SEARCHING FOR THE APPROPRIATE STANDARD: STOPS, SEIZURE, AND THE REASONABLE PERSON'S WILLINGNESS TO WALK AWAY FROM THE POLICE

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Abstract: A person is "seized" by an officer, and thus entitled to Fourth Amendment protections, if a reasonable person would not feel free to leave. Although courts must set a standard for when a person has been seized by an officer, few real-world studies exist regarding when individuals feel truly free to disregard the police. In addition, gathering new data poses challenges. This Comment presents newly produced data sets and then explores adjustments to the current reasonable person standard, arguing the advantages of focusing on officer actions as opposed to the current focus on whether a defendant feels "free to leave."

This Comment begins with an overview of the standards set by the United States Supreme Court and the Supreme Court of Washington regarding when a reasonable person would feel free to terminate a police interaction. Next, the Comment discusses nuances and exceptions seen within other reasonable person standards. The Comment then reviews the psychological and social science research regarding laypersons' difficulty resisting authority figures. David Kessler's 2009 study—indicating that most respondents feel uncomfortable refusing to cooperate with police, even during "social" interactions—receives in-depth attention.

This Comment next presents an original study that asks two population samples the Kessler questions. Neither result precisely mirrors the Kessler study result. Washington voter survey respondents indicated a higher comfort refusing the police than hypothesized; recovery center survey respondents provided a more bifurcated response pattern to the standard questions and offered qualitative commentary regarding how disabilities may impact an individual's perceived freedom to leave an officer interaction.

Following the data analysis, the Comment discusses whether courts should add more nuance to the existing reasonable person standard by accounting for potential vulnerabilities within the civilian population. If courts follow this path, they would benefit from the ability to review additional studies before finalizing such updates. The Comment ultimately argues, however, that other jurisdictions should follow Washington's lead and focus on objective officer actions when determining whether a social contact has evolved into a seizure. Focusing on officer choices will provide more predictable and socially just results than delving into the subjective experience of a hypothetical "reasonable" suspect.

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INTRODUCTION

Fourth Amendment jurisprudence encompasses the boundaries of a search or a seizure, whether the police had probable cause to search or seize, and the consequences if authorities search or seize without probable cause—which typically includes exclusion of the improperly obtained evidence.[1] A seizure occurs when a reasonable person would have, "in view of all the circumstances surrounding the incident . . . believed that he was not free to leave."[2] Phrased differently, "[i]f a reasonable person would feel free to terminate the encounter, then he or she has not been seized."[3]

Searches and seizures typically require a warrant; however, courts have developed a plethora of exceptions to the warrant requirement, including the following: (1) exigent circumstances,[4] (2) "*Terry*"[5] stops, and (3) searches incident to arrest.[6] The first exception, exigent circumstances, covers urgent situations where waiting for a warrant would increase the chance of harm or loss.[7] For example, authorities may enter a burning building without a warrant but require judicial approval before entering charred building remains to search for evidence of arson.[8] The second exception, *Terry* stops, occurs when an officer briefly interrupts an individual due to alleged suspicious activity; warrantless searches are permissible but limited to a pat down frisk for weapons.[9] If police exceed that boundary, searching for items outside of plain view that are clearly not weapons, courts must suppress the evidence.[10] Jurisprudence concerning the third exception, searches incident to arrest, is an evolving doctrine that could itself fill an entire paper, particularly given the number of abrogated United States Supreme

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1. *See* Mapp v. Ohio, 367 U.S. 643 (1961); Davis v. United States, 564 U.S. 229, 231–32 (2011) (explaining practical purpose of excluding evidence obtained via improper seizure).

2. United States v. Mendenhall, 446 U.S. 544, 554 (1980) (plurality opinion).

3. United States v. Drayton, 536 U.S. 194, 201 (2002).

4. Riley v. California, __ U.S. __, 134 S. Ct. 2473, 2486 (2014) (referencing some case-by-case warrant exceptions, including that for exigent circumstances).

5. Terry v. Ohio, 392 U.S. 1, 21 (1968).

6. *See Davis*, 564 U.S. at 234–35 (summarizing rule regarding search of an automobile incident to arrest as outlined in *Arizona v. Gant*, 556 U.S. 332 (2009)).

7. *See* Michigan v. Tyler, 436 U.S. 499 (1978).

8. *Id.* at 515–16.

9. *See* Minnesota v. Dickerson, 508 U.S. 366, 373 (1993).

10. *Id.* at 373 (citing Sibron v. New York, 392 U.S. 40, 65–66 (1968)).

Court cases on the subject.[11] In short, the risk of harm to officers and destruction of evidence outweighs most arrestee privacy concerns involving physical objects. Although the Court has typically supported police leeway, it has firmly required the government to obtain a warrant before searching mobile phones and the personal data therein when conducting incident-to arrest-searches.[12]

While the above warrant exceptions focus primarily on issues related to search, a "social" stop involves everyday police interactions that fall short of formal detention, search, or arrest.[13] Courts perform a fact-intensive analysis to determine whether a social interaction has morphed into something more.[14] A police officer commenting on the local sports team or inquiring about the welfare of people sitting in a car is not engaged in a "seizure"; on the other hand, a social contact is a "voluntary, consensual encounter between the police and a subject with the intent of engaging in casual and/or non-investigative conversation."[15]

Courts must establish a seizure standard that maintains civilians' rights while allowing officers to perform their duties.[16] The courts should not prevent police from making conversation or engaging in community policing activities.[17] Nonetheless, police must not disregard official procedures under the guise of socializing with a suspect,[18] and

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11. *See, e.g.*, New York v. Belton, 453 U.S. 454 (1981), *abrogation recognized by Davis*, 564 U.S. 229; United States v. Chadwick, 433 U.S. 1 (1977), *abrogated by* California v. Acevedo, 500 U.S. 565 (1991); Chimel v. California, 395 U.S. 752 (1969), *abrogation recognized by Davis*, 564 U.S. at 229. In addition, many cases not abrogated are nonetheless not followed on grounds of state law. *See, e.g.*, *Gant*, 556 U.S. 332 (2009); Thornton v. United States, 541 U.S. 615 (2004).

12. Riley v. California, 573 U.S. __, 134 S. Ct. 2473, 2484–85 (2014) (declining to extend United States v. Robinson, 414 U.S. 218 (1973)).

13. State v. Harrington, 167 Wash. 2d 656, 664, 222 P.3d 92, 95–96 (2009).

14. *See, e.g.*, *id.* at 666, 222 P.3d at 96; State v. Soto-Garcia, 68 Wash. App. 20, 22, 841 P.2d 1271, 1272 (1992), *abrogated on other grounds by* State v. Thorn, 129 Wash. 2d 347, 917 P.2d 108 (1996).

15. SEATTLE POLICE DEP'T, SEATTLE POLICE DEP'T MANUAL 6.220 (2015), http://www.seattle.gov/police-manual/title-6-arrests-search-and-seizure/6220-voluntary-contacts-terry-stops-and-detentions [https://perma.cc/P4DJ-TMPK] (providing department policy for voluntary contacts, *Terry* stops, and detentions).

16. *See* United States v. Mendenhall, 446 U.S. 544, 565–66 (1980) (plurality opinion).

17. *See* U.S. DEP'T OF JUSTICE BUREAU OF JUSTICE ASSISTANCE, UNDERSTANDING COMMUNITY POLICING: A FRAMEWORK FOR ACTION (1994), https://www.ncjrs.gov/pdffiles/commp.pdf [https://perma.cc/7D44-VF9C] (labelling community policing "an approach that may very well enhance and maximize performance and resources").

18. For an extreme example of an officer blurring the line between official duties and socializing, see People v. Becker, No. 52142(U), slip op. (N.Y. Sup. Ct. Nov. 3, 2013).

courts must indicate limits on what constitutes reasonable police behavior in these contexts.[19]

In searching for the proper limits, courts may look to social science and psychology research to support or weaken the justification for maintaining the current seizure standard.[20] New data sources could illuminate whether the average person would indeed feel free to leave, what fact patterns might lead ordinary individuals to insist on enhanced protections—or, alternatively, when the average person might agree with granting police more leeway.[21]

This Comment provides an overview of the seizure standards at the federal level and within Washington State. Part I examines evidence (or, in many cases, the lack thereof) supporting those state and federal standards. Section I.A discusses the United States Supreme Court's "free to leave" variant of the "reasonable person" standard in detail. Section I.B explores how the Supreme Court of Washington's "free to leave" standard aims to uphold the state constitution's more restrictive privacy requirements.[22] Part II reviews existing legal frameworks for analyzing and adapting the reasonable person standard in a variety of contexts. Part III discusses previous studies relating to subjects' willingness to disregard actors in positions of authority, particularly the 2009 Kessler study.[23]

The Comment's next Parts introduce fresh data on individuals' willingness to refuse the police, making recommendations regarding potential future studies and adjustments to the reasonable person standard. Part IV examines a telephone survey of registered Washington voters who were asked questions nearly identical to those from the Kessler study and then discusses data gathered from a smaller sample of addiction recovery center clients. Part V compares the new data to the 2009 Kessler results, noting that the new data and Kessler data conflict.

Part VI suggests how researchers and courts should respond to this recent social science research. Contrary to some earlier data, the newly

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19. *See* Radley Balko, *When the 'Reasonable Police Officer' Standard Isn't Reasonable at All*, WASH. POST (Dec. 17, 2015), https://www.washingtonpost.com/news/the-watch/wp/2015/12/17/when-the-reasonable-police-officer-standard-isnt-reasonable-at-all/?utm_term=.696fb2b4446f [https://perma.cc/V3YA-ZBA4].

20. *See infra* Parts II–III.

21. *See generally* John Monahan & Laurens Walker, *A Judges' Guide to Using Social Science*, 43 CT. REV: J. AM. JUDGES ASS'N. 156, 156–63 (2007), http://aja.ncsc.dni.us/publications/courtrv/cr43-4/CR43-4Monahan.pdf [https://perma.cc/Z26N-V2V9] (article contained within Issue 4).

22. *See* WASH. CONST. art. I, § 7.

23. David K. Kessler, *Free to Leave? An Empirical Look at the Fourth Amendment's Seizure Standard*, 99 J. CRIM L. & CRIMINOLOGY 51, 68 (2009).

presented study indicates that many ordinary civilians feel comfortable refusing to cooperate with a police officer during what the courts would consider a "social" contact—but some subpopulations report feeling fearful, and not all relevant subpopulations have been tested. If federal or state courts wish to update the reasonable person standard to account for challenges faced by vulnerable civilians, they should have the opportunity to review additional data; unfortunately, gathering and accurately explaining such data presents challenges. Instead, instructing fact finders to focus on officers' actions, rather than hypothesizing how suspects should feel, will allow for more just outcomes when determining whether a social contact has evolved into a seizure.

I. THE "SOCIAL STOP" REASONABLENESS RULE PROTECTS CIVILIANS FROM INTERFERENCE WHILE ALLOWING POLICE TO PERFORM THEIR DUTIES

The judiciary must navigate the tension between protecting individuals from unnecessary government intrusion and allowing officers the freedom to engage in effective police work.[24] The United States Supreme Court has established that a show of force without physical restraint constitutes a seizure when "a reasonable person would have believed that he was not free to leave."[25] The Supreme Court of Washington follows a similar "free-to-leave" standard but maintains that the state constitution provides broader individual protections.[26]

A. The Federal Standard Assumes that Most People Feel Free to Walk Away from Law Enforcement

The United States Supreme Court free-to-leave standard sets a "high bar for the kinds of encounters that qualify as 'seizures.'"[27] Laypersons may face a number of situations in which courts retroactively label an exchange with law enforcement "voluntary." Distinguishing between seizures and voluntary exchanges affects evidence admissibility and the bounds of constitutionally acceptable policing.

The United States Constitution protects individuals from unlawful searches and seizures.[28] Specifically, the Fourth Amendment guarantees

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24. *See* United States v. Mendenhall, 446 U.S. 544, 565–66 (1980).

25. *Id.* at 554.

26. State v. Harrington, 167 Wash. 2d 656, 664, 222 P.3d 92, 95 (2009).

27. *See* Kessler, *supra* note 23.

28. U.S. CONST. amend. IV.

"[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . and no warrants shall issue, but upon probable cause."[29]

Fourth Amendment jurisprudence leaves the door open for an evolving definition of seizure. Commenting on the reasonableness standard and the lack of data regarding the average person's definition of seizure, Justice Scalia quipped during an oral argument, "Maybe we can just pass [on defining the standard] until the studies are done?"[30] During the same oral argument, Justice Breyer elaborated:

> So what do we do if we don't know? I can follow my instinct. My instinct is he would feel he wasn't free because the red light's flashing. That's just one person's instinct. Or I could say, let's look for some studies. They could have asked people about this, and there are none . . . . What should I do? . . . Look for more studies?[31]

Judges have used their own instincts regarding what members of the public consider reasonable and when an average individual feels seized.[32] According to the Court's elaboration on the free-to-leave standard, evidence of a seizure can include "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled."[33] Consequently, the free-to-leave standard depends upon a fact-intensive, case-by-case analysis.[34]

Scenarios involving officers interacting with airport travelers provide concrete examples of the line between whether an individual is at liberty or seized. When talking with plainclothes government agents who "request" to see identification and ask a few questions, the Court considers a passenger "free to leave."[35] In contrast, the Court considers an individual seized when agents isolate the person in a room, retain a passenger ticket and driver's license, and specifically call out that the

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29. U.S. CONST. amend. IV; *see also* Mapp v. Ohio, 367 U.S. 643 (1961).

30. Transcript of Oral Argument at 43, Brendlin v. California, 551 U.S. 249 (2007) (No. 06-8120) (quoted in Kessler, *supra* note 23, at 51).

31. *Id.* (quoted in Kessler, *supra* note 23, at 51).

32. *See Should Judges Use Instinct?*, TRANSFORM JUSTICE (Feb. 4, 2016), http://www.transformjustice.org.uk/should-judges-use-evidence-or-instinct/ [https://perma.cc/VV24-RZGP].

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

34. *See id.* at 555.

35. *Id.*

person is suspected of a crime.[36] Declaring that a subject is literally or effectively under arrest distinctly indicates seizure.[37]

The free-to-leave test hinges on whether a person would feel free to cease interacting with law enforcement, not necessarily whether the person would feel free to physically leave the area. The Court has ruled that members of the public would feel free to end a conversation if questioned on a public sidewalk or on a bus.[38] In *Florida v. Bostick*,[39] the Court noted that the free-to-leave standard was an inappropriate test on a Greyhound bus because a person on a bus would not feel free to disembark regardless of the officer's presence. "[T]he appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter."[40]

The Court more often assumes that police officers have seized a person within a car because a traffic stop involves interrupting the mode of travel.[41]

> An officer who orders one particular car to pull over acts with an implicit claim of right based on fault of some sort . . . . [E]ven when the wrongdoing is only bad driving, the passenger will expect to be subject to some scrutiny, and his attempt to leave the scene would be so obviously likely to prompt an objection from the officer that no passenger would feel free to leave in the first place.[42]

The Court considers it sufficient for a seat-bound bus passenger to feel free to decline an officer's request despite a limitation on his freedom to disembark, focusing on details such as whether the officer used a quiet tone of voice,[43] yet the test for a curb-bound car passenger remains whether the person would feel free to leave the scene.[44]

The United States Supreme Court free-to-leave standard establishes a challenging test—particularly for those in scenarios, such as traveling

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36. Florida v. Royer, 460 U.S. 491, 501 (1983).

37. *See* Johnson v. United States, 333 U.S. 10, 13 (1948) (holding that an individual allowing a hotel room search after being told she should consider herself under arrest did not constitute the suspect giving the officer voluntary consent).

38. Muehler v. Mena, 544 U.S. 93, 101 (2005).

39. 501 U.S. 429 (1991).

40. *Id.* at 436. *But cf.* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 311 (2000) (discussing the unacceptable pressures to conform felt by non-religious audience members listening to a loudspeaker prayer delivered at a school football game).

41. *See* Brendlin v. California, 551 U.S. 249, 257 (2007).

42. *Id.*

43. *See* United States v. Drayton, 536 U.S. 194, 204 (2002).

44. *See Brendlin*, 551 U.S. 249.

long distances on a bus, not often experienced by members of the Court.[45] The Supreme Court of Washington standard, though still connected to a free-to-leave analysis, attempts to provide greater protections.[46]

B. *Washington Also Uses a "Free to Leave" Standard, but Its Constitution Provides Somewhat More Protection than the Fourth Amendment Protections Against Searches and Seizures*

The Supreme Court of Washington has adopted a standard very similar to the federal free-to-leave approach.[47] The Washington State Constitution, however, generally provides broader privacy protections (and thus greater search and seizure protections) than those rooted in the Fourth Amendment.[48] Under the Washington Constitution "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law."[49] This Washington clause "is not limited to subjective expectations of privacy but, more broadly, protects 'those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.'"[50]

This privacy right feeds directly into an overall standard for what constitutes a seizure: "a seizure occurs, under article I, section 7, when considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority."[51] Washington courts aim to make this determination by objectively looking at the actions of the law enforcement officer.[52]

Although similar to the federal standard, the Washington standard reflects the state's high regard for privacy and thus leads to more

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45. *See* Kessler, *supra* note 23, at 58.

46. *See, e.g.*, State v. Rankin, 151 Wash. 2d 689, 694, 92 P.3d 202, 204 (2004); State v. O'Neill, 148 Wash. 2d 564, 584, 62 P.3d 489, 500 (2003); State v. Jones, 146 Wash. 2d 328, 332, 45 P.3d 1062, 1064 (2002).

47. *O'Neill*, 148 Wash. 2d at 574, 62 P.3d at 495.

48. *See, e.g.*, *Rankin*, 151 Wash. 2d at 694, 92 P.3d at 204; *O'Neill*, 148 Wash. 2d at 584, 62 P.3d at 500; *Jones*, 146 Wash. 2d at 332, 45 P.3d at 1064.

49. WASH. CONST. art. I, § 7.

50. State v. Parker, 139 Wash. 2d 486, 494, 987 P.2d 73, 78 (1999) (quoting State v. Myrick, 102 Wash. 2d 506, 511, 688 P.2d 151, 154 (1984), *abrogated on other grounds by* Brendlin v. California, 551 U.S. 249 (2007)).

51. *Rankin*, 151 Wash. 2d at 695, 92 P.3d at 204 (citing *O'Neill*, 148 Wash. 2d at 574, 62 P.3d at 495).

52. State v. Young, 135 Wash. 2d 498, 501, 957 P.2d 681, 682 (1998).

protective outcomes in some cases.[53] Treatment of passenger suspects during a traffic stop provides an example of the differing levels of protection provided by the federal free-to-leave standard as compared to the Washington free-to-leave standard. When examining a passenger's right to suppress evidence taken from a traffic stop, the United States Supreme Court in *Brendlin v. California*[54] held that passengers are (rightfully) seized along with the driver from the moment of the stop.[55] Before *Brendlin*, the Supreme Court of Washington had ruled that, unless officers have an articulable safety concern, passengers have an affirmative right to walk away from a car that has been pulled over for a traffic violation, and passengers may move to suppress evidence gathered during a traffic stop on the basis of the police *having no right to detain the passenger in the first place*.[56]

Attempting to provide heightened state constitutional protections still requires drawing the line between socializing and seizing. In Washington, a social contact "occupies an amorphous area in [the state's] jurisprudence, resting someplace between an officer's saying 'hello' to a stranger on the street and, at the other end of the spectrum, an investigative detention (i.e., *Terry* stop)."[57] Not every conversation between police officers and citizens constitutes a seizure, and optimal law enforcement strategies may require interaction with individuals out in public.[58] However, escalating police conduct may transform an interaction from a social contact into a seizure.[59]

State v. Harrington[60] provides a classic example of contact escalation. In the *Harrington* case, a single police officer hailed the defendant without using his emergency lights or siren; the officer parked out of

53. *See, e.g.*, *Rankin*, 151 Wash. 2d at 694, 92 P.3d at 204; *O'Neill*, 148 Wash. 2d at 584, 62 P.3d at 500; *Jones*, 146 Wash. 2d at 332, 45 P.3d at 1064.

54. 551 U.S. 249 (2007).

55. *Id.* at 257.

56. State v. Mendez, 137 Wash. 2d 208, 970 P.2d 722 (1999), *abrogated by Brendlin*, 551 U.S. 249. As of this Comment, the Washington State Supreme Court has not reviewed a post-*Brendlin* scenario in which a passenger asserts that the police have no right to detain him or her in the first place. In the most recent prominent case on a somewhat related topic, *State v. Flores*, 186 Wash. 2d 506, 510–11, 379 P.3d 104, 107 (2016), officers were interacting with the pedestrian companion of a known gang member; there was no automobile involved.

57. State v. Harrington, 167 Wash. 2d 656, 664, 222 P.3d 92, 95 (2009); *see also* Terry v. Ohio, 392 U.S. 1, 21 (1968).

58. *Harrington*, 167 Wash. 2d at 665, 222 P.3d at 96.

59. *See id.* at 666, 222 P.3d at 96; State v. Soto-Garcia, 68 Wash. App. 20, 22, 841 P.2d 1271, 1272 (1992), *abrogated on other grounds by* State v. Thorn, 129 Wash. 2d 347, 917 P.2d 108 (1996).

60. 167 Wash. 2d 656, 222 P.3d 92 (2009).

sight, remained within Harrington's field of view while approaching, and asked for permission to speak to Harrington—all of which the Court considered a social contact.[61] The Court held that subsequent actions "quickly dispelled the social contact, however, and escalated the encounter to a seizure."[62] The non-exclusive factors that indicate whether a seizure has occurred include the arrival of additional police officers, the request to remove hands from one's pockets, the display of a weapon, the request to search or frisk, and the request for identification.[63] Of particular note, the *Harrington* Court cited cases in which other jurisdictions held that the presence of multiple officers did not constitute seizure,[64] but it disagreed with these other jurisdictions and held that a "second officer's sudden arrival at the scene would cause a reasonable person to think twice about the turn of events and, for this reason [the second officer's] presence contributed to the eventual seizure of Harrington."[65]

Similar to the United States Supreme Court, the Supreme Court of Washington has made it clear that labeling an interaction a "seizure" has important consequences, holding that "[t]he exclusionary rule mandates the suppression of evidence gathered through unconstitutional means."[66] Even during a *Terry* detention, police may not search beyond performing a safety frisk for weapons, and courts exclude evidence gathered from any search that goes beyond said frisk.[67]

Washington largely follows the federal reasoning for dividing a social interaction from a seizure, but the state diverges from the federal standard by providing more protection when the state deems necessary.[68] The Supreme Court of Washington has held that the federal standard focuses too much on the subjective defendant mindset and that courts provide better guidance for police officers when focusing on objective

61. *Id.* at 665, 222 P.3d at 96.

62. *Id.* at 666, 222 P.3d at 96.

63. *Id.* at 667–68, 222 P.3d at 97; State v. Young, 135 Wash. 2d 498, 512, 957 P.2d 681, 688 (1998) (quoting United States v. Mendenhall, 446 U.S. 544, 554 (1980)) (accepting examples of police actions likely resulting in seizure).

64. *Harrington*, 167 Wash. 2d at 666, 222 P.3d at 96 (citing People v. Robinson, 909 N.E.2d 232, 243 (Ill. 2009); United States v. Jones, 523 F.3d 1235, 1237, 1242 (10th Cir. 2008); United States v. Buchanon, 72 F.3d 1217, 1224 (6th Cir. 1995)).

65. *See supra* note 64.

66. State v. Garvin, 166 Wash. 2d 242, 254, 207 P.3d 1266, 1272 (2009) (discussing unconstitutional seizure prior to arrest).

67. *Id.* at 249, 207 P.3d at 1270 (citing State v. Duncan, 146 Wash. 2d 166, 176, 43 P.3d 513 (2002)).

68. *See Young*, 135 Wash. 2d at 510, 957 P.2d at 687.

police actions.[69] The remainder of this Comment explores research-based and normative arguments for other jurisdictions to embrace the Washington approach and for refining the Washington "reasonable person" standard to further clarify when a social interaction ends and a seizure begins—and from whose perspective to draw the line.

II. COURTS CAN PROTECT CIVILIANS BY INCLUDING ALLOWANCES FOR DEFENDANTS' PERSONAL CHARACTERISTICS OR BY FOCUSING ON THE REASONABLENESS OF POLICE ACTIONS TOWARD THE CIVILIAN

This section explores current reasonable-person-standard exceptions for persons with disabilities, children, and women, as well as "reasonable actor" requirements applied specifically to police officers. Tort law provides protection for persons with disabilities.[70] Courts allow special exceptions for child actors.[71] Exceptions for the "reasonable woman" also exist in some contexts, but receive harsh criticism from multiple scholars.[72] At times, rather than analyzing a civilian's actions, the courts provide protection to civilians by insisting on officer reasonableness.[73] This patchwork of exceptions and protections leaves room for reinterpreting reasonable person standards as research and society progress.

A. Disabled Persons Face a "Reasonable Disabled Person" Standard Rather than the More General "Reasonable Person" Standard

Although some scholars argue that individual actors should bear the cost of their own good or bad "luck,"[74] the prevailing tort negligence standard adjusts for most disabilities. An actor "with a physical disability is negligent only if the conduct does not conform to that of a reasonably careful person with the same disability."[75] When considering

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69. *See id.* at 507–10, 957 P.2d at 685–87 (criticizing the United States Supreme Court's reasoning and ultimately rejecting the subjective standard in *California v. Hodari D.*, 499 U.S. 621 (1991)).

70. *See infra* sections II.A–B.

71. *See, e.g.*, J.D.B. v. North Carolina, 564 U.S. 261, 273 (2001).

72. *See infra* section II.C.

73. *See infra* section II.D.

74. ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY, AND THE LAW 84–87 (2001).

75. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 11(a) (AM. LAW INST. 2010).

whether an actor exercised due care, a jury may consider that person's physical disability, such as legs of differing lengths[76] or blindness.[77] Sudden incapacitation due to a physical condition such as heart attack or epileptic seizure will also excuse otherwise negligent conduct.[78] In contrast, the people with mental illness or mental disability face the same standard of care as a person of sound mind[79]—but scholars advocate for updating the reasonable person negligence standard for those with mental illnesses and mental disabilities as well.[80] As discussed later in this Comment,[81] courts could draw on the rationale for carving out a "reasonable disabled person" standard in the tort context and similarly establish a "reasonable disabled person" standard in the Fourth Amendment free-to-leave context.

B. Children Receive Protection Under a Differentiated Standard

Children also frequently receive disparate treatment under the law. "The law has historically reflected . . . that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them."[82] Courts may

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76. *See* Sterling v. New England Fish Co., 410 F. Supp. 164, 166–67 (W.D. Wash. 1976).

77. Hill v. Greenwood, 100 N.W. 522, 524 (Iowa 1904).

78. *See, e.g.*, Walker v. Cardwell, 348 So. 2d 1049, 1052 (Ala. 1977); Goodrich v. Blair, 646 P.2d 890, 892 (Ariz. Ct. App. 1982); Lutzkovitz v. Murray, 339 A.2d 64, 67 (Del. 1975); Watts v. Smith, 226 A.2d 160, 161–62 (D.C. 1967); Burns v. Grezeka, 508 N.E.2d 449, 452 (Ill. App. Ct. 1987); Holcomb v. Miller, 269 N.E.2d 885, 887 (Ind. Ct. App. 1971); Freese v. Lemmon, 267 N.W.2d 680, 684 (Iowa 1978); Rogers v. Wilhelm-Olsen, 748 S.W.2d 671, 673 (Ky. Ct. App. 1988); Brannon v. Shelter Mut. Ins. Co., 507 So.2d 194, 197 (La. 1987); Moore v. Presnell, 379 A.2d 1246, 1248 (Md. Ct. Spec. App. 1977); Murphy v. Paxton, 186 So.2d 244, 246 (Miss. 1966); Storjohn v. Fay, 519 N.W.2d 521, 526 (Neb. 1994); Word v. Jones, 516 S.E.2d 144, 147 (N.C. 1999); Jenkins v. Morgan, 566 N.E.2d 1244, 1248 (Ohio Ct. App. 1988); Parker v. Washington, 421 P.2d 861, 866 (Okla. 1966); Van Der Hout v. Johnson, 446 P.2d 99, 102 (Or. 1968); Howle v. PYA/Monarch, Inc., 344 S.E.2d 157, 159 (S.C. Ct. App. 1986); McCall v. Wilder, 913 S.W.2d 150, 155–56 (Tenn. 1995); Witt v. Merricks, 168 S.E.2d 517, 518 (Va. 1969).

79. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 11C (AM. LAW INST. 2013) ("An actor's mental or emotional disability is not considered in determining whether conduct is negligent, unless the actor is a child.").

80. *See, e.g.*, Kristin Harlow, *Applying the Reasonable Person Standard to Psychosis: How Tort Law Unfairly Burdens Adults with Mental Illness*, 68 OHIO ST. L.J. 1733, 1735–36 (2007) ("To be consistent and fair, mentally ill defendants should have a subjective standard for determining liability that is consistent with their particular disability, just as a subjective standard is available for defendants with physical disabilities."); Harry J. F. Korrell, *The Liability of Mentally Disabled Tort Defendants*, 19 L. & PSYCHOL. REV. 1 (1995).

81. *See infra* section VI.B.1.

82. J.D.B. v. North Carolina, 564 U.S. 261, 273 (2001).

release children from contracts made before the age of majority.[83] Tort law across many states also makes exceptions for children, providing that they should be compared to those of similar age and experience.[84]

More closely related to the Fourth Amendment issues raised in this Comment, the United States Supreme Court recently declared in no uncertain terms that children should face a different standard than adults in the context of police interactions.[85] Courts should not inquire into the "actual mindset" of individual suspects, but courts and police must recognize that "a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go . . . [C]ourts can account for that reality without doing any damage to the objective nature of the custody analysis."[86] The Court considers children's special vulnerability "self-evident to anyone who was a child once himself, including any police officer or judge."[87]

This reasoning, from *J.D.B. v. North Carolina*,[88] has potentially broad implications. Although a "social" stop and a *Terry* stop both differ from the formal *Miranda*[89] custody discussed in *J.D.B.*, arguably the three may blur together as conversation turns to command turns to restraint. The assumptions and logic applied to how to define custody bear a distinct resemblance to the assumptions and logic concerning whether police have "detained" a suspect as part of a *Terry* stop.[90] Justice Kennedy's concurrence dismisses the assertion that having an existing general safeguard eliminates the need for erecting more specific protections, a proposition with analogies beyond *Miranda* custody scenarios:

> [T]he State and the dissent suggest that . . . the due process voluntariness test independently accounts for a child's youth . . . . To hold, as the State requests . . . would be to deny

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83. RESTATEMENT (SECOND) OF CONTRACTS § 14 (AM. LAW INST. 1981) ("Unless a statute provides otherwise, a natural person has the capacity to incur only voidable contractual duties until the beginning of the day before the person's eighteenth birthday.").

84. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 10(a) (AM. LAW INST. 2013) ("A child's conduct is negligent if it does not conform to that of a reasonably careful person of the same age, intelligence, and experience").

85. *J.D.B.*, 564 U.S. at 271.

86. *Id.* at 272.

87. *Id.*

88. *Id.* at 261.

89. Miranda v. Arizona, 384 U.S. 436 (1966).

90. *See generally* Katherine M. Swift, *Drawing a Line Between* Terry *and* Miranda, 73 U. CHI. L. REV. 1075, 1083 (2006).

> children the full scope of the procedural safeguards that Miranda guarantees to adults.[91]

Although the United States Supreme Court has done less to shield individuals during investigatory stops than it has done to shield individuals from interrogation,[92] the "self-evident"[93] fact that children perceive the world differently than adults at least raises questions as to what other categories may require protecting those with a distinctly different worldview. Other potentially vulnerable groups may aspire to similar, case-appropriate, individuated standards. In addition to the exceptions for disabled persons, discussed above,[94] some exceptions account for ways that the female viewpoint may differ from the male viewpoint.

C. *Feminist Theory Critiques the "Reasonable Woman" Standard*

Despite some application of a "reasonable woman" exception,[95] courts and scholars have struggled with the ways that a "reasonable woman" may differ from a "reasonable man."[96] The reasonable woman archetype has appeared, to mixed reviews, in cases concerning rape (how much would the reasonable woman resist),[97] domestic violence (when might the reasonable woman feel threatened),[98] and sexual harassment (would the reasonable woman consider the environment hostile).[99] This Comment now turns to the ways in which scholars have critiqued, and occasionally supported, using a standard differentiated by gender.

The arguments for adopting a reasonable woman standard may be less clear than those for adopting exceptions and protections for the disabled. At least three different theories underlie the justification for a reasonable woman standard.[100] The first, "difference" theory, suggests that women

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91. *J.D.B.*, 564 U.S. at 280–81 (Kenndy, J., concurring).

92. *Compare* Terry v. Ohio, 392 U.S. 1, 21 (1968), *with* Miranda v. Arizona, 384 U.S. 436, 444 (1966).

93. *J.D.B.*, 564 U.S. at 272.

94. *See supra* section II.A.

95. *See, e.g.*, Ellison v. Brady, 924 F.2d 872, 880 (9th Cir. 1991); State v. Leidholm, 334 N.W.2d 811, 820 (N.D. 1983).

96. *See* Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 798 (1987).

97. Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398, 1401 (1992).

98. *See, e.g.*, State v. Stewart, 763 P.2d 572 (Kan. 1988).

99. *See, e.g.*, Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991).

100. *See* Cahn, *supra* note 97, at 1401.

as a group tend toward nurturing and morality, and thus women as a group behave differently than men.[101] This approach may suffer from accepting the "compliments of Victorian gender ideology while rejecting its insults."[102] A second and related theory, "difference-as-dominance," concerns the power relationships within a system that has historically excluded female perspectives—and the importance of including women's experiences when setting policy today.[103] The third theory, critical race studies theory, challenges whether rules that exclude the experiences of outsiders are ever truly "neutral."[104]

Whatever the chosen theoretical underpinning, in the past, when men have determined the outlines of the reasonable woman standard, scholars have observed that the standard served as a paternalistic straightjacket rather than as a layer of protection for women.[105] For example, in criminal law concerning rape, the test for whether the woman resisted as much as a "reasonable" woman was developed by men "to protect other men who, in their eyes, were wrongfully accused of rape."[106] Reasonableness standards in the areas of sexual harassment and domestic violence had more female input at the outset, and thus suffer from less bias regarding how women "should" behave.[107]

Scholars have also argued that the historical view of women as emotional beings, perhaps incapable of rational thought, makes it difficult to ever divorce a "reasonable person" standard from the underlying "reasonable man" reference point.[108] Yet, men have received leeway when giving in to emotions in certain contexts, particularly manslaughter of a female partner in the "heat of passion."[109] Some feminists also note that using a reasonable man standard in sexual

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101. *Id.*; *see also* Williams, *supra* note 96, at 798 (discussing the contrast between the struggle to encourage consideration of every man and woman as an individual as opposed to the possibility of making useful group characterizations).

102. Williams, *supra* note 96, at 807.

103. Cahn, *supra* note 97, at 1401; *see also* Catherine A. MacKinnon, *Legal Perspectives on Sexual Difference*, *in* THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE 213, 214–15 (Deborah L. Rhode ed., 1990).

104. *See* Cahn, *supra* note 97, at 1401.

105. *See id.* at 1402.

106. *Id.*

107. *Id.*

108. *See* Alan D. Miller & Ronen Perry, *The Reasonable Person*, 87 N.Y.U. L. REV. 323, 362 (2012).

109. Antonia E. Miller, *Inherent (Gender) Unreasonableness of the Concept of Reasonableness in the Context of Manslaughter Committed in the Heat of Passion*, 17 WM. & MARY J. WOMEN & L. 249, 249 (2010) (quoting Judge Cahill: "I seriously wonder how many men married five, four years would have the strength to walk away without inflicting some corporal punishment.").

harassment cases with male victims tends to reinforce societal stereotypes concerning masculinity, resulting in reduced protection for men who do not conform to those stereotypes and who may be at the most risk for sexual harassment.[110]

In light of the potential for misuse, courts may prefer to avoid a "reasonable for the gender" standard. On the other hand, adapting a blanket or modified version of any reasonable person standard can serve useful social goals when approached from a normative (i.e., how members of society should behave) rather than a positive (i.e., how members of society *do* behave) perspective.[111] One feminist normative approach uses a standard of "reasonable care," requiring a "conscious concern for the possible consequences of our actions or inactions for another person's safety or health."[112] This standard may prove difficult to apply to female defendants arguing that a particular stop actually constituted a seizure, but it may form the basis for a "reasonable police officer" standard, as discussed immediately below.

D. Police Officers Face Particularized Standards for Acting as a "Reasonable Person"

Although the United States Supreme Court has noted that a case-by-case approach may not always "provide a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment,"[113] police officers nonetheless face many flexible, reasonableness-based standards dependent on the totality of the circumstances. For example, courts structure exceptions to the warrant requirement based on the reasonableness of officers acting without a warrant in the individual situation: "[t]o the extent dangers to arresting officers may be implicated in a particular way in a particular case, they are better addressed through consideration of case-specific exceptions to the warrant requirement, such as the one for exigent circumstances."[114]

Similarly, *Wilson v. Arkansas*[115] refused to set exact parameters for the "knock and announce" rule, holding that "[t]he Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a

110. *See, e.g.*, Ann C. McGinley, *Reasonable Men?*, 45 CONN. L. REV. 1 (2012).

111. *See generally* Miller & Perry, *supra* note 108.

112. *Id.* at 365.

113. Oliver v. United States, 466 U.S. 170, 181 (1984).

114. Riley v. California, 573 U.S. __, 134 S. Ct. 2473, 2486 (2014).

115. 514 U.S. 927 (1995).

rigid rule of announcement."[116] Courts also judge the brief suspect detentions during *Terry* stops reasonable or unreasonable based on the overall set of circumstances.[117] The Supreme Court analyzing a *Terry* stop or a "knock and announce" interaction does not generally indicate that keeping a defendant for thirty-one rather than thirty minutes will destroy an otherwise constitutional action.[118] On the contrary, courts frequently employ *Wilson's* flexible requirement, asking officers to use professional judgment and evaluate the totality of the circumstances.[119]

The flexibility and reasonableness standards apply outside of the officer exception context. For example, in a civil rights violation suit, an officer loses qualified immunity if the officer's actions do not meet an "objective reasonableness" standard.[120] Courts may apply the reasonableness analysis to multiple stages of a police officer's interaction with a suspect, with the officer failing at any point. The United States Supreme Court has explained that courts should examine actions of government actors leading up to a seizure.[121] One federal appellate court has held that courts should "carve up the incident into segments and judge each on its own terms to see if the officer was reasonable at each stage."[122] The Supreme Court of Washington also has indicated that officers should conduct themselves reasonably during suspect stops.[123]

Courts may wish to extend the inquiry into officer actions to additional scenarios.[124] Because the police officer is the authority figure

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116. *Id.* at 934.

117. *See, e.g.*, United States v. Place, 462 U.S. 696, 709 (1983) (declining to adopt a specific time limit for length of a stop, but holding that, on the facts of the case, a ninety-minute seizure was unacceptable).

118. *See id.*

119. *See, e.g.*, Richards v. Wisconsin, 520 U.S. 385, 395 (1997) (ruling that it was reasonable for officers to enter a motel room without knocking when defendant might imminently dispose of evidence); Coleman v. United States, 728 A.2d 1230, 1235 (D.C. 1999) (holding that police with a warrant using a ruse to gain peaceful entry into a home acted reasonably).

120. *See* St. Hilaire v. City of Laconia, 71 F.3d 20, 25 (1st Cir. 1995) (citing Anderson v. Creighton, 483 U.S. 635, 638–39 (1987)).

121. Brower v. County of Inyo, 489 U.S. 593, 596 (1989) (noting that actions leading up to a suspect's ceasing movement might in some circumstances indicate a tort rather than a seizure).

122. Plakas v. Drinski, 19 F.3d 1143, 1150 (7th Cir. 1994). *But see* Dickerson v. McClellan, 101 F.3d 1151 (6th Cir. 1996) (noting the importance of only holding officers accountable for knowledge they had at the time of the alleged civil rights violation).

123. State v. Young, 135 Wash. 2d 498, 512, 957 P.2d 681, 688 (1998) (noting with approval that "[b]ased on the totality of the circumstances, the deputy acted reasonably in seeking to renew his contact with Young").

124. *See infra* section VI.B.2.

in a position of power in most officer-non-officer scenarios, formulating standards to drive officer behavior may prove simpler and more effective than attempting to measure or shape laypersons' choices. As discussed in Part III, below, instructing or encouraging laypersons to disregard authority often proves unexpectedly difficult.

III. PREVIOUS STUDIES DEMONSTRATE LAYPERSONS' DIFFICULTY REFUSING REQUESTS FROM AUTHORITY

Previous studies have demonstrated that civilians rarely feel free to ignore authority figures. Researchers have conducted a number of queries examining subjects' actions when commanded by an official, responses to requests from those in uniform, behavior adaptions when warned in advance of rights, and willingness to interact with police, each discussed in turn below. Electric shock experiments[125] and experiments testing laypersons' reaction to those in uniform[126] show that most people comply with requests from authority figures. Studies covering warnings' effect on voluntary consent further support that civilians tend to acquiesce.[127] Finally, a thorough study testing willingness to refuse police indicates laypersons' discomfort with avoiding officers.[128]

A. *Electric Shock Experiments Show that Individuals Tend to Do What They Are Told*

In a famous series of 1960s experiments ("the Milgram experiments"),[129] Stanley Milgram demonstrated the difficulty with saying "no" to an authority figure. Milgram invited subjects to a lab to train "learners" (actually actors playing a role) via shock treatment.[130] Subjects administered shocks with progressively higher voltages when a learner answered incorrectly; officials in lab coats insisted that subjects continue with the experiment despite the agonizing pleas for help and screams from the actors.[131] The Milgram experiments show the degree to which an ordinary person will comply with orders from authority

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125. *See* STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW 3–6 (1974).

126. *See generally* Leonard Bickman, *The Social Power of a Uniform*, 4 J. APPLIED SOC. PSYCHOL. 47 (1974).

127. *See, e.g.*, Illya Lichtenberg, Miranda *in Ohio: The Effects of* Robinette *on the "Voluntary" Waiver of Fourth Amendment Rights*, 44 HOW. L.J. 349, 353–54 (2001).

128. *See* Kessler, *supra* note 23.

129. *See* MILGRAM, *supra* note 125.

130. *Id.* at 3–4.

131. *Id.* at 4.

figures, with Milgram commenting that "[r]elatively few people have the resources needed to resist authority. A variety of inhibitions against disobeying authority come into play and successfully keep the person in his place."[132]

Milgram further observed that "values are not the only forces at work in an actual, ongoing situation. They are but one narrow band of causes in the total spectrum of forces impinging on a person."[133] In one particularly noteworthy experiment variation, even when subjects signed a contract with the "learner" stating that the learner had a heart condition and could opt-out, sixteen of forty subjects shocked the learner to the maximum voltage.[134]

Far from a historical relic, Milgram's results have been replicated within the last decade by social psychologist Jerry M. Burger:[135] "[p]eople learning about Milgram's work . . . point to the lessons of the Holocaust and argue that there is greater societal awareness of the dangers of blind obedience. But what I found is the same situational factors that affected obedience in Milgram's experiments still operate today."[136] Modern researchers have attempted to answer what motivates acquiescing to authority. One experiment using an implicit measurement indicated that obeying orders actually reduced subjects' sense of agency (as opposed to *reports* of reduced agency, which may be motivated by the desire to avoid punishment).[137] A different update to the Milgram experiments questions whether some dutiful behaviors originate from fear rather than mere blind obedience.[138] For one subject, an overseer's absence of emotion triggered fright without the need for yelling or a

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132. *Id.* at 6.

133. *Id.*

134. *Id.* at 66.

135. Jerry M. Burger, *Replicating Milgram: Would People Still Obey Today?*, 64 AM. PSYCHOLOGIST 1, 1 (2009), https://www.apa.org/pubs/journals/releases/amp-64-1-1.pdf [https://perma.cc/357B-D858].

136. *Researcher Finds Most Will Inflict Pain if Prodded*, WASH. POST (Jan. 5, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/01/05/AR2009010501173.html [https://perma.cc/SC7U-EKPD] (quoting Jerry Burger).

137. Emilie A. Caspar et al., *Coercion Changes the Sense of Agency in the Human Brain*, 26 CURRENT BIOLOGY 585 (Mar. 7, 2016), http://www.cell.com/current-biology/pdfExtended/S0960-9822(16)00052-X [https://perma.cc/KEV5-DWSP].

138. Michael Shermer, *What Milgram's Shock Experiments Really Mean: Replicating Milgram's Shock Experiments Reveals Not Blind Obedience but Deep Moral Conflict*, SCI. AM. (Nov. 1, 2012), http://www.scientificamerican.com/article/what-milgrams-shock-experiments-really-mean/ [https://perma.cc/RY2Q-3TQL].

show of weapons: "I didn't know what was going to happen to me if I stopped. He just—he had no emotion. I was afraid of him."[139]

These insights are relevant to judges or laypersons who envision certain default reactions when police confront a civilian. Taking into account typical overconfidence in one's own abilities[140] and Milgram's experimental observations, judicial "gut" instincts and survey respondent claims serve as an upper limit of the likelihood of resisting authority. The "he had no emotion"[141] note in the update to Milgram's experiment should also inform what constitutes "use of language or tone of voice indicating that compliance with the officer's request might be compelled."[142]

B. Experiments from Bickman and Bushman Show that People Follow Instructions from Those in Uniform

In the years following the Milgram experiments, psychologists explored factors that might affect authority figure influence. The impact of uniforms received particular attention and validation.

Renowned psychologist Leonard Bickman ran an experiment testing the effects of wearing a uniform.[143] Passersby saw an ordinarily dressed person, or a person dressed as a milkman, or a person dressed as a security guard.[144] Those asked by the "security guard" to pick up litter complied significantly more often than those asked by an ordinarily dressed person or a person dressed as a milkman.[145] When Brad Bushman ran an experiment with similar methodology but replaced the security guard figure with someone dressed as a fireman, compliance rates were also higher for requests from the fireman than they were for requests from someone ordinarily dressed.[146]

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139. *Id.*

140. Isabelle Brocas & Juan D. Carillo, *Are We All Better Drivers Than Average?: Self-Perception and Biased Behaviour*, CTR. FOR ECON. POLICY RESEARCH (Oct. 2002) (discussing a preliminary model of testing our imperfect self-knowledge and noting the extensive psychological literature concerning the propensity to consider oneself better than average).

141. *See* Shermer, *supra* note 138.

142. United States v. Mendenhall, 446 U.S. 544, 554 (1980) (plurality opinion).

143. *See* Bickman, *supra* note 126.

144. *Id.*

145. *Id.*; *see also* Ric Simmons, *Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773, 800–01 (2005) (discussing that people presented with the fake security guard rarely failed to cooperate, regardless of how much they insisted on their confidence level before the interaction).

146. *See* Brad J. Bushman, *Perceived Symbols of Authority and Their Influence on Compliance*, 14 J. APPLIED SOC. PSYCHOL. 501, 506 (1984).

Several years later, Bushman conducted a similar experiment testing whether the status conferred by dress applied equally to female authority figures. Bushman found a difference in compliance rates depending on dress, with higher compliance when the woman issuing a command wore a uniform as compared to the level of compliance when a woman wore a suit or casual clothing.[147] His work verified previous hypotheses that uniforms are influential because they serve as a certificate of legitimacy.[148]

Bickman and Bushman supplied valuable information regarding the way laypersons respond to requests from those in uniform. Their studies suggest that, when discussing civilian interaction with the police and the likelihood that regular people will simply walk away in the middle of the conversation, most people automatically comply with those utilizing the "certificate of legitimacy."[149]

C. Warnings Regarding Rights Do Not Lower the Rate of Consent

The Milgram experiments show that laypersons tend to do what authority figures tell them to do,[150] but laypersons also conform to officers' wishes even when they are told explicitly that they may decline. Although some choose to believe that informing a suspect of his or her rights—the *Miranda*[151] right to remain silent and the *Robinette*[152] "right" to refuse a search—will benefit suspects,[153] research indicates no significant effect of a warning on a subject's tendency to allow police intrusion.[154] Perhaps the presence or absence of a verbal warning does not explain the "subtle factors that may overcome the subject's will."[155] In at least one study, willingness to allow a vehicle search *increased*

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147. Brad J. Bushman, *The Effects of Apparel on Compliance: A Field Experiment with a Female Authority Figure*, 14 PERSONALITY SOC. PSYCHOL. BULL. 459, 463 (1988).

148. *Id.* at 465.

149. *Id.*

150. *See* MILGRAM, *supra* note 125.

151. Miranda v. Arizona, 384 U.S. 436 (1966).

152. Ohio v. Robinette, 519 U.S. 33 (1996) (holding, contrary to the implication of the phrase "*Robinette* warning," that warnings prior to searching a vehicle are not required).

153. *See* Press Release, Am. Psychological Ass'n, Right to Remain Silent Not Understood by Many Suspects: Confusion About Constitutional Rights Can Lead to Self-Incrimination, Psychologist Reports (Aug. 5, 2011), http://www.apa.org/news/press/releases/2011/08/remain-silent.aspx [https://perma.cc/Y99T-P3PL] ("The public, police and sometimes courts wrongly believe that people in custody understand their rights.").

154. *See* Lichtenberg, *supra* note 127, at 374.

155. *Id.*

after drivers received a *Robinette* warning.[156] Sadly for those who hoped that knowledge of one's rights would empower the public, "[r]esearch suggests that verbal warnings do not have any substantial impact on consent or confessions."[157]

Unfortunately, "observers outside of the situation systematically overestimate the extent to which citizens in police encounters feel free to refuse" consent.[158] Further information is needed to establish how often individuals will actually feel comfortable declining to interact with officers. The Kessler study, discussed immediately below, contributes to that conversation.

D. Kessler's Study Indicates People Do Not Feel Comfortable Disregarding Police Questions

A 2009 study by David Kessler[159] served as a primary inspiration for this Comment ("the Kessler study"). Kessler collected data from a sample of commuting adults to determine how free they would feel to ignore a police officer who asked them questions on a sidewalk or while riding a bus.[160] He used a one-page questionnaire[161] "distributed in four locations in Boston on four different dates . . . ."[162] Kessler's surveyors spoke with 406 individuals with an overall survey response rate of 36.6 percent.[163] His sample over-represented people under age twenty-five and under-represented non-White persons.[164] Kessler describes surveyor behavior as follows:

> The surveyors were trained to use a standard prompt to ask people if they wanted to participate and a standard response to explain what the survey was about if people asked. Surveyors were trained to let the respondents circle or write their own answers; surveyors were to provide help only by saying that "there are no right answers" and that the respondent should "select whatever answer he thought made the most sense to

156. *Id.* at 367.

157. *Id.* at 374.

158. Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 156 (2002).

159. *See* Kessler, *supra* note 23, at 70.

160. *Id.* at 68. Eight Harvard Law School students conducted the surveys; half of the students were female and all but one White. *Id.*

161. *See infra* Appendix A.

162. *See* Kessler, *supra* note 23, at 68.

163. *Id.* at 73.

164. *Id.* at 73–74.

> him." Finally, surveyors were trained to track the number of people who declined to complete a survey or who did not respond in any way when asked, but they did not track the age, race, or gender of those who declined. Surveyors were warned to avoid favoring any particular demographic. Instead, they were asked simply to talk to everyone in the area, including both individuals and groups of people.[165]

Kessler acknowledges potential biases, including the possibility that individual attitudes in the Boston area do not represent national attitudes as a whole.[166] Kessler also notes that the type of people who stop in public, talk to a surveyor, and fill out a questionnaire may "be the type of people who generally feel more compelled to do what other people ask them to do."[167] Kessler minimizes these concerns, however, by claiming "it is difficult to imagine that the situational forces surrounding a law student's request to complete a survey are similar enough to a police officer's request to answer questions that the sample, consisting of people who are willing to stop for the law student, would be significantly skewed."[168]

Another potential problem that Kessler does not discuss in his paper[169] involves the use of mean (average) values. Although Kessler's questions one and two (regarding comfort refusing to interact with the police on a sidewalk and comfort refusing to interact with the police on a bus, respectively) provide five response options[170] laid out symmetrically in the styling of a Likert scale,[171] the "somewhat free to leave or say no"[172] third option may have been insufficiently clear to respondents, calling into question whether respondents perceived the spacing between the answer options as a truly even interval. Without an even interval between response options, responses are best treated as

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165. *Id.* at 68.

166. *Id.* at 72.

167. *Id.*

168. *Id.*

169. *See generally id.*

170. For the reproduction of Kessler's questions, see *infra* Appendix A.

171. A Likert scale is made up of a series of questions with response options often ranging from one to five. *See* Christian Vanek, *Likert Scale—What Is It? When to Use It? How to Analyze It?*, SURVEYGIZMO (Apr. 24, 2012), https://www.surveygizmo.com/survey-blog/likert-scale-what-is-it-how-to-analyze-it-and-when-to-use-it/ [https://perma.cc/8RQE-8M2V].

172. See the reproduction of Kessler's questions *infra* Appendix A.

ordinal[173] data, and hence discussing mean values is a non-preferred method of reporting and analysis.[174] Furthermore, while Kessler considers the response options for his third question[175] as ordered from highest to lowest obligation,[176] some readers may view the response categories as not on the same spectrum of rights versus obligations, and thus these responses may not be properly ordinal. In light of these concerns and the degree to which the Washington questions replicate the Kessler questions, means will not be calculated or compared for the Washington study discussed below.[177]

The Kessler study finds that the vast majority of respondents expressed at least some discomfort with ignoring a police officer's questions: "[a]s the distribution of responses in both scenarios . . . shows, about half of the sample selected [option one] or [option two], and almost 80% selected [option three] or less."[178] Because Kessler's results so clearly indicate respondents' discomfort with refusing police questions, Kessler suggests alternatives to the United States Supreme Court's reasonable person standard, such as adopting a more fact-specific or narrowly tailored reasonable person standard, or, alternatively, modifying the perspective from which courts consider reasonableness (e.g., analyzing the scenario from the perspective of a model citizen or model police officer).[179] Both approaches are discussed further below.[180]

IV. NEWLY GATHERED DATA SUGGEST MORE COMFORT REFUSING THE POLICE THAN FOUND IN KESSLER'S STUDY

The current project focuses on the following goals: generate a small batch of data; compare that data with the Kessler study;[181] and suggest

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173. *What Is the Difference Between Categorical, Ordinal and Interval Variables?*, UCLA INST. FOR DIGITAL RES. AND EDUC. (Jan. 14, 2006), http://www.ats.ucla.edu/stat/mult_pkg/whatstat/nominal_ordinal_interval.htm [https://perma.cc/4MRL-3CYU].

174. Jim Frost, *Choosing Between a Nonparametric Test and a Parametric Test*, THE MINITAB BLOG (Feb. 19, 2015), http://blog.minitab.com/blog/adventures-in-statistics/choosing-between-a-nonparametric-test-and-a-parametric-test [https://perma.cc/TQF5-6R4E].

175. *See infra* Appendix A.

176. Kessler, *supra* note 23, at 70.

177. *See infra* Part IV.

178. Kessler, *supra* note 23, at 75.

179. *Id.* at 84–85.

180. *See infra* Part VI.

181. *See generally* Kessler, *supra* note 23.

hypotheses worth testing with future, more sophisticated sampling. Time, funding, and personnel were limited. To that end, the researcher[182] attached questions to a statewide telephone poll conducted by professionally trained interviewers[183] collecting responses from a random sample of Washington voters. The researcher then took those same questions and personally collected responses from a small, targeted sample: clients at a Seattle addiction recovery center.[184] The random sample of Washington voters produced different responses than the targeted sample of persons recovering from addictions.[185] Neither set of responses mirrors the results from the Kessler study.[186] Below, the Comment first lays out findings from the telephone poll and the recovery center survey, then compares those findings with the Kessler study.

A. A Telephone Survey of Washington Voters Indicates More Boldness than Seen from the Kessler Study Respondents

Most respondents in the present study reported comfort ignoring the police. The sample over-represented older, White members of the overall population,[187] but non-White respondents' answers did not seem to markedly differ from White respondents' answers. More people than expected (27% of all respondents and 38% of respondents making more than $100,000 per year) claimed to have been stopped by police for reasons other than traffic stops.[188]

Answers to question one, regarding refusing to answer questions when stopped on the sidewalk, as well as question two, regarding refusing to answer questions while on a bus, both produced more responses indicating comfort with ignoring the police when compared to the 2009 Kessler study.[189] Washington voters' comfort refusing the police did not always align with their sense of obligations and rights. Respondents expressed relative comfort talking with police, but many

182. References to "the researcher" throughout this paper refer to the author.

183. *See Methods & Services*, ELWAY RESEARCH, INC., http://www.elwayresearch.com/services.html [https://perma.cc/SBX8-MEXT].

184. Many thanks to the staff and members at Seattle's Recovery Café. For more information on that organization, see RECOVERY CAFÉ, https://recoverycafe.org/ [https://perma.cc/J56D-V5ZQ].

185. *See infra* Part V.

186. *Compare supra* section III.D, *with infra* Part V. *See generally* Kessler, *supra* note 23.

187. For information regarding voter survey methodology, see *infra* Appendix C.

188. *See infra* Appendix B. Data on file with author.

189. *See infra* section V.A. Data on file with author.

reported believing they have at least some obligation to interact or else face unfortunate consequences.[190]

B. *The Survey of Seattle-Based Recovery Center Clients Provided Further Surprises, Tracking the Kessler Study in Some Respects but Adding a Qualitative Twist*

Unlike the wide, random sample pursued above, the survey of recovery center clients took the same questions and solicited responses from a purposive[191] group of individuals who have undergone extreme experiences and taken steps to seek stability. The researcher spoke with this group "in order to develop a richer, more in-depth understanding" of how an outlier case might respond to police.[192] Some respondent clients face issues such as homelessness, substance abuse, and mental illness,[193] and the researcher suspected these challenges may affect this subpopulation's perceptions of police and freedom to leave a conversation. Recovery program membership ensured that respondents could answer in a safe, sober space, allowing maximum ability to participate.[194]

This particular center served as a convenient place to sample one cluster of a target population; using volunteer respondents added an additional layer of convenience rather than randomness.[195] Future studies may aim for a broader, more random set of participants from within this target group.

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190. *See infra* section V.A. Data on file with author.

191. For an explanation of selecting a non-probability sample based on population characteristics and study purpose, see Ashley Crossman, *Understanding Purposive Sampling: An Overview of the Method and Its Applications*, ABOUT.COM (May 13, 2016), http://sociology.about.com/od/Types-of-Samples/a/Purposive-Sample.htm [https://perma.cc/W289-5KNZ] (discussing variants of purposive group sampling).

192. D. Cohen & B. Crabtree, *Extreme or Deviant Cases*, ROBERT WOOD JOHNSON FOUNDATION (July 2006), http://www.qualres.org/HomeExtr-3808.html [https://perma.cc/TK9C-KKYL].

193. *See About*, RECOVERY CAFÉ, https://recoverycafe.org/about/ [https://perma.cc/TMN8-2LGD].

194. *Id.*

195. *See* Ashley Crossman, *Convenience Sample: A Brief Overview of the Sampling Technique*, ABOUT.COM (June 10, 2016), http://sociology.about.com/od/Types-of-Samples/a/Convenience-Sample.htm [https://perma.cc/3G8B-TSC6].

1. *The Recovery Center Survey Drew from a Sample Demographically Different from the Washington Voter Survey and Allowed for Unexpected Qualitative Elements*

The recovery center survey output exceeded that intended based on the planned methodology.[196] This raised potential analysis challenges and questions for future research.[197] This section will discuss respondent demographics and then address the unique character of particular responses.

The recovery center survey sampled a more demographically diverse group than did the Washington voter survey.[198] Of the recovery center respondents, 53% indicated male gender and 60% indicated Caucasian race.[199] Other races included African American (10%), Asian (7.5%), and Mixed Race (7.5%). A high percentage (75%) of respondents indicated experiencing a stop other than a traffic stop.[200]

The small group survey environment increased the likelihood that respondents would talk with each other or with the researcher.[201] Many respondents verbally reported learning disabilities, and at least one respondent reported blindness.[202] The researcher opted to avoid the chance of bias from not including these perspectives rather than avoiding the potential bias from explaining the words on the survey form or allowing a respondent's friend to read the form aloud.[203] Some of the respondents made written or verbal comments.[204] Anecdotes about relevant life experiences stood out in the moment, alerting the researcher

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196. *See infra* Appendix D.

197. Qualitative research interactions commonly involve such evolution. *See* CHAVA FRANKFORT-NACHMIAS & DAVID NACHMIAS, RESEARCH METHODS IN THE SOCIAL SCIENCES 292 (5th ed. 1996) ("Data analysis in qualitative field research is an ongoing process . . . . As the research progresses, some hypotheses are discarded, others are refined, and still others are formulated.").

198. *See supra* section IV.A.

199. *See infra* Appendix B. Data on file with author.

200. *Id.*

201. *See infra* Appendix D.

202. *See infra* section IV.B.2.

203. Communication barriers reduce response rates. *See* Ann Bowling, *Mode of Questionnaire Administration Can Have Serious Effects on Data Quality*, 27 OXFORD J. PUB. HEALTH 281, 281–91 (2005), http://jpubhealth.oxfordjournals.org/content/27/3/281.full [https://perma.cc/Q88J-NNF8] ("The lower the response rate to a study, the greater the danger that the responders may differ from non-respondents in their characteristics, which affects the precision (reliability) of the survey's population estimates, resulting in study bias, and weakening the external validity (generalizability) of the survey results.").

204. *See infra* section IV.B.2.

to capture this unsolicited qualitative data as accurately and as soon as possible.[205]

Due to the differences in collection methods and sample size, the telephone survey and the recovery center survey results cannot be combined and, in some respects, may be difficult to compare.[206] Although certain members of the population are statistically more likely than others to vote,[207] the telephone survey of Washington voters nonetheless featured a larger and more random sample than the recovery center survey.[208] Yet the information communicated by the addiction center respondents was richer and thus potentially more illuminating than that gathered during the more standardized telephone survey process.[209] During the recovery center survey, the researcher acquired not only responses, but also some reasons behind those responses.[210]

In Part V, this Comment explains any indications that the Kessler study, the telephone survey, and the recovery center survey point in similar directions. It also discusses how the results generally compare. That discussion, and the recommendations in Part IV, draws in part upon unsolicited comments from recovery center survey respondents, the topic discussed immediately below.[211]

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205. *See* FRANKFORT-NACHMIAS & NACHMIAS, *supra* note 197, at 291–92 ("When researchers cannot overtly document observations, they must use devices to help them remember events as they occurred so they can be fully documented at the earliest possible opportunity.").

206. While it is possible that the Wednesday and Friday experiences differ enough that the data could be considered separately, no evidence indicates categorically different attendees on one day versus the other. Given the relatively small sample size and the known presence of multiple clients present on both days, the researcher has opted to present combined information from Wednesday and Friday.

207. Voter eligibility, voter registration, and voter turnout differ; overall, Whites tend to vote at a higher rate than many other groups. *See Voter Registration Data*, WASH. SECRETARY OF STATE (Jan. 31, 2016), http://www.sos.wa.gov/elections/vrdb/vrdbfaq.aspx [https://perma.cc/24HQ-FQTW] ("Approximately 80% of the state's voting eligible population is registered to vote, according to the statistics gathered by Michael P. McDonald's United States Elections Project in 2014."); Jens Manuel Krogstad, *2016 Electorate Will Be the Most Diverse in U.S. History*, PEW RESEARCH CTR. (Feb. 3, 2016), http://www.pewresearch.org/fact-tank/2016/02/03/2016-electorate-will-be-the-most-diverse-in-u-s-history/ [https://perma.cc/65AC-ZXSY] ("In the 2012 presidential election, 64% of non-Hispanic white eligible voters cast ballots, as did 67% of black eligible voters. By comparison, the voter turnout rate was 48% among Hispanics and 47% among Asians.").

208. *Compare infra* Appendix C, *with infra* Appendix D. Data on file with author.

209. *Compare infra* section V.A, *with infra* section IV.B.2.

210. *See infra* section IV.B.2.

211. As an aside, the extra information revealed during the recovery center conversations may inform the best way to structure future research efforts. For example, a series of semi-structured interviews or focus groups discussing the reasonable person standard would allow for follow-up questions and exploration of what motivates attitudes, perhaps contributing more or different

2. *Recovery Center Respondent Comments Show Mixed Feelings Regarding Empowerment and Trust When Interacting with Authority Figures*

A few participants shared unsolicited written comments on their survey response forms.[212] The written comments provided some limited information but were less revealing than verbal discussions. The written comments split along confidence lines. For example, in the section relating to sidewalk stops,[213] one participant wrote, "I have a schedule to keep."[214] Other participants expressed more deference to or distrust of police or other authority, including the following: (1) "No rights on a metro bus;"[215] (2) "I was arrested for refusing to talk to an officer responding to a 911 call to my home;"[216] and (3) "'You have a legal right to ignore the officer, but he may assume you are guilty of wrongdoing if you do' is my true answer, but 'You have the legal right to refuse to talk with the officer with no consequence to yourself' is how it should be."[217]

Some participants also opted to make verbal comments, engaging in conversation with the researcher or making comments while exiting.[218] The researcher attempted to preserve the commenter's phrasing as accurately as possible.[219] Verbal comments fell along a spectrum from empowerment to fear.

The empowerment comments included the following: (1) "I'm blind. If someone asks me a question I don't want to answer, I just don't say anything. A lot of times they assume I'm deaf too and leave me alone,"[220] (2) "I believe I have a moral duty to help police in most

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information than another round of randomized surveys. For further discussion, see *infra* Parts V and VI.

212. *See supra* section IV.B.1; *infra* Appendix D.

213. *See infra* Appendix B. Data on file with author.

214. Personal communications with recovery center survey respondents, by handwritten comments on paper forms, in Seattle, WA (Oct. 28, 2015) (on file with author).

215. *Id.*

216. *Id.*

217. *Id.*

218. *See supra* section IV.B.1; *infra* Appendix D.

219. Recording actual statements as nearly as possible, rather than attempting to record summary impressions, minimizes "cultural" phrases that could include a researcher's biases. *See* CAROLYN FRANK, ETHNOGRAPHIC EYES 6–7 (1999).

220. Personal communications with recovery center survey respondent, by verbal comment, in Seattle, WA (Oct. 28, 2015).

situations but not a legal duty,"[221] (3) "No one has a right to interrupt me if I'm on my way somewhere important, not even the police. I just keep walking,"[222] and (4) "Am I being detained? I just keep asking that until I get a straight answer. If I'm not being detained, they have to let me go."[223]

Comments about subordination by authority figures included the following: (1) "I refuse to ride transit. I don't care how many miles I have to walk. I've got no rights once I step onto a bus,"[224] and (2) "It's all fine and good to talk about my legal right to not cooperate. That won't help me when I'm lying on the sidewalk with a police boot on my head."[225]

The fearful comments included the following: (1) "With all the news on TV about police shooting people, especially Black people, I wouldn't feel safe just walking away,"[226] and (2) "I have disabilities, but they're not obvious to someone walking down the street. Being handcuffed might break my wrists, and being pushed to the ground might break my hip. If I break my hip again, the doctor says I'll be stuck in a wheelchair probably for life. I'm terrified of the police. They don't understand how strong they are and how easily they could hurt me. If they stop me, I'll tell them whatever they want to know."[227]

The last comment above raises a poignant issue regarding disability protections.[228] Not all disabilities necessarily lead to a sense of powerlessness—see the first comment in the "empowerment" batch above—but certain conditions may make "freedom to leave" a farce. Just as knowing that civil tort suits exist does not necessarily reduce fear during an assault,[229] the ability to sue the police for a civil rights violation after the fact[230] (assuming one even learns of the option) may not prevent a person with disabilities from feeling seized and vulnerable during a police interaction.

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221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *See supra* section II.A.

229. Indeed, without reasonable apprehension of bodily harm at the moment of the alleged assault, a plaintiff cannot prevail when bringing a civil assault suit. *See* RESTATEMENT (SECOND) OF TORTS § 21 (AM. LAW INST. 1965).

230. *See* Brower v. County of Inyo, 489 U.S. 593, 601 (1989).

As discussed earlier, legal standard accommodations for those with disabilities already exist.[231] Adjusting the seizure standard in response to disabilities or other vulnerabilities receives more attention below.[232]

V. THE KESSLER, WASHINGTON VOTER, AND RECOVERY CENTER SURVEYS SHOW DIVERGING TRENDS BUT INDICATE A POSSIBLE GENDER DIFFERENCE

The overall results of the Kessler, Washington voter, and recovery center surveys point in different directions; the Kessler study shows discomfort interacting with the police whereas the newer surveys indicate higher comfort levels. The Washington voter survey shows high comfort levels from respondents of both genders.[233] The Kessler study and the recovery center survey results, however, indicate a possible difference between the willingness of women and men to refuse police interactions.[234]

A Overall Responses from the Kessler Study, the Telephone Survey, and Recovery Center Survey Diverge

The Kessler study responses, discussed in greater detail below, indicate discomfort interacting with the police.[235] Responses from the Washington voter telephone survey indicate a higher comfort level and willingness to terminate interactions with police.[236] The recovery center survey outcome is more opaque, with respondents divided.[237]

First, the Kessler study responses, below, show a distribution clearly indicating discomfort with refusing to respond to police questions on a sidewalk (question one) or on a bus (question two).[238]

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231. *See supra* section II.A.

232. *See infra* section VI.B.1.

233. *See infra* Figure 5.

234. *See infra* Figures 4, 6.

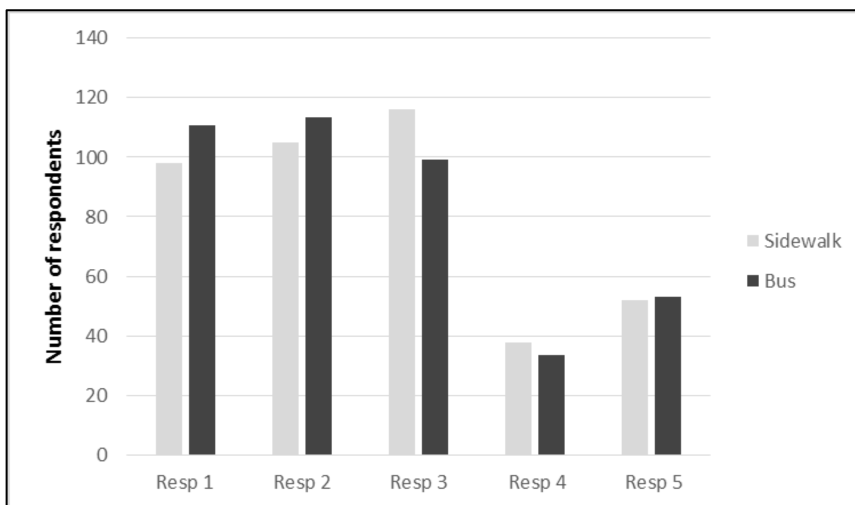
235. *See infra* Figure 1.

236. *See infra* Figure 2.

237. *See infra* Figure 3.

238. Kessler, *supra* note 23, at 74–75.

Figure 1:
Kessler's Distribution of Responses to Questions 1 and 2



Next, the Washington telephone survey of voters suggests the opposite result—but one could argue whether respondents selecting option three should be treated as uncomfortable, neutral, or comfortable.239 Kessler's survey form labeled option three as "somewhat free to leave or say no" and treated this wording as indicating some level of discomfort,[240] whereas this researcher believes option three may indicate neutrality or perhaps a positive lean.[241] In any case, those choosing options four and five in the Washington telephone survey outnumber those choosing options one and two.[242]

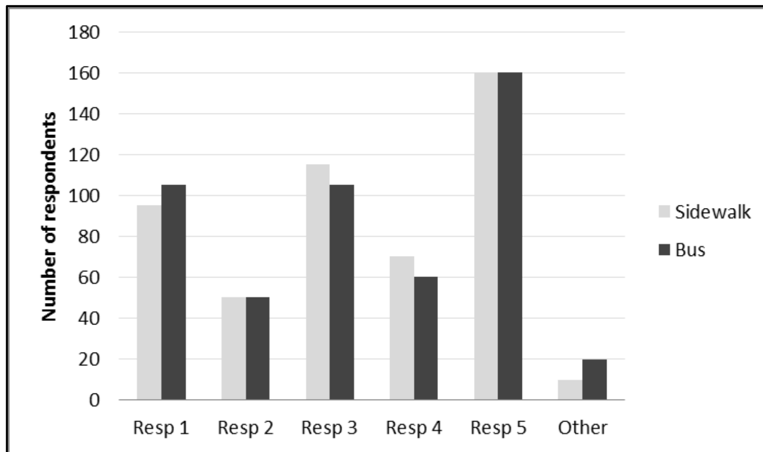
239. *See supra* section III.D.

240. *See* Kessler, *supra* note 23, at 75.

241. For a more detailed discussion of issues with the wording in question three, including the "somewhat free to leave" phrasing, see *supra* section III.D.

242. *See infra* Figure 2.

Figure 2:
Washington Telephone Survey:
Responses to Questions 1 and 2

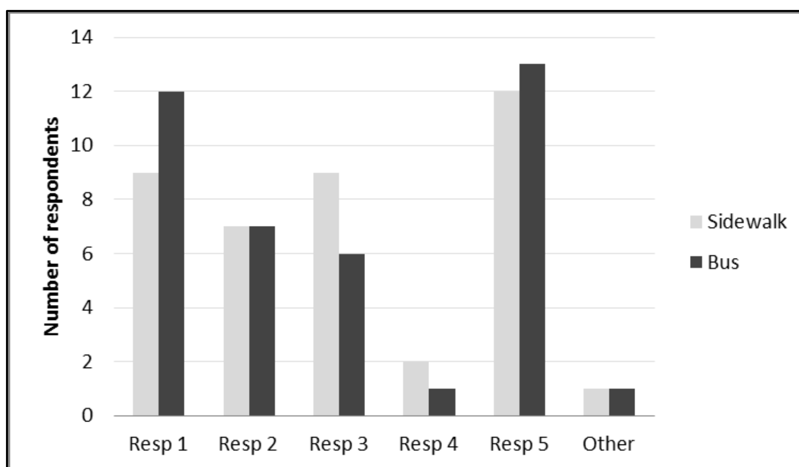


Finally, the survey of addiction recovery center patrons produced a bifurcated set of responses.[243] Given the small number of respondents selecting option four, however, the answers weigh more toward indicating discomfort with refusing to respond to police questions.[244]

243. *See infra* Figure 3.

244. *Id.*

Figure 3:
Addiction Recovery Center Patron Survey:
Responses to Questions 1 and 2



B. Women May Feel Less Comfortable Refusing the Police than Do Men

Kessler's study provides some evidence that women may feel less comfortable refusing to interact with police than men typically feel.[245] The Washington voter survey shows the opposite result.[246] The recovery center survey responses, however, follow the Kessler pattern.[247]

Kessler's study did not produce results supporting or refuting the idea that racial minorities might feel less comfortable refusing the police, but Kessler did notice a pattern related to respondents' status as young or female.[248] He postulated this may relate to vulnerability, stating that the "coercive pressure of police encounters"[249] led to the result that "groups generally expected to feel especially vulnerable—the young and women—would in fact feel less free to leave in the face of police authority."[250]

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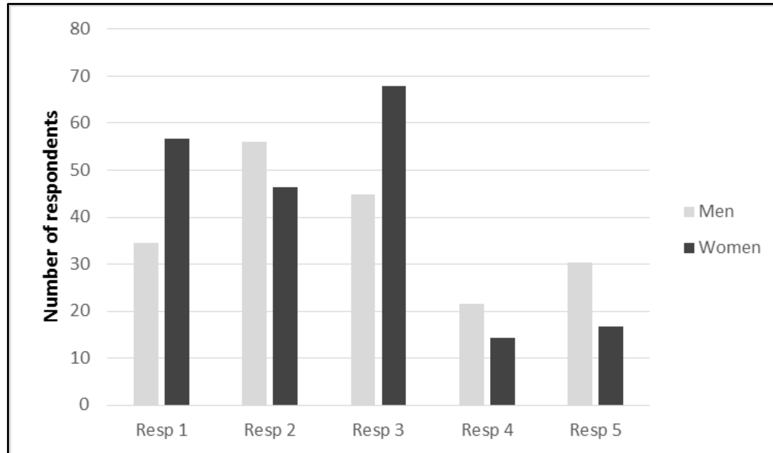
245. *See infra* Figure 4.
246. *See infra* Figure 5.
247. *See infra* Figure 6.
248. Kessler, *supra* note 23, at 75–76.
249. *Id.* at 77.
250. *Id.*

Figure 4
Kessler Comparison of Male and Female Responses to Question 1[251]



The Washington telephone survey of voters did not indicate that women experience more discomfort refusing the police than do men.[252] If anything, the telephone survey results indicate a slightly higher likelihood that women would choose response five, "Completely free to leave or say no,"[253] although the difference is not statistically significant.[254]

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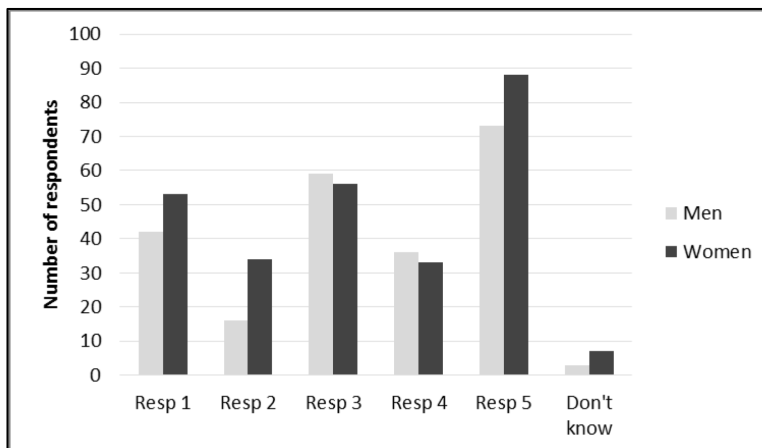
251. Due to space concerns, this Comment compares answers to question one across the three surveys. Comparing the answers to question two across the three surveys strongly mirrors the comparison between question one answers.

252. *See infra* Figure 5.

253. *See infra* Appendix B.

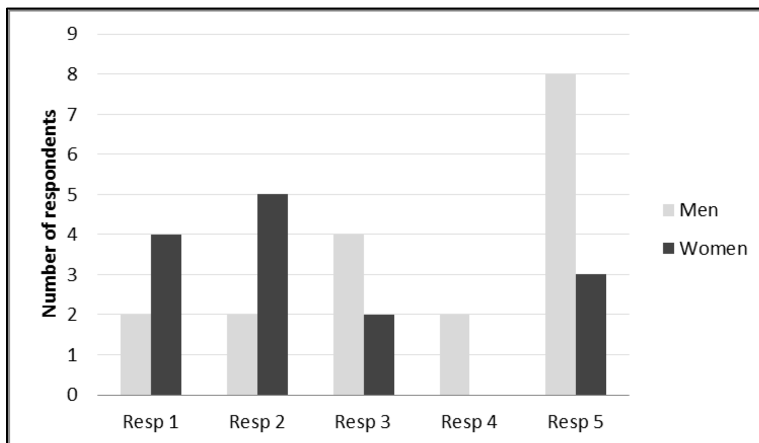
254. Compare this with the result from women in the recovery center survey. *See infra* note 255.

Figure 5:
Washington Voters, by Sex,
Responses to Question 1, Sidewalk Scenario



In contrast, the addiction recovery center survey showed male respondents significantly more likely to indicate comfort refusing the police.[255]

Figure 6:
Addiction Recovery Survey, by Sex, Question 1, Sidewalk Scenario



255. The proportion of female respondents selecting responses four or five differed from the portion of male respondents selecting responses four or five; the result was statistically significant, with a p-value of less than 5%.

Rather than verifying Kessler's 2009 findings,[256] the new data sets instead prompt further questions, answerable only with more extensive research. For example, the field would benefit from a study with a sample of minority respondents large enough to draw meaningful conclusions.[257] Questions also remain as to whether the impetuousness or fragility of youth prevails during police interactions.[258] Finally, the recovery center survey process highlighted unexpected information regarding those with disabilities, providing some conflicting information but triggering troubling possibilities.[259] Further investigation is warranted. A more extensive discussion of future research possibilities follows.

VI. NEXT STEPS: EFFECTIVELY UPDATING THE REASONABLE PERSON STANDARD REQUIRES GIVING JUDGES ACCESS TO MORE SOCIAL SCIENCE RESEARCH, BUT SWITCHING TO A REASONABLE OFFICER STANDARD MAY ACCOMPLISH MORE

When determining the standard for when officers have seized a civilian, courts must balance the goals of protecting individual liberties and allowing officers to efficiently fight crime.[260] The seizure standard should account for real-world circumstances, including demonstrated patterns of laypersons acquiescing to authority figures.[261] Unfortunately, acquiring new data regarding civilians' attitudes about police interactions poses difficult challenges for researchers.[262] To the extent that the courts wish to update the reasonable person "free-to-leave" standard to increase fairness for vulnerable populations, judges should have the opportunity to review additional psychological and social science research. Switching the seizure standard to exclusively focus on officer actions, however, may produce superior results.

256. *Compare* section III.D, *with* Part V.

257. *See* Kessler, *supra* note 23, at 73.

258. *See infra* section VI.A.

259. *See supra* section IV.B.2.

260. *See* United States v. Mendenhall, 446 U.S. 544, 565–66 (1980) (plurality opinion).

261. *See* Kessler, *supra* note 23, at 82–83.

262. *See supra* Parts IV, V.

A. *If Judges Wish to Continue with the Existing Reasonable Person Standard, They Should Have the Opportunity to Review More Social Science Research, Particularly Focusing on Young Minorities and Disabled Persons*

This researcher's studies, discussed above, did not provide clear answers regarding youth or racial minorities' opinions.[263] Non-White individuals under age thirty-five require further study.[264] Studies thus far have not indicated a difference in comfort refusing the police based on race, but those efforts have not surveyed many persons of color, particularly young persons of color.[265] Given well-publicized problems with police engagement within minority communities,[266] one may continue to hypothesize that a young Black man or woman will feel different about a police stop than an older White man.

Finding a robust sample of a young population is challenging.[267] High schools contain large groups of minors, but interacting with minors triggers more stringent human research restrictions.[268] Community college students or four-year college students do not represent an

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263. *See supra* sections IV.A, IV.B.

264. *See* Kessler, *supra* note 23, at 73 ("It will not be possible to determine the effects of [White respondent] selection bias until subsequent research explores similar questions in other populations.").

265. Some early experiments did not even record racial identifiers. *See, e.g.*, MILGRAM, *supra* note 125, at 14 (drawing volunteers from the general population of New Haven, seeking a diversity in "class backgrounds" but failing to even note race or ethnicity of participants). According to the 1960 United States Census, New Haven's population was 90.1% Caucasian. Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for Large Cities and Other Urban Places in the United States* 39 tbl.7 (U.S. Census Bureau Population Div., Working Paper No. 76, Feb. 2005), http://www.census.gov/population/www/documentation/twps0076/CTtab.pdf [https://perma.cc/J66A-6XJA]. For a more recent experiment that did not shed light on racial differences, see Alisa M. Smith et al., *Testing Judicial Assumptions of the "Consensual" Encounter: An Experimental Study*, 14 FLA. COASTAL L. REV. 285, 302–03 (2013) (finding no difference between respondents of varying races, but surveying only fourteen persons who self-identified as a race other than Caucasian).

266. *See, e.g.*, Rebecca Kaplan, *How Do Police Improve Relations with Minority Communities?*, CBS NEWS (Dec. 7, 2014), http://www.cbsnews.com/news/are-police-doing-enough-to-improve-relations-with-minority-communities/ [https://perma.cc/L4WY-XXFH].

267. Paul R. Amato, *Life-Span Adjustment of Children to Their Parents' Divorce*, 4 CHILD. & DIVORCE 143, 144 (1994), http://futureofchildren.org/publications/journals/article/index.xml?journalid=63&articleid=415§ionid=2839 [https://perma.cc/QW9D-QY6S] ("Unfortunately, these types of samples [(random samples of children)] are also the most difficult and expensive to obtain.").

268. *See, e.g.*, Requirements for Permission by Parents or Guardians and for Assent by Children, 45 C.F.R. § 46.408 (2009), http://www.hhs.gov/ohrp/regulations-and-policy/regulations/45-cfr-46/index.html#46.408 [https://perma.cc/FQ2Y-45EH].

unbiased sample of the total population,[269] and attempting to focus on campus subsets, such as race-themed organizations, can lead to further selection bias.[270]

Despite these complications, shedding even partial light on the subject could allow more-fully-informed future decision-making.[271] Perhaps a paper analyzing two additional groups would add more than any one sample could. First, researchers could collect responses from a large sample of community college students, preferably statewide.[272] Although students may not have the same life experiences as non-students, police may more likely profile or stereotype young people of color during "social" stops,[273] and thus compiling any mass of youth responses may yield useful insights despite potential sample bias. Next, an organization such as the local or statewide NAACP may allow a researcher to survey registered members.[274] Such an effort may have an unpredictable response rate, but mailing or emailing a sufficiently large set of surveys or using weighting adjustments would at least begin painting a picture of

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269. *See* WHO ATTENDS COMMUNITY COLLEGE?: COMMUNITY COLLEGE STUDENTS COME FROM A BROAD RANGE OF BACKGROUNDS, DATA POINTS, AM. ASS'N OF CMTY. COLLS. (Apr. 2015), http://www.aacc.nche.edu/Publications/datapoints/Documents/WhoAttendsCC_1_MD.pdf [https://perma.cc/3PR7-JC6N] (discussing that many community college students are "nontraditional," including single parents and students with disabilities); Bethany Brookshire, *Psychology Is WEIRD: Western College Students Are Not the Best Representatives of Human Emotion, Behavior, and Sexuality*, SLATE (May 8, 2013), http://www.slate.com/articles/health_and_science/science/2013/05/weird_psychology_social_science_researchers_rely_too_much_on_western_college.html [https://perma.cc/7YW4-QP8X] (noting that Western college students differ from the global population, that people with different socioeconomic backgrounds have different perceptions of the world around them, and that college students may differ in their responses to social punishment).

270. *See* Amato, *supra* note 267, at 144 ("Researchers obtain *convenience samples* of children or adults through community organizations (such as single-parent support groups) or other local sources. Convenience samples are relatively easy and inexpensive to obtain, but people in these groups may be atypical in unknown ways." (emphasis in original)).

271. *See* Oral Argument at 44, Brendlin v. California, 551 U.S. 249 (2007) (No. 06-8120) (quoted in Kessler, *supra* note 23, at 61 n.60).

272. For a discussion of approaches to sampling community college students, see Richard A. Rasor & James E. Barr, *Survey Sampling of Community College Students: For Better or for Worse*, ANN. CONF. OF THE RES. & PLAN. GRP. FOR CAL. CMTY. COLLS. (1998), http://files.eric.ed.gov/fulltext/ED416932.pdf [https://perma.cc/M752-927E].

273. *See* Ranjana Natarajan, *Racial Profiling Has Destroyed Public Trust in Police. Cops Are Exploiting Our Weak Laws Against It*, WASH. POST (Dec. 15, 2014), https://www.washingtonpost.com/posteverything/wp/2014/12/15/racial-profiling-has-destroyed-public-trust-in-police-cops-are-exploiting-our-weak-laws-against-it/ [https://perma.cc/37C2-X6R3].

274. Some branches of the NAACP survey members. *See, e.g.*, *SGV NAACP Membership Information Survey*, SAN GABRIEL VALLEY NAACP BRANCH #1066 (2016), http://www.sgvnaacp.org/#!take-our-survey/g36nm [https://perma.cc/P79D-24GH].

this subgroup's experiences.[275] Results from either a youth survey—preferably one with a substantial number of minority respondents—or an NAACP survey—preferably one with a substantial number of youth respondents—could be enlightening, and in the event that both sets of responses point toward the same conclusion, the judiciary may value having fresh data to inform an updated standard.[276]

Research regarding effects on persons with disabilities may prove even more difficult than the racial or youth sampling issues discussed above. First, the researcher would need to designate which disability categories merited investigation; as one potential starting point, the Social Security Administration lists fourteen disability categories, each with specific conditions enumerated.[277] If a researcher wished to further narrow the field, perhaps he or she could start with samples targeting the two conditions (blindness and likely some variant of brittle bones, either due to osteoporosis or osteogenesis imperfecta) discussed in the recovery center survey comments.[278] The researcher could then assess whether a significant portion of respondents in the target sample report discomfort refusing the police.[279] Such deeper investigation would elucidate whether the recovery center qualitative responses uncovered an important factor or merely a coincidence.

As discussed above,[280] researchers may also pursue interviews and focus groups, as they may prove more fruitful than the basic survey approach. These face-to-face interactions allow the researcher to ask not only whether an individual would feel comfortable refusing to interact with police, but *why* the person feels that way and what might change the person's reaction.[281]

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275. For a discussion of one method for using weighting to adjust for low survey response rates, see Eric L. Dey, *Working with Low Survey Response Rates: The Efficacy of Weighting Adjustments*, 38 RES. IN HIGHER EDUC. 215, 215–27 (1997), https://www.jstor.org/stable/pdf/40196243.pdf (last visited Mar. 1, 2017).

276. *See* Monahan & Walker, *supra* note 21.

277. *See Disability Evaluation Under Social Security: Listing of Impairments - Adult Listings (Part A)*, SOCIAL SECURITY, https://www.ssa.gov/disability/professionals/bluebook/AdultListings.htm [https://perma.cc/ENH5-33J9]; *Disability Evaluation Under Social Security: Part III - Listing of Impairments*, SOCIAL SECURITY, https://www.ssa.gov/disability/professionals/ bluebook/listing-impairments.htm [https://perma.cc/S427-VX7X] (implying that many unlisted debilitating conditions may exist, as the Social Security Administration list focuses on "impairments [that] are permanent or expected to result in death, or the listing includes a specific statement of duration").

278. *See supra* section IV.B.2.

279. For a discussion of purposive sampling and its merits, see Crossman, *supra* note 191.

280. *See supra* section IV.B.1.

281. *See* D. Cohen & B. Crabtree, *Focus Groups*, ROBERT WOOD JOHNSON FOUNDATION (July 2006), http://www.qualres.org/HomeFocu-3647.html [https://perma.cc/QDJ8-TKA4] (noting that

B. The Reasonable Person Standard Could Be Updated to More Accurately Account for Vulnerabilities, but Switching to an Emphasis on Officer Conduct Would Produce Better Outcomes

This Comment has reviewed previous studies concerning civilian response to authority[282] and added new data regarding comfort levels when interacting with police.[283] Arguments exist for updating the existing reasonable person standard to better account for circumstances faced by certain vulnerable members within the civilian population.[284] The courts, however, may be more likely to shape actual behavior by focusing on officer conduct rather than the supposedly objective notions of civilian comfort levels.[285]

1. Adding Nuance to the Existing Reasonable Person Standard Would More Accurately Account for Defendants' Vulnerabilities

Modifying the reasonable person standard by adding exceptions for categories of people rather than engaging in individual-by-individual protections would maintain some semblance of objectivity. It is also easier for social scientists to sample and thus produce research examining broad (e.g., "all men") rather than narrow (e.g., "youth of Pacific-Islander origin") categories.[286] Unfortunately, a large category such as "the reasonable woman" may create more problems than it solves.[287]

The combination of the Kessler study and the recovery center study indicates a potential argument for differentiating between the reasonable woman and the reasonable man,[288] and some psychological research

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focus groups often "explore a topic that does not lend itself to observational techniques (e.g. attitudes and decision-making)"); *Surveys, Focus Groups and Interviews*, QUEENSL. GOV'T (June 28, 2016), https://www.business.qld.gov.au/business/starting/market-customer-research/researching-customers/surveys-focus-groups-interviews [https://perma.cc/C2LL-NMAD] (noting that open-ended questions "tend to be better suited to qualitative research methods such as focus groups and interviews where you can ask follow-up questions to get more information").

282. *See supra* Part III.

283. *See supra* Parts IV, V.

284. *See, e.g.*, *supra* section IV.B.2.

285. *See infra* section VI.B.2.

286. *See* Aaron Smith, *Problems Associated with Surveying Small Demographic Groups*, PEW RESEARCH CTR. (Aug. 12, 2010), http://www.pewinternet.org/2010/08/12/problems-associated-with-surveying-small-demographic-groups/ [https://perma.cc/N6KG-5P3D] (discussing the extreme expense of collecting an adequately large set of responses from an ethnic subpopulation).

287. *See supra* section II.C.

288. *See* Kessler, *supra* note 23, at 84–85; *supra* section V.B.

indicates that women may be more prone to feel obligated to comply.[289] But substantial feminist legal scholarship raises criticisms of a "reasonable woman" standard.[290] Kessler's study notes that, while it may be "easier for law enforcement officials to know if their actions would make the reasonable person feel restrained than to know if their actions make the particular person with whom they are currently dealing feel that way,"[291] courts may nonetheless consider adopting a "reasonable person of similar age" or "reasonable person of the same gender" standard.[292] Kessler observes that, because the United States Supreme Court has previously discussed this more granular type of standard in the context of seizure,[293] moving toward consistent implementation would not constitute a complete reversal of precedent. Courts also have made modifications to the reasonable person negligence standard—for example, holding a defendant to varying standards based on the defendant's skill level[294]—and so a precedent for narrowing a reasonable person standard does exist.[295]

When one considers the Washington results independent of the Kessler study, however, the evidence supporting a separate standard based on any easily identifiable exterior characteristics, even based on gender, appears weaker.[296] The recovery center survey may have shown females indicating a greater hesitation to interact with the police, but it featured a small sample of a particular subset of the population.[297] The broader Washington voter survey did not indicate that females are less comfortable refusing the police than are males.[298] In light of the opaque evidence, if courts opt to modify the existing standard, they may do better focusing on a few particular vulnerabilities.[299]

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289. Jesse-Justin Cuevas & Tonja Jacobi, *The Hidden Psychology of Constitutional Criminal Procedure*, 37 CARDOZO L. REV. 2161, 2180 (2016) ("[A] woman would be more likely than a man to feel that she should be compliant and helpful, even if she does not want to submit to a search.").

290. *See* Cahn, *supra* note 97, at 1401.

291. Kessler, *supra* note 23, at 84.

292. *Id.*

293. *Id.* (noting discussion of a "twenty-two year old . . . female" within *United States v. Mendenhall*, 446 U.S. 544, 558 (1980) (plurality opinion)).

294. *See* Charles R. Korsmo, *Lost in Translation: Law, Economics, and Subjective Standards of Care in Negligence Law*, 118 PENN ST. L. REV. 285, 306, 319 (2013) (discussing the law and economics "standard model" and "inverse model" of injurer capacity).

295. *See supra* section II.A.

296. *See supra* section V.B.

297. *See supra* section IV.B; *infra* Appendix D.

298. *See supra* section V.B.

299. *See supra* section IV.B.2.

The verbal comments from the recovery center survey[300] may suggest that courts should expand jury instructions concerning disability or vulnerability. Even without definitive study results, courts have already established exceptions protecting individuals with disabilities;[301] clarifying that disabilities also deserve special consideration within seizure contexts would be a matter of tidying up existing verbiage. The courts could maintain the current standard but add a catch-all wrinkle for recognized disabilities or other special circumstances that place a defendant in a societally-recognized vulnerable position. Rather than, for example, changing the standard to assume that the average woman feels more vulnerable, the courts could continue to refer to the generic reasonable person but add a line item allowing the jury to account for individualities.[302] Individualities may include disabilities, recent local violence toward certain minority groups, prejudice against youth, or whatever particularized vulnerabilities courts choose to consider.[303]

As an example, one subset of women who may react differently to perceived threats include those experiencing or recovering from domestic violence.[304] Women in this situation may have reason to be more fearful than the average woman in a variety of circumstances that ordinary individuals take for granted.[305] Courts have dealt with this in certain assault or murder cases by allowing expert testimony to explain to jurors the intricacies of battered-woman syndrome and its effects on behavior.[306] Juries can then evaluate the expert testimony and the totality of the circumstances to determine whether a female defendant's choice seems reasonable in that instance. Scholars have been willing to express support for the "reasonable woman" standard within a domestic violence context in other areas of law, and thus using, for example, a "reasonable woman who has experienced domestic violence" standard in the seizure context may warrant further consideration.[307]

Whether a defendant chose to argue membership in a group suffering

300. *See supra* section IV.B.2.

301. *See supra* section II.A.

302. *See* Kessler, *supra* note 23, at 85.

303. *See id.*; *supra* section IV.B.2.

304. *See* Cahn, *supra* note 97, at 1401.

305. Jamie Rich, *Compass Cards Compromise Women's Safety and Enable Abusers*, BATTERED WOMEN'S SUPPORT SERVS. (Jan. 29, 2016), http://www.bwss.org/compass-cards-compromise-womens-safety-and-enable-abusers/ [https://perma.cc/636H-Y9C3].

306. *See generally* Emily J. Sack, *From the Right of Chastisement to the Criminalization of Domestic Violence: A Study in Resistance to Effective Policy Reform*, 32 T. JEFFERSON L. REV. 31 (2009).

307. *See supra* section II.C.

from an invisible disability, repeated exposure to race-based violence, a paranoia diagnosis, or any other particularity, courts could ask the jury to determine whether they believe the sincerity of the defendant's claim or the strength of the group's propensities. Some may insist that—perhaps to avoid excessively fact-intensive inquiries or to reduce the incentive for fabrication—courts must "decline to take [the defendant's] personal equation into account";[308] however, this level of fact-finding would be no more arduous than, for example, asking juries to determine the level of emotional involvement between a claimant and a victim in a negligent infliction of emotional distress (NIED) claim, a charge already commonly given.[309]

Perception of personal vulnerability may seem insufficiently objective as a base standard, but it is no less measureable than the present "reasonableness" standard.[310] When choosing between one immeasurable standard and another, courts should opt for the choice that maximizes fairness and broader justice.[311]

2. *Courts Should Provide Guidance to the "Reasonable Police Officer" Rather than the "Reasonable Seized Defendant"*

Determining what an "average" or "objective" suspect feels when interacting with the police involves multiple hurdles.[312] Providing guidance designed to directly shape officer behavior, while also challenging, has a higher likelihood of producing results.[313] In particular, courts often rely on the "reasonable officer" standard, first promulgated in *Graham v. Connor*.[314]

Graham explains that officers must behave as an objectively reasonable officer would in light of the circumstances known in the

308. O. W. HOLMES, JR., THE COMMON LAW 108 (1909).

309. *See, e.g.*, Dunphy v. Gregor, 642 A.2d 372, 378 (N.J. 1994) (determining that a fiancée was emotionally close enough to deceased to recover for NIED claim as a spouse would and noting that courts can deal "with the realities, not simply the legalities, of relationships").

310. For a discussion of the difficulties in establishing a coherent "reasonable person" standard based on positive measurements, see Miller & Perry, *supra* note 108, at 328, 371.

311. Fairness is such an important principle that, despite its arms-length distance from heat-of-the-moment choices, increasing procedural fairness in the courtroom may reduce the number of crimes committed. *See The Case for Procedural Justice: Fairness as a Crime Prevention Tool*, CMTY. POLICING DISPATCH (Sept. 2013), http://cops.usdoj.gov/html/dispatch/09-2013/fairness_as_a_crime_prevention_tool.asp [https://perma.cc/G78H-VXAS].

312. *See* Miller & Perry, *supra* note 108, at 328, 371.

313. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966) (prompting concrete changes in police behavior when taking suspects into custody).

314. 490 U.S. 386 (1989).

moment.[315] In *Graham*, the factual record indicated[316] that officers cuffed and placed facedown a man experiencing a diabetic reaction, then refused to allow him orange juice.[317] The Court held that a proper analysis should focus on the higher standard of Fourth Amendment reasonableness rather than a due process inquiry to determine whether the particular officers had malicious intent.[318] The Court did not consider whether the diabetic man behaved rationally, but rather whether the officers responded reasonably.[319]

In *J.D.B. v. North Carolina*[320], the Court similarly explored what the police should have known, rather than what the individual child likely felt, during in-custody questioning.[321] The Court asserts that police cannot fail to notice and account for how a suspect's age affects fear levels and the freedom to walk away.[322] Justice Kennedy stated things plainly:

> Though the State and the dissent worry about gradations among children of different ages, that concern cannot justify ignoring a child's age altogether. Just as police officers are competent to account for other objective circumstances that are a matter of degree such as the length of questioning or the number of officers present, so too are they competent to evaluate the effect of relative age.[323]

The Court used the word "competent,"[324] perhaps indirectly signaling normative reasons for focusing on police actions rather than suspects' emotions.

Normative approaches to imposing a "reasonable person" standard focus on the likelihood (or at least the hope) that court-imposed standards affect actor behavior in a manner that benefits society.[325] Some assert that "normative definitions are categorically preferable to positive

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315. *Id.* at 395–97.

316. *Id.* at 388 ("Because the case comes to us from a decision of the Court of Appeals affirming the entry of a directed verdict for respondents, we take the evidence hereafter noted in the light most favorable to petitioner.").

317. *Id.* at 389.

318. *Id.* at 398–99.

319. *See generally id.*

320. 564 U.S. 261 (2001).

321. *Id.* at 274.

322. *Id.* at 276.

323. *Id.* at 279.

324. *Id.*

325. *See generally* Miller & Perry, *supra* note 108.

definitions" because grossly conflicting outcomes emerge when one assumes that members of a broad society will conform to a few basic axioms and act in a logically consistent manner.[326]

From the normative perspective, then, is the purpose of the existing reasonable person standard to educate all Americans about how they should feel during a police interaction? In light of the research regarding instinctive responses to authority, such court-imposed instruction may not work.[327] If instead the purpose is to protect citizens from over-intrusion or optimize officer-civilian interactions, then focusing on the party who has greater control over the encounter makes more sense.[328]

The courts may accomplish more by focusing on reasonable police actions. From an efficiency perspective, the police make up a small subpopulation[329] that already attends police academy and continuing education sessions. Politeness and fair procedures impact citizens' perception of police legitimacy and willingness to cooperate with police to solve crimes.[330] Thus, encouraging police to maximize the comfort of conversational partners during social interactions may increase police productivity in addition to decreasing accusations of unwarranted seizure.[331]

Courts using a new "reasonable officer" standard should ask questions focused on the officer-civilian interaction on a case-by-case basis—for example, whether officers blocking all the exits to a factory[332]

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326. *Id.* at 326.

327. *See supra* Part III.

328. U.S. DEP'T OF JUSTICE, CMTY. RELATIONS SERV., PRINCIPLES OF GOOD POLICING: AVOIDING VIOLENCE BETWEEN POLICE AND CITIZENS v (2003), https://www.justice.gov/archive/crs/pubs/principlesofgoodpolicingfinal092003.pdf [https://perma.cc/SF2Y-BBZR] ("[T]he police, by virtue of the authority that society vests in them, have overarching responsibility for the outcome of encounters with citizens.").

329. *See* BRIAN A. REAVES, U.S. DEP'T OF JUST. BUREAU OF JUST. STAT., FEDERAL LAW ENFORCEMENT OFFICERS, 2008, at 1 (June 2012), http://www.bjs.gov/content/pub/pdf/fleo08.pdf [https://perma.cc/DQK8-23C6] (reporting that, as of 2008, federal agencies employed 120,000 full-time officers authorized to make arrests); BRIAN A. REAVES, U.S. DEP'T OF JUST. BUREAU OF JUST. STAT., CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, at 1 (July 2011), http://www.bjs.gov/content/pub/pdf/csllea08.pdf [https://perma.cc/Z5RP-K4YW] (reporting that, as of 2008, state and local law enforcement employed about 765,000 full-time and 44,000 part-time personnel with general arrest powers).

330. *See generally* Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231 (2008).

331. *See id.*

332. *See* I.N.S. v. Delgado, 466 U.S. 210, 221 (1984) (Powell, J., concurring).

or officers requesting and then retaining identification[333] acted in a way that a reasonable officer having a social interaction would act. Shifting the inquiry to police choices will signal to officers that, when labeling an interaction "social," the officer must choose an approach that reasonably appears social, rather than assuming it is the suspect's responsibility to walk away.[334] Encouraging these types of police choices could reduce confusion, increase perceived legitimacy, and indirectly reduce crime.[335]

Washington courts already aim to focus on officer behavior to determine whether a social contact has escalated into a seizure.[336] Other courts, including the United States Supreme Court, should follow Washington's lead. Additionally, authors of future Washington opinions could take greater pains to avoid references to the suspect's feelings or expected reaction and instead focus exclusively on the officers' objective actions.[337] Furthermore, in light of demonstrated tendencies to acquiesce to authority, as shown in the Milgram[338] and Bickman[339] experiments—and as underscored in one update to the Milgram experiment in which a subject reported fear even absent any show of aggression from the overseer[340]—all courts (and perhaps even

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333. *See generally* Aidan Taft Grano, *Casual or Coercive? Retention of Identification in Police-Citizen Encounters*, 113 COLUM. L. REV. 1283 (2013) (discussing the split between the Fourth Circuit and the D.C. Circuit regarding whether retaining a pedestrian's identification constitutes seizure).

334. The "free-to-leave" standard arguably instructs civilians on when they should or should not feel comfort. Observing that a civilian who feels uncomfortable is simply behaving unreasonably harkens back to one infamous United States Supreme Court decision: *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896), *overruled by Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) ("We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.").

335. *See* Tyler & Fagan, *supra* note 330.

336. State v. Young, 135 Wash. 2d 498, 501, 957 P.2d 681, 682 (1998).

337. *Compare* State v. Harrington, 167 Wash. 2d 656, 665, 222 P.3d 92, 96 (2009) ("Analyzing this encounter under Washington's purely objective standard, a reasonable person at the beginning of the conversation would not have thought [the officer] *restrained* that person's freedom of movement." (emphasis added)), *with id.* at 670, 222 P.3d at 98 ("A reasonable person would not have *felt free* to leave due to the officer's display of authority." (emphasis added)). The first phrasing focuses on what the officer did, whereas the second phrasing focuses on how a civilian might have felt about it.

338. *See* MILGRAM, *supra* note 125, at 123 ("We have now seen several hundred participants in the obedience experiment, and we have witnessed a level of obedience to orders that is disturbing.").

339. *See* Bickman, *supra* note 126, at 47.

340. *See* Burger, *supra* note 135.

legislatures[341]) may wish to reexamine the show of force necessary in order for a police officer to have seized a suspect.

When drawing the line between social interactions and seizures, judges must balance the goals of protecting individual liberty and allowing police enough leeway to effectively fight crime.[342] Previous attempts to rely on "gut" instincts regarding suspects' comfort levels have resulted in strained assumptions that may not reflect average civilians' actual attitudes.[343] Yet attempts to measure civilian reactions run into roadblocks due to overestimation of willingness to resist authority[344] as well as difficulties collecting accurate data.[345] Putting the spotlight on objective officer behavior would focus analysis on what officers may *do* rather than on what civilians may feel.

CONCLUSION

The United States Supreme Court and the Supreme Court of Washington have set a seizure standard without the benefit of robust social science research.[346] Kessler's 2009 study attempted to shed light on when the typical person feels comfortable refusing to answer police questions, and thus when a "real" reasonable person might actually feel seized—contrasting with courts' prior assumptions about a reasonable person's attitude toward questioning.[347] This Comment compares the Kessler results[348] to new data gathered within Washington State. The new data do not support changing the current standard based on obvious, externally-identifiable characteristics, with the exception of some indication that attitudes may differ based on gender.[349] Qualitative information that emerged during the study, however, may point toward allowing juries to consider indicators of vulnerability for some suspect

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341. *Cf.* David. M. Jaros, *Preempting the Police*, 55 B.C. L. REV. 1149, 1184 (2014) (discussing a successful Maryland legislative effort to block unnecessary DNA collection by police).

342. *See supra* Introduction.

343. *See, e.g.*, Florida v. Bostick, 501 U.S. 429, 438 (1991) (explaining that a seat-bound passenger on a long-distance bus ride would feel free to refuse to interact with an immediately adjacent police officer).

344. *See supra* Part III.

345. *See supra* section VI.A. and Part V.

346. United States v. Mendenhall, 446 U.S. 544, 554 (1980) (plurality opinion) (setting a standard that a person is seized if a reasonable person would not feel free to leave).

347. *See supra* Part I.

348. *See supra* Part V.

349. *See supra* Part V.

categories.[350] Future research is needed, but researchers will face difficulties gathering accurate data.[351] Courts would do better to clarify and emphasize the standard for the "reasonable police officer" during a seizure rather than focusing on the behavior of a seized defendant.[352]

350. *See supra* section IV.B.2.

351. *See supra* section VI.A.

352. *See supra* section VI.B.

APPENDICES

Appendix A

Kessler 2009 Survey Questions

1. You are walking on the sidewalk. A police officer comes up to you and says, "I have a few questions to ask you." Assume you do not want to talk to the officer.

On a scale of 1 to 5, please indicate how free you would feel to walk away without answering or to decline to talk with the police officer.

1---------------2---------------3---------------4---------------5

Not free to leave or say no	**Somewhat** free to leave or say no	**Completely** free to leave or say no

2. You are riding the bus. A police officer comes up to you and says, "I have a few questions to ask you." Assume you do not want to talk to the officer.

On a scale of 1 to 5, please indicate how free you would feel to walk away without answering or to decline to talk with the police officer.

1---------------2---------------3---------------4---------------5

Not free to leave or say no	**Somewhat** free to leave or say no	**Completely** free to leave or say no

Which sentence best describes your legal rights in each of the above situations?

1. You have the legal duty to talk with the officer even if you do not want to.
2. You have a legal duty to be reasonably helpful to the officer, but may leave in some situations.
3. You have a legal right to ignore the officer, but he may assume you are guilty of wrongdoing if you do.
4. You have the legal right to refuse to talk with the officer with no consequence to yourself.

Please provide the following demographic information:
Age: _______Zip Code: _______

Have you ever been stopped before by a police officer? _____

Appendix B

Fall 2015 Survey Questions for Telephone Survey and Addiction Recovery Survey

Thank you for answering a few questions. Your participation is voluntary, and your identity will be kept completely anonymous.

A. Imagine you are walking on the sidewalk. A police officer comes up to you and says, "I have a few questions to ask you." Assume you do not want to talk to the officer.

On a scale of 1 to 5, please indicate how free you would feel to walk away without answering or to decline to talk with the police officer.

1---------------2---------------3---------------4---------------5

Not free to leave or say no	**Somewhat** free to leave or say no	**Completely** free to leave or say no

B. Imagine you are riding the bus. A police officer comes up to you and says, "I have a few questions to ask you." Assume you do not want to talk to the officer.

On a scale of 1 to 5, please indicate how free you would feel to walk away without answering or to decline to talk with the police officer.

1---------------2---------------3---------------4---------------5

Not free to leave or say no	**Somewhat** free to leave or say no	**Completely** free to leave or say no

C. Which sentence best describes your legal situation in each of the above scenarios?

1. You have the legal duty to talk with the officer even if you do not want to.
2. You have a legal duty to be reasonably helpful to the officer, but may leave in some situations.
3. You have a legal right to ignore the officer, but he may assume you are guilty of wrongdoing if you do.

4. You have the legal right to refuse to talk with the officer with no consequence to yourself.

Please provide the following demographic information:

Age: _______

Zip Code: ___________

Race/ethnicity: ____________________________

Gender:________

Education (circle one):

Did not finish high school

High school/GED

Some college/vocational school

2-year college degree

4-year college degree

More than 4-year college degree

Other than for a traffic violation, have you ever been stopped by a police officer? _____

Appendix C

Telephone Survey of Washington Voters Methodology

The researcher paid Elway Research, Inc. to ask proprietary questions with wording nearly identical to the questions used in the Kessler study.[353] Elway asked the questions during its statewide telephone poll, conducted October 13–15, 2015.[354] The poll drew from a pre-selected randomized sample of registered voters from across Washington State. Live interviewers made the calls, and 28% of calls went to cell phones. Of the 500 respondents, 54% were female, 46% were male. Respondents were 31% from King County, 49% from the remainder of Western Washington, and 20% from Eastern Washington. The voter sample had very few non-White respondents (87% Caucasian, compared to 77.7% Caucasian in the Kessler sample[355]), and only 7% of respondents were under age thirty-five (compared to 26.7% of respondents in the fifteen to twenty-four age range in the Kessler sample[356]). The margin of sampling error is plus or minus 4.5% at the 95% confidence level.

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[353] *See supra* section III.D.

[354] *See The Elway Poll*, ELWAY RESEARCH, INC., http://www.elwayresearch.com/elwaypoll.html [https://perma.cc/9GY2-3JES].

[355] *See* Kessler *supra* note 23, at 73–74.

[356] *Id.*

Appendix D

Recovery Center Survey Methodology

The researcher expected to enter a classroom during a time-limited session, briefly introduce the survey process, pass out a large number of written questionnaires, and then collect anonymously completed forms and depart. However, the survey setting proved different when the researcher entered the facility and observed a large buffet with clients socializing at spread-out tables. A staff member rang a bell and called the room to attention, and the researcher explained the survey. Center clients joined the researcher in a side room a few at a time. Those who completed the survey returned to the dining area and encouraged their associates to participate. The researcher offered those who participated a small dessert (a cookie or piece of candy) as an incentive.

Calculating the sample size, thirty-seven, simply involved counting the survey sheets, but the flow of buffet patrons in and out of the building—and the need to avoid pressuring members of a vulnerable population—complicated participation rate calculation. The researcher could not pinpoint exactly how many people in the room heard the initial announcement or follow-up invitations from their associates. The researcher received twenty-five responses from approximately fifty Wednesday buffet patrons and twelve responses from fewer than forty Friday buffet patrons—partly due to repeat buffet attendees not taking the survey twice. Thus, during the Friday visit, the response rate of those *eligible to complete* the survey was likely 50%, similar to Wednesday's rate.