The Wrong Line Between Freedom and Restraint: The Unreality, Obscurity, and Incivility of the Fourth Amendment Consensual Encounter Doctrine

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I. INTRODUCTION

In the world of legal classification, the line between freedom and restraint is clearly one of the most important, and one the law should be most anxious to get right. On the one side lies freedom to move around physically—the essence of what most people mean by “liberty.” While not explicitly defined in the Constitution, this liberty is protected by several of its provisions: the due process clauses of the Fifth and Fourteenth Amendments,1 the right to habeas corpus, the Thirteenth Amendment’s ban on slavery, and the Fourth Amendment’s protection against unreasonable seizures. Together they ensure against interference with personal freedom of movement in the form of bondage, incarceration, civil confinement, arrest, or police detention short of arrest. Freedom is thus the constitutional state of nature.

On the other side of this legal line is governmental interference with physical freedom. With the exception of slavery, which is prohibited outright, the Constitution generally requires valid individual grounds, determined in accordance with procedural fairness, before personal liberty may be restricted. For the most part, the constitutional provision governing initial restraints on liberty is the Fourth Amendment’s prohibition on unreasonable seizures.2 A seizure may reasonably be conducted if there is some objective indication of past, present, or future criminality. For an arrest, the prototypical seizure, there must be

1. City of Chicago v. Morales, 527 U.S. 41, 53 (1999) (“We have expressly identified this ‘right to remove from one place to another according to inclination’ as ‘an attribute of personal liberty’ protected by the Constitution.” (citations omitted)).
probable cause to believe a crime has been committed and that the person to be arrested committed it. For a brief investigative seizure—a *Terry*\(^3\) stop—the officer must have reasonable suspicion that crime is afoot, or that the suspect has committed a past felony.\(^4\)

The Supreme Court has also recognized, however, a form of interaction between persons and police that does not constitute a Fourth Amendment seizure, and is therefore outside constitutional scrutiny. It has denominated these interactions "consensual encounters."\(^5\) According to the Court, a consensual encounter is itself an exercise of freedom by the individual who is involved in it.\(^6\) The dividing line between a *Terry* stop and a consensual encounter thus marks the boundary between restraint and freedom under the Fourth Amendment.

Under the consensual encounter doctrine, the Court has upheld substantial investigative questioning by uniformed, armed police officers. The officers' usual aim is to develop enough incriminating information, through the citizen's response or her consent to search, to seize the individual for further investigation, or to make an arrest. Even when the consensual encounter produces no evidence of criminality, the procedure itself provides, from the law enforcement perspective, a valuable demonstration of police presence. Requiring no objective indication of criminality, a consensual encounter can be initiated for no reason or for any reason at all, including the kind of inchoate hunches and suspicions disallowed even for stops, the least intrusive form of seizure. Consensual encounters are thus a fertile field for the racial stereotyping that is, unfortunately, prevalent in every area of unregulated police discretion.

The Supreme Court's principal rationale for holding that consensual encounters are not seizures is that not all interactions between citizens'
and police involve restraint. As long as a reasonable person feels free to terminate the encounter, according to the Court, no seizure has occurred. Cooperation by the individual is not deemed submission to a show of official authority, but voluntary acquiescence. The Court has proceeded to find that a reasonable person would feel free to decline police investigative questioning, requests for identification, and requests for permission to search. As with other doctrines, constitutional fact makes constitutional law. The Court’s conclusions about how the world operates—in the form of legislative facts judicially noticed—shape the contours of its constitutional rule. By defining a “seizure” by how a reasonable person would experience a particular interaction with a law enforcement officer, the Court has linked the scope of the constitutional term to a real world behavioral construct.

Given the importance of this behavioral construct, one might expect that the Court’s image of the world would pass several measures of validity. One is accuracy: how well it accords with reality. Does the Court’s view of how a reasonable person reacts to an investigative encounter get the “constitutional fact” right? Second is clarity, or what is sometimes called rules transparency: how well the rule can be understood by its intended audience, lay and professional. The doctrine of consensual encounters, as presently formulated, relies on citizens to know and assert their right to terminate unwanted interactions with the police. To a large degree, it is the citizen who must police the boundary between freedom and restraint. The third basis of evaluation, therefore, concerns our expectations that laypeople will learn their rights and assert them, and the effect of such behavior on the civility with which citizens and police engage each other.

This Article proceeds in Part II by examining the place of consensual encounters in the law of seizure of the person. Part III presents a critical analysis of the lack of reality in the Court’s notion of a reasonable person, on both conceptual and practical planes, including a summary of the costs of its errors. In Part IV, the Article imagines what the world

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10. Id. at 434–35.
11. Id. at 436.
would be like if we all became the reasonable people the Court thinks we already are. This includes a guide to becoming a reasonable person, some accounts of what happened to individuals who took the Court's vision of police-citizen contact to heart, and the significant collateral costs for civility in interactions that flow from investigative encounters.

This Article contends that, overall, the consensual encounter doctrine is based on unreal assumptions, and thereby mislocates the divide between freedom and restraint. In addition, this line is quite obscure, but clarifying it invites confrontation between police and citizens. These costs of the doctrine argue for reform. Part V then proposes several alternatives: greater reliance on empirical evidence of how people perceive investigative encounters; a presumption that an investigative encounter amounts to a seizure, requiring Fourth Amendment oversight; or, at the least, a requirement that police state their business at the outset of any encounter with citizens.

II. THE LAW OF SEIZURE OF THE PERSON

Legal regulation of police-citizen interaction stems directly, and almost entirely, from the U.S. Constitution. As a general matter, under the Fourth Amendment some factual justification is necessary to "seize" a person. Although the Supreme Court has never comprehensively canvassed the law of seizure of the person in one opinion, an overall hierarchy has been established over the years. What emerges is a two-tiered structure of interactions between police and the public amounting to Fourth Amendment seizures, each tier having its own degree of intrusion, required evidentiary basis, and right to search. The two levels, outlined in brief in this section, are arrest and stop. Beneath arrest and stop, and thus outside the ambit of regulation under the Fourth Amendment, is the so-called consensual encounter. As can be seen in


the following review, the greater the degree of intrusion—measured by
the duration of restraint and the possibility of an accompanying search—
the greater the likelihood of criminality required to trigger the procedure.
Implicit in the entire structure is the assumption that some specific
indication of criminality is necessary under the Fourth Amendment to
"seize" an individual. Restraint, in other words, requires factual
justification.\footnote{6

A. Arrest

The paradigm seizure of the person is an arrest: the taking of an
individual into custody for the purpose of charging that person with a
crime. To make a valid arrest, the officer must have probable cause
to believe a crime was committed and the person to be arrested committed
it.\footnote{17 In addition to the basic right to restrain the arrestee for a period of
time,\footnote{18 an arrest, the Court has held, carries with it the right to conduct
searches incident to the arrest.\footnote{19 This includes a search of the arrestee’s
person,\footnote{20 packages and containers in the arrestee’s possession,\footnote{21 and
items within other areas of the arrestee’s immediate control, including,
for motorists, the interior of the vehicle.\footnote{22 Where the arrest takes place
indoors, the police may conduct a protective sweep of closets and other

\footnote{16. Florida v. Royer, 460 U.S. 491, 498 (1983) (stating that an individual “may not
be detained even momentarily without reasonable, objective grounds for doing so”).
17. Probable cause has been described by the Supreme Court as a “fair
based on a warrant this probable cause requirement comes directly from the terms of the
Fourth Amendment itself. To avoid creating a disincentive to use a warrant, probable
cause is also a necessary element in unwarranted arrests. Wong Sun v. United States,
371 U.S. 471, 479 (1963). Probable cause justifies stopping or arresting the suspect,
whether or not he will be taken into custody, even when the stop is conducted for ulterior
18. An arrest entitles the officer to take the arrestee into custody and hold that
person for an extended period of time solely on the officer’s finding of probable cause.
The Court has held that “the detached judgment of a neutral magistrate is essential if the
Fourth Amendment is to furnish meaningful protection from unfounded interference with
liberty.” Gerstein v. Pugh, 420 U.S. 103, 114 (1975). The Fourth Amendment thus
requires a “fair and reliable determination of probable cause as a condition for any
significant pretrial restraint of liberty, and this determination must be made by a judicial
officer either before or promptly after arrest.” Id. at 125. The Court has gone on to hold
that judicial determinations of probable cause are presumptively reasonable if held
within forty-eight hours of the arrest. County of Riverside v. McLaughlin, 500 U.S. 44,
20. Id. at 236.
21. Id.
752, 763 (1969).}
spaces adjoining the place of arrest. If the arrestee is to be jailed, an inventory search of his possessions is also permissible.

Finally, an arrestee under the control of the police may be subjected to police interrogation or may spontaneously make incriminating statements. Although an arrested suspect may not be subjected to legal, psychological, or physical pressure to incriminate himself, the restraint authorized by a lawful arrest makes the individual subject to police efforts to elicit incriminating statements. From the investigative point of view, then, an arrest opens the door to a criminal prosecution while simultaneously making possible further investigative measures, some of which focus on securing a waiver of other constitutional protections.

B. Investigatory Stops

Authority for, and conditions upon, investigatory stops were first established in *Terry v. Ohio* in 1968. *Terry* held that the Fourth Amendment governs all intrusion by agents of the public upon personal security, no matter how limited the scope of the intrusion. Having brought investigatory stops within the terms of a Fourth Amendment seizure, the Court declined the suggestion that such seizures be treated as arrests requiring probable cause. Instead, employing an overall reasonableness assessment, the Court balanced the government need to perform the stop against the degree of intrusion on the freedom of the suspect. From this analysis, the Court derived the conclusion that investigatory stops could be conducted where “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion.” It distinguished such permissible interferences with personal security from those based on “nothing more substantial than inarticulate hunches” or “inchoate and unparticularized

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23. Maryland v. Buie, 494 U.S. 325, 334 (1990). Beyond that, the police may sweep other parts of the building if they have reasonable suspicion that the area to be swept harbors a person “posing a danger” to them. *Id.* at 327.
26. *Id.* at 19.
27. *Id.* at 25–27.
28. *Id.* at 22–27.
29. *Id.* at 21. Elsewhere, the Court described its holding as allowing stops “where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot.” *Id.* at 30.
30. *Id.* at 22.
suspicion," neither of which lawfully justifies a stop. The rubric most commonly used to describe the quantum of evidence required for a lawful stop is "reasonable suspicion."

The Court has extended investigatory stops to past crimes. It has also elaborated on the concept of reasonable suspicion in a number of cases. But the basic point of Terry remains unchanged: "[T]he detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." For the police, stopping an individual opens up a range of investigative techniques: a request for identification, questioning of the suspect, a request for consent to search him or his property, and, if there is reasonable suspicion that he is armed and dangerous, a frisk of the suspect's outer clothing.

C. Consensual Encounters

As it was approving and defining the conditions for investigative stops in Terry, the Supreme Court distinguished such seizures from other interactions between the police and citizens: "Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." It did not take long for this

31. Id. at 27.
34. Cortez, 449 U.S. at 417–18. Terry had described this "demand for specificity in the information upon which police action is predicated [as] the central teaching of this Court's Fourth Amendment jurisprudence." Terry, 392 U.S. at 21 n.18. A stop, the Court has said, may last as long as is reasonably necessary to confirm or dispel the officer's suspicions. United States v. Sharpe, 470 U.S. 675, 686 (1985). The Court is agreed, however, that at some point a stop cannot be justified on the basis of reasonable suspicion but becomes tantamount to an arrest and thus requires probable cause. Id. at 685. In United States v. Place, 462 U.S. 696 (1983), the Court held that a ninety-minute detention alone rendered the search unreasonable. Id. at 709–10. Otherwise, the Court has assessed the issue as one of reasonableness. Important factors in this assessment include the duration of the stop, whether the police diligently pursue the investigation, Sharpe, 470 U.S. at 686 (1985), and whether the suspect is moved during the detention, Florida v. Royer, 460 U.S. 491, 504–05 (1983).
37. Terry, 392 U.S. at 19 n.16. See also id. at 34 (White, J., concurring) ("[T]here is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way."); id. at 32–33 (Harlan, J., concurring). Justice Harlan wrote:
concept to grow into a doctrine of its own. In *United States v. Mendenhall*, a plurality of the Court distinguished police action amounting to a seizure from “an encounter that intrudes upon no constitutionally protected interest” in the following terms:

> We adhere to the view that a person is “seized” only when, by means of physical force or show of authority, his freedom of movement is restrained. . . . As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no [seizure]. . . .

> We conclude that a person has been “seized” within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.

The standard of whether a reasonable person would feel free to leave was modified slightly in *Florida v. Bostick*, a case concerning drug interdiction on interstate buses. Given that Bostick was not literally “free to leave” the bus without unexpectedly interrupting his journey, the Court reformulated the *Mendenhall* test to read: “[T]he appropriate inquiry is whether a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter.”

Implicit in these cases is the assumption that when an individual agrees to police requests to engage in conversation, she is not submitting to a “show of authority” of the kind that would convey the message that she is not free to leave. In short, basic to the consensual encounter doctrine is the notion that an approach and inquiry by law enforcement officers does not constitute the “show of authority” that produces a

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Any person, including a policeman, is at liberty to avoid a person he considers dangerous. If and when a policeman has a right instead to disarm such a person for his own protection, he must first have a right not to avoid him but to be in his presence. That right must be more than the liberty (again, possessed by every citizen) to address questions to other persons, for ordinarily the person addressed has an equal right to ignore his interrogator and walk away; he certainly need not submit to a frisk for the questioner’s protection.

*Id.*

39. *Id.* at 552.
40. *Id.* at 553–54. This formulation was again used by the plurality in *Florida v. Royer*, *460 U.S. 491*, 502 (1983), and finally employed by a majority in *Immigration & Naturalization Serv. v. Delgado*, *466 U.S. 210*, 215 (1984).
42. *Id.* at 436.
seizure when the individual submits.\textsuperscript{44}

In \textit{California v. Hodari D.},\textsuperscript{45} the Court assumed that if an officer’s action amounted to a show of authority sufficient to convey the message that the person was not free to leave (in this case, a chase by a clearly identifiable police officer), a seizure could result.\textsuperscript{46} It held, however, that a seizure did not occur until either the individual actually submitted to the show of authority or the officer applied physical force.\textsuperscript{47} \textit{Hodari D.} thus adds a new element to the \textit{Mendenhall-Bostick} test, but not one that comes into play very often. The usual scenario is one in which the individual \textit{does} acquiesce to the officer’s approach, and the dispute centers on whether or not the officer’s behavior, \textit{in toto}, would convey to the reasonable person a lack of freedom to avoid the encounter.

This line of cases defined a class of permissible police behavior that falls short of a seizure. The police can approach an individual, ask questions including whether or not he will consent to a search of his person or belongings, and even request identification or travel tickets.\textsuperscript{48} Most importantly, because these actions can all be taken without invoking Fourth Amendment protections, the police need not have particular or objective bases for their behavior. The same “inarticulate hunches” and “inchoate suspicions” (not to mention racial stereotypes)\textsuperscript{49} that are insufficient bases for an investigatory stop are perfectly acceptable predicates to a consensual encounter. Furthermore, while the Court has held that “refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure,” the officer is under no obligation to so inform the individual.\textsuperscript{50} Nor need the officer inform the individual that he or she is free to terminate the encounter.\textsuperscript{51} Indeed, the Court recently held that a “[you] are free to go” warning was not required by the Fourth Amendment at the termination of a valid traffic stop to mark the beginning of a consensual interrogation by the officer.\textsuperscript{52}

\textsuperscript{44} \textit{Bostick}, 501 U.S. at 434.
\textsuperscript{46} \textit{Id.} at 625–26.
\textsuperscript{47} \textit{Id.} at 629.
\textsuperscript{48} United States v. Mendenhall, 446 U.S. 544, 555 (1980).
\textsuperscript{49} See \textit{Bostick}, 501 U.S. at 441 n.1.
\textsuperscript{50} \textit{Id.} at 437 (citations omitted).
\textsuperscript{51} \textit{Mendenhall}, 446 U.S. at 555.
\textsuperscript{52} Ohio v. Robinette, 519 U.S. 33, 39–40 (1996). \textit{Robinette} squarely addressed the issue of a law enforcement obligation to articulate the line between detention and freedom to depart. The defendant had been stopped for speeding on an interstate highway. After his driver’s license was taken by the officer and checked, the officer decided not to issue him a speeding ticket. At that point the officer asked the defendant to get out of his car and step to the rear of his vehicle. Upon returning the defendant’s license, the officer asked him, “One question before you get gone: [A]re you carrying
Instead, the Court has based the determination of whether police interaction is a consensual encounter or a seizure on a "totality of the circumstances" analysis. It has indicated a number of factors to be considered in this assessment. As stated in Terry, a police officer may approach a citizen, either in or out of uniform. Self-identification by that officer as a police or narcotics officer does not by itself convert the encounter into a seizure. Nor does the display of weapons in the sense any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?" Id. at 35-36. When the defendant said that he did not have any contraband in the car, the officer asked if he could search the vehicle. The defendant agreed, and the ensuing search turned up a small amount of drugs. The Ohio Supreme Court found that the search was invalid since it was the product of an unlawful seizure. State v. Robinette, 653 N.E.2d 695, 699 (Ohio 1995). The court used the case to establish a bright-line rule, requiring a police officer to inform a motorist that his legal detention has been concluded before the police officer may engage in any so-called consensual interrogation. Id. at 697. The court reasoned that "the transition between detention and a consensual exchange can be so seamless that the untrained eye may not notice that it has occurred." Id. at 698. It noted the special circumstances of a consensual encounter following a traffic stop, stating:

Most people believe that they are validly in a police officer's custody as long as the officer continues to interrogate them. The police officer retains the upper hand and the accouterments of authority. That the officer lacks legal license to continue to detain them is unknown to most citizens, and a reasonable person would not feel free to walk away as the officer continues to address him.

Id. For this reason, the Ohio Supreme Court held that any attempt at consensual interrogation following a detention for a traffic stop "must be preceded by the phrase '[a]t this time you are legally free to go' or by words of similar import." Id. at 699.

On certiorari, the majority in the United States Supreme Court chose to view this issue as one that had been addressed under consensual search doctrine in its previous case law. Citing the leading consensual search case, Schneckloth v. Bustamonte, 412 U.S. 218 (1973), the Court reiterated that no warnings of any kind about the right to refuse needed to precede a request for consent to search. Analogizing the consensual encounter to a consent search, the Court rejected the Ohio bright-line rule in favor of a totality-of-the-circumstances test, again taken from Schneckloth. Robinette, 519 U.S. at 39. On remand the Ohio Supreme Court, while still suppressing the evidence against the defendant, chose not to impose a warning statement as a matter of state constitutional law. State v. Robinette, 685 N.E.2d 762, 765-67 (Ohio 1997).

Notice to the individual that the stop had ended and the consensual phase of the encounter had begun would have been particularly appropriate for the reasons given by the Ohio Supreme Court in its first decision. Even more than the usual consensual encounter, the transition from detention to freedom ought to be marked by some notice to the citizen. Regrettably, the Robinette case seems to put to rest the possibility of any additional notice of this kind being given.

53. Robinette, 519 U.S. at 39; Bostick, 501 U.S. at 439; see also United States v. Hill, 199 F.3d 1143, 1147 (10th Cir. 1999).
54. Terry v. Ohio, 392 U.S. 1, 22-23 (1968).
of having them on the officer’s person.56 Questioning alone is not a seizure, as long as the police do not convey a message that compliance is required.57 This is true even when the questioning takes place in a highly confined area, such as a bus58 or workplace.59

The most common single determinant of a seizure is physical touching or detention of the person.60 Undertaking steps that interfere with the individual’s freedom of movement, such as retaining a driver’s license or airplane ticket, may also create a seizure.61 Pointing a gun at the individual may also have this effect.62 While following an individual in a patrol car has been held not to communicate to the reasonable person that he is not free to go about his business,63 a full-fledged chase could communicate such a belief.64 Other factors to which the Supreme Court has alluded, in dictum, include the threatening presence of several officers,66 a gesture or signal summoning the person rather than an approach or request by the officer,66 and “the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.”67

61. Florida v. Royer, 460 U.S. 491, 501 (1983). The suspect in Royer also was moved from the airport concourse and had his baggage removed from the airline baggage system. Id. at 494. For an example in which police retained identification but the court found no seizure, see United States v. De La Rosa, 922 F.2d 675, 678 (11th Cir. 1991).
62. See Bostick, 501 U.S. at 437. For a somewhat amusing instance in which pointed guns resulted in a seizure, see Fontenot v. Corimer, 56 F.3d 669, 672 (5th Cir. 1995).
64. Hodari D., 499 U.S. at 628–29. However, the seizure will not be effected until the object of the chase submits, is caught, or at the least has been physically touched. Id.
66. Id. at 555.
67. Id. at 554.
D. Interactions Between the Levels

The three levels of police interactions with the public reviewed above, including the required basis, the permissible duration, and the police right to search, are summarized in Table I.

**TABLE I**

<table>
<thead>
<tr>
<th>Police-Citizen Interaction</th>
<th>Required Basis</th>
<th>Duration of Interaction</th>
<th>Right to Search</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arrest</td>
<td>Probable cause</td>
<td>Until first appearance (presumptively forty-eight hours in absence of warrant)</td>
<td>The arrestee and the items within arrestee’s immediate control</td>
</tr>
<tr>
<td>Stop</td>
<td>Reasonable suspicion of ongoing criminal activity or past felony</td>
<td>Limited period reasonably necessary to confirm or dispel suspicion</td>
<td>Frisk of suspect’s outer clothing if a reasonable suspicion that the suspect is armed and dangerous exists</td>
</tr>
<tr>
<td>Consensual Encounter</td>
<td>None</td>
<td>No limit</td>
<td>None</td>
</tr>
</tbody>
</table>

Litigation over the admissibility of evidence produced by police-citizen contact, usually raised in a motion to suppress, concerns mainly the question of which box appropriately characterizes the event. For example, the defendant may claim that what the prosecution terms a “stop” was in effect an “arrest,” but was not supported by probable

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68. The individual may consent to a broader search than the police have a right to perform. Florida v. Jimeno, 500 U.S. 248, 249–51 (1991); Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973).
cause, rendering the arrest illegal. Or a defendant might contend that while a stop was justified, the ensuing search exceeded the permissible limits of the accompanying frisk. The initial classification of the type of encounter, by triggering a discrete set of conditions, will thus set the parameters for the legality of the police action. By the same token, the facts of the encounter will help determine the classification of the action as an arrest, stop, or consensual encounter. The line between each level of intrusion has enormous practical effects on the admission or exclusion of evidence.

Furthermore, as the courts have long recognized, and the police well know, facts discovered through one form of interaction can provide the basis to move to a more intrusive level. Thus, if in the course of a stop the police discover evidence justifying an arrest—the scenario in Terry itself and countless other cases—they may then intensify their intrusion consistent with the law of arrest. Indeed, the function of a stop is to make that determination—in the words of the Supreme Court opinions, to “confirm or dispel” the initial suspicion for the stop. There is thus a dynamic quality to the three-level hierarchy portrayed in Table I.

It is this quality that gives consensual encounters their special importance as a police practice. Information developed during the encounter, including even the fact and manner of avoiding or resisting it, can give rise to reasonable suspicion for a stop. This, of course, triggers further intrusions and the possibility of moving on to an arrest. Since questions may be directed to the individual, including the question whether she will consent to a search, it is not uncommon for a consensual encounter to lead directly to probable cause to arrest.

71. See Cloud, supra note 2, at 273.

The rule applier (be it police officer or judge) must select the relevant characteristics of the present event, and compare them to the facts of the rule-generating events to determine which of the three rules governs. If—as is likely—the past and present events being compared are not identical, the decisionmaker will have the opportunity to identify differences among the potentially relevant properties of each event.

Id.
72. Place, 462 U.S. at 702; Florida v. Royer, 460 U.S. 491, 500 (1983) (stating that the function of the stop is to “verify or dispel” the initial suspicion for the stop).
74. See Bostick, 501 U.S. at 437–38; Royer, 460 U.S. at 507.
Coupled with the fact that consensual encounters require no initial objective justification, this makes them a powerful and tempting police tool.

In addition, even when they do not succeed in triggering further investigation, consensual encounters constitute a satisfying signal of police presence. This was true from the first establishment of full-time police forces in the United States in the mid-nineteenth century. "[T]he rise of the police was... an event of huge significance. The police interposed a constant, serious, full-time presence into the social spaces of the cities." With the increase in attention to "community policing," this function of the police has regained prominence. One aspect of community policing is order maintenance through the enforcement of quality of life crimes, on the theory that this practice will reduce the incidence of more serious crime. Police approaches to instigate consensual encounters provide a fruitful means of both making their presence felt and deterring such quality of life violations.

III. UNREALITY AND ITS COSTS

The doctrine of consensual encounters, as established by the Supreme Court and administered by the lower courts, is by and large a fictional construct, exempting from the coverage of the Fourth Amendment significant interferences with personal liberty. The Supreme Court's

75. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 70 (1993).
78. Because community policing is a theory of police practice and not a legal doctrine, cases invoking it by name are few. For one example recognizing the link between community policing and consensual encounters, see Augustin v. Florida, 666 So. 2d 218, 220 (Fla. Dist. Ct. App. 1995) (Altenbernd, J., concurring in part and dissenting in part). Judge Altenbernd stated that "it is sometimes difficult to distinguish appropriate policies of community policing from policies that allow or encourage good police officers to engage in conduct that the public will perceive as harassment." Id. Judge Altenbernd recommends that the local police department "review its policies of authorizing deputies to repeatedly request 'consensual' searches from an individual" when the police have no reason to stop that person and the policy of "'chasing a citizen on foot when he or she declines to engage in a 'consensual encounter.'" Id.
doctrine is flawed in conception by its use of the reasonable person standard, and its picture of a reasonable person is simply out of touch with societal reality. Briefly put, most people have neither the knowledge nor the fortitude to terminate unwanted interactions with the police. This Part explores these conceptual and practical deficiencies in the law of consensual encounters.

A. The Reasonable Person Standard

As noted above, the Court has phrased the question of whether an individual has been seized as "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." 79 The Court has specified that this "reasonable person" is a reasonable innocent person. 80 On the surface this reasonable person standard appears quite reasonable itself. If a reasonable person would not feel restrained under the circumstances, then why should a particular suspect be heard to complain that he perceived himself to be seized? The reasonable person formulation has the advantage of creating an objective, uniform, national standard—one that will not vary with the susceptibilities of the particular individual. 81 Furthermore, this one-size-fits-all test will be easier for the police to learn and apply, a general concern for the Court in its Fourth Amendment jurisprudence.

This approach to the seizure/nonseizure divide is similar to the Court's treatment of the meaning of "search" under the Fourth Amendment. The question of whether police action amounts to a search depends on whether it intrudes on a "justifiable" or "reasonable" expectation of privacy 82—in other words, an expectation society is prepared to recognize as reasonable. 83 This analysis turns on "societal understandings" of the degree of protection from intrusion of certain areas or activities. 84

It is important to recognize that defining a seizure by the response of a "reasonable person" necessarily means that some people who personally perceive themselves to have been seized will not be found to have been. In other words, even in theory this concept does not hit the mark in all cases. It operates like a bell curve, with the reasonable person defined as a certain number of standard deviations from the mean. Figure 1 illustrates.

80. Id. at 438.
81. Cf. Berkemer v. McCarty, 468 U.S. 420, 442 & n.35 (1984) (holding that the question of whether an individual is in custody for purposes of Miranda warnings is based on a uniform, objective standard and not the subjective beliefs of the suspect).
84. See id.
In this sense, the reasonable person standard by its nature excludes “outliers,” those with genuine but statistically unusual perceptions. This is true even if, in a statistical sense, the reasonable person standard accurately captures the beliefs and attitudes of the general population—if, in terms of Figure 1, the curve accurately reflects the population and the lines of demarcation are correctly drawn on the curve. As discussed below, the outlier problem becomes even more serious if those conditions are not met.

The uniform conception of the reasonable person ignores not only individual differences in reaction to police encounters, but group differences as well. If discrete minorities within the population would not feel free to terminate an encounter where members of the majority would, those distinctions will be ignored. Professor Tracey Maclin has argued that “[w]hen assessing a challenged police confrontation, the

86. See infra text accompanying notes 101–42.
Court should consider the race of the citizen and how the citizen's race might have influenced his attitude toward the encounter. The history of police treatment of black men, Maclin contends, means that black men will experience fear of possible violence or humiliation and distrust that police will respect their rights. To the extent that black men, or any other societal subgroup, deviate from the norm posited by a uniform reasonable person standard, that standard will obviously not accurately reflect their experience of a given encounter.

The second problem with a "reasonable person" standard is that it lacks content. The standard derives, of course, from tort law, where it figures prominently. In that field, however, its facial indeterminacy is a strength, not a weakness. This is so because the jury, not a judge, employs the standard. In negligence cases, for example, the question of what a reasonable person would have done under the circumstances is generally for the jury because of "the public's desire to have its conduct judged by the layman ('the man in the street') rather than by the more sophisticated and expert judgment of the trained lawyer, whose judicial experience may have given him a biased point of view." Not only is application of the reasonable person standard ordinarily a jury question, but, also, the standard is generally not further defined or elaborated in jury instructions. Explication of how a reasonable person ought to behave flows unmediated from the twelve reasonable people on the jury.

This source of content is not available in most determinations of how a reasonable person would react to an engagement with police. Because these decisions are made by the judge on a motion to suppress, the issue is solely one of judge-made and -applied law. Where then are judges,

89. DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 22 (1999) (making the same point with regard to juveniles).
90. Cf. Anita Bernstein, Treating Sexual Harassment with Respect, 111 HARV. L. REV. 445, 465 ("Neither 'reasonable' nor 'person' gives the factfinder much content to explore.").
91. Francis H. Bohlen, Mixed Questions of Law and Fact, 72 U. PA. L. REV. 111, 116 (1924). See also Fleming James, Jr., Functions of Judge and Jury in Negligence Cases, 58 YALE L.J. 667, 668–87 (1949). The jury is supposed to bring "the common sense wisdom of the layman to bear on the problems of finding facts" and evaluating conduct. Id. at 685. See also Railroad Co. v. Stout, 84 U.S. (17 Wall.) 657, 663–64 (1873).
especially those on the Supreme Court, to look to learn the attributes and
behavior of the reasonable person?

In theory this is an empirical question which has, potentially at least,
an empirical answer. As with the somewhat analogous issue of
reasonable expectations of privacy, the Court has not treated the
"reasonable person" as a fact-based construct. Instead, it has built the
reasonable person almost entirely by ipse dixit. At most, the Court's
opinions contain a listing of the factors that point toward or away from
the seizure or nonseizure conclusion of the Court. In none of the
majority or plurality opinions is there any attempt to link these factors to
the real world responses of those subjected to the police procedure at
issue. There is no reference whatsoever to any empirical data on how
the public perceives a particular practice or cluster of practices. 93

While there is general agreement on the Court that "reasonable
person—free to terminate" is the appropriate test, the dissents in these
cases also do not invoke any empirical proof supporting their application
of the test. 94 Their disagreement centers on the conclusion to be drawn
by a reasonable person from the facts of each encounter. While there
tends to be a bit more analysis in the dissents than in the majority or
plurality opinions, their assertions about human behavior have no better
factual grounding.

The reasonable person is often described as "sensible, ordinary,
moderate, or average," 95 and "a prudent, sensible, centrist member of
society, who shares its understandings." 96 The British refer to the
hypothetical reasonable person as "the man in the Clapham omnibus." 97
It is this reasonable person whom the Supreme Court—and under its
guidance the lower courts—has made up virtually out of whole cloth.

Who, then, is the American "reasonable person" when it comes to
police interactions? A review of the case law above provides some
characteristics. He is someone who knows his rights and feels free to

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93. For discussion of such data, see infra text accompanying notes 205–10.
dissenting) ("I agree that the appropriate question is whether a passenger who is
approached during such a sweep "would feel free to decline the officers' requests or
otherwise terminate the encounter." What I cannot understand is how the majority can
possibly suggest an affirmative answer to this question." (citation omitted)). But see
95. Bernstein, supra note 90, at 456.
96. Id. at 465.
exercise them. He is not intimidated by the police, whether they are alone or in a group, in uniform or in plain clothes. He knows that when questioned, he can refuse to answer, and when asked for identification, he can decline to comply. He always feels free to end the encounter even if physically constrained by his surroundings and even if the police persist in their attempts to engage him in conversation. He rests secure in the knowledge that no physical harm will result and that the police cannot legally draw an inference of criminality from his refusal to cooperate. In short, he regards an encounter with police as no different from one with a panhandler on the street, a religious proselytizer at his doorstep, or a Hare Krishna in the airport. This is the American version of the man in the Clapham bus: the hypothetical reasonable person on the Greyhound bus.

This reasonable person is a figment of the Court’s imagination in both the literal and figurative senses of the term. Literally, the Court seems to be drawing on, and projecting from, its own personal experiences. If its reasonable person resembles any real human being, it is a white, middle-class, educated professional—just like most members of the Court itself. This is a distinctly odd concept to employ when positing the hypothetical citizen on an interstate bus. It is perhaps less surprising considering that “ways of looking at what is reasonable and what is not... inevitably derive from the point of view of those who dominate law-making in a given society.”

For a recent example of the Justices’ reliance on personal experience, in this case concerning whether law enforcement manipulation of luggage in an overhead rack amounts to a search, see the following excerpt from the oral argument in Bond v. United States, 529 U.S. 334 (2000):

QUESTION: What do I do with the following problem for me, which is, I fly quite a lot up to Boston and so forth, and I put bags all the time in the upper thing, and people are always moving them around. They [sic] push them, they lift them up, they move them to other places, and if they’re soft they would feel just what was in the inside. Now, that happens all the time, and I do it myself, frankly. I move somebody else’s bag and push mine in, and I imagine the interstate bus here was no different.

So if that happens all the time, how can I say that your client has some kind of special expectation, since in my own experience, people are always handling this soft luggage?


In my view, the only thing the past three decades have established about the Katz test (which has come to mean the test enunciated by Justice Harlan’s separate concurrence in Katz) is that, unsurprisingly, those ‘actual (subjective) expectation[s] of privacy’ ‘that society is prepared to recognize as “reasonable,”’ bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable.

Id. (alteration in original) (internal citations omitted).

100. CALABRESI, supra note 85, at 22.
The Court’s “reasonable person” is figuratively a figment of the imagination in the sense that it appears to bear little relation to reality. As the next two sections describe, the Court ascribes to the reasonable person a level of knowledge of rights and willingness to exercise them that few, if any, people actually possess.

B. Knowledge

It is highly unlikely that the average citizen, or reasonable person, is aware of the notion of consensual encounters with police, let alone the doctrine’s parameters. To begin with, citizens’ awareness of even the broad outlines of their constitutional rights is severely limited.\(^{101}\) The basic right to be free from unreasonable seizures is, for most people, either unknown or fuzzy in the extreme. Many, if not most, individuals are unlikely to be aware that they may have a consensual encounter with a police officer.\(^{102}\) The notion is not so intuitive as to immediately spring to mind. It is at least as probable that the reasonable person would believe that all inquiries from police officers require attention and response. As Lord Devlin commented in 1958:

> It is probable that even today, when there is much less ignorance about these matters than formerly, there is still a general belief that you must answer all questions put to you by a policeman, or at least that it will be the worse for you if you do not.\(^{103}\)

Even those informed few who know they may, in some circumstances, decline to cooperate will almost certainly be unaware of the specifics of such a rule. As reviewed above, one of the problems with the

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102. But see Maclin, supra note 87, at 254 (stating that black law students and lawyers know their rights but do not feel free to ignore the police); Carol S. Steiker, Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers, 94 Mich. L. Rev. 2466, 2534, 2537 (1996) (arguing that the public’s knowledge of substantive Fourth Amendment doctrines exceeds its knowledge of restrictions on the exclusionary rules, but not attempting to quantify the public’s knowledge of either police conduct rules or the rules governing remedies for conduct rule violations).

consensual encounter doctrine is the fineness of the line that separates a consensual encounter, which the citizen is free to terminate, from a stop, which he is not. The Court has noted that this standard is “necessarily imprecise” and that “what constitutes a restraint on liberty prompting a person to conclude that he is not free to ‘leave’ will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs.”

Like other constitutional doctrines, the law of consensual encounters is hard enough for experts to decipher. Its counter-intuitive and largely inscrutable boundaries create a conundrum for law enforcement personnel and citizens alike. From the citizen’s standpoint, uncertainty will almost surely breed compliance. A person need not be especially risk averse to choose to acquiesce to a police inquiry that might, or might not, be a command to stop.

1. Education

In theory, this deficiency might be remedied by education, by legal guides for laypeople, or even by the “teachings” of mass culture. Education, particularly at the high school level, might be assumed to be the most logical means for citizens to learn of their rights vis-à-vis the police. Civics constitutes an important part of the high school curriculum and appears on proficiency and other required tests. Yet a review of nine high school civics texts reveals that only one has anything at all to say about consensual encounters. It is worth quoting

   Especially in its exposition of individual rights as restraints or obligations on both the federal and state governments, the Court may be gradually altering the character of the Constitution by turning it into a complex body of rules and regulations—into an “instrument for dialectic subtleties.”
   We the People of the United States under this “increasingly particularistic Constitution” are thus forced to turn more and more to specialists, to experts in constitutional law, in order to gain some understanding of the structure of government and of our fundamental rights as individuals and as members of a group.

Id. (citations omitted).

from that one text, both for what it manages to convey in one paragraph and for what it does not:

Not every time the police stop a person to ask questions or even to seek that person’s consent to a search is there a seizure or a detention requiring probable cause or a warrant. If all that happens is that the police ask questions, or even seek consent to search that individual’s person or possessions in a noncoercive atmosphere, there is no detention. “So long as a reasonable person would feel free to disregard the police and go about his business, the encounter is consensual and no reasonable suspicion is required. The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature.”

While this paragraph is correct as far as it goes, it does not describe what factors distinguish a stop, which must be complied with, from an attempt at a consensual encounter, which may be refused. Nor does it directly state that an individual may decline a consensual encounter. Clearly, high school classes may cover topics not discussed in their assigned texts, but the available evidence fails to suggest that the necessary information about consensual encounters is being delivered in high school.

Legal guides for lay people are probably not widely used, but are instructive for what they tell the relatively few people who might take the trouble to learn of their rights in this manner. The ACLU “Bustcard”: Pocket Guidelines on Encounters with the Police, while addressing street encounters with the police (as the title indicates), does not say anything at all about consensual encounters or the right to terminate them. It does say that the individual does not have to answer questions, but does not indicate other forms of noncooperation. Rather, it recommends against complaining or telling the police “they’re wrong.” In short, the individual who pulls out the ACLU “Bustcard” when approached by an officer gets virtually no guidance on the line between a stop and a consensual encounter, how to distinguish between the two, or how to respond to the latter.

107. BURNS ET AL., supra note 106, at 145.
108. For an argument that law-related education should occur from kindergarten through high school to better prepare children to participate fully in our democratic society, see Mark C. Alexander, Law-Related Education: Hope for Today’s Students, 20 OHIO N.U. L. REV. 57, 57 (1993).
110. Id.
The Criminal Law Handbook," also a lay guide, does a better job. In answer to the question, "Can I walk away from a police officer who is questioning me?" this book states:

Unless a police officer has "probable cause" to make an arrest or a "reasonable suspicion" to conduct a "stop and frisk", a person has the legal right to walk away from a police officer. However, at the time of the encounter, there is no real way to tell what information the officer is using as a basis for his or her actions... Common sense and self-protection suggest that people who intend to walk away from a police officer make sure that the officer does not intend to arrest or detain them. A good question might be, "Officer, I'm in a hurry, and I'd prefer not to talk to you right now. You won't try to stop me from leaving, right?" If the officer replies that the person is not free to leave, the person should remain at the scene and leave the question of whether the detention is correct to the courts at a later time.12

This is all correct, though it does not say what to do if the officer refuses to answer the suspect's query. Nor does it mention that requests for identification, explanation of presence, travel plans, or consents to search may also be declined. For a concise summary, however, this one makes the most important point: the right to terminate the encounter.

2. Popular Culture

"'You guys can't trick me. I know my rights. I watch TV!'" a suspect once said to a New York policeman.13 While there is no question that popular culture can influence the public's knowledge of law,14 it seems unlikely that the nuances of the consensual encounter doctrine can effectively be conveyed by this means. Crime-oriented entertainment programs, news programs, and police "reality" shows are not designed to teach the law. Rather, "[s]uch shows are structured for dramatic impact; the selection of cases, the editing, and the overall presentation of events is intended not just to inform viewers, but to entertain them."15 In fact, the selection is made primarily to entertain.16 Furthermore, on

112. Id. at 1/4 (citations omitted).
television, "[c]onstitutional rights and civil liberties at best play minor parts, and at worst are portrayed as technicalities that only impede the police." In recent years this balance may be shifting, but at the same time the television audience, at least, is shrinking.

More particularly, there is no indication that television or other forms of popular culture deliver the kind of explanatory detail that would help a lay audience distinguish a consensual encounter from a stop, or to avoid the former. If anything, regular reports of police use of excessive force send a message that compliance with all police requests is the safest course. Witness the lyrics of Bruce Springsteen’s recent account of the Amidou Diallo shooting, American Skin (41 Shots), in which a mother implores her son: "Promise me if an officer stops you that you’ll always be polite. Never ever run away, Promise me you’ll keep your hands in sight."

A comprehensive survey of all the police–citizen interactions portrayed in popular culture is beyond the scope and intent of this Article. One would expect that at least some of the Court’s teachings on consensual encounters would find their way into various forms of popular culture, though sometimes mediated by the perceptions or beliefs of the writers or producers. Perhaps the public is more informed than it would be without this exposure, but there is little reason to believe that popular culture will have much effect on the knowledge deficiencies built into the workings of the doctrine.

117. Harris, supra note 115, at 809. See also Stark, supra note 113, at 282 ("[I]f crime shows are about law and order, they are light on the law, and heavy on the order.").
119. Bruce Springsteen, American Skin (41 Shots) (Bruce Springsteen 2000), quoted in Jon Pareles, Born to Run or at Least to Be Redeemed, NY TIMES, June 14, 2000, at E8. The entire verse and the chorus read:

Laina gets her son ready for school / She says now on these streets Charles /
You got to understand the rules / Promise me if an officer stops you that you’ll always be polite / Never ever run away, / Promise me you’ll keep your hands in sight / Is it a gun? / Is it a knife? / Is it a wallet? / This is your life / It ain’t no secret / It ain’t no secret / No secret my friend / You can get killed just for living in your American skin

Id.
C. Power

Even if a citizen knows she is free to terminate an encounter with the police, how likely is she to act on that knowledge? While the Court in Terry analogized the right of a police officer to approach a person to that of any other citizen, the effect on the person approached is likely to be markedly different.

Being approached by a stranger on the street or in some other public place is usually not good news. To be sure, the stranger may be trying to be helpful—warning of danger ahead or a dropped personal item behind. He or she may simply want directions. On the other hand, one may encounter the importuning of the panhandler or street peddler, the ranting of the mentally imbalanced, the advances of the sexually aggressive, or even the threats of a mugger. Most people are quite happy to travel from point A to point B, or even to rest temporarily somewhere in between, without making new acquaintances. The criminal law aims to protect individuals from the most annoying or dangerous public experiences. Social norms work in more subtle ways to discourage others. While no amount of norm enforcement can prevent all such unpleasantness, the ideal of personal security on the street is to keep dangerous experiences to a minimum. In public places, personal security, in the broadest sense, depends on the avoidance of uninvited encounters with one’s fellow citizens.

Public encounters with law enforcement personnel have a very different cast. On the one hand, they are less likely to be the source of commercial, sexual, criminal, or otherwise threatening approaches. Statistically, interaction with a police officer (rather than a private individual) is probably more likely to involve helpful advice or assistance. On the other hand, law enforcement personnel, through their powers to stop or arrest, to interrogate, to search, and to employ physical or even deadly force, possess the ability to interfere with a person’s movement in ways that private persons cannot. As a result, an encounter with a police officer almost always carries an air of menace, particularly in its threat of detention, prosecution, or physical harm. This power imbalance clearly discourages the assertion of rights. For these

120. See, e.g., Model Penal Code and Commentaries §§ 250.2 (disorderly conduct), 250.4 (harassment), 250.5 (public drunkenness, drug incapacitation), 250.6 (loitering or prowling), 250.7 (obstructing highways and other public passages), 251.1 (open lewdness) (Official Draft and Revised Comments 1980).


reasons, "practically every constitutional scholar who has considered the issue has agreed that the average, reasonable person will not feel free to leave a law enforcement official who has approached and addressed questions to them."\textsuperscript{123}

The available psychosocial evidence supports this conclusion. The most recent and compelling work on the subject of citizen obedience to police requests is that of Illya D. Lichtenberg, whose writing both reviews the existing social science literature on authority and police-citizen interactions and adds its own empirical findings.\textsuperscript{124} Although Lichtenberg's research was directed at consent searches, much of it is relevant to consensual encounters as well.

Authority, Lichtenberg writes, is derived from social power.

Police officers have a complex, dual source of power, both coercive and legitimate. A policeman acting within the limitations placed on his authority by law possesses legitimate power conferred on him or her by the state. This legitimate power is supplemented by coercive power to execute and enforce the authority derived from the legitimate power.\textsuperscript{125}

Laboratory studies of legitimate authority, including Stanley Milgram's famous experiments in the administration of electric shocks to another person or an animal,\textsuperscript{126} showed an extraordinarily high level of obedience.\textsuperscript{127} In addition to the legitimacy of authority, the coercive power of police induces compliance. Recapitulating the findings of other researchers, Lichtenberg writes:

\begin{quote}
[When] a police officer makes a request, the recipient is expected to take it as a command. A policeman's first concern in virtually all interactions which he has initiated (proactive) is to establish his authority. Police officers are consciously aware that when they approach a person their first concern is to show who is the "boss." A challenge to this "authority" is viewed as criminal; police view an assertion of Constitutional rights by a citizen as a direct challenge to their authority.\textsuperscript{128}
\end{quote}

\begin{thebibliography}{99}
\bibitem{123} Maclin, \textit{supra} note 87, at 250 (citing Tracey Maclin, \textit{The Decline of the Right of Locomotion: The Fourth Amendment on the Streets}, 75 \textit{Cornell L. Rev.} 1258, 1301 n.205 (1990)).
\bibitem{124} Illya D. Lichtenberg, Voluntary Consent or Obedience to Authority: An Inquiry Into the "Consensual" Police-Citizen Encounter (1999) (unpublished Ph.D. dissertation, Rutgers University (on file with author)).
\bibitem{125} \textit{id.} at 73.
\bibitem{126} \textit{Stanley Milgram, Obedience to Authority: An Experimental View} (1974).
\bibitem{127} \textit{Id.} note 124, at 75–99.
\bibitem{128} \textit{Id.} at 129–30 (citations omitted).
\end{thebibliography}
For their part, citizens perceive resistance as likely to produce a retaliatory exercise of police discretion. In sum, an "asymmetrical power relationship" exists in every "police-citizen encounter." Individuals perceive the officer's discretion as unlimited and unbridled. They feel helpless to stop it, and see no salvation through the law or the courts.

Two other studies demonstrate that individuals on the street are considerably more likely to comply with requests from persons perceived as having authority than with requests from those without such status. In the Bushman study, investigators dressed as a "bum," a business executive, or a fireman, and requested minor help from a pedestrian. Compliance ranged from 44% for requests from the "bum" to 82% for those from the fireman. Bickman's earlier study produced an even greater discrepancy in response to requests by a nonuniformed citizen (33%) and a guard dressed in a uniform resembling police attire (89%). These differences can be explained by the fact that "any police suggestion, request, command, or threat is fraught with implications of legal control." Citizens are goal-directed, evaluating the costs and benefits of compliance. An additional normative element of agreement with the overall ideals of law enforcement may also explain people's willingness to comply with apparent public servants. Furthermore, other research shows that the less time one has to consider a request from an authority figure, the more likely one is to comply. Resistance to authority is also hardest in a face-to-face situation.

Lichtenberg, using data generated by state agencies, studied compliance with state police requests for motorists' consent to search

129. Id. at 132.
130. Id. at 138.
131. Id. at 325.
133. Bushman, supra note 132, at 506.
134. Bickman, supra note 132, at 50-51.
136. Id. at 272.
137. Id. at 273. Studies have also shown that a friendly, nonthreatening initial approach is significantly more likely to produce compliance than is a forceful initial stance. Id. at 273. In the area of consent searches, search requests phrased interrogatively were more likely to produce the requested consent compared to those phrased declaratively. Dorothy K. Kagehiro, Psycholegal Research on the Fourth Amendment, 1 PSYCHOL. SCI. 187, 188 (1990). Ironically, therefore, a consensual encounter may be effective precisely because it is less confrontational than a stop.
138. Lichtenberg, supra note 124, at 91, 104.
139. Id. at 80.
their vehicles in Maryland and Ohio. In total, 9,028 people were asked for consent and 8,152 agreed, comprising 89.3% of those asked.\textsuperscript{140} Lichtenberg concludes that "the findings offer clear preliminary support that the obedience to authority model is applicable to the police–citizen encounter where consent is requested."\textsuperscript{141} It is not much of a leap to assume that it also applies to other kinds of so-called consensual interactions. There are at least two significant differences between a request to search a driver's car on the highway and an attempt to engage in consensual interrogation on the street. These distinctions point in opposite directions. On the one hand, a motorist, usually stopped for a traffic infraction, has more to fear by way of citation, arrest, search, or impoundment of his vehicle, and thus more reason to comply.\textsuperscript{142} On the other hand, a vehicle search would seem to be far more time-consuming and intrusive than a street encounter, suggesting it would be more likely to be refused. On balance, there is no reason to think that the dynamics of consent to a vehicle search are, at base, different from those of a consensual encounter. Far from feeling free to terminate an encounter, the reasonable person, by all indications, submits to the legitimate and coercive authority of the police. He or she is, in brief, on the short end of an asymmetric power relationship. These findings strongly suggest that the Court's view to the contrary is factually wrong.

\textbf{D. The Costs of Unreality}

The costs of the inaccurate assumptions behind the consensual encounter doctrine are far from trivial. The law defines a consensual encounter as voluntary for the reasonable person, and therefore neither interruptive of liberty nor particularly humiliating. This is true only if the law captures accurately the realities of everyday existence. To the extent that citizens lack the knowledge or assertiveness to resist police inquiries, they will perceive themselves to be seized though the law does not. The most basic harm is the resulting widespread interference with personal liberty without any objective justification. Furthermore, this interference is almost always accompanied by "the indignity of being

\begin{itemize}
\item \textsuperscript{140} \textit{Id.} at 199.
\item \textsuperscript{141} \textit{Id.} at 200; see also \textit{Id.} at 238–39, 331–33.
\item \textsuperscript{142} Lichtenberg concludes that "[p]eople consented to [a] search [of their vehicle] for one primary reason: fear of reprisal." \textit{Id.} at 250. Further, almost none of the drivers felt the officer would honor their decision to refuse, believing instead that the search would be conducted with or without their agreement. \textit{Id.} at 275.
\end{itemize}
publicly singled out as a criminal suspect and the fear that flows from being targeted by uniformed, armed police officers.\textsuperscript{143} The stigma of a police-citizen encounter may often be more traumatic than the detention itself.\textsuperscript{144}

The consensual encounter doctrine exempts a large sphere of police investigative practices from constitutional regulation, producing a number of important, and troubling, consequences. First, since no reason is required to subject an individual to a consensual encounter, there is no limit on the number of circumstances that may trigger the practice. It stands to reason that the less initial justification for a police investigative practice, the less likely it will produce evidence of criminality. By definition, consensual encounters will impact far more innocent than guilty persons, itself a significant cost.\textsuperscript{145} With so many consensual encounters aimed at investigating drug possession, these may be seen as the civilian casualties (or collateral damage) in the war on drugs.

Second, if past experience is any indication, these harms are not

\textsuperscript{143} Stuntz, supra note 13, at 1064.

\textsuperscript{144} See Lichtenberg, supra note 124. Lichtenberg interviewed a number of those persons whose consent for a vehicle search was requested in Ohio. He summarizes these interviews as follows:

Generally, the subjects' feelings towards the search were not positive. The impact of the search varied from subject to subject. Some seemed to have permanent emotional scars from the search, some tried not to think about the search, and others seemed unscathed by the event or even found the encounter almost humorous. The effect of the police encounter on the subjects' view of police also varied. Some subjects' perceptions were unquestionably strained by the encounter, others were instilled with a fear of the police and many others merely accepted the abuse of police authority as a permanent condition in society. Some indicated they had not given the encounter a second thought until getting the letter from the "consent search project" about an interview. Although a majority of subjects were negative about the event, that negativity varied in degree and there was not a universal impact on the subjects. Id. at 289–90.

\textsuperscript{145} Lichtenberg's review of consent requests in traffic stops found that, at most, controlled substances were found in 22.7% of such searches in Maryland, and 13.6% of those in Ohio. These figures are inflated by the fact that each different type of drug was counted as a separate discovery, producing double counting if more than one kind of drug was found in a single search. Lichtenberg, supra note 124, at 165–72. Marijuana was the drug most frequently discovered, id. at 174–77, and "[a] large percentage of those in possession of marijuana possessed small individual quantities." Id. at 177. Significantly, in Ohio (which had a much lower success rate than Maryland to begin with), the data permitted an evaluation of success rates in relation to the number of searches conducted over time. There, "[t]he rate at which criminal evidence was discovered did not increase proportionately with the increase in the number of consent searches. As the number of consent searches increased, the percentage of searches which yielded criminal evidence diminished, and this decrease was substantial." Id. at 172. "By increasing the use of consent searches, more innocent people were detained while a proportional increase in criminal detections was not observed." Id. at 174.
distributed evenly among the American populace. Under the prevailing double standard of criminal justice, "police officers routinely use methods of investigation and interrogation against members of racial minorities and the poor that would be deemed unacceptable if applied to more privileged members of the community."146 Because consensual encounters are outside the bounds of the Fourth Amendment's limits on seizures, the kind of stereotyping now often referred to as racial profiling can be given free rein. As with other areas of essentially unfettered police discretion, such as traffic stops, race and class may commonly be used as a proxy for founded suspicion.147 There is now a substantial body of literature on the role race plays in criminal investigation,148 and it need not be reviewed here. Suffice it to say that consensual encounters are more likely to be used against minorities and the poor, so that they disproportionately suffer the consequences described above. This, in turn, has serious consequences for minority attitudes toward the police, the criminal justice system, and, indeed, the majority community as a whole.

These, then, are the direct consequences of the consensual encounter doctrine. A less direct, but nevertheless proximate, product of the doctrine is the encouragement of rude and confrontational behavior on the part of citizens, which has a detrimental effect on police–citizen interaction in general. The next section discusses the prospect—and costs—of American citizens becoming the "reasonable people" the Supreme Court thinks we already are.

IV. ACTING LIKE A REASONABLE PERSON

All legal doctrine carries a message of behavior modification. Whatever its deficiencies, the Court's conception of a reasonable person has an implicit normative effect. As Justice Harlan once put it, "it is the

146. Cole, supra note 89, at 8.  
147. Id.; Kennedy, supra note 87, at 138–67; David A. Harris, "Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L & CRIMINOLOGY 544, 544–46 (1997); Maclin, supra note 87, at 279.  
task of the law to form and project, as well as mirror and reflect." Even if, absent the Court’s decisions, most people in the United States would not behave as the Court imagines, once the Court has established its image of the reasonable person, it is in effect telling the populace that it must behave that way if it wishes to be free of certain police attention. The prevailing doctrine is thus a potential goal to which people are encouraged to aspire. The implicit message is that we should all become "reasonable people," as defined and described by the Court.

By the same token, one solution to the unrealistic aspect of the Court’s decisions on consensual encounters is to conform reality to its fictional constructs. If the image does not meet the reality, change the reality, and eliminate some of the dissonance between the previous reality and the Court’s view of a reasonable person. Since here the “reality” consists of knowledge and behavior, that transformation is at least theoretically possible.

This transition does not come easily, however. Changing public awareness and willingness to assert rights is a huge undertaking. On the knowledge side of the equation, it might be attempted in public schools and through other civic institutions, but this has its costs in resources, time, and attention taken from other subjects. As for the people’s readiness to stand up for their rights against law enforcement personnel, are we to launch a national program of assertiveness training?

Were these efforts to bear fruit, public adoption of the “reasonable” behavior contemplated by the Court would bring increased incivility and friction between the police and the public. An individual’s avoidance of consensual encounters requires informed and assertive responses to the police, particularly by a rejection of their questions and requests. This reaction is likely to be perceived by the officer as rude and disrespectful, if not downright suspicious or illegal. In many cases this perception is likely to trigger a correspondingly discourteous rejoinder by the officer, verbal or physical abuse, a seizure or prosecution of the person, or other harmful exercises of police discretion. In short, having members of the public behave as “reasonable people” may be as much a part of the problem as the solution.

This Part proceeds by first proposing a guide to becoming a reasonable person, describing the kinds of behavior encouraged by the consensual encounter doctrine. This is followed by two true accounts of individuals who responded along the lines suggested in the guide. The responses of the officers involved illustrate the incivility that may be

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150. See supra text accompanying notes 106–08.
151. See infra text accompanying notes 171–81.
triggered by this assertion of rights. The final section summarizes the implications for police–citizen interaction of both the citizen's attempt to avoid consensual encounters and the police reactions to these attempts.

A. Conversations with Cops—A Guide to Becoming a Reasonable Person

It is possible, of course, that any one of us may wish to engage in a conversation with a police officer, and no doubt most of us have done so at one time or another. We might even wish to provide identification, explain our presence in a particular locale, detail our past and future travel plans, or consent to the search of our persons or property. On the other hand, according to the Court, a reasonable person has the option to terminate such an encounter at any time. The following presents guidelines for how to do so, with some comments on the implications for the civility of police–citizen relations.

1. State Your Business, Officer

A police officer approaches. "May I speak to you for a minute?" she says. One could simply say "no," invoking Rule Two below, but civility and utility dictate on most occasions that the first answer be "Why?" or "What is the reason, officer," or even "Sure." As the Court noted in Terry, there are many possible reasons for conversation between an officer and a citizen. The citizen may have dropped a scarf; she may have parked illegally and the officer is asking her to move the car—thankfully without ticketing it. The officer may merely be seeking information, ranging from directions to the recollections of eyewitnesses to a homicide. One just needs to imagine the number of people approached for information in the Oklahoma City bombing and

152. See infra text accompanying notes 156–67.
153. See Terry v. Ohio, 392 U.S. 1, 13 (1967). The Court stated:
Street encounters between citizens and police officers are incredibly rich in diversity. They range from wholly friendly exchanges of pleasantries or mutually useful information to hostile confrontations of armed men involving arrests, or injuries, or loss of life. Moreover, hostile confrontations are not all of a piece. Some of them begin in a friendly enough manner, only to take a different turn upon the injection of some unexpected element into the conversation. Encounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to a desire to prosecute for crime.

Id.
Unabomber investigations to get an idea of the police-citizen contacts that can arise in police work. In the suburban village where the author lives, the police flag down children wearing their bicycle helmets to give them free fast food certificates as a reward—something the children have come to call "good tickets." At the risk of seeming naive, the author still believes a reasonable person can give the police the benefit of the doubt, and not automatically regard every encounter as an unwelcome exercise of authority. A simple question about the officer's approach can clarify its purpose.

The answer to this initial query concerning the reasons for the impending conversation is all-important, however. If the answer is directed at criminal investigation (for example, "We are investigating narcotics trafficking"), then the reasonable person ought to proceed to Rule Two and just say no. The same holds true for requests for identification or for questions concerning presence in the locale or travel plans. It also applies to nonresponsive answers, such as "this will just take a minute," and to answers that respond with a question, like "Why do you ask?" In short, a knowledgeable reasonable person ought to require the officer to state his or her business clearly, and at the first opportunity, in order to make an informed decision about whether to proceed with the encounter. If the officer does describe the purpose of the encounter and then veers into new territory, the same danger signals ought to be triggered.  

2. Just Say No

The crux of avoiding a consensual encounter is noncooperation—refusal to answer questions and to consent to police requests. As

154. Interviews with Sam Steinbock and Anna Steinbock (July 29, 1998). The author wonders if this does not also serve to acclimate the children to respond positively to police summons, including consensual encounters, in the future when "bad tickets" or worse are likely to be the payoff.


156. See Scott E. Sundby, "Everyman's" Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?, 94 COLUM. L. REV. 1751, 1793 (1994). Sundby has distilled this advice in this excerpt from his "Accidental Tourist's" guidebook:

Travel is a considerable problem. One should be aware that law enforcement officers may stop someone and ask permission to look in his luggage even if the traveler has not acted in a fashion that would provoke articulable suspicion of wrongdoing. This is true whether traveling by land, air, or sea. If approached, the innocent traveler should not be alarmed but should state to the officer that he or she has no desire to converse and has other, more important appointments to keep. Although this might strike the traveler at first as rude and abrupt, and perhaps a bit frightening if the questioner is armed, the Supreme Court has made clear that the Fourth Amendment is not for the timid.

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noted above, this requires a fair degree of self-confidence and a willingness to flout the conventions of common discourse (which, of course, this is not). Nevertheless, it is the sine qua non of consensual encounter avoidance. “Can we see your driver’s license?” “No!” “What are you doing here?” “I am not answering,” or less politely, “None of your business.”

Saying “no” once may not be enough. Some courts have held that continued badgering after a first refusal causes the encounter to cross the line to a seizure, but others have permitted repeated questioning and requests for consent to search without concluding that a seizure had taken place. A reasonable person would thus be well-advised to say “no” repeatedly, and to reject any attempt by the officer to accompany her if she tries to leave. Some courts have found it significant that the refusals were delivered in a shout or scream, or that the individual ran from police in an attempt to get away. The cases thus not only encourage flatly rebuffing the officer’s inquiries, but also encourage doing so in the rudest, most confrontational, and most obnoxious manner.

A corollary of just saying “no” is never saying “yes.” Once an individual acquiesces to police requests it becomes harder to switch gears to rejection mode. As the Supreme Court has noted in a related context, a basic tenet of police interrogation is to get the suspect to start talking—once she has, she is much more likely to continue. There is

Consequently, the wise traveler should carry a copy of the Fourth Amendment and display it to the questioner and thus avoid any unnecessary discourse.

Id. 157. One can easily imagine even less polite responses, the possibility of which is one of the disadvantages of this requirement.


160. Wilson, 953 F.2d at 123; but see infra text accompanying notes 173–76.

161. See Lichtenberg, supra note 124, at 93 (“If to successfully disobey authority the subject must begin resistance early in the police–citizen interaction, then if the citizen fails to display resistance early in the encounter, he will find himself in a cycle of compliance from which he may be unable to free himself.”).

162. Oregon v. Elstad, 470 U.S. 298, 328 (1985) (Brennan, J., dissenting) (“Interrogators describe the point of the first admission as the ‘breakthrough’ and the ‘beachhead,’ which once obtained will give them enormous ‘tactical advantages.’” (citations omitted)); Lichtenberg, supra note 124, at 94 (“[R]esearch has found that once agreement has been obtained, even for a small request, the likelihood of obtaining consent for a much larger request is doubled. . . .” (citing Jonathan Freedman & Scott Fraser, Compliance Without Pressure: The Foot-in-the-Door Technique, 4 J. PERSONALITY & SOC. PSYCHOL. 195, 198 (1966))).
no reason to doubt that the same principle applies to consensual encounters.

In addition, refusal looks more suspicious if it comes after the individual has already cooperated. While the Supreme Court has held that a refusal to cooperate, without more, does not give rise to reasonable suspicion or probable cause, the police often do not take this principle at face value. An abrupt refusal to answer questions, a consent to search some items but not others, or a revocation of a previously granted consent all trigger police suspicion of criminality. At the very least, the officer is likely to intensify her efforts. Some courts have agreed with these officers, finding reasonable suspicion in these changes in course. It is far wiser for the reasonable person to take a consistent position of noncooperation from the outset—to just say no.

This suggestion must apply, unfortunately, even to conversations about apparently innocuous topics. One of the more invidious features of the consensual encounter routine, as practiced in many areas, is that of engaging citizens in the kind of conversation two strangers might have in order to put the individual at ease. The officer then often switches to more intrusive requests, such as questions about past and future travel, or outright requests for consent. What begins as something approaching a social exchange becomes a far different experience. While it is theoretically possible to draw the line between the two, for most people it is probably far better never to start talking. In short, do not talk about anything, at least once it is clear that the conversation has taken an inquisitive or investigative turn.

One further point on refusal to cooperate: by hypothesis, the reasonable person is innocent and therefore cooperation is not going to lead to incrimination. One might ask, therefore, why not cooperate? The answer is twofold: (1) the indignity and delay of responding to the

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163. United States v. Carter, 985 F.2d 1095, 1097 (D.C. Cir. 1993) (reasonable suspicion can be based on the manner in which the suspect withdraws his consent to search belongings during a consensual encounter); United States v. Jones, 973 F. 2d 928, 931 (D.C. Cir. 1992) ("A suspect is 'free to leave' a nonseizure interview, but when he does so by abruptly bolting after having consented to talk, the officers are free to draw the natural conclusions.").

164. The Drug Abuse Resistance Education (D.A.R.E.) program, authored in part by police officers, gives eight ways to say no to drugs and alcohol that apply quite well to police–citizen encounters. These are: (1) say "no thanks," (2) give a reason or excuse, (3) repeated refusal, or keep saying no, (4) walking away, (5) changing the subject, (6) avoiding the situation, (7) cold shoulder, and (8) strength in numbers. D.A.R.E., D.A.R.E. TO RESIST DRUGS AND VIOLENCE: STUDENT WORKBOOK GRADES 5-6, at 19 (1994) (on file with author).

165. United States v. Lattimore, 87 F.3d 647, 649 (4th Cir. 1996) (en banc); United States v. Ramos, 20 F.3d 348, 352 (8th Cir. 1994).

166. See supra text accompanying note 80.
officers' request; and (2) the possibility that answers will nevertheless trigger some suspicion, reasonable or not. This is not like the situation in which an officer already has some basis to stop, arrest, or search and an explanation from the suspect may undermine that conclusion. In short, cooperation will rarely benefit the individual.

3. Walk (Don't Run) Away

One of the most dangerous ambiguities of the consensual encounter doctrine is the fine line between a stop and a consensual encounter. Since the police are not required to inform the citizen that she is free to go, she is unlikely to know whether or not she is. A clear statement by the officer one way or the other would certainly help delineate the boundary between freedom and restraint. The Supreme Court seems to have rejected this alternative in 1996 in *Ohio v. Robinette*, treating a consensual encounter as it had a consensual search. The Court in *Robinette* emphasized that it had "eschewed bright line rules" in its previous seizure cases, preferring instead a totality-of-the-circumstances analysis, and imposing that standard on consensual encounters. This decision seems likely to foreclose for the foreseeable future any constitutional requirement that officers inform the individual that she is—or is not—free to go.

Citizens must therefore decide from the circumstances whether or not they may decline to cooperate. One obvious way is to ask; however, there is no way to require the officer to respond directly. In such a situation the individual may have no other means to determine if she has been seized than to attempt to walk away. It might be prudent to preface this departure with a statement to the officer to that effect. Even then, walking away from the officer can precipitate a negative reaction, as the next section illustrates.

Furthermore, walk—do not run or otherwise seem to be "evading" the police. The Supreme Court recently held in *Illinois v. Wardlow* that

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169. See supra note 52.
“headlong” or “unprovoked flight” can establish reasonable suspicion for a Terry stop, at least when it occurs in a high crime area. In fact, a reasonable person would be well-advised to avoid a high crime area altogether, unless for some unfortunate reason she happens to live or work there. This decision has serious implications for avoidance of consensual encounters. While the majority attempts to distinguish an individual’s right to go about his business from “unprovoked flight,” this is a fuzzier line than the Court suggests. It will undoubtedly generate substantial litigation, and is likely to be pushed toward including behavior more ambiguous than the defendant’s in Wardlow. If this happens, Wardlow becomes something of a Catch-22 for a person who wishes to avoid an investigative encounter. She can go about her business, but not too abruptly. The best course, perhaps, is to announce one’s intent to depart and then do so at a measured pace.

B. Police Reactions: Two Real Life Examples

1. Suron Jacobs

Suron Jacobs, an African-American man, was sitting on a fire hydrant at a busy intersection in Ottawa Hills, Ohio, an affluent, almost entirely white suburb of Toledo. At 11:30 a.m., the police received an anonymous call that a black man in a baseball cap and T-shirt was at that location, a block from both the local high school and elementary school. The police decided to “check an adult” who “may be lost or confused.” Officer Miller responded to the scene. According to an unpublished

173. Id. at 124.
174. Harris, supra note 148, at 660.
175. Wardlow, 528 U.S. at 125 (“Unprovoked flight is simply not a mere refusal to cooperate. Flight, by its very nature, is not ‘going about one’s business’; in fact, it is just the opposite.”).
176. See id. at 129 (Stevens, J., concurring in part and dissenting in part). Justice Stevens states: The inference we can reasonably draw about the motivation for a person’s flight... will depend on a number of different circumstances. Factors such as the time of day, the number of people in the area, the character of the neighborhood, whether the officer was in uniform, the way the runner was dressed, the direction and speed of the flight, and whether the person’s behavior was otherwise unusual might be relevant in specific cases. Id.
district court opinion in Jacobs’ civil suit against the Village, the following then transpired:

After Officer Miller arrived, she approached the plaintiff, and asked him if he needed help, or what was going on. Plaintiff assured her that he was “all right.” Officer Miller then asked if plaintiff were [sic] waiting for a ride or if someone was going to pick him up. He told her, “No, I’m supposed to be meeting my brother here.”

At that point, according to plaintiff, Officer Miller asked, “What’s your brother’s name?”

Plaintiff said, “Well, wait a second, when you first approached me you seemed as if you were here to help me. Now you’re making me feel as if you’re here to harass me. What’s the problem. I can’t sit right here[?]”

Officer Miller said, “No, it’s not that. It’s just that somebody called in on you.” Plaintiff responded, “Called in on me[?]” Wait a second, [this is starting to seem like some racial stuff because I’m not doing anything wrong.”

Then, according to plaintiff, Officer Miller made a comment to the effect of “don’t give me that.” At that point, plaintiff refused to give his brother’s name, and according to his testimony (which is disputed), told Officer Miller that he was going back to the school.

Although the plaintiff knew that Officer Miller was still asking him questions, he started across [the street] toward the High School. Officer Miller told him to stop. Plaintiff continued walking, and Officer Miller grabbed him. Plaintiff pulled his arm away, and, facing Officer Miller, asked her what the problem was. Officer Miller grabbed him again, and he again pulled his arm away. He told Officer Miller she had better not hit him again.

In the meantime, Officer Knallay had arrived on the scene. He and Officer Miller grabbed the plaintiff, handcuffed him, took him to Officer Miller’s cruiser, and placed him in the back seat. He was taken to the police station and charged with obstructing official business and resisting arrest.179

It turned out that Jacobs was employed on a construction project at the nearby high school. The criminal charges were later dismissed on Jacobs’ motion;180 a civil rights action against the Village is now

179. Id. at 3–4. Officer Miller’s account varies somewhat from plaintiff’s: At the outset plaintiff told her he was fine and was waiting for his brother. When she asked him when his brother was coming, he told her that his brother was not coming to get him. When asked why he was at the corner, he told her that he was waiting for his brother. Then he said he was harassing him and would not have questioned him if he were white. She then told him that someone had called and asked that a patrol officer check on him. She again asked when his brother was coming. She was concerned, and increased the distance between the two of them. Plaintiff, according to her testimony, was upset. She stated that she ordered plaintiff to stop several times as he started to walk away. She was concerned that he might strike her. Though she had asked plaintiff for some identification, he had refused to provide it.

pending.  

Jacobs did exactly what the Supreme Court in the consensual encounter cases said a citizen is free to do: refuse to answer questions or give identification and then walk away. For his pains he was arrested and prosecuted. While this one case does not prove the point, it does illustrate several of the risks of acting like the Court's reasonable person. One is that the police may not fully understand the limits of their powers in a consensual encounter, and that the doctrine may be almost as obscure to the police as it is to lay people. If the citizen refuses to cooperate, and no evidence of criminality has turned up in that brief interval, the encounter is at an end. This noncooperation, however, will too often itself look suspicious to the officer. It also may be seen as an insulting affront to police authority. In the same way that citizens may need to learn their rights to refuse to submit, officers need to learn their finally calibrated powers in such a setting. The danger that they will not is another strike against the consensual encounter doctrine.

2. Jon Stewart

Consider the following exchange between a law student named Jon Stewart and a police officer in Salt Lake City, Utah in 1997.  

After leaving a downtown coffee shop, and while on my way to my car, I was stopped by a police officer (just so you know, I'm white, 6'0" tall, with hair half way down my back). The officer wanted identification, which I produced. The following dialogue ensued (roughly):

OFFICER: "are you carrying any weapons . . . "
ME: "No sir."
OFFICER: "I need to check to make sure." The officer then proceeded to do a Terry "stop and frisk." Just what his reasonable suspicion that I was carrying a weapon or was otherwise dangerous, I can only imagine, but frankly, I thought it better to acquiesce rather than possibly escalate the situation, and possibly thereby create "reasonable suspicion"! In the course of the frisk, the officer felt a lump in my pocket, which he investigated, and this lump turned out to be my car keys. At the time, my car was parked about 10 feet from where we were at a parking meter.
OFFICER: "I am going to run a check on your license; stay here, don't move."
ME: "Okay."
The officer then ran a check which (no surprise to me) came back with nothing.
OFFICER: “Here’s your license. Does one of these cars belong to you?”
ME: “Yes, the gold Buick over there.” (me pointing to my car)
OFFICER: “Would you mind if I took a look through your car?” Needless to say, at this point I was absolutely floored. I knew damn well this officer had nothing even approaching probable cause, and without my consent could do nothing.
ME: “Are you asking for my consent to search my car?”
OFFICER: “Well, I would like to look around a bit.”
ME: (somewhat coyly) “I’d rather you did not. Do I have the right to refuse to allow you to search my car?” (at this point I was having a great time)
OFFICER: “Well, if you have nothing to hide, it’ll only take a minute.”
ME: “Listen, I am not going to give you permission to search my car—period. But I will tell you what; is that your car there?” (pointing to the officer’s cruiser)
OFFICER: (somewhat confused) “Yes, but why does that matter?”
ME: “Well, I’ll make you a deal. If you let me search your car, I’ll let you search mine!”
OFFICER: (not happy) “What! You want to search my car? What the hell for?!?”
ME: “Well, if you have nothing to hide, it will only take a minute.” At this point the officer was VERY unhappy with me and my attitude. Fortunately he did not arrest me or otherwise mess with my life.
OFFICER: “Look, I’m going to ask you one last time. May I look through your car or not?”
ME: “Absolutely not. I will not consent to any search whatsoever. I know you can’t search without ‘probable cause’ and that you have nothing even close to it. I’m not a criminal, and you would not find any contraband of any kind if I were to consent. I’m a graduate student and if you were to look through my trunk, you’d find nothing but a few books. However, I have no interest in allowing a complete stranger to rifle through my things simply because he asked me if I would let him. No, I will not consent to such a search, and unless you are placing me under arrest, I am going on my way now.”
OFFICER: “Get the F**K out of my face!”

This exchange illustrates several typical aspects of street encounters between police and citizens. First, it seems to have been premised solely on the appearance of the individual. Second, it produced behavior by the officer that violated the Fourth Amendment: a frisk for weapons without any reason to believe the “suspect” was armed and dangerous. Next came another unconstitutional maneuver: detaining Mr. Stewart while his license was checked. This amounted, of course, to a Terry stop conducted without reasonable suspicion of past, present, or future criminal activity.

The officer then segued into a request for consent to search without

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183. Id.
either telling Mr. Stewart he was now free to go or that he had a right to refuse.\textsuperscript{185} The third not atypical technique was the officer's refusal to answer questions directly. In response to Mr. Stewart's question, "Do I have the right to refuse to allow you to search my car?" the officer's reply was, "Well, if you have nothing to hide, it'll only take a minute." Fourth, the officer would not take no for an answer, repeatedly asking for permission to search.

This exchange obviously also contains some atypical elements. One, of course, is Mr. Stewart's request to search the officer's cruiser, to which the officer not surprisingly takes offense. The logic of consensual encounter doctrine runs both ways, however. If an officer is treated like any other citizen in his freedom to make inquiries,\textsuperscript{186} then certainly citizens also have that right. Here, however, it is treated as an act of insolence, and one can surmise that this usually would be the case. Second, and more importantly, Mr. Stewart brings a highly unusual degree of knowledge and assertiveness to the encounter. It is hard to imagine one individual in a thousand being as aware of his rights and as willing to exercise them.\textsuperscript{187} The result of Mr. Stewart's "reasonable" behavior, however, is a heightened level of anger and hostility by the police, culminating in his cursing at the individual who has done nothing worse than assert the rights the Supreme Court says he has.

\textbf{C. Civility and Trust in Police–Citizen Interactions}

As conceived and implemented, the consensual encounter doctrine undermines civility and trust between the government and citizens, and it does so at several different levels. At the most general, as Professor Scott Sundby has written, with the vesting of constitutional rights the government recognizes the citizen as a responsible social actor, in whom the government places its trust.\textsuperscript{188} That trust is broken "when the government is allowed to intrude into the citizenry's lives without a finding that the citizenry has forfeited society's trust to exercise its freedoms responsibly."\textsuperscript{189} Sundby contends, therefore, that on a trust view of the Fourth Amendment, all police actions aimed at investigating whether an individual has obeyed the law would have to be justified

\textsuperscript{185} This, of course, is permissible under \textit{Ohio v. Robinette}, 519 U.S. 33, 35 (1996), and \textit{Schneckloth v. Bustamonte}, 412 U.S. 218, 248 (1973).
\textsuperscript{186} \textit{Terry v. Ohio}, 392 U.S. 1, 34 (1968) (White, J., concurring).
\textsuperscript{187} Even so, Mr. Stewart seems to have tendered his identification without protest. \textit{But see} \textit{Kolender v. Lawson}, 461 U.S. 352, 364 (1983).
\textsuperscript{188} Sundby, \textit{supra} note 156, at 1782.
\textsuperscript{189} \textit{Id.} at 1777. \textit{See also} REISMAN, \textit{supra} note 121, at 149 (stating that the modern liberal state is committed "to maintaining a zone where public power does not operate").
 Investigaive consensual encounters, Sundby contends, violate the high regard owed by the government to its citizenry. The government's reliance on the knowledge and power imbalance between citizens and police marks another level of incivility and distrust. The right to terminate an encounter is a kind of stealth right, and the Court has rejected any attempt to make it less of a secret. Trading on citizens' ignorance and weakness would seem inconsistent with a notion of civility that demands "respect to our fellow citizen because of the humanity we share in common" and our "equal standing in a democratic society." This was the theme of Justice Marshall's dissents in two leading consent search cases, Florida v. Bostick and Schneckloth v. Bustamonte.

The third level of incivility promoted by the consensual encounter doctrine is its incitement of hostility and rudeness by the lay population. Faced with suspicionless police inquiries, citizens may rightly feel that they are the objects of police trickery and guile, if not racial or class profiling. As described above, a reasonable person acting under the Court's guidelines must respond in a noncooperative, hostile, and disrespectful way in order to clarify her status, possibly prompting a comparable reaction from the officer. In short, Fourth Amendment law in this area seems to be grounded in an assumption of suspicious, adversary, and rights-oriented behavior by both sides. As Albert J. Reiss wrote, over thirty years ago:

A civil and democratic society requires reciprocity if frequent breakdowns in

190. Sundby, supra note 156, at 1796.
191. Id.
193. Justice Marshall stated in Bostick:
The majority's observation that a mere refusal to answer questions, "without more," does not give rise to a reasonable basis for seizing a passenger is utterly beside the point, because a passenger unadvised of his rights and otherwise unversed in constitutional law has no reason to know that the police cannot hold his refusal to cooperate against him.

Bostick, 501 U.S. at 447 (Marshall, J., dissenting). See also Bustamante, 412 U.S. 288 (Marshall, J., dissenting) (referring to the absence of warnings informing individuals that they may decline a consent search as, "the continued ability of the police to capitalize on the ignorance of citizens so as to accomplish by subterfuge what they could not achieve by relying only on the knowing relinquishment of constitutional rights").
196. See supra text accompanying notes 177-87.
citizen and police relations are to be avoided. Civility must be met with civility.

... [R]eciprocity necessarily breaks down where police authority is challenged and thereby the citizen-police relationship enters a cycle where conflict may escalate. Each may progressively move toward the exercise of coercive authority, with threats of violence followed by the use of force.197

Insults and rudeness on the street go to the heart of current concerns about incivility in American life. As Professor Stephen Carter has written, “Civility certainly requires that we strive to eliminate from our vocabularies the nastiness and hatred.”198 He suggests a rule: “Civility requires that we express ourselves in ways that demonstrate our respect for others.”199 The consensual encounter doctrine encourages the opposite of this sensible credo.

In so doing, it poisons the relationship between citizens on the one side and law enforcement personnel or, more generally, government, on the other. The practical consequences of this tainting of the well of social relations reach the criminal justice system and beyond. People's willingness to “become involved,” either as a source of information or as a witness, will certainly be undermined. A spillover effect may also color the assessment of police testimony and even juror readiness to convict guilty defendants.200 Undoubtedly, investigative consensual encounters have already weakened community policing efforts. “[I]t is obvious that community policing—both its methods and its goals—depends on mutual trust” between citizens and police.201 The implicit deception, humiliation, and interference with personal liberty associated with investigative encounters are inconsistent with the creation of that trust. Most generally—and importantly—consensual encounters generate an air of hostility between citizen and government that affects every level of their interactions, and makes this a less united nation in the process.

199. Id.
200. Judge James G. Carr of the United States District Court for the Northern District of Ohio, Western Division, reports:

[There has been] a noticeable change in responses of veniremen to the conventional voir dire question: “Would you be more or less likely to believe a law enforcement officer than another witness?” That question, historically asked to detect pro-police bias, frequently results in a response that manifests distrust of and a belief that police officers are more likely to lie under oath than other citizens. Responses that they would be more likely to believe a policeman become correspondingly less frequent.
Interview with James G. Carr, Judge of the United States District Court for the Northern District of Ohio, Western Division, in Toledo, Ohio (Oct. 12, 2000).
201. Harris, supra note 122, at 309.
V. WHERE DO WE GO FROM HERE?

The deficiencies and costs of the consensual encounter doctrine strongly suggest that reform is in order. This Part presents three possible approaches to revising the contours of the doctrine. Underlying all three is an attempt to bring the law of street encounters closer to their factual reality, and thereby to reduce the harms discussed above. These suggestions are described in descending order of priority, with the first being most preferable. Possible approaches include: (1) a call for empirical data, (2) a blanket limitation on encounters aimed at investigating the individual approached, and (3) a bright line requirement that law enforcement personnel state their purpose in any encounters with citizens.

A. A Call for Data

Because much of the criticism of the consensual encounter doctrine is directed toward the fact that it ignores the reality of police–citizen interactions, it is fair to ask if and how the Court could do better. The criticism discussed above centers on the Court's disregard of the actualities of police–citizen encounters—its deviation from the empirical realities. Since the Court has phrased its predominant test in terms of the reasonable person, the constitutional question could clearly be merged with the factual one: how would the average American perceive certain police practices? In other words, the Court seems to have linked the meaning of a constitutional term, "seizure" with a factual question: when does the average person perceive himself as being restrained? Indeed, because the empirical issue has expressly been assimilated with the interpretive one, there is even more reason to look to sociological evidence here than in most constitutional cases where it has been considered relevant.

202. "[I]f one takes the Justices at their word, a sense of how (innocent) U.S. citizens gauge the impact of police investigative techniques on their privacy and autonomy is highly relevant to current Fourth Amendment jurisprudence." Christopher Slobogin & Joseph E. Schumacher, Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society," 42 DUKE L.J. 727, 732 (1993).


204. See id. at 556–601.
The author knows of no scientific study on this issue directly, but there is no reason one could not be undertaken. What we have so far is a plethora of anecdotal information and some empirical work not precisely on point. Aside from the examples mentioned above, the empirical data closest to the issue at hand is that of Professors Christopher Slobogin and Joseph E. Schumacher. They surveyed 217 individuals on the relative intrusiveness of fifty search and seizure scenarios taken from Supreme Court or lower court cases. Their survey produced intrusiveness ratings for this sample of police practices, which were then ranked relative to each other. For example, the least intrusive police procedure (looking in foliage in a public park) received an intrusiveness rating of 6.48 (rank: 1), while the most intrusive (a body cavity search at the border) received a rating of 90.14 (rank: 50). On this same scale, several of the police practices described above were rated and ranked as follows.

(a) Following a pedestrian in a police car
    rating: 32.73 rank: 8

(b) Questioning on public sidewalk for 10 minutes
    rating: 69.45 rank: 36

(c) Boarding a bus and asking to search luggage
    rating: 77.22 rank: 44

The Slobogin–Schumacher study, however, does not correspond to the on-off quality of the Supreme Court’s jurisprudence in this area. That is, the Court finds a practice or constellation of practices either to constitute a seizure or not, because a reasonable person would so experience them. Slobogin and Schumacher’s research only reveals how the respondents rank a practice relative to other practices. To be sure, their results produce a distribution at odds with Supreme Court classifications, raising the distinct probability that Americans generally would find some practices (particularly bus boarding) to be seizures. In short, the

206. Despite the authors’ calls for data on “U.S. Citizens”’ reactions to the intrusiveness of police practices, twenty-eight percent of the respondents to the survey were Australian law students. Id. at 735, 737.
207. Id. In addition, “each scenario was varied according to Person (First and Third) and Evidence (No or Yes).” This latter variable concerned whether or not the police practice was conducted with the aim of obtaining evidence of criminality. Id. at 735.
208. Id. at 738–39. Some of the results of the ranking raise questions about the remainder. In particular an “[a]rrest, handcuffing and detention for 48 hours” (rating: 65.58; rank: 28) is considered less intrusive than ten minute street questioning or a request to search luggage on a bus. Id.
209. Id. at 740–42.
Slobogin–Schumacher study does not produce the kind of empirical data that squarely hits the issue, but it does suggest the desirability of further investigation. What is needed is research directed to the question of whether the subject would feel free to terminate encounters marked by each of the factors, or some combinations of them, described above.210

Even with research aimed directly at whether most people in the United States perceive certain police practices to be “seizures,” two serious questions remain. One is whether their current understandings have been influenced by the existing jurisprudence. The Court has already defined the effect of a number of police actions along the boundary between seizures and consensual encounters. Some people have been exposed to these actions directly; many more have seen them in the media, particularly television shows that consist mainly of videotapes of police–citizen interactions.211 To some immeasurable degree, this exposure affects the public’s understanding of what is permissible police behavior.212 There is thus something of a “feedback effect,” with the Court’s rulings shaping the people’s expectations. This poses a problem for survey research designed to elicit the “understandings” of the American public.

Second, there remains the issue of the Court’s willingness to heed the results of even the highest quality research. Nothing but the Court’s own sense of legitimacy compels it to address the existence of empirical research. Even when considering social science data, the Court has employed a variety of strategies to avoid its implications.213 As the

210. But see Lichtenberg, supra note 124, at 90 (“What people perceived they would do, or perhaps would want to do, in such a situation, is very different from what people actually do when confronted with an asymmetrical authority relationship.”).
211. See supra text accompanying notes 113–19.
212. See United States v. White, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting) (“Our expectations ... are in large part reflections of laws that translate into rules the customs and values of the past and present.”).
213. Faigman, supra note 203, at 549. The Court “continues to approach factual questions as a matter of normative legal judgment rather than as a separate inquiry aimed at information gathering.” Id. “Researchers armed with volumes of data regularly challenge the Court’s factual statements. The Court so far has responded to this challenge using the same strategy it has always employed, viewing facts according to its vision of the Constitution, rather than according to reality.” Id. at 612. See also Donald N. Bersoff & David J. Glass, The Not So Weisman: The Supreme Court’s Continuing Misuse of Social Science Research, 2 U. CHI. L. SCH. ROUNDTABLE 279, 293 (1995) (“The Court has (1) misused or misapplied data when it believes the data will enhance the persuasiveness of its opinions; (2) ignored or rejected data despite its assertion of empirically testable statements; and (3) disparaged data when the research does not support its views. In some cases, it has done all three.”).
quantity and quality of data have increased, the Court “has responded to this challenge using the same strategy it has always employed, viewing facts according to its vision of the Constitution, rather than according to reality.”

Whether the Court would be willing to defer to real-world perceptions about police practices and the seizure–consensual encounter divide remains an open question. As with the related area of reasonable expectations of privacy, the Court may be unwilling to trust the issue to the fires of truth, and may be hiding its normative judgments behind the veil of putative empiricism. In actuality, the majority may be adopting a view voiced by Justice Harlan in a very different context: “[W]e should not, as judges, merely recite the expectations and risks without examining the desirability of saddling them upon society.” It may be that the Court has decided to saddle society with consensual encounters regardless of whether or not society actually regards them as consensual. If so, no amount of exposure to reality is likely to change its view. But this legal issue is so fact-based that some deference to empirical data is the only intellectually honest approach. It cannot help but improve upon the intuitions of the Justices themselves.


216. White, 401 U.S. at 786 (Harlan, J., dissenting) (rejecting the Court’s conclusion that monitoring statements made by the accused to an informant wearing a hidden radio transmitter did not constitute a “search” under the Fourth Amendment).

217. Cole, supra note 89, at 20. David Cole states:

By adopting a “reasonable person” standard that is patently fictional, [the Court] allows the police to engage in substantial coercion under the rubric of “consent,” without any limits on the persons to whom that coercion can be applied. . . . The Court’s test . . . finds coercion only where police engage in some coercive conduct above and beyond their inherent authority. For all practical purposes, the Court’s test erases the inherently coercive nature of all police encounters from the legal calculus for determining whether a Fourth Amendment “seizure” has occurred. Id. (emphasis in original). This seems to meet the approval of Wayne R. LaFave, who sees the doctrine as:

Strik[ing] the appropriate balance in marking the reach of Fourth Amendment protections. Police remain free to seek cooperation from citizens on the street without being called upon to articulate a certain level of suspicion in justification if a particular encounter proved fruitful, but yet the public is protected from any coercion other than that which is inherent in a police–citizen encounter.


B. No Investigative Encounters Without Justification

In the absence of hard data on the subject, we have to make some informed estimates about human behavior. Most of the available evidence, both empirical and anecdotal, suggests that encounters between police officers and citizens are least likely to be "consensual" when the citizens are subjected to investigative inquiries about themselves and their activities. This includes questions about presence in a particular location, travel plans, and the like, as well as requests for identification or permission to search the individuals or their possessions. It does not include investigative questions about others, offers of assistance, and the many other kinds of welcome interactions that police may have with the public. Also, investigative inquiries are the kinds of exchanges that are least similar to those an individual would have with other civilians. That is, to the extent the doctrine of consensual encounters is premised on the right of a police officer, like any other person, to approach an individual, that argument is the weakest when investigative techniques are employed. Citizens simply do not generally approach and investigate each other, especially in public places.

For these reasons, some objective justification should be required for investigative encounters. The issue then becomes what level of suspicion should precede these interactions. The Court of Appeals of New York has recognized—and regulated—two kinds of encounters short of a seizure.219 One is a police request for information, which may be posed on "an objective credible reason not necessarily indicative of criminality."220 This request for information may include "basic, nonthreatening questions regarding, for instance, identity, address or destination."221 At the next level:

Once the officer asks more pointed questions that would lead the person approached reasonably to believe that he or she is suspected of some wrongdoing and is the focus of the officer's investigation, the officer is no longer merely seeking information. This has become a common-law inquiry that must be supported by a founded suspicion that criminality is afoot.222

There is thus an escalating continuum of police-citizen interactions in

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220. Hollman, 590 N.E.2d at 206.
221. Id.
222. Id.
New York, from a request for information, to a common law inquiry, to a Terry stop, to an arrest.

Although this structure is certainly more protective of individual liberty than the Supreme Court's tripartite division, there are some good reasons why it is not the optimal alternative to the current law. For one, there would seem to be no constitutional basis for imposing restrictions on police behavior that does not produce a search or seizure. While this point was fudged in the first New York case, *People v. De Bour,* by the time the Court of Appeals undertook to clarify its four-level construction in *People v. Hollman* some eighteen years later, the court seemed to recognize the error of its ways. Now, *De Bour* represents "the culmination of a number of State common-law cases" and "the adoption of a State common-law method to protect the individual from arbitrary or intimidating police conduct." This is all well and good as far as New York law is concerned, but it hardly provides a basis to transpose New York's four-level framework to the federal constitutional level. If an officer's request for information or her common law inquiry is not a "seizure," it would seem to be beyond the Fourth Amendment's reach.

Further, because the police and citizens already seem largely incapable of distinguishing a consensual encounter from a stop, adding two additional levels of regulated interaction would almost certainly add to uncertainty on both sides. These additional levels would inevitably breed even finer distinctions, 266 sending "police and judges into a new thicket of [the] Fourth Amendment . . . to seek a creature of uncertain description." The marginal additional protection for individual liberty may not be worth the added confusion among the courts, police, and public.

The most logical alternative to this highly nuanced scheme is simply to treat an investigative encounter as the equivalent of a stop and require reasonable suspicion that crime is afoot. 228 As discussed above, the
available evidence suggests most people perceive an investigative encounter to be a seizure. Reasonable suspicion is a standard that has already been explicated and applied in a number of U.S. Supreme Court decisions and thousands of state and lower federal court cases. To the extent a fact-specific standard can ever truly be known to judges and police, this one is. For the public, the contours of reasonable suspicion may be cloudy, but public knowledge of the justification for an actual seizure is much less essential than is knowledge of the justification for lesser encounters with police. When a citizen is stopped we expect her to cooperate even if, in retrospect, that stop is premised on insufficient proof.229

The major objection to requiring reasonable suspicion for investigative questioning, of course, is that there will be less of it, and fewer criminals will be apprehended. This is true, but it is equivalent to arguing that we would catch more wrongdoers if we did not require probable cause to arrest or search. Once it is concluded that a reasonable person would not feel free to avoid an investigative encounter—that the individual is in fact seized—the ensuing Fourth Amendment control of this police method will necessarily reduce the discovery of criminals and their contraband. That, of course, is the price of the Fourth Amendment itself.230 It is, moreover, a small price to the extent that individual liberty of officer motivation or "real" purpose. Bond v. United States, 529 U.S. 334, 338 (2000); Whren v. United States, 517 U.S. 806, 816 (1996). The suggestion here covers investigative questioning and requests without regard to the officer's motivation. It encompasses all questioning of an individual concerning his presence, past, current and future actions, and possessions.


Street pursuits always place the public at some risk, and compliance with police orders to stop should therefore be encouraged. Only a few of those orders, we must presume, will be without adequate basis, and since the addressee has no ready means of identifying the deficient ones it almost invariably is the responsible course to comply.


[The Court has frequently bewailed the "cost" of excluding reliable evidence. In large part, this criticism rests upon a refusal to acknowledge the function of the Fourth Amendment itself. If nothing else, the Amendment plainly operates to disable the government from gathering information and securing evidence in certain ways. In practical terms, of course, this restriction of official power means that some incriminating evidence inevitably will go undetected if the government obeys these constitutional restraints. If is the loss of that evidence that is the "price" our society pays for enjoying the freedom and privacy

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C. Requiring Law Enforcement Personnel to State Their Business

The paradigm of reasonable Fourth Amendment action is an arrest or search with a warrant. A warrant ensures judicial assessment of the legal justification for the search or arrest before it is carried out. But it also serves several communicative functions: informing the individual of the authority of the officer, of the legal grounds for the officer’s action, and of the limits of the officer’s power to search or arrest.231 In other words, the warrant serves to state the officer’s business: “I have come to search/arrest.” There is no reason why those subjected to searches or arrests without a warrant should not get the same information, since the reasons for dispensing with a warrant are unrelated to its notice function.232 This requirement can also be seen as analogous to the knock-and-announce aspect of the reasonable execution of a search warrant.233 For arrests and stops, a clear statement of purpose could only encourage the required submission.

If we are to retain the idea that a person may have an investigative encounter with a police officer that falls on the nonseizure side of the line, it would clearly help in drawing that line for the Court to demand that here, too, the officer be made to state his or her business. For an arrest, a simple “you’re under arrest for X” would be required; for a stop, something like, “stop right there.” A consensual encounter would be prefaced by, “I’d like to talk with you for a minute about Y,” or words to that effect. As the requirement of a statement of the officer’s purpose became commonplace, the significance of each form of words would likely become widely known to the public, and would serve to inform citizens of their relative rights in each situation. By making clear that a consensual encounter was being attempted, the last phrase would serve to clarify the line between freedom and restraint and to enhance citizens’ ability to exercise their rights to cut short an officer’s attempt at conversation.

The suggestion of requiring a statement of the officer’s business is vulnerable to at least two criticisms. One, is that it is similar to the “you are free to go” warning the Supreme Court recently rejected in Ohio v.

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Robinette. The Court in Robinette reiterated its totality-of-the-circumstances standard for all issues of consent, seemingly including consensual encounters. It resisted, as it had in Schneckloth v. Bustamonte, exalting any one factor, particularly that of a police-given notice of the right to refuse or leave. This is a serious concern. One response is that the objection to giving citizens notice of any kind is remarkably weak. In Schneckloth the majority held the proposed warning to be “impractical”; in Robinette it was described as “unrealistic.” In neither case was there any explanation of why this is so, and it seems counterintuitive to believe that some statement of purpose would be either impractical or unrealistic. Certainly, more elaborate notice has not proven to be an insurmountable practical problem in criminal interrogation. The Court’s objection so far to giving citizens any information about their legal status vis-à-vis the police seems to amount to little more than “we won’t require it because we won’t require it.”

That said, it can be argued that a statement of purpose by an officer is both subtly different from the notices rejected in Schneckloth and Robinette and more justified as reasonable police practice. A statement of purpose does not constitute advice about legal rights, which may be among the Court’s unspoken concerns. It simply informs the individual about the reason for the officer’s approach. Since some contacts with the police cannot be terminated by the individual, a statement of the officer’s business would seem to be a sine qua non for any reasonable choice about whether to continue or terminate the encounter. How, otherwise, are citizens to know if they must submit or not? Indeed, because the police are public servants working for all citizens, insisting that they give a reason for personal contact would seem to be the least that citizens, as their “employers,” can expect. This is especially true for interactions that are not prompted by indicia of

236. Id. at 231.
237. Robinette, 519 U.S. at 40.
238. Dickerson v. United States, 120 S.Ct. 2326, 2336 (2000) (“Miranda has become embedded in routine police practice to the point where the warnings have become part of our national culture.”); see also Miranda v. Arizona, 384 U.S. 436, 444 (1966).
criminality.

What is being suggested here is a bright-line rule for citizens. Thus far, with the exception of Miranda and its progeny, the Court has created bright-line rules for law enforcement personnel only. The justification is that police officers must often make “a quick ad hoc judgments” about the legality of their actions. In these circumstances “[a] single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.” The same considerations apply at least as much to lay men and women interacting with a police officer, as can be seen by substituting “citizens” for “police officers” in the previous quotation. If officers, trained to some extent in the rudiments of the law, need bright line rules for guidance, how much more so do citizens? An officer’s statement of business would be the kind of salutary bright-line advice that the Court has had no hesitancy in providing to police.

It might be objected that such a rule demands that officers assess their options at a very early stage of an investigation, and that a mistaken statement of purpose might taint police actions that follow. The importance of this notice, however, is its effect on the person to whom it is given. If officers define their business as a stop, then the person who submits or was physically restrained is seized, regardless of whether there was justification for the seizure. The police practice, like other administrative decisions, should rise or fall on the contemporaneous record.

The second objection to a state-your-business rule is somewhat the opposite—that it is toothless because it redresses too little of the informational and power advantage of the police. Having curtly stated their business, the officers would be free to proceed to employ the usual consensual encounter techniques. How much would a statement of the officers’ purpose enhance the citizen’s ability to exercise her right to terminate the encounter? Would it prove any more effective than

244. The available empirical evidence suggests that the answer to this question is: “not much.” Between the first decision of the Ohio Supreme Court in Robinette, and its reversal by the U.S. Supreme Court, Ohio troopers were required to give a “you are free
Miranda warnings are in ensuring the exercise of the right to remain silent or obtain counsel? Perhaps not, but in some marginal way it could only serve to clarify the line between freedom and restraint. In so doing, it would also increase the civility of the encounter on both sides. By telling citizens the reason for their approach, the police would be treating the objects of their attention with greater respect. Civilians would have less need to be confrontational in obtaining that basic information. A state-your-business rule for law enforcement officers is probably the least effective of the means proposed for addressing the core deficiencies in the current consensual encounter doctrine, but it can bring nothing but benefit, however small.

VI. CONCLUSION

There are legal fictions and there are legal fictions. One means of differentiating good from bad legal fictions is by their relationship to reality, for “[a] fiction is frequently a metaphorical way of expressing a truth.” As Fuller says, “No statement is an entirely adequate expression of reality, but we reserve the label ‘false’ for those statements involving an inadequacy that is outstanding or unusual.” By that measure, in light of the available evidence, the consensual encounter
doctrine paints a false picture of reality as applied to encounters involving investigation of the individual being questioned. In so doing, it mislocates the dividing line between freedom and restraint, including on the “freedom” side of this line many people who are effectively restrained or—to put it another way—are restrained in all but the eyes of the law. This price alone should be enough to compel reform.

The doctrine exacts other costs, as well. The imprecision of the line between a consensual encounter and a stop not only contributes to the “substantive” errors of the doctrine just mentioned, but also confuses and misleads those whom the rule seeks to regulate. These are substantial costs in themselves. The obscurity of the line between freedom and detention bespeaks an uncivil distrust of the persons whose liberty is at stake. It plays on their ignorance and understandable sense of powerlessness in relation to law enforcement officers. Moreover, attempts by citizens to clarify their status, or assert the rights they believe they have, produce additional incivility and friction on both sides. The consensual encounter doctrine virtually invites citizens, as an initial response, to question or rebuff police approaches. It encourages mistrust, avoidance, and noncooperation with the police. Rudeness and confrontation by citizens, which are virtually required in order for citizens to determine whether they are free to go, stimulates police rudeness and confrontation in response. This, in turn, poisons the relationship between citizens and their government, creating social friction and disunity.

Reexamination or reform of the doctrine of investigative encounters, therefore, is imperative. Since the concept of consensual encounters is premised on the notion that, in some circumstances, a reasonable person would feel free to decline an officer’s inquiries, one step toward reform would be to find out how the “reasonable” American responds to investigative encounters. The Supreme Court has not done this, preferring instead a kind of projective ipse dixit about the behavior of a reasonable person. There is no reason current social scientific methods cannot provide a reasonably accurate answer to the question posed by the Court.

If the Court is unwilling to await, or react to, such data, a second-best choice is to make a pragmatic judgment based on currently available evidence, including anecdotal reports. By all indications, most people do not feel free to terminate investigative questioning by police officers, either through ignorance of their rights, lack of assertiveness, or some combination of the two. If the reasonable person is likely not to feel free to go in such a situation, then she has effectively been seized. This suggests, in the absence of hard data that would call for a different approach, that investigative encounters be treated as seizures, requiring
the reasonable suspicion we already demand for brief investigative stops. At the least, police officers should be required to state their business upon approaching any citizen. For actual searches and seizures, searches and arrests with warrants provide the precedent for this kind of notice. Even if investigative encounters continue to be held to be outside the Fourth Amendment, a statement of the officer’s business would help delineate their boundaries and alert the individual to the general contours of the situation.

In the absence of some kind of reform, consensual encounters will continue to breed mutual suspicion and incivility between the people and those meant to serve them. Whatever the merits of legal fictions in general, this area of law is too important, and the costs too high, to continue to regulate by a noxious combination of unreality, obscurity, and incivility.