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The Right to Refuse and the Obligation to Comply: Challenging the Gamesmanship Model of Criminal Procedure

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INTRODUCTION

The law of criminal procedure is shaped by the suppression motion. Courts, naturally reluctant to grant the suppression of relevant and probative evidence, invariably apply the law with an eye to the outcome. The desire to attend to results produces criminal procedure doctrine that can be, in many contexts, decidedly ungenerous to defendants. At the same time, the courts for the most part believe in, and want to reaffirm, positive law that honors the American commitment to the autonomy and privacy of its citizenry with respect to the police. The protections of the criminal procedure amendments are distinctive markers of liberty, and the courts persistently articulate a vision that accords those protections significant weight.

The courts' need to articulate an expansive vision of constitutional protection while at the same time producing desirable outcomes has generated doctrine that places the responsibility for maximizing constitutional freedoms in the hands of the defendant. An individual faced with an encounter with a police officer can protect his rights, but he must behave in a distinctive fashion to do so. Under existing doctrine, the defendant's loss of his constitutional freedoms often becomes, as a constitutional matter, his own fault. It is not that the defendant could not have protected his privacy, but that under the circumstances he has failed

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to take the necessary steps—to say or do the right thing—that would have protected it. The correct behavior, which maximizes the defendant's constitutional protection, often has two distinguishing characteristics: it is counterintuitive, and demands that the individual demonstrate an extraordinary and unlikely degree of assertiveness, autonomy, and empowerment.

The result is a curious product: what I call the "gamesmanship" model of criminal procedure. The model does three things. First, it defines rules that place the responsibility to protect rights on the defendants themselves. Second, it applies those rules so that the loss of rights is understood as the product of defendant-centered decisions like consent, compliance, or voluntary cooperation rather than police conduct. Last of all, it suggests that, because the result is the product of the defendant's own choices, the outcome is both reasonable and adequately protective of individual rights. In some cases, the courts even describe the way the defendant should have behaved if he wanted to protect his Fourth Amendment rights and avoid the ultimate seizure of evidence.

It is not only the courts that accept the gamesmanship model. The government, in turn, routinely argues that it is the individual's responsibility to avoid, defuse, or refuse interactions with police that lead to the seizure of contraband or evidence.

A distinctive example of the gamesmanship model is provided by the law governing so-called consensual encounters with police. The consensual encounter, which is deemed to be outside the protections of the Fourth Amendment, is defined as an encounter that a reasonable person would feel free to decline. The legal standard is thus defined in terms of how citizens should behave, rather than how the police should. The courts take an extremely expansive view of the reasonable person's capacity to decline such encounters, and consider a defendant's failure to express an affirmative refusal to comply the equivalent of voluntary compliance. It then becomes the defendant's failure to refuse the encounter that justifies the loss of constitutional protections.

The consensual encounter context reflects the profound pitfalls of the gamesmanship model. First, the model makes the courts and the government advocate for the view that

reasonable people can and should decline to cooperate with police. Moreover, it suggests that the smart defendant—the good player—invokes that right and refuses cooperation. The cooperator winds up portrayed as a fool or a sucker, someone who foolishly but willingly relinquished his right to be left alone. While in the context of suppression motions this may produce admissible evidence, in the long run this approach disregards the socially beneficial goal of encouraging citizens to cooperate with police. It is, moreover, inconsistent with the government's much more constrained view of the individual's right to refuse an encounter with police in other contexts, as, for example, when it seeks to prosecute an individual for violation of a statute criminalizing failure to cooperate with police.

Second, the model causes the courts, and ultimately the law, to focus on questions of how individuals should behave rather than how police should. The criminal procedure area creates a unique opportunity to focus attention on the reasonableness of law enforcement behavior. The gamesmanship model, and its focus on the defendant, abdicates the courts' role in articulating the appropriate parameters of constitutional reasonableness for law enforcement behavior in a free society.

Implicitly, many courts recognize this in their analysis of consensual encounter cases. While claiming to apply the traditional standards of the gamesmanship model and to focus on how the reasonable person would feel under the circumstances, many courts in fact look to whether police, in their view, have behaved appropriately, or to whether there has been police overreaching. This attention to police behavior has a significant analogue in the Fifth Amendment Due Process cases, where a conclusion that a statement is involuntary and constitutionally inadmissible requires a finding that there has been police overreaching. This Article concludes that the courts, in fact, are applying a more appropriate standard than the one they purport to apply. A standard that focuses on police wrongdoing rather than citizen failure is the appropriate way to counter the gamesmanship model in the context of the consensual encounter.

I. THE GAMESMANSHIP MODEL AND THE CONSENSUAL ENCOUNTER

A. *Understanding the Consensual Encounter*

To understand how the gamesmanship model works, it is first necessary to understand the context in which we will consider it—the consensual encounter.

Under the Fourth Amendment, police encounters with individuals are governed by a rubric in which particular levels of suspicion are required before certain categories of encounter are permissible. This framework creates a sort of constitutional quantum mechanics, establishing three levels of intervention and a required level of suspicion associated with each level. An intervention that exceeds the parameters of its level without a concomitant increase in the level of suspicion is impermissible.

Under this framework, probable cause justifies the arrest of a suspect, and reasonable suspicion justifies a “stop”—an intermediate interaction, short of arrest, and constrained in both duration and scope. When a police officer has no articulable suspicion at all about an individual, the officer may initiate what the courts have termed a “consensual encounter.” Police are free to initiate a consensual encounter with an individual for any reason or no reason, perhaps based on a whim or a “hunch” that cannot be supported by specific and articulable facts.

What can police do in a consensual encounter? In theory, without individualized suspicion that a person is engaging or has engaged in criminal activity, police power is limited. Officers may not, in the ordinary course, command or require a person to comply with their investigatory requests.¹ But they are free to ask for voluntary compliance with those requests. Overstepping the

1. Public safety might require a different approach to this problem in some circumstances; see, e.g., *MacWade v. Kelly*, No. 05CIV6921RMBFM, 2005 WL 3338573 (S.D.N.Y. Dec. 7, 2005) (upholding suspicionless search of containers brought onto the New York City subways under the “special needs” doctrine), *aff’d*, 460 F.3d 260 (2d Cir. 2006). The analysis here relates to what police may do in furtherance of investigating an individual’s own potentially criminal behavior.

bounds of a consensual encounter can turn it into a stop and render its fruits inadmissible.

The test for whether an encounter is consensual is whether a reasonable innocent person in the position of the individual approached would "feel free to decline the officers' requests or otherwise terminate the encounter."² The police entitlement to conduct the encounter thus turns on the notion that the individual subjected to the encounter is privileged to refuse it; an encounter that is consensual is, by definition, one a citizen is freely entitled to decline.³

Since the individual is constitutionally privileged to decline the encounter, the consequences of that refusal should be extremely limited. Courts do less well with this concept than one might expect. While they regularly articulate the principle that the refusal to comply with police requests, standing alone, should not create suspicion that justifies a stop,⁴ they do not always honor it. Courts

2. *Florida v. Bostick*, 501 U.S. 429, 436 (1991).

3. Some courts analyze the problem by asking whether an ordinary citizen could have engaged in behaviors similar to those engaged in by the police. *See, e.g., People v. Luedemann*, 828 N.E.2d 355, 360, 365 (Ill. App. 2d 2005) (finding a seizure where an officer parked his squad car in the middle of the street, approached defendant's car, and shined a flashlight on it; "private citizens cannot, and simply do not, stop their cars in the middle of the road and block traffic under normal circumstances. . . . Officer Pate's actions were consistent with those of a police officer initiating formal contact with a suspect, not those of a citizen simply stopping to have a conversation with defendant"; "Officer Pate shined a flashlight around and into [the car]. Again, private citizens do not behave in this manner."), *rev'd*, 857 N.E.2d 187 (Ill. 2006); *see also State v. Jackson*, 824 So. 2d 1124, 1126 (La. 2002) ("[T]he police do not seize a person merely by standing approximately 10 feet away and identifying themselves without taking any additional measures to assert their authority over the person that he or she would not expect from the encounter if it had occurred with an ordinary citizen."); *Smith v. Florida*, 753 So. 2d 713, 716 (Fla. Dist. Ct. App. 2000) (Altenbernd, Acting C.J., concurring) ("It is helpful to remember that [a consensual] encounter is permissible and is not regarded as a seizure because it is the equivalent of two ordinary citizens engaging in a personal discussion."). This may be the product of a reference in Professor LaFave's treatise, where he indicates that "the critical inquiry would be whether the policeman, although perhaps making inquiries which a private citizen would not be expected to make, has otherwise conducted himself in a manner consistent with what would be viewed as a nonoffensive contact if it occurred between two ordinary citizens." 3 WAYNE R. LAFAVE, *SEARCH AND SEIZURE*, §9.2, at 53 (1978).

4. *See Illinois v. Wardlow*, 528 U.S. 119, 125 (2000) ("[A]ny 'refusal to cooperate, without more, does not furnish the minimal level of objective

routinely permit failure to comply to be considered in assessing whether there was adequate suspicion to support a stop.⁵ Ironically, courts sometimes rely upon this privileged refusal to decline the police encounter as the sole justification for a stop.⁶ Police, even less impressed with

justification needed for a detention or seizure.”) (quoting *Florida v. Bostick*, 501 U.S. 429, 437 (1991)); see also *Brown v. State*, 714 So. 2d 1191, 1193 (Fla. Dist. Ct. App. 1998) (“The mere fact that a citizen refuses to comply with an officer’s request in a consensual encounter cannot be sufficient to provide the officer with reasonable suspicion”); *Outlaw v. People*, 17 P.3d 150, 157 (Colo. 2001) (“[W]hen a police officer approaches an individual in a public place and seeks to ask him questions, the individual may ignore the officer and proceed on his way. . . . Accordingly, the fact that Outlaw and his companions began walking away from the patrol car after one of them apparently noticed the car fails to provide reasonable suspicion.”); *Commonwealth v. Clarke*, 776 N.E.2d 1039 (Table), No. 01-P-310, 2002 WL 31322649 (Mass. App. Ct. Oct. 15, 2002) (“[T]he defendant’s refusal to stop and talk to the officers when Officer Dunn stated ‘stop—we’re police officers—we want to talk to you,’ may not be considered in determining whether there was reasonable suspicion to stop him. When police officers have no reasonable suspicion for an investigatory stop, it is a defendant’s right to ignore the officer. . . . As a result, in such a situation, refusing to answer an officer’s initial questions ‘cannot provide reasonable suspicion for justification of a detention or seizure.’”) (quoting *Commonwealth v. Barros*, 755 N.E.2d 740, 746 (Mass. 2001)).

While the refusal to comply with police requests cannot *alone* create reasonable suspicion, whether it can be considered at all—and can add to what would otherwise be an insufficient quantum of suspicion—is unclear.

5. See, e.g., *Baker v. Commonwealth*, 5 S.W.3d 142 (Ky. 1999). An officer saw Baker standing on the street talking to a known prostitute in a high-crime area. His hands were in his pockets. The officer asked Baker to remove his hands from his pockets. He did not do so. The officer then ordered Baker to remove his hands from his pockets. He did so and threw two items of contraband to the ground; he was charged with possession of the contraband. The court concluded that the order to remove his hands from his pockets constituted a seizure but that, under the circumstances, Baker’s refusal to comply with the request created reasonable suspicion. See generally *id.* If, however, there was no suspicion of Baker at the time of the order, Baker was entitled to refuse to comply with the request that he remove his hands from his pockets; it is therefore unclear how his failure to do so added to the quantum of reasonable suspicion. See also *United States v. Adams*, 137 F. Supp. 2d 240, 247 (W.D.N.Y. 2001).

6. See, e.g., *United States v. Breland*, 356 F.3d 787, 791 (7th Cir. 2004) (once defendant fled from an attempt by police to initiate a consensual encounter, “the officers undoubtedly had reasonable suspicion to pursue Breland in order to conduct a *Terry* stop”); *United States v. Adams*, 137 F. Supp. 2d 240, 247 (W.D.N.Y. 2001) (statement to individual on a bike, “Hey you on the bike,” was an attempt to institute a consensual encounter, but defendant’s “subsequent flight from the encounter on his bicycle,” in view of a recent bank robbery, “created reasonable suspicion that criminality was afoot”); *State v. Biehl*, 2004-

this principle than the courts, plainly view a failure to comply as suspicious, and treat resistance to an attempt to initiate a consensual encounter as sufficient to create reasonable suspicion.⁷

Many encounters between police and individuals on the street are supported by little or no suspicion at the outset. The consensual encounter is accordingly the constitutional framework that governs thousands of daily on-the-street encounters between police and individuals. The area is therefore an appropriately significant context for considering the gamesmanship model.

B. The Gamesmanship Model and the Consensual Encounter: Rules of Reasonableness

As noted in Part I.A, the rule that delineates what constitutes a consensual encounter is defined in terms of how reasonable citizens would feel they could respond to police conduct. What may a police officer who lacks any articulable suspicion ask without running afoul of the Fourth Amendment? Anything which a reasonable person would feel free to decline. Accordingly, rather than defining the rule in terms of how the officer ought to behave, the law turns the question around, making the legitimacy of police action turn on the anticipated perception of the reasonable person with regard to her right to refuse the interaction.

Suppression motions, accordingly, create curiously counterintuitive litigation postures. Individuals argue that

Ohio-6532, No. 22054, 2004 WL 2806340, at *7 (Ohio Ct. App. Dec. 8, 2004) (noting that part of reasonable suspicion was based on the possibility “that at least one of these boys, who had already established their belligerence by refusing to answer [the officer’s] questions or consent to the search, might choose to respond with violence or at least attempt to flee into the surrounding darkness”).

7. See, e.g., *State v. Kwiatkowski*, 519 S.E.2d 43, 45 (Ga. Ct. App. 1999) (police called drug dog because individuals, parked “in a ‘high drug area’ in an ‘out-of-state vehicle’” declined permission to search) (“You know, if you’re not holding, you don’t say no [to a request to search]. You don’t care.”). The court rejected the government’s argument that the refusal to consent to a search of the car provided reasonable suspicion. *Id.* at 46; see also *Graves v. City of Coeur d’Alene*, 339 F.3d 828, 841-42 (9th Cir. 2003) (defendant, police officer in § 1983 action, argued that one factor giving rise to probable cause to search plaintiff’s backpack was that plaintiff did not consent to search of the backpack; court held that the factor could not properly be considered in determining probable cause).

they lacked free will, that interactions with police were compelled, and that the situation was coercive. By contrast, the government argues that reasonable people feel a broad and profound freedom to decline a wide range of contacts with police. The litigation positions envision radically different perceptions of the social context of police-citizen interaction. To defendants, encounters with police are displays of hierarchy and authority, in which submission is required, resistance is dangerous, and requests are really orders, however politely couched. To the government, in the suppression context, encounters with police are voluntary social interactions, in which individuals stand as equals with police and are free to refuse, resist, or ignore what are merely invitations to voluntary cooperation.

The courts' inquiry into the reasonable person's view of the encounter is further encumbered, because the standard requires them to assess the situation from the perspective not just of the reasonable person, but the reasonable *innocent* person. The justification for this appears to be to reject the otherwise quite convincing argument that the suspect must have felt compelled to comply because no rational person who was concealing contraband would voluntarily disclose it.⁸ Accordingly, the standard does not

8. *United States v. Perez*, 198 F. Supp. 2d 406, 414 (S.D.N.Y. 2002). *Perez*, who consented to open a cooler and show three law enforcement officers twenty-six kilograms of cocaine, argued that he had "no choice" but to comply with the officer's requests, claiming, "common sense and ordinary human experience dictate that no rational person who is knowingly carrying 26 kilograms of cocaine would willingly consent to a [search]." *Id.* The court rejected this argument on the ground that "the 'reasonable person' test presupposes an *innocent* person." *Id.* (quoting *Florida v. Bostick*, 501 U.S. 429, 438 (1991)).

Without this requirement, many cases make no sense. Consider, for example, *Whisenant v. State*, 521 S.E.2d 204 (Ga. Ct. App. 1999). Mr. Whisenant and a companion were sitting on a wall in a high crime area. An officer drove up and asked if he lived there (he answered no), if he had any identification on him (again, he answered no), and if he had "any dope, any guns, anything" on him. *Id.* at 205. Mr. Whisenant responded that he had a "shooter" with him, which was understood to mean a crack pipe. *Id.* The resulting patdown detected the pipe, which contained cocaine residue, for possession of which he was convicted. *Id.* Most people, even if asked, do not ordinarily volunteer the information that they are in possession of contraband in an entirely consensual manner. The insistence that courts consider only how a reasonable innocent person in the situation would feel makes irrelevant the most rational argument: that people who know they are committing a crime rarely volunteer that information to police absent some sense of obligation to do so.

ask the courts to assess whether a reasonable person in the defendant's situation would have believed himself free to decline the encounter, but whether a person who knew herself to be guilty of nothing would have.

C. The Gamesmanship Model and the Consensual Encounter: Autonomy and Accountability

As Part I.B demonstrates, the standard for the consensual encounter looks to the expectations of the reasonable person to define what constitutes a Fourth Amendment seizure. On its face, the standard itself seems perhaps overly generous to defendants, because one would assume that it would treat a large number of interactions between police and citizens as compelled rather than consensual. Most people do not, in fact, feel free to walk away when a police officer has asked them a question or otherwise indicated a desire for their cooperation, whether those views are motivated by fear of the consequences, by simple good manners, or by an internal psychological compulsion to obey the direction of authority figures.

Before *Bostick*, judges sometimes acknowledged this. See, e.g., *State v. Waller*, No. 1685, 1984 WL 3468, at *4 (Ohio Ct. App. 1984) (Grey, J., dissenting) ("I further dissent on the absolutely irrational position taken by the appellant State of Ohio in this case, i.e. that defendant's actions were consensual. According to the State's theory Waller voluntarily approached the police car when called, told the officers what he had, agreed to have it checked out with the stolen property lists, knowing all the time that he had the right to refuse to obey the police officer. . . . Thus, under the State's theory, Waller, knowing he had the right to refuse, that he was not under arrest and that he could leave at any time, voluntarily turned over property he knew to be stolen to a police officer. Such a contention boggles the mind!").

Another possible justification for the "reasonable innocent" standard may be that innocent people are less knowledgeable than others about the practices of law enforcement. See, e.g., *United States v. Williams*, 356 F.3d 1268 (10th Cir. 2004). In *Williams*, police with a drug detection dog allowed the dog to sniff an individual's waist and groin. The dog alerted to the presence of drugs. The defendant argued that this behavior constituted an illegal detention; the dog's obvious alert meant that he was not free to go. The court concluded that the benchmark was the perception of an innocent person, and that "[a] reasonable innocent person in these circumstances would not feel sufficiently accused by such behavior to transform the encounter into a seizure." *Id.* at 1275. A dissent questioned this conclusion: "When, as in this case, a drug dog shoves its nose in a person's groin, and the person is told that the dog is searching for drugs, the notion that an innocent person would not feel constrained—but free to leave unmolested—strains my credulity." *Id.* at 1276 (McKay, J., dissenting).

In the context of suppression litigation, however, the application of that standard produces results entirely consistent with the gamesmanship model. Courts are quick to conclude that the reasonable person has—and believes that he has—an extraordinary amount of freedom to decline encounters with police. Faced with arguments in suppression motions that defendants felt that they had no choice but to cooperate with police under varying circumstances, the courts describe, at the government's urging, a free-wheeling universe in which ordinary individuals regularly turn their backs, and feel free to decline, ignore, or reject the direction of police.

The hypothetical reasonable person that courts posit in these cases seems to possess an extraordinarily optimistic level of autonomy and confidence. This may, in part, be a function of the fact that judges, whose social status makes them confident social equals or superiors with regard to law enforcement, may be singularly uninformed about the situation of the reasonable person in the ordinary street encounter. Be that as it may, the reasonable person is, in the courts' view, a libertarian spirit with nothing to hide, and a strong and confident certainty of her capacity to decline a police request.⁹

Because the courts take such an expansive view of the reasonable person's capacity to decline police encounters, they treat a vast range of such encounters as voluntary and consensual. In any given case, the defendant's failure to decline the encounter is invariably the defendant's own fault—the product of citizen behavior rather than police behavior.

In the view of the courts, reasonable people feel compelled to obey the police only when they are ordered to

9. Edwin J. Butterfoss, *Bright Line Seizures: The Need for Clarity in Determining When Fourth Amendment Activity Begins*, 79 J. CRIM. L. & CRIMINOLOGY 437, 439 (1988) (noting that the standard has constructed "a highly artificial 'reasonable person,' who is much more assertive in encounters with police officers than is the average citizen"); see also *id.* at 455 ("[L]ower courts . . . are engaged in defining the parameters of an artificial reasonable person that has little contact with reality."). I routinely ask my law students whether they would feel free to decline a request such as the one made in *Florida v. Bostick*, 501 U.S. 429, 431-32 (1991), and almost uniformly, they indicate that they would not, notwithstanding my assumption that law students are among the most educated and empowered of Americans.

do so. Thus, police commands or orders create seizures.¹⁰ The quintessential command is the order to stop,¹¹ though many other orders—to take one's hands out of one's pockets, to get out of or into a vehicle, or to go someplace you do not otherwise plan to go—are interpreted by the courts as creating seizures as well.

Requests, by contrast, do not create seizures.¹² This is usually true regardless of what is requested, unless the request is quite extreme. A request to accompany police to

10. For cases holding orders to stop to be seizures, see, e.g., *Commonwealth v. Smith*, 772 N.E.2d 1084 (Mass. App. Ct. 2002); *State v. Beauchesne*, 868 A.2d 972 (N.H. 2005); *State v. Crandall*, 108 P.3d 16 (Or. Ct. App. 2005), *rev'd on other grounds*, 136 P.3d 30 (Or. 2006). For cases holding other orders to be seizures, see, e.g., *Castle v. State*, 999 P.2d 169, 170 (Alaska 2000) (order to "get back in the car and stay there" constituted a seizure); *Ippolito v. State*, 789 So. 2d 423 (Fla. Dist. Ct. App. 2001) (order to get out of car constituted a seizure); *Baker v. Commonwealth*, 5 S.W.3d 142 (Ky. 1999) (order to remove hands from pockets a seizure); *State v. Sparr*, 688 N.W.2d 913, 918-19 (Neb. Ct. App. 2004) (officer pointing at defendant and telling her "No," when she tried to leave the area, effected a seizure); *State v. Morales*, 2005-NMCA-27, 107 P.3d 513, 517 (N.M. Ct. App. 2005) (order to keep hands on the wall effected a seizure); *State v. Sanchez*, 2005-NMCA-81, 114 P.3d 1075, 1079 (N.M. Ct. App. 2005) (order that defendant come out of a shed constituted a seizure); *State v. Cook*, 2004-Ohio-4793, No. 20427, 2004 WL 2008776, at *3 (Ohio Ct. App. Sept. 10, 2004) (order that defendant open her hand a seizure); *State v. Smith*, 2005-Ohio-2560, No. 04AP-859, 2005 WL 1220742, at *22 (Ohio Ct. App. May 24, 2005) (order to "come back here" constituted a seizure); *State v. Ruiz*, 101 P.3d 824 (Or. Ct. App. 2004) (order to remove hands from pockets a seizure); *Commonwealth v. McClearse*, 750 A.2d 320 (Pa. Super. Ct. 2000) (stating to individual in parked car, "Police Officer. Stay in your vehicle," constituted a seizure).

11. *Commonwealth v. Clarke*, 776 N.E.2d 1039 (Table), No. 01-P-310, 2002 WL 31322649, at *2 (Mass. App. Ct. Oct. 15, 2002) ("The defendant was seized in the constitutional sense when Detective Dunn stated to him 'stop—we're police officers—we want to talk to you.' A police officer's use of the word 'stop' conveys to a reasonable person that compliance is not optional and that he or she is not able to leave.").

12. See, e.g., *United States v. Lockett*, 406 F.3d 207, 209 (3d Cir. 2005) (asking individual sitting on a bench in the Amtrak station if he would "answer a few questions" not a seizure); *Chapman v. State*, 780 So. 2d 1036, 1037-38 (Fla. Dist. Ct. App. 2001) (police statement "Come here for a minute, can I talk to you?" initiated a consensual encounter); *Commonwealth v. Thomas*, 708 N.E.2d 669, 672 (Mass. 1999) (asking defendant his name and address, and whether he had any money, did not create a seizure). *But see* *State v. Egan*, 739 A.2d 469, 473-74 (N.J. Super. Ct. 1999) (holding that officer approaching a parked vehicle, displaying his badge, and asking the driver for his "driving credentials" constituted a seizure; "his request following his assertion of police authority was likely perceived (indeed most likely intended) to be a command . . . and a refusal to comply or depart the scene was not likely to be tolerated").

the precinct for investigatory questioning is not a seizure; a reasonable person would not believe that such a request constrained his freedom.¹³ A request for identification, and retaining that identification to run a warrant check, is often not treated as a seizure, for reasonable people feel they can decline such requests.¹⁴ In the courts' view, the reasonable person feels free to refuse anything that should properly be understood as a request, regardless of the fact that it comes from a police officer.¹⁵ The courts are impressed with

13. *People v. Lawes*, 790 N.Y.S.2d 481, 482 (App. Div. 2005) (“[D]efendant was not seized when police detectives] approached him and requested that he accompany them to the precinct for investigatory questioning. The detectives were in plain clothes, no weapons were drawn, no force was used, and no commands were given. A reasonable person under the circumstances would not have believed that the conduct of the detectives or their request was a significant limitation on his or her freedom.”).

14. *People v. Jenkins*, 691 N.W.2d 759 (Mich. 2005) (request for identification and retaining it to run a warrant check not a seizure). There is some disagreement about identification; asking to see identification is ordinarily viewed as a consensual request, *see, e.g.*, *People v. Cartwright*, 85 Cal. Rptr. 2d 788, 794 (Ct. App. 1999) (“[P]assenger in vehicle subjected to traffic stop was not seized when the officer requested her identification, because] he asked Cartwright if she had any identification. Because nothing in the content or form of the question imparted any compulsion to comply, there is no basis for finding Cartwright was under the kind of restraint associated with a Fourth Amendment detention. . . . [H]er decision to cooperate by producing some sort of identification paper appears to have been wholly consensual.”); *cf. J.P. v. State*, 855 So. 2d 1262, 1264 (Fla. Dist. Ct. App. 2003) (reasonable juvenile would believe he was compelled to respond to officer’s request for identification). Courts disagree about whether keeping the identification to run a warrant check turns that consensual request into a seizure. While most courts treat it as consensual, some consider it a seizure. *Compare* *People v. Cook*, No. C047085, 2005 WL 567324, at *5 (Cal. Ct. App. Mar. 10, 2005) (warrant check does not “automatically convert a consensual encounter into a detention.”), *People v. Bennett*, 80 Cal. Rptr. 2d 323 (Ct. App. 1998) (request that defendant wait in the back of the police car while the officer checked for outstanding warrants generated a consensual encounter), *State v. Reinders*, 690 N.W.2d 78, 83 (Iowa 2004) (no seizure occurs when officer asks for identification or retains it to check for outstanding warrants), *and McLellan v. Commonwealth*, 554 S.E.2d 699 (Va. Ct. App. 2001) (request for identification and retaining it to run a warrant check was consensual encounter), *with State v. Page*, 103 P.3d 454, 457 (Idaho 2004) (“[A] limited detention does occur when an officer retains a driver’s license or other paperwork of value.”), *and Reynolds v. State*, 746 A.2d 422 (Md. Ct. App. 1999) (initial request for defendant’s name was not a seizure, but implicitly expecting him to wait while officers ran a warrant check on his identification for five minutes turned the encounter into a seizure).

15. In fact, this is not even an accurate picture of many social interactions; social norms make many “requests” in fact simply commands: “Will you step

politeness and tend to view well-mannered behavior as consistent with requests rather than commands,¹⁶ even though this disregards the fact that many “requests” are in fact simply commands: “Will you step over here, please?” may not really be a request that an individual in an interaction with a police officer is free to refuse.¹⁷ Conversely, ambiguous statements—construable as orders or as requests—are more likely to be deemed orders if they are rude or hostile¹⁸ or if they seek something highly intrusive.¹⁹

this way, please?” or “Can you please hold?” are not really requests we are free to refuse, even though as a matter of language they may be couched that way.

16. See, e.g., *People v. Robinson*, No. D036905, 2002 WL 27127 (Cal. Ct. App. Jan. 10, 2002). Robinson was sitting in a legally parked car. Two officers approached the car, and one said to Robinson, “Would you mind stepping out of the car?” *Id.* at *3. Robinson complied, and complied with a further request for proof of identification. The information revealed an outstanding warrant on Robinson; police then asked permission to search Robinson’s car and found cocaine. Robinson’s motion to suppress was denied. *Id.* at *1. “Krouss asked, rather than commanded, Robinson to step out of and move to the back of the car,” and “Robinson willingly cooperated with Krouss’s requests.” *Id.* at *2. There is a dissent that disparages the notion that this was a consensual encounter. *Id.* at *3-4 (McDonald, J., dissenting). But see *United States v. Johnson*, 326 F.3d 1018, 1022 (8th Cir. 2003) (holding that where officers interrupted an individual in conversation, asked him to come and speak to the officers, stood on either side of the individual, asked for his identification, and took possession of it, the individual was seized). The district court was “swayed by the fact that Engeldinger politely questioned Johnson rather than made demands of him. The district court’s focus on Engeldinger’s tone and language is misguided. We again reiterate that it is the totality of circumstances, not one particular detail, that we consider when determining if a seizure occurred.” *Id.* at 1022.

17. *Smith v. Florida*, 753 So. 2d 713, 717 (Fla. Dist. Ct. App. 2000) (Altenbernd, Acting C.J., concurring) (“I realize that case law is beginning to develop distinctions based upon an officer’s rhetoric. . . . I am not entirely convinced that a reasonable person stopped by an officer believes that he is free to leave if the officer says, ‘May I look in your mouth?’ but has a different understanding if the officer says, ‘Open your mouth.’ . . . All people, including police officers, communicate the level of their authority to control others both verbally and non-verbally.”) (citation omitted).

18. See, e.g., *Brown v. City of Oneonta*, 221 F.3d 329, 340 (2d Cir. 2000) (allegation that an officer said to plaintiff, “What, are you stupid? Come here. I want to talk to you,” coupled with a demand to show his hands, sufficiently alleged a Fourth Amendment seizure).

19. See *State v. Newton*, 737 So. 2d 1252 (Fla. Dist. Ct. App. 1999) (request that defendant open his mouth so officer could search for drugs inside his mouth was a seizure).

Even on their own terms, these rules seem questionable. The line between requests and orders can be hard to discern.²⁰ Is “hey, come over here” a request or an order? Would the addition of a word or two appreciably change our understanding of the character of the phrase? Even assuming the legitimacy of the test, some decisions are plainly inconsistent with it.²¹ Moreover, conclusions that turn on the specific language used in a street encounter place significant importance on what are certain

20. See, e.g., *In re D.T.B.*, 726 A.2d 1233 (D.C. Cir. 1999) (“come here,” stated twice in a “stern and commanding tone,” resulted in a seizure when defendant submitted); *Popple v. State*, 626 So. 2d 185 (Fla. 1993) (request that defendant get out of car was really a demand and effected a seizure when defendant complied); *People v. Dent*, 797 N.E.2d 200, 203 (Ill. App. Ct. 2003) (“wait a minute,” followed by approach of a number of officers as defendant sought to enter a residence, constituted a seizure); *Dowdell v. State*, 747 N.E.2d 564, 565 (Ind. 2001) (statement “hey come here” constituted a seizure); *Jones v. State*, 572 A.2d 169, 170, 172 (Md. 1990) (statement by officer that was either “Hey, could you come here,” “Hold on a minute,” or “Hey, wait a minute” effected a seizure); *State v. Quezada*, 681 A.2d 79, 81 (N.H. 1996) (holding, over dissent, that police call to defendant, “Hey, you, stop” followed by the statement, “Hey, I want to speak to you,” constituted a seizure because the second statement, “in conjunction with the first . . . fairly indicated that compliance was mandatory”).

21. See, e.g., *People v. Kennedy*, No. F045610, 2005 WL 15193 (Cal. Ct. App. Jan. 4, 2005). In *Kennedy*, a deputy sheriff observed the defendant walking by and thought he seemed “unusually interested” in the officer’s presence. *Id.* at *1. The deputy said to the defendant, “[w]hat are you doing tonight?” *Id.* at *2. The defendant turned the right side of his body away from the deputy. He lifted his right hand up and under the jacket to the area of his waistband and pocket. The deputy said “[l]et me see your hands.” *Id.* The defendant took his hand out of his pocket, slid it down his leg, and dropped items on the ground, which proved to be a magnetic key box containing methamphetamine. The defendant claimed that the command to take his hands out of his pocket turned the encounter into a seizure. The court disagreed: “Baldwin neither commanded defendant to stop nor to approach. He merely told defendant to take his hand back out of his pocket. No reasonable person in these circumstances would think himself not free to leave.” *Id.* at *3. One possible basis for the court’s misunderstanding here is the standard it applied—whether Reynolds felt “free to leave.” *Id.* The federal standard defining when a seizure occurs was originally articulated as whether a reasonable individual in the defendant’s situation would have felt “free to leave,” see *United States v. Mendenhall*, 446 U.S. 544, 545 (1980), but was revised in *Bostick* to the current standard: whether a reasonable person would feel free to decline the request or terminate the encounter. *Florida v. Bostick*, 501 U.S. 429, 436 (1991). In situations like this one, the question for a person who has been told by an officer, “let me see your hands,” is not whether a reasonable person in this situation would be free to leave, but whether he would feel free not to do what he has been told. *Kennedy*, 2005 WL 15193 at *3.

to be different recollections of the precise language and tone of voice employed by officers. This in turn relies on credibility determinations about whose version of events to believe.²² There are also some fuzzy areas, where the ambiguity of the police message makes the answer unclear: the repeated request,²³ conduct plus a request,²⁴ or requests coupled with a show of force.²⁵ Symbolic conduct is parsed

22. See, e.g., *State v. Taylor*, 118 A.2d 36, 40 (N.J. Super. Ct. App. Div. 1955) ("There is an extreme variation, if not a complete contradiction, between the testimony of the two Newark police officers involved and that of defendant and his four supporting witnesses.").

23. In some circumstances, a request, when repeated, is treated as an order and results in a seizure. The issue seems to be whether the repetition of the request conveys a message that ignoring the request was impermissible and that compliance is in fact required. See, e.g., *Commonwealth v. Barros*, 755 N.E.2d 740, 742, 745 (Mass. 2001) (officer's first statement to defendant, "[h]ey you . . . I want to speak with you," did not amount to a seizure, but when the defendant ignored the request and the officer walked up to the defendant, pointed at him and said, "[h]ey you. I wanna talk to you. Come here," that amounted to a seizure; the officer "was communicating what a reasonable person would understand as a command that would be enforced by the police power"). But see *United States v. Barry*, 394 F.3d 1070 (8th Cir. 2005) (fact that officer knocked on window of vehicle three times "did not amount to a show of authority such that a reasonable person would believe he was not at liberty to ignore Sergeant Brother's presence and go about his business"; suspect ignored the officer twice but rolled down the window the third time); *United States v. Torres-Guevara*, 147 F.3d 1261 (10th Cir. 1998) (fact that request to consent to a search was made twice did not render the encounter nonconsensual) ("[T]he officers did nothing to indicate to Torres-Guevara that she was required to agree to be searched or to answer [the officer's] questions."); *Edge v. State*, 603 S.E.2d 502 (Ga. Ct. App. 2004) (officer "requested that Edge come to him" and when Edge ignored him, said "hey" and again requested that he stop; court concluded the encounter was consensual and noted: "That the officer called out to Edge twice does not change our analysis").

24. Compare *Outlaw v. People*, 17 P.3d 150, 153-54 (Colo. 2001) (officer calling defendant over to the car, after pulling the police vehicle onto the sidewalk and following five feet behind defendant for a distance of twenty or thirty feet, constituted a show of authority and amounted to an investigatory stop), and *State v. Patterson*, 2005 ME 26, 868 A.2d 188, 188 (Me. 2005) (tapping on a car window and asking the driver to roll down the window constituted a seizure), with *Purce v. United States*, 482 A.2d 772, 777 (D.C. 1984) (tapping on window and asking occupant to show identification was not a seizure).

25. See, e.g., *United States v. Smith*, 423 F.3d 25, 27, 30 (1st Cir. 2005) (officers asked a man whether he lived in the house where he was sitting, asked why he was sitting there, emerged from their patrol car, physically boxed in the individual, and asked for his identification; court held encounter was consensual); *Stith v. Commonwealth of Virginia*, No. 2394-03-2, 2005 WL 41529, at *5 (Va. Ct. App. Jan. 11, 2005) (holding over a dissent that four armed

with care. In the most subtle interpretation of expressive police conduct, approaching a stopped vehicle with the blue lights on is ordinarily deemed a seizure, while approaching it with a white searchlight or flashlight creates a consensual encounter.²⁶

In many situations deemed consensual, most of us would have profound doubts about whether the individual in question voluntarily participated in the encounter. Consider, for example, *People v. Robinson*.²⁷ Mr. Robinson was sitting in a legally parked car. Two officers approached the car, and one said to Mr. Robinson, "Would you mind stepping out of the car?"²⁸ Mr. Robinson complied, and complied with a further request for proof of identification. The information revealed an outstanding warrant on Mr. Robinson; police then asked permission to search Mr. Robinson's car and found cocaine. Mr. Robinson's motion to suppress was denied; the court concluded that the situation was entirely consensual. The officer "asked, rather than commanded, Robinson to step out of and move to the back of the car," and "Robinson willingly cooperated with [the officer's] requests."²⁹ The court viewed Mr. Robinson as completely free to decline the officer's "request" for identification.³⁰ Or, consider *United States v. Laboy*,³¹ in

officers standing in a semicircle three to four feet from an individual and questioning him about criminal conduct was a consensual encounter).

26. For cases holding that turning on the blue lights constitutes a seizure, see *Stevens v. State*, No. CACR 04-919, 2005 WL 1231713, at *2, *4 (Ark. Ct. App. May 25, 2005); *State v. Morris*, 72 P.3d 570, 570 (Kan. 2003) (activation of emergency lights when officers pulled up behind parked vehicle constituted a show of authority and rendered encounter a seizure); cf. *United States v. Mikulski*, 139 F. Supp. 2d 1204, 1206, 1210-11 (D. Utah 2001) (where police drove up to a pickup truck without blocking it or using emergency lights, two officers in plain clothes approached the truck, one on either side, identified themselves as police officers, and showed their badges, and asked for identification, the encounter was consensual), *aff'd*, 317 F.3d 1228 (10th Cir. 2003).

27. No. D036905, 2002 WL 27127 (Cal. Ct. App. Jan. 10, 2002). Many of these seizure decisions are unpublished. In California, this means litigants are precluded from citing or relying on them. CAL. R. CT. 976, 977. While this might suggest the cases are so factually specific that they lack precedential value, in fact the same stylized fact situations recur frequently.

28. *Robinson*, 2002 WL 27127, at *1.

29. *Id.* at *2.

30. "Krouss did not order Robinson to surrender his identification card nor did he use physical force, threats or coercion to obtain Robinson's card. Instead,

which the court held that an officer's gesture to an eighteen-year-old indicating that the officer wanted the young man to come to him was not a seizure, because "a reasonable person would have felt free not to cross the street and encounter" the beckoning officer.³²

As the reasonableness standard is applied in the suppression context, it appears that individuals, in the view of the courts, participate voluntarily in all kinds of interactions that incriminate them,³³ and do so under circumstances in which reasonable people would know that they are not obliged to do so. A person carrying a cooler containing twenty-six kilograms of cocaine felt no compulsion to agree when law enforcement officials asked to look inside his cooler, but simply participated in a consensual encounter.³⁴ A man who agreed to be subjected

Robinson voluntarily gave his identification card to Krouss in response to Krouss's request, which Robinson was free to decline." *Id.*

31. 979 F.2d 795, 799 (10th Cir. 1992) (officer gesturing to eighteen-year-old man to come to him, while three other men were being placed under arrest, not a seizure). Noted the dissent:

Given our society's propensity to obey the reasonable requests of police officers, I believe common sense is ignored by holding the actions of the police officer in signaling Mr. Laboy to cross the street and appear in front of the officer were not inherently coercive. A nonverbal hand signal ordering a person to cross a street and travel 100 feet to the police officer's presence would not lead a reasonable person to believe he or she was free to ignore the police officer's directives and questions.

Id. at 800 (Brorby, J., dissenting).

32. See also *State v. Jones*, 2002-Ohio-1109, No. 20810, 2002 WL 389055, at *1 (Ohio Ct. App. Mar. 13, 2002) (when officers approached a group and Jones and another man walked away, officers "called from the window of the cruiser" and "asked him to return to the group," which he did; Jones' rejoining of the group was voluntary and resulted in a consensual encounter).

33. See, e.g., *People v. Ellison*, No. A098273, 2003 WL 21321834, at *4 (Cal. Ct. App. June 10, 2003) (holding encounter consensual when officer asked defendant what was going on, asked some other questions, and "asked Mr. Ellison if he could put his hands behind his head so I could pat search him for weapons and he did so"); *State v. Poole*, 730 So. 2d 340, 341-42 (Fla. Dist. Ct. App. 1999) (in response to question by officer whether defendant "had any narcotics," defendant answered "yes," and pulled homemade crack pipe from her pants; court concluded this was "purely consensual" encounter).

34. *United States v. Perez*, 198 F. Supp. 2d 406, 412 (S.D.N.Y. 2002) (individual who was followed into an elevator by three law enforcement agents, who was asked by the agents if they could look into the large plastic cooler he had with him, who gave consent, and who told the officers, when they asked, that the bricks inside were narcotics—twenty-six kilograms of cocaine—

to a patdown for weapons was simply participating in a consensual encounter, even though it revealed his possession of crack cocaine.³⁵

On occasion, the courts go even further in the gamesmanship direction. When a defendant claims that he was required to comply with a police request, courts sometimes shift the burden to the individual stopped to affirmatively assert the desire to leave. Under this approach, the right to decline must be asserted to determine whether it will be honored.³⁶ Consistent with the gamesmanship model, it is the defendant's failure to indicate the desire to leave that resulted in the seizure of evidence. In the absence of such a request, courts deem the encounter consensual.³⁷

participated in consensual encounter) ("[P]olice did nothing more than ask Perez one question in the lobby and one question inside the elevator in a casual and relaxed manner.").

35. *State v. Hardin*, 2005-Ohio-130, No. Civ. A. 20305, 2005 WL 78702, at *3 (Ohio Ct. App. Jan. 14, 2005) (interaction in which officers asked Hardin his name, asked for identification, asked if he had weapons, and asked to perform a patdown for weapons which revealed crack cocaine was consensual encounter; officer "merely asked Hardin some questions and requested some information from him;" there was no "display of physical force or authority that would have caused a reasonable person in Hardin's position to believe that he was not free to decline [the officer's] requests or otherwise terminate the encounter").

36. *See, e.g., People v. Cartwright*, 85 Cal. Rptr. 2d 788, 795 (Ct. App. 1999) ("Her argument the officer *would* have stopped her had she tried to leave the area is unavailing because it is based solely upon speculation. The burden is on the individual to assert her right to terminate the encounter, and Cartwright never asserted her right. If she had, and the officer *then* decided to stop her, the Fourth Amendment would have been engaged. But she made no such attempt.").

37. *See, e.g., People v. Lippert*, No. E034959, 2005 WL 1539584, at *4 (Cal. Ct. App. June 30, 2005) ("[N]othing in the record shows that Detective Siebert would have prevented defendant from simply asserting his preference not to talk and walking away. Because Detective Mason had no information connecting defendant with the crime, the officers had no basis to detain him. If he told them that he did not wish to speak with them, the officers could not have forced an interview. If so, that would have been an unlawful detention."); *People v. Cook*, No. C047085, 2005 WL 567324, at *5 (Cal. Ct. App. March 10, 2005) (holding that there was no seizure when the individual was approached by a deputy who asked for his name, date of birth, and parole status and then ran a records check) ("The record does not reflect how long the records check took. There is no evidence, however, that defendant expressed a desire to leave or otherwise terminate the encounter."); *State v. Kwiatkowski*, 519 S.E.2d 43, 45 (Ga. Ct. App. 1999) (individuals who were parked and who gave their

Such requests would not inevitably solve the problem, however. Perversely, courts sometimes note a defendant's decision to assert his right to refuse as proof of the fact that he felt empowered to refuse, making the encounter one a reasonable person could have refused and therefore making it consensual.³⁸ Under this approach, a request to terminate the encounter makes it consensual, while the absence of such a request also reflects consent. This "heads I win, tails you lose" environment invokes a tremendously expansive and highly unrealistic view of individual autonomy and empowerment in the traditional street encounter. It also makes it possible to place the responsibility for the encounter and its result squarely on the shoulders of the defendant, who, regardless of the circumstances, could have achieved a different outcome if only he had done the right thing.

There is another gamesmanship component to the consensual encounter standard. While the standard presumes that a reasonable person knows when he is free to decline an officer's requests, as a legal matter that freedom turns, in part, on the officer's level of suspicion. If the officer's observations do not amount to reasonable suspicion, then the individual is free to decline the encounter. On the other hand, if the officer has reasonable suspicion, he has the authority to subject the individual to a stop and to require compliance if the individual refuses. But the individual, even assuming he understands the governing legal principles, has no way of knowing how much suspicion the officer has. Walking away may be constitutionally protected, or it may be a criminal act; which

drivers' licenses to police were free to leave—"all they had to do was ask"); see also *Cartwright*, 85 Cal. Rptr. 2d at 795.

38. See, e.g., *United States v. Pointer*, 991 F.2d 797 (Table), No. 92-1161, 1993 WL 101458 (6th Cir. Apr. 6, 1993). *Pointer* was asked to go to the police station for questioning and was told he was not under arrest. He claimed that "no reasonable black man, when faced with police officers, would reject an 'invitation,' no matter how friendly, to go to a police station." *Id.* at *5. The court disagreed, noting that

Pointer refused a police request to be fingerprinted and photographed, after he had already accompanied the officers to the station and had given an inculpatory statement. We note that he had no compunction at that time, after he had been fully 'coerced,' in refusing the police. His behavior belies his claim of intimidation.

Id. at *5-6.

it is may prove to be a roll of the dice.³⁹ At least in some circumstances, the suspect needs not only to be reasonable about the legality of the officer's actions, but to be right.⁴⁰

One might argue that an individual knows perfectly well whether he's guilty of anything, but that is both an overinclusive and underinclusive inquiry. There can easily be suspicion pointing to even an entirely innocent person, so my certainty that I have done nothing wrong does not mean that the officer does not have reasonable suspicion or probable cause to detain me.⁴¹ The fact that I know that I have a criminal act somewhere in my past does not tell me whether the officer in question knows that, whether his information is valid, and whether it amounts to the requisite quantum of suspicion. The law, in effect, requires the individual to test the officer's powers by declining to comply with them. The failure to do so—and the consequent result—is thus squarely the defendant's responsibility.

The gamesmanship model assumes that the choice to decline a police request is unburdened, that no negative consequences will accompany a failure to comply, and therefore that individuals will readily assume the risk of reaching an erroneous conclusion about their obligations to

39. See, e.g., *State v. Ballough*, 2002-Ohio-1006, No. 01-COA-1415, 2002 WL 358627 (Ohio Ct. App. Feb. 22, 2002). Ballough was standing in a Wendy's parking lot at 12:45 a.m. looking north. An officer deemed this conduct to be suspicious, and asked defendant for his identity and address. When defendant refused to provide this information and "began to leave," he was arrested, charged, and ultimately convicted for obstructing official business. *Id.* at *1. The appellate court affirmed. *Id.* at *2. A dissent criticized the court's opinion, arguing that because there was no reasonable suspicion to stop defendant, his failure to comply with the request for identification—which he was not required to produce—could not constitute a crime. *Id.* (Hoffman, P.J., dissenting).

40. N.D. CENT. CODE § 12.1-08-02 (1997). The North Dakota offense of "preventing arrest" makes it a crime to resist or to assist anyone else in resisting an arrest for a misdemeanor. The statute provides: "It is a defense to a prosecution under this section that the public servant was not acting lawfully, but it is no defense that the defendant mistakenly believed that the public servant was not acting lawfully." *Id.*

41. Imagine, for example, that an officer hears a report that a white woman in her mid-forties was seen robbing a nearby bank, and that she left the bank, wearing a business suit and tennis shoes, and carrying a black briefcase. Imagine, further, that a woman meeting this precise description walks past the officer at exactly the time one would expect her to do so if she were fleeing the bank. There is surely reasonable suspicion to stop the woman and inquire, even if she is a law professor on an after-work stroll rather than a fleeing felon.

obey. Reasonable people are sometimes risk averse, however, and there are several downside risks involved in disregarding police directions. One is the concern that, by refusing to comply with police direction, an individual exposes himself to the risk of the use of force.⁴² There are certainly police brutality cases in which the triggering incident was the victim's failure to obey police orders,⁴³ even though police had no reasonable suspicion and

42. In *Commonwealth v. Hart*, 695 N.E.2d 226 (Mass. App. Ct. 1998), the trial court viewed this as relevant to the question of whether there was a seizure, stating that "[h]istorically . . . blacks who have walked, run, or raced away from inquisitive police officers have ended up beaten and battered and sometimes dead," and that a "reasonable black American would not feel free to leave when stopped and questioned by police." The appellate court reversed the trial court's determination that there was a seizure when an officer, "at all times courteous," initiated a contact by saying, "[e]xcuse me," and asked if he could speak with defendant. *Id.* at 227, 229.

There is also an interesting legal problem with refusing to comply. If I believe that I have been ordered to submit, but I do not, I have not been seized. A seizure requires not only the order to submit, but submission or the use of physical force, however slight, to control the suspect. So the only way for me to test the legitimacy of the officer's order to submit is, in fact, to submit. Submission, however, tends to add credence to a claim that the encounter was consensual. *See supra* notes 36-37 and accompanying text.

43. *See, e.g., Lewis v. City of Chicago*, No. 04 C 3904, 2005 WL 947195 (N.D. Ill. Apr. 11, 2005). Officers on a Chicago Transit Authority train saw Christopher Hicks, an African-American male, standing on a platform at a CTA station, and thought that he was suspicious. They followed him onto a train and observed him walking between cars, a violation of a CTA ordinance. When officers confronted Hicks with his violation of the ordinance, he ran from the train. Officers left the train at the next stop, pursued Hicks, and subdued him using a choke hold. Hicks died as a result of the officers' prolonged efforts to subdue him, although all conceded that there was no justification for the use of deadly force to arrest Hicks. *Id.* at *3. *See also Bennett v. City of Eastpointe*, 410 F.3d 810 (6th Cir. 2005). This case involved several allegations that African-American youths riding bicycles in a Detroit suburb were stopped when they crossed Eight Mile into Eastpointe. In one incident, four boys were riding their bicycles when an officer "turned his car in front of the youths and blocked their paths," and ordered the youths to get off their bikes and put their hands on the car. *Id.* at 831. Three of the boys obeyed this direction but a fourth did not, instead dismounting his bike and walking two blocks toward Eight Mile Road. "As he was about to cross back into Detroit, another Eastpointe officer pulled his patrol car in front of James, threw him against the car, handcuffed him, and forcibly detained him in the patrol car." *Id.* The court concluded that the stop was permissible because the way in which the boys were riding their bikes (riding double, as police alleged, or riding four abreast, as plaintiffs claimed) violated state law. *Id.*

therefore no legal basis to compel compliance.⁴⁴ Other negative consequences also potentially follow.⁴⁵ As Part II of this Article argues, a failure to cooperate often carries with it significant consequences: seizure, arrest, and charge and conviction of a crime stemming from the failure to cooperate.

D. The Gamesmanship Model and the Consensual Encounter: Better Luck Next Time

The gamesmanship model leaves the courts with a problem. While the outcomes often favor the government, the courts are eager to demonstrate that such a result was not a foregone conclusion, and that it would have been possible for a defendant, acting differently, to avoid the result. Accordingly, they sometimes creatively discuss ways in which the individuals in question could have thwarted or

44. See, e.g., *Steinbrecher v. Dickey*, 138 F. Supp. 2d 1103, 1105 (N.D. Ill. 2001). Without any reasonable suspicion or particularized need, a police officer approached plaintiff and asked for her identification; she said she did not have it with her and was told that the officer "would have to take her into custody and search her." *Id.* When plaintiff said she did not want to be searched and attempted to walk away, "Officer Dickey grabbed her arm, twisted it behind her back, pushed her by the neck to the squad car and ordered her to place her hands on the hood." *Id.* The officers then searched plaintiff's backpack. "When she asked what authority they had to stop and search her, Sergeant Radley responded that it was department policy. The officers ultimately released her and no charges were brought against her." *Id.* The police chief refused to initiate a complaint against the officers at the request of the plaintiff, saying that "everything that happened was in conformity with Oswego Police Department policy." *Id.* at 1105-06; see also *Newell v. City of Salina*, 276 F. Supp. 2d 1148 (D. Kan. 2003). An officer called "stop" and grabbed a female pedestrian by the arm but did not identify himself, and the pedestrian pulled away. *Id.* at 1151. The officer then "used an arm bar twist to force plaintiff to the ground, then placed his knee or elbow into her back for a number of seconds, as if to hold her down, and grabbed her left arm." *Id.* at 1152. Officers believed the pedestrian was intoxicated. She was charged with public intoxication and resisting arrest, and brought a civil suit after her acquittal on those charges. The defendant argued that the case "presents the classic situation in which a plaintiff's own actions in reaction to a legitimate law enforcement encounter . . . justify the subsequent actions of the law enforcement officers involved." *Id.* at 1154.

45. See, e.g., *People v. Garcia*, No. 00CM7134, 2002 WL 89006, at *4 (Cal. Ct. App. Jan. 24, 2002) (testimony of defendant on whether he was asked to stop or told to stop, "I don't know his exact words he said, but if you keep walking and stuff you get arrested for some reason or another").

ignored, presumably with impunity, even the most persistent police requests.

Consider, for example, *United States v. Esparza-Mendoza*.⁴⁶ Esparza-Mendoza was at a house when someone threw a brick at his car. The officer called to the house where the incident took place said she “needed” to speak to the owner of the car to ask about the damage. Responding to the officer’s claim of “need,” Esparza-Mendoza came out of the house and was told by the officer that she “needed to get some identification from him.”⁴⁷ Esparza-Mendoza replied that he did not want anything done about the damage to the vehicle. She reiterated that she “needed” to see his identification. Ultimately, he produced identification, which provided evidence that he was a deported felon.⁴⁸ Esparza-Mendoza claimed that the repeated insistence that the officer “needed” to see his identification constituted a demand for it, making the encounter a seizure. The court disagreed. It then suggested that Esparza-Mendoza had many lawful alternatives to complying with police requests, and described them: he could have stayed in the home notwithstanding the officer’s request that he come out; he could have simply refused to provide identification; and he could have reentered the house without doing what the officer asked of him.⁴⁹

46. 386 F.3d 953, 960 (10th Cir. 2004).

47. *Id.* at 956.

48. *Id.*

49. *Id.* at 960. While “[a] reasonable person might indeed have felt compelled by simple good manners, or by an understandable but nonetheless unnecessary unease around law enforcement officers, to accede to Deputy Cook, . . . a reasonable person should not have felt legally compelled to do so in these circumstances.” *Id.*; see also *State v. Jennings*, 99 P.3d 1145 (Kan. Ct. App. 2004). Police were executing a search warrant at a home when Mr. Jennings and two companions knocked at the door of the home. The three men were wearing large winter coats—it was late December. Police told the men to take their hands out of their pockets and officers questioned each man. Jennings consented to a search, which resulted in the seizure of rock cocaine from his pocket. Jennings claimed that the search was impermissible because it was the fruit of an unlawful seizure. The court disagreed, arguing that Jennings had not been seized at all; notwithstanding the order to remove their hands from their pockets, the officer “did not command the men to remain in place . . . and would not communicate to a reasonable person that he or she was not free to leave.” *Id.* at 1149. As noted *supra* note 21, the confusion regarding whether an individual is free to leave or to refuse to comply is problematic. The court’s

Is this really how courts, prosecutors and police believe that interactions between individuals and police do or should function? While the suppression cases make the government a situational advocate for the view that reasonable individuals can and should treat anything short of a direct order from a police officer as an offer that can be refused, this approach is a product of the gamesmanship model. The best evidence of gamesmanship is the way that the government treats the citizen's right to refuse in a very different set of cases, involving violations of the legal duty to comply with police officers.

II. EVIDENCE OF GAMESMANSHIP: CONSIDERING THE OBLIGATION TO COMPLY

Part I demonstrated that in the context of motions to suppress, the government argues that compliance with police requests is in many circumstances entirely voluntary—something which individuals are free to refuse. Any loss of constitutional rights is the fault of the defendant, who failed to assert his right to decline. The courts, in turn, seem to find these arguments convincing; the right to refuse cases envision an expansive and empowered universe of individuals privileged to disregard and disobey the directions of police officers. Any failure to assert that privilege is the fault of the individuals involved, not the police. As we have seen, in the absence of a direct order, many courts consider that individuals, notwithstanding their own internal compulsion to obey or the fear of consequences for failure to comply, are free to disregard police requests.

There are, however, circumstances in which the government views the relationship between the police and the citizen differently. In some cases, it seeks to convict an individual for violating one of a myriad of statutes that punish failure to comply with the orders of a police officer.

analysis means that Jennings would have been free, notwithstanding the officer's direction, to ignore it and to walk away from the police.

The court in *Esparza-Mendoza* may have felt that its decision was the lesser of two evils. The district court there held that there was a Fourth Amendment seizure, but that aliens lacked the right to assert Fourth Amendment claims. By deciding that there had been no Fourth Amendment event in the case, the court of appeals avoided having to address the district court's extraordinary holding.

A. Noncooperation Statutes

A large range of statutes could arguably be understood as criminalizing an individual's failure to comply with a police officer's direction. If such a failure could be criminalized in all circumstances, the constitutional privilege to decline a police request would be illusory. Police could simply direct conduct they had no power to require, and then arrest any individual who failed to comply. Most courts appear to recognize this problem and ordinarily refuse to permit criminalization of a refusal to comply with police direction unless the officer was constitutionally able to require compliance. But the fact that these cases need to reach the appellate courts to be resolved correctly suggests that the possibility of prosecution is a significant threat, one that should—but has not yet—played a role in assessing whether reasonable people routinely conclude that they are entitled to decline to follow police direction.

There are numerous categories of noncooperation statutes. Perhaps the most visible are the so-called stop and identify statutes,⁵⁰ most recently addressed by the U.S.

50. See, e.g., MO. ANN. STAT. § 84.710 (1989) (police in Kansas City "have the power to stop any person abroad whenever there is reasonable ground to suspect that he is committing, has committed or is about to commit a crime and demand of him his name, address, business abroad, and whither he is going"); UTAH CODE ANN. § 77-7-15 (2003) ("A peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address and an explanation of his actions."); 24 VT. STAT. ANN. Tit. 24, § 1983 (2005) ("A law enforcement officer is authorized to detain a person if: (1) the officer has reasonable grounds to believe the person has violated a municipal ordinance; and (2) the person refuses to identify himself or herself satisfactorily to the officer when requested by the officer."); WIS. STAT. ANN. § 968.24 (West 1998) ("A law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person's conduct."); see also ALA. CODE § 15-5-30 (1995); COLO. REV. STAT. ANN. § 16-3-103 (West 2006); DEL. CODE. ANN. tit. 11, § 1902 (2001); KAN. STAT. ANN. § 22-2402 (1995); NEB. REV. STAT. § 29-829 (1995); NEV. REV. STAT. § 171.123 (2006); N.H. REV. STAT. ANN. § 594:2 (2003); N.D. CENT. CODE § 29-29-21 (2006). Some of these statutes remain questionable after *Hübel*. See, e.g., R.I. GEN. LAWS § 12-7-1 (2002), which provides:

A peace officer may detain any person abroad about whom he or she has reason to suspect is committing, has committed, or is about to commit a crime, and may demand of the person his or her name,

Supreme Court in *Hiibel v. Sixth Judicial District Court of Nevada*.⁵¹ *Hiibel* held that a stop and identify requirement is constitutional if limited to circumstances in which police have reasonable suspicion.⁵² This principle is currently being tested in the context of claims that antiterrorism measures require individuals to identify themselves at police request regardless of whether there is any evidence of individual wrongdoing.⁵³

address, business abroad, and destination; and any person who fails to identify himself or herself and explain his or her actions to the satisfaction of the peace officer may be further detained and further questioned.

The purely subjective requirement that the explanation be to the officer's satisfaction seems of dubious constitutionality.

51. 542 U.S. 177 (2004). In *Hiibel*, police went to the scene of a reported assault and saw a man talking to a woman in a truck. The man appeared to be intoxicated. The officer asked him for identification, and the man refused to provide it. Ultimately, he was arrested for failure to provide identification and was charged with "willfully resist[ing], delay[ing], or obstruct[ing] a public officer in discharging or attempting to discharge any legal duty of his office." *Id.* at 180-81. The legal duty was imposed by NEV. REV. STAT. ANN. § 171.123, which provided that a peace officer may detain a person "under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime," in order to "ascertain his identity and the suspicious circumstances surrounding his presence abroad," and provides that "[a]ny person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer." *Hiibel* was convicted of violating the obstruction statute. The Court held that the state could punish a refusal to disclose identity, pursuant to a state statute, when a person was subjected to a reasonable suspicion stop. In the Court's view, the criminal sanction was necessary to compel individuals to provide their names when asked for them during a *Terry* stop. "The threat of criminal sanction helps ensure that the request for identity does not become a legal nullity." *Hiibel*, 542 U.S. at 188. One author has suggested that the war on terror and the perceived need to identify potentially suspicious persons motivated *Hiibel*. See Jamie L. Stulin, *Did Hiibel Redefine Terry? The Latest Expansion of the Terry Doctrine and the Silent Impact of Terrorism on the Supreme Court's Decision to Compel Identification*, 54 AM. U. L. REV. 1449, 1452-53, 1478-83 (2005).

52. *State v. Hauan*, 361 N.W.2d 336 (Iowa Ct. App. 1984), expresses the converse: that there is no right to demand identification where there is no reasonable suspicion. Police arrived at a private club to execute a search warrant. They asked defendant's name, saying it was "needed" for the investigation. When defendant refused to provide his name, he was arrested and charged with "interference with official acts." *Id.* at 338. The court of appeals overturned the conviction, holding that as defendant was not seized, he was free to disregard the officer's request. *Id.* at 340-41.

53. Such a situation created a cause célèbre in Colorado, when Deborah Davis, a woman riding on a bus through a federal compound, refused to show

Stop and identify statutes are only one of a wide range of criminal statutes which punish varying degrees of refusal to cooperate with police officers. Statutes define offenses such as obstruction of an officer,⁵⁴ obstruction of governmental administration,⁵⁵ failure to obey,⁵⁶ disorderly conduct,⁵⁷

identification to guards who requested it while she was on the bus. *See* Karen Abbott, *Refusal to Present ID Sparks Test of Rights; Arvada Woman Said 'No' at Federal Center While on Public Bus*, ROCKY MOUNTAIN NEWS, Nov. 29, 2005, at 5A. Ms. Davis was not getting off the bus at the Federal Center but was simply riding through the area. She was removed from the bus, handcuffed and ticketed, but ultimately the federal prosecutor dismissed the charges. *See* Karen Abbott, *Doors Close on Bus Case: Technicality Frees Arvada Woman Who Refused to Show ID*, ROCKY MOUNTAIN NEWS, Dec. 8, 2005, at 5A. Officials cited a technicality involving signage in dismissing the charges. *Id.* But similar situations are certain to recur.

54. *See, e.g.*, GA. CODE ANN. § 16-10-24(a) (2003) (“[A] person who knowingly and willfully obstructs or hinders any law enforcement officer in the lawful discharge of his official duties is guilty of a misdemeanor.”); ILL. COMP. STAT. ANN. § 5/31-1 (West 2003) (“A person who knowingly resists or obstructs the performance by one known to the person to be a peace officer . . . of any authorized act within his official capacity commits a Class A misdemeanor.”); MINN. STAT. ANN. § 609.50, subd. 1(2), 2(3) (West 2003 & Supp. 2006) (“Whoever intentionally . . . obstructs, resists, or interferes with a peace officer while the officer is engaged in the performance of official duties” is subject “to imprisonment for not more than 90 days or to payment of a fine of not more than \$1,000, or both.”); OHIO REV. CODE ANN. § 2921.31 (a) (LexisNexis 2006) (“No person, without privilege to do so and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within the public official’s official capacity, shall do any act that hampers or impedes a public official in the performance of the public official’s lawful duties.”); W. VA. CODE ANN. § 61-5-17(a) (LexisNexis 2005) (“Any person who threatens, menaces, acts or otherwise, forcibly or illegally hinders or obstructs, or attempts to hinder or obstruct, any law-enforcement officer . . . acting in his or her official capacity is guilty of a misdemeanor.”); WIS. STAT. ANN. § 946.41 (West 2005) (“Whoever knowingly resists or obstructs an officer while such officer is doing any act in an official capacity and with lawful authority, is guilty of a Class A misdemeanor.”).

55. *See, e.g.*, N.Y. PENAL LAW § 195.05 (McKinney 1999) (“A person is guilty of obstructing governmental administration when he intentionally obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference, or by means of any independently unlawful act.”); MIDDLETOWN, OHIO CITY ORDINANCES § 606.14 (2006) (“No person, without privilege to do so and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within the public official’s official capacity, shall do any act that hampers or impedes a public official in the performance of the public official’s lawful duties. Whoever violates this section is guilty of obstructing official business.”).

interference with an officer,⁵⁸ and resisting.⁵⁹ Such statutes—take as an example Georgia, which prohibits “[a] person who knowingly and willfully obstructs or hinders any law enforcement officer in the lawful discharge of his official duties”⁶⁰—suggest that citizens are required, on pain of

56. “Any person who knowingly fails or refuses to obey any lawful order of any peace officer who is controlling or directing traffic shall be guilty of a traffic infraction.” NEB. REV. STAT. § 60-6,110(1) (2004).

57. *See, e.g.*, N.J. STAT. ANN. § 2C:29-1(a) (West 2005) (“A person commits an offense if he purposely obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from lawfully performing an official function by means of flight, intimidation, force, violence, or physical interference or obstacle, or by means of any independently unlawful act.”).

58. *See, e.g.*, CONN. GEN. STAT. ANN. § 53a-167a (West 2001 & Supp. 2006) (“A person is guilty of interfering with an officer when such person obstructs, resists, hinders or endangers any peace officer . . . or firefighter in the performance of such peace officer’s . . . or firefighter’s duties.”); IOWA CODE ANN. § 719.1 (West 2003) (“A person who knowingly resists or obstructs anyone known by the person to be a peace officer . . . in the performance of any act which is within the scope of the lawful duty or authority of that officer . . . commits a simple misdemeanor.”).

59. *See, e.g.*, ANCHORAGE MUN. CODE § 8.30.010(A)(4) (2006) (“resisting or interfering with a peace officer when . . . [t]he person intentionally, recklessly, or knowingly delays or obstructs a police officer’s active investigation of a crime by fleeing after having been told to stop.”); CAL. PENAL CODE § 148(a)(1) (West 2006) (“Every person who willfully resists, delays, or obstructs any public officer, peace officer, or an emergency medical technician . . . in the discharge or attempt to discharge any duty of his or her office or employment . . . shall be punished by a fine not exceeding one thousand dollars (\$1,000), or by imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment.”); FLA. STAT. § 843.02 (2002) (“Whoever shall resist, obstruct, or oppose any officer . . . in the lawful execution of any legal duty, without offering or doing violence to the person of the officer, shall be guilty of a misdemeanor of the first degree.”); IDAHO CODE ANN. § 18-705 (2004) (“Every person who willfully resists, delays or obstructs any public officer, in the discharge, or attempt to discharge, of any duty of his office . . . is punishable by a fine not exceeding one thousand dollars (\$1,000) and imprisonment in the county jail not exceeding one (1) year.”); IND. CODE § 35-44-3-3(a)(3) (2004) (“A person who knowingly or intentionally . . . flees from a law enforcement officer after the officer has, by visible or audible means . . . identified himself and ordered the person to stop; commits resisting law enforcement.”); MICH. COMP. LAWS § 750.479(1)(a) (2004) (“Any person shall not knowingly and willfully . . . [a]ssault, batter, wound, obstruct or endanger . . . duly authorized person[s] serving or attempting to serve or execute any process, rule, or order made or issued by lawful authority or otherwise acting in the performance of his or her duties.”).

60. GA. CODE ANN. § 16-10-24 (2003).

criminal sanction, to comply and cooperate with law enforcement.

If one took these statutes literally, one might conclude that, notwithstanding the Fourth and Fourteenth Amendments, states may freely criminalize the failure to comply with police requests. Consider, for example, a municipal ordinance that provides that “fleeing after having been told to stop” constitutes an offense.⁶¹ If this statute criminalized all failures to stop in response to police direction, regardless of whether the officer in question had any basis for issuing the order to stop, then the right to refuse would have no force; the state or municipality in question could simply criminalize assertion of the right. The courts, for the most part, recognize this concern and, using a number of theories, constrain the potentially broad scope of the obligation to comply statutes.⁶² Some implicitly read into the statutes a Fourth and Fourteenth Amendment limitation on their application.⁶³ An ordinance that penalizes the

61. ANCHORAGE MUN. CODE § 8.30.010(A)(4) (2006), which forbids a person from fleeing after a police officer has told the person to stop, is discussed in *Melson v. Municipality of Anchorage*, 60 P.3d 199 (Alaska Ct. App. 2002).

62. There are some exceptions. See, e.g., *H.A.P. v. State*, 834 So. 2d 237, 240 (Fla. Dist. Ct. App. 2002) (affirming a delinquency adjudication for resisting an officer without violence when a juvenile refused to leave the front of his apartment building when asked to do so by police; the dissenting judge wrote, “[u]ntil today I had thought that one could ignore the *unlawful* order of a police officer without incurring criminal liability.”) (Joregenson, J., dissenting); *State v. Ballough*, 2002-Ohio-1006, No. 01-COA-01415, 2002 WL 358627 (Ohio Ct. App. Feb. 22, 2002) (upholding conviction of individual who refused to provide identification to a police officer, although there was no reasonable suspicion to stop him). In some cases, it is unclear whether the issue was properly presented to the courts. See, e.g., *Johnson v. State*, 507 S.E.2d 13 (Ga. Ct. App. 1998). A driver was stopped at a “routine roadblock” and asked for his license and insurance. When he refused to produce it, he was arrested and ultimately convicted of obstruction of an officer. *Id.* at 14. Since it was not clear that there was a constitutional basis to conduct the road block, it appears that there was no lawful basis to demand the license and no basis to convict Johnson of his failure to comply; however, it does not appear that Johnson ever made that argument. See also *City of Fargo v. Roberson*, 2001 ND 204, 636 N.W.2d 926 (N.D. 2001) (defendant convicted of unlawfully resisting an officer claimed that because the officer had no reasonable suspicion to stop him, he could not be convicted of resisting arrest; court held that he had not adequately preserved the issue at trial).

63. See, e.g., *Jones v. Commonwealth*, 334 S.E.2d 536, 541 (Va. Ct. App. 1985) (upholding Arlington County Code § 17-13, which provided that “[i]t shall be unlawful for any person at a public place . . . to refuse to identify himself by

refusal to stop on the order of a police officer could be interpreted to require that police have the reasonable suspicion necessary to conduct a stop—or believe in good faith that they do⁶⁴—before the statute can criminalize the failure to comply.⁶⁵ An analogous issue has arisen in the

name and address at the request of a uniformed police officer . . . if the surrounding circumstances are such as to indicate to a reasonable man that the public safety requires such identification,” by interpreting the section “to permit a detention only upon reasonable suspicion of criminal activity based upon objective facts”).

64. See, e.g., *Turner v. State*, 618 S.E.2d 607 (Ga. Ct. App. 2005). Turner passed a traffic stop on the road, rolled down his window and yelled, “you bastards.” *Id.* at 608. The officer pursued Turner, believing him to be guilty of disorderly conduct. The officer then pulled Turner’s vehicle over. While writing the citation, Turner disobeyed the officer’s command to stay inside his vehicle and was charged with obstruction of a law enforcement officer. *Id.* Turner argued that the obstruction conviction could not stand because the stop of his vehicle had been unlawful since his “rude and disrespectful comments” were not a violation of the disorderly conduct statute. The court concluded that Turner had not, in fact, violated the disorderly conduct statute but that, since the officer had a good faith belief that he had, the stop of Turner’s vehicle was lawful. *Id.* at 608-09.

65. See, e.g., *Melson v. Municipality of Anchorage*, 60 P.3d 199, 203 (Alaska Ct. App. 2002) (“AMC § 8.30.010(A)(4) forbids a person from fleeing after a police officer has told the person to stop. Such a command to stop would not violate the person’s Fourth Amendment rights if the police officer already had the authority to seize the person But the ordinance would raise significant Fourth Amendment concerns if . . . the ordinance applied to situations where the police have no objective justification for seizing the person.”); *H.H. v. State*, 775 So. 2d 397, 398 (Fla. Dist. Ct. App. 2000) (offense of “resisting an officer without violence” may be applied to someone who flees an officer if the individual knows the officer intends to detain him, and the officer is justified in making a stop). In *H.H. v. State*, the defendant was riding a bicycle; an officer thought the bicycle was stolen and stopped the defendant. The court concluded that the officer lacked reasonable suspicion for the stop; accordingly, the stop was not legal and the defendant could not be found to have resisted or obstructed the officer in the lawful execution of a legal duty. *Id.* In *S.G.K. v. State*, 657 So. 2d 1246 (Fla. Dist. Ct. App. 1995), a juvenile ran from the scene of a traffic accident, fearing that he would be caught skipping school. An officer chased and apprehended him and he was convicted of “resisting arrest without violence.” *Id.* at 1247. The court overturned the conviction. Because the officer “lacked an articulable well-founded suspicion of criminal activity” on the part of the juvenile, he had no justification for attempting to detain him. *Id.* at 1247-48. Accordingly, he was constitutionally entitled to flee; the flight could not, therefore, create a basis on which to charge him with a crime. The court noted that the situation might have been different had the juvenile been ordered to stop, but the mere fact that he might have known that the officer wanted to question him about the accident was not enough to sustain his conviction. *Id.* at 1248. It seems likely that the reason the officer did not order the juvenile to stop was that he knew he lacked the authority to do so; without the reasonable

context of the Fourth Amendment constraints on home entry, and has been resolved comparably.⁶⁶

Courts also look beyond the Fourth Amendment to a range of alternative means to limit the potentially impermissible scope of these statutes. Some view this as a problem of police discretion and vagueness, imposing constraints on the broad application of these statutes as a matter of due process,⁶⁷ and in some cases viewing the

suspicion necessary to justify a stop, he did not have a constitutional basis to order the juvenile to halt. By contrast, flight from an officer was held to constitute obstruction of an officer where the individual was ordered to stop and submit to arrest, but instead fled the officer. *Mangum v. State*, 492 S.E.2d 300 (Ga. Ct. App. 1998); *cf. Wester v. State*, 480 S.E.2d 921, 923 (Ga. Ct. App. 1997) (holding that flight after police officers identified themselves to defendant sufficed to support a conviction of obstruction of an officer; "the jury was authorized to infer that [defendant] knew that a police officer was attempting to perform his official duty . . . and to find that [he] deliberately took action to delay, hamper or impede the officer in the performance of his duty") (quoting *Sanders v. State*, 419 S.E.2d 759 (Ga. Ct. App. 1992)).

66. If police come to your home and demand entry, but there is no lawful basis for an entry without consent, can the refusal to consent constitute a crime? For the most part, the courts have held that it cannot, using evidence of an individual's assertion of rights under the Fourth Amendment to prove a criminal offense would be problematic. *See, e.g., United States v. Prescott*, 581 F.2d 1343, 1351 (9th Cir. 1978). Police were looking for Prescott's neighbor; they had probable cause to believe the neighbor was in Prescott's house, but did not have a warrant. Police asked Prescott repeatedly to permit them to enter to search for the neighbor, but Prescott refused. Ultimately, the officers kicked in the door, located the neighbor, and charged Prescott as an accessory after the fact. *Id.* at 1346-48. Prescott argued that the evidence that she refused consent to the police entry should not be admissible because it was constitutionally privileged. The court agreed, concluding that "her passive refusal to consent to a warrantless search is privileged conduct which cannot be considered as evidence of criminal wrongdoing." *Id.* at 1351; *see also People v. Hilgenberg*, 585 N.E.2d 180 (Ill. App. Ct. 1991). There, the defendants were in a home when a sheriff arrived to investigate a complaint of underage drinking and disorderly conduct. They refused to open the door for the sheriff, and were charged with the offense of obstructing a peace officer. The court concluded that the charging instruments were properly dismissed. The sheriff had no warrant and no basis was alleged to justify a warrantless entry of the home; accordingly, the prosecution charged it was a crime to assert the constitutionally-protected privilege to decline to consent to a search of the home. *See also City of Parma v. Campbell*, Nos. 79041, 79042, 2001 WL 1352657 (Ohio Ct. App. Nov. 1, 2001); *City of Middleburg Heights v. Theiss*, 28-Ohio-B-9, 501 N.E.2d 1226 (Ohio Ct. App. 1985); *Brown v. City of Oklahoma*, 721 P.2d 1346 (Okla. Civ. App. 1986).

67. *See, e.g., Commonwealth v. Stahl*, No. 32 of 1988, 1989 WL 229385 (Pa. Commw. Ct. Aug. 11, 1989). Stahl challenged the constitutionality of 34 PA. CONS. STAT. ANN. § 904, which provided that "it is unlawful for any person to resist or interfere in any manner or to any degree or to refuse to produce

absence of such constraints as justification for striking down the statute.⁶⁸

Some statutes make clear that they are not intended to apply to simple failures to comply.⁶⁹ Courts may narrow

identification" upon request of an officer performing any duty under the Pennsylvania Game Code. *Stahl*, 1989 WL 229385, at *2. Stahl refused to identify himself to a game commission officer and was cited and subjected to an \$800 fine. The court held that the statute was facially invalid: "Imposing criminal sanctions on an individual who does nothing more than decline to state his name to an officer of the law and who is not the subject of any investigation is a patent violation of the due process clause of the 14th Amendment . . ." *Id.* at *7. The court did not consider there to be any Fourth Amendment issues in the case because in its view the defendant was never seized. *See also* *State v. White*, 640 P.2d 1061, 1065 (Wash. 1982) (overturning statute making it a misdemeanor to "obstruct a public servant" because what constitutes a violation is "left to the unfettered discretion of not only police officers, but virtually any public servant"). *But see* *American Fork City v. Pena-Flores*, 2002 UT 131, 63 P.3d 675 (Utah 2002) (upholding conviction of defendant for "interfering with a peace officer seeking to effect a lawful arrest or detention" even though the conduct that constituted "interference" was the defendant telling gang members who were being unlawfully detained that they did not need to cooperate with the officers; court held that the legality of the detention was irrelevant; dissenting chief justice argued that the statute was unconstitutionally overbroad).

68. *See, e.g.,* *People v. Flinn*, 497 N.Y.S.2d 994 (Erie County Ct. 1986). A Buffalo ordinance provided that "[n]o person shall refuse to obey a reasonable order or request of a police officer in the discharge of his regular duty." *Id.* at 995. A failure to comply with the section constituted disorderly conduct. The court held that the ordinance criminalized the refusal to comply with orders even if the police had no lawful authority to issue the orders.

The ordinance thus allows the police to make the law as well as to enforce it. In so doing it permits the arrest and prosecution of individuals engaged in lawful activity which conflicts with objectively reasonable police requests. It may, for example, allow for an officer to order an individual standing on a street corner to move on. Although it is established that loitering, without more, is not illegal, a failure to comply with the order could result in the individual's immediate incarceration despite the legality of his presence on the street.

Id. at 995-96. The "conflict between reasonable police requests and the free exercise of constitutional rights" required the striking down of the ordinance. *Id.* at 996.

69. *See, e.g.,* N.J. STAT. ANN. § 2C:29-1 (West 2005) ("A person commits an offense if he purposely obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from lawfully performing an official function by means of flight, intimidation, force, violence, or physical interference or obstacle, or by means of any independently unlawful act. This section does not apply to failure to perform a legal duty other than an official duty, or any other means of avoiding compliance with law without affirmative interference with governmental

others as a matter of statutory interpretation. If the statute precludes obstruction of an officer, the courts typically conclude that the obstruction statute is violated only where the officer's conduct is lawfully part of his duty;⁷⁰ obstructing unlawful conduct by an officer—like an illegal stop—does not violate the obstruction statutes.⁷¹ Some statutes require that the act of the defendant be “without privilege,” and interpret constitutionally permitted conduct as privileged conduct.⁷²

functions.”), *quoted in* State v. Perlstein, 502 A.2d 81, 84 (N.J. Super. Ct. App. Div. 1985). Most do not, however, relying on the courts to read these requirements into the statutes.

70. For example, in Georgia, the offense of unlawful obstruction of an officer, GA. CODE ANN. § 16-10-24(a) (2003), requires that the obstructed officer be in the “lawful discharge of his official duties.” *Overand v. State*, 523 S.E.2d 610, 611 (Ga. Ct. App. 1999). If police lack articulable suspicion justifying a stop, “their detention and questioning of a witness or suspect do not constitute official duties and, though obstructed, are insufficient for an obstruction conviction.” *Id.* at 612. This principle does not always appear to be followed; in *Bean v. State*, 418 S.E.2d 798 (Ga. Ct. App. 1992), for example, police observed Bean getting into a car. A nearby driver yelled “[t]here’s the police,” and Bean began to run, throwing away contraband as he went. *Id.* at 799. The court deemed his flight and attempt to hide evidence were sufficient to constitute obstruction, even though it is not clear on the facts that police had reasonable suspicion to stop him. *Id.*

71. *See, e.g., State v. Wiedenheft*, 27 P.3d 873 (Idaho Ct. App. 2001). The statute there, IDAHO CODE ANN. § 18-705 (2000), provided criminal sanction for “[e]very person who willfully resists, delays, or obstructs any public officer, in the discharge, or attempt to discharge, of any duty of his office” The court noted that “duty” in this statute applied only to “lawful and authorized acts of a public officer,” and therefore that an individual’s obstruction of “an act of a public officer which is contrary to the law” does not violate § 18-705. *Wiedenheft*, 27 P.3d at 875 (quoting *State v. Wilkerson*, 755 P.2d 471, 477 (Idaho Ct. App. 1988)); *see also Overand*, 523 S.E.2d at 611-12 (“Misdemeanor obstruction of an officer in Georgia requires that [the obstructed officer be in the lawful discharge of his official duties,” and that “refusal to remain at an alleged crime scene pending a brief official police investigation constitutes unlawful obstruction. But if police lack an articulable suspicion, their detention and questioning of a witness or suspect do not constitute official duties and, though obstructed, are insufficient for an obstruction conviction.”); *State v. Mendez*, 970 P.2d 722 (Wash. 1999) (applying the state constitution, court ruled that WASH. REV. CODE § 9A.76.020(1) (West 2000), which penalizes “obstructing a public servant,” could not be applied to flight of a passenger from the scene of a traffic stop, where no reasonable suspicion existed justifying a stop of the passenger).

72. For example, *see* OHIO REV. CODE ANN. § 2921.31 (LexisNexis 2006), which requires that a defendant perform an act, without privilege, with purpose to prevent, obstruct, or delay the performance of a public official of any authorized act within the public official’s official capacity that in fact hampers or impedes the performance of the public official’s duties; *see also In re Payne*,

Resisting statutes are typically interpreted to require some act of physical resistance; a failure to comply with an officer's direction is not ordinarily sufficient.⁷³ Flight is interpreted not to constitute resistance unless the officer had the legal right to detain the individual and the individual knew the officer intended to detain him.⁷⁴ Courts typically interpret these statutes so that simple refusals to comply with police requests do not violate them.⁷⁵

Most appellate courts, accordingly, recognize that an individual's failure to cooperate with police can be criminalized only where cooperation could constitutionally be compelled. They recognize the potential that penalizing the failure to comply with an officer's request imposes on other individual rights.⁷⁶ Without such a principle, states could

2002-Ohio-4849, No. C-040705, 2005 WL 2248870 (Ohio Ct. App. Sept. 16, 2005).

73. See, e.g., *People v. Stoudt*, 555 N.E.2d 825, 827 (Ill. Ct. App. 1990) (complaint alleging that "defendant did knowingly refused [sic] to remove himself from the 400 block of Lincoln Highway, De Kalb . . . after being instructed to do so by Sgt. Berke of De Kalb City Police," did not sufficiently allege the crime of resisting a police officer); see also *City of Middletown v. Hollon*, 2004-Ohio-1502, 807 N.E.2d 945, 949-50 (Ohio Ct. App. 2004) (offense of obstructing official business requires affirmative act; defendant's refusal to provide requested identification was not an act that obstructed the officer).

74. See *J.P. v. State*, 855 So. 2d 1262, 1265-66 (Fla. Dist. App. 2003) (adjudication of delinquency of juvenile reversed; juvenile was charged with resisting police officer without violence for fleeing from officer; officer had no reasonable suspicion juvenile was involved in criminal activity).

75. See, e.g., *City of Columbus v. Michel*, 378 N.E.2d 1077, 1078 (Ohio Ct. App. 1978) (refusal to answer officer's knock at the door was an omission and therefore could not violate an obstruction statute, which required that the person "do any act which hampers or impedes a public official in the performance of his lawful duty"). Noted one court, "noncompliance by a suspect is not always a criminal offense." *State v. Carroll*, 2005-Ohio-4048, 834 N.E.2d 843, 846 (Ohio Ct. App. 2005); see also *State v. Gillenwater*, No. 97 CA 0935, 1998 WL 150354 (Ohio Ct. App. 1998) (refusal to comply with *Terry* frisk not a separate criminal offense of obstructing official business).

76. See, e.g., *People v. Ailey*, 350 N.Y.S. 2d 981 (Buffalo City Ct. 1974). Ailey was standing on the street distributing leaflets. A police officer approached him and asked for identification; when he provided it, the officer told him that he "had a duty to ascertain what he was distributing and who was distributing and if he didn't allow me to do so, I would place him under arrest." *Id.* at 984. Defendant refused to surrender the literature and was charged with "resisting an officer in discharge of duty" under a Buffalo City Ordinance, which provided that "[a]ny person who shall refuse to obey, or shall resist any officer or employee of the city in the discharge of his regular duty shall be subject to a fine." *Id.* at 986. The court granted a motion to set aside the jury verdict

use the threat of prosecutions for failure to comply with the requests of officers as a vehicle for conducting otherwise unlawful stops, searches, and arrests.⁷⁷

While appellate courts, for the most part, are clear that the obligation to comply statutes cannot negate the right to refuse, police and prosecutors are not. When individuals refuse to comply with police requests, police may react by compelling compliance,⁷⁸ and the failure to comply may

convicting the defendant, concluding that “[t]o require more information or more co-operation under any circumstances could well violate defendants’ Fourth, Fifth, Ninth and Fourteenth Amendment rights or in effect compel the defendants to waive their rights thereunder by being required to obey the request made by the police.” *Id.* at 986.

77. *See id.* at 987. The court first construed the statute to require an officer to have the constitutional authority to make a demand before refusal to comply with the demand could constitute a crime:

where a police officer has no power or right to demand something, then he has no authorized duty to perform in that regard and . . . any order given is unauthorized where no power or right exists. Thus the arrest for refusing to obey the officer would be unauthorized.

Id. at 988. The court went on to note the danger if such prosecutions were permitted:

If the demand of the arresting officer and the invocation of the city ordinance provision were ruled proper under these circumstances, then some unusual consequences and applications could be had. A police officer could, for example, after merely seeing a pack of cigarettes in someone’s shirt pocket, demand that a citizen surrender it to determine if perchance it contained marihuana; a police officer seeing someone carrying luggage in a bus terminal could request him to open it to determine if it contained contraband; seeing two people laughing while reading a newspaper, a police officer could demand inspection to determine if the paper exposed any group or individual to ridicule. For failure to obey such demands for satisfaction of unbridled curiosity, a citizen could subject himself to a fine and imprisonment unless he was willing to waive a number of constitutional rights.

Id.

78. *See, e.g., State v. Maland*, 103 P.3d 430 (Idaho 2004). Two officers went to a house to investigate a noise complaint. When they arrived, there was music playing, but it was not excessively loud. The officers knocked and Maland answered. *Id.* at 431. They asked him for identification and he said he did not have any. *Id.* at 432. The officers suspected he was not telling the truth and when Maland tried to end the encounter by shutting the door, the officer blocked the door with her foot and pushed against it. The individual relented, opened the door and revealed his true identity, and the officers learned there was an outstanding warrant for his arrest. He was charged with obstructing an officer. *Id.* The state supreme court ultimately ruled the entry unlawful and overturned the resulting conviction. *Id.* at 437.

then be prosecuted as a crime. Courts repeatedly address situations in which individuals have been arrested and subjected to criminal charges for nothing more than the failure to do what police wanted them to do.⁷⁹ Police do not like the failure to comply or cooperate with their directions, and they treat it as—and often it is charged as—a crime.⁸⁰ These issues arise both in the context of criminal

79. One court expressed some frustration on this score. *See State v. Christman*, 2002-Ohio-2915, No. 19039, 2002 WL 1332034, at *2 (Ohio Ct. App. June 14, 2002) (individual was charged with obstructing official business and resisting arrest for hiding from police and failing to respond to their requests and was convicted; court of appeals stated “[t]he facts reveal absolutely no basis for the charge of obstructing official business. In fact, we wonder why the State even charged the defendant, much less prosecuted him”).

80. *See, e.g., J.G.D. v. State*, 724 So. 2d 711 (Fla. Dist. Ct. App. 1999) (overturning adjudication of delinquency when defendant was arrested for failure to obey officer’s command to leave an area; police had no articulable suspicion of defendant and no basis to order him to leave); *State v. Wilson*, 35,963-KA (La. App. 2 Cir. 6/14/02); 822 So. 2d 20 (reversing conviction for resisting an officer; defendant was arrested for refusing entry to her home to a marshal, but court held that entry was not authorized by law); *People v. Ferreira*, 807 N.Y.S.2d 832, 834 (N.Y.C. Crim. Ct. 2005) (granting motion to dismiss indictment charging defendant with obstruction of governmental administration for refusing to follow a police direction to stay so that defendant could be questioned because defendant was a witness to a shooting. Where there was no suspicion that the defendant had been involved in a criminal act, he had “no obligation to remain and answer the officer’s questions,” and “it follows that his failure to comply with the officer’s directive not to leave can furnish no alternative basis for arrest”); *State v. Redd*, 2004-Ohio-4689, No. 20284, 2004 WL 1949476 (Ohio Ct. App. Sept. 3, 2004) (overturning defendant’s conviction for failure to comply with police officer’s lawful order; defendant was a passerby who noticed that an officer was arresting an acquaintance and stopped to observe the arrest; the officer ordered defendant to leave the scene and he refused, but did not obstruct traffic or interfere with the arrest); *State v. Ballough*, 2002-Ohio-1006, No. 01-COA-01415, 2002 WL 358627 (Ohio Ct. App. Feb. 22, 2002) (officer observed defendant standing in a Wendy’s parking lot “staring” at 12:45 a.m., asked what he was doing, and asked him for his identity and address; when defendant refused to comply with the request for identification “and began to leave,” he was arrested, charged, and convicted of “obstructing official business”); *see also Graves v. City of Coeur d’Alene*, 339 F.3d 828, 836 (9th Cir. 2003) (plaintiff was arrested for refusing to consent to the search of his backpack while at a counterdemonstration against an Aryan Nation parade; the backpack looked heavy and appeared to have two cylinders in it, plaintiff refused to identify himself, and was “defiant” in his loud refusal to consent to search, stating loudly that what the police were doing was “a violation of [his] civil rights.” Police told plaintiff that he would be arrested for obstructing an officer if he did not permit a search; he responded that it was his Fourth Amendment right not to be searched. The search of the backpack, at the scene, revealed only food and clothing; plaintiff was arrested nonetheless).

prosecutions and § 1983 suits,⁸¹ where the individual in question challenges the legitimacy of the police action.

The obligation to comply statutes are often invoked against defendants whose conduct is unusually obstreperous or annoying.⁸² People who test the police may find

81. See, e.g., *Wilson v. Kittoe*, 337 F.3d 392 (4th Cir. 2003). Wilson lived next door to Woolever, who arrived home intoxicated one evening and was being arrested. *Id.* at 395. Wilson, an attorney, came outside to see what was happening. Kittoe, the arresting officer, told Wilson to “get out of here” but Wilson did not. Wilson asked Woolever if he wanted Wilson to represent him and Woolever said yes. Wilson then asked Kittoe if he could speak with his client for a moment when the arrest process was complete. *Id.* Wilson remained calm and did not physically approach the arrest area, but Kittoe again told him to leave. *Id.* at 396. Ultimately Kittoe arrested Wilson. *Id.* He claimed that Wilson’s “verbal criticism” and his offering of legal services to Woolever, as well as his refusal to leave the area when directed to do so by Kittoe, provided probable cause to justify his arrest for unlawful obstruction. Wilson was charged with this offense, and the charge was ultimately *nolle prosequi*. The court held that Kittoe lacked probable cause to arrest Wilson for obstruction, and that he was not entitled to qualified immunity. *Id.* at 399; see also *Marrs v. Tuckey*, 362 F. Supp. 2d 927, 932 (E.D. Mich. 2005). Marrs was a passenger in a vehicle driven by her boyfriend. *Id.* at 931. Tuckey stopped the vehicle when the driver failed to come to a complete stop at a stop sign, and when the officer approached the vehicle he found that Marrs was not wearing her seat belt. *Id.* He asked for her identification, which she refused to provide. After telling her “[i]f you don’t tell me who you are right now, I’m going to place you under arrest,” *id.* at 932, Marrs was arrested and charged with resisting and obstructing a police officer. A state court dismissed those charges several months later on the ground that the statute prohibited only actual or threatened physical interference with a police officer. *Id.* at 941.

82. The perfect example of this is *McCormick v. City of Lawrence*, 253 F. Supp. 2d 1172 (D. Kan. 2003). McCormick got into a series of altercations with local police in which he was loudly and sometimes profanely critical of them, goaded them into anger, and persistently engaged in video and audio taping of the officers. For example, McCormick called an officer a “cognitively impotent pig,” and videotaped an officer’s threat to take McCormick to jail. *Id.* at 1178-79. Also, McCormick “flipped the bird” at an officer, called him a “sick pig,” and told him “you’d better get your pig ass out of here before you get in more trouble.” *Id.* at 1179-80. The officer responded by yelling, “Oh, you wanna talk some shit, huh? I can talk some shit, too, mother-fucker.” *Id.* at 1180. At an altercation involving a separate traffic stop, McCormick protested and was threatened with arrest for obstruction of official duty. *Id.* at 1181. At a third traffic stop, McCormick protested and used a micro-cassette recorder to tape the officers’ comments. An officer forcibly took the device from him, grabbed him, and placed him under arrest for “disorderly conduct” and “interference with police duties” although these charges were later dismissed. *Id.* McCormick protested yet another traffic stop and videotaped an officer threatening to arrest him. *Id.* at 1182. Mr. McCormick eventually survived summary judgment on many of his § 1983 claims. *Id.* at 1208-09; see also *State v. Srnsky*, 582

themselves charged.⁸³ There is also a significant First Amendment element to some of these cases, in which criticism or protest of police conduct winds up being treated as arrestable.⁸⁴ But this is not a necessary element. Often

S.E.2d 859 (W. Va. 2003) (overturning conviction for, *inter alia*, obstructing an officer; defendant was one of three brothers involved in a disagreement with neighbors and refused to give his name to police when asked; court held that refusal to give one's name to a police officer when asked "standing alone, does not constitute obstruction").

83. *See, e.g., State v. Aloï*, 861 A.2d 1180 (Conn. App. Ct. 2004). Here, defendant repeatedly interfered with a fire truck used to pump water to a neighboring property. *Id.* at 1182. Though warned to stay away, he did not. An employee of the neighboring property complained, and police arrived and asked defendant for identification. *Id.* Defendant refused, stating "that he did not need to produce identification, that he was on public property and that 'this isn't Russia. I'm not showing you any . . .'" *Id.* at 1182-83. Defendant was arrested, charged with, and convicted of interfering with an officer. The court reversed his conviction, holding as a matter of statutory construction that declaratory statements and a refusal to show identification were insufficient to constitute the crime of interfering with an officer under CONN. GEN. STAT. § 53a-167a (2004). *Aloï*, 861 A.2d at 1183-84. *But see People v. Smith*, No. F036729, 2002 WL 1396943 at *3 (Cal. Ct. App. June 26, 2002) (upholding conviction for obstructing an officer where defendant claimed he had been assaulted by someone, insisted that the officer arrest that individual, and refused to sit down so the officer could investigate the allegations); *Hall v. State*, 411 S.E.2d 274 (Ga. Ct. App. 1991) (upholding conviction of obstruction of a woman who was stopped for a traffic violation, exited her car, approached the officer's car, and insisted that "I wasn't speeding, I've done nothing wrong. The only reason you stopped me is because you're a male chauvinist pig," and refused repeated requests to produce her driver's license).

84. *See, e.g., J.G.D.*, 724 So. 2d at 711 (J.G.D. failed to obey police command to leave an apartment complex following his "loud and profane, but . . . non-violent, protest of police actions" and was arrested and charged with nonviolently resisting arrest; court ruled that since the order to leave was unlawful, the arrest was as well and J.G.D.'s resisting without violence was therefore not unlawful); *L.A.T. v. State*, 650 So. 2d 214, 215 (Fla. Dist. Ct. App. 1995) (when police arrested one of L.A.T.'s companions, he screamed, "[i]s everybody watching this. Police brutality, Rodney King style," and cursed, "You fucking cops, what the hell do you think you're doing? You are full of bull shit. . . . This is abuse."; when L.A.T. did not lower his voice in response to police direction, he was arrested and charged with disorderly conduct; court held that L.A.T. was punished for exercising his right to free speech, which, although offensive, was protected); *City of Bismarck v. Schoppert*, 469 N.W.2d 808, 809 (N.D. 1991) (overturning conviction for disorderly conduct where defendant walked past a police car, gestured with his middle finger, and said, "[f]ucking, bitching cop," and responded to the officer's follow-up requests with "[f]uck you").

These concerns appear in § 1983 cases as well. *See, e.g., Duran v. City of Douglas*, 904 F.2d 1372, 1378 (9th Cir. 1989) (officer pulled over vehicle when passenger made obscene gestures at him and yelled profanities in Spanish

police view the failure to comply with their direction—whether authorized or not—as sufficient to justify arrest.

Police officers in suppression cases routinely testify that, had the individual in question sought to terminate the encounter, he would have been free to do so.⁸⁵ In fact,

while driving on a rural highway; court concluded that there was no basis to stop the vehicle, because the plaintiff's behavior was not a crime, and that it was particularly troubling if the conduct was a retaliation for Duran's insulting the officer) ("[W]hile police, no less than anyone else, may resent having obscene words and gestures directed at them, they may not exercise the awesome power at their disposal to punish individuals for conduct that is not merely lawful, but protected by the First Amendment."); *Kaylor v. Rankin*, 356 F. Supp. 2d 839, 844 (N.D. Ohio 2005) (plaintiff was arrested after allegedly calling police officer an "asshole, a mother f--king asshole" and refusing to provide identification; the officer's own testimony was that he responded to this comment with, "Do you want to go to jail?"; Plaintiff was charged with obstructing official business; the charges were later dismissed); see also *Greene v. Barber*, 310 F.3d 889, 892-93 (6th Cir. 2002). The court there reversed a grant of qualified immunity for the officer who arrested Greene. Greene, a lawyer, went to the Police Department to retrieve his automobile after it had been towed. Frustrated with the response he received from the supervisor, Lt. Barber, who Greene believed was being "arrogant," the following exchange ensued:

Greene: "[Y]ou know, you're really being [an] asshole."

Barber: "You can't talk to me like that in my building."

Greene: "What do you mean I can't talk to you like this in your building. . . . I'm exercising my freedom of speech. . . . This is the United States of America and we have freedom of speech here and if you don't like it you should move to another country."

Barber: "Well, not in my building[.]"

Greene: "Well, if that's how you feel you're really stupid."

Id. at 892. At that point Barber placed Greene under arrest. Greene resisted and pepper spray was used to subdue him. Greene was charged with creating a disturbance and with hindering and opposing a police officer and was acquitted of both charges. The court held that while Greene's comments were constitutionally protected, the officer might reasonably have believed he had probable cause to arrest Greene, but that he could not reasonably have believed he could do so in retaliation for Greene's exercise of his First Amendment rights. *Id.* at 893-98. This was also the concern in *City of Houston v. Hill*, 482 U.S. 451 (1987).

85. See, e.g., *Guadalupe v. United States*, 585 A.2d 1348, 1349 (D.C. Ct. App. 1991) (officer testified that if persons approached in the train station and asked if they would answer a few questions refused, "then 'there is nothing you can do. People walk away,'" and that if persons did so he would make no attempt to stop them); *People v. Dent*, 797 N.E.2d 200, 203-05 (Ill. App. Ct. 2003) (officer approached defendant with no reasonable suspicion as he was entering a house, said, "Wait a minute," and when the defendant turned, asked him if he had any drugs on him; when the defendant answered in the negative,

individuals who decline to cooperate with officers under such circumstances may instead find themselves charged with obstruction offenses.⁸⁶ Not only are prosecutions routinely brought for these offenses, convictions are obtained for various obstruction offenses predicated on nothing more than an individual's failure or refusal to do something that police wanted him to do.⁸⁷ Numerous appellate decisions

the officer said, "Well, you won't mind me checking" and patted him down, finding drugs; officer testified that "when he asked the defendant whether he would submit to a pat-down, the defendant was free to leave").

86. See, e.g., *D.T.B. v. State*, 892 So. 2d 522, 523 (Fla. Dist. Ct. App. 2004) (officers wanted to conduct a "voluntary field interview" with D.T.B., which they testified was a "consensual, citizen encounter"; when police approached D.T.B., he ran away; they pursued him and arrested him for obstructing/resisting arrest without violence).

87. Consider *City of Topeka v. Grabauskas*, 99 P.3d 1125, 1128 (Kan. App. Ct. 2004). Police were seeking two teenaged runaways. They saw two young women walking down the street. The women did not meet the description of the runaways: the runaways were 12 and 14, while defendant and her sister were 22 and 17; they did not match the description of the runaways in terms of height, weight, hair color, or clothing. *Id.* Police asked the young women if they lived in the area. They indicated that they did and police asked for their names. "Rather than answering the question the women asked why the officers needed to know their names." *Id.* When the officer replied that they "needed to know for an investigation," defendant answered, "[w]e don't have to tell you shit. Stop harassing us We don't—We don't have to tell you shit. Leave us fucking alone." *Id.* In response, police arrested defendant, breaking her arm in the process, and charged her with violation of a municipal ordinance preventing interference with city officers and employees. *Id.* Defendant was convicted by the municipal court and her conviction was affirmed by the trial court; not until she reached the court of appeals was the conviction reversed, on the ground that, since police had no reasonable suspicion, they had no basis to seize defendant, who was within her rights in refusing to cooperate, and the state could not criminalize the defendant's assertion of her Fourth Amendment rights. *Id.* at 1135; see also *Aloi*, 861 A.2d 1180, 1183-84 (Conn. App. Ct. 2004) (rejecting state's argument that "a refusal to cooperate" with an officer "is equivalent to interfering with an officer," and that an individual's refusal to provide identification on request, coupled with the statement that he did not need to produce identification, that he was on public property and that "this isn't Russia. I'm not showing you any" constituted the criminal offense of interfering with an officer); *Slydell v. State*, 792 So. 2d 667, 669 (Fla. Dist. Ct. App. 2001) (overturning conviction of defendant for "resisting an officer without violence"; when asked his name, defendant responded "[w]hy the fuck you want my name?" and walked away from officers; court held that because there was no reasonable suspicion justifying a stop, his failure to cooperate did not constitute resisting an officer); *Coley v. State*, 344 S.E.2d 490 (Ga. Ct. App. 1986) (holding that defendant's refusal to comply with officer's orders, when there was no basis to suspect defendant of a crime, did not constitute the crime of obstruction of an officer); *State v. Huan*, 361 N.W.2d 336, 340-41 (Iowa. Ct. App. 1984)

demonstrate that trial-level courts routinely permit conviction for nothing more than the failure to comply with the requests of police officers.

Given the fact that these offenses are often violations providing for a comparatively minor sanction and that the defendants in these cases may not be entitled to counsel, the volume of appellate cases is likely to be the tip of a considerably larger iceberg. Furthermore, the fact that an individual's stop or arrest was illegal does not insulate the individual from the consequences of that police action.⁸⁸ Civil remedies seem unlikely to address the concerns with the application of the cooperation statutes to simple failures to obey.⁸⁹ Moreover, the doctrine of qualified immunity poses significant barriers to relief in these cases. The qualified immunity inquiry is two-pronged; the plaintiff must first show that his constitutional rights were in fact violated, and next that the right was clearly established at the time

(overturning conviction of defendant for interference with official acts for refusing to give his name when he happened to be at a private club where a search warrant was being executed) ("This is not a country where an individual must present his or her green card and proper papers at the whim of a law officer, or face jail."); *State v. Richmond*, 602 N.W.2d 647, 653 (Minn. Ct. App. 1999) (defendant was uncooperative during a traffic stop; motion to suppress was granted because search of defendant's person exceeded permissible bounds of *Terry* stop; state argued that search could have been incident to lawful arrest for obstructing legal process "because he did not cooperate with officers when they asked him questions and searched him"); *People v. Offen*, 408 N.Y.S.2d 914, 915-16 (N.Y.C. Crim. Ct. 1978) (defendant, who "walked away from the officers and did not heed their request for identification" so they could cite him for littering, did not commit the crime of obstructing governmental administration) ("[I]gnoring an officer's request for identification is not a crime.").

88. See *Michigan v. DeFilippo*, 443 U.S. 31 (1979) (arrest pursuant to invalid statute not itself invalid); *United States v. Dawdy*, 46 F.3d 1427 (8th Cir. 1995) (defendant's resistance to arrest was an independent basis for arrest, even assuming that his initial arrest was unlawful).

89. First, in light of the comparatively minor damages suffered by the potential plaintiffs, the likelihood of securing contingent-fee counsel to pursue such cases seems rather remote. It is somewhat surprising to see as many reported decisions as we do; given that § 1983 actions are unwieldy and expensive ways to challenge such behaviors, it makes sense that the plaintiffs appear disproportionately to be lawyers. See, e.g., *Oliver v. Woods*, 209 F.3d 1179 (10th Cir. 2000) (criminal defense attorney who was arrested when he refused to identify himself while dropping his car off in the early morning at a repair shop; when the plaintiff left, police pursued him, pulled his vehicle over, and forced him to his knees when he did not drop to the ground as quickly as the officers wished).

of the alleged violation, such that a reasonable officer would have known about it.⁹⁰ While the reasonable man-on-the-street, in the courts' view, is quite knowledgeable, the reasonable officer subjected to suit under § 1983 seems remarkably dense.⁹¹

90. See *Brousseau v. Haugen*, 543 U.S. 194, 198 (2004).

91. See, e.g., *Carter v. Anderson*, No. Civ.A.6:02-CV-0005BI, 2004 WL 2208488, at *1 (N.D. Tex. 2004) (officer's mistaken belief that he could arrest plaintiff for possession of a suspended driver's license when he was not driving was not unreasonable). The courts sometimes express the view that it is not reasonable to expect too much understanding of the law from police officers: "Circumstances on the beat often require immediate action in order to prevent serious harm to persons or property; rarely is there time for brushing up on the Supreme Court's latest pronouncements on warrant requirements, probable cause or reasonable suspicion." *Duran v. City of Douglas*, 904 F.2d 1372, 1376 (9th Cir. 1989) (explaining this as the justification for the doctrine of qualified immunity). But see *Steinbrecher v. Oswego Police Officer Dickey*, 138 F. Supp. 2d 1103, 1109 (N.D. Ill. 2001) (denying claim of qualified immunity; officers claimed that the search of plaintiff's backpack was consensual, but plaintiff alleged that officer had twisted her arm behind her back and pushed her down to the squad car by her neck; the physical force vitiated any possible voluntary consent, noted the court, and "[t]his [was] not a point on which a reasonable officer could make a mistake").

Police confusion and uncertainty is rarely reflected as clearly as it was in *Oliver*, 209 F.3d at 1179, a § 1983 case. The plaintiff was a criminal defense attorney who was dropping his car off at a repair shop in the early morning hours. *Id.* at 1182. Unbeknownst to him, officers were watching the repair shop to detect individuals who were dumping bags of motor oil there, and he had triggered an infrared alarm by driving into the parking lot. Police asked Oliver for his identification, and he refused to provide it, contending that under the relevant Utah statute, he only had to identify himself if he was suspected of wrongdoing. *Id.* Oliver left the scene in his son's vehicle. *Id.* at 1183. Police pursued him, stopped him, forced him to the ground, and placed him under arrest, telling him to relax. The scene was captured on the officer's video camera, including Oliver's response: "I can't relax with two ass holes pushing me around like that. What law did I break?" *Id.* After Oliver was arrested, the officers conferred:

Officer Woods: He asked if he'd broken any laws by dropping off his vehicle, and I told him no.

Officer Scow: He didn't, but he still has to identify himself.

Officer Woods: What code is that?

Officer Scow: I don't know exactly what code it is, to tell you the truth.

Id. at 1183. Oliver was charged with violating the state "stop and identify statute." *Id.* at 1183-84. The charge was amended by the prosecutor to a failure to display motor vehicle registration, and ultimately dismissed by a Justice of the Peace on the ground that the officers lacked reasonable suspicion and therefore that Oliver had no obligation to identify himself. *Id.* at 1184. The Court of Appeals in the § 1983 case disagreed, finding, over a dissent, that there

While in the “right to refuse” context prosecutors argue that individuals are free to decline officers’ requests, in the obligation to comply context prosecutors contend that the failure to cooperate with police is a sufficient basis to charge an individual with a crime.⁹² These cases may be brought in part in an attempt to avoid or defuse possible civil lawsuits.⁹³ It is also possible that those persons charged with obstruction offenses are the ones who were not committing any other crime; if the process of arrest produced contraband, doubtless the individual would be charged with a substantive offense rather than the relatively minor noncooperation offense. The charge of a noncooperation offense may be the price individuals pay for being both uncooperative and not guilty.⁹⁴ In any event, while most

was reasonable suspicion to stop Oliver and that he therefore had an obligation to identify himself and was properly arrested for leaving the scene without doing so. *Id.* at 1191.

92. See, e.g., *City of Lakewood v. Simpson*, 2002-Ohio-4086, No. 80383, 2002 WL 1824975, at *1 (Ohio Ct. App. Aug. 8, 2002) (reversing defendant’s conviction for obstructing official business for refusing to open his door at officers’ request; prosecution argued that defendant “did obstruct official business . . . by not cooperating with the police.”).

93. In *City of Topeka v. Grabauskas*, 99 P.3d 1125, 1128 (Kan. Ct. App. 2004), for example, discussed *supra* note 87, the police broke the defendant’s arm in the course of unlawfully placing her in detention. It is possible that the municipality thought that charging her and convicting her of a municipal offense might make the use of force seem more appropriate and minimize the chance of a civil damages award.

94. In *City of Pontiac v. Baldwin*, 413 N.W.2d 689, 689-92 (Mich. Ct. App. 1987), for example, police were called to the scene of a domestic dispute in which, they had been told, two men—Baldwin and his son—were fighting. When they arrived at the scene, the fight was over. *Id.* at 690. Police went to the back of the house to talk to Baldwin, who was sitting in his car preparing to leave. *Id.* at 691. Baldwin said he did not wish to talk to them. Police told Baldwin to stop and get out of the car because they wanted to talk to him. He yelled that he was leaving. Police opened the car door, forcibly removed Baldwin from the moving vehicle, and arrested him. *Id.* Ultimately, Baldwin was charged with obstructing or hindering a police officer in the discharge of the officer’s duties. *Id.* at 690. This was a violation under Art. 9, § 16-95 of the Pontiac City Code. Baldwin was sentenced to thirty days in jail, a \$500 fine, and \$250 in costs. *Id.* The officers testified that they arrested Baldwin because he “was about to drive away before the officers had completed their investigation,” and for “refusing to cooperate.” *Id.* at 691. The court concluded that, while Baldwin was properly subjected to a *Terry* stop, “the police officers could not compel defendant to answer their questions,” and that mere refusal to cooperate and answer their questions could not rise to the level of obstructing a police officer. *Id.* at 691-92. Notwithstanding the court’s ultimate resolution, the

appellate courts protect defendants from ultimate conviction for failure to comply, the prevalence of cases in which appellate courts are forced to do so suggests that the failure to comply with a police request subjects individuals to likely prosecution, and to the expense, inconvenience, and stigma of answering the charges. Moreover, the correct outcome is not a foregone conclusion.

B. Other Recognitions of the Duty to Comply

In the context of the noncooperation statutes, the law reflects a different tone, and one perhaps more consistent with our perceptions of refusal to cooperate with police requests. While ultimately many appellate courts conclude that failure to cooperate, without more, cannot constitute a criminal offense in the absence of a level of suspicion sufficient to compel compliance, they do not demonstrate in the cooperation context the same enthusiastic endorsement of the right to refuse. In fact, in other contexts, courts articulate a duty to assist police in the conduct of their business which is entirely at odds with the freewheeling right to refuse that is articulated in the suppression cases.

Courts refer to the duty in a wide range of different contexts and situations.⁹⁵ In the context of malicious prosecution claims,⁹⁶ the courts sometimes assert the

officers plainly believed—and convinced a prosecutor—that the defendant had committed a crime because he had refused to participate in their inquiry and answer their questions. *See id.*; *see also* *People v. Offen*, 408 N.Y.S.2d 914, 914-16 (N.Y.C. Crim. Ct. 1978). Police told the defendant they were going to give him a summons for littering and demanded identification. *Id.* at 915. Defendant ignored the demand and walked away. *Id.* Defendant was charged with “obstructing governmental administration.” *Id.* at 914. The court concluded that ignoring the officer’s request was not a crime. *Id.* at 916. “Were the law otherwise, it would follow that whenever any barrier is placed in the path of process and/or arrest, this . . . misdemeanor . . . could be added.” *Id.*

95. In discussing a civil claim brought by an informant against a municipality and its officers who had negligently disclosed her identity, the court contended that “[t]he duty of citizens to aid law enforcement” created public policy that required protection of the anonymity of an informant. *Maynard v. City of Madison*, 304 N.W.2d 163, 169 (Wisc. Ct. App. 1981).

96. *See, e.g., Downtown Grill, Inc. v. Connell*, 721 So. 2d 1113, 1119 (Miss. 1998) (“[T]here is an unspoken civic duty to cooperate with police officers.”). The court’s conclusion that the individual in question, an employee of the Downtown Grill, who had mistakenly identified the defendant as a check forger, had a duty

principle in support of the argument that a complaining witness is not liable because "citizens not only have the right but also the duty to cooperate with law enforcement authorities in the detection and apprehension of crime."⁹⁷ Sometimes, courts claim that such a duty is created by the cooperation statutes.⁹⁸ The duty is also asserted in the treatment of private individuals called upon to assist law enforcement.⁹⁹

Ironically, courts sometimes assert the duty to cooperate even in criminal procedure cases. A claim that required compliance with police requests amounted to an arrest, for example, is countered by the contention that "every citizen has a duty to assist police officers up to the

to cooperate with police made it possible to conclude that he had a qualified privilege.

97. See *McHenry v. Tom Thumb Page Drug Stores*, 696 S.W.2d 664, 665 (Tex. App. 1985); see also *Hagberg v. Cal. Fed. Bank FSB*, 81 P.3d 244, 258 (Cal. 2004) (upholding absolute privilege to report to police against plaintiff's tort claim that she was wrongly reported to police as having attempted to cash an invalid check; court noted earlier precedent, which observed "that it was the duty of every citizen to cooperate with the police in their investigation of crime and to provide information to investigating officers").

98. See, e.g., *Ottenbacher v. City of Hoquiam*, 537 P.2d 862, 863-64 (Wash. Ct. App. 1975). Mrs. Ottenbacher called the police to report a domestic disturbance, but when the police came to the scene, she attempted to leave. *Id.* at 863. Police insisted that she get in their car and return to her mother's home until police completed their investigation. Plaintiff sued for false imprisonment. *Id.* The court rejected her claim on the ground that plaintiff's failure to cooperate with the investigation constituted a misdemeanor offense of obstruction. *Id.* at 863-64. The statute, which provided that

[e]very person who, after due notice, shall refuse or neglect to make or furnish any statement, report or information lawfully required of him by any public officer, . . . or who shall willfully hinder, delay or obstruct any public officer in the discharge of his official powers or duties, shall be guilty of a misdemeanor,

imposed a "legal duty upon plaintiff to cooperate with the police," and her refusal justified her lawful detention. *Id.* at 854.

99. See *Proffitt v. Ridgway*, 279 F.3d 503 (7th Cir. 2002). Lykins, a private citizen, attempted to assist Ridgway in subduing an arrestee; the arrestee died as a result. *Id.* at 503. Plaintiff sought to bring a § 1983 claim against Lykins. The court noted that an individual's rendering "brief, ad hoc assistance to a public officer" did not turn him into a state actor. *Id.* "To assist the police is a duty of citizenship; and the performance of a duty to someone does not turn the performer into that someone." *Id.* at 508.

point of self-incrimination.”¹⁰⁰ A defendant’s claim that he was placed in custody, and therefore should have received Miranda warnings, may be answered by the claim that the individual was not in custody, but was simply complying with his duty as a citizen to cooperate with law enforcement.¹⁰¹ Prosecutors have even argued—sometimes successfully!—that such a duty exists in the consensual encounter context, requiring individuals to cooperate when police ask them questions.¹⁰² Courts sometimes mention

100. See, e.g., *People v. Jackson*, 500 N.E.2d 537, 539 (Ill. App. Ct. 1986) (“The assumption that an individual is required to cooperate with the police cannot be equated with an arrest since every citizen has a duty to assist police officers up to the point of self-incrimination.”); *People v. Miller*, 412 N.E.2d 175, 179 (Ill. App. Ct. 1980) (“[P]olice officers may question citizens during criminal investigations. Citizens have a duty to cooperate with the police in these investigations.”); *Coates v. United States*, 413 F.2d 371, 374 (D.C. Cir. 1969) (concluding that an encounter in which police approached two individuals did not constitute arrest; “[w]e have in past cases commented on the duty of every person to cooperate with police and to respond unless a Fifth Amendment claim is involved.”); *Malone v. State*, 361 So. 2d 674, 690 (Ala. Crim. App. 1978) (“No arrest occurred when the appellant was taken to police headquarters. The assumption that ‘one is required to cooperate with the police can hardly be equated with an arrest, every citizen has a duty to assist police officers up to a point of self-incrimination.’”).

101. See, e.g., *People v. Myrick*, 651 N.E.2d 637 (Ill. App. Ct. 1995). Myrick claimed he was arrested when he was taken in for questioning about the death of an infant, and that the police at the time lacked probable cause for an arrest. *Id.* The court rejected his claim, viewing his behavior as that of a “good citizen cooperating in an investigation,” who went “voluntarily to the police station,” and stated, “[e]very citizen has a duty to cooperate with the police up to the point of self-incrimination.” *Id.* at 642-43 (quoting *People v. Jackson*, 500 N.E.2d 537, 539 (Ill. App. Ct. 1986)); see also *People v. Johnson*, 544 N.E.2d 392, 400 (Ill. App. Ct. 1989) (“The assumption that an individual is required to cooperate with the police cannot be equated with an arrest since every citizen has a duty to assist police officers up to the point of self-incrimination.”); *People v. Holmes*, 626 N.E.2d 412, 420 (Ill. App. Ct. 1994) (“As every citizen has a duty to assist police officers up to the point of self-incrimination, an assumption that one is required to cooperate with the police can hardly be equated with an arrest.”); *Hicks v. United States*, 382 F.2d 158, 161 (D.C. Cir. 1967) (Burger, J.) (same); *United States v. Calhoun*, 363 A.2d 277, 283 (D.C. App. 1976) (same).

102. See *People v. Dent*, 797 N.E.2d 200 (Ill. App. Ct. 2003). A number of police officers approached defendant without any articulable suspicion as he was entering a home and stated, “[w]ait a minute.” *Id.* at 207. Defendant turned, was asked if he had drugs on him, and when he responded that he did not, was subjected to a frisk that revealed cannabis. *Id.* The defendant argued that he had been unlawfully seized and that the drugs should be suppressed; the officer testified that this was a consensual encounter and that the defendant was free to leave. *Id.* The trial court held that a reasonable person under the circumstances would have believed himself to be detained. *Id.* The State, on

this duty in a wide range of other cases as well, from employment cases,¹⁰³ to takings claims,¹⁰⁴ to claims of evidentiary privilege.¹⁰⁵ In any event, an individual scouring legal rulings for evidence that he had an obligation to obey police officers would find some significant support for such a contention. Even the U.S. Supreme Court has ventured the view that “private citizens have a duty to provide assistance to law enforcement officials when it is required.”¹⁰⁶

III. THE PROBLEMS WITH GAMESMANSHIP

The test defining the consensual encounter has been widely criticized. One could argue that there is nothing wrong with the articulated test, only with its application. The test, as applied, posits that reasonable individuals feel free to decline a wide range of police encounters. As we have

appeal, argued that this was a community caretaking activity, that “citizens have a duty to cooperate,” and therefore that “the defendant had a duty to assist the police in their investigation of these reports.” *Id.* at 209. The court suppressed the evidence notwithstanding the state’s argument. *Id.*

103. See, e.g., *Ky. Farmers Bank v. Nutter*, No. 85-CA-2279-MR, 1987 WL 194726, at *1 (Ky. Ct. App. May 15, 1987) (wrongful discharge case where plaintiff claimed she was fired because she had assisted local law enforcement officials in a sting; “the public policy of this Commonwealth requires that ‘a person assist a law enforcement officer in the performance of his duties’”; the fact that plaintiff had a duty to so act made discharge an exception to the employment-at-will doctrine); cf. *id.* at *5 (Gudgel, J., dissenting) (“Contrary to the majority’s holding, it is settled that private citizens in this state do not have a general duty to assist law enforcement officials in enforcing the provisions of the penal code.”).

104. See *Lee v. City of Chicago*, 330 F.3d 456 (7th Cir. 2003) (discussing possibility that plaintiff could assert a takings claim when the city seized his car as evidence of a crime as to which he was the victim, required him to pay towing and storage charges for the car, and spray-painted large numbers on the vehicle, diminishing its value). A concurring judge noted that “[s]ome courts have ruled, at least in the context of relatively limited retentions of property, that nothing legally cognizable has been ‘taken’ from the plaintiff because all citizens have a duty to assist the police.” *Id.* at 475-76 (Wood, J., concurring).

105. See *United States v. Leslie*, No. 402CR039, 2002 WL 32059743, at *2 (E.D. Tenn. Oct. 4, 2002) (privilege of withholding names of confidential informants “recognizes the obligation of citizens to communicate their knowledge of criminal activity to law enforcement officers. By preserving the anonymity of informants, it encourages persons to perform this obligation and cooperate with the police.”).

106. *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 175-76 n.24 (1977).

seen, the reasonableness standard applied by the courts in the consensual encounter context fails to take into account several significant facts: that noncompliance sometimes results in physical compulsion; that failure to obey even a consensual request can subject an individual to prosecution for violation of a noncooperation statute; that elsewhere a duty to cooperate with law enforcement has been articulated as a principle of positive law; and that whether compliance is obligatory or voluntary may turn on facts—the existence of reasonable suspicion—known only to the officer at the time of the encounter.

Yet, viewed in the context of the gamesmanship model, the test not only may produce erroneous results, but has structural problems that are of more profound concern.

A. Advocacy of Noncooperation

The gamesmanship model views defendants' loss of rights as their own responsibility. As we have seen, the way that is accomplished in the context of the consensual encounter is to argue that, in the ordinary course, reasonable people have—and believe that they have—the right to disregard the police, ignore their requests, and refuse to cooperate with them. Compliance with police thus becomes the product not of compulsion or submission to police authority, but of individual acquiescence. This minimizes suppression. It also, at least in the short run, may have comparatively little impact on the degree of compliance with police requests. It is nonetheless troubling that this principle of law requires courts and prosecutors to routinely articulate the view that people are free to refuse to cooperate with police. Moreover, the gamesmanship model means that cooperators should blame their loss of constitutional rights on their own foolish desire to engage in cooperative and socially appropriate behavior. One might be concerned that, over time, such norms of cooperation and compliance will erode in the face of the persistent judicial message that such compliance is not required, and is, moreover, a mistake.¹⁰⁷ In

107. See, e.g., *Smith v. State*, 753 So. 2d 713, 716 (Fla. Dist. Ct. App. 2000) (overturning conviction of possession of cocaine where the government claimed a consent search; court found that police direction with regard to the search of the interior of defendant's mouth went beyond the scope of defendant's consent).

the long run, society is not benefited by a pervasive insistence not only that individuals are free to disregard police requests, but that the most savvy citizens regularly do so. The system's own discomfort with the principle is reflected in the very different attitude taken towards the question of noncooperation in situations other than suppression.

B. Focus on Individual Behavior, Not Police Behavior

The law of consensual encounters, defined as it is in terms of the expectations of the hypothetical "reasonable person" in her interactions with police, inevitably causes the courts to focus on the behavior of individuals rather than police. The question is not whether the police should have behaved differently, but whether, under the circumstances, the defendant should have. The standard, as articulated, affirmatively disregards any sense that the courts should play a significant role in articulating the appropriate constitutional boundaries of police behavior.

At least this is what the courts say they are doing. What they are actually doing is more complicated and, I would argue, harmonizes more effectively with the more proactive role the courts should take in governing police conduct.

C. A Better Approach: Police Overreaching

Courts typically do two things in the consensual encounter cases that are inconsistent with a "reasonable person" test. First, they disregard factors that, while they may be characteristics of the reasonable person, are not the fault of the police. For example, while people may feel some

We fear that similar situations will arise in the future, perhaps because most citizens hold it to be their duty to cooperate with law enforcement, a belief with which we join. But once engaged in the process, few citizens know the boundaries that law enforcement may not legally exceed or the means to stop conduct they may perceive to be unduly intrusive. . . . Thus, ignorance of one's rights may lead to a denial of those rights.

Id. Noted the concurrence: "Citizens should be encouraged to cooperate with such encounters. The methods demonstrated in this case, however, by which an initial encounter subtly evolves into an oral cavity search, serve to discourage reasonable, law-abiding citizens from cooperating during a field interrogation." *Id.* at 716 (Altenbernd, J., concurring).

inherent compulsion to obey the police, that compulsion is not taken into account in assessing the reasonable person's response to police authority.¹⁰⁸ The tendency of the reasonable individual to obey police direction is not a factor that the courts are willing to consider in assessing how the reasonable person would behave. This is the case even though such a tendency is plainly relevant, as a characteristic of the reasonable person, to a true reasonable person inquiry. Second, they look to factors that reflect the level of authority exerted by police: the display of weapons, the show of force reflected in the deployment of multiple officers, and so forth. While such demonstrations might be relevant to the views of the reasonable person's perception of his freedom to decline the officer's requests, the courts do not necessarily limit their consideration of these factors to how the reasonable person would understand them. Instead, they treat the facts as relevant to the propriety of the officer's action under the circumstances. Courts, while articulating the reasonable person test, are asking not only how a reasonable person would react to a situation, but whether the situation constituted a reasonable exercise of the officer's authority. De facto, the courts seem to be considering not only whether a reasonable person under the circumstances would feel that compliance was required, but whether police have done something inappropriate to create that impression.

There is an obvious—but unstated—analogy here to the due process voluntariness standard applied to the admissibility of confessions.¹⁰⁹ In assessing whether a person's statement to police was involuntary and should be suppressed as a matter of due process, the Supreme Court has held, it is not enough that the statement be involuntary in the sense that it is not the product of the affirmative will

108. See, e.g., *People v. Tweedy*, No. 04CA0037, 2005 WL 2680540 (Col. Ct. App. 2005) ("Any inherent social pressure defendant may have felt to cooperate with the police was not a sufficient basis for concluding that the encounter constituted a seizure."); see also *United States v. Ayon-Meza*, 177 F.3d 1130, 1133 (9th Cir. 1999) ("[T]here is an element of psychological inducement when a representative of the police—even unarmed and in civilian clothes . . . initiates a conversation. But it is not the kind of psychological pressure that leads, without more, to an involuntary stop."); *Outlaw v. People*, 17 P.3d 150, 155 (Colo. 2001) ("Inherent social pressure to cooperate with the police is not itself a sufficient basis for declaring the encounter non-consensual.").

109. See *Colorado v. Connelly*, 479 U.S. 157 (1986).

of the speaker. For a statement to be involuntary under the due process clause, it must be the product of police overreaching.¹¹⁰ In the context of the due process cases, of course, asking whether there has been police overreaching makes more confessions admissible; a pure voluntariness standard would exclude confessions that the existing standard will admit. In the consensual encounter context, by contrast, requiring the courts to scrutinize the encounters for police overreaching rather than merely for voluntariness might produce a different result.

In fact, the courts in the consensual encounter cases appear to be seeking a similar test. The question they seek to ask is whether the police engaged in conduct which unreasonably compelled the individual in question to obey or comply. It is not enough that the individual feels compelled to comply to create a seizure. The police officer must affirmatively do something to create a coercive environment for a seizure to arise. Merely taking advantage of the fortuitous existence of an internally driven compulsion is insufficient.¹¹¹ The courts seem to be confusing a reasonableness-based standard—which turns on the characteristics of the reasonable person in the defendant's

110. *See id.* at 167.

111. *See, e.g.,* *People v. Lippert*, No. E034959, 2005 WL 1539584, at *3 (Cal. Ct. App. June 30, 2005) ("Despite defendant's repeated claims that he felt that he could not leave the hospital or disregard the officers' requests, the officers' words or actions would not have caused a reasonable person to feel such restraint."); *see also* *United State v. Ramirez*, 172 F.3d 880 (Table), No. 97-2347, 1999 WL 100891, at *1-3 (10th Cir. Mar. 1, 1999). An officer boarded a bus on which Ramirez was a passenger at a fixed border checkpoint. *Id.* at *1. Because Ramirez appeared nervous, the officer "asked Ramirez to step off the bus and into a nearby checkpoint trailer for further questioning." *Id.* The officer's request for Ramirez to submit to a patdown revealed cocaine taped to his legs. *Id.* at *2. The court concluded that it did not even need to consider whether the removal of Ramirez from the bus for questioning was supported by any level of objective suspicion, because "Ramirez consented to this questioning." *Id.* at *5. The basis on which the court concluded that this encounter was entirely consensual was that "[a]t no time was Mr. Ramirez threatened or coerced," that the officer used a "normal tone of voice" in asking Ramirez to leave the bus, that the officer "did not brandish his weapon, use aggressive language, or physically touch Ramirez when he asked Ramirez to disembark," that "he did not threaten" Ramirez, and that Ramirez "knew he was not under arrest" while he was on the bus. *Id.* at *5-6 (alteration in original). The appellate court concluded "that a reasonable person who was not carrying contraband could have believed that he was free to decline Davila's request to disembark and submit to further questioning." *Id.* at *6.

situation—for a misconduct-based standard, requiring some police overreaching in order to find that there has been a seizure. This implicit standard may have developed because the courts view a true reasonableness standard, which includes consideration of the socially-imposed compulsion to comply with police authority, as inconsistent with enabling law enforcement to do its job.¹¹² Consistent with this approach, courts view the circumstances that create seizures—that tend to suggest to an individual that he is not free to decline a request—as circumstances that suggest that he is compelled by police conduct to comply.¹¹³

112. Noted one court:

It might perhaps be contended that all of this is unduly formalistic and does not give sufficient play to the natural tendency of any person—the wholly innocent individual as well as someone transporting contraband—to feel somewhat cowed when a law enforcement officer approaches and begins to ask questions, particularly those probing into the possibility of illegal activity. But even apart from the difficulties that a more restrictive approach would pose for entirely legitimate law enforcement efforts, it is too late in the day—the law is too firmly established—to convert that notion into a more demanding test for the legality of a noncustodial encounter with an officer.

United States v. Ringold, 335 F.3d 1168, 1174 (10th Cir. 2004); *see also* United States v. Abdenbi, 361 F.3d 1282 (10th Cir. 2004). Police came to Abdenbi's home at 6:15 a.m. and requested entry so they could speak with someone who lived inside. They were admitted, and asked defendant to come out of his bedroom and speak with them. Defendant admitted he was in the United States illegally, and was arrested. Defendant argued that the consent to enter the apartment was involuntary "because no reasonable person ever feels free to decline an officer's request for permission to enter or search." *Id.* at 1288. The court declined to accept this proposition "because it would have the practical effect of preventing all district courts in this circuit from ever finding that an individual's cooperation with law enforcement officials was voluntary." *Id.*

113. *E.g.*, United States v. Mendenhall, 446 U.S. 544, 554 (1980) ("Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be 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."). This language has been widely adopted in determining when a reasonable individual would not feel free to decline a request by police. *See, e.g.*, United States v. Smith, 423 F.3d 25 (1st Cir. 2005); United States v. Peters, 194 F.3d 692, 697 (6th Cir. 1999); State v. Baker, 107 P.3d 1214, 1215 (Idaho 2004). Accordingly, courts tend to look to whether the police engaged in coercive activity, rather than to whether reasonable individuals under the circumstances would have felt coerced. *See, e.g.*, *In re S.D.*, No. A107548, 2005 WL 1274449, at *4 (Cal. Ct. App. May 27, 2005) ("It may be that the circumstances before us would be intimidating to an innocent reasonable person, but that is because encounters between uniformed

The court's desire for such a standard should be explicitly acknowledged. In the consensual encounter context, courts should apply a test that asks whether the conduct of the officers in question was reasonable in an interaction with a person as to whom there was no reasonable suspicion of criminal activity. Such a standard would turn the inquiry into one about police conduct rather than citizen behavior. More importantly, it would stop requiring police, government and the courts to repeatedly articulate the view that individuals interested in protecting their constitutional rights should routinely refuse and reject cooperation with police officers. In the long run, such a rule is more conducive to socially desirable behavior on the part of all participants in the criminal justice system.

police officers and juveniles late at night in dark parking lots are inherently intimidating, not because of any affirmative coercive actions on the part of the police.”). In concluding that there has been no seizure, courts tend to mention facts like the fact that officers did not have their guns drawn. *See, e.g., id.*; *Stith v. Commonwealth*, No. 2394-03-2, 2005 WL 41529 (Va. Ct. App. Jan. 11, 2005).