

**BLIND RHYME:  
THE REASONABLE PERSON  
STANDARD VIOLATES THE FIRST  
AMENDMENT**

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I. INTRODUCTION

An impotent man reacted poorly to the taunts of a prostitute.<sup>1</sup> He became violent.<sup>2</sup> Murder ensued.<sup>3</sup> When tried, he claimed that a reasonable impotent man would similarly have reacted.<sup>4</sup> The court held that the reasonable person standard is a fictitious standard unifying all people.<sup>5</sup> *Ad hoc* adaptations would lead to inconsistencies.<sup>6</sup> That persuasive explanation has guided the development of the law.<sup>7</sup> Yet, several adaptations have arisen.<sup>8</sup> Since *Bedder*

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<sup>1</sup> *Bedder v. DPP*, 1 W.L.R. 1119 (1954).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Bedder*, 1 W.L.R. 1119.

<sup>8</sup> *See* Section II.

v. *DPP*<sup>9</sup>, people have further classified themselves and others; and now, the classifications have become restrictive.<sup>10</sup> Meanwhile, the reasonable person standard has constricted speech for those seeking to avoid penalization and liability.<sup>11</sup>

The reasonable person standard challenges the First Amendment of the United States Constitution.<sup>12</sup> It may violate the First Amendment when the law requires people to define their persons or ideas according to standardized ideas.<sup>13</sup> The First Amendment grants the right to free speech, but the reasonable person standard requires individuals to comply with social norms.<sup>14</sup> Violation of norms incriminates and subjects violators to liability.<sup>15</sup> Though behavior must be reasonable under the circumstances, circumstances are composed of subjective scenarios, facts, and observations.<sup>16</sup> For

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<sup>9</sup> Bedder, 1 W.L.R. 1119.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Cal. Civ. Code Ann. §§1746–1746.5 (2009). U.S. CONST. AMEND. I.

<sup>13</sup> U.S. CONST. AMEND. I.

<sup>14</sup> Brown v. Entertainment Merchants Ass’n, 564 U.S. 786 (2011).

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

<sup>16</sup> *Infra* Sections II and IV.

example, gender norms may create distinct standards of reasonableness.<sup>17</sup> Overly broad standards and underinclusive polices may violate the First Amendment.<sup>18</sup> This Article presents case law about the reasonable person in Section II.<sup>19</sup> Section III discusses free speech standards, judicial review standards, and criminal law.<sup>20</sup> It asserts that the reasonable person standard violates the First Amendment because without fairness, a legal standard is an ambiguous prior restraint on speech that is overbroad.<sup>21</sup> Restraints should be narrowly tailored and use the least restrict means.<sup>22</sup> Section IV shows how the Equal Protection clause in conjunction with the First Amendment may be violated by the reasonable person standard.<sup>23</sup> It also discusses examples such as minority, competency, and mental state.<sup>24</sup> Gender, sex, and sexual

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<sup>17</sup> *Id.*

<sup>18</sup> U.S. CONST. AMEND. I.

<sup>19</sup> *E.g.* United States v. Stevens, 559 U.S. 460 (2010).

<sup>20</sup> *E.g.* Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, 482 U.S. 569 (1987).

<sup>21</sup> U.S. CONST. AMEND. I.

<sup>22</sup> *Boos v. Barry*, 485 U.S. 312 (1988).

<sup>23</sup> U.S. CONST. AMEND. XIV.

<sup>24</sup> *Infra* Sections IV.

orientation are explored.<sup>25</sup> One question is how does a reasonable transperson understand and comply with a duty to disclose material facts to gain sexual consent?<sup>26</sup> Section V concludes.<sup>27</sup>

## II. REASONABLE PERSON STANDARD

Cases interpreted according to the reasonable person standard where speech was at issue, but not hate crimes or provocation, considered nuanced characteristics to determine whether behavior was reasonable.<sup>28</sup> Circumstances were described after the fact and standards were developed or applied in response to the public's classification of the individual or individuals whose conduct was under consideration.<sup>29</sup>

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Infra* Section V.

<sup>28</sup> Brown, 564 U.S. 786. Nevada Comm'n on Ethics v. Carrigan, 564 U.S. 117 (2011).

<sup>29</sup> Brown, 564 U.S. 786 (2011).

In *Brown v. Entertainment Merchants Association*,<sup>30</sup> the Court considered the imposition of a reasonable person standard.

California Assembly Bill 1179 (2005), Cal. Civ. Code Ann. §§1746–1746.5 (West 2009) (Act), prohibits the sale or rental of ‘violent video games’ to minors, and requires their packaging to be labeled ‘18.’ The Act covers games ‘in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted’ in a manner that ‘[a] reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors,’ that is ‘patently offensive to prevailing standards in the community as to what is suitable for minors,’ and that ‘causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.’ §1746(d)(1)(A). Violation of the Act is punishable by a civil fine of up to \$1,000. §1746.3.<sup>31</sup>

The Court maintained that the reasonable person standard served a limited purpose in First

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<sup>30</sup> *Id.*

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

Amendment jurisprudence.<sup>32</sup> Sprawling interpretations and applications could not be sustained in light of the First Amendment.<sup>33</sup> Although community standards could be used to determine whether material entering the community is obscene, and in need of redemption, a reasonable person standard could not be used to bar violent video games or prevent minors from acquiring violent video games.<sup>34</sup> No longstanding tradition to prevent minors from accessing violent video games had been demonstrated to require the Court to uphold the law under due process.<sup>35</sup> It had not been demonstrated that parents required the government's assistance to maintain their parental authority.<sup>36</sup> Though community standards could not prevent people from giving the games to their children, the interactive experience of playing video games

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<sup>32</sup> California Assembly Bill 1179 (Act), Cal. Civ. Code Ann. 1746-1746.5.

<sup>33</sup> *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004); *Ginsberg v. New York*, 390 U.S. 629 (1968); *Erznoznik v. Jacksonville*, 422 U.S. 205, 212-13 (1975).

<sup>34</sup> *Stevens*, 559 U.S. 460 .

<sup>35</sup> U.S. CONST. AMEND. V.

<sup>36</sup> *Brown*, 564 U.S. 786.

demonstrated that community members in nearby and distant communities viewed the games as social.<sup>37</sup> Playing the games was a reasonable activity for minors and adults.<sup>38</sup> Yet, the standard could not be used to defend the legislature's sensitivities toward synthetic depictions of non-sexual violence.<sup>39</sup> An overly broad application of an obscenity analysis to violent video games using a reasonable person standard resulted in an underinclusive persecution of violent video games.<sup>40</sup> For example, violent cartoons were not barred.<sup>41</sup> The statute did bar depictions of sexual violence in video games sold to minors, but overextended to non-sexual depictions.<sup>42</sup>

In *Nevada Commission on Ethics v. Carrigan*, a law was upheld that prevented public officers from voting on matters involving cronies or relatives or

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Stevens, 559 U.S. 460.

<sup>40</sup> Brown, 564 U.S. 786.

<sup>41</sup> Brown, 564 U.S. 786.

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

any other persons who would influence the official.<sup>43</sup>

The law relied on the reasonable person standard.<sup>44</sup>

Nevada's Ethics in Government Law provides that 'a public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by,' *inter alia*, '[h]is commitment in a private capacity to the interests of others.' Nev. Rev. Stat. §281A.420(2) (2007). Section 281A.420(8)(a)–(d) of the law defines the term 'commitment in a private capacity to the interests of others' to mean a 'commitment to a person' who is a member of the officer's household; is related by blood, adoption, or marriage to the officer; employs the officer or a member of his household; or has a substantial and continuing business relationship with the officer. Paragraph (e) of the same subsection adds a catchall to that definition: '[a]ny other commitment or relationship that is substantially similar' to one of those listed in paragraphs (a)–(d).<sup>45</sup>

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<sup>43</sup> Carrigan, 564 U.S. 117.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

The Nevada Supreme Court struck the law on First Amendment grounds.<sup>46</sup>

The United States Supreme Court upheld the law.<sup>47</sup> Though the law does not impinge on due process by requiring officials to recuse themselves from private relationships, it bars them from publicly defining their relationships.<sup>48</sup> They are unable to vocalize and affirm the limited scope of those relationships and maintain their impartiality.<sup>49</sup> They are forced by the reasonable person standard to accept that the government will portray their relationships as being more vital and influential than their commitment to the government and their work.<sup>50</sup> At any rate, the spirit of the law protects the public and constituency by requiring lawmakers to be impartial.<sup>51</sup> Legislators must avoid cronyism and nepotism, and disclose financial interests while avoiding criminal enterprise.<sup>52</sup> Yet, the reasonable

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<sup>46</sup> Carrigan, 564 U.S. 117.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Carrigan, 564 U.S. 117.

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

person standard imposes constraints on their expression of personal identity.<sup>53</sup>

In *Carrigan*, a city council member consulted the city attorney about whether he was required to disclose a business relationship with a consultant working for a company proposing to build a casino.<sup>54</sup> The attorney advised him to disclose the relationship and he did.<sup>55</sup> He voted on the matter and was censured.<sup>56</sup> Nevada’s Supreme Court protected voting rights and used strict scrutiny to find that the catchall provision “[a]ny other commitment or relationship that is substantially similar’ to one of those listed in paragraphs (a)–(d)” was overbroad.<sup>57</sup> The Court found that although the statute barred Carrigan from participating in any discussion about the proposal in the public forum, the restraint was a reasonable time, place, manner restriction.<sup>58</sup> The Court did not view voting as symbolic speech in this

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<sup>53</sup> *Id.*

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

<sup>55</sup> *Id.*

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

<sup>57</sup> *Carrigan*, 564 U.S. 117.

<sup>58</sup> *Id.*

context.<sup>59</sup> However, Carrigan's rejection of the reasonable person's interpretation of his capacities and sentiments was clearly unpopular and restrained speech.<sup>60</sup> According to the Court, Carrigan may have voted because he felt that he could express his wishes in the matter and was not intending to use his vote symbolically to describe his preference for certain individuals.<sup>61</sup>

In *Boos v. Barry*, the Court held that a police officer shares a reasonable belief about actions and intentions with other police officers.<sup>62</sup> Although the reasonable person standard is evident, the legislator noted that the standard may be curtailed.<sup>63</sup> In *Carrigan*, a nuanced ethical rubric was defined by a general presumption.<sup>64</sup> The reasonable person would feel that certain relationships could be excessively persuasive.<sup>65</sup> The reasonable legislator, the

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<sup>59</sup> *Id.*

<sup>60</sup> *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002).

<sup>61</sup> *Id.*

<sup>62</sup> *Boos v. Barry*, 485 U.S. 312 (1988).

<sup>63</sup> *Carrigan*, 564 U.S. 117.

<sup>64</sup> *Id.*

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

reasonable police officer, the reasonable family man, the reasonable bachelor, the reasonable businessperson, and the reasonable gambler may articulate distinct ideas.<sup>66</sup> Yet, the expressions of a reasonable member of any of these groups may not sufficiently represent protected, reasonable, important, or necessary ideas possessed by other members of the groups.<sup>67</sup>

In *Reichle v. Howards*, the Court decided whether a First Amendment claim could be sustained for retaliation against speech when the speech appeared to have been made in conjunction with a crime and probable cause existed at the time of the arrest.<sup>68</sup> The Court also considered whether officers should be immunized.<sup>69</sup> The Court concluded that the speech was not relevant to the crime for which the defendant was arrested and a reasonable officer would not have believed that the First Amendment could be invoked in that instance to shield the

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

<sup>67</sup> *Id.*

<sup>68</sup> *Reichle v. Howards*, 566 U.S. 658 (2012).

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

defendant from arrest.<sup>70</sup> A defendant was arrested for lying to the Secret Service.<sup>71</sup> He approached the vice president at a mall and made anti-war comments.<sup>72</sup> He touched the vice president's shoulder.<sup>73</sup> Secret Service agents working for the vice president believed that he had harassed the vice president.<sup>74</sup> The defendant claimed that their interrogation was retaliatory.<sup>75</sup> However, he denied touching his shoulder.<sup>76</sup> He had touched his shoulder, and was arrested for lying to the agents, but was not prosecuted.<sup>77</sup> Later, local officials brought charges for harassment.<sup>78</sup> Those charges were dropped.<sup>79</sup> He sued the Secret Service agents for retaliation.<sup>80</sup> The Court held that they had not retaliated because probable cause existed to arrest him for lying.<sup>81</sup> A

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

<sup>71</sup> *Id.*

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

<sup>73</sup> *Howards*, 566 U.S. 658.

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

<sup>75</sup> *Id.*

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

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

<sup>78</sup> *Id.*

<sup>79</sup> *Howards*, 566 U.S. 658.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

reasonable agent would not have believed that his First Amendment right to protest against the vice president extended to a right to lie to the Secret Service.<sup>82</sup> His suit before the U.S. Supreme Court did not challenge the charges brought by local officials.<sup>83</sup>

Officials may be immunized when they reasonably believe that a right barring their conduct has not been clearly established.<sup>84</sup> Secret Service agents may have observed other people touching the vice president.<sup>85</sup> Their interpretation of the defendant's aggression and intent may have related to the content of the speech.<sup>86</sup> They may not have believed that it was reasonable to arrest him for harassment even though they felt that they were required to question him.<sup>87</sup> The context-specific reasonable person standard required them to participate in a cultural assessment of whether they as a group believed that the First Amendment clearly

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

<sup>83</sup> *Id.*

<sup>84</sup> *Howards*, 566 U.S. 658. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)

<sup>85</sup> *Howards*, 566 U.S. 658.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

could have been applied to protect the defendant from arrest.<sup>88</sup> Had they believed that his comments were not negative, then perhaps their perception of his physical conduct may have been different.<sup>89</sup> Yet, they may reasonably have interpreted the hostility of his remarks to be evidence of his intent to harass the vice president.<sup>90</sup> If the agents menaced the defendant in a manner that caused him to lie due to fear because they retaliated against him for making unwanted remarks, then their conduct was unreasonable.<sup>91</sup> Yet, the reasonable person standard designed to protect officers and citizens was too vague in this case because the defendant was charged by a different organization for a crime that did not relate to his original arrest and seemed to hinge on whether the vice president felt harassed.<sup>92</sup> Neither that fact nor a final factual description of the type of touch were included in the case.<sup>93</sup> Furthermore, the reasonable

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<sup>88</sup> *Id.*

<sup>89</sup> *Grayned v. Rockford*, 408 U.S. 104 (1972).

<sup>90</sup> *Howards*, 566 U.S. 658.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *See, Hartman v. Moore*, 547 U.S. 250 (2006).

officer standard seems restrictive because any person would feel that an individual who makes physical contact after verbally challenging another may be stepping beyond the United States Constitution.<sup>94</sup> Therefore, the standard may need revision because it seems to require that officers only protect and serve harassed individuals when they believe that a suspect probably has committed some other crime.<sup>95</sup> In this case, their conduct may have violated his speech right and the requirement may have violated their right to explain that his conduct was offensive in conjunction with his intent to jostle the vice president.<sup>96</sup>

The reasonable person standard may violate the First Amendment by requiring individuals to assume roles and make statements about their beliefs and perceptions.<sup>97</sup> Statements are inaccurate and subjective.<sup>98</sup> They are based on presumptions about

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<sup>94</sup> *Howards*, 566 U.S. 658.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

others pertaining to similar classes.<sup>99</sup> The rule may undermine individuals' decency and sensitivity.<sup>100</sup> The standard allows the legislature to fabricate identity and restrict sound judgment and expressions of neutrality and impartiality.<sup>101</sup> It causes people to look unfavorably on community members and the government.<sup>102</sup> In some scenarios, a general ethos, which may be explained as a reasonable person standard, may be rational, important, or necessary.<sup>103</sup>

### III. FREE SPEECH

#### A. Relevant Governmental Purposes and Judicial Review Standards

Lawful speech is protected.<sup>104</sup> The government may regulate speech using content-based and content-neutral restrictions.<sup>105</sup> Content-based restrictions are subject to strict scrutiny.<sup>106</sup> They

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<sup>99</sup> *Howards*, 566 U.S. 658.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> U.S. CONST. AMEND. I.

<sup>105</sup> *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

<sup>106</sup> *Id.*

must be narrowly tailored to allow as much speech as possible.<sup>107</sup> A content-based regulation of political speech in a public forum must be necessary to effectuate a compelling government interest.<sup>108</sup>

The secondary effects doctrine, as originally intended, applies to local detriments incurred by the community when proprietors distribute pornography and provide access to other vices.<sup>109</sup> Regulations have been described in some cases as being content-neutral, for example zoning laws.<sup>110</sup> The government attempted to suppress political speech in *Boos* using the secondary effects doctrine.<sup>111</sup> The U.S. Supreme Court decided that impingement on political speech was a content-based restriction.<sup>112</sup>

In *Boos*, demonstrators were required to maintain a distance of at least 500 feet from an embassy when their signs disparaged international policies or sided

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

<sup>108</sup> *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983), at 45. *Jews for Jesus*, 482 U.S. 569. *Widmar v. Vincent*, 454 U.S. 263 (1981).

<sup>109</sup> *Id.*

<sup>110</sup> *Playtime Theatres*, 475 U.S. 41.

<sup>111</sup> *Boos*, 485 U.S. 312.

<sup>112</sup> *Id.*

against the nation.<sup>113</sup> The government claimed that the law was justified because it quelled violent protests and protected diplomats from indignity.<sup>114</sup> The Court analyzed two clauses, a congregation clause and a display clause.<sup>115</sup> It held that people could congregate and display signs outside embassies.<sup>116</sup> Justices challenged the secondary effects doctrine as being a maneuver to chill speech and a method to suppress litigation.<sup>117</sup> The indignity of being exposed to speech was addressed by Justices who surmised that speech is protected at times because it is critical and may offend.<sup>118</sup> Emotional responses and intellectual realizations are not secondary effects.<sup>119</sup> They may be primary purposes of speech.<sup>120</sup> Damaged self-esteem may be an intended wrench in a callous system.<sup>121</sup> Visual bulk inspeech and unruly commentary demonstrates

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<sup>113</sup> *Id.*

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

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

<sup>116</sup> *Boos*, 485 U.S. 312.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Boos*, 485 U.S. 312.

opposition.<sup>122</sup> The regulation was not viewpoint-based, but impermissibly dismissed all controversy.<sup>123</sup> It prohibited the discussion of bothersome topics.<sup>124</sup>

The government cannot bar the discussion of specific topics in public.<sup>125</sup> It may place content-neutral restrictions to keep the peace.<sup>126</sup> Those restrictions may relate to known effects of certain types of speech.<sup>127</sup> However, it cannot consider the expression of speech to be a secondary effect. Also, the primary effect of speech cannot be banned using inapplicable doctrines.<sup>128</sup>

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<sup>122</sup> *Boos*, 485 U.S. 312. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)

<sup>123</sup> *Boos*, 485 U.S. 312.

<sup>124</sup> *Id.*

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

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* *Playtime Theatres*, 475 U.S. 41.

<sup>128</sup> *Vincent*, 466 U.S. 789; *Schacht v. United States*, 398 U.S. 58, 63 (1970); *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 537 (1980).

## B. Application to Criminal Law

The reasonable person standard varies throughout criminal law.<sup>129</sup> In some cases, a reasonable person symbolizes an objective standard.<sup>130</sup> In other cases, it represents prudent decision-making. Some laws require people to act in conformity with certain groups.<sup>131</sup> Jurors may be asked to view defendants as reasonable men, women, children, etc.<sup>132</sup> A reasonable person may be evaluated in light of his or her conduct, beliefs, or intent.<sup>133</sup> Groupings may be arbitrarily decided by the jurisdiction.<sup>134</sup> They may relate to some professions, such as standards of care (e.g., gross negligence), but not to other occupations (e.g., housewife).<sup>135</sup> They may evaluate the importance of some characteristics, such as blindness, but not other characteristics, such as low, yet normal,

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<sup>129</sup> Boos, 485 U.S. 312.

<sup>130</sup> *Infra* note.

<sup>131</sup> Bedder, 1 W.L.R. 1119.

<sup>132</sup> *Id.*

<sup>133</sup> *E.g.*, Ariz. Stat. § 13-404 (2017).

<sup>134</sup> U.S. CONST. AMEND. XIV.

<sup>135</sup> United States v. Virginia, 518 U.S. 515, 568 (1996).

intelligence.<sup>136</sup> Height and weight may be relevant to reasonable person standards that are applied as a part of self-defense and provocation defenses.<sup>137</sup> A blind defendant may be defended under a reasonable person standard for the blind when claiming self-defense.<sup>138</sup> Yet, the standard suppresses authentic identification and unevenly classifies groups.<sup>139</sup>

### C. Application to Reasonable Person Standards

#### 1. Equality

The Fourteenth Amendment states that no state can “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>140</sup> Laws that discriminate on their face or in effect may be subject to strict scrutiny, intermediate

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<sup>136</sup> *People v. Mathews*, 30 Cal. Rptr. 2d 330, 335 (Cal. Ct. App. 1994).

<sup>137</sup> *Rodriguez v. State*, 641 S.W.2d 669, 672 (Tex. Ct. App. 1982).

<sup>138</sup> *People v. Mathews*, 30 Cal. Rptr. 2d 330, 335 (Cal. Ct. App. 1994).

<sup>139</sup> *Boos*, 485 U.S. 312.

<sup>140</sup> U.S. CONST. AMEND. XIV.

scrutiny, or rational review depending on which class of persons have been subjected to discrimination.<sup>141</sup> People who have consistently been victims of discrimination, such as racial minorities, may ask the Court to review the law to find that it preserves as much of their right as possible.<sup>142</sup> The law must be necessary to perform a compelling governmental function.<sup>143</sup> People who regularly suffer discrimination, but have not sued as much as racial minorities (i.e., women), may ask the Court to examine laws to find that they substantially relate to an important governmental function.<sup>144</sup> All other claimants, complainants, and victims are at the Court's mercy under rational review.<sup>145</sup> Laws only need to be rational and reasonably related to a legitimate governmental interest.<sup>146</sup>

The First Amendment protects people from the legislature's imposition of their reasoning about

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<sup>141</sup> Virginia, 518 U.S. 515.

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

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

classes and equality, which may otherwise be used to force people to describe others, themselves, and their ideas in a manner that expresses the legislature's point-of-view.<sup>147</sup> The legislature may require people to express approval or disapproval for certain groups.<sup>148</sup> The Equal Protection clause may urge employers to express approval (e.g., part Native American heritage) and federal hiring requirements may require an expression of disapproval (e.g., crimes of dishonesty).<sup>149</sup> Although some forms of discrimination (e.g., race, sex, minority, disability, and nationality) may be illegal, other forms are legal (e.g., height, eye color, and odor).<sup>150</sup> People may express political opinions about any classifications.<sup>151</sup> Government employees have limited speech rights within the scope of employment.<sup>152</sup> They have the right to discuss

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<sup>147</sup> Virginia, 518 U.S. 515.

<sup>148</sup> *Id.*

<sup>149</sup> U.S. CONST. AMEND. XIV. 49 CFR § 1572.103(b)(2)(iii).  
Washington v. Davis, 426 U.S. 229 (1976); Davis v. Passman, 442 U.S. 228 (1979). 41 CFR 60-1.5(a)(7) (2020).

<sup>150</sup> Virginia, 518 U.S. 515.

<sup>151</sup> U.S. CONST. AMEND. I.

<sup>152</sup> Hansen v. Soldenwager, 19 F.3d 573 (11<sup>th</sup> Cir. 1994).

matters of public concern.<sup>153</sup> This includes discrimination and equality.<sup>154</sup>

Police work may involve classification, group identification, and protection of equality.<sup>155</sup> A reasonable officer standard may impose on police the legislature's, defendant's, or community's belief system and classification system.<sup>156</sup> This may not benefit police, and may suppress police officers' speech.<sup>157</sup> Though police may not exercise their speech right or believe they have a right to discuss their departure from the reasonable person standard, their refinement of class-based observations benefits their profession.<sup>158</sup> Imposition of the standard erodes development of distinctions that rigidly bind the public to occasionally propitious or privileged, yet inaccurate and sometimes painful, classifications.<sup>159</sup>

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<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Evans v. City of Indianola*, 778 F.Supp. 333 (1991).

<sup>156</sup> *Id.*

<sup>157</sup> *Evans*, 778 F.Supp. 333; *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Hansen*, 19 F.3d 573 (1994).

<sup>158</sup> *Garcetti*, 547 U.S. 410.

<sup>159</sup> U.S. CONST. AMEND. XIV.

Even officers' testimony is subject to impingements.<sup>160</sup> Their testimony is not fully protected by the First Amendment.<sup>161</sup> Departmental needs weigh against full protection.<sup>162</sup> Speech that is considered to be unprofessional may not outweigh compelling departmental needs.<sup>163</sup> The reasonable person standard, sometimes described as the reasonable officer standard, may determine which concepts an officer may express.<sup>164</sup> A police department's policies and judgment determine how speech will be restrained.<sup>165</sup> It may not be clear to officers until after they complain about restraints.<sup>166</sup> Complaints may be viewed as personal matters, even when they are voiced in the press.<sup>167</sup> They may be unprotected.<sup>168</sup>

A reasonable police officer may be one who would profile a citizen according to particular

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<sup>160</sup> Boos, 485 U.S. 312.

<sup>161</sup> Hansen, 19 F.3d 573 (1994).

<sup>162</sup> Boos, 485 U.S. 312.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> Boos, 485 U.S. 312. Garcetti, 547 U.S. 410.

<sup>166</sup> Angle v. Dow, 822 F. Supp. 1530 (S.D. Ala. 1993).

<sup>167</sup> Boos, 485 U.S. 312.

<sup>168</sup> *Id.* Garcetti, 547 U.S. 410.

groupings.<sup>169</sup> Expressing resentment, disagreement, new information, progressive attitudes, or alternative points-of-view may result in dismissal.<sup>170</sup> An officer giving testimony potentially could be fired for explaining a belief that suspects appeared to be mixed-race rather than merely White, Native, Asian, or Black.<sup>171</sup> An officer accused of racial profiling of Black males may be unprotected under current First Amendment standards.<sup>172</sup> It may be unreasonable to say that because the officer suspected them of committing a crime, he did not merely investigate under a pretext to discriminate against them because they are Black and male.<sup>173</sup> Though the defendants may identify with those classifications and may be identified that way by the community or the department, an individual officer may or may not have conformed to other officers, but independently may have viewed the suspects as possibly being transgender, female, mixed-race, or ethnic, and

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<sup>169</sup> *Boos*, 485 U.S. 312.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* *Garcetti*, 547 U.S. 410.

<sup>172</sup> *Boos*, 485 U.S. 312.

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

possibly culturally aligned with an alternate racial upbringing or background.<sup>174</sup> The reasonable person standard may objectively measure the officer's accuracy and professionalism, yet fights against stereotypes about officers and citizens using the officers' reputation and alleged inferences.<sup>175</sup> Some of the benefits may not be necessary, and may not be used to abridge officers' speech.<sup>176</sup> Victims similarly may be situated.<sup>177</sup> Those who identify as mixed-race may fear an absence of protection when they identify with the roots of those who are less protected systemically or in practice.<sup>178</sup> The phenomenon extends to youth, age, competency, mental state, sexuality, gender, sex, and other self-described classifications and labels.<sup>179</sup> These examples suffice to show how criminal law suffers when imposition of the reasonable person standard results in an abridgment of speech.<sup>180</sup>

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

<sup>175</sup> *Whren v. United States*, 517 U.S. 806 (1996).

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

<sup>177</sup> U.S. CONST. AMEND. XIV.

<sup>178</sup> *Id. Virginia*, 518 U.S. 515.

<sup>179</sup> *Boos*, 485 U.S. 312.

<sup>180</sup> *Id.*

## 2. Gender

Sexual or gender-based discrimination subject to evaluation under the reasonable person standard may cause hostile environments.<sup>181</sup> Hostility and harassment may be primary and secondary effects of censorship.<sup>182</sup> People who administrate may rely on reasonable person standards to communicate with subordinates.<sup>183</sup> Limitations in public and private workplaces that are subject to governmental regulations may affect the climate, culture, and standards. Reasonable person standards may not impermissibly impose distinct duties on various classes.<sup>184</sup> However, improved sensitivity to individuality, self-classification, inner-group oppression, and other forms of segregation, adversity, and hostility may emerge as a result of better constructed objective and subjective standards.<sup>185</sup> Improvement of the reasonable person

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<sup>181</sup> *Id.*

<sup>182</sup> *Playtime Theatres*, 475 U.S. 41.

<sup>183</sup> *Garcetti*, 547 U.S. 410. *Boos*, 485 U.S. 312.

<sup>184</sup> *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 113 (1949). *Craig v. Boren*, 429 U.S. 190 (1976).

<sup>185</sup> *Boos*, 485 U.S. 312.

paradigm may protect those who express sensitive opinions that contravene restrictive standards fostering hostility and contributing to stagnant attitudes and policies.<sup>186</sup>

a. Male

The male sex may be described as being both privileged in comparison to and disadvantaged by female sexuality.<sup>187</sup> Males are politically advantaged.<sup>188</sup> In the political realm they may dominate by asserting their force, patriarchal unity, and command over the home where women are falsely promised footholds.<sup>189</sup> Yet, they may complain that female or effeminate sexuality manipulates them and conquers their virtues.<sup>190</sup> In the workplace they are less likely to prevail using theories of homosexual or heterosexual sexual harassment or hostility because they are presumed to

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<sup>186</sup> *Id.*

<sup>187</sup> *See* Stevens, 559 U.S. 460.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *See* Virginia, 518 U.S. 515.

be more politically powerful than women and gay men.<sup>191</sup> Reasonable person standards may not take specific moral traditions under consideration.<sup>192</sup> They may generalize the reasonable perspective of a homosexual male, homosexual female, heterosexual male, and heterosexual female.<sup>193</sup> The effect is that heterosexual males are unable to complain about the discomfort they feel.<sup>194</sup> A reasonable person may presume that males feel that they may complain without incurring disciplinary action.<sup>195</sup> Heterosexual males may not only feel disadvantaged because they are perceived as being unequally powerful, they may feel pressure to maintain a wall of silence to promote that image.<sup>196</sup> The image may provide the only sense of safety they feel in comparison to others whose sensitivities have been more publicly promoted in recent years.<sup>197</sup> While

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<sup>191</sup> *Id.*

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

<sup>193</sup> Craig, 429 U.S. 190.

<sup>194</sup> *Id.*

<sup>195</sup> See Garcetti, 547 U.S. 410.

<sup>196</sup> See *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 113 (1949).

<sup>196</sup> Boos, 485 U.S. 312.

<sup>197</sup> Craig, 429 U.S. 190.

men may continue to prevent the equal treatment of minorities in the workplace, the conduct of some cannot permit those who have been harmed to feel unified or be grouped with those who aggress.<sup>198</sup> Limitations on speech distort discourse and do not maintain a standardized method for thinking or behaving.<sup>199</sup>

#### b. Female

Anecdotally, women have expressed that they sporadically or predictably experience tremendous bursts of passion, worry, joy, fear, anxiety, and other emotions that prevent them from behaving in conformity with men.<sup>200</sup> Although men may have benefited from workplace conditioning for a greater number of years and may guide social and behavioral standards, women have been expected to conform rapidly to dry sentiments throughout the brief duration of the development of feminism.<sup>201</sup> Their

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<sup>198</sup> See *Virginia*, 518 U.S. 515.

<sup>199</sup> *Boos*, 485 U.S. 312.

<sup>200</sup> *Virginia*, 518 U.S. 515.

<sup>201</sup> *Id.*

points-of-view may be feminist issues and political speech.<sup>202</sup> Few women capably politicize emotional femininity and when asked to identify their emotions in legal matters they may second guess their right to liberally divulge their thought processes.<sup>203</sup> A reasonable person standard should consider the underlying unity between women and consider that betrayal may be despised.<sup>204</sup> Women who treat other women as if they have fabricated their entitlement to feel dignified, overly emotional, sensitive to mistreatment, and receptive to good treatment are considered to be outsiders.<sup>205</sup> Any standard that groups persecutors and neglectors with the majority may be constructed by those who seek to profit from the demise of sensitive, fair, and thoughtful individuals.<sup>206</sup>

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<sup>202</sup> Boos, 485 U.S. 312.

<sup>203</sup> Craig, 429 U.S. 190.

<sup>204</sup> Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982).

<sup>205</sup> See generally Mississippi Univ. for Women, 458 U.S. 718 (1982).

<sup>206</sup> See Washington v. Davis, 426 U.S. 229 (1976); Davis v. Passman, 442 U.S. 228 (1979).

## c. Trans

A trans identity may be complicated.<sup>207</sup> A reasonable trans person may instinctively be able to identify and respond to transgender and cysgender presentation.<sup>208</sup> Trans persons must disclose material facts, and yet a reasonable transperson may believe that one's gender has obviated itself.<sup>209</sup> In private matters, a reasonable transperson may genuinely and responsibly believe that one party sufficiently informed the other party of one's sex, sexuality, and gender due to the conjunctive employment of four factors. First, information is communicated as a result of the language used. For example, "I'm really a man" or "I'm really a woman;" or "I'm not original. I am altered." Second, one must gain informed consent, for example by saying "Do you think it's OK for me to be trans?" Another example is, "Before we go further, you should know more about me. I am transsexual." Third, context intimates (e.g., meeting

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<sup>207</sup> *Bostock v. Clayton County*, 590 US \_ (2020).

<sup>208</sup> *See Virginia*, 518 U.S. 515.

<sup>209</sup> *Id.*

at gay bar). Fourth, one's appearance may contribute to the communication of one's sex, sexuality, and gender. For example, a transman may be extraordinarily small, such as being 40 years old, 90 pounds, and five feet tall. A transwoman may be very tall, such as twenty two years old, 200 pounds, and six feet six inches tall.<sup>210</sup> A reasonable person knew or should have known that he or she was alternatively biologically identified by society and behaved reasonably under the circumstances; however some people do not know as a result of misinformation, intersex confusion, or state of mind.<sup>211</sup> Any reasonable person would disclose one's true sex, not deceive using gender misrepresentation.<sup>212</sup> Transpeople who do not engage in sexual conduct with suitors may rightfully argue that an overly broad reasonable person standard violates the right to privacy.<sup>213</sup> They may also argue that unsolicited attention (e.g., gift) that later invites the disclosure of

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<sup>210</sup> Craig, 429 U.S. 190.

<sup>211</sup> See generally Mississippi Univ. for Women, 458 U.S. 718 (1982).

<sup>212</sup> *Id.*

<sup>213</sup> U.S. CONST. AMEND. V.

private information under the reasonable person standard may violate the First Amendment (e.g., best female actor prize).<sup>214</sup> In private, public, criminal, civil, and other contexts, one may possess a right to explain one's knowledge of one's self.<sup>215</sup> Would-be sex partners seeking to exercise sexual rights should seek information, yet reasonable person standards cannot abridge speech rights.<sup>216</sup> A penumbra extends the right to privacy to protect people from each other not just the government (e.g., intentional infliction of emotional distress and sexual battery tort).<sup>217</sup> Gender-presenting alone, without intent to misrepresent may not violate a reasonable person standard; generally, application of the standard to a transperson's detriment may violate free speech.<sup>218</sup>

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<sup>214</sup> U.S. CONST. AMEND. I.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> U.S. CONST. AMEND. V.

<sup>218</sup> U.S. CONST. AMEND. I.

#### IV. CONCLUSION

The reasonable person standard cannot be applied to the detriment of free speech.<sup>219</sup> The First Amendment may protect people who explain themselves and express ideas that benefit the system.<sup>220</sup> The First Amendment guarantees that unpopular, but not illegal, speech will not be subjected to the legislature's control.<sup>221</sup> Norms should not incriminate, but rather, should unify and allow liberty whenever possible.<sup>222</sup> Subjective observations and experiences, such as gender, importantly may create differences that will be articulated by those who do not conform to normalized standards of reasonableness.<sup>223</sup> The First Amendment may not be violated by suppressive standards.<sup>224</sup> This Article does not encourage exceptionalism, but recognizes changing barriers.<sup>225</sup>

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<sup>219</sup> Cal. Civ. Code Ann. §§1746–1746.5 (2009). U.S. CONST. AMEND. I.

<sup>220</sup> U.S. CONST. AMEND. I.

<sup>221</sup> *Brown*, 564 U.S. 786.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> U.S. CONST. AMEND. I.

<sup>225</sup> *E.g.* *Stevens*, 559 U.S. 460.

The law must be uniform, but cannot be so rigid as to bind members of the system and citizens detrimentally to groups for the convenience of the government.<sup>226</sup> Legal standards must conform to the spirit of the law, therefore, laws that abridge expression must be narrowly tailored and use the least restrict means.<sup>227</sup> The Fourteenth Amendment protects vulnerable classes of people, but cannot be used to lure people from exercising their First Amendment right.<sup>228</sup> The Article concludes thus that the reasonable person standard, and varied adaptations, may violate the First Amendment's guarantee.<sup>229</sup>

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<sup>226</sup> *E.g.* *Jews for Jesus*, 482 U.S. 569.

<sup>227</sup> *Boos*, 485 U.S. 312.

<sup>228</sup> U.S. CONST. AMEND. XIV. *United States v. Carolene Products Company*, 304 U.S. 144 (1938).

<sup>229</sup> *Boos*, 485 U.S. 312.