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The Hidden Psychology of Constitutional Criminal Procedure

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ABSTRACT

There is vast empirical evidence of the difference in men and women’s perceptions of and responses to police authority, their speech patterns and conduct. 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 a 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 lowered 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 and lower courts’ erratic consideration of subjectivity throughout constitutional criminal procedure law.

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INTRODUCTION

Studies show that women and men have developed different verbal lexicons, wherein “women’s speech” is indirect and polite. ¹ Specifically, women—along with other less powerful groups—tend to employ more hedging ² and modal language ³ that qualifies rather than strengthens their sentiments, tag questions ⁴ that request validation rather than express certainty, and intonation ⁵ that infuses doubt and politeness into their statements. For men the opposite is true: they tend towards assertive, bold language that manifests in imperative commands and direct statements or questions. ⁶ Differences between genders are not restricted to verbal 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 psychological 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. ⁷ These studies show that men may be more willing to engage with authority and terminate a police–citizen encounter when they no longer wish to be engaged, 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 empirical gendered predispositions and embrace a male approach. For example, a female under interrogation might say, “Maybe I should have a lawyer present” or “I ought to have an attorney here, right?”, but Supreme Court precedent requires the desire to speak to an attorney be “unambiguous.” ⁸ Finding no unambiguous

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¹ Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259, 263 (1994). This female register was also coined “powerless speech” because of its prevalence among the weaker positioned individual in gender-neutral confrontations. *Id.* This is discussed further infra in Part I.A.1.

² 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.

³ Modal language consists of conditional language, such as “may” and “ought,” which work to soften assertions. *Id.* at 280.

⁴ 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.

⁵ 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.

⁶ *Id.* at 262.

⁷ See Hannah Riley Bowles, *Psychological Perspectives on Gender in Negotiation* 3, (Harvard Kennedy School Working Paper No. RWP12-046, 2012) (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 AMER. J. PSYCH. 15, 16 (2007) (finding that men have higher reactance levels than women, which directly influences “how people handle rules and comply with requests”).

⁸ See *Davis v. United States*, 114 S. Ct. 2350, 2356–57 (1994) (holding that to invoke the right to counsel, the detainee must make an “unambiguous invocation”). For a discussion
invocation, interrogation would continue, and the woman’s statements would be admitted into evidence. Similarly, when physical rights-assertions are legally relevant—i.e. when assessing seizures and consent under the Fourth Amendment—the court does not consider any subjective characteristics relevant to an individual’s self-advocacy. 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. When a police officer confronts a female citizen on the street, she is generally 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.

Constitutional criminal procedure jurisprudence infuses into the relevant legal doctrines assumptions about a citizen’s verbal and physical assertions of his rights. But 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—to measure whether a constitutional violation has occurred. Thus, the differences between genders that manifest in different verbal and physical conduct in turn affect individuals’ interactions with law enforcement and, sometimes even, the outcome of a case. This is most notable in the seizure, warrantless search, consent, and in-custody interrogation and waiver doctrines—where the consent, seizure, invocation, and waiver doctrines depend upon verbal rights-assertions; and the seizure and consent doctrines depend on physical rights-assertions.

This Article ties what we know about gender’s psychological effects to how the courts actually treat—that is, ignore—them in their constitutional criminal procedure analyses. Differences between the genders’ speech and psychological tendencies, and how those differences affect our responses to authority have been well documented. But the

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 (Working Paper 2015).

9 Florida v. Bostick, 501 U.S. 429 (1991) (formulating the “free to decline the officers’ requests or otherwise terminate the encounter” seizure standard); United States v. Mendenhall, 446 U.S. 544 (1980) (crafting the “free to leave” seizure standard).

10 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 Part I.A, infra, for more detail.

11 The evidence also shows overwhelmingly that people of different races respond differently to police as well. 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.”). This Article does not explore the issue of how racial identity affects police–citizen interactions because that area of legal scholarship is well canvased. We do believe, however, that our findings and proposed solution apply analogously to race.
causal relationship between these differences and their affect on police–citizen interactions specifically, and the innate relationship between these different responses and whether men and women wind up defendants or uncharged citizens, have not been explored in legal scholarship. We propose a new standard that incorporates the objective measure from the courts’ current reasonableness inquiries, but considers any 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, we envision these tests must account for the defendant’s apparent, relevant subjective characteristics when evaluating the constitutionality of police–citizen interactions. 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.

The Supreme Court has refused to recognize the effect of gender in the operation of these doctrines, yet it has considered other relevant subjective characteristics in a limited number of ad hoc circumstances. In particular, judicial consensus on the psychological effects of age and intellectual disability has led the Court to consider age and intellectual ability in its death penalty analysis, to require consideration of the juvenile suspect’s age in an in-custody determination, and to require consideration of the juvenile suspect’s age in its warrantless search in school analysis. But when it comes to seizures, requests for consent, and in-custody waiver and invocation, neither age nor intellectual ability are considered, despite their equivalent relevance. Moreover, gender’s effect on the citizen–police dynamic closely mirrors the age and intellectual ability effects, but the Court has yet to invoke gender’s importance outside the context of Title VII sexual harassment claims. Thus, when the courts do not account for the subjective characteristics that affect the

12 Although research on gender differences reports central tendencies, making our solution apply to the majority (but not all) of women, discussed infra in Part I.A, a completely subjective, case-by-case standard is unrealistic given the Court’s preferences when and hesitation in introducing variance, discussed further infra in Part II.

13 Some lower courts have agreed that gender is relevant in the employment discrimination context. See infra Part II.A.5.


16 See New Jersey v. T.L.O., 469 U.S. 325 (1985). The Court also specified consideration of the student’s sex in assessing the degree of intrusiveness of the search, id. at 341, but this consideration has limits, id. at 381–82 (Stevens, J., concurring and dissenting) (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”).

17 This Article does not compare gender, age, and intellectual ability to lump these categories together for psychological purposes. Rather, we look to the psychological similarities between these groups in terms of how each group asserts their rights—or doesn’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.
police–citizen dynamic when analyzing a particular police–citizen interaction, they effectively condition rights on conformity with male, adult, able-minded modes of behavior. Women, youths and the intellectually disabled have constitutional rights, but in certain circumstances only to the extent that they act like adult, able-minded men.

The result is that constitutional criminal procedure’s multitude of subjective, objective, and mixed subjective–objective tests (from both the defendant’s and officer’s perspective) make the law as a whole appear arbitrary and illogical because the instances of subjective considerations are scattered and inconsistent. This makes the Court’s unwillingness to “shackle the police” 18 (by introducing subjective variations of the reasonableness and totality of the circumstances tests) all the more superficial: the Court already has introduced enormous variation. Our proposed standard calls for subjective variation when 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 of cutting back on the morass of tests that plague this area of law. Our solution simplifies the variety of tests into one cohesive approach, a standard test combining objective and well-established subjective characteristics. It thus not only solves the gender problem but also the larger problem of doctrinal inconsistency.

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, and 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. Finally, Part III introduces our solution and discusses how it applies to the relevant doctrines discussed in Parts I and II, clearing up the doctrinal chaos within, and revealing the currently hidden but relevant psychology of constitutional criminal procedure.

18 J.D.B. v. North Carolina, 131 S. Ct. 2394, 2402 (2011). This case is discussed further infra Parts II.B, III.B.
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. On four different days in 2007 and 2008, he presented questionnaires to randomly selected individuals in Boston, Massachusetts, hoping to learn how “free to leave” they actually felt or would feel during certain described police–citizen interactions. 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. Respondents on average reported a free-to-leave score of 2.61 in the sidewalk scenario and 2.52 in the bus scenario.

The respondents’ genders were roughly split half-and-half, but the results were anything but balanced. 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: “[W]omen . . . reported that they would feel less free to leave than did men . . . [W]omen were also more likely to select 1, meaning ‘not free to leave,’ whereas men were more likely to select 5, meaning ‘completely free to leave.’” 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.”

Social science supports this conclusion. Men and women differ in a host of physical, biological, and psychological ways: we develop biologically and psychologically; we mature at different rates; we use our emotions in wholly different ways. To some extent

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19 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 Mendenhall v. United States, 446 U.S. 544 (1980); this jurisprudence is analyzed infra Part II.A.1.
21 Id. at 69.
22 Id. at 74.
23 The study was composed of 52% female respondents and 48% male respondents. Id. at 74 tbl.1.
24 Id. at 75–76.
25 Id.
26 Id. at 77.
this is well-canvased ground, but what has not been adequately explored is that some of the ways in which the genders differ are intrinsically linked to our different responses to authority and other stress-laden, rights-based confrontations that affect whether we wind up defendants or uncharged citizens. In speech, reactance, and negotiation, men and women exhibit such variation that differences in the ways they respond—and their mere willingness to respond—to authority figures should no longer be ignored or taken for granted.

I. Speech

Sociolinguistic research shows that women and men consistently use different speech patterns, which leads to, or reflects, gendered structural relationships of power and dominance in live human interaction. Although of course these are only tendencies, and both women and men vary considerably within their group, empirical studies confirm that this finding is systematic. Men tend to use direct, assertive language, whereas women incline to more indirect, deferential speech. 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 hyper-politeness, such as “please,” “excuse me,” “okay,” and “thank you.” 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?” The indirect speech, coined “women’s speech,” consists of five specific speech characteristics: (1) hedges (pauses and qualifiers, such as “kind of,” “sort of,” etc.); (2) tag questions (a statement followed by a question of validation, such as “The bus is yellow, isn’t it?”); modal verb usage (frequent use of words such as “may,” “must,” “should,” “ought,” etc. that work to soften assertive statements); absence of imperatives (directions that are spoken in a less

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30 Ainsworth, supra, note 1, at 263 (1994). This is true across cultures: research on both American and Japanese women produce similar results. Id. at 283–84.

31 E.g., Kriss A. Drass, The Effect of Gender Identity on Conversation, 49 SOC. PSYCH. QUARTERLY 294 (1986); see also, e.g., Ainsworth, supra note 1, at 271 nn.30–35. Variation of the effect of gender by class is discussed infra, text at note 54.

32 Ainsworth, supra note 1, at 262.


34 Crosby & Nyquist, supra note 32, at 317.

35 Ainsworth, supra note 1, at 275 (quoting ROBIN T. LAKOFF, LANGUAGE AND WOMAN’S PLACE (1975)).
assertive or inviting way, such as “would you be quiet?” instead of “be quiet.”); and rising intonation (heightening the tone of voice for the last word or syllable to create a question-sounding statement).  

Hedging “implicitly involves fuzziness” and works to make language less definite. The function of hedging is to expand the “truth value” of a 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 the precision of the claims.” Thus, when a person hedges, she appears polite, evasive, vague, or even equivocal. By virtue of her word choice and vocal patterns alone, the hedging woman disappears behind her statements. In theory, she intends to be helpful by “giving the right amount of information,” “saying what [she] do[es]n’t know how to say,” “covering for lack of specific information,” or “protecting [her]self against making mistakes.” But in reality, she comes across as less sure of herself, less forthcoming, and less credible.  

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. 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[] less judgmental about [fellow workers’]’[] contributions,” whereas similarly situated high-performing

36 Ainsworth, supra note 1, at 275–82.
38 Id. at 415, 417; Ainsworth, supra note 1; 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 Cameron et al., Lakoff in Context: the Social and Linguistic Function of Tag Questions, in WOMEN IN THEIR SPEECH COMMUNITIES: NEW PERSPECTIVES ON LANGUAGE AND SEX 82–83 (Jennifer Coates & Deborah Cameron eds., 1989) (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, but 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.
39 Hinkle et al., supra note 36, at 416.
40 Id.
41 Erickson et al., supra note 37, at 268, 274.
men receive constructive criticism that lacks such personality-focused critiques. 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.” Of these words, only “aggressive” appeared in the reviews of male workers, but far less often and usually as encouragement.

This linguistic phenomenon need not be biological; it is socially enforced: American culture promotes and perpetuates a double standard in which women should be polite, hesitant, and less assertive when speaking. This speech pattern, in turn, leaves women—and other stereotypically and socially “powerless” identities—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 not all women and all men exhibit this dichotomy. Many women will never use indirect speech, and many men will. But this research reflects the exhibited speech patterns among the majority, and this is not random: this 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. 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.

In fact, some research shows that there is a stronger correlation between powerlessness and female speech than between gender and female speech. One study captured this in the context of judicial

44 Id.
45 Id.
46 See Cameron et al., supra note 37, at 78 (asking whether “‘women’s language’ [is] a consequence of being female, or of being subordinate, or some mixture of the two?”).
47 Ainsworth, supra note 1, at 261, 263.
48 See LAKOFF, supra note 34; Ainsworth, supra note 1.
49 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.”); see also LAKOFF, supra note 34, at 206.
50 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 O’Barr & Bowman K. Atkins, “Women’s Language” or "Powerless
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 his or her linguistic patterns. Not only did black and female lower court judges use more hedges, but also the district judges that stood in ideological opposition to the reviewing court employed more vague, indirect, and hedging language to survive scrutiny. In contrast, the more experienced judges employed that language less often. 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 the class differences, which interacts with gender differences. A study of witnesses in courtrooms by O’Barr and Atkins confirmed that women more commonly hedged than men, but found 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. 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. But regardless of cause, they found mock jurors were considerably less persuaded, and had less confidence and trust in the witness, when they use the female register.

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. 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. The statements were, “Usually, men are ____” and “Usually, women are ____”. To identify the gender self-definitions, Drass also asked respondents to finish the sentence, “As a man/woman, I usually

Language”?, in, WOMEN AND LANGUAGE IN LITERATURE AND SOCIETY 94 (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 the reason it is referred to as “women’s language” is because of the “powerless position of many women in American society”). Importantly, our proposed standard will and should apply equally to other powerless groups. See supra note 11 and accompanying text; infra Part III–Conclusion.

51 Hinkle et al., supra note 36, at 432.  
52 Id. at 418–19, 432.  
53 Id. at 434–35.  
54 O’Barr & Atkins, supra note 49, at 102.  
55 Id. at 104.  
56 Id. at 107.  
57 Drass, supra note 30, at 296.
am ___” using the same twenty-four adjectives;\textsuperscript{58} this enabled Drass to evaluate the so-called maleness or femaleness of each respondent, both as he or she sees him or herself and as he or she sees 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.\textsuperscript{59} The transcripts of the conversations were analyzed for “overlaps,” a minor violation where one 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.\textsuperscript{60} 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.\textsuperscript{61}

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.\textsuperscript{62} Thus even within same-sex conversations, an association between dominance and male identity, 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.\textsuperscript{63} 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.”\textsuperscript{64} 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 freedoms are “threatened, reduced, or eliminated,” and the motivation to reestablish those freedoms.\textsuperscript{65} 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 freedoms.\footnote{\textsuperscript{66} E. Thomas Dowd et al., \textit{The Therapeutic Reactance Scale: A Measure of Psychological Reactance}, 69 J. Counseling & Development 541, 541 (1991).} Originally, reactance was proposed as a “situation-specific variable,” where “reactance arousal” was determined not by individual differences in the actor but by characteristics of the situation.\footnote{\textsuperscript{67} Id. at 541.} It is now advanced as an individual trait—but one that may change and develop over time.\footnote{\textsuperscript{68} Id. at 15–16.} This motivational state may be expressed in a variety of ways, both behaviorally and verbally.\footnote{\textsuperscript{69} Dowd et al., \textit{supra} note 65, at 541.} Some of the general behaviors include acting “less socially acquiescent” or “interpersonally aggressive” and territorial.\footnote{\textsuperscript{70} Woller et al., \textit{supra} note 7, at 16.} But it may also manifest in a direct reassertion of the freedom through oppositional behavior or by engaging in a related behavior.\footnote{\textsuperscript{71} Dowd et al., \textit{supra} note 65, at 541.}

In other words, 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.\footnote{\textsuperscript{72} Id. at 17–18.}

Studies that evaluate reactance levels provide participants with the Therapeutic Reactance Scale (TRS), or one of its sister surveys, and analyze the results.\footnote{\textsuperscript{73} Id. at 17.} 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.” The respondents rate on a four-point scale ranging from 1 (“strongly disagree”) to 4 (“strongly agree”). The sum of the scores creates the respondent’s total reactance level.\footnote{\textsuperscript{74} Woller et al., \textit{supra} note 7, at 16.} 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.\footnote{\textsuperscript{75} Woller et al., \textit{supra} note 7, at 17.} The TRS was provided to 3,475 university students along with a demographic questionnaire.\footnote{\textsuperscript{76} Id. at 17–18.} Across all categories, men’s scores were significantly higher than women’s.\footnote{\textsuperscript{77} Id. at 18.}

Moreover, past studies suggest that gendered differences in “personality”—such as assertiveness and anxiety—significantly affect
reactance.78 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 significance of this difference is discussed in more detail in Part II.A.

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

Psychological studies have made significant findings with regard to the relationship between gender and negotiation styles. In negotiations, women tend to prioritize cooperation over advocacy and submit to a less-than-ideal outcome to avoid conflict or risk. Women are also particularly likely to submit or acquiesce to their opponent when confronted by a dominant, powerful, or even manipulative adversary.79 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-averse80 and less confident than men,81 and this translates into women’s more reticent behavior during negotiations.82 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.83

Consistently, women tend to be more concerned than men with other people’s impressions of them,84 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

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78 *Id.* at 21.
79 Bowles, *supra* note 7, at 3.
82 See Bowles, *supra* note 7, *passim*.
were told the simulation was merely a learning exercise, and others were told it was diagnostic of their actual negotiating skills. In the “diagnostic” group, women performed more poorly than the women in the “learning” group. In fact, when negotiators believed that their performance had no bearing on their negotiation abilities, the gender effects disappeared altogether. In the stressful scenario where a woman believes an evaluator—say, a police officer—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 a simulated negotiation and a during a confrontation with the police, such as the stress-inducing environment, the importance of outcome, and the effect of that importance on the negotiation itself. 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 for negotiators to manage their own expectations. 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 within negotiations is likely to be exacerbated in the police–citizen interaction.

Despite all this evidence, courts continue to not only treat men and women alike, when they are palpably different, but numerous doctrines require verbal assertiveness in order for constitutional criminal rights to be respected. Next, we begin to introduce how these differences in gender speech and behavior patterns further disempower women through their effect on police–citizen interactions.

4. Gender and Powerlessness

Mere police questioning, no matter where it takes place, does not constitute a seizure under the Fourth Amendment. Rather, a seizure only occurs when the officers “convey a message that compliance with their requests is required.” On the street or other open area, police-initiated questioning absent reasonable suspicion does not constitute a seizure so

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85 See Bowles, supra note 7, at 9–10.
86 See id.
87 See id.
88 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, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.”).
89 Id. at 437.
long as the citizen feels “free to leave.”90 On a bus or in another confined space, there is no seizure so long as the reasonable person would feel free “to decline the officers’ requests or otherwise terminate the encounter.”91 Here, we provide a glimpse into how this free-to-leave concept is affected by gendered responses to authority to shed light on how the psychological differences between genders described above are relevant to the doctrine. The courts’ actual treatment of the seizure standard—and other doctrines—as applied to female suspects will be discussed in-depth in Part II.

A woman confronted on the train by a police officer may employ speech patterns and behaviors the officer has been trained to associate with a guilty person. This could include hedging language, such as indirect answers to questions, or tag questions, such as “Oh I haven’t done anything wrong, have I?”, raising the officer’s suspicions. The woman’s responses and the officer’s trained inferences from those responses escalate the situation until she is no longer free to leave.92

Even if the woman had not initially responded in the “powerless” linguistic register, research shows she is likely to adopt that lexicon as the dialogue evolves.93 Because police are trained to control the dialogue in both pre-arrest and post-arrest interrogations, the woman is more likely to become powerless and adopt such a register in the middle of the interaction.94 This is not such a far-fetched hypothetical; women have different experiences and perspectives regarding legal rights and police confrontations.95 Those experiences and perspectives, combined with risk-aversion, a general reluctance to assert their rights, and a natural inclination to please, push women to respond, unbeknownst even to them, in a manner against their best interests.

If in the same train scenario, rather than responding immediately with hedging and vague language, the woman knows her legal rights. She tells the officer straightforwardly, “No you may not search my belongings.” The officer finds her off-putting, abrasive, and, maybe because the woman’s response was “out of character,” even suspicious.

This uprooting of expected behavior triggers what psychologists call implicit bias,96 an unconscious mental process that often affects—or creates—judgments about and behaviors towards different groups of

91 Bostick, 501 U.S. at 435–36 (“[T]he 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.”) (emphasis added)).
92 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.”).
93 See Ainsworth, supra note 1.
94 See Ainsworth, supra note 1, at 287.
95 Id. at 262.
96 L. Song Richardson, Police Efficiency, 87 Ind. L.J. 1143 (2012); L. Song Richardson, Arrest Efficiency and the Fourth Amendment, 95 Minnesota L.Rev. 2035 (2011).
people. 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.

Mixed messages and miscommunications are particularly common when there is a cross-sex relationship. So even though the officer may consciously know not all women are meek or submissive and many women are bold and assertive, the officer has an unconscious expectation that the woman will be compliant rather than stand her ground. Gendered behavior he has observed has created a gendered expectation (an implicit bias) in his mind. Rather than responding with merely pointed questions about her travel plans to glean more information, the officer believes he is matching her firm, matter-of-fact tone with a curt response to reinforce his dominance. His implicit bias triggered 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 been seized.

Although reasonable suspicion cannot be based on a mere officer “hunch,” reasonable suspicion can and often do explicitly depend upon officer impressions. 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. 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

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97 L. Song Richardson & Phillip Atiba Goff, 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.”).
98 Id. at 2629–30.
99 Ainsworth, supra note 1, at 289.
100 This mismatch between male officer–female citizen communication and implicit bias is not unfamiliar, and many attribute Sandra Bland’s arrest to such ingrained gender and racial expectations. Derrick Clifton, The Role of Implicit Bias in Sandra Bland’s Death, DAILYDOT (July 22, 2015), http://www.dailydot.com/opinion/Sandra-bland-dash-cam-video-implicit-bias (attributing the escalation between Encinio and Bland to the officer’s “false[] interpret[ation of] her firm but fair words as patently disrespectful”); Zerlina Maxwell, Women of Color Are Still Limited in the Range of Emotions They Can Show, COSMOPOLITAN (July 28, 2015), http://www.cosmopolitan.com/politics/a43964/Sandra-bland-women-of-color-emotion (describing a society implicit bias that “Bland, like most black women, was only permitted to express a limited range of emotions during the encounter”).
101 Terry v. Ohio, 392 U.S. 1, 21–22 (1968).
102 Data maintained by the N.Y.P.D. 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 71% and 52% of cases respectively. Tonja Jacobi, et al., The Attrition of Rights Under Parole, 87 S. CAL. L. REV. 887, 960 (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.
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: when people have implicit biases towards others—such as the 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. The receiver of that negative behavior then responds in kind. But because the person who set off the domino effect—here, the police officer—is unaware that his actions were both a response to an unconscious, incorrect assumption and the trigger of the cycle, he is likely to attribute the negative behavior to the other person alone, creating a “behavioral confirmation effect.” The ultimate outcome—a seizure based on reasonable suspicion—is not the true notion of suspicion at all; it is 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.

If in the second train scenario, in addition to knowing that technically an officer may not seize her without reasonable suspicion, she also knows that courts seem to lend far more credibitly to the officer’s perspective than to the defendant’s, Realistically, she fears that refusal may land her in more trouble than consenting to a search, and so may feel obliged to consent out of fear rather than convenience. Women’s lower reactance levels and confidence and higher risk aversion translate directly into a fear of legal consequences, particularly compared to their male counterparts. Research on crime and deviance shows that overall, women commit less 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. Moreover, as previously discussed, low

103 See Richardson & Goff, supra note 96, at 2638 (describing a “cycle of mutual distrust”).
104 Richardson & Goff, supra note 96, 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.” (footnotes omitted)).
105 Id. at 2638.
106 Weight is given by the court to the officer’s inferences, because they are based “in light of his experience,” Terry v. Ohio, 392 U.S. 1, 27 (1968), which grants the officer a level of deference that critics describe as coming “to extend virtually limitless discretion to law enforcement,” Thomas B. McAffee, Setting up for Disaster: the Supreme Court’s Decision in Terry v. Ohio, 12 NEVADA L.REV. 609, 623 (2012).
107 Schneckloth v. Bustamonte, 412 U.S. 218, 227–28 (1973) (“[A] search pursuant to consent may result in considerably less inconvenience for the subject of the search, and properly conducted, is a constitutionally permissible and wholly legitimate aspect of effective police activity,” even, as here, absent probable cause).
108 Grasmick et al., supra note 83, at 685.
psychological reactance plays a significant role in a woman’s failure to assert her rights when presented with a reduction in or threat of reduction in freedom. Men and women respond very differently to authority and 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.

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 Part discusses, similar differences arise 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 greater disadvantage than 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 be more reckless and greater risk-takers. 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.

Although by age sixteen or seventeen teenagers have similar reasoning and processing abilities as adults, adolescents of this age are “less capable than adults [] in using these capacities in making real-world choices.” This phenomenon is long-established in numerous behaviors: statistics on car collisions, binge drinking, unsafe sex, and crime indicate that young people are “impelled to thrill seeking,” but technically, adolescents are no less irrational, unaware of, or unable to evaluate

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109 Woller et al., supra note 7, at 16; 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).

110 Interestingly, as described above, 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 unmindful 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, as discussed in Part II.


112 Id.
consequences than fully developed adults.\textsuperscript{113} Most teenagers have more or less fully developed logical-reasoning abilities by the age of fifteen. Rather, it is the psychosocial capacities, which “improve decisionmaking and ... impulse control, emotion regulation, delay of gratification, and resistance to peer influence,” not yet fully developed in adolescents.\textsuperscript{114} 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 youth’s decisionmaking capabilities differ from adults’ “in ways that are relevant to their criminal choices.”\textsuperscript{115} 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 police officers. “[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.”\textsuperscript{116} Moreover, “research confirms that adolescents are more likely than young adults to make choices that reflect a propensity to comply with authority figures.”\textsuperscript{117}

Not only do adolescents succumb to peer pressure and act recklessly, but also they tend to comply with authority out of feeling fear or obligation. This is particularly significant during the sort of threshold police-citizen interaction, such as a stop, seizure, or 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 himself. And 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 Part 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

\textsuperscript{113} Laurence Steinberg, Risk Taking in Adolescence: New Perspectives from Brain and Behavioral Science, 16 CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE 55, 55 (2007).
\textsuperscript{114} Id. at 56.
\textsuperscript{115} Scott & Steinberg, supra note 112, at 20.
\textsuperscript{117} Id. at 12–13 (quoting Thomas Grisso et al., Juveniles’ Competence to Stand Trial: A Comparison of Adolescents and Adults’ Capacities as Trial Defendants, 27 L. & HUM. BEHAV. 333, 357 (2003)).
The intellectually disabled “share [with adolescents] 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.” 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”.

Because there is variability among the intellectually disabled in terms of, relevant here, IQ, decisionmaking capacity, and compliance tendency, it is important to clarify at the outset what we mean by intellectual disability in the context of this Article. American jurisprudence on the subject has evolved from the prohibition on subjecting “idiots and lunatics” to punishment to the modern Eighth Amendment rule regarding the “legally” intellectually disabled. 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 limitation in intellectual functioning;” (2) concurrent with “significant limitations in practical or ‘adaptive’ functioning;” (3) of which the “onset [begins] before adulthood.”

Although there is a varied range of displayed “intellectual” and “adaptive” abilities among this population, which comprises at most 3% 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.”

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,” and, like juveniles, they are “less able than a normal adult to control his impulses or to evaluate the

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119 APA et al. as Amici, supra note 117, at *2.
120 Id. at *7.
121 See 4 BLACKSTONE, COMMENTARIES (“[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.” (internal quotation marks omitted)).
122 See discussion infra in Part II.B.
123 APA et al. as Amici, supra note 117, at *3.
124 Id. at *6–7.
125 Id. at *8.
consequences of his conduct.”¹²⁶ 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 reasonability analysis that other characteristics do not: because of the variability among the developmentally mentally challenged, in terms of displayed intellectual and adaptive abilities, police officers may not be aware of an intellectually disabled individual’s legal status. Amici in Atkins v. Virginia explain that the particular population at issue consists of extreme cases—so presumably an officer would know that something about the accused is different cognitively—but it is important to acknowledge from the start two things: first, that we are concerned with a very specific subset of the developmentally limited, and second, that this category of people in particular can pose challenges that differ from 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.

II. REALITY VERSUS JURISPRUDENCE: POLICE–CITIZEN INTERACTIONS

We have seen gender, age, and intellectual abilities bear on a person’s response to certain authoritative stimuli, including how individuals perceive circumstances and how they express their responses to them. Women tend to express themselves less directly and be more submissive in the face of a dominant “other,” and adolescents, like the intellectually disabled, are categorically inclined to comply with authority, even when against their interest or better judgment. 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 turn of the nineteenth century, the courts have imagined a “reasonable person,” or a “reasonably prudent person,” in

¹²⁶ Penry, 492 U.S. at 322.
criminal law and constitutional criminal procedure to determine the constitutionality or propriety of various offenses and police–citizen confrontations. The reasonable person is at once every man and no man, and he serves as “the common law’s most enduring fiction.” 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 here, which we have illustrated with regard to gender, youth and intellectual disability, is that our experiences instruct our psychological process; we make decisions based on our experiences and the known experiences of others.

The reasonable person has existed even longer. See Blyth v. Birmingham Waterworks Co., 156 Eng. Rep. 1047 (1856); Vaughan v. Menlove, 132 Eng. Rep. 490 (1837). 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:

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

127 See, e.g., Addington v. United States, 165 U.S. 184 (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 (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., 156 Eng. Rep. 1047 (1856); Vaughan v. Menlove, 132 Eng. Rep. 490 (1837).
129 132 Eng. Rep. 490, 493 (1837) (Tindal, C.J.) (“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.”).
131 Randy T. Austin, 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.
132 156 Eng. Rep. 1047, 1049 (1856) (Alderson, B., J.) (“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.”).
establish decline to take his personal equation into account.\textsuperscript{133}

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 was faced with, instead of asking what the defendant actually did or felt and why.\textsuperscript{134} This is because courts seek to avoid premising the entire scope of constitutional protection on subjective characteristics of the defendant.\textsuperscript{135} Nevertheless, they recognize the need to pay some attention to the defendant’s individual qualities in some circumstances, and so they incorporate some subjective factors.\textsuperscript{136} 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 the citizen-suspect’s actual behavior. When the analysis replaces the citizen with the reasonable person or another reasonableness-based measure—which happens with Fourth Amendment seizure and consent law and Fifth and Sixth Amendment waiver and invocation jurisprudence, as the rest of this Part demonstrates—female, youth, or intellectually disabled citizens retain less 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 the court’s evaluation. Yet the courts treat these citizens as though the characteristics do not exist, creating rules rewarding behaviors entire populations tend not to exhibit—in effect writing their rights out of constitutional criminal procedure law.

On one hand, the court needs an assessment of what is appropriate that can be conceptualized in a unit of measurement that is somewhat generally applicable; but on the other hand, the reasonableness inquiry, through the reasonable person, could simply be the vehicle by which a judge may import society’s majoritarian prejudices (or his own discriminatory views) 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 \textit{man}: male, adult, colorless, heterosexual, able-bodied, of average intellectual ability, and class privileged.\textsuperscript{137}

\textsuperscript{133} O.W. HOLMES, JR., THE COMMON LAW 108 (1881).


\textsuperscript{135} See 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.”).

\textsuperscript{136} Moran, supra note 127, at 1235.

\textsuperscript{137} Kermit A. Mawakana, \textit{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 \textit{man}.” Some attribute this evolution to the women’s movement’s impact on the law. See Klein,
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 Parts explore some of those doctrines in more detail, as well as demonstrate how the same failure arises in jurisprudence that 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.” The courts have interpreted this language to allow police to stop or seize an individual without a warrant or probable cause. The reasonableness standard is translated into a reasonable person test, both when assessing reasonableness from the police and suspect’s perspective. When the judge determines the reasonableness of the suspicion justifying the 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?” When the shoe is on the other foot and the judge is charged with determining whether the individual was seized, there is a different but equally reasonableness-focused inquiry: whether “in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.”

This “every man” is not only innocent and therefore less flustered by the initial approach by police and the ensuing coercive aspects

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138 U.S. CONSTITUTION, amend IV.
139 Terry v. Ohio, 392 U.S. 1, 21, 30 (1968).
140 Id. at 21–22 (emphasis added) (internal quotation marks omitted).
of a police confrontation, but he is also unaffected by the otherwise applicable male (officer)–female (citizen) power dynamic. 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–free-to-leave standard requires courts to consider “all of the circumstances surrounding the incident.” Although one may query whether subjective characteristics qualify as “circumstances,” 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 the reasonable person standard was intended to do. Yet courts ordinarily neglect to evaluate any of the suspect’s subjective characteristics.

The problem with this approach is illustrated by United States v. Drayton. During a scheduled bus stop on an interstate, three plain clothed police officers boarded a bus with concealed weapons and visible badges. One officer stood at the rear of the bus, facing inward toward the front of the bus. Another officer stood at the front of the bus, facing inward toward the rear. 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. That police officer “approached [Drayton] from the rear and leaned over Drayton’s shoulder,” held up the 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 nose.

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145 Mendenhall, 446 U.S. at 554 (emphasis added).
146 Jackson, supra note 133, at 654 (“[T]here 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[—]… [t]he physical features of the situation… [or] the particular peccadilloes of the defendant….”) (internal quotation marks omitted).
147 See supra Part II.A.I.
148 Even in T.L.O., where the Court announced a rule that requires consideration of the child student’s age and gender, the Court refrained from such analysis. See infra Part II.B.
149 536 U.S. 194 (2002).
150 Drayton, 536 U.S. at 197.
151 Id. at 198.
152 Id. at 198, 204.
The Supreme Court held that this interaction did not describe a seizure. 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.” If Drayton had been an adult, white male that may have been the case, but he was not; he was a young, black man. 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.

Mere police presence, while not per se coercion, is nonetheless intimidating because of the uneven power dynamic between citizen and officer. 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 encounters with people that are either more powerful or dominant, or are in more powerful or dominant positions. So the power imbalance is even more pronounced a female citizen in Drayton’s position. And if the Court operates from the premise that a power imbalance plays a more prominent role in the interaction between a female citizen and a police officer, then how the officer acts is even more important to the Court’s analysis because her sensitivity amplifies the significance of his actions—be them movements, positioning, or speech.

Women’s general lower reactance levels inhibit them from advocating for themselves, particularly in the face of a removed or threatened liberty. Moreover, their 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—and less likely to feel free to do either. So in the context of a female Drayton, even absent “intimidating movements” on behalf of 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. 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 or to plainly tell the officer she does not wish to talk about her travel plans.

153 Id. at 203.
154 Id. at 202–04.
155 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, etc. Fred E. Inbau & John E. Reid, CRIMINAL INTERROGATION AND CONFESSIONS (2d ed. 1967).
This may have been part of what happened in *United States v. Mendenhall*, a preeminent Supreme Court case on seizure (and consent) that actually involved a female defendant.\(^{156}\) There, Sylvia Mendenhall was stopped by DEA agents upon arrival in the Detroit Metropolitan Airport after exhibiting the “characteristics 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 baggage claim without claiming luggage, and her flight out of Detroit was on a different airline.\(^{157}\) Assuming momentarily that the 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\(^ {158}\)—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 s]he had a hard time speaking.”\(^{159}\) 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.\(^ {160}\)

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.”\(^ {161}\) 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.\(^ {162}\) The Court’s recitation of the interaction, however, begs the question of whether Mendenhall objectively felt free to leave, and the Court’s analysis assumes its conclusion that she should have 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 with Mendenhall’s gendered

\(^{156}\) 446 U.S. 544 (1980).

\(^{157}\) *Mendenhall*, 446 U.S. at 547 & n.1.

\(^{158}\) See supra Part I.A.2–3.

\(^{159}\) *Mendenhall*, 446 U.S. at 548.

\(^{160}\) The opinion does not describe the conversation beyond the officer’s relation of the facts.

\(^{161}\) *Mendenhall*, 446 U.S. at 555.

\(^{162}\) Id.
characteristics and in her position would feel. In merely describing the police conduct as generally noncoercive, the Court refused to acknowledge conduct that does not rise to the level of coercion or intimidation per se may still subdue a woman into silence or auto-compliance when it would not 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 person” is indeed the every-person 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;” but without acknowledging women’s different reaction 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 neglect to consider gender. Although a warrantless search is per se unreasonable, a search conducted pursuant to the citizen’s consent is valid regardless whether there is probable cause or a search warrant. That, of course, makes the inquiry hinge 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 over a car on a routine traffic stop at 2:40 AM, ordered the vehicle’s six occupants out of the car, and called for back-up assistance. After additional police arrived, the officer asked to search the vehicle, and one passenger (not the defendant) consented. 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 his consent was involuntarily given: if he did not know he could refuse consent, how could his consent have been voluntary?

The U.S. 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. 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

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163 Holmes, supra note 132, at 108 (“When 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.”).
165 412 U.S. at 220.
166 That passenger was the car owner’s brother. Id.
168 Bustamonte, 412 U.S. at 227.
However, the Supreme Court majority held that no single characteristic was dispositive; instead, to properly balance the competing concerns of security and liberty going forward, voluntariness must be a “question of fact” determined from the “totality of the circumstances.”

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 rights—comprehension—and disregarding the subjective factors that may affect that comprehension, transforms the scenario into a hypothetical in which police–citizen encounters are generic. The inquiry, *In light of all the surrounding circumstances, was the accused’s consent voluntary?* begins to sound a lot more like, *Would a reasonable person, given the facts of the surrounding circumstances, consent freely or feel coerced to respond in the affirmative?* Even the outcome in *Bustamonte* confirms this: The Court did not consider the fact that all passengers were ordered out of the vehicle, that it was approximately 3 AM, that most or all of the passengers were Hispanic, that *Bustamonte* did not know he could refuse consent, or that the patrolling officer called for backup. Absent consideration of *Bustamonte*’s lack of knowledge that he could refuse consent, the courts gloss over all facts tipping the voluntariness scale in favor of the accused.

The totality of the circumstances test has moved away from a citizen’s subjective perspective inquiry and toward an objective evaluation of the officers’ conduct. This drains the test of its subjective considerations, exposing it to the same biases of the reasonable person.

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169 Id. at 226–27.
170 Id. at 227.
171 See id. at 247 (“There is no reason to believe . . . that the response to a policeman’s question is presumptively coerced.”).
172 JOSHUA DRESSLER AND GEORGE C. THOMAS III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES 321 (5th ed., 2013). Notably, the decision does not even mention this point.
173 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 “indicate[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); Ric Simmons, *Not “Voluntary” but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773, 779 (2005) (“It is an open secret that the subjectivity requirement of *Schneckloth* is dead.”); Brian A. Sutherland, *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. 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] is clear: Consent is voluntary in the absence of police misconduct.”).
inquiry. Now, when the 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.\(^\text{174}\)

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.\(^\text{175}\) 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—in submission to police authority. Of course, the Court’s voluntariness analysis does not discuss these behavior-altering effects of gender, or of gender at all.\(^\text{176}\)

Yet gender is relevant. Whereas courts are more likely not to find a seizure when there likely is one, thanks to gender’s effects, courts are more likely to find voluntary consent when it more arguably does not exist. Such findings arise in one of 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 “affirming behavior” to constitute consent, including behaviors such as stepping back from the residence’s entryway and saying “okay” in response to a police request to talk;\(^\text{177}\) even stepping back and denying wrongdoing can constitute an invitation to a police officer to confirm that denial.\(^\text{178}\) Thus

\(^{174}\) E.g., United States v. Perea, 374 F. Supp. 2d 961 (D.N.M. 2005) (holding consent 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 offices’ (mistaken) belief that he was wanted for a homicide).

\(^{175}\) For instance, although *Bustamante* 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—suggesting 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 US 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.”).

\(^{176}\) For further discussion of women and consent that delves into the underlying voluntariness philosophy, see Carole Pateman, *Women and Consent*, 8 *Political Theory* 149 (1980).

\(^{177}\) United States v. Garcia, 997 F.2d 1273, 1281 (9th Cir.1993).

\(^{178}\) People v. Cove, 228 Cal. App. 2d 466, 470 (Ct. App. 1964) (concluding that because defendant “stepped back and claimed absence of any disturbance[, this] was an implied
women’s tendency to 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 feeling 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. 179 And as with seizure, 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, but it is nonetheless important to include the different female perspective in constructing what consent ordinarily looks like for an allegedly neutral perspective.

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 Supreme Court stated that “account must be taken of . . . the possibly vulnerable subjective state of the person who consents.” 180 In discussing this subjective vulnerability, the Court referred to cases where consent was given in “submission” to authority, 181 but those cases themselves failed to discuss the subjective characteristics that led to acquiescence—in two of the cases, gender. Instead, they detailed scenarios in which law enforcement lied to the suspect to finagle consent, explicit or implied. 182

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.” 183 Upon this false claim of authority, the woman invited the officers to search the home. 184 The Court found no legal consent. In Johnson v. United States, on the other hand, the female suspect impliedly consented to a search of her hotel room by “stepp[ing] back acquiescently and admit[ting the officers]” into her room after the officer appeared in the doorway and told her he wanted to speak with her and that she should

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179 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). Our research found a similar dearth in this arena.
180 Bustamonte, 412 U.S. at 229.
181 Id. at 233–34.
183 391 U.S. at 546–47.
184 Id.
“consider [her]self under arrest because [he was] going to search the room.” 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. 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. Significantly, too, 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, in the same opinion, the Court continued only to focus on the school administrator’s actions rather than the young, female student when determining the validity of the warrantless search.

This failure to consider the effect of gender has led the Court to distort its own voluntariness analysis. Consider again United States v. Mendenhall. After first speaking with the DEA agent, the agent asked Mendenhall to accompany him to the airport DEA office. When the agents asked that Mendenhall follow them, she complied without speaking. To the agents, this was voluntary compliance; 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 subsequently was taken to have given verbal consent—twice—when the agents later requested to search her bag and her person. Mendenhall’s later alleged consent 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. Under these totality of the circumstances tests, each alleged grant of consent should be evaluated separately and then in light of one another, to evaluate the

185 333 U.S. 10, 12 (1948).
186 Id. at 13–17 (having no discussion of gender or how the Court concluded that the woman “consented” in submission to authority rather than voluntarily).
189 Id. at 345–47. The Court’s treatment of juvenile status is discussed in Part II.C.
190 446 U.S. 544 (1980).
191 Id.
192 Id.
193 Id. at 549.
cumulative effects. Rather, the Court made a single summary evaluation of voluntariness.

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.” 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 identical to the second assent 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—reads very differently when we consider the empirical evidence showing that women lack the same confidence or reactance levels as men that would propel them to advocate for their rights 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, stating that “she had a plane to catch.” This statement clearly constituted an avoidance of a direct answer to the 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 a nonvoluntariness.

During the voluntariness analysis of Mendenhall’s consent the Court paid lip service to her subjective characteristics (young, uneducated, black, 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.[196]

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. In this way, courts fail to account for gender in their reasonableness analysis: a woman’s powerless language and conduct appear generic, rather than coerced, when viewed through the lens of a powerful (white) man. “[L]inguistic norms in law act as they so often do to privilege supposedly ‘masculine’ linguistic behavior and to penalize supposedly ‘feminine’

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194 Id.
195 Id. at 548–49.
196 Id. at 558.
197 Id.
linguistic behavior.” 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 here, 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. Consequently, the Court held that a suspect, upon arrest, must be informed of his *Miranda* rights, including the right to remain silent and to have counsel present during an interrogation. If the suspect affirmatively waives his right to counsel, the police are free to question him. Similarly, when the accused invokes his right to counsel, he cannot be further interrogated without a lawyer present unless the defendant, by himself, initiates conversation. Any confession or statement must be made “voluntarily, knowingly[,] and intelligently;” the defendant may not be “involuntarily impelled to make a statement when but for the improper influences he would have remained silent.”

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, and waiver is its cousin. Initially, the Supreme Court in *Miranda* stated that “[i]f . . . [the defendant] indicates in any manner . . . that he wishes to consult with an attorney before speaking there can be no questioning.” 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 invocation.” State and lower federal courts have taken different approaches to what qualifies as an unambiguous invocation.

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200 Id. at 444–45.
203 *Miranda*, 384 U.S. at 444.
204 Id. at 462.
205 Id. at 444–45 (emphasis added).
207 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
And it is in these post-\textit{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 \textit{People v. Krueger}. 208 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 [twenty] to [forty] years.” 209 The court determined that such an infirm reference to an attorney was insufficient to invoke the right to counsel:

\textit{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. . . . 210

In other words, \textit{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. 211 Thus, by requiring unambiguous invocation, the courts are systematically hindering women from asserting their \textit{Miranda} rights.

The female register consists of precisely the language used by Michael Krueger (“maybe,” “ought,” and the statement as a whole, as compared to a more definitive request, such as “I want a lawyer”). These lexicons, whether learned or innate, are either way involuntary. Yet the \textit{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.

The court in \textit{Krueger} did not evaluate the significance of Krueger’s gender, but neither did it discuss any of Krueger’s subjective characteristics. Although it is technically unclear whether the court would have engaged in such a dialogue had Krueger been a woman, it seems unlikely, given the history of invocation jurisprudence. Instead, the court fashioned a rule deeming such indirect, nonassertive language as incapable of legal invocation under \textit{Miranda}. 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

\footnotesize{for counsel the only subsequent questions allowed must be limited to clarify whether the suspect is actually invoking his right to counsel).}

\footnotesize{208} 412 N.E.2d 537.

\footnotesize{209} \textit{Id}. at 538.

\footnotesize{210} \textit{Id}. at 540 (“[W]e find that defendant’s remarks here did not constitute an invocation of such right [to counsel].”).

\footnotesize{211} O’Barr & Atkins, \textit{supra} note 49, at 102.
and assertively) the alleged request for counsel was insufficient. But if it did so, it did it in a way that prevented any future court coming to a contrary conclusion, because the court fashioned a rule that excludes the female lexicon from invocation as a matter of law.

This is especially so when considering the standard police manuals that instruct officers to “deprive[. . . [t]he suspect . . . of every psychological advantage.” 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 the mental subterfuge on behalf of the police.

5. The Reasonable Woman

Courts’ apparent refusal to consider gender as a subjective characteristic worthy of consideration in its constitutional criminal reasonableness analyses is even more concerning when looking to 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.

In 1976, in Williams v. Saxbe, a federal district court first recognized sexual harassment as a form of sex discrimination under Title VII (the federal antidiscrimination law). In 1986, the Supreme Court in Meritor Savings Bank, FSB v. Vinson 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.” The Court did not alert lower courts as to what constitutes such severity; subsequently, the lower courts have turned to the reasonable person standard with a variety of interpretations. Unfortunately, however, the Supreme Court has denied certiorari to engage with or clarify the male-centric nature of the

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212 The leading police interrogation manual explicitly aims to break down the will of the suspect. See Miranda v. Arizona, 384 U.S. 449, 449–50 (1966) (describing how police manuals ordinarily recommend that the “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. The atmosphere suggests the invincibility of the forces of the law”); Inbau & Reid, supra note 154, at 60–62.
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 considered explicitly the impact of gender on reasonableness in sexual harassment 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.  

In *Rabidue*, the only 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. The Sixth Circuit majority—of an all-male panel—found no sexual harassment, and its focus on the plaintiff’s “capable, independent, ambitious, aggressive, intractable, and opinionated” characteristics exemplifies the discrepancy discussed in Part I.A between the female 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.” Thus, the reasonable person—i.e.: the common man—would not find the work environment hostile, precluding the existence of sexual harassment. Although the court acknowledged some workplaces have “rough hewn and vulgar” language and humor, as well as “[s]exual jokes, sexual conversations and girlie magazines. . . . Title VII was not meant to—or can—change this.”

Judge Keith disagreed. He believed equal employment opportunity includes a woman’s ability to be free of just that kind of harassment. 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, “[T]he reasonable person perspective fails to account for the wide divergence between most women’s views of appropriate sexual conduct and those of men.”

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.” He warned, “[U]nless the outlook of the

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216 805 F.2d 611; Forell, *supra* note 129, at 796.
217 805 F.2d at 615.
218 See *id.* at 614.
219 *Id.* at 615.
220 *Id.* at 615, 622.
221 *Id.* at 620–21.
222 *Id.* at 623–24, 625–26 (Keith, J., concurring in part and dissenting in part).
223 *Id.* at 626.
224 *Id.*
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.”

In Ellison v. Brady, the Ninth Circuit heard Judge Keith’s plea. 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. The court found:

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

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.

Despite the opportunity to analyze this standard, the Supreme Court has neglected to do so. In Harris v. Forklift Systems, Inc., the Supreme Court visited sexual harassment under Title VII, but it sidestepped the reasonable woman inquiry. 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.”

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225 Id.
226 See 924 F.2d 872 (9th Cir. 1991).
227 See id. at 879–80.
228 Id. at 879.
229 Id.
231 510 U.S. 17.
232 Id. at 22 (emphasis added); 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 ‘make it more difficult to do the job.’” (emphasis added)).
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.” Even though the trial court expressly applied the reasonable woman test, the Supreme Court avoided that conversation entirely and neither considered the reasonable woman standard nor clarified the gender ramifications for the reasonable person standard.

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.\[234\]

The court may be correct regarding sexual harassment, but gender does not only impact issues that arise in an explicitly gendered context, such as rape or sexual harassment. As the previous Parts demonstrated, time and again women are marginalized under the law as it applies to non-sexual issues also, 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 non-gendered lexicon or register—thus prompting the “cycle of suspicion” (or of prejudice, or of victimhood, etc.) that results when a woman defies gendered expectations. Just as women are more often the victims of sex crimes, women are more often misunderstood because of their speech. Just

\[234\] 924 F.2d at 879 (footnotes omitted).
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 Part discusses courts’ limited and sporadic consideration of age and 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 startling 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 very marginalized women are in constitutional criminal procedure as compared to their male counterparts, and on how practical and possible it is to make such subjective considerations a uniform standard in reasonableness analysis.

In this Part, 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 over-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 those characteristics. Instead, it has crafted rules on a case-by-case basis despite the striking similarities between the 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, but it was not until 1985 with New Jersey v. T.L.O. that the U.S. Supreme Court formulated a rule expressly protecting minors on constitutional grounds.235 Even then, however, the

235 469 U.S. 325 (1985) (recognizing that juveniles have some rights on school grounds under the Fourth Amendment, albeit under a lowered standard).
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 subsequent to *T.L.O.* in *Thompson v. Oklahoma*, when the Court considered the death penalty’s Eighth Amendment consequences for juveniles.\(^{236}\) 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. Strangely, the Court has failed to keep up with its own findings in its 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.”\(^{237}\) The Court found: “That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.”\(^{238}\) 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, in 1962, the Court made a similar ad-hoc determination in *Gallegos v. Colorado* when it suppressed another young boy’s confession.\(^{239}\) As in *Haley*, the fourteen-year-old in *Gallegos* confessed immediately after he was taken into custody and without a lawyer present.\(^ {240} \) 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.\(^{241}\)

*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 the bathroom, contrary to school rules, the Assistant Vice Principal questioned them both.\(^ {242} \) 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.\(^ {243} \) When he opened it, he saw a pack of cigarettes and rolling papers, and suspected drug use. Searching the purse further, he found a small amount of marijuana, a pipe, plastic baggies, money, and an index card that looked like a list of T.L.O.’s debtors. The Assistant Vice Principal then called T.L.O.’s mother and the police.\(^ {244} \) The police asked that T.L.O. be brought to police headquarters. Her mother

\(^{237}\) 332 U.S. 596, 599 (1948).
\(^{238}\) Id. at 599.
\(^{239}\) 370 U.S. 49 (1962).
\(^{240}\) Id. at 54.
\(^{241}\) 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 protect his own interests or how to get the benefits of his constitutional rights.").
\(^{243}\) Id.
\(^{244}\) Id.
complied, and T.L.O. confessed she had been selling marijuana at school. 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 the Court held the Fourth Amendment applies to searches conducted by school officials as well as law enforcement. 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. 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 w[ould] turn up evidence that the student ha[d] violated or [wa]s violating either the law or the rules of the school;” and second, whether the “measures adopted [for the search] [we]re 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.”

Given our discussion of the Court’s treatment of both the “totality of the circumstances” and “reasonableness” inquiries, it is unsurprising that when the Court finally confronted the legality of the searches at bar, it did not discuss either T.L.O.’s age or gender, the two subjective characteristics the Court swept into its rule. 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, just like the Court focuses on a police officer’s subjective beliefs about the accused and his subsequent actions in response to those beliefs.

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 en 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. 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

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245 Id. at 329.
246 Id. at 333.
247 Id. at 340.
248 Id. at 341–42 (emphasis added).
249 See Part II.A. supra.
250 Searches because the first was a search for cigarettes, and the second was a search for marijuana.
251 T.L.O., 469 U.S. at 345–47.
252 See id.
253 See Part II.A. supra.
inquiry the Court made into school-aged youth was about their reasonable expectations of privacy in school.

Make no mistake: the Supreme Court came to the proper conclusion regarding 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.\textsuperscript{255} Subsequently, he had reason to believe she was violating the law—possessing marijuana based on the discovery of rolling papers—and the identical search was again proportional. This is the case 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). 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.

Three years after its decision in \textit{T.L.O.}, the Court again confronted the dilemma of youth vulnerability and development when faced with very serious criminal consequences: the death penalty. What is important to keep in mind is that there is no difference in the psychology between the youth in the warrantless school search context and the youth in the death penalty context, 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. In \textit{Thompson v. Oklahoma}, the Court crafted a rule prohibiting the death penalty’s imposition on a minor sixteen years of age or younger. This time, the Court faced the issue of adolescence head-on:

\begin{quote}
[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.\textsuperscript{256}
\end{quote}

The Court specifically referenced adolescents’ vulnerability, poor impulse control, incapacity to “control their conduct and to think in long-range

\textsuperscript{255} \textit{Compare} Safford Unified School District v. Redding, 557 U.S. 364 (2009) (holding that school officials violated the Fourth Amendment when they strip searched her down to her bra and underwear while looking for Ibuprofen).

\textsuperscript{256} \textit{Thompson}, 487 U.S. 815, 834 (1988) (internal quotation marks omitted) (quoting Bellotti v. Baird, 443 U.S. 622, 635 (1979)).
terms,” and their susceptibility to “mere emotion” and peer pressure\(^\text{257}\)—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, but in the interim the Court addressed the issue of the death penalty with regard to the intellectually disabled. And 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 the imposition of the death penalty on an intellectually disabled person was a violation of the Eighth Amendment.\(^\text{258}\) The *Atkins* Court determined that the death penalty was inappropriate as applied to intellectually disabled defendants because their limited culpability rendered the punishment disproportional, contrary to the Eighth Amendment.\(^\text{259}\)

The Court drew heavily on the psychology literature that underpinned its subjective considerations of age, echoing its sentiments on youth and decisionmaking in the Opinion of the Court. 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.”\(^\text{260}\) Acknowledging an exception in the efficiency of our procedural safeguards, it found, “[S]ome characteristics of [intellectual disability] undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards.”\(^\text{261}\) This is significant: the Court finally recognized that a categorical group of citizens, “by definition,” has less 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. Of course, this decision applies only to the intellectually disabled and the death penalty, which is a problem, but *Atkins* demonstrates the Court is able and willing to carve out rules for subjective characteristics.

Following on *Atkins*, in 2005 the Supreme Court revived this language of proportionality and “group” psychology when it held in *Roper v. Simmons* that the Eighth Amendment categorically precluded minors

\(^{257}\) *Id.* at 834–35; see also *id.* at 837 (plurality opinion) (“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.”).

\(^{258}\) 536 U.S. 304 (2002).

\(^{259}\) *Id.* at 313–17, 319–20. The Court also was influenced by what it deemed to be a national consensus against imposition of the death penalty against mentally retarded defendants. *Id.*, at 316 (“The practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it”).

\(^{260}\) *Id.* at 318.

\(^{261}\) *Id.* at 317.

\(^{262}\) See *id.* at 318.
from the death penalty altogether.\textsuperscript{263} The Court drew parallels between the case law’s development on death penalty and the intellectually disabled and the then-developing jurisprudence on the death penalty and juveniles.\textsuperscript{264} 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 \textit{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.\textsuperscript{265} Thus, under \textit{Atkins}, juveniles are not the “most deserving of execution,” particularly in light of the difficulty—“even for expert psychologists”—to determine when a juvenile’s offense stems from immaturity or “irreparable corruption.”\textsuperscript{266} Even Justice O’Connor’s dissenting opinion considered empirical evidence and acknowledged that juveniles “as a class” are less mature and, therefore, less culpable.\textsuperscript{267}

Five years later, the Court made its final decision to-date concerning juveniles and the Eighth Amendment in \textit{Graham v. Florida}.\textsuperscript{268} 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. The Court again followed the \textit{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.\textsuperscript{269} Also pulling from \textit{Roper}, the Court found, “As 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.”\textsuperscript{270} Because juveniles make rash decisions without thinking of the consequences, the Court also found them “less likely to take a possible punishment into consideration.”\textsuperscript{271} 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 \textit{Terry} stop, and how best to do so—yet the Court has not generalized their reasoning to that context.

In \textit{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. It acknowledged that the susceptibility to outside pressures make young people “internalize and perceive the circumstances” of a police–citizen interaction differently than adults in the context of an interrogation. 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 conference rooms. In the conference room was the investigator, the assistant principal, an administrative intern, and the uniformed officer assigned to the school. J.D.B. was never read his Miranda warnings, given the chance to speak to his grandmother (his legal guardian), or told that he was free to leave. 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. Only after this admission did the investigator tell J.D.B. he could remain silent and leave the room. 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.

The Supreme Court granted certiorari to determine whether the in-custody analysis under Miranda requires the courts to consider a juvenile suspect’s age, and in J.D.B. it finally held that age was relevant to the totality of the circumstances determination. Deciding whether a child is “in custody” under the Fifth Amendment Miranda standard, 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.” Considering age in the reasonable person analysis, the Court found, “It 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.” 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. It determined “a child’s age differs from other personal characteristics that, even when known to police, have no objectively discernible relationship to a

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273 Id. at 2399.
274 Id.
275 Id. at 2400.
276 Id.
277 Id. at 2401.
278 Id. at 2404 (quoting Thompson v. Keohane, 516 U.S. 99, 112 (1995)).
279 Id. (internal quotation marks omitted).
280 Id. at 2398, 2402–03.
281 Id. at 2403.
reasonable person’s understanding of his freedom of action.”

So long as the officer is aware of the child’s age during questioning, or the child’s age “would [be] objectively apparent to any reasonable officer,” the Miranda in-custody determination now requires consideration of the juvenile suspect’s age.

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 between 1988 and 2011 refused to consider adolescence in light of anything but the death penalty. The Court drew the same conclusions about the intellectually disabled community in its death penalty jurisprudence, but again we see a lack of consideration, and therefore protection, for them 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. hinted at age’s importance under the reasonable person standard more broadly. 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. So if the Court has opened these doors to subjective considerations in certain criminal contexts, why ultimately youth and intellect but not 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 Part 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 female will adopt or develop any or all of them.

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

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282 Id. at 2404.
283 Id.
284 Id. (“Indeed, even where a ‘reasonable person’ standard otherwise applies, the common law has reflected the reality that children are not adults.”).
285 See id.
psychological freedom or physical willingness to act or speak in a certain way—in her best interest. 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) 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 50% of the national population. The law, by viewing the gender as irrelevant to these core constitutional doctrines, 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. 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

As mentioned, it is not altogether clear precisely which circumstances the courts originally envisioned as being encompassed by the reasonable person test’s “surrounding circumstances” language. Professor Christopher Jackson maintains that this open question actually consists of two separate questions: (1) “[H]ow [does] a reasonable person reason[]”?286 and (2) “[W]hat context . . . should [we] give the reasonable person before asking how she reasons”?287 Jackson’s bifurcation of the issue is astute because on one hand, at the crux of the reasonable person standard is the hazy notion of reasonableness itself, and on the other hand, in applying that standard, it is equally uncertain how to determine how this hypothetical every-person “think[s], feel[s], behave[s].” 288 Various scholars have written on this subject and come to different conclusions.289 We posit 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

286 Jackson, supra note 133, at 655.
287 Id.
288 Id.
The novelty is simply to acknowledge the overwhelming evidence of difference between men and women, adults and children, fully enabled and intellectually disabled persons. Just as it is discriminatory to treat like as unalike, it is equally unfair to define away differences that make it impossible to exercise the same rights in reality. The second element is that to determine which characteristics meet the threshold, we should look to the same empirical evidence—as the 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.

The standard we advocate does not eschew the objective nature of the reasonable person test. We acknowledge there is a need for an objective rule, and not every psychological or physiological characteristic of the defendant is or should be relevant to the reasonableness determination. Rather, only those subjective characteristics (1) apparent to the officer during the police–citizen interaction and (2) empirically demonstrated to require consideration should be injected into the reasonable person test. This excludes amorphous qualities, such as class and experience with law enforcement; even though these characteristics may also affect a person’s perceptions or reactions to a police encounter, both 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 we imagine 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 non-consensual acquiescence.

Our proffered gloss on the reasonable person inquiry stems directly from the extensive research establishing the meaningful differences in the

\[290\text{ Giovanna Shay, Similarly Situated, } 18 \text{ GEO. MASON L.REV. 581, 584-86 (2001) (describing how the phrase “similarly situated” has been used in over one thousand Supreme Court cases, in numerous areas of law, including death penalty, Eighth Amendment proportionality analysis, and ex post facto laws).} \]

\[291\text{ To some extent, this proposal reifies socially-enforced gender differences, and if adopted by the courts would institutionalize them. But such controversy is unavoidable: the courts likely will never adopt a purely individualized subjective standard, and the objective standard is not objective. Difference treatment thus accounts for the empirically demonstrated central tendencies, which likely covers the majority of women, where the current approach fails to account for women at all and indeed excludes them.} \]

\[292\text{ See, e.g., supra note 10 and accompanying text; see also Part I, supra.} \]
categorical 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 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.

The ability to assert one’s rights of course also depends upon the doctrine being evaluated. And some doctrines will not be affected by this additional subjective consideration. For example, the reasonable expectation of privacy inquiry would remain the same. In *Katz v. United States*, the Supreme Court articulated the “reasonable expectation of privacy” test that is still used to determine whether the governmental intrusion at issue constitutes a Fourth Amendment search, and therefore whether constitutional protections were required. 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.”

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. Even in *New Jersey v. T.L.O.*, where the Supreme Court endeavored to determine the Fourth Amendment rights of a fourteen-year-old, the Court’s analysis of society’s recognition of T.L.O.’s subjective 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.

In contrast to reasonable expectations of privacy, we see the workings of reactance, speech, and other rights-assertion behaviors in

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293 389 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).


295 See 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.").
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, it still may have reached the same conclusion. This is so even if the Court had accounted for her status as an uneducated, young, black woman. 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. In response to this, she nonetheless replied expressly and verbally, “Go ahead.” The Court could reasonably have determined that, even though Mendenhall was a 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.

In contrast, it would be much harder to maintain that Mendenhall’s second consent was voluntarily given once gender is 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. When the police officer told her that “if she were carrying no narcotics, there would be no problem,” Mendenhall began to disrobe without comment. In light of the gender differences in speech, reactance, risk-aversion, and confidence, a court would have to consider whether Mendenhall’s “I have a plane to catch” was in fact a denial of consent. The important difference is to genuinely consider Mendenhall’s responses in light of her circumstances—circumstances which have been shown, in the overwhelming majority of cases, to be affected by her gender. Although our 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. Our 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. And there are a plethora of additional tests not yet discussed that function like these tests

297 Id.
298 Id. at 548–49.
299 Id. at 549.
but, as will become clear, conduct a reasonableness-oriented inquiry from a mess of perspectives that 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 our readers’—concerns, our proposed test offers a lens through which we 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 “hampering the traditional function of police officers in investigating crime.”

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,” 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. 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 non-momentary seizures, and public seizures versus seizures in a confined space), waiver of the right to remain silent, and invocation of the right to counsel. 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.

Table 1 provides a visual map of the current landscape of scattered inquiries.
<table>
<thead>
<tr>
<th>Doctrine: Application</th>
<th>Defendant’s Perspective</th>
<th>Officer’s Perspective</th>
<th>Rule, <em>(Governing Case)</em></th>
</tr>
</thead>
<tbody>
<tr>
<td>Warrantless Search: general</td>
<td>X</td>
<td>X</td>
<td>Whether D expected privacy—<em>subjective</em>—and whether that expectation was reasonable—<em>objective</em> (REP) <em>(Katz)</em></td>
</tr>
<tr>
<td>Warrantless Search: physical trespass</td>
<td></td>
<td>X</td>
<td>Whether implied or express license exists on behalf of police—<em>subjective</em>—which requires an evaluation of the officer’s purpose for intrusion—<em>objective</em> <em>(Jones; Jardines)</em></td>
</tr>
<tr>
<td>Warrantless Search: the home</td>
<td>X</td>
<td>X</td>
<td>REP (as above) exists if: the interior of the home is revealed—<em>objective</em>; and any enhanced technology used for the search is not widely available—<em>objective</em> <em>(Kyllo; Karo)</em></td>
</tr>
<tr>
<td>Warrantless Search: school</td>
<td>X*</td>
<td></td>
<td><em>Totality of the Circumstances</em></td>
</tr>
<tr>
<td>Seizure: administrative inspection</td>
<td></td>
<td>X</td>
<td>Administrative plan and tradition of inspection, or else citizen complaint or “other satisfactory reason for securing immediate entry”—<em>objective</em> <em>(Camara; Burger)</em></td>
</tr>
<tr>
<td>Seizure: warrant execution</td>
<td></td>
<td>X</td>
<td><em>Objective primary purpose</em> of stop must be closely related to policing the border or ensuring roadway safety, not “general interest in crime control” <em>(Edmond; Sitz)</em></td>
</tr>
<tr>
<td>Seizure: administrative checkpoint</td>
<td></td>
<td>X</td>
<td><em>Reasonable</em> to seize a person for the duration of a search, and to use <em>reasonable</em> force, within the immediate vicinity <em>(Summers, Bailey)</em></td>
</tr>
<tr>
<td>Doctrine: Application</td>
<td>Defendant’s Perspective</td>
<td>Officer’s Perspective</td>
<td>Rule, (Governing Case)</td>
</tr>
<tr>
<td>-----------------------</td>
<td>-------------------------</td>
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<td>-----------------------</td>
</tr>
<tr>
<td></td>
<td>OBJECTIVE</td>
<td>SUBJECTIVE</td>
<td>OBJECTIVE</td>
</tr>
<tr>
<td>Terry stop/frisk (RAS): justification</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td></td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Terry Stop: occurrence</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Terry Stop: confined space</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Terry Stop: degree of intrusion</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Probable Cause (PC)</td>
<td></td>
<td>X*</td>
<td>* Totality of the Circumstances</td>
</tr>
<tr>
<td>PC / RAS: mistake of law</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Consent to Search: general</td>
<td></td>
<td>X*</td>
<td>* Totality of the Circumstances</td>
</tr>
<tr>
<td>Consent to Search: apparent authority</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Doctrine: Application</td>
<td>Defendant’s Perspective</td>
<td>Officer’s Perspective</td>
<td>Rule, <em>(Governing Case)</em></td>
</tr>
<tr>
<td>------------------------</td>
<td>-------------------------</td>
<td>-----------------------</td>
<td>-------------------------</td>
</tr>
<tr>
<td>In-Custody Determination: general</td>
<td></td>
<td></td>
<td>Whether a <em>reasonable person</em> in suspect’s position would believe that he was under arrest or something equivalent to an arrest <em>(Alvarado; Mathiason)</em></td>
</tr>
<tr>
<td>In-Custody Determination: for a minor</td>
<td>X</td>
<td>X</td>
<td>A child’s age is one of the relevant circumstances that determines whether a <em>reasonable person</em> feels free to leave; the child’s age must be known or <em>objectively apparent</em> to the officer <em>(J.D.B.)</em></td>
</tr>
<tr>
<td>Interrogation: <em>Fifth Amendment</em></td>
<td></td>
<td>X</td>
<td><em>Deliberate intent</em> by police to elicit incriminating statements <em>(Brewer v. Williams)</em></td>
</tr>
<tr>
<td>Interrogation: <em>Sixth Amendment</em></td>
<td></td>
<td>X</td>
<td>Voluntariness—confession is made freely, voluntarily, and without compulsion or inducement of any sort <em>(Spano)</em></td>
</tr>
<tr>
<td>Interrogation: <em>Due Process</em></td>
<td>* Totality of the Circumstances*</td>
<td>X</td>
<td>Request for lawyer must be clear and unambiguous, such that a <em>reasonable police officer</em> in the circumstances would understand it to be a request for an attorney <em>(Davis)</em></td>
</tr>
<tr>
<td>Invocation: <em>Fifth Amendment</em></td>
<td></td>
<td>X</td>
<td>Under all the circumstances of defendant’s background, experience and conduct, whether through his words and actions, defendant gave a clear waiver <em>(Miranda; Butler)</em></td>
</tr>
<tr>
<td>Waiver: <em>Fifth Amendment</em></td>
<td>* Totality of the Circumstances*</td>
<td>X</td>
<td>Second statement is admissible as long as first statement was not “involuntary”—<em>objectively assessed</em>, and not an intentional police practice <em>(Elstad; Seibert)</em></td>
</tr>
<tr>
<td>Two-Stage Interrogation: fruits</td>
<td>X</td>
<td></td>
<td>Whether from suspect’s standpoint, the Miranda warnings function effectively, giving a real choice between talking and remaining silent <em>(Elstad; Seibert)</em></td>
</tr>
<tr>
<td>Two-Stage Interrogation: waiver</td>
<td>X*</td>
<td>X*</td>
<td></td>
</tr>
<tr>
<td>Doctrine: Application</td>
<td>Defendant’s Perspective</td>
<td>Officer’s Perspective</td>
<td>Rule, <em>(Governing Case)</em></td>
</tr>
<tr>
<td>------------------------</td>
<td>-------------------------</td>
<td>-----------------------</td>
<td>--------------------------</td>
</tr>
<tr>
<td><strong>Waiver:</strong> Sixth Amendment</td>
<td><strong>OBJECTIVE</strong></td>
<td>X</td>
<td><strong>SUBJECTIVE</strong></td>
</tr>
<tr>
<td><strong>Exclusion:</strong> Fourth Amendment</td>
<td><strong>OBJECTIVE</strong></td>
<td>X</td>
<td><strong>SUBJECTIVE</strong></td>
</tr>
<tr>
<td><strong>Exclusion:</strong> errors</td>
<td><strong>OBJECTIVE</strong></td>
<td>X</td>
<td><strong>SUBJECTIVE</strong></td>
</tr>
<tr>
<td><strong>Exclusion:</strong> Fifth Amendment</td>
<td><strong>OBJECTIVE</strong></td>
<td>X</td>
<td><strong>SUBJECTIVE</strong></td>
</tr>
<tr>
<td><strong>Exclusion:</strong> Sixth Amendment</td>
<td><strong>OBJECTIVE</strong></td>
<td>X</td>
<td><strong>SUBJECTIVE</strong></td>
</tr>
<tr>
<td><strong>Life Imprisonment without Parole</strong></td>
<td>X</td>
<td><strong>OBJECTIVE</strong></td>
<td><strong>SUBJECTIVE</strong></td>
</tr>
<tr>
<td><strong>Death Penalty</strong></td>
<td>X</td>
<td><strong>OBJECTIVE</strong></td>
<td><strong>SUBJECTIVE</strong></td>
</tr>
</tbody>
</table>

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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; 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. 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: whether the reasonable person would have done or felt XYZ (objective), and what the defendant did or felt (subjective). Some tests even do both. 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 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—but does not include characteristics such as gender in that assessment. The very same subjective characteristics that

302 A number of tests further define reasonableness in specific situations, such as in determining the legality of use of deadly force. E.g., Plumhoff v. Rickard, 134 S. Ct. 2012 (2012) (considering whether flight in a car chase posed a “grave public safety risk” to determine reasonable use of force); Scott v. Harris, 127 S. Ct. 1769 (2007) (stating that police must weigh the number of lives at risk, as well as their relative culpability, as 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, Warden v. Hayden, 387 U.S. 294 (1967) (stating 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), and the presumption of unreasonableness of searches and seizures without a warrant inside a home, Payton v. New York, 445 U.S. 573 (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 (2014) (refusing to apply a case-by-case analysis, and instead defining a category of effects exempt from the Robinson, 414 U.S. 218, exception).

303 Compare for example 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 exist specific and articulable facts that give rise to reasonable suspicion that the person is armed and dangerous, with the automatic per se exception allowing police to search the person and immediate surroundings of an arrestee. Compare Terry v. Ohio, 392 U.S. 1, 30 (1968), with Chimel v. California 395 U.S. 752, 763 (1969).

304 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).

might make the defendant feel not free to leave in the seizure context would also make him or her feel not 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, race, and so forth, would work to make uniform all objective defendant perspective tests.

Our proposed test also solves the subjective-defendant inquiry. In part this is because our solution does what the subjective defendant inquiries set out to do by actually considering subjective characteristics instead of distilling the inquiry into an evaluation of the officer’s actions. But it has the added advantage that using our similarly situated analysis injects an objective meter into what otherwise could 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 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. 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 other such assessments. But in addition, there is a practical problem with this test: this is not the analysis typically applied. Instead, courts focus, often “to give clear guidance to the police,” on an analysis of the police officer’s actions and avoid ascertaining the youth’s perception altogether.

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. In North Carolina v. Butler, however, the Court went on to hold that waiver “must be determined on the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.” 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.

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309 Id. at 374–75 (emphasis added).
310 See, e.g., United States v. McFall, No. 07-411, 2012 WL 194078, *4–5 (W.D. Penn. 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”). 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, which was likely the correct result.
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.\(^{311}\) After acknowledging the age of the accused, the court determined his age did not affect his confession because his answers to the police’s questions were “articulate” and “without hesitation.”\(^{312}\) The court then concluded the single paragraph discussing Hammond’s age with a statement that he did not testify the police acted in a threatening or exhausting way, and the officer’s testimony confirmed the police’s lack of threatening conduct.\(^{313}\) The remainder of the waiver inquiry focused entirely on the interrogation’s length, and because there was no police misconduct, the boy was deemed to have made a knowing and voluntary waiver.\(^{314}\)

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 police’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 person’s ability to assert their right to silence, and the increased likelihood to feel free from compulsion to speak—circumstances that the Supreme Court had explicitly recognized should be apparent to the police. Those doctrines evaluating constitutionality on the basis of the reasonable person’s perceptions of police ultimately evaluate the sufficiency of the reasonable person’s willingness, ability, or tendency to assert him or herself through verbal or physical conduct.

That very willingness, ability, or tendency may depend on the person’s subjective circumstances, a subjectivity that must include characteristics beyond age and mental retardation. Yet there is little consistency in either the Court’s move from objective to subjective rulemaking, or in the lower courts’ application of the Court’s subjective and objective standards. The Supreme Court should recognize 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. Although the Court made great strides in acknowledging the social and psychological realities of juveniles and the intellectually disabled, as the

\(^{312}\) Id.
\(^{313}\) Id.
\(^{314}\) Id.
Table makes clear, its willingness to consider these class 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 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 the defendant known to affect the defendant’s responses to citizen–police interactions. Of course, the notion of a characteristic “being known” itself is a product of 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 the established evidence they affect the defendant’s perceptions or responses.

A suspect has the right to counsel when subjected to custodial interrogation, and so the Supreme Court has had to determine what constitutes interrogation and its “functional equivalent.” As the Table 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 know is reasonably likely to elicit an incriminating response from the suspect, the latter assesses whether the police actually intended to elicit incriminating statements. 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 in both contexts the Court has expressed concern that some defendants are far more susceptible to interrogative techniques than others, the characteristics we have 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

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315 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.”).

316 Id. at 301.

317 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.”).

318 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”); Id. (“Detective Leaming knew that Williams was a former mental patient, and knew also that he was deeply religious.”).
and men, behave differently in the presence of police, then there will be subjectively different cues 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 with an adult, white, fully able-minded, male suspect. Thus, under our proposed rule, police can conform their behavior appropriately when 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, for example to speak in a less domineering manner, or to err 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.319

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 he or she has been singled out by the police or treated 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

319 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 80% of suspects waive their rights).
coerced or confused by police statements or behaviors. Either way, such past experience with law enforcement is not only unapparent to the ordinary police officer, but also too individualized to manage.  

In contrast, the suspect’s criminal history could be considered if it is apparent to the officer. And 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 because of precisely 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 as 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—are concerned suggests an even deeper rift between reality and our governing jurisprudence.

Other characteristics, such as race, are also clearly equally worthy of consideration. This Article cannot comprehensively assess every subjective characteristic the courts arguably should consider but choose to ignore; but we have shown how best to proceed in that analysis going forward. We have provided one simple solution to multiple problems with the Court’s blindness to the real and significant effects of gender on citizen–police interactions; of how to reconcile its tentative, uncertain

320 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 8.
forays into accounting for age and intellectual disability; and to the scattered nature of defendant and officer perspective objective–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 consent, waiver, or invocation. Otherwise constitutional criminal procedure will continue to silently undercut the constitutional rights of significant factions of the population.
APPENDIX: CASES LISTED IN TABLE 1