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The Power of Police Officers to Give “Lawful Orders”

ABSTRACT. Forty-four states, the District of Columbia, and the federal government make it a crime to disobey the “lawful orders” of police officers. But there is significant uncertainty about what makes an order lawful. This uncertainty leaves people in the dark about their rights and obligations, risks unfair convictions, and allows police to needlessly escalate confrontations due to civilian confusion or minor noncompliance. This Comment proposes a model statute that would clarify and limit officers’ authority while informing civilians about the legal risks of disobedience.

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INTRODUCTION

Sandra Bland, a twenty-eight-year-old African American woman from Illinois, had just moved to Texas to start a new job at her alma mater, Prairie View A&M University.¹ On July 10, 2015, Texas state trooper Brian Encinia pulled Bland over for failure to signal a lane change, just outside the university's gates in Prairie View, Texas.² Encinia explained to Bland why he stopped her and observed that she seemed "really irritated."³ Bland admitted her frustration and defended her driving. Encinia then asked Bland to extinguish her cigarette. When Bland refused, Encinia repeatedly demanded that she exit her car. The altercation escalated rapidly. Encinia insisted that he was giving Bland "a lawful order."⁴ The officer refused to explain the reason behind his command, and he attempted to yank Bland out of her vehicle, shouting that he would "light [her] up" with his Taser.⁵ The threat prompted Bland to exit the car, while yelling obscenities and questioning why the officer was treating her so aggressively over a failure to signal. As he instructed Bland to turn around, Encinia said again, "I'm giving you a lawful order."⁶ After an audible struggle that occurred out of view of his dashboard camera, Encinia detained Bland for "resisting arrest."⁷ Bland cried that the officer was "about to break [her] wrist," that he put his knee in her back, and that he left her unable to feel her arms.⁸ Encinia told his sergeant after the arrest that Bland kicked him, adding that "I got some cuts on my hand, that's,

1. David Montgomery, *Texas Trooper Who Arrested Sandra Bland Is Charged with Perjury*, N.Y. TIMES (Jan. 6, 2016), <https://www.nytimes.com/2016/01/07/us/texas-grand-jury-sandra-bland.html> [<https://perma.cc/V4G5-DE64>].

2. Ryan Grim, *The Transcript of Sandra Bland's Arrest Is as Revealing as the Video*, HUFFPOST (July 22, 2015, 11:10 PM), https://www.huffingtonpost.com/entry/sandra-bland-arrest-transcript_n_55b03a88e4b0a9b94853b1f1 [<https://perma.cc/Q478-P8A2>].

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

I mean I guess it is an injury, . . . from . . . the handcuffs when . . . she was twisting away from me.”⁹ Three days later, a guard found Bland dead in her jail cell.¹⁰ An autopsy suggested that her death was a suicide.¹¹

The arrest of Sandra Bland raised questions about police officers’ power to issue and enforce “lawful orders” in confrontations with civilians.¹² The power to give lawful orders rests on statutory or regulatory authority, depending on the jurisdiction. At least forty-four states, the District of Columbia, and the federal government make it a crime for civilians to disobey the lawful orders of officers.¹³ But these laws do not make it clear what lawful orders are. Legal scholarship has devoted little discussion to this question, despite the prevalence of lawful-order statutes. The uncertainty about “lawful orders” and civilians’ rights during police encounters prompted Orin Kerr to write about the “‘lawful order’ problem” in an opinion piece that appears to be the primary treatment of this issue.¹⁴

Case law has failed to address the lawful-order problem by leaving the meaning of both “lawful” and “order” uncertain. First, on whether an order is “lawful,” in *Pennsylvania v. Mimms* the U.S. Supreme Court held that the Fourth Amendment permits the police to order people out of their cars in the interest of officer safety.¹⁵ But the lawfulness of other commands depends on the facts of the case and on the open-ended wording of statutes and regulations.¹⁶ For example, New York criminalizes the failure to obey “any lawful order or direction

9. Eli Hager, *What You May Have Missed in the Sandra Bland Video*, THE MARSHALL PROJECT (July 22, 2015, 3:29 PM), <https://www.themarshallproject.org/2015/07/22/what-you-may-have-missed-in-the-sandra-bland-video> [<https://perma.cc/HWA5-UAB3>].

10. David Montgomery, *The Death of Sandra Bland: Is There Anything Left to Investigate?*, N.Y. TIMES (May 8, 2019), <https://www.nytimes.com/2019/05/08/us/sandra-bland-texas-death.html> [<https://perma.cc/94DF-UEW4>].

11. *Id.*

12. See, e.g., Reid J. Schar, *What Constitutes a ‘Lawful Order,’* THE HILL (Sept. 17, 2015, 1:30 PM EDT), <https://thehill.com/blogs/congress-blog/judicial/253939-what-constitutes-a-lawful-order> [<https://perma.cc/EN8X-XNCA>].

13. See Section I.A.

14. Orin Kerr, Opinion, *Sandra Bland and the ‘Lawful Order’ Problem*, WASH. POST (July 23, 2015, 11:57 AM EDT), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/07/23/sandra-bland-and-the-lawful-order-problem/?utm_term=.999613e8ffbe [<https://perma.cc/6S85-KLHH>].

15. 434 U.S. 106, 111 (1977) (“What is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer’s safety.”).

16. See Kerr, *supra* note 14 (“Even if the police pulled over the world’s greatest legal expert, the citizen *still* couldn’t know what orders are lawful because the laws often hinge on facts the citizen can’t know.”); Schar, *supra* note 12 (“The law’s uncertainty, in which neither party

of any police officer or flagperson or other person duly empowered to regulate traffic,” yet the statute does not define “lawful order or direction.”¹⁷ In 1973, a trial court interpreted the New York provision to allow officers to give commands “reasonably and in a manner designated to accomplish a proper objective.”¹⁸ However, no other cases have cited that proposition, and New York’s highest court has not established a standard.¹⁹ The Oregon Court of Appeals declared that judges must evaluate the legality of an officer’s instruction “on a case-by-case basis” with “few if any bright line rules,” noting that “an almost infinite variety of variables” could come into play.²⁰

Second, it is hard to distinguish orders (which civilians must obey) from requests (which they need not obey).²¹ This determination is similarly fact specific. In the Bland case, Encinia asked, “You mind putting out your cigarette, please? If you don’t mind?”²² Many people would likely consider that a request, but Bland’s refusal prompted the officer to demand that she exit her car. Encinia acted as if Bland disobeyed a binding order and her disobedience gave him cause to react aggressively. Due to the difficulty of distinguishing orders from requests, and fear about upsetting an officer, many civilians likely err on the side of doing whatever an officer says to avoid arrest.²³

The lack of clear law leaves civilians in the dark about their rights and obligations during police encounters. This tips the balance of power in officers’ favor and encourages them to escalate altercations. For instance, in 2004, Seattle police tased a pregnant woman three times for refusing to exit her car and sign a speeding ticket.²⁴ The woman, Malaika Brooks, mistakenly believed that signing the ticket would be an admission of guilt. She refused to leave her car and hugged

truly knows the limits of their authority, makes these traffic stop encounters more complicated and less predictable than need be for both drivers and officers alike.”).

17. N.Y. VEH. & TRAF. LAW § 1102 (McKinney 2019).

18. *People v. Jennings*, 347 N.Y.S.2d 818, 821 (Village Ct. Millerton 1973).

19. Schar, *supra* note 12.

20. Kerr, *supra* note 14 (quoting *State v. Ruggles*, 242 P.3d 643, 646 (Or. Ct. App. 2010)).

21. *See id.*

22. Grim, *supra* note 2.

23. *See* Danny Cevallos, *Was the Sandra Bland Traffic Stop Legal—and Fair?*, CNN (July 23, 2015, 10:17 AM EST), <http://www.cnn.com/2015/07/23/opinions/cevallos-sandra-bland-traffic-stop/index.html> [<https://perma.cc/8MA6-WXTH>] (“The idea that motorists answer questions or give consent to search of their own free will in the presence of a highly armed, highly muscled state trooper, and his highly flashing vehicle, is just another ‘legal fiction.’”).

24. David Kravets, *Court OKs Repeated Taserings of Pregnant Woman*, WIRED (Mar. 29, 2010, 3:46 PM), <https://www.wired.com/2010/03/pregnant-woman-tasered> [<https://perma.cc/TJA4-DKPF>].

the steering wheel so that the officers could not remove her.²⁵ The police decided to fire electricity into her body repeatedly, drag her out of the car, and handcuff her as she lay face down on the street—after she had told them she was seven months pregnant.²⁶ The shocks did not harm the baby. But they left Brooks with permanent scars, and she sued the police in federal court.²⁷

An en banc panel of the U.S. Court of Appeals for the Ninth Circuit determined that the officers retained qualified immunity against Brooks’s federal excessive-force claim despite having used excessive force.²⁸ The court said it could not conclude that “every ‘reasonable official would have understood’ . . . beyond debate’ that tasing Brooks in these circumstances” was excessive.²⁹ The Supreme Court declined to review the decision and the parties settled Brooks’s remaining state-law claims in 2014, ten years after the incident.³⁰

Brooks’s and Bland’s cases illustrate the need to curb officers’ ability to invoke disobedience of “lawful orders” as excuses for needless violence. Both women’s offenses were minor enough that the authorities could have issued them summonses to appear in court at a later date. Public safety did not require immediate arrests.³¹ Moreover, although officers require the ability to give commands in potentially dangerous situations, overly broad statutes and regulations

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25. *Mattos v. Agarano*, 661 F.3d 433, 455 (9th Cir. 2011) (Kozinski, C.J., concurring in part and dissenting in part). The Ninth Circuit consolidated the Brooks case with another matter for en banc review. *Id.* at 436 (majority opinion).
 26. *Id.* at 437, 446; *Brooks v. City of Seattle*, 599 F.3d 1018, 1032 (9th Cir. 2010) (Berzon, J., dissenting), *aff’d in part, rev’d in part sub nom. Agarano*, 661 F.3d at 452.
 27. *Agarano*, 661 F.3d at 438.
 28. With little explanation, the en banc panel affirmed the lower court’s denial of qualified immunity on Brooks’s state-law assault and battery claims. *Id.* at 448 n.8, 452.
 29. *Id.* at 448 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)).
 30. Lisa Loving, *Seattle Settles Out of Court in Malaika Brooks Case*, SKANNER NEWS (Sept. 11, 2014), <http://www.theskanner.com/news/northwest/21826-seattle-settles-out-of-court-in-malaika-brooks-case> [<https://perma.cc/ZP83-QR8U>]; Bill Mears, *Justices Decline Case of Police Taser Use on Pregnant Woman*, CNN (May 29, 2012, 2:30 PM EST), <http://www.cnn.com/2012/05/29/justice/scotus-taser-shocks> [<https://perma.cc/RUD7-PSLB>].
 31. Some observers suggested that Bland could have used her cigarette as a weapon and that Brooks could have driven away erratically and injured pedestrians. *See, e.g., Brooks*, 599 F.3d at 1028 (“[S]ome threat [that Brooks] might retrieve the keys and drive off erratically remained, particularly given her refusal to leave the car and her state of agitation.”); Reid Nakamura, *Elisabeth Hasselbeck Gets Burned on Social Media for Sandra Bland Remarks About Cigarettes as Weapons*, WRAP (July 29, 2015, 10:58 AM), <https://www.thewrap.com/elisabeth-hasselbeck-gets-burned-on-social-media-for-sandra-bland-remarks-about-cigarettes-as-weapons> [<https://perma.cc/8GM8-C7FU>]. But nothing in either record supports such con-

create criminal liability even when civilians do not know they must obey an officer's command. Making the law more specific would mitigate the risk of unfair convictions and wrongful escalation while giving police better notice about how they should exercise power over the people they serve.³² Such reform would also work toward avoiding tragedies that damage officer-civilian relations, particularly in communities of color whose members are more likely to be stopped, searched, and shot by police.³³

This Comment surveys the current law on officers' power to issue binding commands and proposes a model statute that would clarify and limit police authority. Part I introduces the statutes and regulations and explains the various interpretations of similarly worded laws, the limited role that judges have played in resolving the ambiguities, and the concerns that apply nationwide. Part II introduces the model statute. The proposed law would establish (1) that a defendant may not be convicted under the statute unless the officer explicitly warns her that noncompliance may result in prosecution; (2) that liability attaches only if the officer is in uniform or explicitly identifies herself as law enforcement; (3) that civilians must obey police only in certain contexts (for example, crime investigations and traffic regulation); and (4) that an order is lawful only if it is reasonably related to the fulfillment of law-enforcement duties. Part III responds to potential objections to the Comment's proposal.

I. CURRENT LAW GOVERNING POLICE AUTHORITY TO COMMAND CIVILIANS

A. Variations in Lawful-Order Statutes and Regulations

At least forty-four states and the District of Columbia make it a crime to disobey the police.³⁴ Analogous provisions in the Code of Federal Regulations re-

jectures. See *Brooks*, 599 F.3d at 1039-40 (Berzon, J., dissenting). In theory, anyone could become violent at any time, so justifying force based on any disobedience would give officers almost unlimited power during interactions with civilians.

32. See Benjamin Jaqua, Note, *Policing the Police: Reexamining the Constitutional Implications of Traffic Stops*, 50 IND. L. REV. 345, 346-47 (2016).
33. See Radley Balko, Opinion, *21 More Studies Showing Racial Disparities in the Criminal Justice System*, WASH. POST (Apr. 9, 2019, 7:00 AM), <https://www.washingtonpost.com/opinions/2019/04/09/more-studies-showing-racial-disparities-criminal-justice-system> [https://perma.cc/WD5H-6EBB].
34. See *infra* Table 1. Connecticut, Kentucky, Maine, Massachusetts, Virginia, and West Virginia—the states in which I did not find lawful-order statutes or regulations—do not appear to have

quire people on federal property to obey lawful orders from federal law-enforcement and emergency personnel.³⁵ The two most common areas of variation in statutory and regulatory language concern culpable mental states and the range of situations in which officers may issue binding instructions.

1. *Culpable Mental States*

Thirty-two jurisdictions penalize only “willful” or “knowing” disobedience; two states punish people who “refuse” to obey lawful orders; two other states use the word “disobey”; and eight states, the Code of Federal Regulations, and the District of Columbia do not require a particular mental state.³⁶

TABLE 1.
MENTAL-STATE LANGUAGE

| Statutory or Regulatory Language | Jurisdictions |
|---|---|
| Law penalizes only “wil[l]fully” or “knowingly” disobeying a lawful order | Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maryland, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Washington, Wyoming ³⁷ |

created common-law versions of an open-ended requirement to obey police commands. In these states, the term “lawful order” appears in contexts such as trespass, contempt of court, and disorderly conduct. *See, e.g.,* *Brown v. Fournier*, No. 2015-CA-001429-MR, 2017 Ky. App. Unpub. LEXIS 705, at *7 (Ct. App. June 2, 2017) (citing KY. REV. STAT. ANN. § 525.060 (LexisNexis 2019)) (applying a disorderly conduct statute requiring obedience to “official order[s] to disperse issued to maintain public safety” at an emergency scene); *State v. Sanchez*, 89 A.3d 1084, 1085 (Me. 2014) (“lawful order not to enter”); *State v. Herbert*, 767 S.E.2d 471, 478 (W. Va. 2014) (“lawful order of the [c]ourt”).

- 35. 32 C.F.R. § 234.6 (2019); 41 C.F.R. § 102-74.385 (2019); *see also* *United States v. Baldwin*, 745 F.3d 1027 (10th Cir. 2014) (upholding a conviction under 41 C.F.R. § 102-74.385 but declining to define the scope of “lawful direction”).
- 36. *See infra* Tables 1 and 3.
- 37. ALA. CODE § 32-5A-4 (2019); ARIZ. REV. STAT. ANN. § 28-622(A) (2019); ARK. CODE ANN. § 27-49-107 (West 2019); CAL. VEH. CODE § 2800(a) (West 2019); COLO. REV. STAT. ANN.

| | |
|---|---|
| Law penalizes “refus[ing]” to obey a lawful order | Alaska, Michigan ³⁸ |
| Law penalizes “disobey[ing]” a lawful order | Nevada, South Dakota ³⁹ |
| Law does not require a specific mental state for noncompliance (e.g., by penalizing “fail[ing]” to comply with or “[v]iolating” a lawful order) | District of Columbia, Georgia, Louisiana, Nebraska, New Jersey, New York, Ohio, Oregon, U.S. (Code of Federal Regulations), Wisconsin ⁴⁰ |

§ 42-4-107 (West 2019); DEL. CODE ANN. tit. 21, § 4103(a) (West 2019); FLA. STAT. ANN. § 316.072(3) (West 2019); HAW. REV. STAT. ANN. § 291C-23 (West 2019); IDAHO CODE ANN. § 49-1419 (West 2019); 625 ILL. COMP. STAT. ANN. 5/18b-103.1(a) (West 2019); IND. CODE ANN. § 9-21-8-1 (West 2019); IOWA CODE ANN. § 321.229 (West 2019); KAN. STAT. ANN. § 8-1503 (West 2019); MD. CODE ANN., TRANSP. § 21-103(a) (West 2019); MINN. STAT. ANN. § 169.02 (West 2019); MISS. CODE ANN. § 63-3-203 (West 2019); MO. ANN. STAT. § 300.080 (West 2019); MONT. CODE ANN. § 61-8-105 (West 2019); N.H. REV. STAT. ANN. § 265:3(I) (2019); N.M. STAT. ANN. § 66-7-4 (West 2019); N.C. GEN. STAT. ANN. § 20-114.1(a) (West 2019); N.D. CENT. CODE ANN. § 39-10-02 (West 2019); OKLA. STAT. ANN. tit. 47, § 11-103 (West 2019); 75 PA. STAT. AND CONS. STAT. ANN. § 3102(1) (West 2019); 1956 R.I. GEN. LAWS ANN. § 31-12-3 (West 2019); S.C. CODE ANN. § 56-5-740 (2019); TENN. CODE ANN. § 55-8-104 (West 2019); TEX. TRANSP. CODE ANN. § 542.501 (West 2019); UTAH CODE ANN. § 41-6a-209(1) (West 2019); VT. STAT. ANN. tit. 23, § 1013 (West 2019); WASH. REV. CODE ANN. § 46.61.015(1) (West 2019); WYO. STAT. ANN. § 31-5-104 (West 2019).

38. ALASKA STAT. ANN. § 28.35.180 (West 2019); MICH. COMP. LAWS ANN. § 257.602 (West 2019).
39. NEV. REV. STAT. ANN. § 475.070 (West 2019); S.D. CODIFIED LAWS § 34-29B-6 (2019).
40. D.C. Code Mun. Regs. tit. 18 § 18-2000.2 (LexisNexis 2019); GA. CODE ANN. § 40-6-2 (West 2019); LA. STAT. ANN. § 32:56(A) (2019); NEB. REV. STAT. ANN. § 81-2008 (West 2019); N.J. STAT. ANN. § 32:1-154.18(3) (West 2019); N.Y. VEH. & TRAF. LAW § 1102 (McKinney 2019); OHIO REV. CODE ANN. § 2921.331(A) (West 2019); OR. REV. STAT. ANN. § 811.535 (West 2019); WIS. STAT. ANN. § 346.04(1) (West 2019); 32 C.F.R. § 234.6 (2019); 41 C.F.R. § 102-74.385 (2019). Unlike the Oregon Vehicle Code, which makes it a traffic violation to fail to obey a police officer, the Oregon Criminal Code’s lawful-order provision applies only to people who “refuse” to comply. *Compare* OR. REV. STAT. ANN. § 811.535 (West 2019), *with* OR. REV. STAT. ANN. § 162.247 (West 2019). The Oregon Court of Appeals distinguished between “refus[ing]” to obey, which “may imply a culpable mental state,” and “fail[ing] to comply,” which does not require the prosecution to prove a culpable mental state. *State v. Whitten*, 379 P.3d 707, 712 (Or. Ct. App. 2016); *see also* *State v. Illig-Renn*, 142 P.3d 62, 68 n.3 (Or. 2006) (distinguishing in dicta between “refusal” – which indicates that noncompliance must be “knowing or intentional” – and mere failure to obey an order). New Jersey punishes people who “[r]efuse to obey” lawful orders of emergency-relief personnel but this language does not appear in the state’s statute requiring obedience to Port Authority police. *Compare* N.J. STAT. ANN. § app. A:9-49(f) (West 2019), *with* N.J. STAT. ANN. § 32:1-154.18(3) (West 2019).

THE POWER OF POLICE OFFICERS TO GIVE “LAWFUL ORDERS”

Few statutes clarify whether a civilian must know that she was being addressed by an officer to be liable for failing to obey a lawful order. Even in a state that penalizes only “willful” noncompliance, it is unclear whether a person may deliberately disobey an off-duty officer whom the civilian reasonably did not recognize as a member of law enforcement. Only four states—Alaska, California, Oregon, and Pennsylvania—make some form of official identification a prerequisite to issuing binding orders.⁴¹

Courts in different states diverge on whether civilians must obey police officers who are off duty. For instance, in a wrongful-arrest action against an off-duty officer, the North Carolina Court of Appeals ruled that when a statute specifically penalizes “willful” disobedience, civilians only violate it when they know (or reasonably should know) that the person issuing the command is law enforcement.⁴² The off-duty officer in that case was wearing plainclothes. The court decided that because there was a triable issue of material fact about whether the plaintiff knew the officer was law enforcement, the plaintiff could proceed with a claim that the officer illegally arrested her for willful disobedience of a lawful order by failing to move her bus out of a travel lane.⁴³ The Alabama Court of Criminal Appeals interpreted a comparable statute differently. According to that court, since the statute did not make “any reference to whether the peace officer was on or off duty,” prosecutors did not need to prove that an officer was actively performing lawful duties when the defendant disobeyed him.⁴⁴

TABLE 2.
LAW-ENFORCEMENT IDENTIFICATION REQUIREMENTS

| Statutory or Regulatory Language | Jurisdictions |
|---|--|
| Law requires officers to be in uniform or otherwise identify themselves as law enforcement for their orders to be binding | Alaska, California, Oregon, Pennsylvania ⁴⁵ |

41. See *infra* Table 2.

42. *Glenn-Robinson v. Acker*, 538 S.E.2d 601, 611-12 (N.C. Ct. App. 2000). The court assumed, without deciding, that the officer’s order was lawful. *Id.* at 611 n.3.

43. *Id.* at 610-12.

44. *Sly v. State*, 387 So. 2d 913, 917 (Ala. Crim. App. 1980).

45. ALASKA STAT. ANN. § 28.35.180 (West 2019) (“A peace officer or firefighter regulating or directing traffic shall, upon request of a driver, produce evidence of authorization unless the officer or firefighter is wearing in view the badge or uniform of office.”); CAL. VEH. CODE § 2800(a) (West 2019) (applies when an officer “is in uniform and is performing duties pursuant to any of the provisions of this code”); OR. REV. STAT. ANN. § 162.247 (West 2019)

2. *The Scope of Officers' Authority*

On the scope of officers' authority, twenty-seven states and the District of Columbia provide that people must obey commands from officers with traffic-control powers. Eight states and the Code of Federal Regulations require people to obey police without reference to particular aspects of officer authority, though many of these laws are codified in statutory sections pertaining to traffic regulation. A final group of nine states specifies that police orders are binding only in particular contexts such as traffic control or emergency relief.

TABLE 3.
THE SCOPE OF OFFICERS' POWER TO GIVE BINDING COMMANDS

| Statutory or Regulatory Language | Jurisdictions |
|--|--|
| Law requires obedience to officers with traffic-control powers | Alabama, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Minnesota, Mississippi, New Hampshire, New Mexico, New York, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, Tennessee, Washington, Wisconsin, Wyoming ⁴⁶ |

(criminal law applies only if the defendant *knew* the officer was a peace officer); OR. REV. STAT. ANN. § 811.535 (West 2019) (traffic law applies only if officer was displaying star or badge); 75 PA. STAT. AND CONS. STAT. ANN. § 3102 (West 2019) (applies to orders given by "any uniformed police officer, sheriff or constable or, in an emergency, a railroad or street railway police officer").

46. ALA. CODE § 32-5A-4 (2019); ARIZ. REV. STAT. ANN. § 28-622 (2019); ARK. CODE ANN. § 27-49-107 (West 2019); COLO. REV. STAT. ANN. § 42-4-107 (West 2019); DEL. CODE ANN. tit. 21, § 4103 (West 2019); D.C. Code Mun. Regs. tit. 18, § 18-2000.2 (LexisNexis 2019); GA. CODE ANN. § 40-6-2 (West 2019); HAW. REV. STAT. ANN. § 291C-23 (West 2019); IDAHO CODE ANN. § 49-1419 (West 2019); 625 ILL. COMP. STAT. ANN. 5/18b-103.1(a) (West 2019); IND. CODE ANN. § 9-21-8-1 (West 2019); IOWA CODE ANN. § 321.229 (West 2019); KAN. STAT. ANN. § 8-1503 (West 2019); LA. STAT. ANN. § 32:56 (2019); MINN. STAT. ANN. § 169.02 (West 2019); MISS. CODE ANN. § 63-3-203 (West 2019); N.H. REV. STAT. ANN. § 265:3 (2019); N.M. STAT. ANN. § 66-7-4 (West 2019); N.Y. VEH. & TRAF. LAW § 1102 (McKinney 2019); N.D. CENT. CODE ANN. § 39-10-02 (West 2019); OHIO REV. CODE ANN. § 2921.331 (West 2019); OKLA. STAT. ANN. tit. 47, § 11-103 (West 2019); 1956 R.I. GEN. LAWS ANN. § 31-12-3 (West 2019); S.C. CODE ANN. § 56-5-740 (2019); TENN. CODE ANN. § 55-8-104 (West 2019); WASH. REV. CODE ANN. § 46.61.015 (West 2019); WIS. STAT. ANN. § 346.04 (West 2019); WYO.

THE POWER OF POLICE OFFICERS TO GIVE “LAWFUL ORDERS”

| | |
|---|--|
| Law requires people to obey police without reference to specific aspects of police authority | Maryland, Missouri, Nebraska, Oregon, Pennsylvania, South Dakota, Texas, United States (Code of Federal Regulations), Utah ⁴⁷ |
| Law requires obedience to orders given in specific contexts (e.g., traffic control or emergency relief) | Alaska, California, Florida, Michigan, Montana, Nevada, New Jersey, North Carolina, Vermont ⁴⁸ |

STAT. ANN. § 31-5-104 (West 2019). These laws are categorized according to statutory or regulatory text, not captions or chapter headings. See *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 242 (2004) (“A statute’s caption, . . . cannot undo or limit its text’s plain meaning.”). That said, note that the Delaware, District of Columbia, Georgia, Idaho, South Carolina, and Wyoming laws cited here have captions that are specific to traffic control. See, e.g., DEL. CODE ANN. tit. 21, § 4103 (West 2019) (captioned “[o]bedience to authorized persons directing traffic”).

47. MD. CODE ANN., TRANSP. § 21-103 (West 2019); MO. ANN. STAT. § 300.080 (West 2019); NEB. REV. STAT. ANN. § 81-2008 (West 2019); OR. REV. STAT. ANN. § 162.247 (West 2019); 75 PA. STAT. AND CONS. STAT. ANN. § 3102 (West 2019); S.D. CODIFIED LAWS § 34-29B-6 (2019); TEX. TRANSP. CODE ANN. § 542.501 (West 2019); UTAH CODE ANN. § 41-6a-209 (West 2019); 41 C.F.R. § 102-74.385 (2019). Like the laws discussed at the end of footnote 46, Pennsylvania’s lawful-order statute has a caption related to traffic control. 75 PA. STAT. AND CONS. STAT. ANN. § 3102 (West 2019) (captioned “Obedience to authorized persons directing traffic”). Note that Oregon has two separate provisions that make violating a lawful order a traffic violation and a criminal offense, respectively. The Oregon criminal provision makes no reference to particular aspects of police authority. OR. REV. STAT. ANN. § 162.247 (West 2019). The Oregon Vehicle Code refers to officers with traffic-control powers. OR. REV. STAT. ANN. § 811.535 (West 2019). Note also that some jurisdictions that have broadly applicable lawful-order provisions cited in Table 3 also have somewhat more specific laws. See, e.g., MD. CODE ANN., CRIM. LAW § 10-201(c)(3) (West 2019) (“A person may not willfully fail to obey a reasonable and lawful order that a law enforcement officer makes to prevent a disturbance to the public peace.”); 32 C.F.R. § 234.6(b) (2019) (requiring obedience to lawful orders of government personnel who are “authorized to maintain order and control public access and movement during . . . activities where the control of public movement and activities is necessary to maintain order and public health or safety”).
48. ALASKA STAT. ANN. § 28.35.180 (West 2019) (requiring drivers to obey lawful orders in traffic-control contexts); CAL. VEH. CODE § 2800(a) (West 2019) (requiring compliance with commands given when an officer “is performing duties pursuant to any of the provisions of [the California Vehicle Code]”); FLA. STAT. ANN. § 316.072(3) (West 2019) (requiring compliance with orders at the scene of an emergency); MICH. COMP. LAWS ANN. § 257.602 (West 2019) (requiring drivers to obey lawful orders in highway-traffic-control orders); MONT. CODE ANN. § 61-8-105 (West 2019) (requiring compliance with commands “pertaining to the use of the highways by traffic”); NEV. REV. STAT. ANN. § 475.070 (West 2019) (requiring compliance with orders given at the scene of a fire or other emergency); N.J. STAT. ANN. § 32:1-154.18(3) (West 2019) (requiring compliance with commands from Port Authority police officers on any air-terminal or marine-terminal highway); N.J. STAT. ANN. § app. A:9-49(f) (West 2019) (requiring people to obey officers who are directing traffic on highways); N.C.

Courts in the first group of twenty-eight jurisdictions disagree about whether traffic-control language prevents officers from issuing binding commands unrelated to directing traffic. For example, an Alabama law mandated compliance “with any lawful order or direction of any police officer invested by law with authority to direct, control or regulate traffic.”⁴⁹ The Alabama Court of Criminal Appeals declared that “[f]or an order of a police officer to be ‘lawful’ within the meaning of this section, it must be ‘directly related to the direction, control and regulation of traffic.’”⁵⁰ Similarly, the Kansas Court of Appeals stated that an almost identical statute does not encompass orders unrelated to traffic regulation. The court declared that, outside the traffic-control context, “a police officer’s command to a thief to stop” does not fall under the statute.⁵¹

Other courts have held that police authority over civilians extends beyond traffic regulation. The Ohio Court of Appeals ruled that the power to “direct, control, or regulate traffic exists by virtue of [the officer’s] position [N]othing in the plain language of [the Ohio lawful-order statute] limits it solely to orders or signals of police officers actively engaging in traffic direction, control, or regulation.”⁵² Thus, a person must obey “even if the police officer’s order is not made in the context of enforcing any traffic law.”⁵³ Florida,⁵⁴

GEN. STAT. ANN. § 20-114.1 (West 2019) (requiring compliance with “with any lawful order or direction of any law-enforcement officer or traffic-control officer invested by law with authority to direct, control or regulate traffic, *which order or direction related to the control of traffic* [sic].” (emphasis added)); VT. STAT. ANN. tit. 23, § 1013 (West 2019) (allowing enforcement officers to “make reasonable orders in enforcement of this title or to prevent or alleviate traffic congestion, property damage, or personal injury.”).

49. ALA. CODE § 32-5-15 (1975) (repealed 1980). The current version of the law is largely the same, but it adds that people must obey firefighters as well. ALA. CODE § 32-5A-4 (2019).
50. *Sly v. State*, 387 So. 2d 913, 915 (Ala. Crim. App. 1980) (quoting *Coughlin v. State*, 320 So. 2d 739, 742 (1975)); accord *Hirsch v. Mathews*, No. 5:10-cv-00134-HGD, 2017 WL 4641075, at *5 (N.D. Ala. May 31, 2017).
51. *State v. Greene*, 623 P.2d 933, 939 (Kan. Ct. App. 1981).
52. *State v. Thigpen*, 62 N.E.3d 1019, 1029 (Ohio Ct. App. 2016); cf. *State v. Redd*, No. 20284, 2004 WL 1949476, at *2 (Ohio Ct. App. Sept. 3, 2004) (applying the same statute but reaching the opposite conclusion, holding that a defendant could not be convicted of failing to obey a lawful order because the defendant’s conduct did not implicate “the direction, control, or regulation of traffic subject to the officer’s lawful authority”).
53. *Thigpen*, 62 N.E.3d at 1029-30.
54. *Koch v. State*, 39 So. 3d 464, 465 (Fla. Dist. Ct. App. 2010) (holding that a lawful-order statute was not limited to emergency situations only).

Hawaii,⁵⁵ and Minnesota⁵⁶ courts reached similar conclusions.

These variations in statutory language can lead to different outcomes in similar cases. In states that penalize mere “failure” to obey a lawful order, a civilian could be convicted even if her noncompliance stemmed from confusion rather than deliberate disobedience. This result would be less likely in states that punish only “willful” or “knowing” noncompliance. But even in the latter group of states, most jurisdictions do not require officers to identify themselves as law enforcement when giving orders. A civilian might be convicted of “willfully” disobeying an off-duty officer whom she reasonably did not recognize as police depending on how the particular state’s courts interpret the statute. And because few states clarify the scope of an officer’s authority to give commands, courts rule unpredictably about the situations in which orders are legally binding.

B. Generally Applicable Concerns About Lawful-Order Statutes and Regulations

Beyond questions arising from variations in lawful-order statutes and regulations, there are ways that civilian defendants might challenge disobedience prosecutions in any jurisdiction. A defendant could argue that a lawful-order statute is unconstitutionally vague, bring a federal civil-rights lawsuit against officers who enforce unlawful orders, and question whether an officer’s statement was actually an order in an individual case. For the reasons explained below, none of these strategies is very promising.

1. Vagueness Challenges

Neither state laws nor federal regulations define the term “lawful order”⁵⁷ even though it is a crime to disobey such a command. The Oregon Court of Appeals explained that the lawfulness of a police order is “frequently a complex

55. *State v. Russo*, 407 P.3d 137, 149 (Haw. 2017) (holding that a lawful-order statute applied “so long as a reasonable officer would conclude that the individual’s action is interfering or about to interfere with the officer’s performance of his or her duties”).

56. *City of St. Paul v. Willier*, 231 N.W.2d 488, 489 (Minn. 1975) (holding that a lawful-order statute applied beyond the context of an “order regulating traffic,” to cover the plaintiff’s refusal to produce his driver’s license on his own property).

57. One partial exception is that New Hampshire defines “lawful order” in the context of disorderly conduct offenses. N.H. REV. STAT. ANN. § 644:2 (2019). However, the state also has a general, open-ended lawful-order statute that applies to all instructions from police officers who have the authority to direct traffic. N.H. REV. STAT. ANN. § 265:3 (2019) (“No person shall willfully fail or refuse to comply with any lawful order or direction of any police officer invested by law with authority to direct, control or regulate traffic.”).

question” involving “vexing and intractable issues.”⁵⁸ The inquiry considers “an almost infinite variety of variables – some of which, such as the officer’s state of mind, could not possibly be known by a defendant.”⁵⁹ Since it is unlikely that a defendant would know whether an order is lawful, the court concluded that the Oregon legislature could not have intended to require “a culpable mental state regarding the lawfulness of the refused order.”⁶⁰ To do so would “severely complicate enforcement of the statute, if not render enforcement impossible.”⁶¹ In other words, the law assumes that civilians need not and often do not know whether they have the right to disobey an officer’s instructions. This built-in uncertainty leaves civilians vulnerable to police abuses because officers may use force to effectuate their orders⁶² and because disobedient civilians face criminal penalties including fines or jail time.⁶³

The uncertainties with lawful-order statutes and regulations have led some criminal defendants to challenge the laws as unconstitutionally vague. The vagueness doctrine has two prongs: fair notice and the avoidance of arbitrary enforcement. According to the U.S. Supreme Court, the Due Process Clause of the Fourteenth Amendment prevents governments from “taking away someone’s life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.”⁶⁴ Laws defining criminal offenses must define crimes “with sufficient definiteness that ordinary people can understand what conduct is prohibited in a manner that does not encourage arbitrary and discriminatory enforcement.”⁶⁵

Lawful-order statutes appear to violate both prongs for related reasons. On fair notice, the discussion above illustrates how unlikely it is that “ordinary peo-

58. *State v. Ruggles*, 242 P.3d 643, 646 (Or. Ct. App. 2010).

59. *Id.*

60. *Id.*

61. *Id.*

62. *See, e.g., Spry v. State*, 914 A.2d 1182, 1186–90 (Md. 2007) (analyzing officers’ power to make arrests for defying lawful commands); Orin Kerr & Bruce Schneier, *Encryption Workarounds*, 106 GEO. L.J. 989, 1004 n.81 (2018) (discussing officers’ power to effectuate their orders).

63. *See, e.g., FLA. STAT. ANN.* § 316.072 (West 2019) (classifying failure to comply with a lawful order as a second-degree misdemeanor); *OHIO REV. CODE ANN.* § 2921.331(C)(2) (West 2019) (defining the offense as a first-degree misdemeanor).

64. *Beckles v. United States*, 137 S. Ct. 886, 892 (2017) (quoting *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015)).

65. *Id.*

ple” have “fair notice” that an officer’s order is lawful. Moreover, the lack of “definiteness” about the meaning of the term “lawful order” creates a risk that lawful-order statutes will be enforced arbitrarily.

But several courts have rejected void-for-vagueness challenges. In response to the claim that ordinary people cannot be expected to conduct “sophisticated legal analysis” to determine whether an order is lawful, the Supreme Court of Oregon dismissed the argument as “an old saw.”⁶⁶ The justices presumed that lay civilians “understand the general parameters of the term ‘lawful order’” because people could consult “the published substantive law” on the subject.⁶⁷ According to the court, state doctrine assumes “that the publication and dissemination of a substantive law is sufficient to inform the public of its import.”⁶⁸

The Supreme Court of Washington accepted a vagueness argument in one case, *City of Seattle v. Rice*,⁶⁹ but subsequently retreated from that decision, which received criticism from three other state courts that reached contrary conclusions. In *Rice*, the court struck down a municipal trespass ordinance on lawful orders to leave a public place. The *Rice* court decided that “[t]he term ‘lawful order’ in the Seattle criminal trespass ordinance is not sufficiently specific to inform persons of reasonable understanding of what conduct is proscribed,” thus violating the vagueness doctrine’s notice requirement.⁷⁰ The Tennessee Supreme Court,⁷¹ the Alaska Court of Appeals,⁷² and the Arizona Court of Appeals⁷³ all rejected *Rice* explicitly, and the Washington Supreme Court impliedly overruled

66. *State v. Illig-Renn*, 142 P.3d 62, 70-71 (Or. 2006).

67. *Id.* at 71.

68. *Id.*

69. 612 P.2d 792 (Wash. 1980), *abrogated by* *State v. Smith*, 759 P.2d 372, 375 (Wash. 1988), *as recognized in* *State v. Harrington*, 333 P.3d 410, 423 (Wash. 2014).

70. *Id.* at 793-94.

71. *State v. Lyons*, 802 S.W.2d 590, 592 (Tenn. 1990) (“The term ‘lawful order’ while general in nature is not vague. The concept of ‘lawfulness’ is not inherently unconstitutionally vague, and ‘people of common intelligence need not always guess at what a statute means by ‘lawful’” inasmuch as that term must be considered in the context of the statements of law contained in relevant statutes and court rulings.” (quoting *State v. Smith*, 759 P.2d 372, 375 (Wash. 1988))).

72. *Johnson v. State*, 739 P.2d 781, 783 (Alaska Ct. App. 1987) (“We believe that any possible vagueness that the phrase, ‘after being lawfully directed [to leave the premises] personally by the person in charge,’ imports into the statute is cured by literally reading the statute in light of the applicable *mens rea*.”).

73. *State v. Burke*, 360 P.3d 118, 124 (Ariz. Ct. App. 2015) (“[W]e find the term ‘lawful order’ to be constitutional as written.”).

Rice in *State v. Smith*.⁷⁴ *Smith* involved an anti-harassment statute that forbids knowingly threatening another person in various ways “without lawful authority.”⁷⁵ The court held that the use of the term “lawful” did not render the statute unconstitutionally vague.⁷⁶ According to *Smith*, “None of our decisions, fairly read, establishes that the concept of ‘lawfulness’ is inherently unconstitutionally vague. We have found the concept problematic in some cases only because of the context in which it has been used.”⁷⁷

2. Federal Civil-Rights Claims Against Officers Who Enforced Unlawful Orders

Federal law also offers few statutory protections against abuses of the power to issue lawful orders. Although 42 U.S.C. § 1983 creates a remedy for violations of federal rights “under color of” state law, qualified-immunity doctrine makes it difficult to sue police for enforcing unlawful orders. Under § 1983, a civilian plaintiff can allege that an arresting officer violated her right to, for example, speak freely under the First Amendment or be free from false arrest under the Fourth Amendment.⁷⁸ Qualified immunity is a formidable barrier to these actions because it immunizes an officer from suit unless the plaintiff proves both

74. *Smith*, 759 P.2d at 379 (examining previous rulings, including *Rice*, and clarifying that the “concept of unlawfulness itself” is not inherently unconstitutionally vague). In 2014, a Washington appellate court stated that *Smith* impliedly overruled *Rice*. *State v. Harrington*, 333 P.3d 410, 423 (Wash. Ct. App. 2014), *review denied*, 337 P.3d 326 (Wash. 2014).

75. WASH. REV. CODE ANN. § 9A.46.020(1) (West 2019).

76. *Smith*, 759 P.2d at 375.

77. *Id.*

78. See, e.g., *Ortega v. City & Cty. of Denver*, Nos. 11-cv-02394-WJM-CBS, 11-cv-2395, 11-cv-2396, 11-cv-2397, 2013 U.S. Dist. LEXIS 12553, at *7-9 (D. Colo. Jan. 30, 2013). In a 2017 appeal of the dismissal of a criminal prosecution under a lawful-order statute, the Hawaii Supreme Court established a framework for evaluating the constitutionality of police commands to civilians who are filming or photographing officers in public. *State v. Russo*, 407 P.3d 137 (Haw. 2017). Though it declined to decide whether the officer’s order in the case was lawful, the court agreed with many federal courts that civilians have a First Amendment right to photograph and film police when they are publicly performing their duties. *Id.* at 149-50. The court stated that this right “may be limited by time, place, and manner restrictions so long as a reasonable officer would conclude that the individual’s action is interfering or about to interfere with the officer’s performance of his or her duties.” *Id.* at 149. Under this framework, “police orders . . . must be narrowly tailored to mitigate the actual danger or risk posed by the recording and leave open ample alternative channels to engage in the protected activity.” *Id.* Orders “must also be specific and ‘clear[ly] and unambiguous[ly]’ communicated by the officer.” *Id.* (quoting *State v. Guyton*, 351 P.3d 1138, 1143-44 (Haw. 2015)). It remains to be seen whether other jurisdictions will follow the Hawaii Supreme Court’s lead.

that the officer violated a constitutional right and that the right was “clearly established” at the time of the violation.⁷⁹ The qualified-immunity inquiry occurs at the motion-to-dismiss or summary-judgment phase of a case, and it “turns on ‘the objective legal reasonableness of the [officer’s] action, assessed in light of the legal rules that were clearly established at the time it was taken.’”⁸⁰ In practice, this means comparing the facts of the plaintiff’s case to those of other cases that were decided before the alleged misconduct occurred. The facts need not be identical, but they must be sufficiently comparable to demonstrate that the officer defendant was “on notice” that her conduct was illegal.⁸¹

The Supreme Court stated that qualified immunity protects “all but the plainly incompetent or those who knowingly violate the law.”⁸² Because police have broad power to give orders and overcoming qualified immunity requires a strong showing, it is difficult for § 1983 plaintiffs challenging police commands to demonstrate violations of clearly established law. An officer invoking qualified immunity can argue that she had probable cause to arrest a plaintiff for violating a lawful order⁸³ and, depending on the case, that the arrest was legitimate even though she also intended to retaliate against the plaintiff’s protected speech.⁸⁴ Officers are entitled to qualified immunity even if “they ‘reasonably but mistakenly conclude[d] that probable cause [wa]s present.’”⁸⁵

79. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)).

80. *Id.* at 244 (quoting *Wilson v. Layne*, 526 U.S. 603, 614 (1999)).

81. *Saucier*, 533 U.S. at 202 (“If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate.”).

82. *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

83. See *District of Columbia v. Wesby*, 138 S. Ct. 577, 586 (2018) (explaining that probable cause for an arrest exists when, to an objectively reasonable police officer, there is “a probability or substantial chance of criminal activity” (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983))); *id.* at 584 n.2 (“Because probable cause is an objective standard, an arrest is lawful if the officer had probable cause to arrest for any offense, not just the offense cited at the time of arrest or booking.”).

84. See *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019) (“It is not enough [for a plaintiff bringing a First Amendment-retaliation claim] to show that an official acted with a retaliatory motive and that the plaintiff was injured – the motive must cause the injury. Specifically, it must be a ‘but-for’ cause, meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive.” (emphasis omitted) (citing *Hartman v. Moore*, 547 U.S. 250, 260 (2006))); *id.* at 1726 (“The presence of probable cause should generally defeat a First Amendment retaliatory arrest claim.”).

85. *Wesby*, 138 S. Ct. at 591 (alterations in original) (quoting *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)).

3. Questioning Whether an Officer's Statement Was an Order

Given the failure of void-for-vagueness challenges and the difficulty of disputing an order's lawfulness, a civilian defendant might instead try to question whether an officer's statement was actually an order. This argument focuses on language, context, and demeanor rather than questions about the extent of police authority. The New York case *People v. Mann* is illustrative.⁸⁶ A police officer stopped a truck driver and indicated that he should move the truck onto a portable scale to allow the officer to determine whether the vehicle was bearing an excessive load. The officer admitted to phrasing the instruction indirectly:

I [the officer] proceeded to get the scales out of the trunk of the car. Mr. Mann [the truck driver] said, "Are you going to drive the truck on the scales?" I said, "Does that mean you are not?" He said, "Yes, it does," at which time he was placed under arrest.⁸⁷

The court held that the officer's question was not "a direct order" and therefore concluded that the driver was not guilty of disobeying a lawful command and reversed his conviction.⁸⁸

Despite the outcome in *Mann*, civilians are almost always better off appeasing police when it is unclear whether an officer is giving a command. A defense based on the order/request distinction is not guaranteed to succeed.⁸⁹ And for most people, the opportunity to parse an officer's language and demeanor in court by refusing to comply in the moment is not worth being forcibly restrained, arrested, thrown in jail, or tried for disobeying an order.⁹⁰ Lawful-order statutes and regulations exacerbate the power imbalance in civilian-police encounters by giving officers vast discretion to issue legally binding commands.

II. AN IMPROVED LAWFUL-ORDER STATUTE

This Part explains why an improved lawful-order statute is necessary, outlines the text of the model law, details its benefits, and describes how the legislation would work in practice.

86. 251 N.Y.S.2d 976 (Warren Cty. Ct. 1964).

87. *Id.* at 978.

88. *Id.*

89. See *Sly v. State*, 387 So. 2d 913, 915 (Ala. Crim. App. 1980) (holding that an officer's "'request' to see the defendant's driver's license constituted a lawful order").

90. See Cevallos, *supra* note 23.

A. *The Model Law Explained*

1. *Why Such a Law Is Necessary*

Following Sandra Bland’s death, reformers focused on several issues related to police training and diversion programs. Texas enacted the Sandra Bland Act of 2017, which requires officers to complete de-escalation training as part of their initial and continuing education.⁹¹ The law also obligates jails to divert people suffering from substance-abuse and mental-health problems to treatment and requires independent law-enforcement agencies to investigate jail deaths.⁹² But reformers did not address the lawful-order statutes that granted Officer Brian Encinia the power to enforce his commands.

Bland’s relatives recognized this omission as a “missed opportunity.”⁹³ They argued that Texas lawmakers should have included a provision authorizing only a citation, rather than an arrest, for minor traffic offenses such as failure to signal.⁹⁴ Sharon Cooper, Bland’s sister, decried the “lack of clarity” on whether she must “do everything that a police officer tells [her] to do.”⁹⁵

A better lawful-order statute would be a partial solution to that lack of clarity.⁹⁶ While it is virtually impossible to define prospectively what makes an order lawful in any given situation,⁹⁷ an improved law would make it harder to convict

91. See Johnathan Silver, *Texas Gov. Abbott Signs “Sandra Bland Act” into Law*, TEX. TRIB. (June 15, 2017, 4:00 PM), <https://www.texastribune.org/2017/06/15/texas-gov-greg-abbott-signs-sandra-bland-act-law> [https://perma.cc/C5CT-PE5G].

92. *Id.*

93. Johnathan Silver, “*Sandra Bland Act*” *Doesn’t Address Cause of Her Arrest, Family Says*, TEX. TRIB. (May 13, 2017, 11:00 PM), <https://www.texastribune.org/2017/05/13/sandra-bland-family-response> [https://perma.cc/8TXF-LC3R]; see also Sam DeGrave, *Sandra Bland Act Passes Senate Unanimously After Key Provisions Dropped*, TEX. OBSERVER (May 12, 2017, 7:37 PM), <https://www.texasobserver.org/sandra-bland-act-passes-senate-unanimously-key-provisions-dropped> [https://perma.cc/NRN2-6LMZ] (discussing the deleted provision prohibiting incarceration for minor traffic violations).

94. Silver, *supra* note 93.

95. *Id.*

96. Reformers must also remember, however, that legislation alone cannot solve problems such as certain officers expecting excessive deference from civilians or juries refusing to rule against officers who act unlawfully. See Safia Samee Ali & William Sherman, *Why Police Officers Often Aren’t Convicted for Using Lethal Force*, NBC NEWS (July 30, 2016, 4:07 PM), <https://www.nbcnews.com/news/us-news/why-police-officers-often-aren-t-convicted-using-lethal-force-n619961> [https://perma.cc/G6XN-WS3F] (discussing judges and jurors’ tendency to “give heavy weight to an officer’s word”).

97. See *State v. Ruggles*, 242 P.3d 643, 646 (Or. Ct. App. 2010).

people for trivial noncompliance. This reform is particularly important because vagueness challenges fail to thwart prosecutions under current statutes and regulations.

Revised legislation could also send the message that police cannot expect unconditional obedience.⁹⁸ At a minimum, it would reduce the impression created by current laws that police authority is nearly unlimited. A new statute may also influence police-department trainings and policies about the level of deference officers can expect from civilians and the extent to which they can press charges against noncompliant civilians.⁹⁹

2. *The Model Law's Text and Features*

The proposed model lawful-order statute reads as follows:

- a. It is illegal for a civilian to willfully refuse to comply with a law-enforcement officer's lawful order.
 1. A civilian defendant does not act willfully unless the officer explicitly warns the civilian that noncompliance may result in prosecution. In addition, if the officer is not in uniform, the officer must explicitly identify herself as law enforcement.
 2. The willfulness requirement is satisfied if a civilian defendant deliberately disobeys an officer's order after the officer objectively fulfilled Section (a)(1)'s requirements.
- b. An order is "lawful" only if it is reasonably related to the fulfillment of law-enforcement duties.
 1. For the purposes of this statute, law-enforcement duties include only:
 - A. preventing, detecting, investigating, and stopping crimes;

98. Cf. Janice Nadler, *Expressive Law, Social Norms, and Social Groups*, 42 LAW & SOC. INQUIRY 60, 70-71 (2017) (arguing that law can "shap[e] group values and norms, which in turn influence individual attitudes").

99. See, e.g., SEATTLE POLICE DEPARTMENT MANUAL § 6.220 (2019), <http://www.seattle.gov/police-manual/title-6---arrests-search-and-seizure/6220---voluntary-contacts-terry-stops-and-detentions> [<https://perma.cc/E67K-B9MG>] (outlining state statutory provisions requiring civilians to provide identification to officers); CHI. POLICE DEPARTMENT, GENERAL ORDINANCE G02-02, THE FIRST AMENDMENT AND POLICE ACTIONS (2012), <http://directives.chicagopolice.org/directives/data/a7a57be2-1287e496-14312-87ee-09b7a8a4b7d34441.html> [<https://perma.cc/9BUR-VC6D>] (explaining Chicago Police Department policy on complying with federal and municipal free-speech law).

- B. protecting people and property from harm;
- C. apprehending people suspected of crimes;
- D. enforcing the law;
- E. regulating traffic; and
- F. assisting in emergency relief, including by administering first aid.

2. As an affirmative defense, defendants prosecuted under this statute may challenge the objective reasonableness of an order. Objective reasonableness depends on whether there was a reasonable nexus between the order and one of the enumerated law-enforcement duties.

The first sentence of the model statute is comparable to the text of many current laws. However, the statute as a whole would impose heightened requirements for proving “willful” noncompliance and clarify the scope of officers’ power to issue commands. Section (a) uses the phrase “willfully” to establish that civilians are liable only for deliberate noncompliance.¹⁰⁰ The use of the word “refuse” (and Section (a)(2)’s use of the word “deliberately”) underscores this mental-state requirement.¹⁰¹ Moreover, unlike any current laws, Sections (a)(1) and (2) provide that a defendant is liable only if the officer is in uniform or explicitly

100. Some but not all authorities use “willfully” in this way; Section (a)(1)’s warning requirement is a failsafe in case a particular court disagrees. *See, e.g., Koch v. State*, 39 So. 3d 464, 466 (Fla. Dist. Ct. App. 2010) (holding that, in a lawful-order statute, “[w]illfully” means intentionally, knowingly, and purposely” (quoting FLA. STANDARD JURY INSTRUCTIONS (CRIMINAL) 28.7 (FLA. SUPREME COURT 2008))); *Glenn-Robinson v. Acker*, 538 S.E.2d 601, 611 (N.C. Ct. App. 2000) (stating that “[t]he word ‘willfully’ [in a lawful-order statute] means ‘something more than an intention to commit the offense [and] implies committing the offense purposely and designedly in violation of law.’” (quoting *State v. Stephenson*, 10 S.E.2d 819, 823 (1940))). *But see* MODEL PENAL CODE § 2.02(8) (AM. LAW INST. 1962) (“A requirement that an offense be committed wil[l]fully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears.”). Courts have also interpreted the term “willfully” to indicate deliberateness in analogous contexts such as laws against contempt and failing to appear in court. *See, e.g., Hutchison v. State*, 27 P.3d 774, 782 (Alaska Ct. App. 2001) (holding that if the defendant “did not act with the conscious purpose of avoiding his obligation to appear, he did not act ‘willfully’”); *El-Dehdan v. El-Dehdan*, 978 N.Y.S.2d 239, 248 (N.Y. App. Div. 2013) (noting in a contempt case that “[t]he word ‘willfully’ . . . differentiates between deliberate and unwitting conduct” (alteration in original) (quoting *Bryan v. United States*, 524 U.S. 184, 191 (1998))).

101. *See State v. Illig-Renn*, 142 P.3d 62, 65, 68 n.3 (Or. 2006) (differentiating in dicta between “refusal,” which indicates that noncompliance must be “knowing or intentional,” and mere failure to obey an order (citation omitted)); *State v. Whitten*, 379 P.3d 707, 712 (Or. Ct. App. 2016) (distinguishing between “refus[ing]” to obey, which “may imply a culpable mental state,” and “fail[ing]” to comply, which does not require the prosecution to prove a culpable mental state).

identifies herself as law enforcement *and* warns the defendant that noncompliance may result in prosecution. The model statute would not solve the problem of civilians hardly ever knowing in the heat of the moment whether an order is actually “lawful,” but the law would give civilians more notice about the risks of disobedience. It would also save courts from trying to determine whether a particular order was a command rather than a request and resolve questions about when civilians must obey off-duty officers. Given officers’ power, responsibility, and training, they should bear the burden of clear communication and identification.

On the scope of officer authority, Section (b) specifies when police are entitled to command civilians—including contexts outside of traffic control. Orders are lawful only if they are reasonably related to the fulfillment of enumerated law-enforcement duties.¹⁰² The first five tasks are derived from Indiana, Michigan, and Ohio laws outlining police responsibilities.¹⁰³ The final task, emergency relief, is in Nevada’s lawful-order statute.¹⁰⁴ Section (b)’s exclusive list of duties would help resolve confusion in several courts about the situations in which officers may issue binding commands. It is broad enough to encompass the range of law-enforcement responsibilities without duplicating the ambiguity and resulting uncertainty of current laws.

The proposed model statute also addresses two harms caused by overly broad lawful-order statutes: wrongful escalation and unfair convictions. The model statute would not replace accountability mechanisms such as punishment for excessive force, but it would reduce officers’ ability to use civilian confusion or trivial disobedience to justify escalating confrontations. It would do so by changing the message that current statutes send to police. While existing legislation does little to clarify the scope of “lawful orders”—suggesting that officers have almost-unlimited power to issue and enforce commands—the model stat-

102. See *People v. Jennings*, 347 N.Y.S.2d 818, 821 (Village Ct. Millerton 1973) (holding that commands are binding only if they are given “reasonably and in a manner designated to accomplish a proper objective”).

103. IND. CODE ANN. § 10-11-2-21(b) (West 2019); MICH. COMP. LAWS ANN. § 92.4 (West 2019); OHIO REV. CODE ANN. § 737.11 (West 2019). The model statute does not include preserving the peace, as the Michigan and Ohio statutes do, because the concept is too ambiguous to mitigate the uncertainty about when orders are binding.

104. NEV. REV. STAT. ANN. § 475.070(2) (West 2019).

ute would establish that police orders are binding only in more limited circumstances. Combatting the perception that officers are all-powerful would help avoid tragic altercations and improve police-community relations.¹⁰⁵

Although the revised statute would not change the powerful incentive to obey police commands—even illegal ones—the new law would make it harder to convict people who did not realize they were being given a binding order. Disobedience prosecutions may arise from encounters, such as traffic stops of individual drivers, that do not produce physical evidence or involve third-party witnesses.¹⁰⁶ Unless the officer had a dashboard or body camera that was turned on and working properly¹⁰⁷ or the civilian recorded the incident, testimony from the defendant and the officer may be the only evidence at trial. Because most Americans trust police,¹⁰⁸ officers will probably receive more deference from judges and juries under current laws that do not define the term “lawful order.” Under the model statute, a defendant would have more potential defenses, including that her disobedience was not “willful”; that the officer failed to identify herself as law enforcement; that the officer did not warn the defendant that non-compliance would result in prosecution; and that the order was not reasonably related to fulfilling specific law-enforcement duties. The absence of a warning or visual or verbal identification could be decisive if the defendant obtained police camera footage or recorded the altercation. In cases where video or audio evidence is unavailable, the defense could still argue that the officer failed to issue a warning or that the officer failed to properly identify herself. Asserting that the officer violated a bright-line rule would likely be easier than attempting to parse an officer’s words, tone, and body language to claim that her statement was a request rather than an order.

105. See Debo P. Adebile, *Policing Through an American Prism*, 126 YALE L.J. 2222, 2225-27, 2256 (2017) (describing how police violence and misconduct harms community trust and explaining that, in Dallas, Texas, “[m]ore trainings, new de-escalation policies, and the release of police data led to a decrease in both crime rates and excessive-force complaints”).

106. See, e.g., *State v. Thigpen*, 62 N.E.3d 1019, 1030 (Ohio Ct. App. 2016) (holding that two officers’ testimony was sufficient to support a disobedience conviction).

107. See Editorial, *Officers, Turn On Your Body Cameras*, WASH. POST (July 22, 2017), https://www.washingtonpost.com/opinions/officers-turn-on-your-body-cameras/2017/07/22/41290ff0-6e3e-11e7-b9e2-2056e768a7e5_story.html [<https://perma.cc/6SDS-VY3Q>] (discussing statistics on failures to properly use police cameras).

108. See Ali & Sherman, *supra* note 96; Niall McCarthy, *The Institutions Americans Trust Most and Least in 2018*, FORBES (June 29, 2018, 7:24 AM), <https://www.forbes.com/sites/niallmccarthy/2018/06/29/the-institutions-americans-trust-most-and-least-in-2018-infographic/#487a048f2fc8> [<https://perma.cc/8QAJ-7HKN>] (reporting that fifty-four percent of U.S. adults trust police “a great deal” or “quite a lot,” making law enforcement the third most trusted institution in the country behind the military and small businesses).

Section (b) could come into play even if the officer satisfied Section (a). Similar to how courts consider whether there is a reasonable connection between a crime and a location to be searched when applying Fourth Amendment law,¹⁰⁹ juries in lawful-order cases should consider whether there is a reasonable nexus between the command and fulfilling a police objective. Questions of reasonableness will always be fact specific, but a reasonable-nexus test tied to a specific list of duties is better for defendants than current statutes offering no clarification about the meaning of the term “lawful order.”

Finally, the model statute would make it somewhat easier for plaintiffs to win false-arrest actions under the Fourth Amendment and 42 U.S.C. § 1983. A plaintiff bringing such a claim must show that an officer “intentionally confined him without his consent and without justification.”¹¹⁰ The officer will defeat a false-arrest claim if she demonstrates that she “ha[d] probable cause to believe that the suspect committed a crime in [her] presence,” such as disobeying a lawful order.¹¹¹ Probable cause “is not a high bar” and “requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.”¹¹² Under current, open-ended lawful-order statutes and regulations, an officer has an easier time establishing a probability that her order was lawful and that the civilian had a culpable mental state (if one is required). Under the model statute, an officer would lack probable cause to arrest a noncompliant civilian unless the officer first provided the warning and identification that Section (a) mandates. There would be no crime unless the bright-line rules were met.¹¹³ Civilians ar-

109. *E.g.*, *United States v. Odeh*, 553 F.3d 150, 151 (2d Cir. 2008) (per curiam) (“A probable cause inquiry focuses on whether the evidence known to officers indicates a likelihood that items appropriate for seizure might be found at the location to be searched.”); *United States v. Crews*, 502 F.3d 1130, 1136-37 (9th Cir. 2007) (explaining that, in the probable-cause context, a “reasonable nexus” means that it would be “reasonable to seek the evidence at the location indicated in the affidavit”).

110. *Dufort v. City of New York*, 874 F.3d 338, 347 (2d Cir. 2017) (quoting *Weyant v. Okst*, 101 F.3d 845, 852 (2d Cir. 1996)); *see also* 13 LOUIS R. FRUMER & MELVIN I. FRIEDMAN, *PERSONAL INJURY – ACTIONS, DEFENSES, DAMAGES* § 59.01 (Matthew Bender, rev. ed. 2019) (“In order to prevail on a cause of action for false imprisonment or false arrest, a plaintiff must establish that[:] (1) the plaintiff was unwillingly detained by the defendant, (2) the defendant intended that the plaintiff be detained, and (3) the detention was accomplished without lawful authority.”).

111. *District of Columbia v. Wesby*, 138 S. Ct. 577, 586 (2018).

112. *Id.* (citations omitted).

113. *See Gonzalez v. City of Schenectady*, 728 F.3d 149, 155 (2d Cir. 2013) (“To ascertain the existence of probable cause, we look at the facts as the officers knew them in light of the specific elements of each crime.”); *Montoya v. City of Albuquerque*, No. CIV 03-0261 JB/RHS, 2004

rested without warning or identification could argue persuasively that, for qualified-immunity purposes, the statutory text put officers on notice of the requirement. In addition, Section (b) would provide a clearer framework for contending that an officer lacked probable cause to believe that her order was lawful (because the command was not reasonably related to law-enforcement duties), though that would be a difficult argument to make in many cases.

B. *Applying the Statute*

Applying the model statute to real cases illustrates how the proposed law would operate in practice. In the Sandra Bland case, the officer framed his question about Bland’s cigarette as a request rather than an order (“You mind putting out your cigarette, please? If you don’t mind?”).¹¹⁴ He did not warn her that she could be prosecuted for refusing. Thus, Bland had no obligation to obey under the model law. But suppose Encinia said, “I order you to extinguish the cigarette and will arrest you if you don’t.” Although this command meets the requirements in Section (a), it would not be binding under the model statute’s reasonable-nexus test in Section (b). The cigarette did not prevent Encinia from speaking to Bland, obtaining her license, or handing her a ticket. The officer might contend that Bland could use the cigarette to burn his hand, but there was no evidence to support such speculation. An order to put out the cigarette would not be reasonably related to Encinia’s duty to enforce traffic laws and Bland would not have been liable for disregarding the instruction. Much as Encinia could not search Bland’s car for weapons without probable cause according to the Fourth Amendment, he would lack the authority to compel Bland to extinguish the cigarette on a whim.

Although the command to put out the cigarette would not be binding, Encinia’s order to exit the car would be mandatory under Section (b) of the model statute. As the Supreme Court said when interpreting federal law in *Mimms*, officers may order motorists out of vehicles to move the conversation away from oncoming traffic and onto the side of the road.¹¹⁵ The order to exit satisfies the model statute’s reasonable-nexus test because the command helps officers carry out their traffic-control duties safely.

More important than the lawfulness of Encinia’s orders, however, is that Encinia appeared to escalate the situation because he expected—but did not receive—total deference from Bland. Encinia revealed this expectation when his

U.S. Dist. LEXIS 28220, at *14 (D.N.M. May 10, 2004) (“A police officer cannot give an unlawful order and then base probable cause for an arrest on a citizen’s refusal to obey that unlawful order.”).

114. Grim, *supra* note 2.

115. *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977).

temper flared after Bland asked why she needed to extinguish the cigarette. Within moments, the officer was raising his voice and threatening Bland for failing to exit the vehicle. Of course, Encinia might have been irritated for reasons unrelated to Bland's apparent noncompliance, and no statute can guarantee that officers will remain calm in the field. But the fact that he repeatedly claimed to be "giving . . . a lawful order" illustrates the danger of lawful-order statutes that seem to demand unconditional obedience.¹¹⁶ The model law would help lessen this perception by clarifying and narrowing the scope of officers' power to issue binding commands.

To understand how the model statute would thwart unjust prosecutions, consider again *People v. Mann*, the case in which a court reversed a civilian's conviction for failing to drive his truck onto a portable scale after an officer suggested that he should do so.¹¹⁷ Although the reviewing court agreed that the order was unclear, it is unjust that the defendant was convicted in the first place, and the appeal might have failed if the officer denied phrasing his instruction as a question.¹¹⁸ The model statute's warning and identification requirements would put similarly situated defendants on firmer ground. Without a warning or display of law-enforcement authority, there could be no conviction. These bright-line rules would help protect defendants who might otherwise struggle to convince a jury that they reasonably did not understand that they had to obey the officer.

The proposed law is no silver bullet, as Malaika Brooks's case shows. In Brooks's case, the Seattle police officers' command to sign a speeding ticket would have been lawful under the model statute. The officers were in uniform and there was a reasonable nexus between the order and the officers' duty to enforce traffic laws because, at the time, motorists in Washington had to sign tickets.¹¹⁹ The injustice was not that the order was unlawful or that the officers failed to give an adequate warning¹²⁰ but that the officers tased a pregnant woman three times and dragged her to the pavement for refusing to sign a speeding ticket. Additional reforms, such as strengthened bans on the use of excessive force,¹²¹ are therefore needed to punish police who go too far when enforcing

116. Grim, *supra* note 2.

117. 251 N.Y.S.2d 976 (Cty. Ct. 1964).

118. *Id.* at 978.

119. Adam Liptak, *A Ticket, 3 Taser Jolts and, Perhaps, a Trip to the Supreme Court*, N.Y. TIMES (May 14, 2012), <https://www.nytimes.com/2012/05/15/us/police-taser-use-on-pregnant-woman-goes-before-supreme-court.html> [<https://perma.cc/QNG3-XP6J>].

120. *Id.* (noting that the officers deigned to brandish the Taser before they shocked Brooks).

121. Without proposing specific language, Monu Bedi has suggested that police-department manuals could be useful sources for drafting anti-excessive-force statutes. States could criminalize

commands. The model statute can only be one part of a larger effort to combat police abuses.

Still, the model law would be an important part of that effort, for the reasons explained above. By making it easier to prove that an order is unlawful, the statute could reinforce new, accompanying excessive-force legislation. The model law and a robust excessive-force ban would interact to reduce police officers’ ability to use unlawful orders to rationalize violence against civilians.

III. POTENTIAL OBJECTIONS

Law enforcement might object that the model law would tie officers’ hands, while police-reform advocates might argue that the statute would fail to reduce officer misconduct. This Part explains why the model statute would increase police accountability without excessively limiting officers’ discretion.

A. *Objections from Law Enforcement*

Police might contend that the model statute’s warning requirement would put an excessive burden on officers who must act quickly based on imperfect

police offenses that presently result in demotion or termination, such as violating departmental excessive-force policies (including bans on using chokeholds). Monu Bedi, *Toward a Uniform Code of Police Justice*, 2016 U. CHI. LEGAL F. 13, 15, 30-31. A statutory solution is necessary because police union protections often prevent police departments from enforcing their own policies. See generally Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712 (2017) (describing how union bargaining agreements prevent accountability by, among other things, allowing officers to challenge disciplinary findings and permitting labor arbitrators to reduce penalties after departments impose them).

The Philadelphia Police Department’s Use of Force Decision Chart is a useful starting point for legislative reform. In brief, this chart provides that no force is authorized when a suspect is compliant and responds to verbal commands; that “moderate/limited” force such as a control hold (but not prohibited neck restraints) is permissible in the face of passive physical resistance (e.g., locking arms or tightening the body); and that the use of electronic-control weapons such as Tasers is authorized only if a suspect “is physically aggressive or assaultive and there is a[n] immediate likelihood that they may injure themselves or others.” PHILA. POLICE DEP’T, DIRECTIVE 10.2: USE OF MODERATE/LTD. FORCE 5 (2015), <https://www.phillypolice.com/assets/directives/D10.2-UseOfModerateLimitedForce.pdf> [<https://perma.cc/XA5A-DMAE>]. The rubric retains flexibility because it does not attempt to describe all situations, but it helps illustrate how officers should adjust their use of force depending on the level of resistance they encounter. A statutory version of such a rubric would provide officers and courts with clearer guidance as to what constitutes excessive force and might help prevent horrific incidents such as the case of Malaika Brooks.

information in perilous situations.¹²² This objection fails for two reasons. First, the warning requirement would not impose a significant burden because it is common for police to invoke their law-enforcement status to induce compliance, as Encinia tried to do when he told Bland, “I’m giving you a lawful order.”¹²³ The model statute would simply require that, for the noncompliant civilian to be convicted, the officer would need to say, “I’m giving you a lawful order *and disobedience is a crime.*” The benefits of giving notice to civilians outweigh a minor inconvenience for officers. Second, police could still arrest someone for committing a crime other than disobeying a lawful order without giving the model statute’s warning.

One could argue that the threat of prosecution encourages civilian compliance and that, by creating heightened requirements for convictions, the warning and identification provisions would wrongfully diminish the incentive to obey. But compliance is not an end in itself. Police deserve obedience only when their commands are lawful, and the model law advances the important goal of clarifying when that is the case. Most people do not know the contours of lawful-order statutes; a person should not be convicted of a crime simply because she did not recognize an off-duty officer or understand the consequence of disobedience. Trained police, rather than frightened civilians, are in the best position to identify themselves and communicate clearly.

Officers might also object that courts are ill-equipped to second-guess whether an order was reasonable.¹²⁴ However, courts already evaluate the reasonableness of officer behavior in excessive-force cases. Under the Supreme Court’s 1989 holding in *Graham v. Connor*, courts consider “whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them” at the scene, without the benefit of hindsight.¹²⁵ By introducing

122. See *Graham v. Connor*, 490 U.S. 386, 396-97 (1989) (“With respect to a claim of excessive force, . . . [t]he 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.”).

123. Grim, *supra* note 2.

124. See *Winzer v. Kaufman Cty.*, 916 F.3d 464, 482 (5th Cir. 2019) (Clement, J., dissenting in part) (accusing a majority opinion on qualified immunity of “undermin[ing] officers’ ability to trust their judgment during those split seconds when they must decide whether to use lethal force. Qualified immunity is designed to respect that judgment, requiring us to second-guess only when it clearly violates the law. The standard acknowledges that we judges—mercifully—never face that split second. Indeed, we never have to decide anything without deliberation—let alone whether we must end one person’s life to preserve our own or the lives of those around us.”).

125. 490 U.S. at 397 (citations omitted).

more specific requirements for convictions than current lawful-order statutes, the model law would streamline judges and juries’ analyses in lawful-order cases.

B. *Objections from Police-Accountability Advocates*

A police-accountability advocate might question the usefulness of a statutory solution to the lawful-order problem. For instance, even if the statute requires officers to identify themselves and give explicit warnings, civilians will probably not know that officers are bound by these requirements. This is particularly important given that those who have the most contact with law enforcement, and are thus most likely to be harmed by the lawful-order problem, are predominantly poor people who are probably unfamiliar with the laws governing police conduct.¹²⁶ Even if a civilian is aware of the new lawful-order statute, she would probably still be vulnerable to police abuse because questioning an officer risks forcible restraint, arrest, incarceration, and trial for disobedience. A higher chance that the civilian would win at trial after all that suffering would not significantly lessen her incentive to obey the officer.

These points are true and sobering. But they are not grounds for maintaining current lawful-order statutes and regulations and the problems they cause. Reformers should enact new legislation while recognizing the limits of that approach and pursuing other mechanisms to increase police accountability.

One might worry that police will use the threat of prosecution as yet another tool to coerce civilians – even when officers’ orders are actually unlawful. But as explained above, officers already have this tool in their arsenal. Requiring officers to inform civilians of the potential for prosecution would at least help people who do not know the risks of noncompliance.

A critic might also contend that the model statute is overly deferential to police. As Chase Madar has argued, courts applying *Graham* have demonstrated that objective-reasonableness frameworks simply leave too much room for deference to officers’ “own personal assessment of the threat at the time.”¹²⁷ Most Americans trust police¹²⁸ and it is difficult to convince a judge or jury that an

126. See Adam Looney & Nicholas Turner, *Work and Opportunity Before and After Incarceration*, BROOKINGS INSTITUTION (March 2018), https://www.brookings.edu/wp-content/uploads/2018/03/es_20180314_looneyincarceration_final.pdf [https://perma.cc/AD46-6SXG] (finding that “[t]wo years prior to the year they entered prison, 56 percent of individuals have essentially no annual earnings (less than \$500), the share earning between \$500 and \$15,000 is 30 percent, and average earnings (among those who worked) was \$12,780”).

127. Chase Madar, *Why It’s Impossible to Indict a Cop*, NATION (Nov. 25, 2014), <https://www.thenation.com/article/why-its-impossible-indict-cop> [https://perma.cc/5JDB-CKWC].

128. McCarthy, *supra* note 108.

officer overstepped her bounds. The model statute is more specific than *Graham*, but it still employs an objective reasonable-nexus test. If the goal of the proposed law is greater accountability, why build on a framework that largely failed to provide accountability?

First, the model statute pushes back against reflexive deference to officers. While *Graham* did little to define “reasonableness” and thus invited judges and juries to accept officers’ threat assessments, the model statute would require fact finders to consider the relationship between orders and a defined list of responsibilities. Making the analysis of officers’ means and ends more specific would clarify the limits of police authority and reduce the likelihood of unfair convictions. There is always a risk that judges and juries will defer to police, but Section (b) of the model statute would still help reduce current statutory ambiguities about the scope of officers’ power to issue orders. This intervention is especially significant given that courts refuse to strike down lawful-order statutes as unconstitutionally vague.

Second, there is not an obvious statutory alternative to objective-reasonableness tests. Lawmakers must balance the need for accountability with the state interest in enabling officers to make quick decisions in dangerous situations. It is unlikely that any state would enact a law that permits fact finders to second-guess officers with the benefit of hindsight. Furthermore, subjective tests would make accountability even harder to achieve by requiring a showing that an officer *knew* her order lacked justification.

CONCLUSION

Current laws grant police vast discretion to issue and violently enforce commands. Those who disobey these orders can be detained, hauled into court, and prosecuted. This Comment proposes a model statute to help address the lawful-order problem by requiring law-enforcement officers to identify themselves and explicitly warn civilians about the consequences of noncompliance. The proposed law would also narrow and clarify the contexts in which civilians must obey police and would make clear that orders are lawful only if reasonably related to fulfilling law-enforcement duties. Although no law can solve police misconduct, the model legislation is worth pursuing not only for the practical benefits it confers but also for the values it conveys. It stands for the proposition that freedom requires carefully limiting officers’ power to demand obedience. The proposed statute would be a step toward that important goal.