the encounter, tells the officer straightforwardly: “No, you may not search my belongings.” The officer finds this abrasive, and even suspicious, because the woman’s response was so out of character.

This uprooting of expected behavior triggers what psychologists call implicit bias,<sup>117</sup> an unconscious mental process that often affects—or creates—judgments about and behaviors toward different groups of people.<sup>118</sup> Such automatic associations are a coping mechanism to mentally manage the overload of information that we are confronted with on a daily basis. Implicit biases are “unintentional,” “involuntary,” and “effortless,” and they occur simultaneously with efforts to fight stereotypes.<sup>119</sup>

These miscommunications are particularly common when there is a cross-sex relationship.<sup>120</sup> Returning to the train scenario, even though the officer may *consciously* know that not all women are meek or submissive and that many women are bold and assertive, the officer is likely to have an *unconscious* expectation that the woman will be compliant rather than stand her ground. Gendered behavior that he has observed is likely to have created a gendered expectation—an implicit bias—in his mind. Accordingly, rather than responding merely with pointed questions about her travel plans in order to glean more information, the officer believes he is matching her firm matter-of-fact tone with a curt response in order to reinforce his dominance. His implicit bias triggers an equally gendered response; in turn, the woman finds the officer’s behavior overly aggressive, and she stands firm. The officer, ever more put off by the woman’s response, finds her resistance suspicious. The woman is no longer free to terminate the encounter; she has once again been seized.

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<sup>116</sup> This does not deny that at other times women may be advantaged by police expectations of their reactions. For instance, women’s tendency towards higher compliance may help them avoid arrest where a more domineering “male” response could inflame the situation.

<sup>117</sup> See generally L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035 (2011); L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143 (2012).

<sup>118</sup> L. Song Richardson & Phillip Atiba Goff, Essay, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2628–29 (2013) (“[O]ver three decades of well-established social science research demonstrates that these biases are ubiquitous and can influence judgments, especially when information deficits exist.”).

<sup>119</sup> *Id.* at 2629–30.

<sup>120</sup> Ainsworth, *supra* note 1, at 289.

Although reasonable suspicion cannot be based on a mere officer “hunch,” it can and often does explicitly depend upon officer impressions.<sup>121</sup> For instance, “furtive movements” by a suspect, as perceived by the police officer, have been shown to constitute one of the most common bases for both stops and frisks.<sup>122</sup> Consequently, by the end of both of our hypothetical interactions, the officer has grounds to seize the woman, even though all of those facts are based on the officer’s perceptions, colored as they are by gender expectations. The woman passenger is thus seized, not on the basis of her *actually objective* behavior, but on the basis of her *gendered response* to the officer and the *officer’s gendered perception* of her behavior.

What has occurred is a cycle of suspicion<sup>123</sup>: when people have implicit biases towards others—such as a police officer’s association of women with a certain type of powerless behavior, or of criminals with a type of dominant behavior—they tend to act in accordance with those biases.<sup>124</sup> Then the receiver of that negative behavior responds in kind. But because the person who set off the domino effect—here, the police officer—is unaware that his own actions were both a response to an unconscious, incorrect assumption and were also the trigger of the cycle, he is likely to attribute the negative behavior to the other person alone, creating a “behavioral confirmation’ effect.”<sup>125</sup> The ultimate outcome—a seizure based on reasonable suspicion—is not legally recognized as “suspiciousness” at all; it is really just the officer’s expectations leading to certain responses that lead to counter-responses, which in turn lead to the false confirmation of the officer’s expectations.<sup>126</sup>

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<sup>121</sup> Terry v. Ohio, 392 U.S. 1, 21–22 (1968).

<sup>122</sup> Data maintained by the New York City Police Department reveal that furtive movements are the most common justification to frisk a suspect, and the second most common justification to stop a suspect (after high crime area, another factor subject to interpretation), occurring in approximately seventy-one percent and fifty-two percent of cases, respectively. Tonja Jacobi et al., *The Attrition of Rights Under Parole*, 87 S. CAL. L. REV. 887, 961 (2014). On average, 1.6 factors are present in justifying a stop, rendering factors that depend entirely upon officer interpretation highly influential. *Id.* at 964.

<sup>123</sup> See Richardson & Goff, *supra* note 118, at 2638 (describing a “cycle of mutual distrust”).

<sup>124</sup> *Id.* at 2637 (“In one study, identical expressions were deemed more hostile on black faces than on white faces by subjects with high [implicit bias]. In another, subjects with more [implicit bias] assessed hostile expressions as lingering longer on black than white faces.” (footnote omitted)).

<sup>125</sup> *Id.* at 2638.

<sup>126</sup> This relationship between implicit bias and the cycle of suspicion becomes all the more significant when considered in the context of contemporary allegations of police brutality, such as the Sandra Bland arrest. See e.g., Erick A. Paulino, *Deconstructing the Arrest of Sandra Bland*, FEMINIST WIRE (Aug. 4, 2015), <http://www.thefeministwire.com/2015/08/deconstructing-the-arrest-of-sandra-bland> (“Ms. Bland’s language and temperament defied a man whose uniform and weapons, male sex, and white race required her full submission. Her defiance insulted and

If in the second train scenario, in addition to knowing that technically an officer may not seize her without reasonable suspicion, the woman also knows that courts seem to lend far more credibility to the officer's perspective than to the defendant's,<sup>127</sup> then the problem can be further worsened. This accurate perception may translate into the woman fearing that refusal may land her in more trouble than consenting to a search, and so she may feel obliged to consent out of fear rather than convenience.<sup>128</sup> Thus rather than being seized, the woman consents, but it is a consent driven by fear, and thus not true consent.

Women's lower reactance levels, risk aversion, and lower confidence translate effortlessly into a fear of legal consequences, particularly as compared to their male counterparts. Research on crime and deviance shows that overall, women commit fewer crimes than men, in part because women fear legal consequences more than men, which leads them to actually believe that the likelihood of those consequences is higher than men believe they are.<sup>129</sup> Moreover, as previously discussed, low psychological reactance plays a significant role in a woman's failure to assert her rights when presented with a reduction, or threat of reduction, in freedom.<sup>130</sup> Men and women respond very differently to authority and the loss of liberty, both real and perceived. These differences affect legal rights, yet we show in Part II that the courts are reticent to acknowledge as much.

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wounded Encinia's pride—as a cop, a man, and a white person. As a result, Ms. Bland was punished.”).

<sup>127</sup> See *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (giving weight to the officer's inferences, because they are based “in light of his experience”); Thomas B. McAfee, *Setting Us up for Disaster: The Supreme Court's Decision in Terry v. Ohio*, 12 NEV. L.J. 609, 623 (2012) (discussing how the Court grants officers a level of deference that critics describe as “com[ing] to extend virtually limitless discretion to law enforcement”).

<sup>128</sup> See *Schneckloth v. Bustamonte*, 412 U.S. 218, 227–28 (1973) (stating that “a search pursuant to consent may result in considerably less inconvenience for the subject of the search, and,” holding that “properly conducted, is a constitutionally permissible and wholly legitimate aspect of effective police activity,” even, as here, absent probable cause); see also Leonard Bickman, *The Social Power of a Uniform*, 4 J. APPLIED SOC. PSYCHOL. 47, 49–51 (1974) (describing a study where the experimenter stood on a public street dressed as either a civilian, a milkman, or a disarmed police guard and directly ordered pedestrians to do certain tasks, resulting in overwhelming (eighty-nine percent) compliance for the experimenter dressed as a guard); Ric Simmons, *Not “Voluntary” But Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773, 808–10 (2005) (finding significant that the forty-five percent increase in compliance for the experimenter in the Bickman study “did not flow from the subject's belief that she legally *must* obey the requester. . . . [T]he extra 45% of individuals who obeyed is the extra amount of persuasive or compelling power that a uniform has *in the absence of actual authority*”).

<sup>129</sup> See Grasmick et al., *supra* note 99, at 685.

<sup>130</sup> See Woller et al., *supra* note 8, at 16, 20–21; see also Kingsley R. Browne, *Biology, Equality, and the Law: The Legal Significance of Biological Sex Differences*, 38 SW. L.J. 617, 620–21 (1984) (discussing empirical findings on the difference in physical and verbal aggression between men and women, particularly that men are the more aggressive sex).

## B. *Adolescence and Intellectual Disability*

Gender is not the only characteristic that is likely to produce a different response to authority in a police-citizen interaction. As this Section discusses, a similar phenomenon arises among people of different ages and intellectual abilities. This is relevant because of the courts' ad hoc treatment—or absence thereof—of all three subjective characteristics.

### 1. Juvenile Decisionmaking, Recklessness, and Vulnerability to Coercion

Juveniles are developmentally at a disadvantage compared to their adult counterparts in police-citizen encounters. Specifically, they lack mature judgment and impulse control, which make them less likely to perceive risks and thus more likely to be reckless and greater risk-takers.<sup>131</sup> Youth are less capable decisionmakers than adults:

[They] tend to lack what developmentalists call “future orientation.” That is, compared with adults, adolescents are more likely to focus on the here-and-now and less likely to think about the long-term consequences of their choices or actions—and when they do, they are inclined to assign less weight to future consequences than to immediate risks and benefits.<sup>132</sup>

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<sup>131</sup> Interestingly, as described in the previous Section, women are made more vulnerable due to risk aversion, which makes them more reticent to assert their rights, whereas juveniles are risk loving, which makes them less mindful of the need to protect themselves and therefore more vulnerable to dominant authority. Both tendencies create vulnerabilities in different ways; it is the failure of the jurisprudence to account for systematic variation that is the real cause of rights attrition among these different groups. See discussion *supra* Part II.

<sup>132</sup> Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, FUTURE OF CHILD., Fall 2008, at 15, 20; see also Brief for the American Psychological Ass'n, & the Missouri Psychological Ass'n as Amici Curiae Supporting Respondent at 4–12, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 1636447 (discussing social science evidence that shows the legal relevance of age difference, and arguing that “[l]ate adolescence is a developmental period during which individuals are particularly prone to risky behavior”); Daniel Goleman, *Teen-Age Risk-Taking: Rise in Deaths Prompts New Research Effort*, N.Y. TIMES (Nov. 24, 1987), <http://www.nytimes.com/1987/11/24/science/teen-age-risk-taking-rise-in-deaths-prompts-new-research-effort.html?pagewanted=all> (discussing various studies on risk-taking among youth and teenagers); Karen N. Peart, *With Increased Age Comes Decreased Risk-Taking in Decision-Making*, YALE NEWS (Sept. 30, 2013), <http://news.yale.edu/2013/09/30/increased-age-comes-decreased-risk-taking-decision-making> (discussing a study conducted by researchers at the Yale School of Medicine that confirmed long-established observations regarding age and decisionmaking, based on the changes in cognitive function that come with age).



Although by age sixteen or seventeen, teenagers have similar reasoning and processing *abilities* as adults, adolescents of this age are “less capable than adults are in *using* these capacities in making real-world choices.”<sup>133</sup> This phenomenon is long-established in numerous behaviors: statistics on car collisions, binge drinking, unsafe sex, and crime indicate that young people are “impel[led] . . . toward thrill seeking,” but technically, adolescents are no less irrational, unaware of, or unable to evaluate consequences than fully developed adults.<sup>134</sup> Most teenagers have more or less fully developed logical-reasoning abilities by the age of fifteen.<sup>135</sup> Rather, it is the “psychosocial capacities that improve decision making and . . . impulse control, emotion regulation, delay of gratification, and resistance to peer influence,” that are not yet fully developed in adolescents.<sup>136</sup> Thus, even though they can identify the potential harms that spring from their actions, youth are unable to weigh those harms appropriately, impeding what would otherwise be competent decisionmaking.

Even more pertinent, “[c]onsiderable evidence” shows that decisionmaking capabilities in youths differ from adults “in ways that are relevant to their criminal choices.”<sup>137</sup> It should follow, then, that adolescents are less capable decisionmakers when it comes to advocating for themselves in the face of an older and much more socially and politically dominating authority, such as a police officer. “[A]dolescents’ present-oriented thinking, egocentrism, greater conformity to authority figures, minimal experience and greater vulnerability to stress and fear leave juveniles more susceptible than adults to feeling that their freedom is limited.”<sup>138</sup> Moreover, “research confirms that ‘[a]dolescents are more likely than young adults to make choices that reflect a propensity to comply with authority figures.’”<sup>139</sup>

Not only do adolescents succumb to peer pressure and act recklessly, they also tend to comply with authority out of fear or obligation. This is particularly significant during the sort of threshold police-citizen interaction, such as a stop, seizure, or a consent to search request, when the citizen is in the position to either self-incriminate, expose himself to more intrusion than is legally required, or protect

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<sup>133</sup> Scott & Steinberg, *supra* note 132.

<sup>134</sup> Laurence Steinberg, *Risk Taking in Adolescence: New Perspectives from Brain and Behavioral Science*, 16 CURRENT DIRECTIONS PSYCHOL. SCI. 55, 55 (2007).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 56.

<sup>137</sup> Scott & Steinberg, *supra* note 132, at 20.

<sup>138</sup> Brief of Juvenile Law Center, et al. as Amici Curiae in Support of Petitioner at 11, *J.D.B. v. North Carolina*, 564 U.S. 261 (2011) (No. 09-11121), 2010 WL 5535752.

<sup>139</sup> *Id.* at 12–13 (alteration in original) (quoting Thomas Grisso et al., *Juveniles’ Competence to Stand Trial: A Comparison of Adolescents’ and Adults’ Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333, 357 (2003)).

himself. Because the legal standards for seizure and consent to search view the police-citizen encounter through the lens of the adult male, the court is likely to determine that an adolescent felt free to leave or consented to a search voluntarily when in fact it was his very *adolescence* that produced the response, as explored in Section II.B.

## 2. Similarities Among the Intellectually Disabled

Although the intellectually disabled “are, of course, *not* children,” the effects of adolescent psychology on youth risk-taking and decisionmaking are similar to the effects of intellectual disability on that population’s impulse control.<sup>140</sup> The intellectually disabled and adolescents “share the critical characteristics of diminished capacity to understand the moral and factual consequences of their actions, to control their impulses, and to make independent decisions without undue influence by others.”<sup>141</sup> But unlike adolescents, who can evaluate and identify consequences even though they cannot weigh them properly, intellectually disabled adults suffer from the diminished capacity to engage in “logical if-then reasoning.”<sup>142</sup>

Because there is variability among the intellectually disabled in terms of (as relevant here) IQ, decisionmaking capacity, and compliance tendency, it is important to clarify at the outset what intellectual disability means in the context of this Article. American jurisprudence on the subject has evolved from the prohibition on subjecting “idiots and lunatics” to punishment<sup>143</sup> to the modern Eighth Amendment jurisprudence regarding the “legally” intellectually disabled.<sup>144</sup> According to the American Psychological Association, American Psychiatric Association, and American Academy of Psychiatry and the Law, three criteria are necessary to make an intellectual disability diagnosis: (1) “significant limitations in intellectual functioning, [(2)] significant limitations in practical or ‘adaptive’ functioning, and [(3)]

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<sup>140</sup> Brief of American Psychological Ass’n et al. as Amici Curiae in Support of Petitioner at 2, *McCarver v. North Carolina*, 533 U.S. 975 (2001) (No. 00-8727), 2001 WL 648606 [hereinafter Brief of APA et al. as Amici]. This Brief was also considered by the Court in *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).

<sup>141</sup> Brief of APA et al. as Amici, *supra* note 140.

<sup>142</sup> *Id.* at 7.

<sup>143</sup> See 2 WILLIAM BLACKSTONE, COMMENTARIES \*25 (“[A] total idiocy, or absolute insanity, excuses from the guilt, and of course from the punishment, of any criminal action committed under such deprivation of the senses . . . .”); see also *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) (“Idiocy was understood as ‘a defect of understanding from the moment of birth,’ in contrast to lunacy, which was ‘a partial derangement of the intellectual faculties, the senses returning at uncertain intervals.” (quoting 1 WILLIAM HAWKINS, TREATISE OF THE PLEAS OF THE CROWN 2 n.2 (7th ed. 1795))), *abrogated by Atkins*, 536 U.S. 304.

<sup>144</sup> See discussion *infra* Section II.B.

onset before adulthood.”<sup>145</sup> Although there is a varied range of displayed “intellectual” and “adaptive” abilities among this population—which comprises at most three percent of the American population—“the very definition of [intellectual disability] means that all persons with this disability suffer from very substantial impairments in their intellectual and adaptive abilities compared to non-retarded individuals.”<sup>146</sup>

Like juveniles, the intellectually disabled are naturally inclined to comply with authority, even when it is against their interest. They are “especially eager to please others,”<sup>147</sup> and like juveniles, they are “less able than a normal adult to control [their] impulses or to evaluate the consequences of [their] conduct.”<sup>148</sup> This combination, as with adolescents, makes the intellectually disabled vulnerable to coercion, manipulation, and, significantly, the intimidating effects of police presence.

Thus, the strict objective reasonableness tests, as well as the unwavering totality of the circumstances tests that consider subjective circumstances *apart from* these identity characteristics, carry the same risks to the intellectually disabled population as they do to adolescents and women. Of course, the intellectually disabled population brings an additional element to the reasonableness analysis that other characteristics do not: because of the variability among the developmentally or mentally challenged, in terms of displayed intellectual and adaptive abilities, police officers may not be aware of an intellectually disabled individual’s legal status. As amici in *Atkins v. Virginia* explained, the particular population at issue consisted of extreme cases<sup>149</sup>—presumably an officer would know that something about the suspect is different cognitively. It is important to acknowledge two caveats: first, we are concerned with a very specific subset of the developmentally limited, and second, this category of people in particular can pose challenges that differ from those posed by gender and age.

In the next Part, we relate these empirical findings on gender, youth, and intellectual ability to the courts’ treatment of these classes in the actual jurisprudence, to paint a picture of the current landscape of consent, seizure, invocation, waiver, and custodial interrogation.

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<sup>145</sup> Brief of APA et al. as Amici, *supra* note 140, at 3.

<sup>146</sup> *Id.* at 6–7.

<sup>147</sup> *Id.* at 8.

<sup>148</sup> *Id.* at 10 (quoting *Penry*, 492 U.S. at 322).

<sup>149</sup> *Id.* at 4–5 (discussing the clinical definition); *id.* at 7 (discussing the small percentage of the population that meets the clinical definition).

## II. REALITY VERSUS JURISPRUDENCE: POLICE-CITIZEN INTERACTIONS

We have seen that gender, age, and intellectual disability all bear on a person's response to authoritative stimuli, including how individuals perceive circumstances and respond to them. Women tend to express themselves less directly and be more submissive in the face of a dominant "other,"<sup>150</sup> and adolescents, like the intellectually disabled, are categorically inclined to comply with authority, even when it is against their interest or better judgment.<sup>151</sup> This Part explores how these characteristics are crucial in translating a suspect's verbal and physical behavior and perceptions in various tests in constitutional criminal procedure. By largely ignoring the reality of how those characteristics affect individuals during police encounters, the Supreme Court has effectively crafted the law to systematically diminish the rights of women, adolescents, and the intellectually disabled.

### A. *Gendered Doctrine*

#### 1. The Reasonable Man

Dating as far back as the Roman Empire, the law has imagined a "reasonable person," or a "reasonably prudent person," in tort law, criminal law, and constitutional criminal procedure to determine the constitutionality or propriety of various offenses and police-citizen confrontations.<sup>152</sup> The reasonable person is at once every man and no man, and he serves as "the common law's most enduring fiction."<sup>153</sup> Fiction because the so-called reasonable person represents a community ideal of reasonable behavior, expressly designed not to account for individual, subjective human experiences. The paradox is that

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<sup>150</sup> See *supra* Section I.A.

<sup>151</sup> See *supra* Section I.B.

<sup>152</sup> E.g., Richard A. Pacia & Raymond A. Pacia, *Roman Contributions to American Civil Jurisprudence*, R.I. B.J., May 2001, at 5, 33 ("The Romans . . . originated the 'reasonable man' standard of conduct."); see also, e.g., *Addington v. United States*, 165 U.S. 184, 187 (1897) (discussing the "reasonably prudent man" in the context of self-defense); *Castle v. Lewis*, 254 F. 917 (8th Cir. 1918) (invoking the "reasonable person" to determine whether a warrantless arrest was justified); *United Cigar Stores Co. v. Young*, 36 App. D.C. 390 (D.C. Cir. 1911) (using the hypothetical beliefs of a "reasonable man" to determine whether false imprisonment occurred). In tort, the reasonable person has existed even longer. See *Blyth v. Birmingham Waterworks Co.* (1856) 156 Eng. Rep. 1047 (Ex.); *Vaughan v. Menlove* (1837) 132 Eng. Rep. 490 (C.P.).

<sup>153</sup> Mayo Moran, Essay, *The Reasonable Person: A Conceptual Biography in Comparative Perspective*, 14 LEWIS & CLARK L. REV. 1233, 1233 (2010).

characteristics such as gender, youth, and intellectual disability instruct our psychological process; we make decisions based on our experiences and the known experiences of others. This Section demonstrates how Fourth Amendment seizure and consent law, as well as Fifth and Sixth Amendment waiver and invocation jurisprudence, inhibits the rights of women, youth, and the intellectually disabled by adopting the reasonable man test or other reasonableness-based measures.

The reasonable man is thought to have first appeared in common law tort jurisprudence in 1837 as “a man of ordinary prudence” in the English case of *Vaughan v. Menlove*.<sup>154</sup> The first opinion to actually use the label “reasonable man” was another nineteenth century English negligence case, *Blyth v. Birmingham Waterworks Co.*<sup>155</sup> When affirming the role of the reasonable man in the U.S. legal system, Justice Oliver Wendell Holmes telegraphed the test’s exclusion of subjective factors by stating that if

a man is born hasty and awkward, is always having accidents and hurting himself or his neighbors, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors accordingly require him, at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account.<sup>156</sup>

The test is an objective inquiry that asks what the hypothetical reasonable person would have done or would have felt under the circumstances the defendant faced, instead of asking what the defendant actually did or felt and why.<sup>157</sup> This is because courts seek to avoid premising the entire scope of constitutional protection on subjective

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<sup>154</sup> *Menlove*, 132 Eng. Rep. at 493 (Tindal, C.J., concurring) (“Instead, therefore, of saying that the liability for negligence should be co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe.”); see also Ronald K.L. Collins, *Language, History and the Legal Process: A Profile of the Reasonable Man*, 8 RUTGERS-CAMDEN L.J. 311, 312–13 n.4 (1977); Caroline Forell, *Essentialism, Empathy, and the Reasonable Woman*, 1994 U. ILL. L. REV. 769, 772.

<sup>155</sup> *Blyth*, 156 Eng. Rep. at 1049 (Alderson, B.) (“Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.”); see also Randy T. Austin, Comment, *Better off with the Reasonable Man Dead or the Reasonable Man Did the Darndest Things*, 1992 B.Y.U. L. REV. 479, 481 & n.12 (noting that the words “reasonable man” did not actually appear in *Vaughan v. Menlove*, although the case discussed a “man of ordinary prudence”).

<sup>156</sup> OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 108 (Dover Publ’ns 1991) (1881).

<sup>157</sup> Christopher Jackson, *Reasonable Persons, Reasonable Circumstances*, 50 SAN DIEGO L. REV. 651, 654–55 (2013).

characteristics of the defendant.<sup>158</sup> Nevertheless, courts recognize the need to pay some attention to the defendant's individual qualities in some circumstances, and so they incorporate some subjective factors.<sup>159</sup> The difficult question, then, is what subjective factors are relevant.

The problem with extensive use of the reasonable person test is that it allows courts to base their decisions on unrealistic expectations of human behavior, rather than on informed evaluations of a citizen-suspect's actual behavior. When the analysis replaces a particular citizen with a reasonable person, then female, youth, or intellectually disabled citizens retain fewer rights because those traits affect the citizen's ability to assert his rights, through speech or physical conduct, in a legally cognizable manner. Thus, gender, age, and intellectual ability are among the subjective characteristics relevant to a court's evaluation. Yet courts treat these citizens as though such characteristics do not exist, creating rules rewarding behaviors that entire subpopulations tend not to exhibit—in effect writing their rights out of constitutional criminal procedure law.<sup>160</sup>

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<sup>158</sup> See, e.g., *Michigan v. Chesternut*, 486 U.S. 567, 574 (1988) (“This ‘reasonable person’ standard . . . ensures that the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached.”).

<sup>159</sup> Moran, *supra* note 153, at 1235. For instance, when determining whether the use of deadly force was reasonable for purposes of the defense of justification, the court in *People v. Goetz* had to determine whether the defendant reasonably believed the person he shot was committing a robbery, and the court held that the defendant's prior experiences being robbed were relevant to that determination—essentially allowing a reasonable prior victim standard. *People v. Goetz*, 497 N.E.2d 41 (N.Y. 1986).

<sup>160</sup> Constitutional criminal procedure is not the only area of law that “writes out” women's experiences. In criminal and evidence law, we see the same male-bent inquiry weaved throughout the doctrine. Consider first, self-defense. The Model Penal Code makes the defense, and the employment of deadly force in such defense, available only when faced with an imminent threat because courts and legislatures alike thought only the immediate threat of death or severe bodily harm would be sufficient to provoke such a response in the reasonable man. MODEL PENAL CODE §§ 3.04(1), (2)(b) (AM. LAW INST. 1985); Moran, *supra* note 153, at 1251. The paradigm self-defense case is thus the “bar-room brawl” scenario. Moran, *supra* note 153, at 1251. However, the vast majority of women who kill their partners in self-defense do so when their partner is asleep or drunk—when the threat surely is not imminent—making the defense virtually unavailable to women who kill their partners. *Id.* Similarly, the Federal Rules of Evidence which provide exceptions to the prohibition on hearsay evidence also by and large except women from their application. For example, FED. R. EVID. 801(d)(2)(B), under certain enumerated circumstances, allows someone's silence in the face of an accusation of wrongdoing into evidence as a tacit adoption of the truth of the accusation. See Janet Ainsworth, *The Performance of Gender as Reflected in American Evidence Rules: Language, Power, and the Legal Construction of Liability*, in PROCEEDINGS OF THE INTERNATIONAL GENDER AND LANGUAGE ASSOCIATION 3–4 (2009). Those who adopt the female register are unlikely to respond to an accusation singularly in bold, direct assertions of innocence, frustrating the purpose of the hearsay exceptions, and unnecessarily and improperly exposing women—or powerless speakers—to criminal or civil liability. See discussion *supra* Section I.A; see also Babcock et al., *supra* note 40 (advising supervisors that women's neglect to ask for promotions or more work responsibility does not signify women's disinterest).

On one hand, courts need an assessment of what is appropriate that can be conceptualized in a unit of measurement that is somewhat generally applicable. On the other hand, the reasonableness inquiry, through the reasonable person, can constitute a vehicle by which a judge may import society's majoritarian prejudices (or his own discriminatory views, subconsciously or not) directly into the law. In other words, the reasonable person test only captures the majority's standards of ordinariness or normalcy; the reasonable person is the common *man*: male, adult, colorless, heterosexual, able-bodied, of average intellectual ability, and class privileged.<sup>161</sup>

What we see is a mismatch: the way people actually express themselves in police-citizen interactions does not align with the expectations the courts have for how people express themselves in such scenarios. Our rights hinge on what we say or do when interacting with the police, but the courts' determinations of our actions and beliefs hinge on a fictitious person's imagined responses to the police, instead of people's actual responses. When constitutional rights are wrapped up in the courts' expectations of behavior, as opposed to the reality of human behavior, the law turns away from reality.

Reasonableness tests proliferate throughout American constitutional criminal procedure, and so the failure to incorporate gender differences in reasonableness affects numerous doctrines. The following Sections assess some of those doctrines in more detail. Those Sections also demonstrate how the same failure arises when the jurisprudence is supposed to be more subjective, such as tests that look to the totality of the circumstances.

## 2. Seizure

Reasonableness arises in seizure jurisprudence through the Fourth Amendment's protection against "unreasonable searches and seizures."<sup>162</sup> The reasonableness standard is translated into a reasonable person test, both when assessing the reasonableness from the perspective of the police and from the perspective of the suspect. When

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<sup>161</sup> Kemit A. Mawakana, *In the Wake of Coast Federal: The Plain Meaning Rule and the Anglo-American Rhetorical Ethic*, 11 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 39, 55 & n.89 (2011). Interestingly, the "reasonable person" used to be a "reasonable *man*." Some attribute this evolution to the women's movement's impact on the law. See Klein, *supra* note 95, at 643–44. Significantly, however, the reasonable person is still a concept dominated by the male perspective, rather than a truly genderless one. See discussion *infra* Section II.B. For more on the reasonable person's male history, see Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398, 1405 (1992); Forell, *supra* note 154, at 770; Klein, *supra* note 95, at 643–44; Moran, *supra* note 153.

<sup>162</sup> U.S. CONST. amend. IV.

a judge determines the reasonableness of the suspicion justifying a police stop, he does so “against an objective standard: would the facts available to the officer at the moment of the seizure . . . ‘warrant a *man of reasonable caution in the belief* that the action taken was appropriate?’”<sup>163</sup> When the shoe is on the other foot and the judge must determine whether the individual was seized, there is a different but equally reasonableness-focused inquiry: whether “in view of all of the circumstances surrounding the incident, *a reasonable person* would have believed that he was not free to leave.”<sup>164</sup>

This “every man” suspect is not only innocent<sup>165</sup> and therefore less flustered by the initial approach by police and the ensuing coercive aspects of a police confrontation,<sup>166</sup> but he is also unaffected by the otherwise applicable male (officer)-female (citizen) power dynamic.<sup>167</sup> So in the context of the Fourth Amendment’s seizure jurisprudence, the judge, subconsciously or intentionally, uses the would-be behavior of a theoretical privileged, able-bodied, white, adult male to measure the reasonableness of a young, minority, undereducated, lower-class, or female (or all of the above) person’s sensibilities in the presence of, and sensitivities to, the police.

Under Fourth Amendment seizure jurisprudence, the reasonable person and free-to-leave standards require courts to consider “*all* of the circumstances surrounding the incident.”<sup>168</sup> Although one may query whether subjective characteristics qualify as “circumstances,”<sup>169</sup> such characteristics must be a part of the inquiry because they are integral to putting the reasonable person in the defendant’s shoes, which is what

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<sup>163</sup> Terry v. Ohio, 392 U.S. 1, 21–22 (1968) (emphasis added).

<sup>164</sup> United States v. Mendenhall, 446 U.S. 544, 554 (1980) (emphasis added). On a bus or in another confined space, there is no seizure so long as “a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter.” Florida v. Bostick, 501 U.S. 429, 435–36 (1991).

<sup>165</sup> Bostick, 501 U.S. at 438 (“[T]he ‘reasonable person’ test presupposes an *innocent* person.”).

<sup>166</sup> See Robert V. Ward, *Consenting to a Search and Seizure in Poor and Minority Neighborhoods: No Place for a “Reasonable Person”*, 36 HOW. L.J. 239, 241 (1993).

<sup>167</sup> See discussion *supra* Section I.A.4. The reasonable person test also eschews the historical relationship between racial minorities and the police. See, e.g., Jazmine Hughes, *What Black Parents Tell Their Sons About the Police*, GAWKER (Aug. 21, 2014, 9:37 AM), <http://gawker.com/what-black-parents-tell-their-sons-about-the-police-1624412625>; see also Ward, *supra* note 166, at 241, 246–48.

<sup>168</sup> Mendenhall, 446 U.S. at 554 (emphasis added).

<sup>169</sup> Jackson, *supra* note 157, at 654 (providing that “there is no analytical way to separate relevant circumstances from irrelevant ones: we do not have ‘a clear sense of which qualities of the reasonable person matter,’” referring to “[t]he physical features of the situation” as likely relevant considerations and “the particular peccadilloes of the defendant” as unlikely ones (quoting MAYO MORAN, *RETHINKING THE REASONABLE PERSON: AN EGALITARIAN RECONSTRUCTION OF THE OBJECTIVE STANDARD* 3 (2003))).



the reasonable person standard was intended to do.<sup>170</sup> Yet courts ordinarily neglect to evaluate any of the suspect's subjective characteristics.<sup>171</sup>

The problem with this approach is illustrated by *United States v. Drayton*.<sup>172</sup> During a scheduled bus stop on an interstate, three plain-clothed police officers boarded a bus with concealed weapons and visible badges.<sup>173</sup> One officer stood at the rear of the bus, facing inward toward the front of the bus.<sup>174</sup> Another officer stood at the front of the bus, facing inward toward the rear.<sup>175</sup> The third officer walked down the aisle, making his way to each passenger, and stood either next to or "just behind" the passengers as he engaged them.<sup>176</sup> That third officer "approached [Drayton] from the rear and leaned over Drayton's shoulder," held up a police badge to signal that he was an officer, and spoke to Drayton "in a polite, quiet voice" with his face twelve to eighteen inches from Drayton's.<sup>177</sup>

The Supreme Court held that this interaction did not describe a seizure.<sup>178</sup> The Court focused mostly on the officer's actions, even though it was determining the reasonable *suspect's* subjective freedom to end the interaction. The Court determined that because the officer never brandished his weapon or made other "intimidating movements," did not position himself to block passengers from leaving through the aisle, and spoke to passengers politely, the officer "gave the passengers no reason to believe that they were required to answer [his] questions."<sup>179</sup> If Drayton had been an adult, white male, that may have been the case, but he was not; he was a young, black man.<sup>180</sup> Yet, the Court did not discuss this or the relationship between Drayton's age, gender, or race, and any intimidation inherent in the officers' movements, or how this may have differed if Drayton had been a woman, as so many courts fail to do.

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<sup>170</sup> See *supra* Section II.A.1.

<sup>171</sup> Even in *New Jersey v. T.L.O.*, where the Court announced a rule that requires consideration of the student's age and gender, the Court refrained from such analysis. See *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *infra* discussion Section II.B.

<sup>172</sup> 536 U.S. 194 (2002).

<sup>173</sup> *Id.* at 197.

<sup>174</sup> *Id.* at 198.

<sup>175</sup> *Id.* at 197.

<sup>176</sup> *Id.* at 198.

<sup>177</sup> *Id.* at 198, 204.

<sup>178</sup> *Id.* at 203.

<sup>179</sup> *Id.* at 203–04.

<sup>180</sup> See, e.g., Joshua Fitch, Comment, *United States v. Drayton: Reasonableness & Objectivity—A Discussion of Race, Class, and the Fourth Amendment*, 38 NEW ENG. L. REV. 97, 98 n.9 (2003) (noting Drayton's race and the general absence of this significant descriptive information in the case law and literature).

Mere police presence, while not per se coercion, is nonetheless intimidating because of the uneven power dynamic between citizen and officer.<sup>181</sup> This reality is exaggerated when looking at the *Drayton* facts from the female perspective. As discussed, men and women respond differently to situations of stress and to encounters with people that are either more powerful or dominant, or with those that are in more powerful or dominant positions.<sup>182</sup> So the power imbalance is even more pronounced for a female citizen in Drayton's position.

Furthermore, the officer's actions can be even more important to the analysis, because a woman's sensitivity amplifies the significance of the officer's movements, positioning, and speech. Women's generally lower reactance levels inhibit them from advocating for themselves, particularly in the face of a removed or threatened liberty.<sup>183</sup> Once the physical proximity of the questioning officer is taken into account, along with the guard-like positioning of the other two officers, the female Drayton would probably not feel free to exit through the aisle. She would also feel less free to plainly tell the officer she does not wish to talk about her travel plans, because women's lower confidence levels and higher risk-averse tendencies make them less likely to defy authority or otherwise stand up for themselves when confronted by it.<sup>184</sup> So in the context of a female Drayton, even absent "intimidating movements"<sup>185</sup> by the officers, the female citizen would be less inclined to terminate the encounter. Moreover, she may feel compelled to interact more than would a man under like circumstances.

This may have been part of what happened in *United States v. Mendenhall*, a preeminent Supreme Court case on seizure (and consent) that involved a female defendant.<sup>186</sup> There, Sylvia Mendenhall was stopped by DEA agents upon arrival in the Detroit Metropolitan Airport after exhibiting the "characteristic[s] of persons unlawfully carrying narcotics"—namely, that she arrived from Los Angeles, she was the last person to leave the plane, she "appeared to be very nervous," she "scanned the whole area where [the agents] were standing," she walked "past the baggage area without claiming any luggage," and she "changed airlines for her flight out of Detroit."<sup>187</sup> Assuming momentarily that the

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<sup>181</sup> The dominant police training manual, the Reid technique, advises officers to make use of, and recommends mechanisms of exacerbating, this uneven power dynamic, including through the positioning of chairs in the interrogation room, calling the suspect by his first name but insisting on titles for the interrogators, among other techniques. FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 185–94 (5th ed. 2013).

<sup>182</sup> See discussion *supra* Section I.A.

<sup>183</sup> See discussion *supra* Section I.A.2.

<sup>184</sup> See discussion *supra* Section I.A.

<sup>185</sup> *Drayton*, 536 U.S. at 204.

<sup>186</sup> *United States v. Mendenhall*, 446 U.S. 544 (1980).

<sup>187</sup> *Id.* at 547 & n.1.

only facts the agents actually knew upon first seeing Mendenhall—that she looked nervous, scanned the area where the agents stood, and departed the plane last—two of those characteristics could be attributed to a single gendered behavioral pattern: Mendenhall saw two male figures of authority watching her, and she felt uncomfortable, even nervous. Although a male passenger may not have such a reaction to the presence of law enforcement—indeed empirical evidence suggests he would not<sup>188</sup>—Mendenhall’s response is characteristic of a female or powerless reaction.

Acting on Mendenhall’s response, the agents approached her. After engaging her, identifying themselves as federal agents, and asking to see her travel documents, Mendenhall “became quite shaken, extremely nervous . . . [and] had a hard time speaking.”<sup>189</sup> Although such behavior is perhaps extreme, the officers’ characterization of Mendenhall’s “hard time speaking” could have been their interpretation of the hedging characteristic of the female register.<sup>190</sup> But the Supreme Court did not engage in such a discussion; instead it determined that no “seizure” of Mendenhall occurred because Mendenhall had no “objective reason to believe that she was not free to end the conversation . . . and proceed on her way.”<sup>191</sup> This, according to the Court, was because the police-citizen interaction occurred in the public concourse, the agents were plain-clothed and did not brandish their weapons, they merely approached Mendenhall rather than “summon [her] to their presence,” and they “requested, but did not demand” to see her travel and identification documents.<sup>192</sup> The Court’s recitation of the interaction, however, begs the question of whether Mendenhall objectively felt free to leave. The Court’s analysis assumes its conclusion that she would have felt free to leave, without ever considering (a) how the actions of the agents and the power imbalance between the three affected Mendenhall, and (b) how an objectively reasonable person of Mendenhall’s gender and in her position would have felt. In merely describing the police conduct as generally noncoercive, the Court refused to acknowledge conduct that, although not rising to the level of coercion or intimidation per se, may still subdue a woman into silence or compliance when it would not so subdue a man.

Even if this much-needed discussion of subjective characteristics does not change the outcome of the inquiry in a given case, the inclusion is nonetheless necessary to ensure that the “reasonable

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<sup>188</sup> See *supra* Section I.A.2–3.

<sup>189</sup> *Mendenhall*, 446 U.S. at 548 (quoting Drug Enforcement Agency (DEA) Agent Anderson’s trial testimony).

<sup>190</sup> The opinion does not describe the conversation beyond the officer’s relation of the facts.

<sup>191</sup> *Mendenhall*, 446 U.S. at 555.

<sup>192</sup> *Id.*

person” is indeed the every-person that the reasonable person was designed to represent. Moreover, it will ensure that the hypothetical reasonable person is a *person* and not only a *man*. The reasonable person is supposed to be the “average”;<sup>193</sup> but without acknowledging women’s different reactions to perceived threats, the law presents a very skewed average, and provides lower protections to women not only in its application, but also in the very construction of the law to be applied.

### 3. Consent

The inquiry into voluntary consent suffers from the same flaw of neglecting to consider gender. Although a warrantless search is per se unreasonable, a search conducted pursuant to a citizen’s consent is valid regardless of whether there is probable cause or a search warrant.<sup>194</sup> Of course, the inquiry then hinges on what constitutes voluntary consent.

In *Schneckloth v. Bustamonte*, the Supreme Court confronted that question, but did not fully answer it. Relevant in *Bustamonte*, police pulled a car over on a routine traffic stop at 2:40 AM, ordered the vehicle’s six occupants out of the car, and called for backup assistance.<sup>195</sup> After additional police arrived, an officer asked to search the vehicle, and one passenger (not the defendant) consented.<sup>196</sup> Evidence connecting defendant Bustamonte to a burglary was found in the trunk of the car, and he was arrested and later convicted at trial. Bustamonte argued that the evidence should have been suppressed because consent was given involuntarily, emphasizing that if he did not know he could refuse consent, his consent could not have been voluntary.<sup>197</sup>

The Supreme Court rejected Bustamonte’s argument that consent may only be given voluntarily if the officer advises the accused of his legal right to refuse consent.<sup>198</sup> The Court acknowledged that it had in the past considered “both the characteristics of the accused,” including the accused’s age, education, intelligence, and knowledge of his constitutional rights, and “the details of the interrogation,” such as the detention’s length, the nature of questioning, and the use of physical punishment.<sup>199</sup> However, the Court held that no single characteristic

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<sup>193</sup> HOLMES, *supra* note 156, at 108 (“[W]hen men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare.”).

<sup>194</sup> See *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973).

<sup>195</sup> *Id.* at 220.

<sup>196</sup> That passenger was the car owner’s brother. *Id.*

<sup>197</sup> *People v. Bustamonte*, 76 Cal. Rptr. 17 (Ct. App. 1969).

<sup>198</sup> *Bustamonte*, 412 U.S. at 227.

<sup>199</sup> *Id.* at 226–27.

was dispositive; instead, to properly balance the competing concerns of security and liberty going forward, voluntariness must be a “question of fact to be determined from the totality of all the circumstances.”<sup>200</sup>

From the test’s name, it may seem that this is precisely the kind of inquiry the courts should be making: one that accounts for both the accused and the police officer’s subjective actions and beliefs. However, removing as a factor the accused’s very relevant, very subjective comprehension of his rights, and disregarding the subjective factors that may affect that comprehension, transforms the scenario into a hypothetical in which police-citizen encounters are generic.<sup>201</sup> The test purports to inquire, “In light of all the surrounding circumstances, was the accused’s consent voluntary?” But with these developments, it begins to sound more like, “Would a reasonable person, given the facts of the surrounding circumstances, consent freely or feel coerced to respond in the affirmative?” The application of the analysis in *Bustamonte* confirms this: The Court did not consider the fact that all passengers were ordered out of the vehicle,<sup>202</sup> that it was approximately 3:00 AM,<sup>203</sup> that most or all of the passengers were Hispanic,<sup>204</sup> that Bustamonte did not know he could refuse consent,<sup>205</sup> or that the patrolling officer called for backup.<sup>206</sup> Absent consideration of Bustamonte’s lack of knowledge that he could refuse consent, the Court glossed over all facts tipping the voluntariness scale in favor of the accused.

The totality of the circumstances test has moved away from an inquiry regarding the citizen’s subjective perspective and toward an objective evaluation of an officer’s conduct.<sup>207</sup> This drains the test of its

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<sup>200</sup> *Id.* at 227.

<sup>201</sup> *See id.* at 247 (“There is no reason to believe . . . that the response to a policeman’s question is presumptively coerced . . .”).

<sup>202</sup> *Id.* at 220.

<sup>203</sup> *Id.*

<sup>204</sup> JOSHUA DRESSLER & GEORGE C. THOMAS III, *CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES* 321 (5th ed. 2013) (noting the fact that all of the passengers were Hispanic and that the decision did not mention this point).

<sup>205</sup> *See Bustamonte*, 412 U.S. at 222.

<sup>206</sup> *Id.* at 220.

<sup>207</sup> *See, e.g., United States v. Drayton*, 536 U.S. 194, 206 (2002) (holding that consent was voluntary, under the standards of a seizure test, because of the manner of the *police officer’s request*, which “indicat[ed] to a reasonable person that he or she was free to refuse” consent because “[n]othing *Officer Lang said* indicated a command to consent to the search” (emphasis added)); *see also* Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 161 (2002) (describing lower courts’ tendency to transform the voluntariness of consent inquiry, which previously focused on characteristics of the suspect suggesting involuntariness, into a search for police misconduct); Simmons, *supra* note 128, at 779 (“It is an open secret that the subjectivity requirement of *Schneekloth* is dead.”); Brian A. Sutherland, Note, *Whether Consent to Search Was Given Voluntarily: A Statistical Analysis of Factors that Predict the Suppression Rulings of the Federal District Courts*, 81 N.Y.U. L. REV.

subjective considerations, exposing it to the same biases as the reasonable person inquiry. Now, when a court asks whether consent was voluntary, it imagines a scenario where a reasonable—white, male, educated, class-privileged, able-bodied—person feels free to refuse consent, unless the police officer misbehaves. And officer conduct often is considered in light of the officer's *subjective beliefs* about the defendant.<sup>208</sup>

Although it is technically an open question whether the suspect's subjective characteristics are considered part of the "surrounding circumstances," the courts move from subjectivity toward a more emphasized reasonableness inquiry creates problems for female suspects.<sup>209</sup> Given what we know about women's speech patterns, confidence levels, risk-aversion, and low reactance levels, women are more likely to consent—or appear to consent (i.e., to assent)—in submission to police authority. Of course, the Court's voluntariness analysis does not discuss these behavior-altering effects of gender, or discuss gender at all.<sup>210</sup>

Yet gender is relevant. Whereas courts are less likely to find a seizure when there likely is one, thanks to gender's effects, courts are also *more* likely to find voluntary consent when it does not exist. Such findings arise in two ways: the first involves the female register, and the second involves reactance, confidence, and risk-aversion.

In the first category, a woman's lack of verbal objection, or her nonassertive refusal to consent, may qualify as consent to the officer and subsequently to the reviewing court without actual analysis of her physical or verbal reaction. The doctrine of "implied consent" allows so-called affirming behavior to constitute consent, including behaviors

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2192, 2194 (2006) ("Whether [the defendant] actually found the police conduct coercive is unclear from the opinion, but the message of [*United States v. Perea*, 374 F. Supp. 2d 961 (D.N.M. 2005)] is clear: Consent is voluntary in the absence of police misconduct.").

<sup>208</sup> See, e.g., *Perea*, 374 F. Supp. 2d 961 (holding that consent was voluntary when officers ordered the accused out of his vehicle at gunpoint, handcuffed him, and put him in the backseat of a patrol car, and considering that the force used to detain the defendant was reasonable in light of the officers' (mistaken) belief that he was wanted for a homicide).

<sup>209</sup> For instance, although *Bustamonte* considers factors specific to the suspect, and even references factors that could potentially be unknown to the police, such as low intelligence or lack of education, *Bustamonte*, 412 U.S. at 226, which suggests a highly subjective test, subsequently, the Court turned to an objective test when assessing apparent authority to consent, hinging the question on the reasonableness of officer's conduct. *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990) ("The Constitution is no more violated when officers enter without a warrant because they reasonably (though erroneously) believe that the person who has consented to their entry is a resident of the premises, than it is violated when they enter without a warrant because they reasonably (though erroneously) believe they are in pursuit of a violent felon who is about to escape.").

<sup>210</sup> For a further discussion of women and consent that delves into the underlying voluntariness philosophy, see Carole Pateman, *Women and Consent*, 8 POL. THEORY 149 (1980).

such as stepping back from the residence's entryway and saying "okay" in response to a police request to talk;<sup>211</sup> even stepping back and denying wrongdoing can constitute an invitation to a police officer to confirm that denial.<sup>212</sup> Thus a woman's tendency toward politeness and avoidance of conflict renders her nonconsenting behavior more likely to be interpreted as consent.

In the second category, the female tendency to be polite and to avoid defiance of authority or conflict more generally also potentially renders a woman to feel less free to decline consent, even when she has been expressly told that she may. Thus, even if the compulsion to consent does not rise to the level of coercion (as a matter of law), a woman is more likely to feel coerced when a man otherwise would not. So in both scenarios, the court overlooks the female reality with its failure to analyze voluntariness completely.<sup>213</sup> And as with seizure, although in some cases the inclusion of a discussion on gender—or the suspect's apparent subjective characteristics more broadly—may not change the conclusion of whether a given woman consented, it is nonetheless important to include the different female perspective in constructing what consent ordinarily looks like from an allegedly neutral perspective. That is, even if the application does not change, it is important to include the female perspective in the construction of the "objective" test to be applied.

Despite gender's clear relevance to consent, the Court has consistently downplayed its significance. In formulating the totality of the circumstances rule for voluntary consent, the Court stated that "account must be taken of . . . the possibly vulnerable subjective state of the person who consents."<sup>214</sup> In discussing this subjective vulnerability, the Court referred to cases where consent was given in "submission" to authority,<sup>215</sup> but those cases themselves failed to discuss the subjective characteristics that led to acquiescence, such as gender. Instead, they detailed scenarios in which law enforcement lied to the suspect to finagle consent, explicit or implied.<sup>216</sup>

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<sup>211</sup> See, e.g., *United States v. Garcia*, 997 F.2d 1273, 1281 (9th Cir. 1993).

<sup>212</sup> See, e.g., *People v. Cove*, 39 Cal. Rptr. 535, 537 (Dist. Ct. App. 1964) (concluding that because defendant "stepped back and claimed absence of any disturbance[,] [t]his . . . was an implied invitation to [Officer] Lyons to step inside and to satisfy himself that conditions conformed precisely to defendant's claim, i.e., no disturbance").

<sup>213</sup> See Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 222 (2001) (finding a very limited number of cases—out of hundreds—where the court actually conducted a thorough analysis of voluntariness). Research conducted for this Article identified a similar dearth in this arena.

<sup>214</sup> *Bustamonte*, 412 U.S. at 229.

<sup>215</sup> *Id.* at 233–34.

<sup>216</sup> See *Bumper v. North Carolina*, 391 U.S. 543, 548–50 (1968); *Johnson v. United States*, 333 U.S. 10 (1948).

For example, in *Bumper v. North Carolina*, police officers showed up at the suspect's place of residence, his grandmother's home, and when the sixty-six-year-old woman answered the door, the officers "walked into the house" and told her they "ha[d] a search warrant to search [her] house."<sup>217</sup> The Court concluded there was no valid consent, but only because it rested upon a false claim of authority by the police, not because of the vulnerability of the resident.<sup>218</sup> In *Johnson v. United States*, the female suspect impliedly consented to a search of her hotel room by "stepp[ing] back acquiescently and admit[ing]" the officer into her room after the officer appeared in the doorway and told her he wanted to speak with her and that she should "consider [her]self under arrest because [he was] going to search the room."<sup>219</sup> The Court acknowledged at the outset that the woman granted entry to the hotel room "in submission to authority rather than as an understanding and intentional waiver of a constitutional right," but the Court did not discuss how it reached that conclusion, let alone how gender was or could have been a factor.<sup>220</sup> It failed to address the far more pressing question of whether, without the officer's statement of intent to arrest her and search regardless of her consent, her silent acquiescence to his implicit power would have constituted consent.

Even when the Court has considered the suspect's subjective characteristics in its voluntariness analysis, it has not considered gender.<sup>221</sup> Significantly, despite the Supreme Court's own rule that voluntary consent in the warrantless school search context requires an evaluation of the student child's age and gender,<sup>222</sup> in the same opinion, the Court continued only to focus on the school administrator's actions rather than the young, female student's perceptions when determining the validity of the warrantless search.<sup>223</sup>

This failure to consider the effect of gender has led the Court to distort its own voluntariness analysis. Consider again *United States v. Mendenhall*.<sup>224</sup> After first speaking with Mendenhall, the agent asked her to accompany him to the airport DEA office. When the agents asked

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<sup>217</sup> *Bumper*, 391 U.S. at 546 (quoting a trial witness).

<sup>218</sup> *Id.* at 548.

<sup>219</sup> *Johnson*, 333 U.S. at 12.

<sup>220</sup> *Id.* at 13–17 (putting forth no discussion of gender or how the Court concluded that the woman "consented" in submission to authority, rather than voluntarily).

<sup>221</sup> *See, e.g., Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973).

<sup>222</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 341–42 (1985).

<sup>223</sup> *Id.* at 345–47. For a discussion of the Court's treatment of juvenile status, see *infra* Section II.B.

<sup>224</sup> 446 U.S. 544 (1980).



that Mendenhall follow them, she complied *without speaking*.<sup>225</sup> To the agents, this was voluntary compliance. However, when considering her position relative to theirs, in light of the psychological evidence, it is hard to consider it so. And although this so-called consent was not evaluated for voluntariness—because it did not directly anticipate or lead to a search—it is significant in light of the fact that Mendenhall was subsequently taken to have given verbal consent—twice—when the agents later requested to search her bag and her person.<sup>226</sup> Mendenhall's later assent ought to have been considered in light of this initial interaction. Moreover, after Mendenhall went to the DEA office and “consented” to a body cavity search, her physical behavior mirrored her powerless verbal behavior: when told that so long as there were no drugs “there would be no problem,” Mendenhall proceeded to undress in silence.<sup>227</sup> Under a totality of the circumstances test, each alleged grant of consent should be evaluated separately, and then in light of one another, to evaluate the cumulative effects. Instead, the Court made a single summary evaluation of voluntariness.<sup>228</sup>

The first time Mendenhall verbally assented to the agent's request to search, she was told of her right to refuse consent. Still, she told the agents, “Go ahead.”<sup>229</sup> Even though that first response provided more ammunition for the Court to find voluntariness (because of the express disclaimer that she could refuse), it was not a response so indistinguishable from the second assent as to warrant a combined analysis. Moreover, the physical circumstances of her express verbal consent—a young, uneducated, black woman was approached and repeatedly questioned by two white men of authority<sup>230</sup>—reads very differently when we consider the empirical evidence showing that women lack the same confidence or reactance levels that would propel them to advocate for their rights as men would when those rights risk infringement.

The second instance of verbal assent speaks further to this tension. The second time Mendenhall permitted law enforcement to search her, a policewoman asked her for consent to search her person. Mendenhall sidestepped the question, “stat[ing] that she had a plane to catch.”<sup>231</sup> This statement clearly constituted an avoidance of a direct answer to the

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<sup>225</sup> *Id.* at 548 (“After returning the airline ticket and driver's license to her, Agent Anderson asked the respondent if she would accompany him to the airport DEA office for further questions. She did so, although the record does not indicate a verbal response to the request.”).

<sup>226</sup> *Id.* at 548–49.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 557 (stating only that there was evidence of voluntariness in the record).

<sup>229</sup> *Id.* at 548.

<sup>230</sup> *See id.* at 558.

<sup>231</sup> *Id.* at 548–49.

question—to neither refuse nor grant consent. In light of the knowledge that women tend to speak in more deferential and less assertive rhetoric, the response indicates that Mendenhall did not consent. Her evasion of consent should have been persuasive, albeit not dispositive, evidence of nonvoluntariness.

During the voluntariness analysis of Mendenhall's consent, the Court paid lip service to her subjective characteristics (young, uneducated, black, and female) but did not delve into them:

[I]t is argued that the incident would reasonably have appeared coercive to the respondent, who was 22 years old and had not been graduated [sic] from high school. It is additionally suggested that the respondent, a female and a Negro, may have felt unusually threatened by the officers, who were white males.<sup>232</sup>

The Court merely concluded that these factors “were not irrelevant, neither were they decisive” and that the “totality of the evidence . . . was plainly adequate” to support a finding of voluntariness.<sup>233</sup> In this way, courts fail to account for the relevance of gender in shaping language that is key to the reasonableness analysis: a woman's powerless language is viewed through the lens of a powerful (white) man, thus masking her attempts to refuse consent, due to their less assertive (i.e., female) manifestations. “[L]inguistic norms in law act as they so often do to privilege supposedly ‘masculine’ linguistic behavior and to penalize supposedly ‘feminine’ linguistic behavior.”<sup>234</sup> The Court's conclusion seems equally as problematic as its process.

#### 4. Invocation and Waiver

The same underlying problem exists in the context of Fifth and Sixth Amendment invocation doctrine. Only there, the difference between genders' speech patterns takes the forefront in explaining the problem. In *Miranda v. Arizona*, the Supreme Court determined that in-custody interrogation takes a “heavy toll” on constitutionally protected freedoms as it is inherently coercive.<sup>235</sup> Consequently, the Court held that a suspect, upon arrest, must be informed of his Fifth Amendment rights, including the right to remain silent and to have

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<sup>232</sup> *Id.* at 558.

<sup>233</sup> *Id.* (citation omitted).

<sup>234</sup> Ainsworth, *supra* note 160, at 9. In this piece, Ainsworth discusses powerless, gendered language within the context of the Federal Rules of Evidence and the controlling “reasonableness” standard.

<sup>235</sup> *Miranda v. Arizona*, 384 U.S. 436, 455 (1966).

counsel present during an interrogation.<sup>236</sup> If the suspect affirmatively waives his right to counsel, the police are free to question him.<sup>237</sup> Similarly, when the accused invokes his right to counsel, he cannot be further interrogated without a lawyer present unless the defendant himself initiates the conversation.<sup>238</sup> Any confession or statement must be made “voluntarily, knowingly and intelligently”<sup>239</sup>—the defendant may not be “involuntarily impelled to make a statement when but for the improper influences he would have remained silent.”<sup>240</sup>

Just as with voluntary consent under the Fourth Amendment, however, the voluntary statement inquiry becomes murky when considering whether the suspect invoked his right to counsel in the first place. This is known as the invocation doctrine,<sup>241</sup> and waiver is its cousin. Initially, the Supreme Court in *Miranda* stated that if the defendant “indicates *in any manner* . . . that he wishes to consult with an attorney before speaking there can be no questioning.”<sup>242</sup> But in *Davis v. United States*, decided nearly thirty years after *Miranda*, the Supreme Court held that to invoke the right to counsel, the detainee must make “an unambiguous or unequivocal request for counsel.”<sup>243</sup> State and lower federal courts have taken different approaches to what qualifies as an unambiguous invocation.<sup>244</sup> It is in these post-*Miranda* interpretations of waiver and invocation that the courts’ male-centered perceptions are illuminated.

The Illinois Supreme Court was the first to require a clear and unequivocal invocation in *People v. Krueger*.<sup>245</sup> There, during an interrogation by police, the defendant said, “Wait a minute. Maybe I ought to have an attorney. You guys are trying to pin a murder rap on me, give me 20 to 40 years.”<sup>246</sup> The court determined that such an infirm reference to an attorney was insufficient to invoke the right to counsel:

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<sup>236</sup> *Id.* at 444–45.

<sup>237</sup> *North Carolina v. Butler*, 441 U.S. 369, 376 (1979).

<sup>238</sup> *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981).

<sup>239</sup> *Miranda*, 384 U.S. at 444.

<sup>240</sup> *Id.* at 462.

<sup>241</sup> *Davis v. United States*, 512 U.S. 452 (1994).

<sup>242</sup> *Miranda*, 384 U.S. at 444–45 (emphasis added).

<sup>243</sup> *Davis*, 512 U.S. at 461–62.

<sup>244</sup> *Compare, e.g., People v. Krueger*, 412 N.E.2d 537 (Ill. 1980) (imposing a clarity threshold with respect to the invocation’s legal significance), *with, e.g., Maglio v. Jago*, 580 F.2d 202 (6th Cir. 1978) (holding that an ambiguous or equivocal request for an attorney suffices to trigger the Fifth Amendment’s protections and that *all* questioning must cease upon such a request, however ambiguous), *and, e.g., United States v. Gotay*, 844 F.2d 971 (2d Cir. 1988) (stating that once the defendant makes an ambiguous request for counsel, the only subsequent questions allowed must be limited to clarify whether the suspect is actually invoking his right to counsel), *abrogated in part by Davis*, 512 U.S. 452.

<sup>245</sup> 412 N.E.2d 537.

<sup>246</sup> *Id.* at 538 (quoting Detective Donnelly).

*Miranda*'s "in any manner" language directs that an assertion of the right to counsel need not be explicit, unequivocal, or made with unmistakable clarity. We do not believe, however, that the Supreme Court intended by this language that every reference to an attorney, no matter how vague, indecisive or ambiguous, should constitute an invocation of the right to counsel. . . . [I]n this instance, a more positive indication or manifestation of a desire for an attorney was required.<sup>247</sup>

In other words, *Miranda* requires direct, assertive speech to invoke one's right to counsel and to protect against self-incrimination. This requirement ignores the empirical fact that women are systematically less likely to use such unambiguous language in any context, including in legal contexts.<sup>248</sup> Thus, by requiring unambiguous invocation, the courts are systematically hindering women from asserting their *Miranda* rights.

The female register consists of precisely the language used by Michael Krueger ("maybe," "ought," and the statement as a whole),<sup>249</sup> as compared to a more definitive request, such as "I want a lawyer." These lexicons, whether learned or innate, are involuntary either way. Yet the *Krueger* Court's rule essentially prevents any "female speech" from constituting invocation—a constitutional protection afforded by the Sixth Amendment and its adjunct Fifth Amendment protections.<sup>250</sup>

This is especially clear given that standard police manuals instruct officers to deprive the suspect "of every psychological advantage."<sup>251</sup> Women's lower reactance levels render them far more likely to feel intimidated as a result of this manipulation, and thus less able to make the kind of unambiguous invocation that the Court requires. Similarly, people of different ages or intellectual abilities will have varying proclivities to certain kinds of responses to police authority, let alone to mental subterfuge by the police.

The Court in *Krueger* did not evaluate the significance of Krueger's gender. Although it is possible that the Court would have engaged in

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<sup>247</sup> *Id.* at 540 ("[W]e find that defendant's remarks here did not constitute an invocation of such right [to counsel].").

<sup>248</sup> O'Barr & Atkins, *supra* note 60, at 102.

<sup>249</sup> *Krueger*, 412 N.E.2d at 538.

<sup>250</sup> See *Brewer v. Williams*, 430 U.S. 387 (1977); *Massiah v. United States*, 377 U.S. 201 (1964).

<sup>251</sup> *Miranda v. Arizona*, 384 U.S. 436, 449 (1966) (quoting CHARLES E. O'HARA, *FUNDAMENTALS OF CRIMINAL INVESTIGATION* 99 (1956)). The leading police interrogation manual explicitly aims to break down the will of the suspect. See *id.* (describing how police manuals ordinarily recommend that "[t]he subject should be deprived of every psychological advantage" and that the suspect be taken to the investigator's office, where he "possesses all the advantages" and "[t]he atmosphere suggests the invincibility of the forces of the law"); INBAU ET AL., *supra* note 181, at 60–63.

such a dialogue had Krueger been a woman, perhaps the (all-male) Court engaged in a silent and subconscious evaluation of Krueger's gender to determine that *in this case* (because Krueger is a man, and men usually speak directly and assertively) the alleged request for counsel was insufficient. But it seems unlikely, given the history of invocation jurisprudence, and if the Court did so, it did it in a way that prevented any future court from coming to a contrary conclusion, by fashioning a rule that deems such indirect, nonassertive language as incapable of legal invocation under *Miranda*, and thus excluding the female lexicon from invocation as a matter of law.

## 5. The Reasonable Woman

Courts' apparent refusal to consider gender as a subjective characteristic worthy of consideration in its constitutional criminal reasonableness analyses is striking given the federal courts' successful consideration of gender, within the context of a reasonable person inquiry, in sexual harassment law. Unlike in the police-citizen interaction context, courts acknowledge that gender is relevant in the workplace. This is important because it is an example of the courts successfully taking note of subjective characteristics in a meaningful way; if employment law has expressly accounted for the ways in which reality affects women differently than men, then constitutional criminal procedure law surely can do the same.<sup>252</sup>

In 1976, in *Williams v. Saxbe*, a federal district court first recognized sexual harassment as a form of sex discrimination under

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<sup>252</sup> Employment law is not an outlier. State courts have also carved out subjective reasonableness tests for women in certain areas of criminal law. As discussed, self-defense rules are crafted with the male reactor in mind. *See supra* note 160. However, in *State v. Wanrow*, the Washington Supreme Court recognized this gendered mismatch and the consequences stemming from it. *State v. Wanrow*, 559 P.2d 548 (Wash. 1977) (en banc). Although the Court did not fashion a reasonable woman standard, it took significant note of the objective self-defense standard's ill fit for a female defendant. *Id.* at 558–59 (finding that the self-defense jury instructions erroneously held the female defendant to “an objective standard of ‘reasonableness’” requiring “the respondent’s conduct [to] be measured against that of a reasonable *male* individual finding himself in the same circumstances,” which “constitute[d] a separate and distinct misstatement of the law and, in the context of this case, violate[d] the [female defendant’s] right to equal protection of the law” (emphasis added)). In the context of domestic abuse, some courts have fashioned a sort of reasonable battered woman’s standard that allows evidence of Battered Woman Syndrome, admitted through an expert, to be considered on the reasonable belief prong of the self-defense inquiry. *See, e.g.*, *State v. Kelly*, 478 A.2d 364 (N.J. 1984) (allowing evidence of Battered Woman Syndrome in a self-defense case). *But see* *State v. B.H.*, 870 A.2d 273 (N.J. 2005) (prohibiting evidence of Battered Woman Syndrome in a duress defense case).

Title VII (the federal antidiscrimination law).<sup>253</sup> In 1986, in *Meritor Savings Bank v. Vinson*, the Supreme Court declared that sexual harassment is actionable so long as the plaintiff alleges harassment “sufficiently severe or pervasive ‘to alter the conditions of . . . employment and create an abusive working environment.’”<sup>254</sup> The Court, however, did not alert lower courts as to what constitutes such severity.<sup>255</sup> Subsequently, the lower courts have turned to the reasonable person standard with a variety of interpretations.<sup>256</sup> Unfortunately, however, the Supreme Court has never taken a case that engages with or clarifies the male-centric nature of the reasonable person standard. This refusal mirrors the Court’s neglect to consider gender in the flurry of objective, subjective, and reasonableness inquiries in constitutional criminal procedure doctrines just discussed. However, the instances in which the circuit courts have explicitly considered the impact of gender on reasonableness in sexual harassment cases are instructive for how the Supreme Court could move forward in constitutional criminal jurisprudence.

Judge Keith’s vigorous dissent in *Rabidue v. Osceola Refining Co.* was the first time a court challenged the singular gender inherent in the reasonable person standard.<sup>257</sup> In *Rabidue*, the sole female manager sued her employer, alleging sexual harassment for the vulgar comments male coworkers made to her and about women generally, and for the degrading photos male coworkers displayed in the workplace.<sup>258</sup> The Sixth Circuit majority—part of an all-male panel<sup>259</sup>—found no sexual harassment, and its focus on the plaintiff’s “capable, independent, ambitious, aggressive, intractable, and opinionated” characteristics<sup>260</sup> exemplifies the discrepancy discussed in Section I.A between the female

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<sup>253</sup> *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976), *rev’d on other grounds sub nom. Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978).

<sup>254</sup> *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

<sup>255</sup> *See id.*

<sup>256</sup> *See, e.g., Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991) (adopting explicitly a feminist version of the reasonable woman standard and explaining that “a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women”); *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986) (utilizing the more traditional and so-called objective reasonable person standard and requiring demonstrated psychological injury to maintain a hostile work environment claim), *abrogated by Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1524 (M.D. Fla. 1991) (considering expert testimony from both sides regarding how a reasonable woman would have reacted to the allegedly hostile conduct, and applying a reasonable woman standard of care).

<sup>257</sup> *Rabidue*, 805 F.2d at 623 (Keith, J., concurring in part and dissenting in part); Forell, *supra* note 154, at 796.

<sup>258</sup> *Rabidue*, 805 F.2d at 615.

<sup>259</sup> *See id.* at 614.

<sup>260</sup> *Id.* at 615.

reality and societal (male) perceptions of women who display the verbal and physical registers of the powerful. The court concluded that because the plaintiff was strong and assertive, her male coworkers' lewd behavior "annoyed" her but did not seriously affect her psyche.<sup>261</sup> Thus, the reasonable person (i.e., the common *man*) would not find the work environment hostile, precluding the existence of sexual harassment. The Sixth Circuit adopted the lower court's acknowledgement that some workplaces have "humor and language [that] are rough hewn and vulgar," as well as "[s]exual jokes, sexual conversations and girlie magazines," and it further agreed that "Title VII was not meant to—[n]or can—change this."<sup>262</sup>

Judge Keith disagreed, finding that equal employment opportunity includes a woman's ability to be free of just that kind of harassment.<sup>263</sup> Invoking the reasonable woman standard, Judge Keith argued the court's application of the reasonable person was actually the application of a reasonable *man* standard that failed to consider sexual harassment as actually experienced by women. He concluded that "the reasonable person perspective fails to account for the wide divergence between most women's views of appropriate sexual conduct and those of men."<sup>264</sup> Urging courts to adopt the reasonable woman standard, Judge Keith argued such a standard would "simultaneously allow[] courts to consider *salient sociological differences* as well as shield employers from the neurotic complainant."<sup>265</sup> He warned that "unless the outlook of the reasonable woman is adopted, the defendants as well as the courts are permitted to sustain ingrained notions of reasonable behavior fashioned by the offenders, in this case, men."<sup>266</sup>

In *Ellison v. Brady*, the Ninth Circuit heard Judge Keith's plea.<sup>267</sup> Nodding to the disproportionality of women as victims of rape and sexual assault, the court adopted the reasonable woman standard in sexual harassment suits as a way to "acknowledg[e] and not trivializ[e]" the common experience of women as victims of harassment.<sup>268</sup> The court found that

[a] complete understanding of the victim's view requires, among other things, an analysis of the different perspectives of men and women. Conduct that many men consider unobjectionable may

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<sup>261</sup> *Id.* at 615, 622.

<sup>262</sup> *Id.* at 620–21 (quoting *Rabidue v. Osceola Ref. Co.*, 584 F. Supp. 419, 430 (E.D. Mich. 1984)).

<sup>263</sup> *Id.* at 623–26 (Keith, J., concurring in part and dissenting in part).

<sup>264</sup> *Id.* at 626.

<sup>265</sup> *Id.* (emphasis added).

<sup>266</sup> *Id.*

<sup>267</sup> See *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991).

<sup>268</sup> See *id.* at 879–80.

offend many women. . . . [A] sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women.<sup>269</sup>

The decision also insisted the reasonable woman standard would not elevate women to afford them greater protection than men in sexual harassment cases. Rather, the court instituted “a gender-conscious examination” of what is otherwise a reasonable person inquiry.<sup>270</sup>

Despite the opportunity to analyze this standard, the Supreme Court has neglected to do so.<sup>271</sup> In *Harris v. Forklift Systems, Inc.*, the Court heard a sexual harassment claim under Title VII, but it sidestepped the reasonable woman inquiry.<sup>272</sup> In holding that Title VII does not require concrete psychological harm, the Court relied on the reasonable *person* standard in its objectiveness analysis: “Title VII bars conduct that would seriously affect a *reasonable person’s* psychological well-being, but the statute is not limited to such conduct. So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious.”<sup>273</sup>

In just two sentences, the Court simultaneously advanced and failed women. The *Harris* holding rescued female plaintiffs from the requirement that they show a psychological injury when the circumstances surrounding harassment clearly sound of hostility, but it also locked them further into the status quo, whereby, as Judge Keith observed, “courts are permitted to sustain ingrained notions of reasonable behavior fashioned by the offenders, in this case, men.”<sup>274</sup> Even though the trial court expressly applied the reasonable woman test,<sup>275</sup> the Supreme Court avoided that conversation entirely and neither considered the reasonable woman standard nor clarified the gender ramifications for the reasonable person standard.

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<sup>269</sup> *Id.* at 878–79.

<sup>270</sup> *Id.* at 879.

<sup>271</sup> The Court did not analyze, or even mention, the reasonable woman standard’s propriety in Title VII and sex discrimination cases. Compare *Harris v. Forklift Sys., Inc.*, No. 3–89–0557, 1991 WL 487444, \*7 (M.D. Tenn. Feb. 4, 1991) (applying the reasonable woman standard), with *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22 (1993) (using, on appeal in the same case, the language of the reasonable person in its objective analysis, but neither mentioning nor discussing whether the standard calls for subjective considerations of gender).

<sup>272</sup> See *Harris*, 510 U.S. 17.

<sup>273</sup> *Id.* at 22 (emphasis added) (citation omitted); see also *id.* at 25 (Ginsburg, J., concurring) (“It suffices to prove that a *reasonable person* subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to ‘ma[k]e it more difficult to do the job.’” (emphasis added) (quoting *Davis v. Monsanto Chem. Co.*, 858 F.2d 345, 349 (6th Cir. 1988))).

<sup>274</sup> *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 626 (6th Cir. 1986) (Keith, J., concurring in part and dissenting in part), *abrogated by Harris*, 510 U.S. 17.

<sup>275</sup> *Harris*, 1991 WL 487444, at \*6–7.



The Ninth Circuit's decision in *Ellison* is the most comprehensive federal decision to incorporate well-established findings of the sociological differences between genders and how they relate to the law. The obvious question, then, is: Why is this analysis relegated to sexual harassment? The *Ellison* Court touched upon the likely answer, drawing on the commonality of victimhood among women with regards to sex offenses:

We realize that there is a broad range of viewpoints among women as a group, but we believe that many women share common concerns which men do not necessarily share. For example, because women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior. Women who are victims of mild forms of sexual harassment may understandably worry whether a harasser's conduct is merely a prelude to violent sexual assault. Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive.<sup>276</sup>

The court may be correct regarding sexual harassment, but gender does not only impact issues that arise in an explicitly gendered context, such as in rape or sexual harassment. As the previous Sections demonstrate, time and again women are also marginalized under the law as it applies to nonsexual issues, either because they adopt a gendered linguistic register—because of an innate or learned communication style, lower reactance and confidence, and more risk-averse tendencies that prevent them from self-advocacy—or because they adopt an unexpectedly *nongendered* lexicon or register, thus prompting the “cycle of suspicion” (or of prejudice, victimhood, etc.) that results when a woman defies gendered expectations.<sup>277</sup> Just as women are more often the victims of sex crimes, women are more often misunderstood because of their speech. Just as women who are victims of harassment may understandably fear physical escalation, women who find themselves in confrontation with a police officer understandably fear escalation or consequences from asserting their rights.

Thus, just as the Ninth Circuit articulated a reasonableness inquiry that is gender conscious in sexual harassment jurisprudence, courts across the nation could and should adopt a reasonableness inquiry that accounts for gender and other relevant subjective characteristics when they are known to the officer at the time of the confrontation. In light of this limited consideration of gender in reasonableness analysis, the next Section discusses courts' limited and sporadic consideration of age and

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<sup>276</sup> *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991) (footnotes omitted).

<sup>277</sup> See *supra* notes 123–28 and accompanying text.

intellectual ability, revealing additional rifts in American reasonableness jurisprudence and the reality that courts can, and sometimes are willing to, consider subjective characteristics in constitutional criminal procedure analysis.

B. *The Ad Hoc Jurisprudence of Age and Intellectual Disability*

In contrast to federal courts' refusal to consider gender in its reasonableness analyses within constitutional criminal procedure, courts have incorporated both age and intellectual disability as relevant subjective considerations. This is striking because of the parallel empirical findings regarding the psychology of gender, age, and intellectual ability. The fact that the courts venture to engage in such discussions is telling—both on how marginalized women are in constitutional criminal procedure as compared to their male counterparts, and on how practical and possible it is to include subjective considerations in a uniform standard in reasonableness analysis.

In this Section, we catalogue the Supreme Court's deliberate consideration of age and intellect in its warrantless search analysis under the Fourth Amendment, custodial interrogation analysis under the Fifth Amendment, and death penalty analysis under the Eighth Amendment. Where the Court has failed female suspects—and gender more broadly—it has elevated suspects that fall into either the youth or intellectually disabled categories. Nevertheless, the consideration of age and intellectual ability has been insufficient and wildly ad hoc. In the more than six decades that the Court has recognized the psychological vulnerability underlying these characteristics, it has forgone the opportunity to craft a uniform or bright-line rule as applied to them. Instead, it has crafted rules on a case-by-case basis, despite the similar effects of age and intellectual ability in these various categories.

As early as 1948, the courts took notice of the vulnerability of youth in police-citizen interactions,<sup>278</sup> but it was not until 1985 in *New Jersey v. T.L.O.* that the U.S. Supreme Court formulated a rule expressly protecting minors on constitutional grounds.<sup>279</sup> Even then, however, the Court failed to fully engage with the ramifications of age. The first time the Court actually discussed the psychological underpinnings of adolescence and their influence was three years later, in *Thompson v. Oklahoma*, when the Court considered the Eighth Amendment's

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<sup>278</sup> See *Haley v. Ohio*, 332 U.S. 596 (1948).

<sup>279</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 342–43 (1985) (recognizing that juveniles have some rights on school grounds under the Fourth Amendment, albeit under a lowered standard).

implications for applying the death penalty to juveniles.<sup>280</sup> It is in its Eighth Amendment jurisprudence that the Court has taken the most strides to incorporate into its opinions the social science behind both adolescence and intellectual disability.<sup>281</sup> Strangely, the Court has failed to keep up with its own findings in the context of interrogation and search jurisprudence.

In *Haley v. Ohio*, decided over sixty-five years ago, the Supreme Court suppressed a fifteen-year-old boy's confession given during a police interrogation because youth are "easy victim[s] of the law." The Court found: "[t]hat which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens."<sup>282</sup> Despite its sympathy for the boy's age, the Court chose not to adopt a bright-line rule regarding juveniles and custodial interrogation. Fourteen years later, the Court made a similar ad hoc determination in *Gallegos v. Colorado*, when it suppressed another young boy's confession.<sup>283</sup> As in *Haley*, the fourteen-year-old in *Gallegos* confessed without a lawyer present, immediately after he was taken into custody.<sup>284</sup> This time, the Court alluded to the intimidation of police presence, as well as the knowledge imbalance inherent in a police-adolescent interaction, but it did not mention psychology or the nature of adolescence itself.<sup>285</sup>

*T.L.O.* presented an opportunity for the Court to do just that, but still it refrained. When two young high school students were found smoking in a bathroom, which was contrary to school rules, the Assistant Vice Principal questioned them both.<sup>286</sup> *T.L.O.*'s smoking companion admitted to the misconduct, but *T.L.O.* insisted she did not smoke. The Assistant Vice Principal asked the fourteen-year-old to go into his "private office" and "demanded" to see her purse.<sup>287</sup> When he opened it, he saw a pack of cigarettes and rolling papers, which caused him to suspect drug use. Searching the purse further, he found a small amount of marijuana, a pipe, plastic bags, money, and an index card that looked like a list of *T.L.O.*'s debtors.<sup>288</sup> The Assistant Vice Principal

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<sup>280</sup> *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

<sup>281</sup> See *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002).

<sup>282</sup> *Haley*, 332 U.S. at 599.

<sup>283</sup> *Gallegos v. Colorado*, 370 U.S. 49 (1962).

<sup>284</sup> *Id.* at 54.

<sup>285</sup> See *id.* ("[A] 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police. . . . [W]e deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protest his own interests or how to get the benefits of his constitutional rights.")

<sup>286</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 328 (1985).

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

then called T.L.O.'s mother and the police.<sup>289</sup> The police asked that T.L.O. be brought to police headquarters. Her mother complied, and T.L.O. confessed that she had been selling marijuana at school.<sup>290</sup> Based on the school's findings and T.L.O.'s confession, New Jersey brought juvenile delinquency charges against the young girl.

The Supreme Court expressed three holdings in *T.L.O.* First, it held that the Fourth Amendment applies to searches conducted by school officials as well as by law enforcement.<sup>291</sup> Second, the Court held that to strike a balance between schoolchildren's legitimate expectations of privacy and a school's legitimate need to maintain a proper learning environment, school officials are exempted from the Fourth Amendment's warrant requirement.<sup>292</sup> Finally, the Court held that the legality of a search by a school official depends on the "reasonableness, under all the circumstances, of the search," which itself involves a two-part inquiry: First, whether there were "reasonable grounds for suspecting that the search [would] turn up evidence that the student ha[d] violated or [was] violating either the law or the rules of the school." Second, whether the "measures adopted [for the search were] reasonably related to the objectives of the search and not excessively intrusive in light of the *age and sex of the student* and the nature of the infraction."<sup>293</sup>

Given this Article's discussion of the Court's treatment of both the "totality of the circumstances" and "reasonableness" inquiries,<sup>294</sup> despite this language, it is unsurprising that when the Court finally confronted the legality of the searches at bar,<sup>295</sup> it did not discuss either T.L.O.'s age or gender, the two subjective characteristics the Court swept into its rule.<sup>296</sup> Instead, the Court focused entirely on the Assistant Vice Principal's subjective beliefs about T.L.O.'s wrongdoing, and the appropriateness of his subsequent actions,<sup>297</sup> mirroring the Court's

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<sup>289</sup> *Id.* at 328–29.

<sup>290</sup> *Id.* at 329.

<sup>291</sup> *Id.* at 333.

<sup>292</sup> *Id.* at 340.

<sup>293</sup> *Id.* at 341–42 (emphasis added).

<sup>294</sup> See *supra* Section II.A.

<sup>295</sup> Searches (plural) because the first was a search for cigarettes, and the second was a search for marijuana. See *T.L.O.*, 469 U.S. at 343–44.

<sup>296</sup> *Id.* at 345–47. In contrast, in the United Kingdom, courts have given more explicit consideration to age and sex. See, e.g., *DPP v. Camplin* [1978] AC 705 (HL) (permitting consideration of age and sex for the defense of provocation to a murder charge, in the context of "a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused").

<sup>297</sup> *T.L.O.*, 469 U.S. at 345–47.

focus on a police officer's subjective beliefs about the accused in determining consent, rather than the accused's own perceptions.<sup>298</sup>

Moreover, in the Court's lengthy discussion about the Fourth Amendment's applicability to school searches, the Court focused entirely on the tension between the school's *in loco parentis* relationship with schoolchildren, and the public school's status as a government institution, subject therefore to the Fourth Amendment through the Fourteenth Amendment.<sup>299</sup> Despite being handed the perfect opportunity to discuss the vulnerability of schoolchildren to the requests and demands of teachers, administrators, and law enforcement, the only real subjective inquiry the Court made into school-aged youth was about their reasonable expectations of privacy in school.<sup>300</sup>

Make no mistake, the Supreme Court came to the proper conclusion regarding the legality of both searches of T.L.O. in this case. The Assistant Vice Principal had reason to believe that T.L.O. was violating a school rule—her teacher witnessed her smoking—and the subsequent search was proportional—he searched her purse, not her person or undergarments.<sup>301</sup> In turn, he had reason to believe she was violating the law—possessing marijuana based on the discovery of rolling papers—and the second search was again proportional.<sup>302</sup> This is so even though T.L.O. was a fourteen-year-old female whose belongings were searched by an adult male authority in his private office (there is no mention of whether other school officials were present or whether the door was left open or closed).<sup>303</sup> What is troubling, however, is that the Court did not consider the impact of her age or gender, even though it was crafting a rule requiring it, and even though it is clearly relevant to the reasonableness of the actions.

Three years after its decision in *T.L.O.*, the Court again confronted the dilemma of youth vulnerability and development in a situation where there was a potential for very serious criminal consequences: the death penalty.<sup>304</sup> What is important to keep in mind is that there is no difference between the psychology of youth in the warrantless school

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<sup>298</sup> See, e.g., *Schneekloth v. Bustamonte*, 412 U.S. 218, 220, 247 (1973); see also discussion *supra* Section II.A.3.

<sup>299</sup> *T.L.O.*, 469 U.S. at 334–37.

<sup>300</sup> See *id.* at 338–39.

<sup>301</sup> Compare *id.* at 345–47 (finding no Fourth Amendment violation when the vice principal searched the student's purse on the reasonable suspicion that she violated school rules), with *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364 (2009) (holding that school officials violated the Fourth Amendment when they strip searched a female student down to her bra and underwear while looking for Ibuprofen).

<sup>302</sup> See *T.L.O.*, 469 U.S. at 328, 347.

<sup>303</sup> See *id.*

<sup>304</sup> See *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

search context and that of the youth in the death penalty context,<sup>305</sup> but there is a huge difference in the law. In its death penalty analyses, the Court expressly confronts and digests the psychology of youth, whereas in the former doctrine the Court sidesteps the core issue.<sup>306</sup> In *Thompson v. Oklahoma*, the Court crafted a rule prohibiting imposing the death penalty on minors sixteen years of age or younger.<sup>307</sup> This time, the Court faced the issue of adolescence head-on:

[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly “during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment” expected of adults.<sup>308</sup>

The Court specifically referenced adolescents’ vulnerability, poor impulse control, incapacity to “control their conduct and to think in long-range terms,” and their susceptibility to “mere emotion [and] peer pressure”<sup>309</sup>—the core psychological elements which the Court chose to ignore in *T.L.O.* in regard to searches.

The Supreme Court nevertheless refused to create another bright-line rule with regard to age until nearly twenty years later,<sup>310</sup> but in the interim the Court addressed the issue of the death penalty with regard to the intellectually disabled. Again, the Court was willing to dip its toes into the waters of social science. In 2002, the Court decided *Atkins v. Virginia*, which held that the imposition of the death penalty on an intellectually disabled person was a violation of the Eighth Amendment.<sup>311</sup> The *Atkins* Court determined that the death penalty was inappropriate as applied to intellectually disabled defendants because their limited culpability rendered the punishment disproportional, in violation of the Eighth Amendment.<sup>312</sup>

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<sup>305</sup> For a discussion on adolescent psychology, see *supra* Section I.B.

<sup>306</sup> Compare *Atkins v. Virginia*, 536 U.S. 304, 318–20 (2002) (discussing the limitations on the intellectually disabled and how those limitations affect decisionmaking and make them vulnerable to coercion), and *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005) (conducting a similar analysis with respect to age), with *T.L.O.*, 469 U.S. at 343–47 (analyzing the reasonableness of the warrantless search without regard to T.L.O.’s age or gender).

<sup>307</sup> *Thompson*, 487 U.S. at 838.

<sup>308</sup> *Id.* at 834 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115–16 (1982)).

<sup>309</sup> *Id.* at 834–35, 837 (quoting *Eddings* 455 U.S. at 115 n.11) (“The likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent.”).

<sup>310</sup> See generally *Roper*, 543 U.S. 551.

<sup>311</sup> *Atkins*, 536 U.S. 304.

<sup>312</sup> *Id.* at 313–17, 319–20. The Court was also influenced by what it deemed to be a national consensus against imposition of the death penalty on intellectually disabled defendants. *Id.* at

The Court drew heavily on the psychology literature that underpinned its subjective considerations of age, echoing its sentiments on youth and decisionmaking. It found pertinent that the intellectually disabled “often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders.”<sup>313</sup> Acknowledging an exception in the efficiency of our procedural safeguards, it found that “some characteristics of [intellectual disability] undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards.”<sup>314</sup> This is significant because the Court finally recognized that a categorical group of citizens who, “by definition,” have less ability to act in their own best interest in the context of a police-citizen encounter.<sup>315</sup> Yet it limited the application of this analysis only to the intellectually disabled in the context of the death penalty. Nevertheless, *Atkins* demonstrates that the Court is able and willing to carve out rules for some subjective characteristics some of the time.

Following on *Atkins*, the Supreme Court revived this language of proportionality and “group” psychology in 2005 when, in *Roper v. Simmons*, it held that the Eighth Amendment categorically precluded minors from the death penalty altogether.<sup>316</sup> The Court drew parallels between the law’s development in death penalty cases involving the intellectually disabled and the then-developing jurisprudence in death penalty cases involving juveniles.<sup>317</sup> Ultimately finding the death penalty unsuitable for minors, the Court focused on three differences between juveniles and adults that harkened back to the Court’s considerations in *Thompson*: (1) lack of maturity and underdeveloped responsibility often lead to “impetuous and ill-considered actions and decisions,” (2) juveniles tend to be more susceptible to negative influences and peer pressure, and (3) the transitory nature of juvenile character.<sup>318</sup> Thus, the Court explained that under *Atkins*, juveniles are not the “most deserving of execution,”<sup>319</sup> particularly in light of the difficulty—“even for expert psychologists”—to determine when a juvenile’s offense stems from

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<sup>316</sup> (“The practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it.”).

<sup>313</sup> *Id.* at 318.

<sup>314</sup> *Id.* at 317.

<sup>315</sup> *See id.* at 318 (finding that the intellectually disabled lack the ability to “understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others”—elements intrinsic to a police-citizen interaction and essential to walking away from one).

<sup>316</sup> *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>317</sup> *See id.* at 560–63.

<sup>318</sup> *Id.* at 569–70.

<sup>319</sup> *Id.* at 568 (quoting *Atkins*, 536 U.S. at 319).

immaturity or “irreparable corruption.”<sup>320</sup> Even Justice O’Connor’s dissenting opinion considered empirical evidence and acknowledged that juveniles “as a class are . . . less mature, and therefore less culpable.”<sup>321</sup>

Five years later, the Court extended its juvenile death penalty to a broader Eighth Amendment jurisprudence as applied to juveniles in *Graham v. Florida*.<sup>322</sup> There, the Court held that the life imprisonment of a minor (under eighteen-years-old) without parole for a nonhomicide crime violated the Eighth Amendment.<sup>323</sup> The Court again followed the *Atkins–Roper* lead in considering the legislative and societal consensus on the practice of sentencing a minor to life imprisonment for a crime other than homicide.<sup>324</sup> Also pulling from *Roper*, the Court found that, “[a]s compared to adults, juveniles have a ‘lack of maturity and an underdeveloped sense of responsibility’; they ‘are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure’; and their characters are ‘not as well formed.’”<sup>325</sup> Because juveniles make rash decisions without thinking of the consequences, the Court also found them “less likely to take a possible punishment into consideration.”<sup>326</sup> This, in the context of the Eighth Amendment, makes youth less culpable than adults and less deserving of execution. But it similarly makes youth less capable of knowing how and when to exercise their criminal procedure rights—for example, when it is in their own interests to refrain from answering questions during a *Terry* stop, and how best to do so—yet the Court has not generalized their reasoning to that context.

In *J.D.B. v. North Carolina*, however, the Court finally recognized that those same characteristics impact how youth interact with the police, but only in one limited circumstance.<sup>327</sup> It acknowledged that the susceptibility to outside pressures makes young people “internalize and perceive the circumstances” of an interrogation differently than adults.<sup>328</sup> J.D.B. was a thirteen-year-old seventh grader who was seen near the scene of two home break-ins. After being questioned by police on the street, police went to J.D.B.’s school five days later, removed him from his classroom, and brought him into one of the school’s

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<sup>320</sup> *Id.* at 573.

<sup>321</sup> *Id.* at 588 (emphasis omitted).

<sup>322</sup> 560 U.S. 48 (2010).

<sup>323</sup> *Id.* at 82.

<sup>324</sup> *Id.* at 61–62.

<sup>325</sup> *Id.* at 68 (quoting *Roper*, 543 U.S. at 569–70).

<sup>326</sup> *Id.* at 72.

<sup>327</sup> See *J.D.B. v. North Carolina*, 564 U.S. 261, 278–80 (2011).

<sup>328</sup> *Id.* at 278.



conference rooms.<sup>329</sup> Present in the conference room were the investigator, the assistant principal, an administrative intern, and the uniformed officer assigned to the school.<sup>330</sup> J.D.B. was never read his Miranda warnings, given the chance to speak to his grandmother (his legal guardian), nor told that he was free to leave.<sup>331</sup> After being told to “do the right thing,” and threatened with a secured custody order, J.D.B. confessed to the break-ins and theft.<sup>332</sup> Only after this admission did the investigator tell J.D.B. that he could remain silent and leave the room.<sup>333</sup> J.D.B. then provided a second, more detailed confession, including a written statement. He was later charged with juvenile counts of breaking and entering and larceny.<sup>334</sup>

The Supreme Court granted certiorari to determine whether the in-custody analysis under *Miranda* requires the courts to consider a juvenile suspect’s age;<sup>335</sup> it concluded that age was relevant to the totality of the circumstances determination.<sup>336</sup> In assessing whether a child is potentially “in custody” under a different Fifth Amendment *Miranda* standard to adults,<sup>337</sup> the Court began from the premise that “[e]ven for an adult, the physical and psychological isolation of custodial interrogation can ‘undermine the individual’s will to resist and . . . compel him to speak where he would not otherwise do so freely.’”<sup>338</sup> Considering age in the reasonable person analysis, the Court found “[i]t is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave.”<sup>339</sup> Drawing from the “commonsense conclusions” it had drawn from “[t]ime and again”—in *Roper*, *Graham*, *Gallegos*, and *Haley*—the Court repeated the empirical observations of juveniles’ susceptibility to outside pressures, general lack of maturity, responsibility, experience, and judgment.<sup>340</sup> It determined that “a child’s age differs from other personal characteristics that, even when known to police, have no objectively discernible relationship to a reasonable person’s understanding of his freedom of action.”<sup>341</sup> So long as the officer is aware of the child’s age during questioning, or the child’s age

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<sup>329</sup> *Id.* at 265.

<sup>330</sup> *Id.*

<sup>331</sup> *Id.* at 266.

<sup>332</sup> *Id.* at 266–67.

<sup>333</sup> *Id.* at 267.

<sup>334</sup> *Id.*

<sup>335</sup> *Id.* at 268.

<sup>336</sup> *Id.* at 280–81.

<sup>337</sup> *Id.* at 270.

<sup>338</sup> *Id.* at 269 (alteration in original) (quoting *Miranda v. Arizona*, 384 U.S. 436, 467 (1966)).

<sup>339</sup> *Id.* at 264–65, 271–72.

<sup>340</sup> *Id.* at 272.

<sup>341</sup> *Id.* at 275.

“would have been objectively apparent to any reasonable officer,” the *Miranda* in-custody determination now requires consideration of the juvenile suspect’s age.<sup>342</sup>

Nevertheless, the Court has not set juveniles apart in the context of any other kind of confrontation with law enforcement. Despite all of its talk of juveniles’ lack of maturity, susceptibility to pressure from peers and authorities, and poor judgment, the Supreme Court has refused to consider adolescence in light of anything *but* this one narrow application and in the context of the death penalty. The Court drew the same conclusions about the intellectually disabled community in its death penalty jurisprudence, but again there is a lack of consideration, and therefore protection, for such individuals in other areas of constitutional criminal procedure law. Certainly the characteristics that make juveniles and the intellectually disabled less culpable for Eighth Amendment purposes make them less able to meet the threshold behaviors required for seizure, consent, invocation, and waiver under the Fourth, Fifth, and Sixth Amendments.

The Court in *J.D.B.*, however, hinted at age’s importance under the reasonable person standard more broadly.<sup>343</sup> Although it expressly referred only to negligence in civil law, rather than other constitutional criminal procedure doctrines, the decision arguably opened the door to subjective considerations under the reasonable person inquiry.<sup>344</sup> So if the Court has opened these doors to subjective considerations in certain criminal contexts, why ultimately limit such opening to youth and intellect, and not expand it to gender? It is possible to argue that age and intellectual disability are categorically different—physiologically and developmentally—from gender. The argument is as follows: gender’s effect on individual behavior varies from person to person and manifests more as a general *tendency*, whereas research on age and intellectual disability reveals more *categorical* conclusions that lend themselves to bright-line rules or definite standards. This is because, with regard to juvenile development, there are observed psychological markers that function like milestones: when a person reaches *X* age, he will have (or should have) developed *Y* process. A similar phenomenon occurs with intellectual disability, as was discussed in Section I.B.2. But with gender, many differences appear to be learned rather than innate, resulting from women’s traditionally less powerful position in society, and there is no guarantee that any given woman will adopt or develop any or all of them.

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<sup>342</sup> *See id.* at 274.

<sup>343</sup> *Id.* (“Indeed, even where a ‘reasonable person’ standard otherwise applies, the common law has reflected the reality that children are not adults.”).

<sup>344</sup> *See id.*

As this Article explains, however, the effects of gender are significant and equally as categorical as both age and intellectual disability, insofar as speech, action, and inaction directly correlate with a woman's psychological freedom or physical willingness to act or speak in a certain way—in her best interest.<sup>345</sup> In fact, the Court's single consideration of gender as effecting a shared experience with one facet of the law (sex discrimination in the employment context)<sup>346</sup> shows not only that the courts are able to account for gender, but also that gender's relevance is not so subjective and variable as to burden courts or law enforcement. Rather, gender is a characteristic that has been empirically demonstrated to affect the law's treatment of over half of the national population.<sup>347</sup> By viewing gender as irrelevant to these core constitutional doctrines, the law is writing women out of constitutional criminal procedure—both in application and in crafting the notion of the reasonable “person's” response through a lens of the ordinary male response. Simultaneously, it is recognizing but largely ignoring the impact of youth and intellectual disability. When so many individuals are marginalized by the national constitutional criminal jurisprudence, the Court should start to pay attention.

### III. ACCOUNTING FOR RELEVANT SUBJECTIVE CHARACTERISTICS

#### A. *An Objectively Reasonable Person, in All the Circumstances*

This Article has shown that women, juveniles, and the intellectually disabled both perceive relevant factors differently from the idealized reasonable man, and also express themselves differently from that reasonable man—both verbally and in terms of their behavioral responses. Consequently, in all its various permutations, the reasonable person test excludes individuals who possess those characteristics from full constitutional criminal protection in two different ways: in the way that notions of reasonableness are conceptualized, and in the way in which they are applied. In developing the test of what constitutes a

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<sup>345</sup> One possibility, which the authors are exploring in a follow-up article, is that the significance of gender may change with time, as women gain more power within society. But at least for now, gender differences significantly impact individuals' constitutional criminal procedure rights.

<sup>346</sup> See *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611 (6th Cir. 1986), *abrogated by Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); discussion *supra* Section II.A.5.

<sup>347</sup> See Kessler, *supra* note 26, at 68–76 (exploring how gender affects one's beliefs about one's freedom to terminate a police-citizen encounter); *see also, e.g.*, sources cited *supra* notes 39 and 46 (listing studies). As explained in some detail in Section II.A, the affect gender has on legally relevant behaviors absolutely affects the law's distinct treatment of women, however unintended.

reasonable response, the courts consider the actions of adult, white, fully able men, and then in applying the test, the courts once again ignore the different expressions of women, juveniles, and the mentally disabled. This Article posits that to properly account for the nuance of human experience, the reasonable person test and its progeny must ask not only what the reasonable person would do when faced with the defendant's circumstances, but what a *similarly situated* (in society) reasonable person would do under the defendant's (physical) circumstances.

Our proposal has two elements, both of which have strong precedent. The first element is to include within the reasonable person test and its variants what a *similarly situated* reasonable person would do. This is a test that stems from the Supreme Court's own constitutional criminal doctrine.<sup>348</sup> The novelty is in acknowledging the overwhelming evidence of difference between men and women, adults and children, fully abled and intellectually disabled persons, and so recognizing that these characteristics are relevantly different.<sup>349</sup> Just as it is discriminatory to treat like as unlike, it is equally unfair to define away differences that make it impossible to exercise the same rights in reality. The second element is that, in order to determine which characteristics meet the threshold, courts should look to the same empirical evidence as the Supreme Court has done numerous times when it has adjusted the law to account for the differences of the intellectually disabled and youth in some circumstances. Once again, this is not a radical change jurisprudentially; rather, the novelty is in applying the standard in a more uniform, less ad hoc manner.

Our proffered gloss on the reasonable person inquiry stems directly from the extensive research establishing the meaningful differences in the ways that certain people assert their rights. As Part II outlined, so many of the constitutional criminal procedure tests rely upon an evaluation of the citizen's ability to assert his rights. But this very ability depends on whether the defendant is a youth and therefore less inclined (or able) to perceive risk in the first place. This ability also depends on whether the defendant is (legally) intellectually disabled and therefore naturally inclined to succumb to police authority in both an effort to

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<sup>348</sup> Giovanna Shay, *Similarly Situated*, 18 GEO. MASON L. REV. 581, 584–86 (2011) (describing how the phrase “similarly situated” has been used in over one thousand Supreme Court cases, in numerous areas of law, including the death penalty, Eighth Amendment proportionality analysis, and ex post facto laws).

<sup>349</sup> To some extent, this proposal reifies socially enforced gender differences, and if adopted by the courts would institutionalize them. But such controversy is unavoidable: the courts likely will never adopt a purely individualized subjective standard, and the objective standard is not objective. Difference treatment thus accounts for the empirically demonstrated central tendencies, which likely covers the majority of women, where the current approach fails to account for women at all, and indeed excludes them.

please and an unconscious and involuntary acquiescence to intimidation. This ability depends on whether the defendant is a man or a woman, and therefore whether the apparent consent is directly asserted or indirectly sidestepped, or whether the interaction is colored by a cycle of suspicion that stems from the genders' mismatched communication styles.

In application, this proposal would mean that, when assessing whether a suspect has invoked the right to counsel during custodial interrogation, or whether the suspect has consented to police entry into a residence, the reasonable police officer would be expected to factor in the gender, age, and intellectual capacity of the suspect. Thus, whereas a male suspect who says "I think I need a lawyer" has been taken to not be clearly enough requesting counsel as to constitute invocation,<sup>350</sup> given what is known of the female register, and the tendency of women to state their needs and desires less clearly and assertively than men, the reasonable police officer should know that a woman who says "I think I need a lawyer" is, in contrast, invoking her rights. Similarly, although courts have held that a fully abled, adult resident "stepp[ing] back" from the doorway when an officer displays his badge is sufficient to indicate consent to enter,<sup>351</sup> when it is apparent to the officer that the resident is intellectually disabled or a minor, and thus more likely to comply with authority even when not voluntarily consenting to the police action, such behavior is inadequate to illustrate that consent has truly been manifested.<sup>352</sup>

The effect of this change will not be to perfectly reflect the different experiences of each individual. Some women may be quite assertive, and some may be less assertive—as the *Krueger* case illustrates<sup>353</sup>—because, as discussed, there is variation within each group. The established differences between the genders, between adults and juveniles, and between the intellectually disabled and the fully intellectually able, are only true overall. Taking into account gender, for instance, will only have the effect of changing the doctrine to better reflect the average woman, to essentially apply two averages, one for men and one for women; it will not perfectly fit the entire distribution of each gender.<sup>354</sup> However, the current situation, whereby the allegedly neutral—but in fact skewed—reasonable person is applied to all, is to apply just one

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<sup>350</sup> *Burket v. Angelone*, 208 F.3d 172, 198 (4th Cir. 2000) (ruling that saying "I think I need a lawyer" does not constitute an unequivocal request for counsel).

<sup>351</sup> *People v. Quinn*, 14 Cal. Rptr. 814, 816 (Dist. Ct. App. 1961).

<sup>352</sup> The proposed solution is applied in more detail and with more scenarios in the following Sections.

<sup>353</sup> See *People v. Krueger*, 412 N.E.2d 537 (Ill. 1980).

<sup>354</sup> Nor can it account for variation within the standard dichotomy of male-female—a worthy goal that this Article leave for another day.

average, and a biased one at that, that reflects only the position of men. Thus, our proposal constitutes an imperfect yet significant improvement.

To instead account for every variation would convert the test into a wholly subjective one, which is neither realistic nor necessarily desirable. This Article acknowledges that there is a need for an objective rule, and not every psychological or physiological characteristic of a defendant is or should be relevant to the reasonableness determination. Rather, only those subjective characteristics that are (1) apparent to an officer during a police-citizen interaction, and (2) empirically demonstrated to require consideration, should be injected into the reasonable person test. This excludes ambiguous or not immediately apparent qualities, such as class and experience with law enforcement. These characteristics ought to be excluded even though they may significantly affect a person's perceptions or reactions to a police encounter. For instance, not only is class likely to have its own effect on suspects' perceptions and behaviors, but it also interacts with gender.<sup>355</sup> Nonetheless, the test cannot simply be the size of the effect. The problem is that both class and law enforcement experience are too nebulous to establish a predictable "objective" measure and too invisible to allow for a workable standard. Thus, they fail the requirement of being readily and reliably apparent to a reasonable police officer.

Moreover, the empirically demonstrated characteristics this Article contemplates are not limited to defendant-friendly attributes, such as gender, age, and intellectual disability, which would demand more officer care or judicial scrutiny. Rather, a suspect's criminal history, which may be apparent to an officer in the case of a wanted suspect or known career criminal, would certainly be relevant not only to the defendant's actions in a reasonable person inquiry, but also to the officer's actions in a reasonable suspicion or totality of the circumstances analysis. A factor such as this may well weigh *against* an expectation of nonconsensual acquiescence.

The final limit on the breadth of our proposal is that the ability to assert one's rights also depends upon the doctrine being evaluated. And some doctrines will not be affected by an additional subjective consideration. For example, the reasonable expectation of privacy inquiry would remain the same if the courts incorporated consideration of gender. In *Katz v. United States*, the Supreme Court articulated the "reasonable expectation of privacy" test that is still used to determine whether a governmental intrusion constitutes a Fourth Amendment

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<sup>355</sup> See, e.g., *supra* note 10 and accompanying text; see also *supra* Section I.A.1.

search, and therefore whether constitutional protections are required.<sup>356</sup> This test consists of two parts: (1) whether the suspect had a subjective expectation of privacy, and (2) whether that subjective expectation is “one that society is ‘prepared to recognize as legitimate.’”<sup>357</sup> This doctrine would be unchanged by a general incorporation of gender into tests of reasonableness because societal expectations of privacy are not particularly gendered, and their qualification does not require an evaluation of responsiveness to law enforcement. Rather, the reasonable expectation of privacy inquiry is about aggregate, nonreactive group expectations, not about the application of (a male-leaning) reasonableness to an individual. And although every few years—particularly as technology advances—the courts are forced to evaluate whether society recognizes as legitimate a subjective expectation of privacy, that evaluation rarely if ever depends on the individual’s personal characteristics.<sup>358</sup>

In contrast to reasonable expectations of privacy, the workings of reactance, speech, and other rights-assertion behaviors do operate in doctrines such as consent, and so these doctrines should incorporate our test of the similarly situated gloss on the reasonable person analysis. Yet even under our similarly situated reasonable person test—or a totality of the circumstances, including subjective characteristics, test—the outcome may not change. For example, had the Court evaluated Sylvia Mendenhall’s two distinct consents to search separately, and then in light of one another, under a totality of the circumstances test, the Court still may have reached the same conclusion, even if it had accounted for her status as an uneducated, young, black woman.<sup>359</sup> For starters, the first time the DEA agents asked Mendenhall if she would allow them to search both her person and her bag, they told her that she had the right to refuse consent.<sup>360</sup> In response to this, she nonetheless replied expressly and verbally, “Go ahead.”<sup>361</sup> The Court could reasonably have determined that, even though Mendenhall was a

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<sup>356</sup> *Katz v. United States*, 389 U.S. 347 (1967). Although, the Court has since reinvigorated trespass analysis, which now augments the reasonable expectation of privacy inquiry. See *United States v. Jones*, 132 S. Ct. 945 (2012).

<sup>357</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 338–39 (1985) (quoting *Hudson v. Palmer*, 468 U.S. 517, 526 (1984)).

<sup>358</sup> Even in *T.L.O.*, where the Supreme Court endeavored to determine the Fourth Amendment rights of a fourteen-year-old, the Court’s analysis of T.L.O.’s expectation of privacy in her backpack did not turn on the fact that she was a child, or even that she was a student in a public school. *Id.* (“[S]choolchildren may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds.”).

<sup>359</sup> See *United States v. Mendenhall*, 446 U.S. 544 (1980).

<sup>360</sup> *Id.* at 548.

<sup>361</sup> *Id.*

woman confronted by male law enforcement, and even though she was a member of a racial minority with a tumultuous history with law enforcement, it would be unreasonable for her to think that the DEA agents' warning that she could refuse consent did not apply to the second request for consent to the first search.

In contrast, it would be much harder to maintain that Mendenhall's consent to the second search was voluntarily given once her subjective characteristics are considered. When the female police officer asked Mendenhall if she could search her person, recall that Mendenhall made a clear effort to avoid answering the consent request in the positive.<sup>362</sup> When the police officer told her that "if she were carrying no narcotics, there would be no problem," Mendenhall began to disrobe without comment.<sup>363</sup> In light of the gender differences in speech, reactance, risk-aversion, and confidence, a court would have to consider whether Mendenhall's statement that she "had a plane to catch"<sup>364</sup> was in fact a denial of consent. The important difference is to genuinely consider Mendenhall's responses in light of her circumstances, which have been shown to be affected by her gender. Although the similarly situated reasonable person standard is not meant to allow subjective considerations to trump objective actions, it would rectify decades of analysis that has excluded approximately half of the population from proper evaluation.

Our proposal provides the means of a radical change that reaches well beyond gender or other characteristics, not only for reasons of equity, but also for reasons of jurisprudential soundness. Such an approach offers a means of cleaning up the morass of tests currently populating constitutional criminal procedure. As discussed, the problems associated with the reasonable person standard and its adjunct reasonableness analysis bleed into the totality of the circumstances test. As the next Section shows, there are a plethora of additional tests that conduct reasonableness-oriented inquiries from a muddle of perspectives; the variation in these approaches is arbitrary and illogical because the Court is willing to consider some subjective characteristics but not others in its constitutional criminal procedure jurisprudence.

### B. *Creating a Uniform Approach*

Even if gender is not at the forefront of the Court's—or the readers'—concerns, our proposed test offers a lens through which courts

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<sup>362</sup> See *id.* at 548–49.

<sup>363</sup> *Id.* at 549.

<sup>364</sup> *Id.*



can view and improve upon the whole area of constitutional criminal procedure law. For decades, the Supreme Court has crafted objective rules in an area of the law ripe with subjectivity. In crafting these rules, it has touted the importance of not “hamper[ing] the traditional function of police officers in investigating crime.”<sup>365</sup> Yet even as it promotes reasonableness analysis to avoid “burdening police with the task of anticipating the idiosyncrasies of every individual suspect and divining how those particular traits affect each person’s subjective state of mind,”<sup>366</sup> over the years the Court has carved out numerous exceptions—albeit rarely described as such—to account for many circumstances and characteristics where an objective rule simply does not do justice.<sup>367</sup> Although perhaps at first these exceptions made sense in juxtaposition with the other rules, now the enormous variety of tests that form the backdrop of constitutional criminal procedure make the landscape appear absurd.

The entire area of constitutional criminal procedure law consists of so many different doctrines and tests for every possible police-citizen circumstance. In exploring the insufficiency of those objective and subjective tests as they relate to gender, this Article also proposes a solution. There is no reason why our solution should not apply more broadly, and in doing so, standardize the existing doctrine.

Consider the plethora of doctrines within constitutional criminal procedure law. Examples include warrantless search rules (in a variety of situations, such as schools, administrative checkpoints, and dog sniffs), consent to search, seizure (which also appears in more than one scenario, i.e., *Terry* stops versus longer seizures, and public seizures versus seizures in a confined space), waiver of the right to remain silent, and invocation of the right to counsel.<sup>368</sup> Each of these doctrines is subject to a different rule, which either considers the defendant’s subjective perspective, the officer’s subjective perspective, the defendant’s objective perspective, the officer’s objective perspective, or the totality of the circumstances. In some—the in-custody determination, for example—subjective characteristics, such as age, are considered in the doctrine. But in other doctrines where the same subjective characteristic is at issue—voluntary consent, for example—the test neglects to consider such subjectivity. Intellectually, this is nonsensical, and the Court’s purely ad hoc approach is not working.

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<sup>365</sup> *Schneckloth v. Bustamonte*, 412 U.S. 218, 231–32 (1973) (quoting *Miranda v. Arizona*, 384 U.S. 436 (1966)); *accord Yarborough v. Alvarado*, 541 U.S. 652, 668 (2004) (describing that objective inquiries provide “clear guidance” to the police).

<sup>366</sup> *J.D.B. v. North Carolina*, 564 U.S. 261, 271 (2011).

<sup>367</sup> See *infra* Table 1.

<sup>368</sup> See *infra* Table 1.

The following Table provides a visual map of the current landscape of scattered inquiries:

Table 1<sup>369</sup>

| Doctrine:<br><i>Application</i>                         | Defendant's Perspective |            | Officer's Perspective |            | Rule  |
|---|-------------------------|------------|-----------------------|------------|---|
|   | OBJECTIVE               | SUBJECTIVE | OBJECTIVE             | SUBJECTIVE |   |
| Warrantless Search:<br><i>General</i>                   | X                       | X          |                       |            | Whether D expected privacy— <i>subjective</i> —and whether that expectation was reasonable— <i>objective</i> (REP) <sup>370</sup>   |
| Warrantless Search:<br><i>Physical Trespass</i>         |                         |            | X                     | X          | Whether implied or express license exists on behalf of police— <i>subjective</i> —which requires an evaluation of the officer's purpose for intrusion— <i>objective</i> <sup>371</sup>  |
| Warrantless Search:<br><i>The Home</i>                  | X                       | X          | X                     |            | REP (as above) exists if the interior of the home is revealed— <i>objective</i> —and any enhanced technology used for the search is not widely available— <i>objective</i> <sup>372</sup>   |
| Warrantless Search:<br><i>School</i>                    |                         |            | X*                    |            | <i>Objective reasonableness</i> of belief (less than RAS) that a search will produce evidence of violation of law or school rules, and search <i>reasonably related</i> in scope to justification for initial interference and not excessively intrusive <i>in light of child's age, sex, and nature of infraction</i> <sup>373</sup> |
| Warrantless Search:<br><i>Administrative Inspection</i> |                         |            | X                     |            | Administrative plan and tradition of inspection, or else citizen complaint, or "other satisfactory reason for securing immediate entry"— <i>objective</i> <sup>374</sup>  |
| Seizure:<br><i>Administrative Checkpoint</i>            |                         |            |                       | X          | <i>Objective primary purpose</i> of the stop must be closely related to policing the border or ensuring roadway safety, not "general interest in crime control" <sup>375</sup>  |

<sup>369</sup> "\*" = Totality of the Circumstances; "REP" = Reasonable Expectation of Privacy; "RAS" = Reasonably Articulated Suspicion; "D" = Defendant.

<sup>370</sup> Katz v. United States, 389 U.S. 347 (1967).

<sup>371</sup> Florida v. Jardines, 133 S. Ct. 1409 (2013); United States v. Jones, 132 S. Ct. 945 (2012) (stating at various times that the Fourth Amendment may be implicated when the government intrudes on a constitutionally protected area *for the purpose of obtaining information*).

<sup>372</sup> Kyllo v. United States, 533 U.S. 27 (2001); United States v. Karo, 468 U.S. 705 (1984).

<sup>373</sup> New Jersey v. T.L.O., 469 U.S. 325 (1985).

<sup>374</sup> Camara v. Mun. Court, 387 U.S. 523, 540 (1967); *see also* New York v. Burger, 482 U.S. 691 (1987).

<sup>375</sup> City of Indianapolis v. Edmond, 531 U.S. 32 (2000); Mich. Dep't of State Police v. Sitz,

|  |   |    |    |  |   |
|--|---|----|----|--|---|
| Seizure:<br>Warrant<br>Execution               |   |    | X  |  | Reasonable to seize a person for the duration of a search, and to use <i>reasonable</i> force, within the immediate vicinity <sup>376</sup>                                       |
| Terry<br>Stop/Frisk<br>(RAS):<br>Justification |   |    | X  |  | Specific and articulable facts exist—of criminality (stop) or physical danger (frisk)—which allow rational inferences that <i>reasonably warrant</i> the intrusion <sup>377</sup> |
| Terry Stop:<br>Occurrence                      | X |    |    |  | Reasonable person would feel free to leave in the circumstances <sup>378</sup>  |
| Terry Stop:<br>Confined<br>Space               | X |    |    |  | Reasonable person would feel free to end encounter and deny the officer's request <sup>379</sup>  |
| Terry Stop:<br>Degree of<br>Intrusion          |   |    | X  |  | Greater intrusion (e.g. moving defendant) permissible for <i>objective</i> officer security purpose, but not for investigative purpose <sup>380</sup>                             |
| Probable<br>Cause (PC)                         |   |    | X* |  | Facts and circumstances sufficient to warrant a law enforcement officer of <i>reasonable caution</i> in the belief that an offense has been or is being committed <sup>381</sup>  |
| PC / RAS:<br>Mistake of<br>Law                 |   |    | X  |  | A <i>reasonably well-trained</i> officer's <i>reasonable mistake</i> of law gives rise to reasonable suspicion that justifies a traffic stop <sup>382</sup>                       |
| Consent to<br>Search:<br>General               |   | X* |    |  | Consent to search must be <i>knowing and voluntary</i> —the will of the defendant was not overborne <sup>383</sup>  |
| Consent to<br>Search:<br>Apparent<br>Authority |   |    | X  |  | Police must <i>reasonably believe</i> that a person can consent, even if that person has no actual authority to consent <sup>384</sup>  |

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496 U.S. 444 (1990).

<sup>376</sup> Bailey v. United States, 133 S. Ct. 1031 (2013); Michigan v. Summers, 452 U.S. 692 (1981).

<sup>377</sup> Terry v. Ohio, 392 U.S. 1 (1968).

<sup>378</sup> United States v. Mendenhall, 446 U.S. 544 (1980); Terry, 392 U.S. 1.

<sup>379</sup> Florida v. Bostick, 501 U.S. 429 (1991).

<sup>380</sup> Florida v. Royer, 460 U.S. 491 (1983).

<sup>381</sup> Illinois v. Gates, 462 U.S. 213 (1983).

<sup>382</sup> Heien v. North Carolina, 135 S. Ct. 530 (2014).

<sup>383</sup> United States v. Drayton, 536 U.S. 194 (2002); Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

<sup>384</sup> Illinois v. Rodriguez, 497 U.S. 177 (1990).

|  |   |    |   |   |  |
|--|---|----|---|---|--|
| In-Custody Determination: <i>General</i>     | X |    |   |   | Whether a <i>reasonable person</i> in suspect's position would believe that he was under arrest (or something equivalent to an arrest) <sup>385</sup>  |
| In-Custody Determination: <i>for a Minor</i> | X |    | X |   | A child's age is one of the relevant circumstances that determines whether a <i>reasonable person</i> feels free to leave; the child's age must be known or <i>objectively apparent</i> to the officer <sup>386</sup>                        |
| Interrogation: <i>Fifth Amendment</i>        |   | X  | X |   | "[W]ords or actions on the part of police officers that they <i>should have known</i> were <i>reasonably likely</i> to elicit an incriminating response" from the suspect, including if D was <i>particularly susceptible</i> <sup>387</sup> |
| Interrogation: <i>Sixth Amendment</i>        |   |    |   | X | <i>Deliberate intent</i> by police to elicit incriminating statements <sup>388</sup>   |
| Interrogation: <i>Due Process</i>            |   | X* |   |   | Voluntariness—confession is made freely, voluntarily, and without compulsion or inducement of any sort <sup>389</sup>  |
| Invocation: <i>Fifth Amendment</i>           |   |    | X |   | Request for lawyer must be clear and unambiguous, such that a <i>reasonable police officer</i> in the circumstances would understand it to be a request for an attorney <sup>390</sup>   |
| Waiver: <i>Fifth Amendment</i>               |   | X* |   |   | Under <i>all the circumstances</i> of defendant's background, experience and conduct, whether through his words and actions, defendant gave a clear waiver <sup>391</sup>  |
| Two-Stage Interrogation: <i>Fruits</i>       | X |    |   | X | Second statement is admissible as long as first statement was not "involuntary"— <i>objectively assessed</i> , and not an <i>intentional</i> police practice <sup>392</sup>  |

<sup>385</sup> *Yarborough v. Alvarado*, 541 U.S. 652 (2004); *Oregon v. Mathiason*, 429 U.S. 492 (1977).

<sup>386</sup> *J.D.B. v. North Carolina*, 564 U.S. 261 (2011).

<sup>387</sup> *Rhode Island v. Innis*, 446 U.S. 291, 302 (1980) (second emphasis added).

<sup>388</sup> *Brewer v. Williams*, 430 U.S. 387 (1977).

<sup>389</sup> *Spano v. New York*, 360 U.S. 315 (1959).

<sup>390</sup> *Davis v. United States*, 512 U.S. 452 (1994).

<sup>391</sup> *North Carolina v. Butler*, 441 U.S. 369 (1979); *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>392</sup> *Missouri v. Seibert*, 542 U.S. 600 (2004); *Oregon v. Elstad*, 470 U.S. 298 (1985).

|                                  |                   |                   |   |  |   |
|----------------------------------|-------------------|-------------------|---|--|---|
| Two-Stage Interrogation: Waiver  | X* <sup>393</sup> | X* <sup>394</sup> |   |  | Whether <i>from suspect's standpoint</i> , the Miranda warnings function effectively, giving a real choice between talking and remaining silent <sup>395</sup>  |
| Waiver: Sixth Amendment          |                   | X                 |   |  | Suspect must <i>intentionally</i> relinquish the right for the waiver to be valid <sup>396</sup>  |
| Exclusion: Fourth Amendment      |                   |                   | X |  | Exclusion only applies if there is <i>objective</i> "culpability" of the police, and the potential of exclusion would <i>objectively</i> deter wrongful police conduct <sup>397</sup>   |
| Exclusion: Errors                |                   |                   | X |  | Evidence need not be suppressed if police relied on invalid warrant in <i>objective</i> "good faith" <sup>398</sup>   |
| Exclusion: Fifth Amendment       |                   | X                 |   |  | Poisonous fruit applies only if <i>involuntary</i> <sup>399</sup>   |
| Exclusion: Sixth Amendment       |                   |                   | X |  | No suppression if evidence would inevitably— <i>objectively</i> —have been discovered by proper means <sup>400</sup>  |
| Life Imprisonment Without Parole | X                 |                   |   |  | Life imprisonment without parole for nonhomicide offenses constitutes cruel and unusual punishment for juvenile offenders; if the state imposes life imprisonment, it must provide the convict some <i>realistic opportunity</i> to obtain release before the end of that term <sup>401</sup> |
| Death Penalty                    | X                 |                   |   |  | Juvenile status and mental retardation prohibit application of the death penalty <sup>402</sup>   |

<sup>393</sup> In *Elstad*, the Court suggested that a subjective, totality of the circumstances analysis may apply, *Elstad*, 470 U.S. at 309, but subsequently a plurality in *Seibert* adopted an objective totality of the circumstances test, *Seibert*, 542 U.S. at 612. Justices Breyer and Kennedy's concurrences each rejected this approach. *Id.* at 618 (Breyer, J., concurring); *id.* at 622 (Kennedy, J., concurring).

<sup>394</sup> See *supra* note 393.

<sup>395</sup> *Seibert*, 542 U.S. 600; *Elstad*, 470 U.S. 298.

<sup>396</sup> *Brewer v. Williams*, 430 U.S. 387 (1977).

<sup>397</sup> *Herring v. United States*, 555 U.S. 135 (2009); *Hudson v. Michigan*, 547 U.S. 586 (2006).

<sup>398</sup> *Evans v. Michigan*, 133 S. Ct. 1069 (2013); *Illinois v. Krull*, 480 U.S. 340 (1987); *United States v. Leon*, 468 U.S. 897 (1984).

<sup>399</sup> *United States v. Patane*, 542 U.S. 630 (2004).

<sup>400</sup> *Nix v. Williams*, 467 U.S. 431 (1984).

<sup>401</sup> *Graham v. Florida*, 560 U.S. 48 (2010).

<sup>402</sup> *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

As this Table demonstrates, the constitutional criminal procedure rules are erratic. Note further that this Table does not include many additional tests that define various exceptions to the warrant requirement;<sup>403</sup> and significantly, it does not differentiate between another major form of variation, namely ad hoc versus per se rules, which the various constitutional criminal procedure tests also combine.<sup>404</sup> Our proposed test—a similarly situated standard that accounts for apparent, relevant, subjective characteristics of the suspect—streamlines the inquiry, whether it is applied from the defendant’s or the officer’s perspective.

### 1. Tests from the Defendant’s Perspective

Even tests beginning the inquiry from the defendant’s perspective ask two very different questions: what the reasonable person would have done or felt (objective), and what the defendant actually did or felt (subjective). Some tests even do both.<sup>405</sup> In the street or bus seizure context, as discussed, the inquiry is purely objective, despite the fact that the defendant may have characteristics that warrant a somewhat subjective consideration. The in-custody determination makes an

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<sup>403</sup> A number of tests further define reasonableness in specific situations, such as in determining the legality of use of deadly force. *See, e.g.,* *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2015–16 (2014) (considering whether flight in a car chase “posed a grave public safety risk” to determine reasonable use of force); *Scott v. Harris*, 550 U.S. 372 (2007) (stating that police must weigh the number of lives at risk, as well as their relative culpability, against the likely death or serious injury of the target). Numerous rules involve judicial assessment of facts and circumstances, rather than police or defendant perceptions of those facts. For example, in defining exigent circumstances, the Court stated that police officers need not “delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others.” *Warden v. Hayden*, 387 U.S. 294, 298–99 (1967). The Court also identified the presumption of unreasonableness of searches and seizures without a warrant inside a home. *Payton v. New York*, 445 U.S. 573, 586 (1980). There are also seemingly specific exceptions to those warrant exemptions, such as a search of a cell phone during the arrest of the person. *Riley v. California*, 134 S. Ct. 2473, 2484–85, 2494 (2014) (refusing to apply a case-by-case analysis, and instead defining a category of effects exempt from the exception in *United States v. Robinson*, 414 U.S. 218 (1973)).

<sup>404</sup> *Compare* *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (setting out the objective frisk rule, which requires an ad hoc analysis of the circumstances of every given limited police search conducted pursuant to a *Terry* stop, to determine whether there existed specific and articulable facts that gave rise to reasonable suspicion that the person was armed and dangerous), *with* *Chimel v. California* 395 U.S. 752, 763 (1969) (crafting the automatic per se exception allowing police to search the person and immediate surroundings of an arrestee), *abrogated as recognized in* *Davis v. United States*, 564 U.S. 229 (2011).

<sup>405</sup> For example, the constitutionality of a warrantless search in the dog sniff context asks two questions, one subjective and one objective. First, the court asks whether the defendant expected privacy in the area that the dog sniff took place, a subjective question, and then it asks whether that expectation was objectively reasonable. *See Florida v. Jardines*, 133 S. Ct. 1409 (2013).

objective inquiry—whether, in light of the physical circumstances surrounding the interrogation, a reasonable person would have felt free to terminate the questioning and leave<sup>406</sup>—but does not include characteristics such as gender in that assessment. The very same subjective characteristics that might make the defendant not feel free to leave in the seizure context would also make the defendant not feel free to terminate the questioning, and should therefore be relevant to an in-custody determination. As such, our proffered reasonable person *in the defendant's position* inquiry—which, as stated, includes relevant subjective considerations such as gender, age, and race—would work to make all objective defendant-perspective tests uniform.

Our proposed test also solves the subjective defendant inquiry. In part, this is because our solution does what the subjective defendant inquiries aim to do—it actually considers subjective characteristics, instead of distilling the inquiry into an evaluation of the officer's actions. But using our similarly situated analysis has the added advantage of injecting an objective meter into what could otherwise become a purely subjective standard, thus providing predictability for the police at the same time as guaranteeing jurisprudential uniformity.

Consider again the in-custody determination. *J.D.B. v. North Carolina* established that a court should consider, when it is apparent, the age of the juvenile suspect being questioned when deciding whether he is “in custody” and therefore whether a Miranda warning is required.<sup>407</sup> As discussed in Part II, there is a logical problem that the same factors that make a juvenile incapable of understanding custodial arrest also make him less able to knowingly consent, and less able to make other such assessments. But in addition, there is a practical problem with this test: this is not the analysis typically applied. Instead, in order “to give clear guidance to the police,”<sup>408</sup> courts focus on an analysis of the police officer's actions and avoid ascertaining the youth's perception altogether.<sup>409</sup>

The same shift occurs with waiver, where the Supreme Court has expressly called for a subjective evaluation within the totality of the circumstances test. *Miranda* requires that waiver be determined by a totality of the circumstances inquiry.<sup>410</sup> In *North Carolina v. Butler*,

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<sup>406</sup> *Oregon v. Mathiason*, 429 U.S. 492 (1977).

<sup>407</sup> See *supra* notes 328–42 and accompanying text.

<sup>408</sup> *Yarborough v. Alvarado*, 541 U.S. 652, 668 (2004).

<sup>409</sup> *J.D.B. v. North Carolina*, 564 U.S. 261, 271 (2011) (“By limiting analysis to the objective circumstances of the interrogation, and asking how a reasonable person in the suspect's position would understand his freedom to terminate questioning and leave, the objective test avoids burdening police with the task of anticipating the idiosyncrasies of every individual suspect and divining how those particular traits affect each person's subjective state of mind.”).

<sup>410</sup> See *Miranda v. Arizona*, 384 U.S. 436, 475–77 (1966).

however, the Court held that “waiver must be determined on ‘the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.’”<sup>411</sup> But with waiver, just as with in-custody determinations, we see a shift in the Court’s reasoning from a rule that requires subjective considerations to an evaluation that precludes them or, at most, makes them optional.<sup>412</sup>

For example, in *People v. Hammond*, a 2012 California state case, the court focused its inquiry almost exclusively on what the police did during an interrogation of a sixteen-year-old.<sup>413</sup> After acknowledging the age of the accused, the court determined his age did not affect his confession because his answers to the police officer’s questions were “articulate” and “without hesitation.”<sup>414</sup> The court then concluded the single paragraph discussing Hammond’s age with a statement that he did not testify that the police acted in a threatening or exhausting way, and that the officer’s testimony confirmed the police’s lack of threatening conduct.<sup>415</sup> The remainder of the waiver inquiry focused entirely on the interrogation’s length. Thus, the court concluded that because there was no police misconduct, the boy was deemed to have made a knowing and voluntary waiver.<sup>416</sup>

Three things are significant here. First, the court seemed to discount the boy’s age because of his assertive (male) communication style. Second, the court discounted his age at least in part because he did not testify to specific police conduct, despite the fact that a defendant is permitted to refrain from testifying altogether, without any adverse inference being permissible. And finally, the court focused on the *officer’s* conduct during an evaluation of age’s effect on the existence of a valid waiver. Instead, the court should have taken account of the circumstances of the defendant—the dampening effect of youth on a

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<sup>411</sup> *North Carolina v. Butler*, 441 U.S. 369, 374–75 (1979) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

<sup>412</sup> *See, e.g., United States v. McFall*, No. 07-411, 2012 WL 194078, at \*4–5 (W.D. Pa. Jan. 19, 2012) (following a Third Circuit five-factor test, which consists of four inquiries that focus on the officer’s actions and one that begs the ultimate question by asking “whether the suspect voluntarily submitted to questioning” (quoting *United States v. Willaman*, 437 F.3d 354, 359–60 (3d Cir. 2006))). Significantly, in this case, age was not an issue for the defendant, but limited mental retardation was. The district court ultimately decided that the *J.D.B.* in-custody inquiry was not relevant because the defendant’s disability was not apparent to the officer, *id.* at \*5, which was likely the correct result. It is telling, however, that the court’s analysis, which followed precedent, was based on a police-centric factor test, and that the court’s eventual discussion of the defendant’s relevant subjective characteristics fell into a catch-all voluntariness factor that does not expressly require a subjective inquiry. *See id.* at \*11.

<sup>413</sup> *See People v. Hammond*, No. B223658, 2012 WL 1503123, at \*7 (Cal. Ct. App. Mar. 15, 2012) (depublished).

<sup>414</sup> *Id.*

<sup>415</sup> *Id.*

<sup>416</sup> *Id.*



person's ability to assert his right to silence, and his decreased likelihood to feel free from compulsion to speak—circumstances that the Supreme Court had explicitly recognized should be apparent to the police.

Such failure to properly apply the doctrine from the perspective of the youth rather than the officer may stem in part from the inconsistency of the Court to follow its own logic in concluding that use and intellectual disability affect an individual's ability to protect their own interests. The willingness, ability, or tendency to assert oneself through verbal or physical conduct applies to many doctrines that the Court has refused to incorporate any consideration of age and mental disability into. Further, those behaviors depend on a person's subjective characteristics beyond age and intellectual disability. Yet there is little consistency in either the Court's move from considering some characteristics but not others, to using objective or subjective rulemaking, or in the lower courts' application of the Court's subjective and objective standards. The Supreme Court should recognize that the same psychological findings and conclusions it made in the juvenile death penalty context also apply to the juvenile interrogation context, and that there exists an analog between gender and these other categories, and use a consistent approach to analyzing all of them. Although the Court made great strides in acknowledging the social and psychological realities of juveniles and the intellectually disabled, as Table 1 makes clear, the Court's willingness to consider these class of characteristics is inconsistent and, frankly, illogical.

## 2. Tests from the Officer's Perspective

Just as many doctrines in constitutional criminal procedure raise inquiries putting the court in the defendant's—or a would-be defendant's—position, there are rules that require analyzing the case from the officer's perspective, both objectively and subjectively. But this in no way diminishes the significance of our analysis. We propose the appropriateness of police conduct should be consistently assessed in terms of reasonableness, but in the context that the reasonable police officer would consider those subjective characteristics of a defendant that are known to affect such defendant's responses to citizen-police interactions. Of course, the notion of a characteristic "being known" itself is a product of a reasonableness analysis—it only applies to characteristics the reasonable police officer ought to know the defendant possessed, and that have been recognized by the courts as relevant, based on established evidence that they affect the defendant's perceptions or responses. But the notion of the reasonable police officer is less problematic than the notion of the reasonable defendant, who as

we have seen is assumed to represent the male, white, intellectually fully able, adult perspective.

A suspect has the right to counsel when subjected to custodial interrogation, and the Supreme Court has had to determine what constitutes interrogation and its “functional equivalent.”<sup>417</sup> As Table 1 illustrates, how the Court has chosen to answer that question is quite different for the Fifth and Sixth Amendments: the former assesses what the police “*should have known* is reasonably likely to elicit an incriminating response” from the suspect,<sup>418</sup> and the latter assesses whether the police *actually intended* to elicit incriminating statements.<sup>419</sup> One is subjective and one is objective, yet both tests are designed to protect largely the same right; the difference between them serves little purpose and is likely only to confuse police, as well as those wanting to exercise their own rights. But furthermore, even though the Court has expressed concern in both contexts that some defendants are far more susceptible to interrogative techniques than others,<sup>420</sup> the characteristics this Article has addressed, which have been shown to systematically impact defendants’ perceptions and responses, have not been so carefully considered by the courts. Yet if we apply our Article’s central premise that different groups, such as women and men, behave differently in the presence of police, then there will be subjectively different cues that the courts—and police—should consider in determining whether statements were reasonably likely to elicit a response.

Some of the suspect’s subjective circumstances should be infused into this evaluation, but others should not. Given the psychological evidence surrounding women’s common responses to authority, a police officer will know that a woman may be more likely to respond to some statements or queries than a man. Similarly, if the officer knows the suspect is intellectually disabled or a juvenile, the police will be equally equipped to manage the situation differently than they would be with an adult, white, fully able-minded, male suspect. Thus, under our proposed rule, police can conform their behavior appropriately when

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<sup>417</sup> *Rhode Island v. Innis*, 446 U.S. 291, 300–01 (1980) (“We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.”).

<sup>418</sup> *Id.* at 302.

<sup>419</sup> *Brewer v. Williams*, 430 U.S. 387, 399 (1977) (“There can be no serious doubt, either, that Detective Leaming deliberately and designedly set out to elicit information from Williams just as surely as and perhaps more effectively than if he had formally interrogated him.”).

<sup>420</sup> *Innis*, 446 U.S. at 302–03 (considering whether “the officers were aware that the respondent was peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children . . . [or] unusually disoriented or upset at the time of his arrest”); *Brewer*, 430 U.S. at 392 (“Detective Leaming knew that Williams was a former mental patient, and knew also that he was deeply religious.”).

questioning suspects of any gender, age, or intellectual ability, securing an actually voluntary and knowing confession and avoiding the suppression of valuable evidence. In turn, this will help the police be more effective law enforcers and more sympathetic agents of the law.

Police and citizens alike would benefit in the same way if subjective characteristics were likewise considered during the in-custody determination. It is sensible that the police should not refrain completely from employing psychological tactics during the interview process; it is an integral part of law enforcement's truth finding. However, if the police know that a court will be evaluating a defendant's age, intellectual ability, or gender (and the expected sensitivities that emanate from those characteristics), officers might be more willing to adapt their approach, such as by speaking in a less domineering manner, or erring on the side of the early provision of Miranda warnings. This would ensure against an accused's imbalanced perception of the interview, or against a court's finding either that the citizen made a voluntary, knowing waiver when he in fact had not, or that the citizen's confession was coerced when police otherwise believed they were in the right.<sup>421</sup> The practical achievability of such police practices is evidenced by the fact that some police manuals have provided for exactly such police conduct in relation to juveniles<sup>422</sup> and others.<sup>423</sup> As mentioned, not all subjective characteristics affecting a person's sensitivity to the police-citizen interaction should be considered. The suspect's previous experience with law enforcement is one of those characteristics because it is too imprecise to cabin into a workable standard. Some suspects are repeat offenders, and their particular histories interacting with police—the good and the bad—will certainly inform their conduct. For example, a suspect who feels that she has been singled out by the police or treated

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<sup>421</sup> This is particularly the case when considering the fact that the Court's prophylactic Miranda warnings, for example, have done little to convince a suspect to actually remain silent. See Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 653 (1996) (observing three California police departments and finding that more than seventy-eight percent of suspects waive their rights).

<sup>422</sup> For instance, in Tampa, Florida, the police manual specifies that "special efforts should be made, preferably on tape, to explain the rights to the juvenile in custody." TAMPA POLICE DEP'T, STANDARD OPERATING PROCEDURES 51 (2011), <http://www.tampagov.net/sites/default/files/police/files/tpd-sop.pdf>. The Rapid City, South Dakota, police manual requires that "rights must be waived by both child and parent/guardian before questioning if the statements/admissions obtained are to be admissible in court." RAPID CITY POLICE DEP'T, RULES AND PROCEDURES 690 (2006) (emphasis omitted), <http://mavweb.mnsu.edu/robbim1/rapid.pdf>. See generally Jacobi, *supra* note 9.

<sup>423</sup> For instance, the Austin, Texas, police manual provides that when interrogating an arrestee, "[i]f an officer cannot inform the arrestee of the Miranda warnings without the use of an interpreter, then the officer must secure an interpreter before any interrogation." AUSTIN POLICE DEP'T, POLICY MANUAL 366 (2013), [http://austintexas.gov/sites/default/files/files/Police/APD\\_Policy\\_2013-2\\_Effective\\_6-1-2013.pdf](http://austintexas.gov/sites/default/files/files/Police/APD_Policy_2013-2_Effective_6-1-2013.pdf); see also Jacobi, *supra* note 9.

unfairly in the past may be more likely to feel threatened by police action. On the other hand, a repeat offender who “knows the drill” of the in-custody process may be less likely to feel coerced or confused by police statements or behaviors. Either way, such past experience with law enforcement is both not apparent to the ordinary police officer and too individualized to manage.<sup>424</sup>

In contrast, the suspect’s criminal history could be considered if it is apparent to the officer. This constitutes another example of a characteristic whose consideration would aid the police in the law enforcement process. Although “once a criminal, always a criminal” is a maxim our justice system rejects, sometimes an officer’s increased suspicion of an observed citizen is justified precisely because of his known prior conduct. As of now, that is not a categorically accepted factor, but it is an apparent characteristic that would justify police conduct that may otherwise be considered aggressive or unreasonable.

Rather than continuing to have intellectually inconsistent, ad hoc rulemaking in the constitutional criminal procedure jurisprudence, the Court should consider a uniform overhaul of its objective, subjective, and mixed tests that account for subjective characteristics when they are apparent to the police and have been systematically established to be relevant to the constitutional inquiry.

#### CONCLUSION

The Court’s willingness to consider some subjective characteristics in limited Fourth, Fifth, and Eighth Amendment contexts proves arbitrary when compared to other comparable constitutional criminal procedure doctrines. Because of judicial consensus on the psychological effects of age and intellectual disability, courts are now supposed to consider: age (and, theoretically, gender) in warrantless searches in schools, age in the in-custody determination, age and intellectual disability in death penalty analyses, and gender in hostile work environment claims. But with respect to stops, seizures, requests for consent, waiver, or invocation, demonstrably relevant characteristics such as age, intellectual ability, and gender are excluded from the equation. Moreover, the fact that the Court will expressly take notice of empirical social science evidence when it comes to juveniles and the intellectually disabled, but not when half of the population—women—

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<sup>424</sup> Although prior offenders are more likely to make use of constitutional criminal protections, studies show that even repeat offenders are often uninformed about their rights. See Jacobi, *supra* note 9, at 67.

are concerned, suggests an even deeper rift between reality and our governing jurisprudence.

Other characteristics may also be worthy of such consideration. For instance, this Article's analysis applies equally to race, and our proposal provides an applicable solution to undermining the same cycle of suspicion that arises due to racial differences between police and suspects. This Article does not comprehensively assess every subjective characteristic the courts could consider—instead, it has shown how the courts can proceed in that analysis going forward, by providing a single, simple solution to multiple problems that arise from the Court's blindness to the real and significant effects of subjective characteristics on citizen-police interactions. This Article has shown why gender should be considered in constitutional criminal procedure jurisprudence; how the Court should reconcile its tentative, uncertain forays into accounting for age and intellectual disability; and how to resolve the scattered nature of defendant- and officer-perspective objective and subjective inquiries. Whenever a court's decision, and therefore a citizen's liberty, depends on her perception of the police-citizen interaction or her ability to assert herself in the presence of police—either physically or verbally—the courts must take notice of the subjective characteristics that infect those very perceptions and abilities, if those effects are systematic and recognized. Similarly, the reasonable police officer must account for subjective characteristics he ought to know will affect a defendant's behavior, such as the defendant's consent, waiver, or invocation. Otherwise constitutional criminal procedure will continue to silently undercut the constitutional rights of significant factions of the population.