

ARTICLE

LAW AND ORDERS

*Rachel Harmon**

Coercive policing is conducted mostly by means of commands, and officers usually cannot use force unless they have first issued an order. Yet, despite widespread concern about force and coercion in policing, commands are both underregulated and misunderstood. Officers have no clear legal authority to give many common commands, almost no departmental guidance about how or when to issue them, and almost no legal scrutiny for many commands they give. Scholars rarely study commands, and when they do, they get them wrong. As a result of vague law and inadequate analysis, basic questions about police commands—what role they play, where officers get authority to issue them, and how law regulates them—remain unanswered. Instead, officers interact with the public in a legal gray zone, a recipe for illegitimacy and conflict. This Article offers initial answers to these questions. First, it explains the constitutive role commands play in policing: Long-standing law dictates that officers usually cannot compel people, including by stop or arrest, without issuing commands that impose new legal duties. Second, it contends that although statutes sometimes authorize specific commands, officers’ authority to issue many orders comes from—and is limited by—officers’ authority to stop, search, and arrest suspects. Third, the Article

* Harrison Robertson Professor of Law, University of Virginia Law School. I owe thanks to participants in law faculty workshops at the University of Virginia, Northwestern University, and the University of Pennsylvania and in the Law of the Police roundtable at the University of South Carolina. I am also grateful to Thomas Crocker, Brandon del Pozo, Barry Friedman, John Harrison, Adil Haque, Jody P. Kraus, Eric Miller, Caleb Nelson, Bob Newman, Richard Re, Anthony O’Rourke, and Malcolm Thorburn for their helpful discussions and suggestions on drafts of this Article, and to Christina Ponsa-Kraus for suggesting the title. I gave an early, short version of this paper as the 2022 Mastrofski Lecture at George Mason University and benefited from comments and questions from those who attended, including members of the Department of Criminology, Law and Society. Thanks also to Spencer Goldberg, Billi Jo Morningstar, Maya Nir, Nicholas Roberti, Lisa Wehrle, and the librarians at the University of Virginia Law School for research and editing assistance, and Nathan Eagan, Adam Stempel, and James Tomberlin for long-ago research on commands that has continued to aid me here. Similarly, I appreciate all those who commented on my previous, unpublished efforts to make sense of commands, including at law faculty workshops at the University of Georgia, the University of Michigan, and the University of Texas. All sources behind a paywall are on file with the *Columbia Law Review*.

argues that the legal functions commands serve—namely, generating and communicating legal duties—dictate that lawful orders must satisfy three constraints: They must be authorized by state law; they must obey constitutional limits; and they must provide adequate notice and opportunity for individuals to comply. These constraints are embedded in the law, but few avenues exist for challenging commands. Courts have therefore not defined or enforced limits on command authority well, except when commands violate constitutional rights. Courts can easily do better, and legislative and departmental action could clarify, extend, and enforce appropriate limits on police authority.

INTRODUCTION	945
I. THE ESSENTIAL ROLE OF POLICE COMMANDS	951
A. How We Think Police Change Conduct	951
1. Searches and Seizures.....	952
2. Force.....	956
B. How Police Actually Change Conduct: Commands	965
1. Ask, Tell, Make.....	966
2. The Nature of Police Commands	969
II. UNDERSTANDING POLICE COMMANDS	974
A. Studying Police Commands.....	974
B. The Authority to Command.....	980
1. An Inherent Power to Command?.....	980
2. An Alternative Account of the Power to Command	987
III. THE LAW OF POLICE COMMANDS	992
A. Legal Limits on Police Commands.....	992
1. Commands Must be Authorized	992
2. Commands Must Be Constitutional.....	997
3. Commands Must Offer Notice and Opportunity to Comply.....	1000
B. The Challenge of Challenging Commands	1006
C. Changing the Law of Commands.....	1010
CONCLUSION	1014

INTRODUCTION

In a now infamous incident, State Trooper Brian Encinia pulled over Sandra Bland for failing to signal in Waller County, Texas, in July 2015. In the dashcam video of the incident, you can see Encinia speaking briefly to Bland, taking her driver's license back to his patrol car and, shortly after, returning to Bland's car with a warning in hand for failing to signal.¹ But rather than give it to her and let Bland go on her way, Encinia asks, "You OK?"² After she responds briefly, he adds, "[Y]ou seem very irritated."³ Bland admits that she is, making it clear that, though the stop may have been lawful, she views it as unjust since she moved over only because the patrol car was tailing her closely.⁴ Encinia isn't happy, and the encounter takes a terrible turn when, responding to Bland's annoyance, the officer asks Bland, "You mind putting out your cigarette, please, if you don't mind?"⁵

When seen in writing, it looks like a polite request, but neither Bland nor Encinia treated Encinia's question that way. Both saw it as a command. If Bland had believed in the legitimacy of the police generally or in her traffic stop that day, she might have put out the cigarette, received her warning, and been on her way. But she didn't. Bland was a Black Lives Matter activist who thought—with some reason—that the traffic stop was bogus.⁶ Rather than comply immediately, Bland sought to clarify the officer's legal authority to give her that order: "I'm in my car, why would I have to put out my cigarette?"⁷

At that point, the confrontation intensifies. Encinia doesn't answer. Instead, he orders her out of the car.⁸ Bland refuses, again doubting his authority. After all, he had previously suggested she would receive a warning or a ticket, and all she did was ask about the cigarette. Encinia escalates again and again, threatening to pull her from the car and to tase her, repeating, "I am giving you a lawful order."⁹ Almost as often, Bland

1. For the video and a description of the incident, see Abby Ohlheiser & Abby Phillip, 'I Will Light You Up!': Texas Officer Threatened Sandra Bland With Taser During Traffic Stop, *Wash. Post* (July 22, 2015), <https://www.washingtonpost.com/news/morning-mix-wp/2015/07/21/much-too-early-to-call-jail-cell-hanging-death-of-sandra-bland-suicide-da-says> [<https://perma.cc/8USX-3JJJ>]. For a transcript of the encounter, see Rachel Harmon, *The Law of the Police* 41–44 (2021) [hereinafter Harmon, *Law of Police*].

2. Harmon, *Law of Police*, *supra* note 1, at 41.

3. *Id.* at 42.

4. See *id.* ("I was getting out of your way, you were speeding up, tailing me, so I move over, and you stop me, so yeah, I am a little irritated, but that doesn't stop you from giving me a ticket . . .").

5. See *id.*

6. See Katie Rogers, *The Death of Sandra Bland: Questions and Answers*, *N.Y. Times* (July 23, 2015), <https://www.nytimes.com/interactive/2015/07/23/us/23blandlisty.html>.

7. See Harmon, *Law of Police*, *supra* note 1, at 41–42.

8. See *id.* ("Well, you can step on out now.").

9. See *id.* at 42–43.

responds, “No, you don’t have the right.”¹⁰ The incident ends only after Encinia uses both force and an arrest to back up his demands.

No one who sees the dash camera footage could think Bland’s arrest was anything but senseless. And, tragically, Sandra Bland died by suicide in jail a few days later.¹¹ Still, it is hard not to be struck by what drove the interaction off the rails. Encinia and Bland came to blows because they disagreed about the lawfulness of his directives—both his “request” to put out the cigarette and his demand that she step out of the car. Bland refused to do what Encinia wanted because of that disagreement. And Encinia used force and an arrest because she did not comply.

The law governing Encinia’s directives was unclear, not only to Encinia and Bland but also to experts after the fact. Commentators disagreed about whether Encinia’s question about the cigarette was a request Bland was free to disregard or a command with which she should have complied,¹² as well as about what standard determines whether such an order is legal.¹³ Their disparate views were based more on intuition than legal evidence, since nothing in Texas law makes either issue clear.

By contrast, experts almost all agreed that *Pennsylvania v. Mimms*,¹⁴ a Fourth Amendment case decided by the Supreme Court, authorized the officer to order Bland out of the car,¹⁵ though that view is obviously wrong.

10. See *id.* at 42.

11. See Ohlheiser & Phillip, *supra* note 1.

12. Compare, e.g., Danny Cevallos, Opinion, Was the Sandra Bland Traffic Stop Legal—And Fair?, CNN (July 23, 2015), <https://www.cnn.com/2015/07/23/opinions/cevallos-sandra-bland-traffic-stop/index.html> [<https://perma.cc/RPG6-LXRM>] (command), and Reid J. Schar, Opinion, What Constitutes a ‘Lawful Order’, Hill: Congress Blog (Sept. 17, 2015), <https://thehill.com/blogs/congress-blog/judicial/253939-what-constitutes-a-lawful-order/> [<https://perma.cc/LX4Y-EY4Q>] (same), with Orin Kerr, The Law of the Sandra Bland Traffic Stop, Wash. Post: Volokh Conspiracy (July 23, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/07/23/the-law-of-the-sandra-bland-traffic-stop/> [<https://perma.cc/B5SL-ZUSD>] [hereinafter Kerr, Law of Traffic Stop] (request), and Richard Winton, Can a Police Officer Order You Out of Your Car? Experts Weigh In on Sandra Bland Case, L.A. Times (July 22, 2015), <https://www.latimes.com/nation/la-na-sandra-bland-arrest-experts-20150722-story.html> [<https://perma.cc/X9SQ-GQKS>] (same) (quoting former law enforcement officers Greg Meyer and Professor Seth Stoughton).

13. Compare, e.g., Orin Kerr, Opinion, Sandra Bland and the ‘Lawful Order’ Problem, Wash. Post: Volokh Conspiracy (July 23, 2015), <https://www.washingtonpost.com/news/volokhconspiracy/wp/2015/07/23/sandra-bland-and-the-lawful-order-problem/> [<https://perma.cc/DD5S-8PUM>] (citing related Oregon cases and noting that “[a]n order is lawful if forcing compliance would not violate any law”), with Schar, *supra* note 12 (citing a New York case that instead concludes that “an order is lawful when that order is ‘reasonably designed to achieve’ its [law enforcement] goal” (quoting *People v. Jennings*, 347 N.Y.S.2d 818, 820 (N.Y. Just. Ct. 1973))).

14. 434 U.S. 106 (1977).

15. See, e.g., Cevallos, *supra* note 12; Kerr, Law of Traffic Stop, *supra* note 12; Mark Joseph Stern, Asking Sandra Bland to Get Out of Her Car Was Legal. What Happened Next Likely Was Not., Slate (July 22, 2015), <https://slate.com/news-and-politics/>

Although the Constitution gives some powers to the President and Congress and reserves other powers for the states, the Fourth Amendment grants power to no one. Instead, it limits what states—which empower state and local police officers—may authorize police officers to do, something the U.S. Supreme Court frequently forgets.¹⁶ Even Texas courts have relied on *Mimms* to find that officers have such authority as a matter of state law.¹⁷ And even if Texas had given Encinia the power to order drivers out of vehicles during traffic stops, he still likely violated the U.S. Constitution—and perhaps Texas law—by ordering Bland out of the car after the traffic stop was effectively complete.¹⁸

If Bland had lived, the legal status of Encinia’s commands still would not have been clarified. If prosecutors pursued criminal charges against her or she sued for damages, courts would have evaluated Encinia’s decision to arrest Bland and his use of force against her without much evaluation of the officer’s orders. And if Bland had cooperated instead, she might have gone on her way with a warning. At that point, she would have had little recourse to complain.

After Bland’s death, Encinia was fired. But though the state trooper’s actions consisted mostly of commands and efforts to defend or enforce them, he was fired for failing to remain “courteous and tactful” and to “exercise patience and discretion.”¹⁹ The department complained that he

2015/07/sandra-bland-arrest-her-detention-was-legal-but-encinia-used-excessive-force.html [https://perma.cc/9V93-UQ9L]; Tamara Tabo, Sandra Bland and What No One Seems to Know About Their Rights, Above the Law (Jan. 8, 2016), <https://abovethelaw.com/2016/01/sandra-bland-and-what-no-one-seems-to-know-about-their-rights/> [https://perma.cc/38W9-3UXZ]; Winton, *supra* note 12 (quoting Ed Obayashi and Greg Meyer, a sheriff’s deputy and retired Los Angeles police captain, who agree that the officer’s actions were lawful).

16. See *infra* notes 43–47 and accompanying text. Though, by its text, the Fourth Amendment runs only against the federal government, it has been incorporated against the states through the due process clause of the Fourteenth Amendment. *Wolf v. Colorado*, 338 U.S. 25, 27–28 (1949).

17. Facing challenges under both the Fourth Amendment and the Texas Constitution, Article 1, Section 9, which also protects against unreasonable searches and seizures, Texas courts regularly cite *Pennsylvania v. Mimms*, 434 U.S. at 111, and sometimes Texas cases relying on *Mimms*, to conclude that officers may order drivers out of cars. See, e.g., *Hill v. State*, 303 S.W.3d 863, 871 (Tex. App. 2009); *Estrada v. State*, 30 S.W.3d 599, 603 (Tex. App. 2000); *Josey v. State*, 981 S.W.2d 831, 840 (Tex. App. 1998). Texas constitutional doctrine does not follow in lockstep with federal search and seizure law. See *Autran v. State*, 887 S.W.2d 31, 37 (Tex. Crim. App. 1994).

18. See *Rodriguez v. United States*, 575 U.S. 348, 357 (2015) (“[A] traffic stop ‘prolonged beyond’ that [end] point is ‘unlawful.’” (quoting *Illinois v. Caballes*, 543 U.S. 405, 407 (2005))).

19. Letter from Steven C. McCraw, Dir., Tex. Dep’t of Pub. Safety, to Brian Encinia, Trooper, Tex. Dep’t of Pub. Safety (Jan. 28, 2016) (on file with the *Columbia Law Review*) [hereinafter McCraw January 28 Letter to Encinia] (detailing allegations against Encinia); Letter from Steven C. McCraw, Dir., Tex. Dep’t of Pub. Safety, to Brian Encinia, Trooper, Tex. Dep’t of Pub. Safety (Mar. 1, 2016) (on file with the *Columbia Law Review*) (notifying Encinia of his termination).

extended the stop inappropriately and did not follow the department's stop script properly.²⁰ Yet it said nothing about either the scope or the manner of his commands. Officers who follow might not show such bad judgment, but they will be little better informed about when and how they may issue orders.

The “pointless indignity”²¹ and the subsequent tragedy of Bland's arrest and death makes hers an egregious case, but uncertainty about and underregulation of police commands goes far beyond this incident. Scholars mostly ignore commands and, except for some broad constitutional constraints, officers get almost no guidance about what commands they may issue, how they should issue them, or what purposes they may serve. Instead, courts, legislatures, police departments, and communities misunderstand how commands function and what legal constraints exist or should exist upon them. And those subject to police commands often have little basis—or venue—for complaint. Yet commands have serious, far-reaching consequences. More than ten percent of Americans are ordered by the police to do something each year.²² At best, they comply, and they are deprived only of some freedom; at worst, they refuse, and they are deprived of their lives.

By many accounts, American policing is less effective and more violent, intrusive, and discriminatory than it should be.²³ To address these

20. See McCraw January 28 Letter to Encinia, *supra* note 19.

21. *Atwater v. City of Lago Vista*, 532 U.S. 318, 321 (2001).

22. Data for 2020, the most recent year available, indicate that U.S. police officers initiated contact with approximately 10% of people over age sixteen, more than twenty-five million people, overwhelmingly during traffic stops. See Susannah N. Tapp & Elizabeth J. Davis, DOJ, Bureau of Just. Stat., NCJ 304527, *Contacts Between the Police and the Public, 2020*, at 2 fig.1 (2022) <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/cbpb20.pdf> [<https://perma.cc/XBW5-Q598>]. All these traffic stops necessarily involve at least one police command, if only to pull over a car. The data could mildly overestimate the number of people who have been commanded because respondents may experience multiple types of contact. But my 10% estimate does not include the many commands that were issued to the 14.5% of Americans over age sixteen who reported initiating contact with the police or who had contact as a result of traffic accidents. See *id.* Nor does my 10% estimate include those who are disproportionately likely to have been subject to commands but are systematically excluded from the Police–Public Contact Survey, including people recently admitted to corrections facilities and jail and people experiencing homelessness. *Id.* at 16. Most estimates put each population at more than a half a million. See, e.g., Todd D. Minton & Zhen Zeng, DOJ, Bureau of Just. Stat., NCJ 303308, *Jail Inmates in 2020—Statistical Tables 1* (2021), <https://bjs.ojp.gov/content/pub/pdf/ji20st.pdf> [<https://perma.cc/7NMQ-5QDA>] (estimating 549,100 people incarcerated in local jails in midyear 2020); Bruce D. Meyer, Angela Wyse & Kevin Corinth, *The Size and Census Coverage of the U.S. Homeless Population 5* (Becker Friedman Inst. for Econ., Working Paper No. 2022-78, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4142734 [<https://perma.cc/BL8W-PN2Y>] (estimating that there are 500,000–600,000 people experiencing homelessness in the United States). Thus, 10% is likely an underestimate.

23. Both President Joseph R. Biden and President Donald J. Trump said as much in executive orders. See Exec. Order No. 14,074, § 1, 87 Fed. Reg. 32,945 (May 25, 2022); Exec. Order No. 13,929, § 1, 3 C.F.R. 376 (2021).

problems, some activists and academics call for radically changing the way public safety is produced, and communities are experimenting with alternatives to policing. Still, as some reach for the “abolitionist horizon,”²⁴ coercive policing, the kind that seeks to control conduct,²⁵ is not going away, at least any time soon; and overwhelmingly, Americans continue to support it.²⁶ Whatever the future may hold for policing, the power officers continue to exercise must be regulated appropriately. That project requires strengthening the law governing police commands because, as this Article argues, both as a legal and a practical matter, police primarily compel people by issuing commands.

This Article proceeds in three parts. Part I argues that we misunderstand how police officers control what people do.²⁷ In analyzing coercive policing, lawyers consider searches and seizures.²⁸ Everyone else emphasizes force.²⁹ But policing practice and the law that generates police authority suggest a different answer: Officers often exercise—and must

24. Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 *Calif. L. Rev.* 1781 (2020).

25. Coercive policing might usefully be distinguished from intrusive policing, which does not attempt to control conduct but nevertheless impinges on citizens’ interests in other ways, such as by surveillance or by searching and taking property without the owner’s involvement.

26. See Justin McCarthy, *Americans Remain Steadfast on Policing Reform Needs in 2022*, Gallup (May 27, 2022), <https://news.gallup.com/poll/393119/americans-remain-steadfast-policing-reform-needs-2022.aspx> [<https://perma.cc/4VHG-US54>] (showing majorities of Americans do not support eliminating police enforcement of nonviolent crime, taking away military weapons and equipment from police, reducing police budgets, or abolishing departments).

27. Policing raises some intractable nomenclature issues. See Harmon, *Law of Police*, *supra* note 1, at xxix–xxx. First, how to name those with whom officers interact. This Article mostly uses “people” but sometimes use “citizens” to emphasize the political relationship in police encounters. In doing so, this Article does not mean to exclude noncitizens who may disproportionately encounter the police. Second, gender. This Article refers to unidentified officers by male pronouns to reflect an empirical reality: Policing remains male dominated and its practices heavily gendered. See, e.g., Frank Rudy Cooper, “Who’s the Man?": Masculinities Studies, *Terry* Stops, and Police Training, 18 *Colum. J. Gender & L.* 671, 675–76 (2009) (arguing that male officers sometimes turn encounters with male civilians into masculinity contests that affect how law is enforced). By contrast, this Article uses the singular “they” to refer to unidentified individuals with whom officers interact. More females than males have contact with the police, though police initiate encounters with males more often. Tapp & Davis, *supra* note 22, at 3 tbl.1. The differences are not profound, and those data fail to capture the estimated 1% of adults who identify as neither male nor female. See, e.g., Anna Brown, *About 5% of Young Adults in the U.S. Say Their Gender Is Different From Their Sex Assigned at Birth*, *Pew Rsch. Ctr.* (June 7, 2022), <https://www.pewresearch.org/fact-tank/2022/06/07/about-5-of-young-adults-in-the-u-s-say-their-gender-is-different-from-their-sex-assigned-at-birth/> [<https://perma.cc/7MRY-ZKK2>]. Third, force. When this Article talks about force, it refers to physical force against a person’s body, whether directly or by a weapon. It does not include nonphysical means of compulsion or constraint, though such activities also can be coercive, harmful, or intrusive.

28. See *infra* section I.A.1.

29. See *infra* section I.A.2.

exercise—their lawful authority by issuing commands that generate new legal duties for those subject to them.³⁰ Commands are the core of policing.

Part II notes that despite how important commands are to policing, neither social scientists nor legal scholars have adequately studied them. Criminologists wrongly view commands as informal or as a form of force; law professors examine them only in passing.³¹ As a result, no one has clearly identified where police get their power to issue commands or what limits constrain that authority. To help, Part II proposes an initial account of the law of commands. Rather than having any inherent or general power to command, officers may issue orders only because of, and within the limits of, state statutes that either specifically authorize commands or authorize stops, searches, and arrests.³²

Part III argues that this account of commands implies three sets of legal constraints, which courts have inadequately enforced: (1) Commands must be authorized; (2) commands must comply with constitutional standards; and (3) commands must provide clear notice and allow individuals an opportunity to comply.³³ Because we have failed to consider commands carefully, and the public has few mechanisms to challenge problematic commands, command law and policy remain underdeveloped, though these legal constraints are already embedded in the law.³⁴ Simply acknowledging these legal requirements could improve judicial and legislative reasoning about the law governing coercive policing. Beyond that, states could by statute, and police departments by policy, better ensure that commands stay within these legal bounds. Finally, as some communities rethink what coercive policing should look like, they could use police department policies and state laws to narrow police authority to issue enforceable commands.

Scholars and other commentators frequently debate laws that restrict policing. Far less attention has been paid to how the law generates police power and what that means for police practice. More needs to be said about commands than can be discussed in a single paper, and law cannot fix all that is wrong with policing. Nevertheless, examining commands and the law that enables them can help us understand policing as it really is and can suggest some steps to ensure that it is appropriately guided and governed.

30. See *infra* section I.B.

31. See *infra* section II.A.

32. See *infra* section II.B.

33. See *infra* section III.A.

34. See *infra* section III.B.

I. THE ESSENTIAL ROLE OF POLICE COMMANDS

In addition to following the Busytown exploits of Grocer Cat, Mayor Fox, and Doctor Lion, the children's book *What Do People Do All Day?* looks at the activities of the police, who "are working at all times to keep things safe and peaceful."³⁵ Sergeant Murphy saves Huckle from drowning, stops two bad boys from fighting, unscrambles a traffic jam, gives Wild Bill Hiccup a speeding ticket, and catches and arrests Gorilla Bananas for stealing fruit, all before going home for supper.³⁶ As Richard Scarry reports, people variously encounter the police when they report crimes or are suspected of them, when they violate traffic laws or have a car accident, when they ask for help or when they disturb others.³⁷ And in most of those encounters, officers try to manage how people act.³⁸

Not all policing involves encounters. Officers often handle derelict vehicles, obtain phone records, assist other emergency responders, and surveil (and sometimes search and seize) property without interacting with the public. And not all police encounters include officers trying to change people's behavior. When officers chat with pedestrians or attend community meetings, they usually do not try to influence what anyone does, at least not in specific ways. But, much of the time, officers want witnesses and suspects to give them information. They want people to reduce disorder by moving cars, stopping fighting, or backing up. And they want people to help them resolve situations by settling down, going on their way, taking a ticket, or submitting to arrest.³⁹ Officers expect people to do these things, even when they don't want to. How do officers get people to do what they want?

A. *How We Think Police Change Conduct*

Common answers to the question of how police change conduct are misleading. Although lawyers usually explain coercive policing in terms of its component searches and seizures—largely using constitutional law to understand police encounters—these legal categories obscure rather than

35. Richard Scarry, *What Do People Do All Day?* 32 (Golden Books 2015) (1968).

36. See *id.* at 33–36.

37. See Nat'l Rsch. Council, *Fairness and Effectiveness in Policing* 57–78 (Wesley Skogan & Kathleen Frydl eds., 2004) (describing "The Nature of Policing in the United States" through officers' activities—uniformed patrol, maintaining order, controlling traffic, preventing crime, investigating crimes, processing information, and specialized functions such as SWAT).

38. See Geoffrey P. Alpert, Roger G. Dunham & John M. MacDonald, *Interactive Police-Citizen Encounters that Result in Force*, 7 *Police Q.* 475, 476 (2004) ("The goal in all police-citizen encounters is for the officer to gain control of the situation.").

39. See Richard E. Sykes & Edward E. Brent, *The Regulation of Interaction by Police: A Systems View of Taking Charge*, 18 *Criminology* 182, 183–84 (1980) (describing common goals during police encounters). Police also often want people to act respectfully toward them, a more problematic coercive goal. See *id.*; John Van Maanen, *The Asshole*, in *Policing: A View From the Street* 307, 309, 315–17 (Peter K. Manning & John Van Maanen eds., 1978).

describe how police coerce people. Other commentators contend that policing's unique characteristic is that officers are authorized to compel people by force. But this view is inconsistent with centuries of law dictating that force plays a secondary role in policing.

1. *Searches and Seizures.* — Lawyers and police officers analyze what police officers do largely in terms of searches and seizures. To see why, it helps to review some basic facts about policing and the law. Police officers get their authority from state law. That law gives officers limited coercive powers to use as they patrol the streets, answer calls, and try to prevent and discover crimes. Mostly, officers are allowed to stop suspicious people and ask for identification;⁴⁰ search for evidence with a warrant—and sometimes without one;⁴¹ and arrest people, usually without a warrant, based on probable cause to believe they have committed a crime.⁴² Officers' state powers are subject to other legal constraints, including those embedded in federal and state constitutional law. The most important of those constraints—indeed, the most important rule governing the police—is the Fourth Amendment, which protects “[t]he

40. See, e.g., Ala. Code § 15-5-30 (2022); Kan. Stat. Ann. § 22-2402 (West 2022); Neb. Rev. Stat. § 29-829 (2022).

41. See, e.g., Del. Code tit. 11, §§ 2302–2303 (2022); N.Y. Crim. Proc. Law § 2.20 (McKinney 2022). Several states' statutes or constitutions apparently prohibit warrantless searches, see, e.g., Va. Code Ann. § 19.2-59 (2022); Wash. Rev. Code Ann. § 10.79.040 (West 2022), but court opinions interpret these statutes to have exceptions. See, e.g., *Commonwealth v. Campbell*, 807 S.E.2d 735, 738–40 (Va. 2017) (discussing the exigent circumstances exception to the state warrant requirement); *State v. Patton*, 219 P.3d 651, 654–68 (Wash. 2009) (en banc) (discussing the scope of search incident to the arrest exception to the state warrant requirement).

42. See, e.g., Cal. Penal Code § 836 (2022); Iowa Code § 804.7 (2023); La. Code Crim. Proc. Ann. art. 213 (2021). Quite literally, we define police officers by their authority to arrest. See, e.g., Sean E. Goodison, DOJ, Bureau of Just. Stat., NCJ 305187, *Local Police Departments Personnel*, 2020, at 1 (2022), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/lpdp20.pdf> [<https://perma.cc/4DWL-MKZX>] (distinguishing in national data on law enforcement personnel between sworn officers and civilians by whether the agency personnel had arrest power). Officers are also allowed to issue tickets in lieu of arrest for some crimes. See, e.g., Alaska Stat. § 12.25.180 (2022); Haw. Rev. Stat. Ann. §§ 286-10, 803-6 (West 2022); Ky. Rev. Stat. Ann. § 431.015 (West 2023).

In using the term “police officers,” this Article includes all sworn officers employed by general-purpose law enforcement agencies, not just those traditionally known as “the police.” “General-purpose law enforcement agencies include municipal, county, and regional police departments; most sheriffs’ offices; and primary state and highway patrol agencies. They are distinct from special-purpose agencies, sheriffs’ offices with jail and court duties only, and federal law enforcement agencies . . . [S]worn officers are those with general arrest powers.” Goodison, *supra*, at 15.

States also generally allow private citizens to make arrests as a matter of common law or by statute. But citizen arrest powers are narrower, citizens have less leeway to use force or make mistakes, and citizens do not have accompanying powers to search arrestees. See Ira P. Robbins, *Vilifying the Vigilante: A Narrowed Scope of Citizen’s Arrest*, 25 *Cornell J.L. & Pub. Pol’y* 557, 565–77 (2016). At common law, private actors had greater powers but still less expansive arrest authority than constables. Thanks to Eric Miller for reminding me that the power to arrest is necessary, but often not sufficient, to make a police officer.

right of the people to be secure in their persons, houses, papers, and effects, against unreasonable *searches and seizures*.⁴³ When officers exercise their state-given powers by stopping people, arresting them, or searching them or their property, they carry out “searches” and “seizures” within the meaning of federal constitutional law.⁴⁴ Although the “quintessential[]” seizure is an arrest,⁴⁵ officers also seize people when they restrain their freedom in less serious ways, such as by detaining them briefly on the street to ask them questions.⁴⁶ When officers enter people’s homes to look for evidence of a crime, open their car doors to look for drugs, or pat them down on the street to look for weapons, they search them within the meaning of the Fourth Amendment.⁴⁷

Constitutional doctrine has a lot to say about when police activities constitute searches and seizures and when those searches and seizures are reasonable.⁴⁸ Lawyers and police study that doctrine and break police encounters down into searches and seizures because those activities constitute policing’s most legally consequential parts. Most significantly, in criminal cases, officers face the possibility that the evidence they discover will be excluded if they do not adhere to the Fourth Amendment’s

43. U.S. Const. amend. IV (emphasis added).

44. Fourth Amendment doctrine holds that a police officer seizes a person when, “by means of physical force or show of authority,” *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968), the officer restrains the person’s liberty such that “a reasonable person would have believed he was not free to leave,” *United States v. Mendenhall*, 446 U.S. 544, 554 (1980), or when a person’s movement is confined for other reasons, “whether a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter,” *Florida v. Bostick*, 501 U.S. 429, 436 (1991). Analogously, a police officer seizes property when “there is some meaningful interference with an individual’s possessory interests in that property.” *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). A police officer searches a person or place when he “obtains information by physically intruding on a constitutionally protected area,” *United States v. Jones*, 565 U.S. 400, 406 n.3 (2012), or intrudes on a person’s expectation of privacy “that society is prepared to recognize as reasonable,” *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018). See also *Katz v. United States*, 389 U.S. 347, 351 (1967) (finding a search when officers violated privacy “upon which [the defendant] justifiably relied”).

45. *Payton v. New York*, 445 U.S. 573, 585 (1980) (internal quotation marks omitted) (quoting *United States v. Watson*, 423 U.S. 411, 428 (1976) (Powell, J., concurring)).

46. *Terry*, 392 U.S. at 16 (“[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person.”).

47. See *New York v. Class*, 475 U.S. 106, 114–15 (1986) (“[A] car’s interior as a whole is nonetheless subject to Fourth Amendment protection from unreasonable intrusions by the police. . . . [I]ntrusion into that space constituted a ‘search.’”); *Payton*, 445 U.S. at 585 (“[T]he ‘physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.’” (quoting *United States v. U.S. Dist. Ct. for E. Dist. Of Mich.*, 407 U.S. 297, 313 (1972))); *Terry*, 392 U.S. at 16 (“[I]t is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person’s clothing all over his or her body in an attempt to find weapons is not a ‘search.’”).

48. See Brent E. Newton, *The Supreme Court’s Fourth Amendment Scorecard*, 13 *Stan. J. C.R. & C.L.* 1, 4 (2017) (analyzing “the 148 cases from 1982 through 2015 in which the Supreme Court granted certiorari and gave plenary consideration to Fourth Amendment issues”).

demands.⁴⁹ To avoid that outcome, officers are trained and expected by departments to follow the Fourth Amendment—the Fourth Amendment jurisprudence has become a sort of national police manual—and searches and seizures are dominant when officers and lawyers think about police coercion.

Still, these legal categories are misleading when it comes to understanding how police behave in encounters and how they compel individuals to act. First, calling something a “stop” or “arrest” or “search” makes it sound like a simple, discrete act that an officer “conducts.” But arrests and searches are not like blows to the head. Every legal “stop,” “search,” and “arrest” represents a complex interaction between an officer and a member of the public.⁵⁰ When an officer engages in a simple custodial arrest, for example, he has to stop a person from doing whatever they were doing, put handcuffs on them, pat them down for weapons, look in their pockets, put them in a police car, and transport them. When officers search a house, they announce their presence, enter, discover and detain residents, look through rooms, and take items before leaving. Even a quick pedestrian “stop” includes a lot more than just curtailing a person’s forward motion. Officers ask questions and look at identification, sit people on curbs, and put them in handcuffs.⁵¹ Police encounters occur over time and space. Both parties participate and respond to each other. And there are many opportunities for things to fall apart.

Second, not all searches and seizures change someone’s conduct. Officers can search you by getting you to open your mouth, your phone, your pockets, or your front door, or by telling you to blow into a breathalyzer at the side of the road. But other searches occur without any interaction. You might not know when an officer sticks a GPS on your car;⁵²

49. See, e.g., *Utah v. Strieff*, 136 S. Ct. 2056, 2059 (2016) (“To enforce the Fourth Amendment’s prohibition against ‘unreasonable searches and seizures,’ this Court has at times required courts to exclude evidence obtained by unconstitutional police conduct.”).

50. See Geoffrey Alpert, Roger Dunham, Justin Nix, Kyle McLean & Scott Wolfe, Authority Maintenance Theory of Police-Citizen Interactions, *in* *Critical Issues in Policing: Contemporary Readings* 376, 378 (Roger G. Dunham, Geoffrey P. Alpert & Kyle D. McLean eds., 8th ed. 2021) [hereinafter Alpert et al., *Authority Maintenance Theory*] (“Police-citizen encounters are social experiences that are alive—exchanges that are based on actions, reactions, social cues, interpretations, and beliefs . . .”).

51. See, e.g., *United States v. Mohamed*, 630 F.3d 1, 6 (1st Cir. 2010) (holding that the officers’ actions did not exceed the scope of an investigatory stop, even though they surrounded the suspect with guns drawn, ordered him to the ground, and handcuffed him); *United States v. Shoals*, 478 F.3d 850, 853 (7th Cir. 2007) (holding that seizure of a person could be a *Terry* stop and not a full arrest, even though officers ordered him to exit the house, drew their guns, and handcuffed him); see also *United States v. Smith*, 3 F.3d 1088, 1094–95 (7th Cir. 1993) (reasoning that handcuffing defendants “did not necessarily turn a legal investigative stop into an arrest” and citing six other circuits in accord).

52. See *United States v. Jones*, 565 U.S. 400, 404 (2012).

opens your mail,⁵³ or listens to your phone calls.⁵⁴ Even if you later feel violated, you will not have been coerced. And consider the range of activities that might constitute an arrest requiring probable cause: touching someone with the intent to take them into custody,⁵⁵ shooting them,⁵⁶ successfully asking them to submit to arrest,⁵⁷ tackling them,⁵⁸ keeping them too long at a traffic stop,⁵⁹ or handcuffing them and transporting them to the stationhouse.⁶⁰

And third, not all of officers' attempts to change conduct constitute either a search or a seizure. Under Fourth Amendment law, an officer who tells you to stop moving or to get into a car seizes you, at least if you comply, because no reasonable person would feel free to leave under the circumstances.⁶¹ When an officer tells you to get out of the way or to move along, he similarly demands that you act. But because he restricts only one activity—staying put—under the same doctrine, many courts conclude that he does not seize you.⁶² When you open a bag because an officer tells you to do so, you have been searched.⁶³ But when you tell him what is inside because he tells you to do so, you have not: The officer has not trespassed on your property or intruded on your reasonable expectation of privacy.⁶⁴

Legal categories exist for legal purposes. Mostly, courts and legislatures draw circles around some harmful activities to impose safeguards on them. Everything that qualifies as a stop requires

53. *United States v. Van Leeuwen*, 397 U.S. 249, 251 (1970); *Ex parte Jackson*, 96 U.S. 727, 732–33, 735 (1878).

54. See *Berger v. New York*, 388 U.S. 41, 51 (1967).

55. See *Torres v. Madrid*, 141 S. Ct. 989, 996–98 (2021).

56. See *id.* at 999.

57. *California v. Hodari D.*, 499 U.S. 621, 626 (1991) (“An arrest requires *either* physical force . . . or, where that is absent, *submission* to the assertion of authority.”).

58. See *id.* at 629.

59. See *United States v. Sharpe*, 470 U.S. 675, 685 (1985).

60. See *Dunaway v. New York*, 442 U.S. 200, 212–13 (1979).

61. See *Hodari D.*, 499 U.S. at 626; *supra* note 44.

62. See, e.g., *Peery v. City of Miami*, 977 F.3d 1061, 1071–72 (11th Cir. 2020); *Youkhanna v. City of Sterling Heights*, 934 F.3d 508, 523 (6th Cir. 2019); *Salmon v. Blesser*, 802 F.3d 249, 253 (2d Cir. 2015).

63. See, e.g., *United States v. Johnson*, 43 F.4th 1100, 1111 (10th Cir. 2022) (“In the context of passenger luggage, an officer violates a passenger’s reasonable expectation of privacy when the officer touches the luggage in a manner that exceeds how a fellow passenger or transportation employee would.”).

64. See *supra* note 44. One might, however, have a different constitutional claim, depending on the circumstances of the questioning. The Fifth Amendment provides that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.” U.S. Const. amend. V. This privilege against self-incrimination applies to police questioning, and officers may not demand that suspects provide testimonial, incriminating answers to questions. Cf. *Hibel v. Sixth Jud. Dist. Ct. of Nev.*, 542 U.S. 177, 191 (2004) (concluding that an officer could demand that a suspect identify himself because a name alone is unlikely to be incriminating).

reasonable suspicion;⁶⁵ everything in the arrest circle requires probable cause.⁶⁶ Some categories of searches require warrants; others do not.⁶⁷ This is not to say that legal categories are unimportant. They structure and constrain policing. They motivate institutional arrangements and generate incentives. But the legal categories that we use to regulate policing hide the varied, complex, and iterative events that happen when officers interact with members of the public. Officers do not change conduct by searching and seizing people. Instead, they search and seize people by repeatedly and varyingly trying to get people to change their conduct.

2. *Force*. — Although most lawyers analyze police encounters by breaking them into searches and seizures, if one asks scholars, commentators, or people on the street how the police change conduct, they likely will give a different answer: Officers threaten and use force. The most important academic account along these lines comes from Professor Egon Bittner. He famously explained that policing's unique function is that it is "a mechanism for the distribution of non-negotiably coercive force employed in accordance with the dictates of an intuitive grasp of situational exigencies."⁶⁸ To Bittner, policing is defined not by the authority to arrest or detain or search, but by "the expectation that the police will use force to achieve their objectives."⁶⁹

This account—that policing is fundamentally about the capacity and authority to use force—has been enormously influential.⁷⁰ Since the 2020 murder of George Floyd, for example, critics of policing have argued that officers should do less, especially less of what they are unsuited or

65. See *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000).

66. See *supra* note 42 and accompanying text.

67. See *supra* note 41 and accompanying text.

68. Egon Bittner, *The Functions of the Police in Modern Society: A Review of Background Factors, Current Practices, and Possible Role Models* 46 (1970) [hereinafter Bittner, *Functions of Police*] (emphasis omitted); see also Egon Bittner, *Florence Nightingale in Pursuit of Willie Sutton: A Theory of the Police*, in *The Potential for Reform of Criminal Justice* 17, 18, 37 (Herbert Jacob ed., 1974) [hereinafter Bittner, *Florence Nightingale*] (arguing "that police are empowered and required to impose or, as the case may be, coerce a provisional solution upon emergent problems without having to brook or defer to opposition of any kind," that is, that they have "the capacity to use force").

69. Bittner, *Functions of Police*, *supra* note 68, at 34.

70. Bittner's 1970 book and follow-on article in 1974 have been cited thousands of times and are well recognized classics in the policing canon. See, e.g., Robert Reiner, *Revisiting the Classics: Three Seminal Founders of the Study of Policing: Michael Banton, Jerome Skolnick and Egon Bittner*, 25 *Policing and Soc'y* 308, 308 (2015). I have cited Bittner's work for these ideas repeatedly. See, e.g., Harmon, *Law of Police*, *supra* note 1, at 27–35, 39; Rachel A. Harmon, *When Is Police Violence Justified?*, 102 *Nw. U. L. Rev.* 1119, 1152 (2008) [hereinafter Harmon, *When Is Police Violence Justified?*]; Rachel A. Harmon, *Why Arrest?*, 115 *Mich. L. Rev.* 307, 343, 345 (2016) [hereinafter Harmon, *Why Arrest?*].

unnecessary to do.⁷¹ Commentators call for “unbundling”⁷² or “disaggregating”⁷³ policing and reassigning traffic enforcement,⁷⁴ conflicts over homelessness,⁷⁵ school safety,⁷⁶ and mental health crises⁷⁷ to other actors. Yet most of these commentators agree that some tasks should stay with police officers, and when they describe that category, they focus on police capacity to do violence. Professor Patrick Sharkey, for instance, suggests reformers identify the activities “we need armed police to do.”⁷⁸ Professor Barry Friedman encourages communities to consider whether “force and law” is the appropriate response before assigning the police a

71. For popular versions, see, e.g., Sarah Jones, We Are Asking the Police to Do Too Much, *N.Y. Mag.: Intelligencer* (June 2, 2020), <https://nymag.com/intelligencer/2020/06/killing-of-george-floyd-shows-our-over-reliance-on-police.html> [<https://perma.cc/8VCX-MKK5>]; Christy E. Lopez, Opinion, Defund the Police? Here’s What That Really Means., *Wash. Post* (June 7, 2020), <https://www.washingtonpost.com/opinions/2020/06/07/defund-police-heres-what-that-really-means/>; Matt Vasilogambros, ‘If the Police Aren’t Needed, Let’s Leave Them Out Completely’, *Pew Charitable Trs.: Stateline* (June 23, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/06/23/if-the-police-arent-needed-lets-leave-them-out-completely> [<https://perma.cc/LH9X-QNF3>]. For academic accounts, see, e.g., Barry Friedman, Disaggregating the Police Function, 169 *U. Pa. L. Rev.* 925, 928 (2021); Jordan Blair Woods, Traffic Without the Police, 73 *Stan. L. Rev.* 1471, 1479 (2021) [hereinafter Woods, *Traffic Without Police*].

72. See Derek Thompson, Unbundle the Police, *Atlantic* (June 11, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/unbundle-police/612913/>.

73. See Friedman, *supra* note 71, at 931.

74. See, e.g., Woods, *Traffic Without Police*, *supra* note 71, at 1477–79; TJ Grayson & James Forman, Jr., Opinion, Get Police Out of the Business of Traffic Stops, *Wash. Post* (Apr. 16, 2021), <https://www.washingtonpost.com/opinions/2021/04/16/remove-police-traffic-stops/>.

75. See, e.g., Nat’l L. Ctr. on Homelessness & Poverty, *Housing Not Handcuffs 2019: Ending the Criminalization of Homelessness in U.S. Cities* 97 (2019), <https://homelesslaw.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf> [<https://perma.cc/LV94-4RQF>]; Friedman, *supra* note 71, at 965–67.

76. See, e.g., Ryan King & Marc Schindler, *Reconsidering Police in Schools*, in *A Better Path Forward for Criminal Justice* 37, 41–42 (Brookings–AEI Working Grp. on Crim. Just. Reform ed., 2021), https://www.brookings.edu/wp-content/uploads/2021/04/Better-Path-Forward_Brookings-AEI-report.pdf [<https://perma.cc/G2NN-HUF4>]; Danielle Layton & Reuben Addo, *Defunding School Resource Officers: A New Commitment to Student Safety*, 2 *J. Pol’y Prac. & Rsch.* 264, 267 (2021) (“A prominent police presence has been linked to heightened feelings of vulnerability [at school], especially for students from over-policed communities.”).

77. See, e.g., Nicholas Turner, We Need to Think Beyond Police in Mental Health Crises, *Vera* (Apr. 6, 2022), <https://www.vera.org/news/we-need-to-think-beyond-police-in-mental-health-crises> [<https://perma.cc/4QQZ-BK8Y>]; Rob Waters, Calling Mental Health Workers, Not Police, to Deal With Mental Health Crises, *Wash. Post* (June 20, 2021), https://www.washingtonpost.com/health/mental-health-workers-not-police/2021/06/18/bf250938-c937-11eb-a11b-6c6191ccd599_story.html.

78. Thompson, *supra* note 72 (quoting and echoing Sharkey); see also Tracey L. Meares & Tom R. Tyler, The First Step Is Figuring Out What Police Are For, *Atlantic* (June 8, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/first-step-figuring-out-what-police-are/612793/> (encouraging cities to consider what armed first responders are for).

problem.⁷⁹ The lesson? When people strip policing down to its core, what they see is force.⁸⁰

Given the violence endemic to policing, no one could doubt a close linkage between policing and force. Nevertheless, the widespread view that officers come to encounters empowered to force people to comply sits in tension with well-established law governing the police. While officers show up authorized to stop, search, and arrest people immediately, at least if the circumstances are right, the law does not permit officers to immediately strike, stun, or pepper-spray people to solve problems except in rare circumstances.⁸¹

Even if state law does not directly authorize officers to use force whenever they have reason to control conduct, one could think that when officers are permitted to arrest someone, they may do so forcibly, at least within broad constraints. The Supreme Court lends credence to this idea when it writes, “Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat

79. Friedman, *supra* note 71, at 930–32; see also Alex Tabarrok, *Why Are the Police in Charge of Road Safety?*, *Marginal Revolution* (June 9, 2020), <https://marginalrevolution.com/marginalrevolution/2020/06/why-are-the-police-in-charge-of-road-safety.html> [<https://perma.cc/D3QL-QB6G>] (advocating “delineating which police duties require the threat of imminent violence and which do not”).

80. Critics of policing often disagree with Bittner about why police coerce people. They argue that police exist to enforce inequitable racial or economic order rather than to solve legitimate safety and order problems. But they still share Bittner’s view about how police operate, that is, through violence and the threat of violence. See, e.g., Mark Neocleous, *The Fabrication of Social Order: A Critical Theory of Police Power* 118 (2000); Alex S. Vitale, *The End of Policing* 28, 33–34 (2017); Kristian Williams, *Our Enemies in Blue: Police and Power in America* 33 (AK Press 3d ed. 2015) (2004); Henry A. Giroux, *To End Racial Capitalism, We Will Need to Take On the Institution of Policing*, *Truthout* (June 18, 2021), <https://truthout.org/articles/to-end-racial-capitalism-we-will-need-to-take-on-the-institution-of-policing/> [<https://perma.cc/38HZ-D5TZ>].

81. This was long reflected in the law of intentional torts, which historically tied authority to use force to the exercise of authority to make a lawful arrest. See, e.g., *Restatement (Second) of Torts* § 140 cmt. a (Am. L. Inst. 1965) (“The privilege to use force to prevent the commission of crime is usually coextensive with the privilege to make an arrest for it without a warrant.”); *Urb. Police Function Standards* § 1-3.4 cmt. at 1-77 to 1-79 (ABA 1979) (noting the historical “reluctance in the tort law to recognize police as having direct authority to use force (e.g., in ordering people to “move on[.]” [or] in removing a disrupter from a meeting hall[.]”). Recent descriptions of intentional tort law have softened, and perhaps forgotten, this connection. For example, while the *Restatement (Second) of Torts*, as quoted above, viewed force this way, see § 140 cmt. a, the *Restatement (Third)* drafts substitute a more permissive force standard without acknowledging or justifying the alteration. See *Restatement (Third) of Torts: Intentional Torts to Persons* § 39 (Am. Law. Inst., Tentative Draft No. 6, 2021) (“[A] law enforcement officer acting within the scope of employment is privileged to use force against another for the purpose of arresting someone; investigating, terminating, or preventing crime; or otherwise enforcing the law.”).

thereof to effect it,”⁸² and when it suggests that force is the usual mechanism for an arrest, noting, “An arrest requires either physical force . . . or, where that is absent, submission to the assertion of authority.”⁸³ In this view, when officers tell suspects to put their hands behind their backs to be handcuffed, they do so magnanimously. They could use violence instead because states grant officers authority to arrest (and stop and search) people forcibly.

But is it really plausible to think officers may lawfully, routinely tackle every trespasser and traffic violator? Or even every felon? Consider the New York Police Department’s arrest of James Blake.⁸⁴ The former tennis star was standing in front of a midtown Manhattan hotel waiting for a car to take him to the U.S. Open when Officer James Frascatore reasonably mistook Blake for a credit card fraud suspect.⁸⁵ Officer Frascatore approached Blake in plainclothes and, without identifying himself or saying a word, grabbed him and slammed him to the sidewalk.⁸⁶

Video of the incident sparked widespread outrage. The Mayor and Police Commissioner apologized to Blake,⁸⁷ and Frascatore was disciplined for using excessive force.⁸⁸ No one suggested that routine arrest-by-takedown is lawful or reasonable. Even Officer Frascatore explained his actions by contending he had been told that the suspect might be armed.⁸⁹ The implication: If Blake was not only a felony suspect but also a dangerous one, then using force to preempt violence might have been justified to protect officers or passersby; otherwise, no. If the authority to arrest carries with it the authority to use force, why not?

82. *Graham v. Connor*, 490 U.S. 386, 396 (1989); see also *Muehler v. Mena*, 544 U.S. 93, 99 (2005) (quoting *Graham*, 490 U.S. at 396); *Saucier v. Katz*, 533 U.S. 194, 208 (2001) (receded from on different grounds by *Pearson v. Callahan*, 555 U.S. 223 (2009)) (same). This discussion puts aside the Court’s odd construction of an officer’s authority to use force or make an arrest as a “right.” See *infra* note 282 and accompanying text.

83. *California v. Hodari D.*, 499 U.S. 621, 626 (1991) (emphasis omitted).

84. For a video of the incident, see *James Blake Seen Being Thrown to the Ground in Video Released by NYPD*, *Guardian* (Sept. 11, 2015), <https://www.theguardian.com/us-news/2015/sep/11/james-blake-thrown-to-the-ground-nypd-video> [<https://perma.cc/8TSC-KGWW>].

85. Another man in the scheme, arrested nearby, identified Blake, who also looked like the photo the officers had of the person they were looking for. See Benjamin Mueller, Al Baker & Liz Robbins, *James Blake’s Arrest Brings Swift Apologies From New York Officials*, *N.Y. Times* (Sept. 10, 2015), <https://www.nytimes.com/2015/09/11/nyregion/james-blake-new-york-police-officer.html>.

86. See *id.* Blake was released minutes later when officers realized he was the wrong man. See *id.*

87. See *id.*

88. See Stephanie Pagonis & Natalie Musumeci, *James Blake: NYPD Let Cop Who Tackled Me Off Easy*, *N.Y. Post* (June 8, 2018), <https://nypost.com/2018/06/08/james-blake-nypd-let-cop-who-tackled-me-off-easy/> [<https://perma.cc/C5YZ-6HT9>].

89. See Ashley Southall, *Officer Who Tackled James Blake Was Told He Might Be Armed*, *N.Y. Times* (Sept. 19, 2017), <https://www.nytimes.com/2017/09/19/nyregion/james-blake-nypd-force-trial.html>.

As all the players in the Blake incident recognized, officers are not allowed to carry out all arrests forcibly. Under both state statutes and federal constitutional law, if a suspect cooperates or resists feebly, they may be arrested or searched, but they may not be subjected to force. Officers are permitted to use force if, and only if, things go awry.⁹⁰

Start with state law's bar on force in the absence of opposition. Local police officers receive their state authority to use force largely in the form of legal defenses to criminal prosecution and civil liability, usually by statute. Officers may use force defensively, as other citizens do, to protect themselves, their property, or others. In addition, state laws specific to the police allow officers to use force in carrying out some of their duties, especially when conducting arrests.⁹¹ These laws authorize both defensive force (to protect the officer or another during the arrest) and assertive force (to make sure the arrest happens).⁹² In both contexts, officers must face opposition or the threat of opposition before they may use force.

That *defensive* force requires a threat is almost tautological. Law and logic dictate that officers must face a threat of force before they defend themselves. Courts may too often allow officers to “jump the gun,” acting before a threat is sufficiently manifested, but they universally acknowledge that a threat should be involved.⁹³ Less obviously, but as importantly, *assertive* force is also conditioned on facing some opposition. States permit assertive force when it is “necessary” to effect the arrest.⁹⁴ And force is necessary to effect an arrest under state law only when it enables an officer

90. See *supra* notes 84–85 and accompanying text.

91. Most state statutes tie force to arrests. See, e.g., Kan. Stat. Ann. § 21-5227 (West 2022); N.C. Gen. Stat. § 15A-401(d) (2022); Or. Rev. Stat. § 161.233 (West 2022); Urb. Police Function Standards § 1-3.4 cmt. at 1-79 (ABA 1979) (“[T]he issue of privilege [to use force] is almost always cast in terms of authority to make lawful arrests.”). Nevertheless, courts interpret them to allow force similarly during other lawful activities, such as stops and searches. See, e.g., *State v. Turner*, 108 So. 3d 753 (La. 2013); *In re David S.*, 789 A.2d 607, 614–15 (Md. 2002); *Morris v. State*, 50 S.W.3d 89, 95 (Tx. App. 2001). One might reason that authority to conduct a stop or search forcibly follows from authority to effect an arrest forcibly because a suspect who fails to submit to a lawful stop or search is usually, for that reason, arrestable. A recent police reform bill in Washington State raised doubts about officer authority to use force to conduct investigatory stops, and the state legislature quickly passed a new law clarifying that officers have such authority. *Modifying the Standard for Use of Force by Police Officers*, 2022 Wash. Sess. Laws 530 (codified at Wash. Rev. Code Ann. § 10.120.020(1)–(2) (West 2022)).

92. See Seth W. Stoughton, Jeffrey N. Noble & Geoffrey P. Alpert, *Evaluating Police Uses of Force* 71–96, 239–87 (2020) (summarizing and reproducing state use-of-force statutes). Police-specific justification statutes authorize defensive force more expansively than most self-defense and defense-of-others statutes because police statutes permit officers to initiate confrontations and do not require retreat. *Id.* at 75, 94–95.

93. See Harmon, *Law of Police*, *supra* note 1, at 369.

94. E.g., Tenn. Code Ann. § 39-11-620(a) (2022) (“necessary to accomplish the arrest”); Utah Code § 76-2-403 (2022) (“necessary to effect an arrest”). The statutes were drafted to codify the common law rule. See Rollin Perkins, *The Law of Arrest*, 25 Iowa L. Rev. 201, 267 (1940). Although states vary as to whether mistakes about necessity must be reasonable, that difference does not matter in this context.

to complete his task in the face of flight or resistance.⁹⁵ Thus, courts allow force when suspects flee or fight, and sometimes when they fail to follow commands.⁹⁶ By contrast, when suspects comply, courts have long found force unjustified.⁹⁷

Fourth Amendment doctrine considers whether force is “reasonable” rather than “necessary,”⁹⁸ but the doctrine similarly allows force only when suspects stand in officers’ way. *Graham v. Connor* tells courts to assess “the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”⁹⁹ Three of these factors—threat, fight, and flight—necessarily incorporate resistance to the attempted seizure. Even the factor that seems different, “the severity of the crime at issue,” mostly functions as “a proxy for determining whether ‘an officer [had] any reason to believe that [the subject of a seizure] was a potentially dangerous individual’” that is, whether they posed a threat to the officer or another.¹⁰⁰ No one thinks that officers can shoot someone who is compliant merely because they are suspected of a serious crime. Noncompliance alone is not always enough to justify force, at least serious

95. Some statutes explicitly yoke necessity to resistance. See, e.g., Kan. Stat. Ann. § 21-5227 (“A law enforcement officer . . . need not retreat or desist . . . because of resistance . . . to the arrest. Such officer is justified in the use of any force which such officer reasonably believes to be necessary to effect the arrest . . . [or] to defend the officer’s self or another from bodily harm . . .”); see also Fla. Stat. Ann. § 776.05 (West 2022) (using language very similar to Kansas’s); Idaho Code § 19-610 (2022) (same); Okla. Stat. tit. 21, § 732 (2022) (“necessary to prevent the arrest from being defeated by resistance or escape”). But even when state laws do not draw this link expressly, the implication is clear, and cases have long confirmed it. See, e.g., *North Carolina v. Gosnell*, 74 F. 734, 738 (C.C.W.D.N.C. 1896); *Thomas v. Kinkead*, 18 S.W. 854, 856 (Ark. 1892); *Stevens v. Commonwealth*, 98 S.W. 284, 287 (Ky. 1906); *State v. Dierberger*, 10 S.W. 168, 170–71 (Mo. 1888). The same is true of using force to conduct authorized searches. Officers must not only provide notice that they have authority to search; they must be refused entry, or at least ignored, before they break in. See, e.g., N.C. Gen. Stat. § 15A-251; Ohio Rev. Code Ann. § 2935.12 (2022); *Wilson v. Arkansas*, 514 U.S. 927, 931–34 (1995) (summarizing the common law rule of announcement and its influence on state law).

96. *Ramsey v. State*, 17 S.E. 613, 615 (Ga. 1893) (“[W]here a person taken in a criminal assault upon another defies the authority of the officer . . . the officer is not bound to wait until he is actually assaulted before himself resorting to force.”).

97. See *Perkins*, supra note 94, at 265–67 (discussing cases and describing common law prohibition on force absent flight or resistance); *id.* at 266 (“Where the arrester is confident that no flight or resistance will be attempted, he should merely require the other to submit to his authority, although a technical touching is not unlawful.”).

98. Even so, the Court recognizes that officers must determine “the amount of force that is necessary in a particular situation” in order to act reasonably. *Graham v. Connor*, 490 U.S. 386, 396–97 (1989).

99. *Id.*

100. *Estate of Armstrong ex rel. Armstrong v. Village of Pinehurst*, 810 F.3d 892, 899–900 (4th Cir. 2016) (alteration in original) (quoting *Smith v. Ray*, 781 F.3d 95, 102 (4th Cir. 2015)); see also *Harmon*, *When Is Police Violence Justified?*, supra note 70, at 1159–66 (criticizing the “severity of the crime” factor).

force.¹⁰¹ But the Court makes crystal clear that noncompliance is required,¹⁰² and lower courts follow suit.¹⁰³

Only in *Muehler v. Mena* did the Court permit force against a compliant person.¹⁰⁴ Officers woke Iris Mena at gunpoint and held her in handcuffs for hours while officers executed a search warrant at her residence.¹⁰⁵ She cooperated, was not suspected of any crime, and—barefoot, in her pajamas, standing 5’2”—posed no danger to officers or anyone else.¹⁰⁶ Nevertheless, the Supreme Court found that the officers acted constitutionally when they handcuffed and detained her.¹⁰⁷ But the Court reasoned that, because the officers were searching for weapons and a gang member, they faced an “inherently dangerous situation[,]” one that could “give rise to sudden violence or frantic efforts to conceal or destroy evidence.”¹⁰⁸ The Justices viewed handcuffs as minimal force and found the level of force justified to prevent likely future violence.¹⁰⁹ Even

101. The Supreme Court has allowed deadly force only when suspects both resist and endanger others. See *Plumhoff v. Rickard*, 572 U.S. 765, 776–77 (2014) (holding constitutional the use of force against someone who fled a traffic stop and endangered the public); *Scott v. Harris*, 550 U.S. 372, 384 (2007) (same); *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (ruling that deadly force is constitutional against only those fleeing felony suspects who are also dangerous); see also *Mullenix v. Luna*, 136 S. Ct. 305, 310 (2015) (“By the time Mullenix fired, Leija had led police on a 25-mile chase at extremely high speeds, was reportedly intoxicated, had twice threatened to shoot officers, and was racing towards an officer’s location.”). Lower courts conclude that some uses of force against noncompliant suspects are unreasonable. See, e.g., *Naselroad v. Mabry*, 763 F. App’x 452, 463 (6th Cir. 2019) (overturning grant of qualified immunity where, despite ignoring police command, there existed a genuine issue of fact as to whether the suspect pointed his gun at the officer); *Cabral v. County of Glenn*, 624 F. Supp. 2d 1184, 1992 (E.D. Cal. 2009) (finding law clearly established that officer could not use stun gun against a noncompliant suspect who posed no threat).

102. In *Plumhoff*, for example, the Court noted, “This would be a different case if” officers had fired shots after force incapacitated Rickard, “end[ing] any threat of continued flight, or if Rickard had clearly given himself up.” *Plumhoff*, 572 U.S. at 777. Professor Alice Ristroph has highlighted the connection between constitutional force and noncompliance. See Alice Ristroph, *The Constitution of Police Violence*, 64 *UCLA L. Rev.* 1182, 1208 (2017) (“Nonsubmission . . . has become the most important consideration in [constitutional] use of force analysis.”).

103. See, e.g., *Soto v. Gaudett*, 862 F.3d 148, 158 (2d Cir. 2017); *Armstrong*, 810 F.3d at 901–04; *Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1260 (10th Cir. 2008); *Goodson v. City of Corpus Christi*, 202 F.3d 730, 733, 740 (5th Cir. 2000); *Rambo v. Daley*, 68 F.3d 203, 207 (7th Cir. 1995).

104. 544 U.S. 93, 99 (2005). Some might reasonably reject the Court’s characterization that handcuffs are force rather than restraint. If so, this case casts even less doubt on the force–noncompliance link.

105. See *id.* at 95–96; *id.* at 107, 109–10 (Stevens, J., concurring).

106. See *id.* at 105–07.

107. *Id.* at 100 (majority opinion).

108. *Id.* (internal quotation marks omitted) (quoting *Michigan v. Summers*, 452 U.S. 692, 702–03 (1981)).

109. Justice Stevens explained further in his concurrence: “When officers undertake a dangerous assignment to execute a warrant to search property that is presumably occupied

if Mena did not threaten harm to the officers, the situation did. *Mena* stretches the idea that lawful force requires resistance but does not break it.

Three features of use-of-force cases make it easy to miss the close connection between lawful force and suspect noncompliance. First, courts allow officers enormous leeway in determining whether noncompliance justifies force in a particular situation. According to the Supreme Court,

“Not every push or shove, even if it may later seem unnecessary in the peace of a judge’s chambers,” violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.¹¹⁰

Earlier state cases echo similar themes.¹¹¹ This thumb on the officer’s side of the scale permits many questionable uses of force. But the leeway in determining when force is necessary to overcome opposition is not the same as permitting force when opposition is clearly absent.

Second, courts obscure the force–noncompliance connection by allowing officers to use force to prevent low-probability events. *Terry v. Ohio* set up the paradigm: The Court allowed a forcible frisk because someone who might be casing a jewelry store also might be carrying a weapon.¹¹² Courts since have found reasonable suspicion that a suspect was armed and dangerous in, at best, ambiguous circumstances.¹¹³ Courts similarly liberally allow officers to dispense with knocking and announcing their presence before they forcibly enter a home if doing so might be dangerous

by violence-prone gang members, it may well be appropriate to use both overwhelming force and surprise in order to secure the premises”—and the people. *Id.* at 108 (Stevens, J., concurring). Still, Stevens concluded that a jury could have found the prolonged use of handcuffs unreasonable. *Id.* at 109–11.

110. *Graham v. Connor*, 490 U.S. 386, 396–97 (1989) (citation omitted) (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)).

111. See, e.g., *State v. Dunning*, 98 S.E. 530, 531 (N.C. 1919) (“It is a principle very generally accepted that an officer . . . is made the judge of the degree of force that may be properly exerted. Called on . . . to act in the presence of conditions importing serious menace, his conduct in such circumstance is not to be harshly judged . . .”); see also *People v. O’Brien*, 62 N.Y.S. 571, 572 (N.Y. App. Div. 1900) (“A police officer in the arrest of criminals has to act on the appearances as they are presented at the time in the excitement of the moment . . .”); *State v. Pugh*, 7 S.E. 757, 758 (N.C. 1888) (“[T]he jury ought not to weigh the conduct of the officer, as against him, in ‘golden scales.’ The presumption is he acts in good faith.”). These formulations are more permissive than mistake-of-fact rules governing other justification defenses, such as self-defense.

112. See *Terry v. Ohio*, 392 U.S. 1, 23–24, 28–29 (1968); *id.* at 33 (Harlan, J., concurring).

113. See *Illinois v. Wardlow*, 528 U.S. 119, 121–22 (2000) (upholding constitutionality of an immediate pat down for weapons during stop after someone fled upon seeing officers in area known for drug trafficking).

or futile, or could compromise the investigation.¹¹⁴ As applied, these rules often allow officers to jump at shadows. But when courts permit officers to perceive improbable peril, they still adhere to the principle that only danger to the officers or a threat to the success of a search or seizure justifies force.

The same cannot be said of the way courts treat low-level force, the third feature of use-of-force doctrine that obscures the force–noncompliance relationship. Encouraged by the Supreme Court’s suggestion that arrest authority entails the authority to use force, lower courts allow officers to use some low-level force without *any* justification.¹¹⁵ As a consequence, officers guide suspects by the elbow, grab their wrists, push them along, and apply handcuffs with little fear of liability.¹¹⁶ Still, when courts allow this low-level force, they expressly distinguish the legal standards for more force, which require that officers face danger or opposition.¹¹⁷

Where are we? State law authorizes only necessary force during arrests, and, if suspects submit, force is not necessary. Federal constitutional law permits only reasonable force, and, when suspects pose no threat to a person and do not thwart the arrest, force is unreasonable, unless it is very minor. In both contexts, the law forbids officers to use force unless they face noncompliance. Officers know this, which is why they justify force by claiming—whether truthfully or falsely—that suspects did not comply.¹¹⁸

114. See *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997) (articulating exceptions to constitutional knock-and-announce requirement). For an illustration, see Blanche Bong Cook, *Something Rots in Law Enforcement and It’s the Search Warrant: The Breonna Taylor Case*, 102 B.U. L. Rev. 1, 50–55 (2022) (analyzing no-knock warrant used to search Breonna Taylor’s home).

115. See, e.g., *Hanson v. Madison Cnty. Det. Ctr.*, 736 F. App’x 521, 530 (6th Cir. 2018); *Nolin v. Isbell*, 207 F.3d 1253, 1257 (11th Cir. 2000); *Hunter v. Namanny*, 219 F.3d 825, 832 (8th Cir. 2000) (“Hunter’s only allegation of force is that Franks was handcuffed and led downstairs. This *de minimis* use of force is insufficient to support a finding of a constitutional violation.”); *Curd v. City Ct. of Judsonia*, 141 F.3d 839, 841 (8th Cir. 1998) (“Even if seizing Curd’s arm and turning her body was unnecessary to effect the arrest, we cannot conclude that this limited amount of force was objectively unreasonable.”); see also *Cortez v. McCauley*, 478 F.3d 1108, 1130 (10th Cir. 2007) (en banc) (“Although *Terry* stops are normally non-intrusive, we have indicated that law enforcement may (1) display some force, (2) place suspects on the ground, (3) use handcuffs, or (4) detain suspects in law enforcement vehicles, even in the absence of probable cause.”).

116. Even if low-level force should be treated differently, courts sometimes go too far in applying *de minimis* force rules, finding force minimal when it clearly is not. See, e.g., *Nolin*, 207 F.3d at 1255, 1258 & n.4 (describing the claim that an officer “grabbed him from behind by the shoulder and wrist, threw him against a van three or four feet away, kned him in the back and pushed his head into the side of the van” as “the minimal amount of force”).

117. See *Saunders v. Duke*, 766 F.3d 1262, 1269–70 (11th Cir. 2014) (noting that the *de minimis* force principle “has never been used to immunize officers who use excessive and gratuitous force after a suspect has been subdued, is not resisting, and poses no threat”).

118. See, e.g., Antonio Planas, Priscilla Thompson, Juliette Arcodia, Doha Madani & Madelyn Urabe, *An Unreleased Police Report Makes Claims About Tyre Nichols Not*

The idea that officers must meet noncompliance to use lawful force is not some newfangled restriction on police authority. True, at early common law—until the fourteenth century or so—those attempting to arrest felons could kill them even if the suspects could be taken peacefully;¹¹⁹ but over time, that rule faded.¹²⁰ In the centuries since, officers could use force only if a suspect “resists or flies,”¹²¹ and “he cannot be otherwise taken.”¹²² The rule holds for deadly force and nondeadly force, for misdemeanors and felonies.¹²³ Except when officers act defensively to prevent imminent harm to an officer or another, noncompliance is now—and has long been—the sine qua non of lawful police uses of force.

You might even think those who believe policing consists of the authority to use force get it exactly backward. Both police officers and soldiers lawfully use force to do their jobs. But soldiers hit the battlefield allowed to open fire on enemy targets, even those who represent no threat to life or mission.¹²⁴ By contrast, police officers may shoot only when defied or threatened. What distinguishes policing from soldiering is that police officers approach their work *without* the authority to use lawful force.

Corroborated by Video, Yahoo: NBC News (Feb. 1, 2023), <https://www.yahoo.com/now/unreleased-police-report-makes-claims-021816429.html> [<https://perma.cc/JX66-9UV6>] (reporting that police report claimed that Tyre Nichols refused to get out of the car after he was ordered to do so and did not comply with repeated commands to stop resisting, justifying force against him, though those claims were unsupported by video of the incident).

119. See Bruce C. McDonald, *Use of Force by Police to Effect Lawful Arrest*, 9 *Crim. L.Q.* 435, 437 (1967).

120. See *id.* (suggesting that perspective on use of force changed after the fourteenth century); see also Nicholas John DeRoma, Note, *Justifiable Use of Deadly Force by the Police: A Statutory Survey*, 12 *Wm. & Mary L. Rev.* 67, 68 (1970) (explaining the historical rule allowing deadly force during an arrest).

121. 2 Matthew Hale, *Historia Placitorum Coronæ: The History of the Pleas of the Crown* 77 (Philadelphia, Robert H. Small 1847).

122. *Id.*

123. At common law, officers could use force, including deadly force, when necessary to defend themselves against resisting suspects during lawful arrests, whether those suspects committed felonies or misdemeanors. And they could use force, including deadly force, when necessary to effect an arrest against a fleeing felony suspect. They had more restrictions for misdemeanants, for whom deadly force was prohibited to stop flight, even when it was necessary. But in all cases, lawful force followed flight or resistance. See, e.g., 2 Joel Prentiss Bishop, *Commentaries on the Criminal Law* § 528 (Boston, Little, Brown, and Co. 1868).

124. Even in soldiering, there are limits. The Hague Regulations of 1907, for example, which are recognized as customary international law, provide that it is forbidden “[t]o kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion.” Convention (IV) Respecting the Laws and Customs of War on Land, Annex, art. 23(c), Oct. 18, 1907, 36 Stat. 2277.

B. *How Police Actually Change Conduct: Commands*

Which brings us back to the question we started with: If officers may not use force, at least initially, how do officers change individual conduct in encounters? Police practice suggests an answer: Officers issue commands. Those orders communicate what officers want us to do, often creating and communicating new legal duties in the process, and they invoke officers' law enforcement authority as reason to obey. Commands can be difficult to identify and distinguish from requests and force used by officers. Yet understanding them is key to understanding the special nature of our interactions with the police.

1. *Ask, Tell, Make.* — Officers are often trained to “ask, tell, make.”¹²⁵ This can be bad advice to officers, who are not always permitted to move directly from asking someone to comply to making them do so.¹²⁶ Nevertheless, such training highlights three ways the police get people to act: They ask, they demand, and they force.

As this typology suggests, when officers want someone to do something, sometimes they just ask. “Do you have time to answer a few questions?” Or, “Would you mind if I looked in the trunk?” But policing cannot proceed by request alone. By definition, a true request allows a person a choice between the officer's objective and their own. Policing includes duties—bringing people into custody and taking their belongings, for instance—that require civilian compliance, whether voluntary or not. Such actions may so interfere with autonomy, bodily integrity, privacy, or property that reasonable, law-abiding people will not cooperate unless they believe they are required to do so. Perhaps states should depend on voluntary cooperation more and coercion less, but no one thinks policing would be policing if police officers merely explained what they wanted and hoped for the best. Nor, as section

125. See, e.g., Seth W. Stoughton, *Principled Policing: Warrior Cops and Guardian Officers*, 51 *Wake Forest L. Rev.* 611, 653–54 (2016) (describing and citing police trainings in “Ask, Tell, Make” approach); Caitlin Doornbos, *Law Enforcement Policy, Training Offer Guidance on Potentially Lethal Situations*, *Lawrence J.-World* (May 9, 2015), <http://www2.ljworld.com/news/2015/may/09/law-enforcement-policy-training-offer-guidance-pot/> (“[S]heriff's deputies are taught the ‘ask, tell, make’ approach in gaining control of a situation.”); Former SWAT Commander Speaks Out on Police Militarization, the War on Drugs, and Civil Liberties, *Libertas Inst.* (Mar. 16, 2014), <http://libertasutah.org/interview/former-swat-commander-speaks-out-on-police-militarization-the-war-on-drugs-and-civil-liberties/> [<https://perma.cc/5SRF-PQWU>] (“Typically what officers have learned in training is to follow a paradigm of ‘ask, tell, make.’”); see also *Ask Tell Make T-Shirt*, *Ranger Up*, <https://rangerup.com/products/ask-tell-make-t-shirt> [<https://perma.cc/A7XX-RG8Q>] (last visited Jan. 27, 2023) (selling t-shirt with “[t]he unwritten rules of law enforcement”).

126. Some forms of noncompliance do not justify some forms of force. See, e.g., *Rice v. Morehouse*, 989 F.3d 1112, 1125 (9th Cir. 2021) (finding the law “clearly establishe[s] one’s ‘right to be free from the application of non-trivial force for engaging in mere passive resistance’” (quoting *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1093 (9th Cir. 2013))); *Estate of Armstrong ex rel. Armstrong v. Village of Pinehurst*, 810 F.3d 892, 905–06 (4th Cir. 2016) (holding it unconstitutional to use a Taser against a noncompliant mentally ill man).

I.A suggests, may policing usually permissibly proceed by force. Legal constraints on force make force legally—and empirically¹²⁷—exceptional, even if it is far too common.

Which brings us to “tell.” Watch an arrest, and what you usually see is one person issuing instructions to another, who mostly complies: “Turn around.” “Put your hands behind your back.” “Get into the car.” We say that officers arrest suspects, but, most of the time, what we mean is that, guided by an officer’s words and aided by his hands, suspects arrest themselves. Look at officers stopping trespassers, ticketing speeders, dispersing disorderly crowds, breaking up bar fights, and searching homes, and you see the same thing. However diverse these activities are, they play out with remarkable consistency. To achieve their goals, most of the time, officers tell people what to do, and, overwhelmingly, people do it.¹²⁸

Officers tell people to do something:

“Move along.”
 “Let’s see some identification.”
 “Hands up.”¹²⁹
 “Drop the gun.”
 “Pop the trunk.”
 “Tell me what happened.”
 “Get down on the ground.”

They tell them not to do something:

“Don’t move.”
 “Don’t shoot.”
 “Stay in the car.”

Or they tell them to stop doing something they are already doing:

“Freeze.”
 “Stop fighting.”
 “Shut up.”

Any police command has two components: It communicates what an officer wants someone to do, and it invokes the officer’s authority as a

127. See Tapp & Davis, *supra* note 22, at 5 tbl.3 (reporting that among 61.5 million U.S. residents sixteen and older who had contact with the police during prior twelve months, 1.3 million (2%) reported threat of force or use of nonfatal force by the police). Although the survey misses some important populations, other estimates are lower.

128. See Alpert et al., *Authority Maintenance Theory*, *supra* note 50, at 382 (hypothesizing that police–citizen encounters are iterative interactions that “revolve around the officer’s exercise of authority (coercion) and the citizen’s deference (or resistance) to that authority”); William Terrill, *Police Use of Force and Suspect Resistance: The Micro Process of the Police-Suspect Encounter*, 6 *Police Q.* 51, 54–55 (2003) (reviewing empirical research showing that commands and “verbal force” are more common than force). Police officers also issue commands for tactical advantage within encounters.

129. “Hands Up!’ has been around as long as police have. For good reason. Hands are where suspects hold weapons, so it makes sense to gain immediate control of a subject[’s] hands.” Robert O’Brien, *Verbal Commands*, *Police Mag.: SWAT* (Nov. 26, 2008), <https://www.policemag.com/373231/verbal-commands> [perma.cc/QG7V-T588]. This helps explain why so many police commands concern hands.

content-independent reason to comply. Or, to put it differently, the command sets a standard by which a person's conduct can be measured, it informs the person of that standard, and it indicates that the law requires the person to meet that standard. When you observe that standard, you have submitted to and satisfied the law.¹³⁰

Commands are not just common to policing; they are essential to it. The rule that force requires noncompliance helps us see why. An officer cannot lawfully use force against someone unless that person does not comply with the officer as the officer exercises his lawful authority. For someone to be *noncompliant*, there must be some yardstick against which compliance can be measured. Sometimes, officers tell us to do something already mandated by law, such as slow down when we are speeding or let the hostages go. But, much of the time, officers want people to do things the law does not otherwise require them to do—to stop moving, to put their hands up, to get in the car, to keep quiet, to turn out their pockets, and so on. In such cases, there is no behavioral standard for the person's conduct unless the officer generates and announces it during the encounter. This requires commands. One might go as far as to say that commands are not just *one* method by which officers execute the state's will; with few exceptions, they are *the* method, one that is necessitated by the duties and powers that create policing.

To be sure, officers conduct some activities during encounters that they cannot execute solely by command and compliance. To conduct a frisk, look in a car trunk, or take a blood draw, an officer must physically act or get a proxy to do so. But these exceptions share a specific, narrow character. In each, officers seek to gather information or objects from people that these people cannot easily, credibly, or safely (for the officers) provide.¹³¹ Absent that, coerces, not coercers, do most of the work in policing. Indeed, some police coercions—think, submitting to a breathalyzer test or providing a voice print—can *only* be self-executed.¹³²

In sum, the state often has reason to change someone's behavior. By allowing officers to stop, search, and arrest us, the law permits officers to coerce people to act in ways they do not choose. By restricting force absent

130. See, e.g., *Bull v. Armstrong*, 48 So. 2d 467, 471 (Ala. 1950) (“One who, upon the command of an officer authorized to enter and search and seize by search warrant, opens the door to the officer and acquiesces in obedience to such a request . . . is but showing a regard for the supremacy of the law.”).

131. See, e.g., *Adams v. Williams*, 407 U.S. 143, 145 (1972) (officer removed a loaded revolver from a suspect's waistband); *Schmerber v. California*, 384 U.S. 757, 758 (1966) (officer directed a physician to draw blood sample from someone suspected of driving under the influence).

132. See, e.g., *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2168 (2016) (“Measurement of [blood alcohol concentration] . . . requires the cooperation of the person being tested. The subject must take a deep breath and exhale through a mouthpiece that connects to the machine.”). Searching a suspect's mouth and taking a cheek swab for DNA analysis are similarly near impossible unless suspects open their mouths for officers.

noncompliance, the law limits how officers may do that. Police are often thought to be distinctive because they may act “without having to brook or defer to opposition of any kind.”¹³³ But coercive policing is less about lawfully overcoming resistance via force and more about communicating demands that make some acts resistance.¹³⁴ In effect, the law insists that coercive policing is carried out largely by command.

2. *The Nature of Police Commands.* — Seeing police commands clearly can be hard in part because commands can be difficult to distinguish from forcing or asking. Commands are so powerful, some think commands *are* force.¹³⁵ But—even though they are closely related—demands accompanied by threats, including threats of force, are different from the force itself. Force does not cause people to alter their conduct the way commands do. To start, most police uses of force restrain (e.g., handcuffing), remove (e.g., carrying), or incapacitate (e.g., shooting) people. These kinds of force do not get us to change our conduct; they physically forestall us from doing what we want. Other kinds of force do change conduct: When an officer pepper-sprays a resisting suspect or presses a Taser to their leg, he tries to induce compliance by causing pain. These techniques generate suffering in order to overwhelm the will to resist.¹³⁶ But, even so, the force does not act as a command would. When officers issue commands accompanied by threats, even threats of force, they raise the specter of future negative consequences that give us good reason to choose to obey. Pain, by contrast, unavoidably transforms our immediate subjective experience, making choice problematic.¹³⁷ Moreover, pain-compliance force does not usually communicate an officer’s will. That is why this kind of force is usually accompanied by an order such as “stop resisting.”¹³⁸

133. Bittner, Florence Nightingale, *supra* note 68, at 18.

134. Cf. *Bumper v. North Carolina*, 391 U.S. 543, 550 (1968) (“When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search.”).

135. See, e.g., *infra* notes 141–142 and accompanying text.

136. The distinction between force that acts upon the will and force that acts upon the body dates back at least to Aquinas. Scott Anderson, *Coercion*, in *Stan. Encyc. of Phil.* (Edward N. Zalta & Uri Nodelman eds., Spring 2023 ed.), <https://plato.stanford.edu/archives/spr2023/entries/coercion/> [<https://perma.cc/BU7R-9HFJ>] (citing Thomas Aquinas, *The Summa Theologica* of St. Thomas Aquinas pt. I.II, q. 6, art. 4 (Fathers of the English Dominican Province trans., 2d ed. 1920)) (contrasting being “dragged by force,” which does not operate on will, and being subject to violence that “prevent[s] the exterior members from executing the will’s command”).

137. For more on the special significance of corporeal pain, see generally Elaine Scarry, *The Body in Pain* (1987), and commentary on it.

138. Officers also use this phrase inappropriately, shouting it when a suspect is not resisting or without giving a suspect a chance to comply. See, e.g., Julian Mark, *Body-Cam Video Shows a Louisiana Trooper Beat a Black Man With a Flashlight 18 Times: ‘I’m Not Resisting!’*, *Wash. Post* (Aug. 26, 2021), <https://www.washingtonpost.com/nation/2021/08/26/aaron-bowman-body-camera/>; NowThis Politics, *Former Police Officer Explains Why ‘Stop Resisting’ Is BS*, *Facebook* (June 25, 2018), <https://www.facebook.com/>

It can be even more difficult to distinguish police commands from police requests. Officers broadcast their authority silently through uniforms, badges, and guns, conveying the message that they act backed by state power. So much so that the police are often called simply “the law.”¹³⁹ If people assume compliance is required, giving them a true choice might take some further communication. Yet, sometimes intentionally and sometimes not, officers fail to indicate whether they are asking or telling. Instead, they equivocate to exert their will.¹⁴⁰ The public cannot simply use an officer’s question mark as a guide because officers often make commands in the form of requests—“May I see your license and registration, please?”, “Would you step out of the vehicle?”, “Can you put your hands behind your back?”.¹⁴¹ In less obvious cases, people may not always be able to assess whether something is a request or command.¹⁴²

Constitutional doctrine compounds the ambiguity problem. In analyzing whether officers have requested or commanded, the Supreme Court brushes aside officers’ accoutrements of authority and treats requesting as the default.¹⁴³ Thus, when officers approach and question

NowThisPolitics/videos/former-police-officer-explains-why-stop-resisting-is-bs/2123261617705317/ (on file with the *Columbia Law Review*) (describing police officers using the phrase “stop resisting” without allowing time to comply).

139. Thanks to Thomas Crocker for pointing this out to me. See, e.g., Lil Baby, *The Bigger Picture*, *on My Turn* (Capitol Records 2020) (“Altercations with the law, had a lot of them.”); N.W.A, *Fuck Tha Police*, *on Straight Outta Compton* (Ruthless Records 1987) (“And the motherfuckin’ weapon is kept in a stash spot, for the so-called law.”); Waylon Jennings, *Don’t You Think This Outlaw Bit’s Done Got Out of Hand*, *on I’ve Always Been Crazy* (RCA Records 1978) (“The car pulls up, the boys get out, and the room fills up with law.”). A more famous song, *I Fought the Law*, treats the criminal justice system as a whole, and not just the police, as “the law.” Though that song was first performed by The Crickets, *on In Style with The Crickets* (Coral Records 1960), it was popularized by several other groups, including The Clash, *I Fought the Law*, *on The Clash* (CBS Records 1977).

140. Officers also use techniques, even if unwittingly, that maximize the degree to which people feel obligated to comply—even if the law does not demand it—and minimize what a person understands about what they give up by consenting, cooperating, and providing information. See Eric J. Miller, *Encountering Resistance: Contesting Policing and Procedural Justice*, 2016 *U. Chi. Legal F.* 295, 323–31. See also *infra* text accompanying notes 311–312.

141. Courts and legislatures add to the confusion, calling commands “requests,” even when they are obviously compulsory. See, e.g., Cal. Penal Code § 1524.3(g) (2022) (“A provider of wire or electronic communication services or a remote computing service, upon the request of a peace officer, shall take all necessary steps to preserve records and other evidence . . .”).

142. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 275–76 (1973) (Douglas, J., dissenting) (“[U]nder many circumstances, a reasonable person might read an officer’s ‘May I’ as the courteous expression of a demand backed by force of law.” (internal quotation marks omitted) (quoting *Bustamonte v. Schneckloth*, 448 F.2d 699, 701 (9th Cir. 1971), *rev’d*, 412 U.S. 218)).

143. See *United States v. Drayton*, 536 U.S. 194, 204 (2002) (concluding that badges, uniforms, and holstered sidearms are irrelevant to whether the public feels free to go about their business in interacting with the police); *Immigr. & Naturalization Serv. v. Delgado*, 466

people, the interaction is considered consensual unless officers clearly communicate that people are not free to leave.¹⁴⁴ When people, even those being detained against their will, answer questions or allow officers access to their belongings, their actions are considered cooperation, unless the officer indicates clearly that compliance is required.¹⁴⁵ The Court has resisted requiring officers to clarify and repeatedly treated what seems like compliance as consent.¹⁴⁶

Still, there remains a difference between state action that encourages conduct (“Do you have a minute?”) and that demands it (“Stop right there.”), a distinction worth preserving when analyzing police practices.¹⁴⁷ The former—at least in theory—does not assert state power to close off alternative action and therefore allows someone to choose to fulfill the officer’s will for their own reasons, such as a desire to help the police. Practically, we know that not all police requests are experienced as commands by members of the public, and members of

U.S. 210, 216 (1984) (“While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response.”).

144. See *Florida v. Bostick*, 501 U.S. 429, 434–35 (1991) (“[E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual . . . as long as the police do not convey a message that compliance with their requests is required.”); see also *State v. Backstrand*, 313 P.3d 1084, 1092 (Or. 2013) (en banc) (“[T]he fact that an individual—for reasons personal to that individual—feels obliged to cooperate with the officer simply because of the officer’s status is not the form or source of coercion that is of constitutional concern.”).

145. See, e.g., *United States v. Brignoni-Ponce*, 422 U.S. 873, 881–82 (1975) (“The officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause.”).

146. See, e.g., *Drayton*, 536 U.S. at 203–05 (treating cooperation with drug interdiction agents on a bus as consensual and refusing to require officers to inform citizens of their right to refuse a consent search); *Delgado*, 466 U.S. at 221 (finding that workers who were systematically approached and questioned by INS agents while armed agents guarded exits to the factory were engaged in “classic consensual encounters, rather than Fourth Amendment seizures”); *Schneckloth*, 412 U.S. at 227 (“While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent.”).

147. The Court has long acknowledged this distinction. See, e.g., *Brower v. County of Inyo*, 489 U.S. 593, 597–98 (1989) (“It would have been quite different . . . if the revenue agent had shouted, ‘Stop and give us those bottles, in the name of the law!’ and the defendant and his accomplice had complied. Then . . . a Fourth Amendment seizure would have occurred.”); *Johnson v. United States*, 333 U.S. 10, 13 (1948) (“Entry to defendant’s living quarters, which was the beginning of the search, was demanded under color of office. It was granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right.”); *Amos v. United States*, 255 U.S. 313, 317 (1921) (“The contention that the constitutional rights of defendant were waived when his wife admitted to his home the Government officers, who came, without warrant, demanding admission to make search of it under Government authority, cannot be entertained.”).

the public refuse some police requests.¹⁴⁸ Research shows, for example, that bystanders, including people who feel especially vulnerable to policing, routinely refuse to provide information to officers about violent crime.¹⁴⁹ Officers ask them what happened, and they do not answer. Though officers sometimes exact obedience in the guise of choice, and it can be challenging to distinguish one from the other, there is no way to get leverage on the ways officers elide commands and requests if one does not first recognize a difference.

Even when officers are clearly commanding, the essential features of command may not be explicit. For example, officers do not always expressly invoke their position when they issue orders. With a uniform, a gun, and a badge, an officer's imperative alone is often sufficient to appeal to the officer's law enforcement authority.¹⁵⁰ Still, when an officer gives commands to a suspect who is turned away or behind closed doors, or when the officer is in plainclothes, he will shout, "Stop, police," or, "Open up. It's the police," to make clear what kind of authority he has.¹⁵¹

Nor do officers always explain what consequences will follow from failing to comply. Sometimes an officer will: "Stop interfering, or I'll arrest you." Or, as Trooper Encinia said to Sandra Bland, "Get out of the car! I will light you up."¹⁵² Those warnings convey an officer's intentions, and the law favors them, at least prior to force.¹⁵³ But if an officer says

148. See Rod K. Brunson & Brian A. Wade, "Oh Hell No, We Don't Talk to Police": Insights on the Lack of Cooperation in Police Investigations of Urban Gun Violence, 18 *Criminology & Pub. Pol'y* 623, 637–39 (2019) (discussing subjects' reluctance to cooperate with the police).

149. See *id.* (reviewing research and describing why high-risk, young Black men who were interviewed refuse to call or cooperate with the police).

150. See *In re Kelsey C.R.*, 626 N.W.2d 777, 787 (Wis. 2001) ("An officer telling a citizen to 'stay put' is similar to an officer telling a citizen 'stop, in the name of the law.'"). The reverse is not always true. When an officer identifies himself as the police, he does not always implicitly issue a command. See, e.g., *United States v. Hayden*, 759 F.3d 842, 847 (8th Cir. 2014) ("Merely identifying oneself as 'Police' does not effect a seizure of a citizen who stops to listen or talk, because self-identification is not a command in the nature of 'Police, halt!' or 'Stop, in the name of the law!'").

151. See, e.g., *White v. Pauly*, 137 S. Ct. 548, 550 (2017) ("Open the door. State Police, open the door," to suspects behind closed doors); *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 621 (5th Cir. 2006) ("Stop in the name of the law!" to people walking away); *State v. Davis*, 377 P.3d 583, 585 (Or. 2016) ("Stop, police!" to suspect running away). Cf., e.g., *Tenn. Code Ann. § 39-11-620* (2022) (requiring officers to identify themselves before using force to conduct an arrest); *Tex. Penal Code Ann. § 9.51* (West 2021) (same).

152. Harmon, *Law of Police*, *supra* note 1, at 43.

153. See, e.g., *Nev. Rev. Stat. Ann. § 171-1455* (West 2021); *N.M. Stat. Ann. § 30-2-6* (2022); *Utah Code § 76-2-404* (2022); see also *Tennessee v. Garner*, 471 U.S. 1, 11–12 (1985) (indicating deadly force to prevent escape may be constitutional only if "where feasible, some warning has been given"). One can think of a warning as a command with a threat of a particular consequence for failing to comply. Without a command, a warning does no more than announce future action, something that courts have far less reason to favor and officers far less reason to employ.

nothing, his command alone will convey a range of potential consequences, including citation, arrest, force, and later criminal charges. The nature of an officer's authority is well known.

Police commands are not just different from other ways officers influence people; they are also different from other legal commands. Court orders, subpoenas, and injunctions also direct individual action and threaten consequences in the name of the state, but police commands are spatially and temporally special. Police almost inevitably give commands in person, usually up close. That distinguishes them from court orders that might be left with a lawyer or delivered in the mail.¹⁵⁴ Police commands demand immediate conduct, and only immediate conduct.¹⁵⁵ Court orders and agency adjudications tell us to act, but not necessarily *now*.¹⁵⁶ Because they demand immediate conduct, police officers can assess compliance then and there. Courts and agencies usually wait, allowing time for people to obey.¹⁵⁷ Police officers may impose immediate consequences for noncompliance, including sometimes compelling compliance. Courts depend on others to execute judgments and sanctions.¹⁵⁸ And because obedience to police orders is expected and evaluated immediately, police commands cannot usually be stayed, revised, or reversed before consequences follow, unlike

154. See, e.g., Fed. R. Civ. P. 5(b), 77 (allowing service of notice about orders and judgments, *inter alia*, by mail or leaving it at someone's house).

155. See Bittner, Florence Nightingale, *supra* note 68, at 33 (explaining that a patrol officer's mandate is to impose provisional solutions, and only provisional solutions, "then-and-there").

156. See, e.g., Fed. R. Crim. P. 4(b)(2) ("A summons must . . . require the defendant to appear before a magistrate judge at a stated time and place."); Fed. R. Crim. P. 41(e)(2)(A) ("The warrant must command the officer to . . . execute the warrant within a specified time no longer than 14 days . . ."). On the other hand, police commands expire quickly, rarely surviving the encounter. States occasionally allow officers to issue persistent commands in the form of civil interdiction orders, exclusionary trespass orders, or nuisance orders, but courts often look skeptically at such practices. See, e.g., *Catron v. City of St. Petersburg*, 658 F.3d 1260, 1269 (11th Cir. 2011) (striking down as vague an ordinance allowing officers to issue lasting exclusionary trespass orders for public property); *Anthony v. State*, 209 S.W.3d 296, 306 (Tex. App. 2006) (holding that an unwritten police policy allowing officers to order exclusion from public property violates due process); see also *Manning v. Caldwell*, 930 F.3d 264, 268 (4th Cir. 2019) (*en banc*) (striking down for vagueness a statute that allowed officers to ask prosecutors for orders against "habitual drunkards"). But see, e.g., *Vincent v. City of Sulphur*, 805 F.3d 543, 545 (5th Cir. 2015) (upholding qualified immunity on some claims for officers who banned a city resident from public property). By contrast, other legal orders generally persist.

157. See, e.g., Fed. R. Civ. P. 70 (providing that court may order an act required by a judgment to be carried out by another, if a party fails to comply with the judgment within the time specified). One obvious exception is that judges may hold people in contempt of court when their conduct violates behavioral standards judges set for the courtroom. In direct contempt of court cases, judges issue the imperative ("quiet down," or, "don't use that language"); assess compliance; and impose civil sanctions summarily. See, e.g., Minn. Stat. § 588.03 (2022); N.C. Gen. Stat. § 5A-13 (2022); Va. Code Ann. § 16.1-69.24 (2022).

158. See, e.g., Fed. R. Civ. P. 69–70.

court and agency orders and judgments, which are often subject to appeal.¹⁵⁹ Finally, others who give legal commands usually operate over a narrow domain. That isn't true in policing, where officers commonly give at least a couple of dozen commands in diverse situations.

These features make encountering police officers a significant legal experience. You know that an officer might order you to do all kinds of things you don't want to do; that he has substantial legal authority to issue such commands; that you have no way to appeal his decision before deciding what to do; and that you must obey immediately or risk force or arrest, as well as subsequent proceedings. And yet, as the next Part shows, we have not developed a legal understanding of police commands.

II. UNDERSTANDING POLICE COMMANDS

If commands are even half as important to policing as this analysis suggests, they are worth considering in depth. Yet this Part shows that criminologists and legal scholars do not examine them much, and when they do, they misunderstand them. Nor have scholars or courts clearly identified where police get their power to issue commands, though many police commands create new legal duties. The origin of this power is not obvious because state statutes give officers express authority to issue such commands only in narrow circumstances. Still, in a legal system committed to allowing individuals to comply with their duties before they are forced to do so, this Part argues, the police power to stop, arrest, and search necessarily includes the authority to issue enforceable commands to exercise those powers.

A. *Studying Police Commands*

Both social scientists and legal scholars study policing. But they do not study commands. For decades, for example, criminologists¹⁶⁰ have

159. See *United States v. Drayton*, 536 U.S. 194, 210 (2002) (Souter, J., dissenting) (“The police not only carry legitimate authority but also exercise power free from immediate check . . .”). Technology that allows real-time police supervision is starting to change this, at least a little. Cf. Seattle Police Dep't, Seattle Police Department Manual § 6.010 (2022), <https://public.powerdms.com/Sea4550/tree/documents/2042880> [<https://perma.cc/ETH6-TC4G>] (requiring that sergeants screen all arrests prior to booking or release).

160. I am loosely referring to the criminologists, sociologists, and criminal justice scholars who conduct research on policing and publish it in major social science journals as criminologists, though I recognize this characterization is imprecise and, to some, controversial. See generally Am. Socio. Ass'n, Report of the ASA Task Force on Sociology and Criminology Programs (2010), https://www.asanet.org/wp-content/uploads/savy/documents/teaching/pdfs/ASA_TF_Report_FINAL.pdf [<https://perma.cc/6YV9-GDGA>] (examining the relationship between sociology, criminology, and criminal justice studies in academic programs and making recommendations to clarify and improve the relationship).

ignored commands in favor of treating searches, citations, arrests, and uses of force as the measurable units of policing.¹⁶¹ On the rare occasions when they consider commands, they take one of two approaches to them.

First, criminologists treat commands as “informal” exercises of authority, distinguishable from “formal” invocations of the law, such as arrests. The classic account comes from Donald Black, who set up a six-step scale for penal social control in *The Manners and Customs of the Police*.¹⁶² Other scholars have refined or revised Black’s scale as a means of classifying and measuring police behavior, with the intent of “allow[ing] for all possible police actions to be arrayed in a coherent order in terms of the amount of law each involves.”¹⁶³ According to the nine-point Police Authority Scale, for example, commands help fill out the informal end of a “continuum of coercion” that proceeds from asking questions, making suggestions, giving orders, and searching people or property, to checking criminal history, issuing citations, and making arrests.¹⁶⁴ As this and other similar scales suggest, criminologists view commands as informal and mild.

Other criminologists address commands when attempting to quantify the forcefulness of police encounters. These scholars locate commands on the less severe end of a continuum of force that runs from a strong tone of voice on one end to a bullet on the other.¹⁶⁵ Because criminologists think commands threaten harm, they see commands as “verbal force”: not as serious as deadly force but more serious than

161. See Jennifer L. Schulenberg, *Moving Beyond Arrest and Reconceptualizing Police Discretion: An Investigation Into the Factors Affecting Conversation, Assistance, and Criminal Charges*, 18 *Police Q.* 244, 245 (2015) (“With a few exceptions, insufficient attention is directed to non-dispositional action that does not invoke the law through arrest and criminal charges but nonetheless represents the use of police authority.”).

162. Donald Black, *The Manners and Customs of the Police* 211 (1980).

163. David A. Klinger, *Quantifying Law in Police–Citizen Encounters*, 12 *J. Quantitative Criminology* 391, 398–99 (1996) (describing a five-point scale in which commands fall within the intermediate category of “imposing solutions”).

164. Robert A. Brown, Kenneth J. Novak & James Frank, *Identifying Variation in Police Officer Behavior Between Juveniles and Adults*, 37 *J. Crim. Just.* 200, 202–03 (2009); see also Ivan Y. Sun & Brian K. Payne, *Racial Differences in Resolving Conflicts: A Comparison Between Black and White Police Officers*, 50 *Crime & Delinquency* 516, 522, 527–28 (2004) (proposing a six-point scale with commands as the second-least coercive activity in a continuum ranging from advising to arrest).

165. See, e.g., Amanda Geller, Philip Atiba Goff, Tracey Lloyd, Amelia Haviland, Dean Obermark & Jack Glaser, *Measuring Racial Disparities in Police Use of Force: Methods Matter*, 37 *J. Quantitative Criminology* 1083, 1088, 1091 (2021); Matthew J. Hickman, Loren T. Atherley, Patrick G. Lowery & Geoffrey P. Alpert, *Reliability of the Force Factor Method in Police Use-of-Force Research*, 18 *Police Q.* 368, 373–75, 377 (2015) (describing commands as level two force and reviewing other research using same scale); Rob Tillyer, *Unpacking Sequential Actions Within Use of Force Incidents*, 25 *Police Q.* 178, 185 (2022).

no force at all.¹⁶⁶ Police departments often see commands the same way.¹⁶⁷

Both views are wrong. To show that police commands are not generally informal, it helps to see that there are two types of commands: those that merely reiterate existing legal duties and those that announce new duties. One might plausibly see police commands in the first category as informal. An officer who tells us not to litter, to get off private property, or to stop resisting arrest is not doing anything legally significant. Instead, he is reminding us that we are violating our existing legal obligations and is giving us an opportunity to change our conduct before we face a ticket, a Taser, or a trip to jail. You could even think that such commands are autonomy-promoting rather than autonomy-limiting; by reiterating our duties, these orders give us a second chance to do what we ought.

But many, maybe most, police commands fall into the other category.¹⁶⁸ These do not reiterate duties. Instead, they generate new legal duties: “Stop and put your hands against the wall.” Or they trigger conditional duties: When an officer pulls up behind you and turns on his lights and sirens—a command that you pull over—you drive to the side of the road or face consequences.¹⁶⁹ Or they announce legal duties you cannot otherwise know: “Open up! We have a warrant.” When an officer signals you to pull over or tells you to put your hands up, he is something like a legislature passing a new law.¹⁷⁰ Before the officer commands you, you have no obligation to act that way. Afterward, you do. The command does not create a permanent criminal record or trigger an immediate physical consequence, but neither does a criminal statute before you are arrested and prosecuted for violating it. In both cases, you may face

166. See, e.g., David A. Klinger, *The Micro-Structure of Nonlethal Force: Baseline Data From an Observational Study*, 20 *Crim. Just. Rev.* 169, 175 (1995) (“When officers did use force, it was most often verbal. Officers issued voice commands . . .”); William Terrill, *Police Use of Force: A Transactional Approach*, 22 *Just. Q.* 107, 115 (2005) (describing force as “acts that threaten or inflict physical harm on citizens, which includes forms of both verbal and physical force”); Jimmy J. Williams & David Westall, *SWAT and Non-SWAT Police Officers and the Use of Force*, 31 *J. Crim. Just.* 469, 471 (2003) (defining use of force as “any act or behavior that compelled a person into submission”). Some scholars mix the two scales. See, e.g., Mengyan Dai & Denise Nation, *Understanding Non-Coercive, Procedurally Fair Behavior by the Police During Encounters*, 37 *Int’l J.L. Crime & Just.* 170, 174–75 (2009) (including verbal force, physical force, and arrest as coercive behavior).

167. See O’Brien, *supra* note 129 (“At the beginning of nearly every law enforcement continuum are verbal commands, considered to be the least forceful method of gaining subject compliance.”).

168. Cf. *supra* note 22.

169. See, e.g., Md. Code Ann., *Transp.* § 21-904 (West 2022) (eluding or escaping police officers prohibited); 75 Pa. Stat. and Cons. Stat. Ann. § 3325 (West 2022) (duty of driver on approach of emergency vehicle); Utah Code § 41-6a-210 (2022) (failure to respond to officer’s signal to stop prohibited).

170. Or perhaps, more accurately, like a judge or an administrative agency issuing an order.

consequences if you violate your legal duties. In neither case are the legal rules that apply to you informal.

Nor does it make sense to view commands as force or threats of force. True, some commands threaten physical force. “Drop the gun” often carries an implicit or express “or I’ll shoot.” But if you ignore an officer who tells you to quiet down, move away from the curb, or step over to him, he will likely detain you, cite you, arrest you, or charge you with a crime, rather than hurt you, at least much of the time.¹⁷¹ Police threaten some purely physical consequences: An officer may incapacitate you by tasing you¹⁷² or restrain you by tackling you. They threaten some consequences that are both physical and legal: When you are arrested, for example, you will be handcuffed, searched, transported, charged, processed, and detained.¹⁷³ And they threaten still other purely legal reactions: Officers issue tickets or summonses, and they file charges after the fact, including for crimes that cannot be committed unless the officer first issues a command, such as resisting arrest or failing to follow a lawful order. When we encounter a police officer and receive a command, we hear an implicit “or else.” But what is implied is not inevitably a threat of force.

Perhaps we shouldn’t fault criminologists who classify commands as informal or as forcible. They do so because they are describing and measuring coerciveness in policing, where deadly force and arrests are the paradigmatic concerns. Commands just get swept into the analysis. But these approaches reveal a problem: Despite the critical legal and practical role they play, commands are never the focus of study.

Why don’t criminologists study commands more or understand them better? The better question is: Why would they? Unlike arrests or force, commands are not recognized as an important, distinct phenomenon by courts, academics, or even police themselves. Departments have no command policies,¹⁷⁴ and officers receive almost no training about police

171. See *supra* note 127. Clearly, however, our experiences of the police differ, leading some to reasonably fear violence more than others. See, e.g., Cody T. Ross, Bruce Winterhalder & Richard McElreath, Racial Disparities in Police Use of Deadly Force Against Unarmed Individuals Persist After Appropriately Benchmarking Shooting Data on Violent Crime Rates, 12 *Soc. Psych. & Personality Sci.* 323, 327 (2020) (finding substantial evidence of racial disparities in the killing of unarmed Americans by police).

172. Used in drive-stun mode, Tasers are a pain compliance technique. In probe mode, Tasers shoot small projectiles attached to thin wires that deliver electricity when they hit the target. In probe mode, Tasers disrupt the neuromuscular system and work by incapacitation instead. See, e.g., Axon, Taser X2 Energy Weapon User Manual 4–5, 40, https://my.axon.com/s/contentdocument/069f3000006Lig3AAC?language=en_US (on file with the *Columbia Law Review*) (last modified Aug. 9, 2022).

173. See Harmon, *Why Arrest?*, *supra* note 70, at 311.

174. Officers receive direction about when to carry out the stops, searches, arrests, and crowd and traffic control that commands affect, but not direction about the commands themselves. See, e.g., Directive Index, Phila. Police Dep’t, <https://www.phillypolice.com/accountability> [<https://perma.cc/NN66-23QL>] (last visited Jan. 27, 2023); Policy Center

commands, except that they should use them to exert control.¹⁷⁵ Whatever officers understand about commands they intuit from practice or learn informally from colleagues. That isn't surprising because training and policy follow law and liability.¹⁷⁶ Right now, courts often fail to recognize or enforce legal limits on commands.¹⁷⁷ That is why, for example, departments have use-of-force policies and pursuit policies that set parameters for high-speed chases, but no policies about commands.

Law professors write about commands as commands even less often than criminologists do, and they too misunderstand them.¹⁷⁸ Criminal procedure scholars largely care about what courts care about. One might think that would be commands since Fourth Amendment cases are filled with them,¹⁷⁹ and the doctrine often turns on the presence or absence of

Topic Directory, Int'l Ass'n of Chiefs of Police, <https://www.theiacp.org/resources/policy-center-topic-directory> [<https://perma.cc/D6DS-E6GJ>] (last visited Jan. 27, 2023) (listing 143 model policies from "active shooter" to "written directive system"). Although departments do not have policies that specify how and when officers should give commands to the public, some departments have policies that specify how supervisors should give commands to officers. See, e.g., San Antonio Police Dep't, General Manual § 3.03 (2015), [https://www.sanantonio.gov/Portals/0/Files/SAPD/GeneralManual/200%20Rules%20and%20Regulations%20\(07-24-15\).pdf](https://www.sanantonio.gov/Portals/0/Files/SAPD/GeneralManual/200%20Rules%20and%20Regulations%20(07-24-15).pdf) [<https://perma.cc/P9W5-KTET>] ("Members shall promptly and willingly obey all lawful orders and directions given by supervisory offices Orders from a supervisor to a subordinate shall be in clear, understandable language, civil in tone, and issued in pursuit of departmental business.").

175. Officers are often taught to exert "command presence." See, e.g., Indep. Comm'n on the L.A. Police Dep't, Report of the Independent Commission on the L.A. Police Department 99 (1991); Erwin Chemerinsky, An Independent Analysis of the Los Angeles Police Department's Board of Inquiry Report on the Rampart Scandal, 34 Loy. L.A. L. Rev. 545, 563 (2001), https://michellawyers.com/wp-content/uploads/2010/06/Report-of-the-Independent-Commission-on-the-LAPD-re-Rodney-King_Reduced.pdf [<https://perma.cc/5Z37-2SWW>]; see also Van Maanen, *supra* note 39, at 313 ("[P]olice have internalized a standard of conduct which dictates that they must control and regulate all situations in which they find themselves.").

176. See Geoffrey P. Alpert & William C. Smith, Developing Police Policy: An Evaluation of the Control Principle, 13 Am. J. Police, no. 2, 1994, at 1, 2 ("[T]he police policy-making process is governed by the principles of risk management and liability.").

177. See *infra* section III.A.

178. There are rare, narrow exceptions. See Stephen E. Henderson, "Move On" Orders as Fourth Amendment Seizures, 2008 BYU L. Rev. 1, 5 (arguing that most "move on" orders are not Fourth Amendment seizures); Note, Defiance of Unlawful Authority, 83 Harv. L. Rev. 626, 628 (1970) (considering courts' responses to defiance of various forms of unlawful authority, including unlawful police orders, and proposing a new framework for courts to apply); James Mooney, Comment, The Power of Police Officers to Give "Lawful Orders", 129 Yale L.J. 1568, 1574–81, 1588–89 (2020) (surveying state statutes defining the crime of disobeying "lawful orders" and proposing a model criminal statute); Note, Orders to Move On and the Prevention of Crime, 87 Yale L.J. 603, 606, 618–19 (1978) (proposing a statute authorizing the police to give orders to move on because stops and arrests provide insufficient authority to officers to prevent crime).

179. In *Whren v. United States*, for example, the pretextual "stop" the Court upheld consisted of an officer directing a driver to put his SUV in park. 517 U.S. 806, 808 (1996). Traffic stops are almost always conducted by commands. See, e.g., *Navarette v. California*, 572 U.S. 393, 395 (2014) (stopping and searching vehicle); *United States v. Sharpe*, 470 U.S.

commands.¹⁸⁰ But, as noted in Part I, these cases are framed by legal categories—stops, searches, and arrests—that make the commands largely disappear from view.¹⁸¹ Perhaps as a result, reading the literature, one might never notice that searches and seizures are carried out by command.

Policing law scholars, not surprisingly, consider policing practices in more depth. But even they overlook the legal significance of commands.¹⁸² They often assume, for example, that commands are relatively unimportant because they only restate existing legal duties rather than make new ones.¹⁸³ But, as noted above, while some commands restate existing duties, other commands create new ones to do what you otherwise have every right not to do: show your hands, get down on the ground, or open your door. No preexisting law gives you notice about the scope or nature of those duties, and the officer's communication is legally significant.

675, 678 (1985) (stopping and detaining driver); *United States v. Cortez*, 449 U.S. 411, 415–16 (1981) (stopping vehicle and questioning driver); *United States v. Brignoni-Ponce*, 422 U.S. 873, 875 (1975) (stopping vehicle and questioning occupants). Many searches are conducted exclusively by commands as well. See, e.g., *City of Los Angeles v. Patel*, 576 U.S. 409, 414–15 (2015) (treating as search mandatory production of hotel guest records to officers upon “request”); *New York v. Burger*, 482 U.S. 691, 693–95 (1987) (treating as search mandatory production of junkyard vehicle records to police officer upon “request”).

180. Compare *Kentucky v. King*, 563 U.S. 452, 469–70 (2011) (finding no illegal entry to prevent the destruction of evidence because police banged on the apartment door and shouted, “Police, police, police,” not, “Open up”), with *Bumper v. North Carolina*, 391 U.S. 543, 546, 550 (1968) (finding consent to search invalid when officer announced “I have a search warrant to search your house” because “[w]hen a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search”).

181. In *Rodriguez v. United States*, for example, Officer Morgan Struble “pulled the Mountaineer over,” “gathered Rodriguez’s license, registration, and proof of insurance,” “asked [the passenger] for his driver’s license,” and “instructed Rodriguez to turn off the ignition, exit the vehicle, and stand in front of the patrol car.” 575 U.S. 348, 351–52 (2015). Yet, the Court’s only question was whether the officer acted unreasonably in detaining the driver after he handed him a warning. See *id.* at 350–51. There is no discussion of these many commands. See *id.*

182. For example, scholars have thoughtfully discussed problems with training officers to exert “command presence,” but, in doing so, they have said little about commands. See Cooper, *supra* note 27, at 674–75, 693–97; Mary Newman, *Barnes v. City of Cincinnati: Command Presence, Gender Bias, and Problems of Police Aggression*, 29 *Harv. J.L. & Gender* 485, 485–88, 490–92 (2006); Stoughton, *supra* note 125, at 652–53.

183. See, e.g., Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 *N.Y.U. L. Rev.* 1827, 1857 (2015) (“[P]olice are not permitted to make members of the general public do (or abstain from doing) anything not already written into the substantive law.”); Christopher Slobogin, *Policing as Administration*, 165 *U. Pa. L. Rev.* 91, 131–33 (2016) (comparing traditional searches and seizures with administrative adjudication rather than prospective rulemaking).

B. *The Authority to Command*

Given that courts obscure commands and scholars underestimate them, it should be no wonder that so little has been said about how law governs commands. As a result, however, many questions remain unanswered, including the most basic legal question one could ask: Where do police officers get the power to issue commands?

For some commands, the answer is clear: States pass statutes giving officers authority to issue specific orders. Officers use these statutes all the time: They stop people and ask them for identification;¹⁸⁴ they direct traffic;¹⁸⁵ they declare assemblies unlawful and disperse political protests;¹⁸⁶ and they demand information or cooperation with evidence gathering.¹⁸⁷ Such laws have been around a long time,¹⁸⁸ and they explain the legal basis for some police commands. But many common commands are not apparently authorized by these specific state laws. No laws authorize officers to order people to get in or out of a car, to put their hands up or behind their back, to shut up or walk away. So where do officers get the authority to issue those orders? This section argues that officers have no inherent or general power to command. Nevertheless, in a legal system committed to allowing individuals to fulfill their legal duties before they are forced to do so, the authority officers have to conduct stops, arrests, and searches necessitates and implies a power to issue some commands.

1. *An Inherent Power to Command?* — One might think that officers have some inherent power to command. Several Justices seemed to come close to this view in a dissent in *City of Chicago v. Morales*.¹⁸⁹ Chicago passed an ordinance that criminalized ignoring police dispersal orders to gang members and their associates. While a majority of Justices concluded that the ordinance was vague, Justice Thomas, with Chief Justice Rehnquist and Justice Scalia, disagreed. Justice Thomas's opinion was ambiguous, but he seemed to suggest that the ordinance merely reiterated traditional

184. See, e.g., Ala. Code § 15-5-30 (2022); Colo. Rev. Stat. § 16-3-103 (2022); Del. Code tit. 11, § 1902 (2022).

185. See, e.g., Ky. Rev. Stat. Ann. § 189.393 (West 2022); Va. Code Ann. § 46.2-1309 (2022).

186. See, e.g., Mass. Gen. Laws Ann. ch. 269, § 1 (West 2022); Tex. Crim. Proc. Code Ann. § 8.04 (West 2021).

187. See *Missouri v. McNeely*, 569 U.S. 141, 160–61 (2013) (noting that all fifty states have laws permitting officers to collect blood and breath for blood alcohol concentration testing); see also Conn. Gen. Stat. Ann. § 14-227b (West 2022); Iowa Code § 321J.6 (2021); Mass. Gen. Laws Ann. ch. 90, § 24(f)(1) (West 2022); *City of Los Angeles v. Patel*, 576 U.S. 409, 414–15 (2015) (describing ordinance authorizing officers to gather hotel guest logs); *New York v. Burger*, 482 U.S. 691, 693–95 (1987) (describing statute allowing officers to gather junkyard vehicle records).

188. See, e.g., John Inazu, *Unlawful Assembly as Social Control*, 64 *UCLA L. Rev.* 2, 13 (2017) (including early statutes requiring officers to command those unlawfully assembled to disperse and to call for aid from others nearby to assist in dispersing the crowd).

189. 527 U.S. 41, 98 (1999) (Thomas, J., dissenting).

authority of officers to order people off street corners, an authority implied by their duty to keep the public peace.¹⁹⁰

The view that officers have inherent authority to issue commands has intuitive appeal: After all, state statutes task the police with keeping the peace, enforcing the law, and maintaining order. And officers have long issued many apparently unauthorized orders toward these ends without much concern by courts. Doesn't that imply that officers have power to issue commands, even in the absence of statutory authority?

There are at least three arguments against the inherent-authority view. First, if officers have such power inherently, more specific laws such as stop-and-identify statutes would seem unnecessary. Why write a permission slip for someone who already has permission? One could argue that these statutes limit when officers may give these commands rather than authorize them. But that reading is implausible for many such statutes. For example, states adopted early statutes allowing officers to make stops on reasonable suspicion after the Interstate Commission on Crime proposed the Uniform Arrest Act in 1942.¹⁹¹ The Uniform Arrest Act was drafted precisely because state law followed the common law, and common law offered only limited and vague authority to officers to stop people on mere suspicion.¹⁹² Thus, the Act's drafters encouraged states to pass stop statutes to provide clear authority to make suspicion-based stops they saw as important in addressing crime. No one thought that common law offered officers authority to stop and question people on no suspicion at all,¹⁹³ though that would seem an implication of the inherent authority view.

190. See *id.* at 107–09. Some other judges share this view. See, e.g., *People v. Nixon*, 161 N.E. 463, 466 (N.Y. 1928) (“Police officers are guardians of the public order. Their duty is not merely to arrest offenders, but to protect persons from threatened wrong and to prevent disorder. In the performance of their duties they may give reasonable directions.”). Others reject the idea that police have inherent authority. See, e.g., *State v. Backstrand*, 313 P.3d 1084, 1111 (Or. 2013) (en banc) (Brewer, J., concurring in the judgment) (“The community caretaking statute is not an exception to the warrant requirement; it is the statutory expression of the well-settled precept that the actions of law enforcement officers, like all other government actors’ actions, must be traceable to some grant of authority from a politically accountable body.”).

191. For the complete text of the Act and a discussion of its origins, see Sam B. Warner, *The Uniform Arrest Act*, 28 Va. L. Rev. 315, 316–17, 343–47 (1942). Delaware, Massachusetts, New Hampshire, and Rhode Island were the first states to adopt the Uniform Arrest Act, breaking with “laws of arrest [which] ha[d] remained virtually unchanged since they were first spawned as part of the common law of twelfth century England.” James Frances Coakley, *Law and Police Practice: Restrictions in the Law of Arrest*, 52 Nw. U. L. Rev. 2, 2 & n.4 (1957).

192. See Warner, *supra* note 191, at 319 (“There is some early judicial recognition of this ancient right of constables and watchmen to stop and investigate suspicious persons. . . . Unfortunately these decisions are insufficient to establish unequivocally an American common-law right to question and detain suspects.”).

193. See Patrick Baron Devlin, *The Criminal Prosecution in England* 82–83 (1958) (speaking of common law: “The police have no power to detain anyone unless they charge

Second, the Supreme Court has twice indicated that giving such broad authority to officers would be unconstitutional, including in *Morales*. According to the Court, because the ordinance Chicago passed “does not provide any guidance to the officer deciding whether such a [dispersal] order should issue,”¹⁹⁴ it unconstitutionally “entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat.”¹⁹⁵ The Court similarly rejected an ordinance that made it “unlawful for any person to stand or loiter upon any street or sidewalk . . . after having been requested by any police officer to move on” in *Shuttlesworth v. Birmingham*, reasoning that “this ordinance says that a person may stand on a public sidewalk in Birmingham only at the whim of any police officer of that city. The constitutional vice of so broad a provision needs no demonstration.”¹⁹⁶ These cases suggest that giving officers general authority to issue commands would be unconstitutional. Without strong evidence in favor, we might be hesitant to read state laws and legal doctrines that are silent on the matter to have created an unconstitutional policing regime.

Third, and most importantly, the inherent-authority view is inconsistent with the history of policing and the structure of current state law. Contemporary salaried police officers evolved largely from semiprofessional constables who previously carried out law enforcement responsibilities in both England and the United States. The connection between police officers and constables persists in state law: State statutes frequently grant officers the powers of constables at common law.¹⁹⁷ Although constables’ authority was broad and somewhat ill-defined, it was not a general authority to preserve the peace or enforce the law.¹⁹⁸ Instead,

him with a specified crime and arrest him accordingly . . . [and they] have no power whatever to detain anyone on suspicion or for the purpose of questioning him”); Warner, *supra* note 191, at 318–19 (discussing common law sources indicating that, under some circumstances, officers might have had authority to detain people on mere suspicion, but not on no suspicion at all).

194. *Morales*, 527 U.S. at 62.

195. *Id.* at 60 (internal quotation marks omitted) (quoting *Kolender v. Lawson*, 461 U.S. 352, 360 (1983)). Justices also reject this view in plurality parts of Justice Stevens’s opinion, signed by Justices Souter and Ginsburg. See *id.* at 58–59 (“If the loitering is in fact harmless and innocent, the dispersal order itself is an unjustified impairment of liberty. If the police are able to decide arbitrarily which members of the public they will order to disperse, then the Chicago ordinance . . . [is] invalid . . .”).

196. 382 U.S. 87, 88, 90 (1965). This is the second of three Supreme Court cases decided during the 1960s that overturned convictions of civil rights leader Reverend Fred Shuttlesworth. All three are commonly called *Shuttlesworth v. City of Birmingham*. See 373 U.S. 262 (1963); 394 U.S. 147 (1969).

197. See, e.g., D.C. Code § 5-127.04 (2022) (constables); Ky. Rev. Stat. Ann. § 95.019 (West 2023) (constables and sheriffs); Mass. Gen. Laws Ann. ch. 41, § 98 (West 2022) (constables); Mont. Code Ann. § 7-32-4105 (West 2021) (constables).

198. See, e.g., Thomas Y. Davies, Farther and Farther From the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination as a “Trial Right” in *Chavez v. Martinez*, 70 Tenn. L. Rev. 987, 1004 (2003) (“The primary peace officer was the parish constable—an amateur who served for a term of a year or so and whose duties consisted primarily of putting down ‘affrays,’ controlling drunks, and executing arrest or

constables had limited authority, centered on the power to make arrests and collect and present evidence. Even Blackstone, for example, who had an expansive view of constable authority, wrote: “The general duty of all constables . . . is to keep the king’s peace . . . and to that purpose they are armed with very large powers, of arresting, and imprisoning, of breaking open houses, and the like”¹⁹⁹

As this quote suggests, Blackstone approved of their power being capacious and nebulous, but he did not think constables had free power to command.²⁰⁰ Instead, their power was tied to specific activities and to those people connected with them. Common law treatises highlight just one command officers could give to those who were not suspicious or subject to a warrant: Constables could demand that citizens assist them in carrying out an arrest.²⁰¹ Professor Thomas Davies contends this power “may have been the most distinctive attribute of his office.”²⁰² That could hardly be said of an officer with general command authority.

Note also the distinction Blackstone makes between the *duties* of constables and their *powers*.²⁰³ That is an important, persistent feature of policing, one that undermines the idea that officers’ powers stem from the duties states assign them today. Early constables served as political representatives with broad law enforcement responsibilities. Over time, they lost power and became subordinate to justices of the peace.²⁰⁴ But

other warrants issued by the local justice of the peace.”); Thomas Y. Davies, The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in *Atwater v. Lago Vista*, 37 Wake Forest L. Rev. 239, 286 & n.139, 424–25 & n.615 (2002) [hereinafter Davies, Fictional Character] (describing and citing sources for the limited nature of constable authority at common law). As Davies explains, constables were expected to “terminate outbreaks of violence that they actually witnessed,” and to “take up persons that they observed to be drunk or vagrant because such persons were perceived as posing a continuing threat to the peace and order of the community. But that was about the extent of proactive policing.” Davies, Fictional Character, *supra*, at 424.

199. 1 William Blackstone, Commentaries *356. He continues, “of the extent of which powers, considering what manner of men are for the most part put into these offices, it is perhaps very well that they are generally kept in ignorance.” *Id.*

200. Framing-era constables played a role in order maintenance mostly through their authority to make arrests. See Thomas Y. Davies, Recovering the Original Fourth Amendment, 98 Mich. L. Rev. 547, 621 n.196 (1999) [hereinafter Davies, Recovering the Original Fourth Amendment] (describing the constable’s order maintenance roles, which operated through his power to arrest); *id.* at 621–27 (describing the limited authority of constables at common law in the absence of a warrant).

201. See, e.g., Hale, *supra* note 121, at 588 (noting that “if the constable in pursuit of a felon require the aid” of a member of the public, “he is bound by law to assist him, and is finable for his neglect”).

202. Davies, Recovering the Original Fourth Amendment, *supra* note 200, at 621.

203. See Blackstone, *supra* note 199, at *356; see also Charles Humphreys, A Compendium of the Common Law in Force in Kentucky 128 (1822) (adopting Blackstone’s distinction when describing Kentucky common law).

204. See H.B. Simpson, The Office of the Constable, 40 Eng. Hist. Rev. 625, 633–36 (1895) (“[B]y the end of the fourteenth century the constables in the matter of keeping the

they retained their broad duties to prevent crime, preserve peace, and secure felons.²⁰⁵ When contemporary police officers replaced constables, this two-track conception of officers, with broad responsibilities and limited powers, carried forward.

Today, states expect police officers to prevent and detect crime, apprehend criminals, safeguard life and property, preserve the peace, and enforce the law.²⁰⁶ But, like their common law counterparts, these officers are granted only limited powers to carry out these projects. Mostly, police officers are given authority tied to the criminal law: They may execute criminal arrest and search warrants; collect and present criminal evidence to courts; make warrantless stops, arrests, and searches under specified conditions; and issue traffic tickets or summonses in lieu of arrests.²⁰⁷ But when they do not have a warrant or suspect a criminal violation, they cannot prevent crime or preserve order solely by telling people what to do and arresting them if they fail to do it.²⁰⁸

peace were beginning to lose their initiative and becoming the mere subordinates of the local ministers of the crown.”); see also Joan Kent, *The English Village Constable, 1580–1642: The Nature and Dilemmas of the Office*, *J. Brit. Stud.*, Spring 1981, at 26, 28–32 (describing dual pulls on constables from responsibilities to village and responsibilities to crown).

205. See Simpson, *supra* note 204, at 636 (“But as the powers which might have grown by exercise more definite and more extensive generally passed away to the newly created local justices, the responsibilities remained and became inseparably attached to the office.”).

206. See, e.g., Ark. Code Ann. § 14-52-203 (2022); Ind. Code Ann. § 5-2-1-17 (West 2022); Ohio Rev. Code Ann. § 737.11 (2023).

207. The President’s Comm’n on L. Enf’t and Admin. of Just., *Task Force Report: The Police 13 (1967)* [hereinafter *The President’s Comm’n Report*] (“It is generally assumed that police have a preventive and protective role To fulfill their obligations, the police are given formal authority to invoke the criminal process—to arrest, to prosecute, and to seek a conviction.”); see also, e.g., N.Y. Crim. Proc. Law § 2.20 (McKinney 2022); Va. Code Ann. § 15.2-1704 (2022). Thus, for example, Virginia makes officers “responsible for the prevention and detection of crime, the apprehension of criminals, the safeguard of life and property, the preservation of peace and the enforcement of state and local laws, regulations, and ordinances.” Va. Code Ann. § 15.2-1704(A). To carry out those duties, the commonwealth invests police officers “with all the power and authority which formerly belonged to the office of constable at common law,” Va. Code Ann. § 15.2-1704(A), and additionally, the power to execute warrants and summons, Va. Code Ann. § 19.2-76 (2022), to issue commands to appear in court to answer criminal charges or facilitate warrant execution, Va. Code Ann. §§ 19.2-73.1, 19.2-73.2, 19.2-74, and to make some arrests without a warrant, Va. Code Ann. §§ 19.2-81, § 19.2-81.3, 19.2-81.6. That is, officers must carry out their broad duties by using criminal powers; except in exceptional circumstances, officers have “no authority in civil matters.” Va. Code Ann. § 15.2-1704(B). As Malcolm Thorburn has pointed out, focus on officer discretion can obscure the degree to which the public office of policing is ministerial, that is, provided with “power to enforce authoritative decisions with authorised coercive force.” See Malcolm Thorburn, *Policing and Public Office*, 70 *U. Toronto L.J.* 248, 254 n.23 (Supp. 2 2020) (citing Blackstone, *supra* note 199, at *331–333).

208. This creates a significant challenge for the occupation: Officers may interpret their mandate in a manner that they cannot lawfully pursue. See Herman Goldstein, *Policing a Free Society* 14–15 (1977) (“Legislatures have commonly given the police responsibilities

Traditionally, commentators have taken police authority, such as it exists, to derive from the power to arrest.²⁰⁹ Since a lot of laws govern public conduct, Bittner could plausibly say that “any policeman worth his salt is virtually always in a position to find a *bona fide* charge of some kind when he believes the situation calls for an arrest.”²¹⁰ Legal changes over the twentieth century have made stops on reasonable suspicion that “criminal activity may be afoot”²¹¹ similarly important in facilitating police coercion.²¹² In both contexts, “policemen use the provisions of the law as a resource for handling problems of all sorts.”²¹³ Why would police officers use the criminal law as a resource to solve problems, as Blackstone and Bittner agree they do, if officers have expansive, inherent power to command?

A second, related view about where officers get the power to issue commands is that they get broad authority from state laws that make it a crime to fail to follow lawful orders.²¹⁴ The thinking is that if citizens have a legal duty to follow orders, then officers must have legal power to issue them. Many officers seem to think so. Watch videos of police encounters

without considering how these responsibilities are to be carried out. . . . The absence of more appropriate authority . . . leads to public criticism of the police, the frustration of police personnel, and the misuse by the police of that authority which they do have.”).

209. See *supra* notes 94–97 and accompanying text.

210. Bittner, Florence Nightingale, *supra* note 68, at 27.

211. *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

212. *Floyd v. City of New York*, for example, describes 4.4 million stops conducted by the NYPD between January 2004 and June 2012. 959 F. Supp. 2d 540, 556 (S.D.N.Y. 2013). The *Floyd* court concluded that at least 200,000 stops, and perhaps many more, lacked reasonable suspicion. *Id.* at 579. But even if the court underestimated the number of illegal stops by an order of magnitude, its findings would mean that the NYPD engaged more than two million *lawful* stops during that period, a vast exercise of coercive authority.

Three legal changes probably matter most in bringing stops to prominence: First, following the Uniform Arrest Act, states began to authorize pedestrian stops on less than probable cause, giving officers clearer authority to make stops. See Warner, *supra* note 191, at 320–21 (explaining the rationale for the Act and asserting that “questioning, without immediate arrest, is essential to proper policing”). Second, the Supreme Court struck down some vagrancy statutes that allowed many street encounters on probable cause, making reasonable suspicion stops an appealing alternative. E.g., *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). Third, the Supreme Court’s decision in *Terry* and its progeny clarified the circumstances in which stops based on less than probable cause are constitutional. See, e.g., *Adams v. Williams*, 407 U.S. 143, 145–47 (1972) (citing *Terry* for idea that brief investigative stops may be constitutionally reasonable and concluding that an unverified informant’s tip provided adequate basis for such a stop).

213. Bittner, Florence Nightingale, *supra* note 68, at 27.

214. Although Justice Scalia signed Justice Thomas’s dissent in *Morales*, he also wrote a dissent of his own. In it, he seems to suggest that officers might need authority, but that broad grants of authority, including through statutes that forbid failing to comply with a lawful order, are adequate to provide it. See *City of Chicago v. Morales*, 527 U.S. 41, 87 (1999) (Scalia, J., dissenting) (arguing that no urban society could exist unless officers may broadly order pedestrians to move on and citing a failure-to-comply ordinance as such a rule).

and you will hear officers repeatedly invoking the language of such statutes, insisting, “I am giving you a lawful order.”²¹⁵

But this view probably isn’t right either. First, even if statutes that criminalize failing to follow a lawful order grant some power, they cannot explain many police commands. Many lawful order statutes are narrow; they criminalize disobedience only to officers engaged in traffic control or managing emergencies.²¹⁶ Only a few states’ statutes do not expressly restrict the context in which violating lawful orders is criminal.²¹⁷ Even when statutes are worded broadly, courts sometimes limit the laws when they interpret them,²¹⁸ and for good reason. In *Shuttlesworth*, mentioned above, the Supreme Court also overturned the petitioner’s conviction on a second count that charged him with violating an ordinance that made it criminal “to refuse or fail to comply with any lawful order, signal or direction of a police officer.”²¹⁹ The Court reasoned that the prohibition was “so broad as to evoke constitutional doubts of the utmost gravity,”²²⁰ but it noted that if the officer had encountered *Shuttlesworth* while directing traffic, and the ordinance had been limited to orders during traffic encounters, the conviction might not have raised the same concerns.²²¹ *Shuttlesworth* suggests that laws that broadly criminalize disobeying police officers outside the traffic context, or perhaps similar contexts, are unconstitutional.²²²

Second, lawful order statutes presume that orders must be lawful. State courts take that to mean they must be authorized.²²³ How can statutes that criminalize failure to follow authorized orders also provide that authority? And last, some states have no laws criminalizing

215. See, e.g., Connie Leonard, LMPD Answers Claim of Police Beating With Bodycam Video, Wave (Oct. 12, 2016), <https://www.wave3.com/story/33377912/lmpd-answers-claim-of-police-beating-with-bodycam-video/> [<https://perma.cc/V9TN-V39K>]; Ohlheiser & Phillip, *supra* note 1.

216. See Mooney, *supra* note 178, at 1578.

217. See *id.* at 1578–80.

218. See *id.* at 1580–81 (describing states that narrow broadly worded statutes to the traffic context). For an example, see *Coughlin v. State*, 320 So. 2d 739, 742 (Ala. Crim. App. 1975) (narrowly interpreting lawful orders to include only those given in the traffic context); but see *State v. Thigpen*, 62 N.E.3d 1019, 1028–30 (Ohio Ct. App. 2016) (interpreting lawful orders to include any order by someone with authority to regulate traffic rather than any order pertaining to the regulation of traffic).

219. *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 88 (1965) (internal quotation marks omitted) (quoting Birmingham, Ala., General City Code, § 1231).

220. *Id.* at 90.

221. *Id.* at 93–94.

222. See also *City of Chicago v. Morales*, 527 U.S. 41, 58–59 (1999) (Stevens, J., plurality opinion) (citing *Shuttlesworth*, 382 U.S. at 90, approvingly).

223. See, e.g., *State v. Lichti*, 367 N.W.2d 138, 141 (Neb. 1985); *State v. Navickas*, 351 P.3d 801, 803 (Or. Ct. App. 2015).

the failure to follow police orders.²²⁴ No one seems to think that officers have narrower authority to issue commands as a result.

2. *An Alternative Account of the Power to Command.* — If the arguments against these views are right, then officers have no inherent or general grant of authority to issue commands. Yet they still seem to lawfully issue orders beyond specific statutory grants of authority to do so. Perhaps officers derive power to command from other powers, such as their state-granted authority to search and to arrest. Figuring out how takes some work.²²⁵

Recall that officers must face noncompliance or a threat before they use force to arrest us. Why? One explanation might be that our legal system—at least with respect to policing, and perhaps more broadly—is committed to allowing us to fulfill our legal obligations voluntarily before the state forces us to do so.²²⁶

Consider the knock-and-announce rule. At common law, an officer could not break open a door to execute a search warrant unless he first demanded entry and was refused.²²⁷ Nor could he break into a house to conduct a felony arrest unless a resident denied him entry.²²⁸ Those rules have persisted in state law.²²⁹ For hundreds of years, then, officers lawfully

224. See Mooney, *supra* note 178, at 1574 (finding no lawful order statutes in Connecticut, Kentucky, Maine, Massachusetts, Virginia, and West Virginia).

225. Commentators have sometimes assumed that the power to command flows from the power to arrest, which is why they have raised questions about police authority to issue commands, such as “move on.” But they have not explained how the arrest power leads to commands or what limits exist on the authority. See, e.g., Urb. Police Function Standards § 1-3.4 cmt. at 1-78 (ABA 1979).

226. See Jeremy Waldron, *The Concept and the Rule of Law*, 43 *Ga. L. Rev.* 1, 27 (2008) (citing Henry M. Hart Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 120–21 (William N. Eskridge, Jr. & Phillip P. Frickey eds., 1994)) (suggesting self-application is a general feature of law).

227. See, e.g., 4 William Blackstone, *Commentaries* *314–315; Hale, *supra* note 121, at 76–120, 582–83; 3 William Hawkins, *A Treatise of the Pleas of the Crown; or a System of the Principal Matters Relating to that Subject, Digested Under Proper Heads* 156–84 (London, G.G. & J. Robinson & J. Butterworth 7th ed. 1795); 1 James Fitzjames Stephen, *A History of the Criminal Law of England* 244–72 (London, Macmillan & Co. 1883).

228. See, e.g., Hale, *supra* note 121, at 583, 588; *Semayne’s Case* (1604), 77 *Eng. Rep.* 194, 195; 5 *Co. Rep.* 91 a, 91 b (“In all cases when the King is party, the sheriff . . . may break the party’s house, either to arrest him, or to do other execution of the K[ing]’s process, if otherwise he cannot enter. But . . . he [first] ought to signify the cause of his coming, and . . . [ask] to open doors . . .”).

229. See, e.g., Alaska Stat. § 12.25.100 (2022) (“A peace officer may break into a building or vessel in which the person to be arrested is or is believed to be, if the officer is refused admittance after the officer has announced the authority and purpose of the entry.”); Fla. Stat. Ann. § 933.09 (West 2022) (“The officer may break open any outer door . . . or any part of a house or anything therein, to execute the warrant, if after due notice of the officer’s authority and purpose he or she is refused admittance to said house or access to anything therein.”); Ohio Rev. Code Ann. § 2935.12 (2023) (“When making an arrest or . . . when executing a search warrant, the peace officer . . . may break down an outer or inner door or window of a dwelling house or other building, if, after notice of his

searching homes had to give people a chance to open their doors, even when the officers had court orders not just permitting but commanding them to enter.

The same rule holds as a matter of constitutional law today. In *Wilson v. Arkansas*, the Supreme Court ruled that the Fourth Amendment incorporates the common law requirement that police officers knock on the door of a home, state their identity and purpose, and wait enough time to allow a response before forcing entry.²³⁰ As under common law, force depends on being refused, or at least ignored. As the Supreme Court stated in *Richards v. Wisconsin*, “[T]he common law recognized that individuals should be provided the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry. These interests are not inconsequential.”²³¹

Other criminal procedure doctrines reaffirm the same idea. In *Pennsylvania v. Mimms*, for example, the Court considered whether the Fourth Amendment allowed an officer to order a driver out of his car during a traffic stop²³²—not pull him out, but order him—though pulling him out of the car might equally serve the state’s interest in protecting officers from “the inordinate risk confronting an officer as he approaches a person seated in an automobile.”²³³ Only when drivers do not comply with officers’ “requests” to get out of the car may officers use force to compel them.²³⁴

James Stephen famously noted that walking to one’s execution is a voluntary act, undertaken because one “prefers it to being carried. This is choice, though it is a choice between extreme evils.”²³⁵ The self-execution principle holds that police officers must allow us to choose

intention to make the arrest or to execute the warrant or summons, he is refused admittance . . .”).

230. 514 U.S. 927, 929 (1995).

231. 520 U.S. 385, 393 (1997). Relatedly, at common law officers making an arrest pursuant to a warrant were “bound to give the substance of the warrant or process, to the end that the party may know for what cause he is arrested and take the proper legal measures to discharge himself.” *Bellows v. Shannon*, 2 Hill 86, 92 (N.Y. 1841).

232. 434 U.S. 106, 109 (1977); see also *Maryland v. Wilson*, 519 U.S. 408, 410 (1997) (applying *Mimms*’s rule to passengers).

233. *Mimms*, 434 U.S. at 110; but see Jordan Blair Woods, Policing, Danger Narratives, and Routine Traffic Stops, 117 Mich. L. Rev. 635, 675–84 (2019) [hereinafter Woods, Routine Traffic Stops] (providing evidence that routine traffic stops are not as dangerous to police officers as the conventional narrative presumes).

234. Compare, e.g., *Ashford v. Raby*, 951 F.3d 798, 801–02 (6th Cir. 2020) (finding officer’s decision to use force to pull a driver out of a vehicle reasonable because the driver “had just led law enforcement on a two-and-a-half-minute highway chase and was now refusing to get out of his vehicle”), with *Brown v. Lewis*, 779 F.3d 401, 418 (6th Cir. 2015) (concluding that “it was unreasonable for the officers to have pulled Brown from her car and thrown her to the ground” when the driver began to move out of the car when ordered).

235. 2 James Fitzjames Stephen, *A History of the Criminal Law of England* 102 (London, Macmillan & Co. 1883).

between the easy way and the hard way. We might not like our options, but when we are denied the choice, we suffer more than physical harm. We are deprived of a freedom to which every citizen is presumptively entitled: that of performing our legal duties ourselves.

What does this have to do with the power of officers to issue commands? Although no commentary considers precisely how the power to command follows from the power to stop, arrest, or search, perhaps the law's self-application principle helps. For us to have a chance to self-apply the law, we must know what the law expects of us.²³⁶ We learn what constitutes a crime when criminal statutes are published,²³⁷ and several legal doctrines help ensure that our notice is fair or, at least, fair enough.²³⁸ How can we learn about the legal duties an officer generates? When an officer decides you should pull over or that you are under arrest, he must let you know it. A request does not do that; it merely invites cooperation. So the officer issues a command. Similarly, though warrants are issued by courts, they are issued *ex parte*. You have no way of knowing when they create a duty for you to open your home. A police officer must tell you.²³⁹ Commands are the way officers inform us of legal duties when we have no other way to know.²⁴⁰

The exceptions to the notice requirement help prove the rule. An officer does not have to give the suspects a chance to cooperate when they

236. Cf. *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964) (emphasizing the need for fair warning of prohibited conduct and concluding that due process is violated when a person is convicted of violating a statute that gave them no reason to imagine that it covered their contemplated conduct); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) (“All are entitled to be informed as to what the State commands or forbids.”).

237. See, e.g., *United States v. Harriss*, 347 U.S. 612, 617 (1954) (“[N]o man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.”). This principle of legality, reflected in the phrase *nulla poena sine lege* (no penalty without law) has been called “one of the enduring ideas of Western civilization.” Jerome Hall, *General Principles of Criminal Law* 35 (2d ed. 2005). Although the Supreme Court has not always required publication for a law to take effect, *Lapeyre v. United States*, 84 U.S. (17 Wall.) 191 (1872), it demands fair notice of a criminal prohibition before a criminal conviction. See, e.g., *Lambert v. California*, 355 U.S. 225, 229–30 (1957).

238. See John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va. L. Rev. 189, 205–12 (1985) (considering fair notice as a justification for legality, vagueness, strict construction, and constitutional rules against bills of attainder and *ex post facto* legislation).

239. See, e.g., *Ariz. Rev. Stat. Ann. § 13-3891* (2022) (“An officer . . . may break open a door or window of any building in which the person to be arrested is or is reasonably believed to be, if the officer is refused admittance after he has announced his authority and purpose.”); *Cal. Penal Code § 1531* (2022) (“The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance.”).

240. Some scholars argue that officers should give an account of their authority and reasons because doing so facilitates individual choice about cooperating or resisting the government. See Miller, *supra* note 140, at 332; Ristroph, *supra* note 102, at 1240, 1242. Here, the information serves a different ideal, one more akin to legality than equality.

are in the process of committing a felony²⁴¹ or when they are trying to escape.²⁴² In those cases, they know their duties and are flouting them. Similarly, the police need not announce themselves at the door when no one is home or when the occupants already know it is the police.²⁴³ Everyone else must be told. The powers we grant officers—searching and arresting without warrants and executing *ex parte* orders—must necessarily entail a power to command.

Without commands, all of policing would look like no-knock raids and James Blake's tackle. Officers could bust down your door whenever they had reason to enter your home, throw you to the ground whenever they were under arrest, and pull you out of your car at every traffic stop. With commands, those practices are legally exceptional. Normally, officers cannot exercise other powers unless they first issue commands.²⁴⁴

In this view, commands are not just something police officers may do. They are often something officers *must* do. As discussed above, there are two types of commands: those that reiterate known duties and those that generate or declare new ones.²⁴⁵ Commands that restate duties have no legal significance. An officer may order you to stop a crime in progress, whether you are blocking a roadway or robbing a bank.²⁴⁶ Yet he need not issue such commands; he can arrest you for violating the law without first telling you to stop.²⁴⁷ Nor does issuing such a command impact the officer's authority; you might comply with the command and still get lawfully arrested.

By contrast, when an officer creates a new legal duty, including a duty to submit to an arrest, he has to communicate that duty and allow you to self-execute it—he must issue a command. And when he does, it impacts the officer as well as the target. It starts a clock that an officer must abide:

241. E.g., *Wolf v. State*, 19 Ohio St. 248, 258–59 (Ohio 1869).

242. E.g., *People v. Pool*, 27 Cal. 572, 578–79 (1865) (“[T]he circumstances are sufficient notice.” (internal quotation marks omitted) (quoting *Rex v. Davis* (1837) 7 Car. and Payne 786)).

243. See *Wilson v. Arkansas*, 514 U.S. 927, 934–35 (1995) (describing common law cases permitting entry where no one is home); *Trent v. Wade*, 776 F.3d 368, 379–80 (5th Cir. 2015) (collecting and discussing useless gesture cases); *Allen v. Martin*, 10 Wend. 300, 300 (N.Y. Sup. Ct. 1833) (person already has notice). These exceptions are what allow no-knock raids. As with the knock-and-announce rule and warrantless arrests, officers did not have to indicate their purpose to arrest pursuant to a warrant if doing so would be dangerous to the officer, undermine the success of the arrest, or be futile. *Perkins*, *supra* note 94, at 250.

244. Of course, officers can often exercise authority without commands when they do not need to change anyone's conduct. So, for example, an officer with a warrant may place a tracking device on a car without commands. E.g., Cal. Penal Code § 1534(b)(2); Va. Code Ann. § 19.2-56.2(D) (2022).

245. See *supra* notes 216–218 and accompanying text.

246. The power to stop people from violating any law in our capacious criminal code can itself provide significant power to issue commands.

247. However, he still must issue commands to effect the arrest, unless exceptional circumstances exist.

He must give you a chance to comply. And it states a standard that constrains his power: If you follow the order, he cannot arrest you for violating that legal duty or use force to compel you to fulfill it. By issuing commands, officers both transform our relationship to the government and tell us of that transformation. Legally speaking, what happens next is up to us.

Looking at the more specific state laws that grant police authority to issue orders reinforces the idea that police derive much of their command authority from their authority to arrest and search. These laws largely provide officers authority to give commands when they have good reason to shape the conduct of people who are not criminal suspects, such as gawkers at a crime scene,²⁴⁸ or law-abiding participants in a protest turned riot,²⁴⁹ or those who possess evidence of someone else's crime.²⁵⁰ The major exceptions are statutes that permit officers to stop criminal suspects on reasonable suspicion. But these statutes support the same conclusion because they authorize officers to command those who are not suspicious enough to arrest. The Supreme Court recognized reasonable suspicion seizures as consistent with the Fourth Amendment in *Terry v. Ohio* and its progeny, which is why these are commonly called “*Terry* stops.”²⁵¹ But, as mentioned above, decades earlier, commentators advocated for, and states passed, statutes authorizing officers to conduct such stops, because: (1) The practice was considered important to the police, and (2) neither the common law nor existing statutes clearly authorized officers to command people to stop on less suspicion than probable cause.²⁵²

If police authority comes from specific statutes that authorize commands and statutes that authorize stops, searches, and arrests, then such authority is not general or unlimited, even apart from any constitutional doctrine that might constrain it. That can be hard to recognize in today's legal environment. Litigants fight about whether an officer violated the Fourth Amendment when he entered a home and used force inside, not whether he had statutory authority to order the resident

248. See, e.g., Or. Rev. Stat. § 133.033 (West 2022); S.C. Code Ann. §56-5-1538 (2022). See also Cal. Penal Code § 409.5 (allowing police officers to close and control the scene of a flood, storm, fire, earthquake, explosion, accident, or other disaster); Ohio Rev. Code § 4511.67 (2023) (“When any police officer finds a vehicle standing upon a highway in violation of section 4511.66 of the Revised Code, such officer may . . . require the driver or other person in charge of the vehicle to move the same.”).

249. See, e.g., Ariz. Rev. Stat. Ann. § 13-3804 (2022); Fla. Stat. Ann. § 870.04 (West 2022); Or. Rev. Stat. § 131.675.

250. See, e.g., Cal. Penal Code § 1524.3(g) (“A provider of wire or electronic communication services or a remote computing service, upon the request of a peace officer, shall take all necessary steps to preserve records and other evidence . . .”).

251. 392 U.S. 1, 30–31 (1968); see, e.g., *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) (noting that “the usual traffic stop is more analogous to a so-called ‘*Terry* stop’ than to a formal arrest” (citation omitted)).

252. Warner, *supra* note 191, at 317 (“The present law is entirely inadequate to meet the modern needs for questioning and detaining suspects.”).

to open the door and lie on the floor.²⁵³ And cases decide whether an officer interfered with a person's First Amendment right to record the police rather than whether the officer had authority to order them to get back into a car, leave the area, or stop filming.²⁵⁴ Legal skirmishes about policing take place on constitutional battlefields; limits on command authority get lost in the fog of war.

III. THE LAW OF POLICE COMMANDS

A. *Legal Limits on Police Commands*

Despite the important role commands play, no one has provided an account of how the law regulates them. This section offers the beginnings of such an account. So far, we have seen that commands allow officers to exercise their limited legal authority, and they are permissible only when such authority exists. They also serve important legal functions: They often generate and communicate legal duties, and they mark the start of our chance to comply. This account of commands implies that, at a minimum, police commands that impose or tell of new legal duties should satisfy three legal constraints. (1) They must be authorized by state law. (2) They must comply with constitutional and other legal limits on police conduct. (3) They must provide adequate notice and opportunity to comply.

1. *Commands Must be Authorized.* — If officers have no inherent or general authority to issue a command, then any police order is lawful only if state law authorizes it.²⁵⁵ As we have seen, that authorization may come from a statute that expressly authorizes commands, such as a stop-and-identify or unlawful assembly law. Or the authority may come from the power to effect arrests and searches. But it must come from somewhere.²⁵⁶

253. See, e.g., *Bonivert v. City of Clarkston*, 883 F.3d 865, 870–871 (9th Cir. 2018) (§ 1983 suit alleging warrantless entry and unreasonable force in violation of the Fourth Amendment after officers entered plaintiff's home; ordered him to open the door, stay back, calm down, get on the ground, show his hands, hold still, and give officers his hands; and tased and threw him across room).

254. See, e.g., *Fields v. City of Philadelphia*, 862 F.3d 353, 356 (3d Cir. 2017) (ordering person who was filming police activity to leave the area); *Gericke v. Begin*, 753 F.3d 1, 3–4, 10 (1st Cir. 2014) (discussing First Amendment right to record rather than the propriety of the order to get back in car or order to tell the officer where the camera was).

255. See *Terry*, 392 U.S. at 32 (Harlan, J., concurring) (“Ohio has not clothed its policemen with routine authority to frisk and disarm on suspicion; in the absence of state authority, policemen have no more right to ‘pat down’ the outer clothing of . . . persons to whom they address casual questions, than does any other citizen.”); *State v. Backstrand*, 313 P.3d 1084, 1111 (Or. 2013) (en banc) (Brewer, J., concurring in the judgment) (noting that police conduct must fall within statutory authority and comply with constitutional law). Cf. *Friedman & Ponomarenko*, supra note 183, at 1834 (arguing that “policing agencies may only act pursuant to sufficient democratic authorization”).

256. For state authorization to be adequate, vagueness doctrine also requires that it define police power sufficiently to prevent arbitrary and discriminatory enforcement. See, e.g., *City of Chicago v. Morales*, 527 U.S. 41, 60–64 (1999); *Kolender v. Lawson*, 461 U.S. 352, 361 (1983); see also *Urb. Police Function Standards § 1-3.4 cmt. at 1-78 to 1-92* (ABA

Unless it does, members of the public have no obligation to obey, and officers have no authority to arrest someone who fails to comply or to enforce the command with force.²⁵⁷ Neither state courts nor state legislatures suggest that such authority is unnecessary. Yet, at present, they often fail to articulate where the power to issue commands comes from or what limits exist on that power.

When officers get their authority to command from statutes that expressly permit commands in specific situations, the scope of authority may be relatively clear. Stop-and-identify statutes require that officers reasonably suspect criminal activity, for example, and they limit the information an officer may demand.²⁵⁸ Laws permitting dispersal orders and unlawful assembly arrests dictate what must transpire before the police declare an assembly unlawful and order people to disperse, even if not as concretely as we might like.²⁵⁹

When command authority derives from the power to search or arrest, the scope of authority is more ambiguous. There are still easy cases: Commands that, if complied with, merely execute an authorized activity seem straightforward. Courts need not linger over orders to “pull over,” “put your hands behind your back,” or “open the trunk,” if the stop, arrest, or trunk search is permissible. But what about “get out of the car,” “take your hands out of your pockets,” or “get down on the ground”?

Stop, arrest, and search statutes might well be read to allow officers to issue some commands to protect themselves as they carry out these authorized activities.²⁶⁰ Thus, for example, a court might find that the authority to conduct a pedestrian stop includes the authority to order the person to put their hands up. Or courts might interpret the authority to arrest to include the authority to order bystanders back to protect officers.²⁶¹ But that authority cannot be assumed, and as we have already

1979) (arguing that existing police authority to arrest is insufficient and costly as a means for allowing police to engage in many coercive nonarrest activities and recommending new statutory authority to clarify and strengthen that authority); *Defiance of Unlawful Authority*, supra note 178, at 638–39 (noting that legislative grants of power to issue police orders “must contain clear and narrow guidelines for the exercise of the policeman’s discretion”).

257. Cf. *Gregory v. City of Chicago*, 394 U.S. 111, 120 (1969) (Black, J., concurring) (“To let a policeman’s command become equivalent to a criminal statute comes dangerously near making our government one of men rather than of laws.”).

258. See *Ariz. Rev. Stat. Ann. § 13-2412* (2022) (“true full name” but no other information); *12 R.I. Gen. Laws § 12-7-1* (2022) (name, address, business abroad, and destination); *Wis. Stat. & Ann. § 968.24* (2023) (name, address, and an explanation of the person’s conduct).

259. See *Inazu*, supra note 188, at 27–37 (describing problems with contemporary unlawful assembly statutes).

260. Cf. *Michigan v. Summers*, 452 U.S. 692, 702–03 (1981) (noting that during a search “[t]he risk of harm to both the police and [others] is minimized if the officers routinely exercise unquestioned command of the situation”).

261. See, e.g., *State v. Dunn*, No. 1 CA-CR 15-0167, 2016 WL 348863, at *2 (Ariz. Ct. App. Jan. 28, 2016) (upholding obstruction conviction after defendant failed to obey an officer’s repeated orders to leave the scene of an arrest).

seen, it is not unlimited.²⁶² Questions abound, especially about what orders officers may issue to prevent threats in absence of evidence the threat actually exists. Federal constitutional law already imposes some limits: An officer may not order a suspect to stand against a wall and submit to a frisk unless the officer has reasonable suspicion both that the person is involved in criminal activity and that they are armed and dangerous. But those limits are generous.

Think back to Sandra Bland's traffic stop. The Supreme Court has concluded that officers may constitutionally order anyone out of a car during a traffic stop without reason to believe they mean harm to an officer.²⁶³ Because of *Pennsylvania v. Mimms*, Texas courts assumed Texas law also permits officers to demand that anyone at a traffic stop exit the vehicle.²⁶⁴ But is it obvious that state arrest law always permits such commands?²⁶⁵ Why not only when an officer has an actual reason to believe his safety may be compromised? A few states take this view as a matter of state constitutional law.²⁶⁶ But for these commands, and others, state courts do not adequately scrutinize the scope of command authority or even consistently understand it as a project of statutory interpretation.²⁶⁷ As a result, they do not consider these questions, and they may allow too much coercion to be reframed as necessary to protect officers from speculative dangers. Some justified Trooper Encinia's order about the cigarette in this way.²⁶⁸

Relatedly, officers often tell people to "go home," "back up," or "move along." Perhaps some such orders are authorized in lieu of—or to protect an officer during—a stop, search, or arrest. But when? And what

262. See, e.g., *Parks v. Commonwealth*, 192 S.W.3d 318, 334 (Ky. 2006) (finding unlawful detention of suspects distant from search execution); *Commonwealth v. Charros*, 824 N.E.2d 809, 817 (Mass. 2005) (noting that search authority allows officers to "exercise unquestioned command" to protect officers, prevent destruction of evidence, and detain people "incidental to . . . the execution of the warrant" but not "in anticipation of" it (quoting *Summers*, 452 U.S. at 703)).

263. Compare *supra* note 233 and accompanying text, with *Terry v. Ohio*, 392 U.S. 1, 24 (1968) (holding frisk of person constitutional "[w]hen an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous").

264. See *supra* note 17 and accompanying text.

265. Common law arrest power does not seem to have been this expansive. See, e.g., *Davies, Fictional Character*, *supra* note 198, at 325, 330–31, 396–401, 421–429; *supra* note 192 and accompanying text.

266. See, e.g., *State v. Kim*, 711 P.2d 1291, 1294 (Haw. 1985) (rejecting *Mimms*); *Commonwealth v. Gonsalves*, 711 N.E.2d 108, 110 (Mass. 1999) (rejecting *Mimms* and *Wilson*); *State v. Sprague*, 824 A.2d 539, 544–45 (Vt. 2003) (same).

267. See, e.g., *State v. Landry*, 588 So. 2d 345, 347 (La. 1991) (adopting *Mimms* without considering the source of authority for the commands in state law); *State v. Smith*, 637 A.2d 158, 163 (N.J. 1994) (same); *Commonwealth v. Brown*, 654 A.2d 1096, 1102 (Pa. Super. Ct. 1995) (same).

268. See *Winton*, *supra* note 12 ("Given Bland's belligerence and behavior, Encinia could have perceived her as representing a potential danger.").

about the ones outside those contexts? If the power to command stems largely from authority to stop, search, and arrest, these commands raise some real questions, and they have long been controversial.²⁶⁹ An adequate law of commands would determine the scope of officers' authority to issue protective and preventative commands, including those that move people along rather than keep them in place, especially when orders cannot obviously be justified by laws permitting stops, searches, or arrests.²⁷⁰

Legislatures and courts often fail to live up to this standard. As a result, the "police regularly tell people what to do under circumstances where police authority is less clear," a conclusion reached decades ago by President Lyndon B. Johnson's crime commission.²⁷¹ It is hard to argue this has changed since. State laws provide little guidance, and when people challenge commands in criminal cases, courts rarely ask where officer command authority comes from. Georgia's traffic-related lawful order statute had been in force for more than eighty years when a Georgia appeals court admitted that the statute had no definition of what constitutes a lawful order, and the court had never had reason to develop one.²⁷² When courts do address such questions, they sometimes come up with improbable answers, as the Texas court did when it located police power to order people out of cars in federal constitutional doctrine.²⁷³

269. See *The Discretionary Powers Vested in Policemen*, N.Y. Times, June 30, 1865, at 4 (on file with the *Columbia Law Review*) ("[T]he discretion promiscuously allowed to policemen to order citizens off the sidewalk is liable to the grossest abuse. . . . The thing is all wrong . . .").

270. See Note, *Types of Activity Encompassed by the Offense of Obstructing a Public Officer*, 108 U. Pa. L. Rev. 388, 401–02 (1960) (concluding that most courts uphold obstruction and resistance charges against those who fail to comply with orders to move on or disperse without analysis).

271. The President's Comm'n Report, *supra* note 207, at 24. The report goes on to name some of the circumstances in which authority is uncertain:

Police order people to "keep the noise down" or to stop quarreling—usually in response to a complaint from a neighbor. They frequently direct a husband to stay away from his wife with whom he has had a fight. They order a young child found on the streets at night to go home. Troublesome "characters" are ordered to stay out of a given area. Persons who congregate on street corners are often told to disperse.

Id.

272. See *Williams v. State*, 778 S.E.2d 820, 822 (Ga. Ct. App. 2015) (interpreting Ga. Code Ann. § 40-6-2 (2015)). Other state courts interpreting traffic-related lawful orders statutes clarify that a lawful order is "an order within the officer's scope of responsibility in directing traffic," *State v. Gates*, 395 N.E.2d 535, 537 (Ohio Mun. Ct. 1979), or that it must be "directly related to the direction, control and regulation of traffic." *Sly v. State*, 387 So. 2d 913, 915 (Ala. Crim. App. 1980) (internal quotation marks omitted) (quoting *Coughlin v. State*, 320 So. 2d 739, 742 (Ala. Crim. App. 1975)). Whatever that means.

273. See *supra* note 17 and accompanying text; see also *State v. Campbell*, 900 N.W.2d 556, 563 (Neb. Ct. App. 2017) ("[I]t is reasonable for an officer to request that a driver sit

Even when state courts do focus specifically on what it means for an order to be “lawful,” they don’t do much better. New York has suggested that a lawful order must have a “legitimate basis” and not interfere in the exercise of a constitutional right.²⁷⁴ The Oregon Supreme Court has said that orders are lawful if they are “authorized by, and [are] not contrary to, substantive law,” without specifying what substantive law might authorize commands.²⁷⁵ And Nebraska has concluded that “‘lawful’ implies that the act in question is ‘authorized, sanctioned, or at any rate not forbidden, by law.’”²⁷⁶ So orders should be authorized and legal before refusing to follow them is illegal. But authorized how?²⁷⁷ In any event, cases interpreting lawful orders are few and far between.

The Supreme Court has not helped. In its Fourth Amendment search and seizure cases, it rarely mentions the state source of authority to carry out an intrusion. To the contrary, the Court often suggests such authority is unnecessary or, worse yet, comes from constitutional law. In *Michigan v. Summers*, for example, the question was whether officers violated Summers’s constitutional rights when they detained him on his front steps while they searched his house pursuant to a warrant.²⁷⁸ In deciding the question, the Court conflated constitutional permissibility and state authority. The Court reasoned, for example, that “the validity of the search . . . depends upon a determination whether the officers had the authority to require him to re-enter the house and to remain there while they conducted their search,” and considered only the Fourth Amendment in answering that question.²⁷⁹

One might think the Court was just being casual, but it makes this error repeatedly. In *Muehler v. Mena*, for example, the Court read *Summers* to mean that “[a]n officer’s authority to detain incident to a search is categorical,”²⁸⁰ as if it could decide such a thing. Then it extended the rule further: “Inherent in *Summers*’ authorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate

in the patrol car during a traffic stop. Therefore, it is reasonable and lawful for an officer to request that a driver exit his or her vehicle.” (citations omitted)).

274. *People v. Leonard*, 465 N.E.2d 831, 835 (N.Y. 1984). See also *State v. Thigpen*, 62 N.E.3d 1019, 1030 (Ohio Ct. App. 2016) (contrasting “lawful” orders under Ohio’s statute with those that violate Fourth or Fifth Amendment rights).

275. *State v. Navickas*, 351 P.3d 801, 803 (Or. Ct. App. 2015).

276. *State v. Lichti*, 367 N.W.2d 138, 141 (Neb. 1985) (quoting *State v. Reeves*, 261 N.W.2d 110, 113 (Neb. 1978)).

277. Nor do courts scrutinize the limits of command authority when they find it in the law. Courts get easy cases right; they overturn convictions for failing to follow traffic orders when an order is simply “not directed toward the regulation of traffic.” *State v. Greene*, 623 P.2d 933, 939 (Kan. Ct. App. 1981); see also *Coughlin*, 320 So. 2d at 742. But, mostly, they uphold orders without saying much about the scope of police authority, even when it is challenged.

278. 452 U.S. 692, 694 (1981).

279. *Id.* at 695.

280. 544 U.S. 93, 98 (2005).

the detention.”²⁸¹ According to the Supreme Court, officers have “rights”: rights to give commands, to search, to seize, and to use force.²⁸² State law be damned.

Constitutional doctrine offers the Court a convenient reason for ignoring whether searches and seizures are authorized by state law. In *Virginia v. Moore*, the Court held that an arrest that violated state law was not for that reason unconstitutional.²⁸³ Therefore, “lawful” in constitutional parlance need not mean authorized under state law.²⁸⁴ Still, the Court should understand the difference, and when it fails to do so, it confuses the law of commands. Police officers are creatures of state law. They cannot grow powers exceeding those granted by that state. But the scope of those powers is presently unclear, in part because courts have inadequately analyzed commands, leading to doctrine that seems impossible to reconcile with the principles that undergird our legal system.

2. *Commands Must Be Constitutional.* — The second clear limit on commands is that officers may not command constitutional or legal violations any more than they may carry them out by force. Thus, officers may not order people to stop if they are suspected of no crime, consistent with the Fourth Amendment.²⁸⁵ They may not order bystanders to “shut up” if they offer no interference or threat, consistent with the First Amendment.²⁸⁶ And they may not order someone to confess if they could face legal jeopardy, consistent with the Fifth Amendment.²⁸⁷

281. *Id.* at 98–99.

282. See, e.g., *Graham v. Connor*, 490 U.S. 386, 396 (1989) (“Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.”); *Terry v. Ohio*, 392 U.S. 1, 33 (1968) (Harlan, J., concurring) (“Where such a stop is reasonable, however, the right to frisk must be immediate and automatic if the reason for the stop is, as here, an articulable suspicion of a crime of violence.”).

Lower federal courts and state courts follow suit. The Fourth Circuit Court of Appeals recently heard oral argument about whether a car passenger has a First Amendment right to livestream a video of officers conducting a stop. A judge on the panel criticized counsel, “[T]he question you ought to be addressing is, what rights do the officer have [sic] during the course of a traffic stop.” Oral Argument at 4:30, *Sharpe v. Winterville Police Dep’t*, 59 F.4th 674 (4th Cir. 2023) (No. 21-1827), <https://www.ca4.uscourts.gov/OAarchive/mp3/21-1827-20221027.mp3> [<https://perma.cc/3YJ6-BDTQ>] [hereinafter *Sharpe* Oral Argument]. This was no casual mistake. The judge talked extensively about the rights of officers, including repeatedly noting that “the Supreme Court says that officers have a right to control the circumstances and maintain control during the traffic stop.” *Id.* at 5:46; see also *id.* at 14:20 (making same point).

283. 553 U.S. 164, 178 (2008).

284. See *id.* at 174, 177.

285. See *Terry*, 392 U.S. at 21–22; see also *Adams v. Williams*, 407 U.S. 143, 145–46 (1972).

286. See *Houston v. Hill*, 482 U.S. 451, 454, 461 (1987).

287. See *Salinas v. Texas*, 570 U.S. 178, 185 (2013) (“The principle that unites all of those cases is that a witness need not expressly invoke the privilege where some form of official compulsion denies him ‘a “free choice to admit, to deny, or to refuse to answer.”’” (quoting *Garner v. United States*, 424 U.S. 648, 657 (1976))); *Kastigar v. United States*, 406

Courts do better here. They apply constitutional doctrine to constrain commands often, and police take those constraints seriously. In Fourth Amendment law, for example, courts treat police commands as equivalent to the activities the commands effect; they decide whether those activities are searches or seizures; and, if they are, they determine whether they are lawful. Thus, when an officer enters a home after he instructs a suspect to open their door and the person does so, the courts ask whether the officer conducted a permissible search.²⁸⁸ When a person responds to an order to stop, a court asks whether the seizure was based on reasonable suspicion or probable cause.²⁸⁹

Still, because courts do not fully understand commands, they get tripped up. To determine whether a seizure has taken place, for instance, the Supreme Court instructs officers and courts to consider all of the circumstances to determine whether “a reasonable person would feel free ‘to disregard the police and go about his business.’”²⁹⁰ In conducting that analysis, the Supreme Court has suggested that commands are merely one factor that might contribute to the “coercive effect of the encounter.”²⁹¹ But that isn’t right.

When a person stops walking pursuant to a command to stop, they have been seized according to the “free to disregard” standard, whether

U.S. 441, 445–56 (1972) (reiterating that, absent a grant of immunity, testimony cannot be compelled from criminal suspects).

288. See, e.g., *Johnson v. United States*, 333 U.S. 10, 12 (1948) (considering whether a search was constitutional when suspect “stepped back acquiescently and admitted” officers after they announced themselves and told her they “want[ed] to talk to her a little bit”); *Amos v. United States*, 255 U.S. 313, 317 (1921) (“The contention that the constitutional rights of defendant were waived when his wife admitted to his home the Government officers, who came, without warrant, demanding admission to make search of it under Government authority, cannot be entertained.”). But courts are frequently reluctant to find that officers demanded entry rather than received consent. See, e.g., *United States v. Jeronimo-Rodas*, 576 Fed. App’x 240, 242 (4th Cir. 2014); *United States v. Holland*, 522 Fed. App’x 265, 275 (6th Cir. 2013) (holding district court’s consent finding was reasonable even though officers banged on door, threatened to get warrant, and did not ask for permission to enter).

289. See, e.g., *Whren v. United States*, 517 U.S. 806, 808–09 (1996) (evaluating lawfulness of a “stop” that consisted of an officer “approach[ing] the driver’s door, identifying himself as a police officer and directing the driver . . . to put the vehicle in park”). In addition, courts enforce the rule that “one cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution.” *Wright v. Georgia*, 373 U.S. 284, 291–92 (1963).

290. *Florida v. Bostick*, 501 U.S. 429, 434 (1991) (quoting *California v. Hodari D.*, 499 U.S. 621, 628 (1991)).

291. *Id.* at 436; cf. *Brendlin v. California*, 551 U.S. 249, 255 (2007) (“When the actions of the police do not show an unambiguous intent to restrain or when an individual’s submission to a show of governmental authority takes the form of passive acquiescence, there needs to be some test for telling when a seizure occurs in response to authority”); *United States v. Drayton*, 536 U.S. 194, 204 (2002) (finding no seizure where “[t]here was no application of force, no intimidating movement, no overwhelming show of force, no brandishing of weapons, no blocking of exits, no threat, no command, not even an authoritative tone of voice”).

or not they face “the threatening presence of several officers, the display of a weapon by an officer, [or] some physical touching of the person of the citizen.”²⁹² Analogously, when a person turns out their pockets because an officer instructs them to, they have been searched.

If the *presence* of a command is not always dispositive, it is not because a command is one circumstance among many; instead, it is because some commands demand actions that do not constitute a search or seizure under relevant doctrine. For example, some courts think an officer who orders someone to take their hands out of their pockets neither searches nor seizes them.²⁹³ And they think orders to “move on” are not constitutional seizures.²⁹⁴ Similarly, if the *absence* of an apparent command is not always dispositive, it is again not because officers can easily achieve the same aims without commands. Instead, it is because officers issue a lot of nonexpress and nonverbal commands.²⁹⁵

To assess the constitutionality of a police directive, courts must determine both whether the officer invoked his authority as reason to act according to his will and whether the state of affairs generated by the

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

293. See *United States v. De Castro*, 905 F.3d 676, 680–83 (3d Cir. 2018) (collecting state and federal cases to illustrate “that an officer’s request that a person take their hands out of their pockets is not alone sufficient to convert an otherwise voluntary encounter into a seizure”). But see, e.g., *United States v. Lowe*, 791 F.3d 424, 433–34 (3d Cir. 2015) (finding that a suspect was seized when he was commanded to show his hands, because although he did not take his hands from his pockets, he did not flee); *United States v. Dubose*, 579 F.3d 117, 121 (1st Cir. 2009) (“We have no difficulty concluding that by the time Dubose had complied with Officer Canuto’s demand that he stop and remove his hand from his sweatshirt pocket, there had been a seizure.”); *In re J.F.*, 19 A.3d 304, 310 (D.C. 2011) (finding an order to remove hands from pockets can constitute a Fourth Amendment seizure if in the circumstances a reasonable person would not believe they are free to leave).

294. See, e.g., *Peery v. City of Miami*, 977 F.3d 1061, 1071 (11th Cir. 2020) (“[P]olice move-on orders do not raise a constitutional issue. . . . A person who is told to leave one place but ‘remains free to go anywhere else that he wishes’ can undoubtedly terminate his encounter.” (quoting *Salmon v. Blesser*, 802 F.3d 249, 253 (2d Cir. 2015))); *Johnson v. City of Ferguson*, 926 F.3d 504, 505–06 (8th Cir. 2019) (finding no seizure when Officer Darren Wilson ordered Michael Brown and Dorian Johnson to “[g]et the f*ck on the sidewalk” because they were not physically restrained and “neither [Johnson] nor Brown was ordered to stop and to remain in place”); *Salmon*, 802 F.3d at 253 (“Police officers frequently order persons to leave public areas . . . [and] may take a person by the elbow or employ comparable guiding force short of actual restraint to ensure obedience . . . as long as the person is otherwise free to go where he wishes.”).

295. See e.g., *Michigan v. Chesternut*, 486 U.S. 567, 575 (1975) (finding no seizure where officers had not “activated a siren or flashers[,] . . . commanded respondent to halt, or displayed any weapons [and had not] operated the car in an aggressive manner to block respondent’s course or otherwise control the direction or speed of his movement”); *Mendenhall*, 446 U.S. at 554 (“Examples of circumstances that might indicate a seizure . . . would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching . . . of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.”); see also *United States v. Tanguay*, 918 F.3d 1, 6 (1st Cir. 2019) (“[N]on-verbal communications can undoubtedly be clear enough to constitute a show of authority.”).

officer's will constitutes a lawful search or seizure. That analysis can be hard. But it is made harder still by the Court's mushy totality-of-the-circumstances test. As a result of this and similar mistakes about the role of commands, courts fail to enforce proper constitutional limits on police orders.

3. *Commands Must Offer Notice and Opportunity to Comply.* — The third legal constraint on commands stems from the work they do. If commands function to communicate new and otherwise unknowable legal duties, then due process requires that, except in exceptional circumstances, they provide us notice that we have the duty and an opportunity to comply with its requirements. Unless those conditions are met, we do not have the knowledge or capacity necessary to self-execute the law, and officers cannot justifiably enforce their commands.

Many existing legal doctrines reflect this principle. As noted above, hundreds of years of cases describing the knock-and-announce rule and its exceptions make clear that the rule is intended to communicate the law and give people a chance to follow it.²⁹⁶ Similarly, state statutes often permit officers to use force to effect arrests only if they have first communicated their intent to arrest or have good reasons not to do so.²⁹⁷ Statutes and courts demand that officers first communicate dispersal orders clearly and allow protesters time to leave the area before they enforce the orders.²⁹⁸ And, overwhelmingly, states only punish people who “willfully” or “knowingly”

296. See *supra* section II.B.2. For an old example, see *Semayne's Case* (1604) 77 Eng. Rep. 194, 195–96; 5 Co. Rep. 91 a, 91 b (officers must “signify the cause of [their] coming, and . . . make request[s] to open doors . . . for the law . . . abhors the destruction or breaking of any house[;] . . . for perhaps . . . if he had notice, it is to be presumed that he would obey it”). For one nearly 400 years later, see, e.g., *United States v. Espinoza*, 256 F.3d 718, 727 (7th Cir. 2001) (“The core interest protected by the knock and announce requirement is therefore the receipt of notice by occupants of the dwelling sufficient to avoid the degree of intrusiveness attendant to a forcible entry as well as any potential property damage that may result.”). Warrants also serve as notice that commands to allow entry are authorized. See, e.g., *Commonwealth v. Valerio*, 870 N.E.2d 46, 55 (Mass. 2007) (“[T]he warrant procedure . . . is intended to notify that person that the officers have been authorized to be in that particular place and to search for that particular thing.” (internal quotation marks omitted) (quoting *Commonwealth v. Gauthier*, 679 N.E.2d 211, 215 (Mass. 1997))).

297. See, e.g., N.H. Rev. Stat. Ann. § 627:5(II)(b)(2) (2022); 12 R.I. Gen. Laws § 12-7-9 (2022); Tex. Penal Code Ann. § 9.51 (West 2021); Model Penal Code § 3.07(2)(a)(i) (Am. L. Inst. 2007); see also Restatement (Third) of Torts: Intentional Torts to Persons § 42 (Am. L. Inst., Tentative Draft No. 6, 2021) (“A . . . law enforcement officer is privileged to use force . . . only if . . . [i]n the context of arrest, the actor prior to using force, communicates or manifests to the other an intention to arrest,” unless certain exceptions are satisfied); *supra* note 229.

298. See, e.g., N.Y. Penal Law § 240.20 (McKinney 2022); Tex. Penal Code Ann. § 42.04; see also *Fed. Commc'ns Comm'n v. Fox Television Stations, Inc.*, 567 U.S. 239, 253–54 (2012) (acknowledging that laws must provide notice of “forbidden or required” conduct because it is essential to due process).

disobey a lawful order,²⁹⁹ in effect requiring both notice and a chance to do otherwise. Each law's details and exceptions vary, and the principle is sometimes inconsistently enforced. Still, it is fair to say that it is a long-standing feature of the law that when officers impose legal duties, they must tell people of them and give people time to satisfy them.

Yet, too often, courts fail to apply this rule properly, and officers fail to comply with it.³⁰⁰ Consider *Kisela v. Hughes*.³⁰¹ When police officer Andrew Kisela shot Amy Hughes, she was standing on her own property, holding a kitchen knife by her side, and talking to a woman about six feet away.³⁰² Officer Kisela did not see Hughes threaten, gesture at, or approach the other woman. The Court held that shooting Hughes did not violate clearly established law and, in doing so, repeatedly noted that Hughes “failed to acknowledge at least two commands to drop the knife,” suggesting that this fact indicated that Hughes posed a threat.³⁰³ Though the Court fretted that prior case law was inadequate to provide Kisela sufficient legal notice that using force against Hughes was unlawful, it worried not at all that Hughes may not have heard the commands and that she had no chance to comply with them.³⁰⁴

If Hughes posed an immediate threat before the commands, as the officers claimed, the commands created no new legal duty, and they were legally insignificant. She had an existing legal obligation not to threaten serious bodily injury, and, under both state and constitutional law, force could be used against her if necessary to stop her from carrying out her threat. Her failure to follow commands might corroborate her intent to harm, but only if she heard the commands and chose to ignore them.³⁰⁵

299. See Mooney, *supra* note 178, at 1575 (“Thirty-two jurisdictions penalize only ‘willful’ or ‘knowing’ disobedience . . .”).

300. See, e.g., Alexander Cardia, Ishaan Jhaveri, Eleanor Lutz, Natalie Reneau, Anjali Singhvi & Robin Stein, Officers Manhandled and Beat Tyre Nichols. We Tracked Each One’s Role., N.Y. Times (Feb. 7, 2023), <https://www.nytimes.com/interactive/2023/02/07/us/memphis-officers-tyre-nichols.html> [hereinafter Cardia et al., We Tracked Each One’s Role] (describing officers who rushed at Tyre Nichol’s car, barked, “Get the fuck out of the fucking car,” and immediately pulled Nichols out of the car); Robin Stein, Alexander Cardia & Natalie Reneau, 71 Commands in 13 Minutes: Officers Gave Tyre Nichols Impossible Orders, N.Y. Times (Jan. 29, 2023), <https://www.nytimes.com/2023/01/29/us/tyre-nichols-video-assault-cops.html> (last updated Feb. 1, 2023).

301. 138 S. Ct. 1148 (2018).

302. *Id.* at 1151.

303. *Id.* at 1150, 1153.

304. *Id.* at 1153 (acknowledging that Hughes may not have heard the commands but suggesting that Hughes could or should have heard them since “Chadwick, who was standing next to Hughes, heard them”).

305. Compare *Cordova v. City of Albuquerque*, 816 F.3d 645, 660 (10th Cir. 2016) (finding failure to comply with commands relevant to degree of force when an officer testified that he issued commands and the suspect had ability to comply), with *Bletz v. Gribble*, 641 F.3d 743, 752 (6th Cir. 2011) (“Zachary Bletz testified that Fred Bletz was lowering his gun in response to Gribble’s command to do so. If Gribble shot Fred Bletz while the latter was complying with the officer’s command, then Gribble violated Fred

If, by contrast, Hughes posed no immediate threat before the commands were given, then she was a woman lawfully in her yard with a kitchen implement. Even if the officer had state law authority to prevent a potential threat by commanding her to drop the knife, the officers could not enforce that new duty unless they gave her notice and an opportunity to comply or had a good reason not to provide it.³⁰⁶ They did not give her notice or opportunity: Officer Kisela shot Hughes almost immediately after officers shouted the orders.³⁰⁷ Nor did they have a good reason for failing to provide it: Assuming she did not pose an immediate threat before the command, she did not move and posed no greater threat afterwards.

If, as the Court implied, the officer who shot Hughes should have been given leeway to conclude that Hughes posed an immediate threat because the officers “had mere seconds to assess the potential danger,”³⁰⁸ then the commands were irrelevant. It does not matter that, as the Court continued, the commands were loud enough to be heard, unless Hughes also had time to react.³⁰⁹ One might think all this beside the point: *Kisela* is a qualified immunity case, so the question the Court decided was whether prior circuit precedent controlled the issue. But how can the Court know whether “precedent squarely governs the specific facts at issue”³¹⁰ if it does not understand why the commands are relevant facts? Whatever the proper result, the Court did not follow the right recipe.

If courts took the notice-and-opportunity principle seriously, both Fourth Amendment law and state law might look different. For example, the Supreme Court has ruled that, as a constitutional matter, officers need not tell someone that they may refuse a search or terminate an encounter for the search or seizure to be treated as consensual.³¹¹ State law and police

Bletz’s clearly established Fourth Amendment right to be free from deadly force.”). Failing to comply with a command is not always considered threatening. See, e.g., *Nehad v. Browder*, 929 F.3d 1125, 1138 n.12 (9th Cir. 2019) (concluding that failure to comply can indicate a threat if officer warns of deadly consequences, but, otherwise, it could be innocuous, and a reasonable jury could find force unreasonable even after suspect ignored repeated commands).

306. Even when suspects have notice and opportunity and choose not to comply with commands, force may be unreasonable. See e.g., *Naselroad v. Mabry*, 763 F. App’x 453, 461 (6th Cir. 2019); *Smith v. City of Hemet*, 394 F.3d 689, 702–04 (9th Cir. 2005); *Beaver v. City of Fed. Way*, 507 F. Supp. 2d 1137, 1145–46 (W.D. Wash. 2007), *aff’d*, 301 F. App’x 704 (9th Cir. 2008).

307. *Kisela*, 138 S. Ct. at 1156 (Sotomayor, J., dissenting).

308. *Id.* at 1153.

309. *Id.*

310. *Id.*

311. See *United States v. Drayton*, 536 U.S. 194, 203 (2002) (finding no seizure because, though they did not tell them they could leave, “[t]he officers gave the passengers no reason to believe that that they were required to answer the officers’ questions”); *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973) (“While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent.”).

practice accord. Law professors hate these rules largely because they treat as voluntary what many people feel is compulsory.³¹² This account of commands highlights a different problem, one that is not about waiver or consent.

Ambiguous requests/commands prevent people from understanding their legal duties. When the state changes your legal duties, you must be told that cooperation is not invited but required. Otherwise, the government is enforcing secret law. But how can you know from an officer's silence whether you are required to comply? If officers consistently told people when compliance was mandated, and this practice were well known, that might be enough; people could infer from silence that they had no duty. Absent that, contrary to the Supreme Court's reasoning, people need to be told when they do not have to comply as well as when they do.³¹³

We might not always require other legal actors to give this kind of negative notice—telling people when they have no legal duty. But, as we have seen, police commands are distinctive: They are issued and enforced by the same legal actor in real time. When officers communicate ambiguously, hearers face a stark choice: Comply, even though doing so compromises liberty to which they may be entitled; refuse and risk lawful arrest or violence if they get it wrong; or question the officer, though doing so can be perceived as disrespect, which decades of research tells us leads to further coercion and control.³¹⁴

312. See, e.g., Alafair S. Burke, Consent Searches and Fourth Amendment Reasonableness, 67 Fla. L. Rev. 509, 511–30 (2015); Janice Nadler, No Need to Shout: Bus Sweeps and the Psychology of Coercion, 2002 Sup. Ct. Rev. 153, 156; Margaret Raymond, The Right to Refuse and the Obligation to Comply: Challenging the Gamesmanship Model of Criminal Procedure, 54 Buff. L. Rev., 1483, 1492–98 (2007); Stephen A. Saltzburg, The Supreme Court, Criminal Procedure and Judicial Integrity, 40 Am. Crim. L. Rev. 133, 135–41 (2003).

313. Cf. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 319 (1950) (finding notice of proceedings that affect substantial property rights inadequate to satisfy due process when “under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand”); Model Code of Pre-Arrestment Procedure xiv–xv (Am. L. Inst. 1975) (“[A] person caught up in the criminal process should be given an opportunity to exercise informed choice. Thus an officer seeking voluntary cooperation must make it clear to a suspect that he is no legal obligation to respond.”).

314. See Robin Shepard Engel, James J. Sobol & Robert E. Worden, Further Exploration of the Demeanor Hypothesis: The Interaction Effects of Suspects' Characteristics and Demeanor on Police Behavior, 17 Just. Q. 235, 239 (2000); Irving Piliavin & Scott Briar, Police Encounters With Juveniles, 70 Am. J. Socio. 206, 210–211, 213 (1964); Douglas A. Smith & Christy A. Visher, Street-Level Justice: Situational Determinants of Police Arrest Decisions, 29 Soc. Probs. 167, 172 (1981); Richard E. Sykes & John P. Clark, A Theory of Deference Exchange in Police-Civilian Encounters, 81 Am. J. Socio. 584, 595–96 (1975); Van Maanen, *supra* note 39, at 307. Officers are more likely to perceive Black people as disrespectful and noncompliant, making questioning an officer especially risky for them. See, e.g., Robin S. Engel, Rob Tillyer, Charles F. Klahm IV & James Frank, From the Officer's Perspective: A Multilevel Examination of Citizens' Demeanor During Traffic Stops, 29 Just. Q. 650, 651 (2012).

In this view, the problem with the Court's doctrine is not that we cannot consent without knowing our rights; it is that when we are not told whether we have duties, we cannot confidently satisfy the law's demands unless we comply with every equivocal request. Officers who issue ambiguous requests/commands expand the practical scope of their power beyond what state law authorizes and constitutional law permits. This is not like legal vagueness, where a law is so indefinite "that men of common intelligence must necessarily guess at its meaning and differ as to its application."³¹⁵ Nor is it like "the practice of Caligula who 'published the law, but it was written in a very small hand, and posted up in a corner, so that no one could make a copy of it.'"³¹⁶ Instead, it is more like an unpublished criminal code. Later, a court can tell us whether we had a legal duty or not, and it won't impose criminal punishment unless we did. But, in the moment, we have no way of knowing whether there is any applicable law at all.

For us to know what the law expects of us, officers have to issue commands clearly as commands and noncommands clearly as noncommands. Even if the Supreme Court refuses to enforce this component of due process as a matter of Fourth Amendment law, other actors are not off the hook. State legislation and legal doctrine, city ordinances, and police department policies should all demand that police follow the dictates of due process in exercising their power.

The consequences of failing to force officers to clarify are even more extreme than they first seem. If officers are not required to tell us when they impose legal duties, they often will not bother to decide whether they are requesting or demanding cooperation. Think about what was in Encinia's head when he asked Sandra Bland to put out her cigarette. An officer's intention is like Schrödinger's cat. It exists in a superposition of a request state and a command state until it interacts with the external world or is observed by it.³¹⁷ The law is not only unpublished, but undetermined.³¹⁸ This is why lawyers and civil rights groups tell citizens to

315. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

316. *Screws v. United States*, 325 U.S. 91, 96 (1945) (quoting Suetonius, *Lives of the Twelve Caesars* 280 (Alexander Thomson trans., G. Bell and Sons, Ltd. 1926)).

317. See John D. Trimmer, *The Present Situation in Quantum Mechanics: A Translation of Schrödinger's "Cat Paradox" Paper*, 124 *Proc. Am. Phil. Soc'y* 323, 328 (1980). Schrödinger imagined a cat "penned up in a steel chamber," along with a "diabolical device" that might kill the cat if a "tiny bit of radioactive substance" decays, shattering a small flask of poison. The cat in the chamber faces equal probability that the substance will not decay, leaving the cat both dead and alive, according to the prevailing understanding of quantum mechanics, until the "indeterminacy originally restricted to the atomic domain becomes transformed into macroscopic indeterminacy, which can then be *resolved* by direct observation." *Id.*

318. Commands are a species of what Joseph Raz describes as normative powers that require communication:

First, when the powers used are partly content-undetermined, the content of the duties, rights, or the other conceptions created using the power is

ask, “Am I free to go?”³¹⁹ Answering that question doesn’t just tell the citizen; it makes the officer decide. And it might explain why officers sometimes hate the question.³²⁰

Consider this encounter. Virginia County Deputy Sheriff Scott Fulford approached George Wingate III when he saw him stopped by the side of the road.³²¹ Deputy Fulford asked Wingate for identification, and Wingate asked why he had to disclose his identity.³²² The exchange continued:

Wingate: Have I committed a crime?

Fulford: No. I didn’t say you did.

Wingate: All right then.

Fulford: You’re still required to—

Wingate: Am I free to go?

Fulford: — identify yourself.

Wingate: Am I free to go?

Fulford: Not right now, no.

Wingate: Am I being detained?

Fulford: You’re not detained.

Wingate: Am I free to go?

Fulford: No.

Wingate: Am I being detained? If I’m not being detained, then I’m free to go.

Fulford: You’re not free to go until you identify yourself to me.³²³

determined (at least in part) by the power-holder when using the power. . . . Second, making a normative change by communicating it enables people to learn of it, thereby helping them to protect their interests, and often also helping a power-holder to protect his interests.

Joseph Raz, *The Roots of Normativity* 172 (Ulrike Heuer ed., 2022).

319. See, e.g., *Stop-and-Frisk*, ACLU of DC, <https://www.acludc.org/en/know-your-rights/stop-and-frisk> [<https://perma.cc/8578-3PZP>] (last visited Jan. 27, 2023) (“If the police approach and question you . . . [y]ou should ask ‘am I free to leave?’”). There is also a popular subreddit, *r/AmIFreeToGo*, which is devoted to upholding and exercising “the right to move about freely without harassment or suspicionless detention” and includes videos and posts that emphasize ambiguity. See *r/AmIFreeToGo*, Reddit, <https://reddit.com/r/AmIFreeToGo/> [<https://perma.cc/R5HC-VXJF>] (last visited Jan. 27, 2023).

320. Some officers treat the question itself as suspicious and use it to help justify the coercion the person is attempting to clarify. Amazingly, courts let them. See, e.g., *Cunningham v. Panola County*, No. 6:10-CV-362, 2011 WL 2149537, at *8 (E.D. Tex. May 31, 2011) (quoting suspect, “Am I free to go?”; officer’s response, “Why are you being so evasive?”; and finding it suspicious that the suspect refused to answer questions and answered questions with questions of his own); *Commonwealth v. Engelbert*, No. 1248 WDA 2015, 2016 WL 4723454, at *3–4 (Pa. Super. Ct. June 17, 2016) (upholding a finding of reasonable suspicion where the suspect, among other things, asked whether he was free to go, a phrase the arresting officer believed to be “specific to law enforcement”).

321. *Wingate v. Fulford*, 987 F.3d 299, 303 (4th Cir. 2021).

322. *Id.*

323. *Id.*

Courts encourage officers to play on ambiguity by refusing to treat their actions as commands until they are unequivocal. The Fourth Circuit Court of Appeals analyzed the exchange this way:

To be sure, Deputy Fulford did not trigger the Fourth Amendment's protections by merely driving up to Mr. Wingate to provide roadside assistance. Officers may approach someone absent suspicion of criminal conduct and "generally ask questions of that individual," request cooperation in a criminal investigation, or provide assistance. And they routinely do.

But Deputy Fulford then told Mr. Wingate that he was not free to leave until he identified himself. This unambiguous restraint on Mr. Wingate's liberty converted the previously voluntary encounter into a compelled detention—an investigatory stop.³²⁴

So Fulford did not exercise command authority when he approached Wingate and told Wingate what he wanted from him. He did so only when he clarified—reluctantly and upon request—that Wingate couldn't leave until he provided it. When we require officers to announce legal duties when they convey their will, we prevent this superposition. The officer must decide what he is doing and whether he has the authority to do it. If we don't require this, then citizens can force the officer's intention into one state or the other only by challenging the officer. Just as Schrödinger's famous feline may be found dead when his chamber is opened, that approach can be dangerous for people who interact with the police. Think about what happened to Sandra Bland.

B. *The Challenge of Challenging Commands*

An ideal law governing commands might have additional features. Perhaps, for example, states or constitutional law should prohibit pretextual commands or those that are disproportionately intrusive compared to the public safety problem they address. Such questions are for another day. These three requirements—that police commands must be authorized, that they must be constitutional, and that they must give people notice and a chance to comply—are different. They reflect the minimum principles that already govern—and must govern—police commands, given their legal functions. Yet courts have not understood them, especially the first and third, and they have applied them unevenly as a result.

Why have courts done a poor job enforcing, and a worse job articulating, the law that governs police orders? Because it is very difficult to challenge commands in court. To illustrate, imagine you are arguing loudly with a friend on the street one night, and an officer tells you both to go home. You don't like it, and you don't think he has any authority to make you leave. How can you challenge the command?

324. *Id.* at 305 (citations omitted) (quoting *Florida v. Bostick*, 501 U.S. 429, 435 (1991)).

You could take a risk and refuse. At that point, you might have the opportunity to complain about the command in court, but only if all of the following events happen: The officer arrests you rather than letting the matter drop. The officer charges you with failing to follow his order, and not for some other crime, such as standing in the roadway. The prosecutor maintains the charge against you, instead of dismissing it. You go to trial rather than plead guilty, though you may not be entitled to a lawyer and, if you are not released pretrial, you will stay in jail. At trial, with little case law to draw on (and maybe without a lawyer), you persuade the court to examine whether the order was unlawful.³²⁵ All this almost never happens, which is why there are so few state cases about what constitutes a lawful order.

More commonly, when an officer gives you a questionable command and you balk, he issues another more credible command. This is what Encinia tried to do.³²⁶ Or he arrests you for a different crime, such as a traffic violation. Or the prosecutor drops the charges.³²⁷ Or you plead out rather than go to trial.³²⁸ Or you fight the charges on other grounds. Or far more routinely, when faced with a legally questionable command, you take a different strategy altogether: You obey, especially when the officer demands something like “show me your hands,” because not doing so might provoke a bullet rather than a trip downtown.

You might do better in getting your complaint about a command into court if you are given an order related to a search or a seizure, such as “stop” or “open up”³²⁹ rather than “back up” or “move along.”³³⁰ In the

325. Cf. *Camara v. Mun. Ct. of City & Cnty. of S.F.*, 387 U.S. 523, 523–33 (1967) (“[O]nly by refusing entry and risking a criminal conviction can the occupant . . . challenge the inspector’s decision . . . [E]ven if the occupant possesses sufficient fortitude to take this risk . . . he may never learn any more about the reason for the inspection than that the law . . . allows housing inspectors to gain entry.”).

326. See *supra* text accompanying notes 1–6.

327. For an example, watch the arrest of Emily Good by a Rochester, New York, police officer. RochesterCopwatch, *Rochester Police Arrest Woman in Her Front Lawn for Filming Traffic Stop*, YouTube (June 21, 2011), <https://youtu.be/a7ZkFZkejv8> (on file with the *Columbia Law Review*). An officer ordered Good from her front yard into her home, claiming improbably that she made him feel unsafe, while he arrested someone on the street in front of Good’s house. Good questioned and refused the order and was arrested for obstructing governmental administration. After Good’s video of the incident went viral, prosecutors dropped the charges against her. See, e.g., Harmon, *Law of Police*, *supra* note 1, at 474–75 (discussing Emily Good’s arrest).

328. See John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, Pew Rsch. Ctr. (June 11, 2019), <https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/> [<https://perma.cc/Z899-6QS4>] (reporting that jury trials occur in only 2% of federal cases and fewer than 3% of state cases in states for which data is available).

329. See, e.g., *Carpenter v. United States*, 138 S. Ct. 2206, 2212 (2018); *Horton v. California*, 496 U.S. 128, 131 (1990); *Terry v. Ohio*, 392 U.S. 1, 7 (1968).

330. Circuits are split regarding “move on” orders. Compare *Peery v. City of Miami*, 977 F.3d 1061, 1071 (11th Cir. 2020) (“A person who is told to leave one place but ‘remains free to go anywhere else that he wishes’ can undoubtedly terminate his encounter.” (quoting

former case, assuming evidence is found, you are charged with a crime, and the government will not forgo the evidence, then you could fight the command in your motion to suppress. But you will be able to challenge only the constitutionality of the search or seizure, so you will be arguing about the command indirectly. Still, this is a far more common path for challenging commands, which is why Fourth Amendment law (and state constitutional law) on whether stops, car searches, and home entries comply with constitutional doctrines is so much more abundant than state law on the scope of officers' authority to issue commands.

Because the remedial paths are so narrow, the law is underdeveloped. In many encounters, you cannot know whether a particular command is authorized or constitutional—that is, whether it is lawful. And neither can the officer. Where the law is weak, police training and policies are usually weak as well; officers are trained and directed to follow the law. That is why officers know they cannot tell you to “come over here” or “stay put” without reasonable suspicion, but they may have no idea when they can tell you to keep moving. And that is why officers otherwise receive little training or guidance from policies about how to communicate commands and noncommands. Instead, they act on unstable ground.

This uncertainty matters. We have many reasons to cooperate with the police. If we believe in the officer's or the government's legitimacy, for example, we may want to support their efforts to promote public safety and order.³³¹ In that case, the lines between request and command, and consent and compliance, may be relatively unimportant. We want to help them even if we are not required to do so. But, as the police recognize, many of us would not go so far voluntarily. We are law abiding, but, perhaps for personal or political reasons, we want to fulfill our legal obligations and do no more.³³² A weak law of commands, by perpetuating ambiguity about our duties, denies us that choice. In effect, the weak law of commands generates penumbral law, a place of shadows where we interact with the government on terms we cannot know or challenge.

Salmon v. Blesser, 802 F.3d 249, 253 (2d Cir. 2015)), and *Salmon*, 802 F.3d at 253 (“Police officers frequently order persons to leave public areas . . . [and] may . . . employ . . . guiding force short of actual restraint to ensure obedience . . . as long as the person is otherwise free to go where he wishes.”), with *Bennett v. City of Eastpointe*, 410 F.3d 810, 834 (6th Cir. 2005) (finding seizure “when a reasonable person would not feel free to remain somewhere, by virtue of some official action.”).

331. See, e.g., Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 *Ohio St. J. Crim. L.* 231, 262 (2008) (finding “that legitimacy shapes willingness to cooperate with the police in fighting crime”); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 *Crime & Just.* 283, 284 (2003) (arguing that public compliance with legal authority is shaped by perceptions of the government actor's legitimacy).

332. See, e.g., Trevor George Gardner, *Police Violence and the African American Procedural Habitus*, 100 *B.U. L. Rev.* 849, 885 (2020) (advocating that Black people adopt a “nonconformist protocol” in which they follow instructions but request information and articulate constitutional rights to promote accountability).

When people express concern about police commands, they are consistently told—and not just by their mothers³³³—to comply now and complain later.³³⁴ A police officer spoke for many when he argued in the *Washington Post* a few years ago that:

[I]n the overwhelming majority of cases it is not the cops, but the people they stop, who can prevent detentions from turning into tragedies. Even though it might sound harsh and impolitic, here is the bottom line: if you don't want to get shot, tased, pepper-sprayed, struck with a baton or thrown to the ground, just do what I tell you. Don't argue with me, don't call me names, don't tell me that I can't stop you, don't say I'm a racist pig, don't threaten that you'll sue me and take away my badge. Don't scream at me that you pay my salary, and don't even think of aggressively walking towards me. Most field stops are complete in minutes. How difficult is it to cooperate for that long?

Save your anger for later, and channel it appropriately. Do what the officer tells you to and it will end safely for both of you Later, you can ask for a supervisor, lodge a complaint or contact civil rights organizations if you believe your rights were violated.

Feel free to sue the police! Just don't challenge a cop during a stop.³³⁵

The National Police Association similarly called for compliance in a public service announcement in 2021 entitled, “Comply Now, Complain Later.” It argued that police violence can often be avoided by having people obey police commands.³³⁶

333. See, e.g., N.Y. Times, *A Conversation With My Black Son*, YouTube (Mar. 18, 2015), <https://www.youtube.com/watch?v=IXgfX1y60Gw> (on file with the *Columbia Law Review*) (describing “The Talk” Black parents give their sons about police encounters).

334. See, e.g., Nat'l Police Ass'n, *The National Police Association Announces New TV PSA Campaign to Address Use of Force*, PR Newswire (July 2, 2021), <https://www.prnewswire.com/news-releases/the-national-police-association-announces-new-tv-psa-campaign-to-address-use-of-force-301324678.html> [<https://perma.cc/PT78-FK2C>]; see also Ryan Martin, *FOP Launches Effort to Teach People the ‘Do’s and Don’ts’ of Interacting with Police*, *IndyStar* (May 23, 2018), <https://www.indystar.com/story/news/2018/05/23/aaron-bailey-shooting-indianapolis-fop-wants-public-training-police-encounters/637548002/> [<https://perma.cc/62VZ-KM3R>] (“The overall theme of these efforts . . . is ‘comply now, complain later.’”).

335. Sunil Dutta, *I’m a Cop. If You Don’t Want to Get Hurt, Don’t Challenge Me.*, *Wash. Post* (Aug. 19, 2014), <https://www.washingtonpost.com/posteverything/wp/2014/08/19/im-a-cop-if-you-dont-want-to-get-hurt-dont-challenge-me/>.

336. See National Police Association, *PSA: Comply Now, Complain Later*, YouTube (July 1, 2021), <https://youtu.be/7P2bU9FhKyA> (on file with the *Columbia Law Review*). The advice is almost as old as police departments. In 1898, a newspaper columnist asked what a self-respecting citizen is to do when officers give commands rudely or outside of their authority:

Is he to remonstrate with the policeman? If he does, it is very much more than likely that he will be speedily taken to the nearest police station, for the average policeman is constitutionally averse to taking “back talk” even

But the public is being sold a bill of goods. The reality is that while members of the public risk violence when they don't comply, there is no effective avenue to complain later if they do. Even beyond the usual problems with departmental disciplinary systems and civil damages actions, officers can be disciplined internally only if they violate their department's policies; they can be held liable criminally or civilly only if they violate the law. In the case of commands, there is often no policy or law against which the officer's actions can be assessed.

C. *Changing the Law of Commands*

Assuming that the police maintain duties and powers broadly similar to those they have now, there are three basic mechanisms for strengthening the law of commands: State courts could better enforce existing legal limits on commands; state legislatures and city councils could regulate or restrict commands with new statutes and ordinances; and police departments could develop training, policy, and supervision that govern the use of commands. These strategies interact: If state courts are more scrutinizing or legislatures more regulating, departments will change training, policy, and supervision. If police departments successfully adopt policies regulating the use of commands, legislatures and courts will look at those policies when they make new law.³³⁷

State judges can change most easily. Starting today, litigants could raise questions about command authority, and judges could more carefully analyze commands and the statutory authority for them. But for those who want to transform coercive policing, state legislation offers more power.

Prior to a few years ago, such legislation would have seemed a pipe dream. In the last five years, however, after decades of quiescence, state legislatures have been astonishingly active in regulating the police.³³⁸ So far, states have raised officers' qualifications, lowered barriers to prosecuting them, restricted the use of force, increased data collection and reporting, expanded decertification, mandated additional training,

of the mildest sort. Is he to refuse to "move on"? If he does, he will be moved on. And in that case is he to resist? Not unless he is utterly bereft of sense, for not only is such a line of action a violation of the law, but it is sure to result in physical damage, and not to the policeman either. The fact is that the citizen has absolutely no redress against the policeman at the time and place of the policeman's offence.

The Law of a Nightstick, N.Y. Tribune, Sept. 25, 1898, at 31.

337. See, e.g., *Tennessee v. Garner*, 471 U.S. 1, 18–19 (1985).

338. See, e.g., Law Enforcement Statutory Database, Nat'l Conf. of State Legislatures (June 30, 2020), <https://www.ncsl.org/research/civil-and-criminal-justice/law-enforcement-statutory-database.aspx> [<https://perma.cc/M7LZ-2LVW>]; Legislative Responses for Policing—State Bill Tracking Database, Nat'l Conf. of State Legislatures (Dec. 10, 2022), <https://www.ncsl.org/research/civil-and-criminal-justice/legislative-responses-for-policing.aspx> [<https://perma.cc/E58L-75LP>] (indicating hundreds of state laws were enacted concerning policing and police accountability from mid-2020 to mid-2022).

required body-worn cameras, and facilitated civil liability. Excepting some laws regulating no-knock warrants, few state statutes have altered officers' powers to stop, arrest, or search. Nor have they clarified or restricted command authority.³³⁹ But they could.

Some might doubt that effective command legislation is possible. It is easy to think that, because “no two police problems are precisely alike, there are no principles that may be applied to the diagnosis of specific situations [N]o more can be asked of officers than that they respond as quickly as possible[,] . . . devising the best solutions they can . . . on the spur of the moment.”³⁴⁰ But as criminologist James Fyfe pointed out decades ago with respect to the use of force, much of what officers confront on the street involves repetitive, foreseeable situations with predictable dangers and forms of resistance.³⁴¹ There is no reason statutes cannot specify what goals commands may serve, what triggering conditions must precede them, and how commands must be given, even when commands are given under officers' authority to stop, arrest, and search.

What would an adequate command statute look like? Consider Virginia's statute allowing officers to establish control around the scene of any emergency.³⁴² The law states who may act: a police chief or chief's representative responsible for securing the area. It states when officers may direct people not to enter and for what purposes: when an emergency threatens life, limb, or property and may cause people to gather in a public area and it is “reasonably necessary to (i) preserve the integrity of evidence at such scenes, (ii) . . . facilitate the movement of vehicular and pedestrian traffic into, out of, and around the scene, (iii) permit firefighters, police officers, and emergency medical services personnel to perform necessary operations unimpeded, and (iv) protect persons and property.”³⁴³ The statute specifies how officers should order people to keep out: They should put up barricades or lines that say something like “Police Line—DO NOT CROSS.”³⁴⁴ It states an alternative method for situations in which such equipment is unavailable: “[A] verbal warning by identifiable law-enforcement officials positioned to indicate a location of a police line or barricade shall be given to any person or persons attempting to cross.”³⁴⁵ It states time limits on such orders: “Such scene may be secured no longer

339. See Law Enforcement Legislation: Significant Trends, Nat'l Conf. of State Legislatures (Oct. 20, 2021), <https://www.ncsl.org/research/civil-and-criminal-justice/law-enforcement-legislation-significant-trends-2021.aspx> [<https://perma.cc/X5EY-DXY>].

340. James J. Fyfe, *The Split-Second Syndrome and Other Determinants of Police Violence*, in *Critical Issues in Policing: Contemporary Readings* 361, 370 (Roger G. Dunham, Geoffrey P. Alpert & Kyle D. McLean eds., 8th ed. 2021).

341. See *id.* at 371–74.

342. See Va. Code Ann. § 15.2-1714 (2022).

343. *Id.*

344. *Id.*

345. *Id.*

than is reasonably necessary to effect the above-described purposes.”³⁴⁶ And it states an exception: News gatherers are not required to comply.³⁴⁷

Are stops, arrests, and searches so much more varied and complicated than fires, car accidents, explosions, active shooter situations, and riots? In all of these contexts, officers predictably deal with suspects and bystanders; they predictably want to control behavior to achieve their ends, prevent harm to officers, and protect other people and property; and they predictably face situations that start and should end. Why shouldn't state law guide them accordingly?

If we paid more attention to the law of commands, some states would surely codify existing permissive command practices. That might still help courts decide questions such as which “move on” orders are allowed. Other states might significantly restrict officer power. Public reaction to George Floyd's death led to statutes limiting chokeholds. More recently, Tyre Nichols was tased and beaten after officers pulled him out of his car.³⁴⁸ What if concern about that incident, alongside research indicating that routine traffic stops are safer for officers than long assumed,³⁴⁹ led some states to wonder whether, when a car rolls through a stop sign, officers really need free rein to order everyone out?³⁵⁰ Similarly, bystander videos have helped challenge police narratives about critical incidents. Perhaps some states might restrict how far officers may order witnesses back;³⁵¹ or restrict them from ordering someone to get down on the ground during a *Terry* stop. It is hard to say which restrictive state laws on commands make the most sense. But it seems obvious that they, along with departmental

346. *Id.*

347. See *id.* The Virginia barricades law offers no remedy. But tort damages actions might be available, and one may be convicted of crossing police lines only if those lines comply with terms of this statute. See Va. Code Ann. § 18.2-414.2 (2022).

348. See Cardia, et al., *We Tracked Each One's Role*, *supra* note 300.

349. See Woods, *Routine Traffic Stops*, *supra* note 233, at 639.

350. A few states already reject *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), or *Maryland v. Wilson*, 519 U.S. 408 (1997), which extends the *Mimms* rule to passengers, as a matter of state constitutional law. See *supra* note 266. They usually require reasonable suspicion that the safety of the officer or others is at risk or that a crime has been committed before an officer may lawfully order someone out of a car. See *supra* note 266. But neither these cases, nor the cases following *Mimms*, consider officers' statutory authority to give commands to drivers to exit their vehicles. See, e.g., *State v. Landry*, 588 So. 2d 345, 347 (La. 1991); *Commonwealth v. Brown*, 654 A.2d 1096, 1102 (Pa. Super. 1995).

351. Cf. *Gericke v. Begin*, 753 F.3d 1, 3 (1st Cir. 2014) (affirming denial of qualified immunity because plaintiff was exercising First Amendment right in filming a traffic stop in absence of order to stop or leave the area but after officer ordered her to return to her car “at least thirty feet away”). Arizona has gone in the opposite direction. See *Ariz. Rev. Stat. Ann. §13-3732(A)* (2022) (making it “unlawful for a person to knowingly make a video recording of law enforcement activity if the person . . . is within eight feet of where the person knows or reasonably should know that law enforcement activity is occurring, [and] . . . receives . . . a verbal warning . . . that the person is prohibited”). But see *Ariz. Broadcasters Ass'n v. Brnovich*, No. CV-22-01431-PHX-JJT, 2022 WL 4121198, at *3 (D. Ariz. Sept. 9, 2022) (enjoining enforcement of *Ariz. Rev. Stat. §13-3732* pending further litigation).

policies and municipal ordinances that further constrain police authority to command, should be part of the conversation about police reform.

Moreover, restrictive statutes are not the only option; not every regulation works by command-and-control. States often pass laws requiring police departments to develop policies, especially for new technology, intrusive activities, and practices that frequently go awry.³⁵² States could similarly promote command policies by statute.³⁵³ Even without a legislative nudge, departmental policies could be used to promote clearer, better, more restrained, and more lawful orders, and they could be reinforced by training, supervision, and administrative accountability schemes.³⁵⁴ Those policies could start with the principles articulated here: All commands must be authorized under state law; commands must not infringe on constitutional rights; and commands must provide clear notice about legal duties and an opportunity to comply with them, including all that requires. This alone would be a significant departure from existing practice.

Without a legislative push, police departments do not always have sufficient incentives to adopt policies that regulate officer conduct.³⁵⁵ But they have an extra reason to do so in this context. A department with a command policy, as well as a decent complaint and disciplinary system, can perhaps more credibly argue that people should comply now and complain later because there would be a standard and a venue for evaluating such complaints. More generally, public command policies might mitigate some conflicts between officers and citizens and provide a locus for community debate about the proper scope of coercive policing, which in turn could feed back into policies.

We should be realistic about what the law can achieve. Even if political will exists, state statutes and departmental policies regulating commands are going to be hard to craft and harder to administer. Cabining police discretion is famously difficult,³⁵⁶ and officer safety concerns will make states understandably hesitant to limit the conditions under which officers may tell people to stand up, get down, show their hands, or turn around. Moreover, even well-drafted, vigorously enforced laws may do little to

352. See, e.g., Cal. Civ. Code § 1798.90.51 (2022) (requiring departmental policies before adopting automated license plate readers); Wash. Rev. Code Ann. § 10.109.010 (West 2022) (requiring departmental policies in agencies using body-worn cameras); Wis. Stat. & Ann. § 175.50 (2021–2022) (requiring departmental policies on eyewitness identifications); see also Harmon, *Law of Police*, supra note 1, at 510–20.

353. Cf. Maria Ponomarenko, *Rethinking Police Rulemaking*, 114 *Nw. U. L. Rev.* 1, 34–36 (2019) (discussing difficulty of ensuring effective police policies by legislation).

354. See *Principles of the Law of Policing* §§ 13.01–13.08 (Am. L. Inst., Tentative Draft No. 3, 2021); Samuel E. Walker & Carol A. Archbold, *The New World of Police Accountability* 13–22 (2d ed. 2014).

355. See Ponomarenko, supra note 353, at 24–25, 31–33.

356. See, e.g., Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 *Colum. L. Rev.* 551, 671–72 (1997).

disrupt occupational norms and departmental cultures that have long encouraged officers to exert control broadly and demand extreme deference as well as compliance.³⁵⁷ Still, assuming that most officers follow the law most of the time, judicial, legislative, and departmental guidance could help.³⁵⁸

CONCLUSION

Even if you believe command practices today are not all that bad, two trends in policing could make things worse. First, one of the most popular ideas in policing today is that, to be effective, police must receive cooperation; that to receive cooperation, the police must be perceived as legitimate; that to be perceived as legitimate, officers must act in procedurally just ways; and that to act in procedurally just ways requires officers to treat people with dignity and respect.³⁵⁹ Although aspects of the theory are controversial and the research is still developing,³⁶⁰ some evidence indicates that procedural justice training can improve policing outcomes for communities, and departments all over the country are teaching officers procedural justice.³⁶¹

But what does it mean to treat people with respect? Usually, it includes being friendly and polite and using influence rather than

357. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 14 n.11 (1968) (noting that police–community tensions are exacerbated by “officers’ perceived need to maintain the power image of the beat officer, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control of the streets” (internal quotation marks omitted) (quoting Lawrence P. Tiffany, Donald M. McIntyre, Jr. & Daniel L. Rotenberg, *Detection of Crime: Stopping and Questioning, Search and Seizure, Encouragement and Entrapment* 47–48 (Frank J. Remington ed., 1967))).

358. See, e.g., David A. Klinger, *Environment and Organization: Reviving a Perspective on the Police*, 593 *Annals Am. Acad. Pol. & Soc. Sci.* 119, 128–29 (2004) (reviewing research and concluding that “a good amount of evidence suggests that . . . rules and regulations [] can substantially affect how officers act on the streets, at least in some areas of police work”); see also Harmon, *Law of Police*, supra note 1, at 402–03 (discussing “The Power of Law” to control the use of force).

359. See, e.g., DOJ, *Off. of Cmty. Oriented Policing Servs., Final Report of the President’s Task Force on 21st Century Policing I* (2015) [hereinafter *President’s Task Force on 21st Century Policing*]; see also supra note 331 and accompanying text.

360. See Daniel S. Nagin & Cody W. Telep, *Procedural Justice and Legal Compliance: A Revisionist Perspective*, 19 *Criminology & Pub. Pol’y* 761, 762 (2020) (critiquing procedural justice theory as misunderstanding the lines of causation between procedurally just treatment, perceived legitimacy, and compliance).

361. See, e.g., David Weisburd, Cody W. Telep, Heather Vovak, Taryn Zastrow, Anthony A. Braga & Brandon Turchan, *Reforming the Police Through Procedural Justice Training: A Multicity Randomized Trial at Crime Hot Spots*, 119 *Proc. Nat’l Acad. Scis.*, Apr. 5, 2022, at 1, 5 (showing that intensive procedural justice training of officers assigned to hot spots led to more procedurally just behavior in the field, reduced community perceptions of police as harassing or excessively violent, fewer arrests, and less crime); George Wood, Tom R. Tyler & Andrew V. Papachristos, *Procedural Justice Training Reduces Police Use of Force and Complaints Against Officers*, 117 *Proc. Nat’l Acad. Scis.* 9815, 9819 (2020) (finding Chicago Police Department procedural justice training reduced the use of force).

control to achieve police objectives.³⁶² Although that might mean coercing people less, such training can also encourage officers to make ambiguous requests rather than issue clear commands. An officer who asks, “Sir, would you step over here and explain what happened?” is polite. But he leaves a lot unsaid if the request is meant as a command or will be immediately followed by one. That is, even if procedural justice training promotes cooperation, it may also lead some officers to blur the immediate stakes of encounters.³⁶³

Second, as noted earlier, some communities are looking to turn responsibility for problems that do not require armed officers over to other actors. Officers have a distinct skillset, the argument goes, and we might prevent unnecessary violence and coercion by giving them only nails to hammer.³⁶⁴ If these efforts are successful, a higher proportion of police encounters would require some sort of coercive authority.³⁶⁵ At the same time, communities recognize that stops, arrests, and home entries are unfairly distributed and cause both immediate harm and long-term consequences. To mitigate these problems, they are pressuring police departments to address public safety and public order concerns

362. See, e.g., Lorraine Mazerolle, Sarah Bennett, Emma Antrobus & Elizabeth Eggins, *Procedural Justice, Routine Encounters and Citizen Perceptions of Police: Main Findings From the Queensland Community Engagement Trail (QCET)*, 8 *J. Experimental Criminology* 343, 356 (2012) (assessing procedural justice by asking respondents, inter alia, whether “[t]he police officer was polite when dealing with me”); Dennis P. Rosenbaum & Daniel S. Lawrence, *Teaching Procedural Justice and Communication Skills During Police-Community Encounters: Results of a Randomized Control Trial With Police Recruits*, 13 *J. Experimental Criminology* 293, 309 (2017) (evaluating whether officers “had a courteous demeanor” and “had a friendly demeanor” in assessing procedural justice); Nat’l Initiative for Bldg. Cmty. Tr. & Just., *Procedural Justice and Police Legitimacy (PJ1) Facilitator Guide* 35, https://s3.truistandjustice.org/misc/PJ1_Facilitators_Guide_NI.pdf [<https://perma.cc/37KE-K6AJ>] (last visited Jan. 28, 2023).

363. Cf. Miller, *supra* note 140, at 362 (“Procedural justice . . . identifies a particularly efficient way to induce compliance or cooperation: it is not concerned with whether those directives are lawful, and thus whether the individual *legally* ought to comply or cooperate.”). A closely related idea, that officers should adopt a “guardian” as opposed to a “warrior” mindset, could risk similar effects, depending on how it gets operationalized. See President’s Task Force on 21st Century Policing, *supra* note 359, at 11 (advocating that the police “should embrace a guardian mindset to build public trust and legitimacy”); Stoughton, *supra* note 125, at 614 (advocating that the police shift to a guardian mindset). So far, “guardian” training is less common, and less research supports the approach. See Kyle McLean, Scott E. Wolfe, Jeff Rojek, Geoffrey P. Alpert & Michael R. Smith, *Police Officers as Warriors or Guardians: Empirical Reality or Intriguing Rhetoric?*, 37 *Just. Q.* 1096, 1097, 1111 (2020).

364. See *supra* notes 71–79 and accompanying text.

365. Efforts to restrict policing to core tasks can conflict with efforts to build legitimacy by fostering positive, nonenforcement police interactions with the public. See, e.g., President’s Task Force on 21st Century Policing, *supra* note 359, at 14 (“Law enforcement agencies should proactively promote public trust by initiating positive nonenforcement activities . . .”). It is not clear which of these trends will predominate.

without so many of these legal actions.³⁶⁶ How are police going to manage more situations coercively with fewer stops, searches, and arrests? They may detain people and cars and then let them go. Or break up fights and send participants home. They could roust people sleeping in parks and tell them to find somewhere else to be. Or they might demand information rather than go looking for it. That is, officers may replace stops, searches, and seizures with more, and perhaps more questionable, commands.

Police commands alter our rights and duties and, sometimes, our lives, and those commands are permitted, necessitated, and limited by the law that gives police their authority. Right now, the law of commands is underdeveloped and misunderstood by officers, the public, scholars, legislatures, and courts. Scholars could better theorize and study commands, and courts, legislatures, and departments could improve the law that governs them. But all of that is unlikely unless we take the first step. We should recognize that coercive policing is carried out mostly by commands, that commands have legal significance, and that lawful commands must be authorized, constitutional, and adequately conveyed. There is more to be done to understand and regulate police commands. But at least this is a start.

366. See, e.g., Betsy Pearl, *Beyond Policing: Investing in Offices of Neighborhood Safety*, Ctr. for Am. Progress (Oct. 15, 2020), <https://www.americanprogress.org/article/beyond-policing-investing-offices-neighborhood-safety/> [<https://perma.cc/C9UT-8LG3>] (arguing police “should employ the lightest touch possible”).