Twitter Thread by Orin Kerr

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There's a lot to be said about the traffic stop of Lieutenant Caron Nazario, but one of them is that it makes this 2015 blog post unfortunately relevant again: "Sandra Bland and the 'Lawful Order' Problem."
(Given the paywall, I'll include screenshots.)
https://t.co/6AU9OdU50g

Opinion by **Orin Kerr**
Contributor, The Volokh Conspiracy

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July 23, 2015 at 8:57 a.m. PDT

Sandra Bland was pulled over for failing to signal while changing lanes. A lot of readers have watched the traffic stop which led to Bland's arrest for assaulting an officer. If you haven't, you should.

The Bland video brings up an overlooked problem with the law of police-citizen encounters. The police can back up their orders with force because it's often a crime to disobey a lawful order from a police officer. But from a citizen's perspective, it's often impossible to know what is a lawful order. As a result, it's often impossible for citizens to know what they can and can't do during a police encounter.

The first problem is knowing what counts as an "order." If an officer approaches you and asks you to do something, that's normally just a request and not an order. But if there's a law on the books saying that you have to comply with the officer's request, then the request is treated as an order. You can't know what is an "order" unless you study the law first, which you're unlikely to have done before the officer approached you.

https://t.co/VLL70fFvtH

The even bigger problem is knowing when an order is "lawful." An order is lawful if forcing compliance would not violate any law. But a citizen is in no position to assess that. Even if the police pulled over the world's greatest legal expert, the citizen *still* couldn't know what orders are lawful because the laws often hinge on facts the citizen can't know.

[Did Sandra Bland have to put out her cigarette? The law says no.]

Here's an example. Imagine an officer walks up to you and tells you to put your hands behind your back so he can handcuff you. To do that lawfully, the officer needs at least reasonable suspicion that you are engaged in a crime and pose a threat to him and maybe probable cause that you have committed a crime. But you can't know how much cause the officer has. Maybe the officer has no cause and is flagrantly violating your constitutional rights. Or maybe ten nuns have just sworn under oath that you robbed a bank in broad daylight that morning. You're innocent, as it was a case of mistaken identity. But the officer doesn't know that. And as the citizen, you can't tell which is which.

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Don't just take my word for it. Here's what the Oregon Court of Appeals wrote about this problem a few years ago:

> Whether a particular police order is "lawful" is frequently a complex question involving some of the most vexing and intractable issues in constitutional law. For example, a police order such as "Stop!" can be an unlawful seizure of a person under Article I, section 9, of the Oregon Constitution, depending on whether the order is accompanied by a sufficient show of authority and the officer who issues the order is subsequently found to have lacked reasonable suspicion to believe that criminal activity was afoot. The inquiry is addressed on a case-by-case basis, there are few if any bright line rules, and there is an almost infinite variety of variables — some of which, such as the officer's state of mind, could not possibly be known by a defendant. Likewise, an order to disperse might unlawfully interfere with a person's right of free expression under Article I, section 8, of the Oregon Constitution — a determination that can surely confound ordinary citizens and has in fact confounded even judges of this court.

You might wonder, wait, if I can't know whether an order is lawful, isn't a law punishing me for failure to obey an unlawful order unconstitutionally vague? The courts have said no — citing, ironically, the idea that everyone is presumed to know the law! Here's the Oregon Supreme Court rejecting a vagueness claim:

> That argument, however, merely expands on an old saw — that the common man cannot reasonably be expected to know and understand the complexities of the law. We generally have rejected such arguments, instead presuming that publication and dissemination of a substantive law is sufficient to inform the public of its import. And, to the extent that the lawfulness of an official's order can be ascertained by resort to the published substantive law, the ordinary citizen must be presumed to know and understand the general parameters of the term "lawful order." We scarcely could do otherwise: If the extent or complexity of the law excuses obedience, it is no law. In short, we hold that the fact that ORS 162.247(1)(b) only requires the public to obey a peace officer's "lawful" orders does not deny ordinary citizens a reasonable opportunity to know what conduct is prohibited.

Got it? If an officer walks up to you and gives you an order, you're "presumed" to immediately know every area of state and federal law. And on top of that, you're presumed to know all the facts known to the officer that the officer won't tell you. Great. (Oh, and I don't mean to pick on Oregon; it just seems to have more clear law on this issue than other jurisdictions I found.)

https://t.co/7p1FpS4fmH

> The uncertainty caused by such laws is likely a contributor to the anxiety and stress people many people feel, particularly in minority communities, when interacting with the police. It's hard to know if the officer is following the law or violating your rights. And if you don't know that, you can't know what you're allowed to do legally in response to the officer or what kind of reaction is justified. The officer has all the cards.
>
> Faced with this, a citizen's cautious strategy might be just to do everything the officer says regardless of whether the officer's command is lawful. Even if you're right that the order is unlawful, the officer may not know that. You might decide it's better just to follow the officer's illegal commands than to be arrested and spend the night in jail out of principle.
>
> But this is America, and we didn't fight a revolution to make that the only choice. And your options, if you want to assert the rights you have, can be awfully hard to figure out.

In this case, one of the (many) problems was that the officers were coming in with one view of their lawful order authority and Lt. Nazario very understandably had no idea of what that was. Here's why.

The officers are trained about the Supreme Court's decision in Pennsylvania v. Mimms, 434 U.S. 106 (1977). Mimms lets officers order the driver of the car out of the car during a traffic stop. They don't need specific cause to do that, Mimms says. They don't need to say why.

> [6] Contrary to the suggestion in the dissent of our Brother STEVENS, *post,* at 122, we do not hold today that "whenever an officer has an occasion to speak with the driver of a vehicle, he may also order the driver out of the car." We hold only that once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures.

An officer trained on Mimms will know that he can order anyone stopped out of the car, with no reason and no stated reason. And he's also know that refusal to obey that order is a crime -- it's refusal to obey a lawful order.

But of course most people WON'T KNOW THAT. It's understandable that a driver ordered out of the car will want to know why. What is happening? Why order him out of the car? What is the officer doing? And here, all that, with *multiple guns drawn already,* yikes.

The driver and the officers are in two totally different mental worlds. The driver is understandably wanting to know what the heck is going on. The officers are meanwhile thinking, "why is this person committing the crime of refusing my lawful order?"

I've wondered if one way of defusing these situations would be for officers to be required to explain the law to the drivers. Perhaps: "sir, I am giving you what the law calls a lawful order. Under the law, I am allowed to order you out of the car. It is a crime to refuse."

That's not perfect wording, I realize. But the thought is that *something* to bridge the gap between those two mental worlds would be really important.

Here's a recent student note offering a statutory proposal somewhat along those lines.
https://t.co/JtPjPTQZiW

JAMES MOONEY

The Power of Police Officers to Give "Lawful Orders"

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

AUTHOR. Yale Law School, J.D. 2019. I am deeply grateful to Steven Duke for supervising this project and encouraging me to pursue publication. Thanks to Orin Kerr for providing very helpful feedback on my draft. Thanks also to Alaa Chaker and other members of the *Yale Law Journal* for careful editing and thoughtful suggestions. This Comment expresses only my opinions and has no connection to my job as a judicial clerk or the views of any court.

And I also think there's a plausible due process argument (albeit not one courts have so far adopted alas) that a person can't be arrested for failure to obey a lawful order unless they have been informed that failure to obey that specific order is a crime.

Maybe I'll write more on this formally at some point. It's unfortunate to see it relevant again. /end