

# An Argument for Requiring Officer Identification

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## INTRODUCTION

Imagine this scenario: A man exits his workplace in a bad neighborhood and enters his car. He turns to his left and sees several men running toward him with guns drawn. Panicking, he reaches for his own weapon to defend himself, only to be shot through the neck. When the strangers reach his car, they inform him that they are undercover police officers executing an arrest warrant. Because of his injuries, he is paralyzed below the neck.

Most law-abiding citizens would wonder, quite reasonably, why the officers did not identify themselves. Indeed, in the case on which this fact pattern was based, the victim asked this question of the police when they arrived at his vehicle.<sup>1</sup> When confronted with a situation like the one outlined above, most would agree that they would act quite differently if they knew that they were being confronted by police officers rather than criminals. This Comment addresses whether an arrest is reasonable under the Fourth Amendment when the officers fail to identify themselves as police when conducting the arrest.

In *Wilson v Arkansas*,<sup>2</sup> the Supreme Court held that Fourth Amendment reasonableness depends in part on whether officers knock and announce their presence prior to entering a home to conduct a search.<sup>3</sup> The rationale behind this rule was articulated in *Hudson v Michigan*,<sup>4</sup> where the majority explained that the “knock-and-announce” rule protected three vital interests: life and limb, property, and privacy.<sup>5</sup> Recently, several plaintiffs, pointing to the Court’s holding in *Wilson*, have argued that the logic of the knock-and-announce rule ought to be extended to police officers conducting arrests in public.

This Comment defends the constitutional validity of a rule requiring police officers to identify themselves as police when conducting an arrest. Specifically, this Comment argues that when an officer

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<sup>1</sup> *St. Hilaire v City of Laconia*, 71 F3d 20, 23 (1st Cir 1995). For a detailed discussion of *St. Hilaire*, see notes 62–73 and accompanying text.

<sup>2</sup> 514 US 927 (1995).

<sup>3</sup> *Id.* at 934.

<sup>4</sup> 547 US 586 (2006).

<sup>5</sup> *Id.* at 594.

fails to identify himself, all three of the interests that the knock-and-announce rule protects are implicated, and thus the police should be required to identify themselves prior to conducting arrests in public. Part I provides a brief legal history of the Fourth Amendment, examines 42 USC § 1983 claims and the doctrine of qualified immunity, and introduces the knock-and-announce rule. Part II details how courts have dealt with the argument that *Wilson* should be extended to the failure-to-identify context. Finally, Part III argues that courts should adopt a rule requiring officers to identify themselves unless they possess reasonable suspicion that doing so would be dangerous. Although adopting an identification requirement could overly burden police officers and endanger their lives, a fair reading of *Wilson's* progeny obviates this concern by allowing officers to suspend a rule requiring identification in instances where they possess reasonable suspicion that identification would threaten their safety.

This Comment's proposed rule—which targets the unreasonable manner in which seizures are carried out, rather than the process by which authorization for these seizures is obtained—would adequately compensate injured plaintiffs through the tort system while shifting the costs of injuries arising from failures to identify from individual plaintiffs to society as a whole. This would not only give police officers an additional incentive to use the least dangerous means of arresting suspects, but it would also avoid placing citizens in situations where they are confronted by unknown assailants. This Comment's proposed rule would help guide both police and citizen behavior.

## I. SECTION 1983 AND THE KNOCK-AND-ANNOUNCE RULE

Before discussing cases in which an officer fails to identify himself or this Comment's argument that the Fourth Amendment requires him to do so, it is necessary to summarize briefly the applicable Fourth Amendment case law in this area. Part I.A explains the legal rules allowing civil suits under 42 USC § 1983 for violations of constitutional rights as well as the doctrine of qualified immunity. Part I.B introduces the knock-and-announce rule.

### A. Section 1983 and Qualified Immunity

The Fourth Amendment protects individuals against unreasonable searches and seizures.<sup>6</sup> In determining whether a given search or seizure is unreasonable under the Fourth Amendment, the Court has

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<sup>6</sup> US Const Amend IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”). See *United States v Verdugo-Urquidez*, 494 US 259, 265 (1990).

recognized that there is no fixed test and that reasonableness is left for trial courts to examine on a case-by-case basis.<sup>7</sup> Generally speaking, when an individual's Fourth Amendment rights are violated, there are two avenues for relief: the exclusionary rule<sup>8</sup> and tort relief under § 1983. By providing a right of action for an underlying constitutional tort committed by state actors, § 1983 compensates citizens via the civil tort system. This means that plaintiffs must allege a violation of a specific constitutional right (such as a violation of the right to be free from unreasonable seizures) in order to successfully bring a § 1983 suit. In the context of Fourth Amendment seizures, there are two basic violations: lack of proper constitutional authorization for a seizure,<sup>9</sup> and failure to conduct the seizure reasonably.<sup>10</sup> This Comment deals with the second violation.

It is important to note that not all such violations are compensable. That is, when an action is brought against officers or agents of the government acting in their official capacity, officials may escape liability through the doctrine of qualified immunity. This doctrine allows courts to balance the need to provide recovery to plaintiffs against the danger that unlimited liability will deter public officials from taking necessary action for fear that litigation will be brought against them.<sup>11</sup> Qualified immunity is an affirmative defense allowing an officer to dismiss the case at the pleading stage, thereby sparing him from the time and expense of litigation.<sup>12</sup> In *Anderson v Creighton*,<sup>13</sup> the Court held that whether an official is entitled to qualified immunity in a Fourth Amendment case turns on the objective reasonableness of his action.<sup>14</sup> The question is whether a reasonable officer would have believed that his actions were lawful in light of clearly established law

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<sup>7</sup> See *Mapp v Ohio*, 367 US 643, 653 (1961). For example, it may be reasonable for police to wait less time before entering a residence if the sought-after material is cocaine than if it is a missing grand piano. See *United States v Banks*, 540 US 31, 41–42 (2003).

<sup>8</sup> The exclusionary rule allows defendants to exclude evidence obtained through a Fourth Amendment violation. See *Weeks v United States*, 232 US 383, 398 (1914). See also *Mapp*, 367 US at 655 (extending the exclusionary rule to the states). Recently, the Court has cut back on the application of the exclusionary rule. See *Herring v United States*, 129 S Ct 695, 700–01 (2009) (suggesting that the exclusionary rule should not be applied as a default and should be applied only where the deterrence benefits outweigh the costs).

<sup>9</sup> See *Nathanson v United States*, 290 US 41, 47 (1933); *Terry v Ohio*, 392 US 1, 21 (1968).

<sup>10</sup> See *Camara v Municipal Court*, 387 US 523, 534–39 (1967).

<sup>11</sup> See *Anderson v Creighton*, 483 US 635, 638 (1987) (describing qualified immunity as the result of balancing plaintiff and government interests). See also *Harlow v Fitzgerald*, 457 US 800, 814 (1982) (noting that without the balancing test, the deterrent effect on public officials would harm society).

<sup>12</sup> See *Harlow*, 457 US at 815.

<sup>13</sup> 483 US 635 (1987).

<sup>14</sup> *Id* at 639.

and the information that he possessed.<sup>15</sup> Subjective beliefs are irrelevant, and the contours of the constitutional right allegedly violated must be clearly established.<sup>16</sup> This doctrine allows officials to anticipate when their conduct will give rise to liability for damages.<sup>17</sup> Thus, qualified immunity operates as a safeguard against unlimited tort liability for public officials, ensuring that liability attaches only for gross violations of a plaintiff's clearly established constitutional rights.

Courts were once required to articulate whether a constitutional right had been violated before considering whether the law was clearly established at the time of the violation.<sup>18</sup> But in *Pearson v Callahan*,<sup>19</sup> the Court reasoned that while a rigid order of consideration may be preferable in many cases, overcrowded dockets made this inflexible rule impracticable.<sup>20</sup> As a result, district courts have discretion over the order in which they apply the test.<sup>21</sup> This creates a catch-22 where courts sometimes use qualified immunity as a device for clearing overcrowded dockets but do not clarify the law to give police officers or citizens fair notice of what the law requires.

Indeed, the threshold for defeating a claim of qualified immunity is very high in the circuit courts. The First Circuit, for example, requires that the cases that have already been decided be factually indistinguishable “in a fair way from the [case] at hand” in order to defeat a claim of qualified immunity.<sup>22</sup> Likewise, the Seventh Circuit requires that plaintiffs find a violation of the right they claim in factually similar cases in order to defeat qualified immunity.<sup>23</sup> The impact on qualified immunity cases is clear: until a critical mass of factually similar cases develops, courts are likely to find that the law was not clearly

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<sup>15</sup> Id at 641.

<sup>16</sup> Id at 640–41.

<sup>17</sup> *Anderson*, 483 US at 646 (suggesting that the alternative rule would require officers to “entangle[] themselves in English and American common law” if they wanted certainty that they would not be subject to suit).

<sup>18</sup> See *Saucier v Katz*, 533 US 194, 201 (2001).

<sup>19</sup> 129 S Ct 808 (2009).

<sup>20</sup> Id at 818.

<sup>21</sup> Id at 821.

<sup>22</sup> See *Savard v Rhode Island*, 338 F3d 23, 32–34 (1st Cir 2003) (allowing a qualified immunity defense and noting that when judges can disagree across a spectrum of similar cases involving strip searches, defendants cannot reasonably be expected to anticipate that their conduct will give rise to Fourth Amendment liability).

<sup>23</sup> *Borello v Allison*, 446 F3d 742, 749–50 (7th Cir 2006) (permitting a qualified immunity defense where the plaintiff did not point to any factually similar cases demonstrating that when a prison official ignores a request for a cell transfer, this conduct violates the Eighth Amendment). See also id at 750 (noting that qualified immunity will also be defeated where “the violation was so clear that an official would realize [the violation] . . . even in the absence of an on-point case”).

established at the time of the offense.<sup>24</sup> But by allowing courts to rule on the qualified immunity claim prior to articulating the constitutional right at issue, the Supreme Court's holding in *Pearson* hinders the development of this critical mass of cases. As a result, plaintiffs bringing these claims go uncompensated.

## B. The Knock-and-Announce Rule

The Supreme Court has long recognized the special legal status of the home, requiring police officers to knock and announce their presence prior to entering a home to conduct an arrest or a search. The knock-and-announce rule deals exclusively with a failure to *conduct* a search properly (as opposed to a failure to obtain authorization for that search by demonstrating adequate probable cause). This Part explores the knock-and-announce rule and its development.

1. In most situations, police officers must knock and announce their presence prior to entering a home.

In *Wilson*, the Supreme Court granted additional procedural protections to individuals against searches by the government.<sup>25</sup> The defendant in *Wilson* made numerous sales of narcotics to a police informant and threatened him with a pistol if he turned out to be working with the police.<sup>26</sup> The police obtained a warrant to search Sharlene Wilson's house and arrest her. In executing the warrant, the police officers entered through an unlocked screen door, identifying themselves as police officers as they entered the home.<sup>27</sup> In the subsequent search they uncovered various narcotics, including marijuana, methamphetamine, and Valium, as well as a pistol and ammunition.<sup>28</sup>

The Court held that the reasonableness of a search of a dwelling depends in part on whether the officers announced their presence and authority prior to entering the house.<sup>29</sup> The Court found that at the time of ratification, the common law required constables to announce their presence prior to entering a home, relying in large part on the

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<sup>24</sup> Other circuits have embraced differing standards. See, for example, *Papineau v Parmley*, 465 F3d 46, 56–61 (2d Cir 2006) (stating that “the right at issue in a qualified immunity case need not be limited to the specific factual situation in which that right was articulated”). This Part's discussion is limited to the First and Seventh Circuits, because those courts are the ones that have addressed officers' failure to identify. See Part II.A.

<sup>25</sup> 514 US at 936.

<sup>26</sup> *Id.* at 929.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Wilson*, 514 US at 931 (explaining that an evaluation of “reasonableness” under the Fourth Amendment has been traditionally guided by common law rights at the time of ratification).

theory that a “man’s home is his castle.” The King’s sheriffs could break into and enter a suspect’s home, but only if they first announced their presence and gave the suspect time to answer the door.<sup>30</sup> The Court reasoned that, given this longstanding common law requirement, the Framers likely would have considered a failure to knock and announce as a factor in the reasonableness inquiry under the Fourth Amendment.<sup>31</sup> But the Court was careful to clarify that the knock-and-announce rule should not be interpreted as a bright-line requirement. Looking again to the common law, the Court found that English courts did not require an announcement of an officer’s presence if such an announcement was likely to aid in the suspect’s escape.<sup>32</sup> While it did not attempt to delineate factors that would obviate the knock-and-announce requirement, the Court did note that police officers could establish the reasonableness of an unannounced entry.

## 2. The Court refines the knock-and-announce rule.

In *Richards v Wisconsin*,<sup>33</sup> the Court clarified situations where the police might defend a failure to knock and announce prior to entry. In *Richards*, officers obtained a search warrant for the defendant’s motel room.<sup>34</sup> They previously applied for a “no knock” warrant—as permitted by Wisconsin law—but the magistrate denied the application.<sup>35</sup> Several plainclothes officers and at least one uniformed officer accompanied an officer dressed as a maintenance man to Steiney Richards’s hotel room. The plainclothes officer knocked and asked if he could enter the room.<sup>36</sup> The defendant opened the door as far as the chain bolt would permit, but then saw a police officer in uniform behind the plainclothes officers and slammed the door. The police kicked the door down and found Richards trying to escape through an open window. A search of the room yielded cash and cocaine.<sup>37</sup>

At issue in this case was whether the Wisconsin Supreme Court’s ruling that officers are never required to knock and announce when executing a warrant in a felony drug investigation was constitutional.<sup>38</sup> The rationale for this exception was that the general culture surrounding the drug trade includes the violent use of weapons as well as the

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<sup>30</sup> Id at 931–32.

<sup>31</sup> Id at 934.

<sup>32</sup> Id at 934–36.

<sup>33</sup> 520 US 385 (1997).

<sup>34</sup> Id at 388.

<sup>35</sup> Id.

<sup>36</sup> Id.

<sup>37</sup> *Richards*, 520 US at 389.

<sup>38</sup> See *State v Richards*, 549 NW2d 218, 219–20 (1996) (finding exigent circumstances always present during the execution of a warrant involving felonious delivery of illegal drugs).

routine destruction of drugs to evade authorities.<sup>39</sup> The Court found this rationale unconvincing, because it overgeneralized all felony drug crimes as dangerous and effectively circumvented the knock-and-announce rule.<sup>40</sup>

But while the Court struck down Wisconsin's blanket exception to the knock-and-announce rule, it nonetheless held that police officers could suspend the rule when they had a reasonable suspicion that knocking and announcing their presence would either be "dangerous or futile" or where it would "inhibit the effective investigation of the crime."<sup>41</sup> This standard of reasonable suspicion is less onerous than the probable cause standard in the Fourth Amendment, but the Court reasoned that a standard of reasonable suspicion struck the appropriate balance between the privacy interests at stake and effective law enforcement practices.<sup>42</sup> The Court noted that the reasonableness of a police officer's decision to forgo the knock-and-announce requirement must be evaluated at the time of entrance into the dwelling.<sup>43</sup> The Court reasoned that while it may be preferable to demonstrate to a magistrate ahead of time the probable cause supporting a no-knock warrant, this was not always practicable, and a decision by a magistrate not to grant a no-knock warrant was not a per se bar on knocking without announcing.<sup>44</sup>

In *United States v Banks*,<sup>45</sup> the Court emphasized the need for a case-by-case determination of how long police officers must wait after knocking and announcing before they are permitted to break down the door.<sup>46</sup> In *Banks*, officers executing a search warrant on the defendant's apartment knocked and announced their presence.<sup>47</sup> They waited about fifteen to twenty seconds before breaking down the door. The defendant had been in the shower and claimed to be utterly

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<sup>39</sup> *Id.* at 225–26. The Wisconsin Supreme Court reasoned that the violation of privacy involved in a no-knock exception is minimal because the resident would ultimately be unable to refuse police entry. See *Richards*, 520 US at 393 n 5 (rejecting this argument).

<sup>40</sup> *Richards*, 520 US at 393–94 (pointing out that if per se exceptions to the knock-and-announce rule were allowed in every circumstance where there might be danger to officers or destruction of evidence, the knock-and-announce rule would be meaningless).

<sup>41</sup> *Id.* at 394.

<sup>42</sup> *Id.*

<sup>43</sup> Although the officers in *Richards* had originally been denied a no-knock warrant by the magistrate, the Court found this to be immaterial, as it merely demonstrated that when they appeared before the magistrate, the officers were unable to demonstrate probable cause for such a warrant. This did not preclude them from making a reasonable assessment of the situation once they tried to execute the search warrant and found *Richards* to be noncompliant. *Id.* at 395.

<sup>44</sup> *Richards*, 520 US at 395–96 & n 7.

<sup>45</sup> 540 US 31 (2003).

<sup>46</sup> *Id.* at 41.

<sup>47</sup> *Id.* at 33.

surprised by their entry as he had not heard their knock.<sup>48</sup> The Court held that “[a]bsent exigency, the police must knock and receive an actual refusal or wait out the time necessary to infer one.”<sup>49</sup>

Ultimately, the issue of how long to wait before breaking a door down is one that must be decided on a case-by-case basis by the lower courts. The Court noted that the situation could change drastically from one case to another—police seeking a stolen grand piano may very well be able to spend more time waiting for an answer than police seeking evidence that can easily be destroyed (such as cocaine powder).<sup>50</sup> The Court rejected the argument that the time police officers must wait before entering should be judged based on the time it would reasonably take for an occupant to reach the door to answer it—especially when the evidence sought is, like drugs, easily disposable.<sup>51</sup>

### 3. The knock-and-announce rule is severely limited in *Hudson v Michigan*.

Recently, however, the Court curtailed the use of the knock-and-announce rule in a 5-4 decision. In *Hudson*, the police obtained a warrant to search the house of Booker Hudson.<sup>52</sup> Upon arriving at his home, they announced their presence, then waited approximately three to five seconds before opening his door and entering his house.<sup>53</sup> The subsequent search revealed large quantities of cocaine, as well as a loaded gun in the chair in which Hudson was sitting.<sup>54</sup> Writing for the majority, Justice Antonin Scalia articulated three interests protected by the knock-and-announce rule: the protection of life and limb, the protection of property, and the protection of privacy and dignity.<sup>55</sup>

Justice Scalia pointed out that the first of these interests—protection of life and limb—is implicated in the knock-and-announce context because individuals typically are very protective of their homes.<sup>56</sup> An unannounced entry is likely to provoke a violent self-defensive reaction—a fact that, in connection with a legal search, could threaten an officer’s life. Justice Scalia also pointed out that the protection of property is implicated in the knock-and-announce rule

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<sup>48</sup> *Id.*

<sup>49</sup> *Banks*, 540 US at 43.

<sup>50</sup> *Id.* at 41–42.

<sup>51</sup> *Id.* at 40 (pointing out that because of the variation in house size, it would be nearly impossible for police to judge reasonable transit time, particularly when there is a high risk of destruction of evidence).

<sup>52</sup> 547 US at 588.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 594.

<sup>56</sup> *Hudson*, 547 US at 594.



because the common law expressly gave individuals the chance to comply with the law in order to avoid damage to suspects' houses.<sup>57</sup> Finally, Justice Scalia pointed out that if an officer does not announce his presence, a suspect can be caught in an undignified and embarrassing state, thus implicating her privacy interests.<sup>58</sup> During the brief period between an officer knocking and entering the home, individuals are able to dress appropriately or pull themselves out of bed to prepare for an encounter with the law. While the knock-and-announce rule can be said to protect all three of these vital interests, Justice Scalia reasoned that it certainly does not protect one's interest in destroying evidence described in a warrant.<sup>59</sup> Justice Scalia pointed out that although the exclusionary rule need not apply for knock-and-announce violations, potential plaintiffs would still have a remedy for civil damages under § 1983.<sup>60</sup>

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In summary, officers must generally knock and announce their presence prior to breaking down a door. In some situations, such as where the officer has a reasonable suspicion that the defendant is dangerous, or where the evidence is likely to be disposed of, the officer may forgo the knock-and-announce requirement. This rule protects vital interests in property, life and limb, and privacy. The required wait time after knocking and announcing should be reviewed on a case-by-case basis and may be different for different types of crimes.

## II. *WILSON* AND THE "FAILURE TO IDENTIFY"

Recently, courts have confronted the question of whether the knock-and-announce rule articulated in *Wilson v Arkansas* and its progeny should extend to cases where police officers (usually dressed in plain clothes) do not identify themselves as police officers before arresting a suspect. Proponents of extending *Wilson* argue for a rule similar to knock and announce, where an officer who fails to identify himself when conducting an arrest would be civilly liable for constitutional violations.<sup>61</sup>

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Hudson*, 547 US at 597.

<sup>61</sup> It is important to note that suspects are not "seized" per the Fourth Amendment until officers either physically lay hands on the suspect or the suspect submits to their authority. See *California v Hodari D.*, 499 US 621, 626 (1991). Like the knock-and-announce rule, however, a rule requiring officers to identify themselves would help guard against a *subsequent* unreasonable

This Part surveys cases in which plaintiffs have argued for a rule requiring officers to identify themselves. Thus far, no circuit court has extended the knock-and-announce rule in *Wilson*, while only one of the three district courts to touch on this issue has done so explicitly.

#### A. Circuit Courts Have Been Reluctant to Extend *Wilson*

The First Circuit was the first to consider whether to extend the knock-and-announce rule to situations where an officer fails to identify himself.<sup>62</sup> The plainclothes police officers in this case had obtained an arrest warrant for Philip St. Hilaire. The police knew that St. Hilaire was dangerous and probably armed.<sup>63</sup> Prior to attempting to arrest him, the officers conferred and decided that the best way to proceed was to make sure that St. Hilaire understood that they were police officers, as he had dealt with the police several times before and had always been compliant.<sup>64</sup> When the officers arrived at St. Hilaire's place of work, they found that he was already leaving and heading for his car.<sup>65</sup> They then decided to execute the warrant.<sup>66</sup> The plainclothes officers ran at his car with their guns drawn. St. Hilaire saw them, reached for his own weapon—and was shot in the neck.<sup>67</sup> The officers claimed to have yelled that they were police as they ran at his car, but St. Hilaire and several bystanders disputed this assertion.<sup>68</sup> When they reached the car, St. Hilaire, bleeding from his neck, said: “I didn't know you guys were the cops. Why didn't he identify himself? Why didn't he say he was a cop?”<sup>69</sup> St. Hilaire repeated these questions to

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seizure by putting the suspect on notice that she is encountering the law and affording her a chance to comply.

<sup>62</sup> The two cases discussed in this Part fell on either side of the Court's rulings in *Wilson v Layne*, 536 US 603 (1999), and *Pearson v Callahan*, 129 S Ct 808 (2009). *St. Hilaire v City of Laconia*, 71 F3d 20 (1st Cir 1995), was decided prior to the Court's requirement in *Layne* that circuit courts first decide whether a constitutional right has been violated and only then move on to whether the right was clearly established when deciding qualified immunity. Before *Layne*, courts were allowed to proceed with the qualified immunity analysis as they saw fit. *Catlin v City of Wheaton*, 574 F3d 361 (7th Cir 2009), meanwhile, was decided *after* the Court's ruling in *Pearson* that overruled *Layne* and returned the order of the qualified immunity analysis to the district court's discretion. Thus, while it may appear that the First and Seventh Circuits misapplied the qualified immunity analysis, the decisions are reflective of the fluctuating tests laid down by the Supreme Court.

<sup>63</sup> *St. Hilaire*, 71 F3d at 22 (noting that the police had information that St. Hilaire possibly carried or possessed a .357 caliber revolver, a .25 caliber semiautomatic pistol, a shotgun, and a crossbow).

<sup>64</sup> *Id.* at 22–23.

<sup>65</sup> *Id.* at 23.

<sup>66</sup> *Id.*

<sup>67</sup> *St. Hilaire*, 71 F3d at 23.

<sup>68</sup> *Id.* (summarizing the officers' individual testimony that they had identified themselves but noting that a motorist eyewitness testified that he just heard “Freeze”).

<sup>69</sup> *Id.*

hospital workers and his wife.<sup>70</sup> He was paralyzed from the neck down as a result of his injuries and subsequently died from complications.

The First Circuit did not foreclose extending *Wilson* but nevertheless dismissed the plaintiff's § 1983 suit through qualified immunity. The court noted that *Wilson* had not been decided at the time of the incident<sup>71</sup> and that the identification requirement needed to have been clearly rooted in Fourth Amendment jurisprudence at the time of the shooting for the plaintiff to prevail.<sup>72</sup> Thus, while not ruling out the possibility of *Wilson's* future extension, the court dismissed the case, holding that qualified immunity applied because the law was not clear at the time of the shooting.<sup>73</sup>

The most recent circuit court to address this issue was the Seventh Circuit in *Catlin v City of Wheaton*.<sup>74</sup> The case was a § 1983 suit brought against two police officers for a violation of the plaintiff's Fourth Amendment rights. The police officers sued in this case were conducting a manhunt for a suspect as part of a drug sting operation.<sup>75</sup> The suspect was known to be armed and highly dangerous and had previously threatened police officers with violent force.<sup>76</sup> While searching for the suspect, the officers (dressed in plain clothes) saw Jonathan Catlin leaving the parking lot of a Red Roof Inn where the suspect was thought to be staying.<sup>77</sup> Catlin substantially resembled the suspect and was driving a motorcycle. The police officers pulled up behind Catlin at a red light, exited their car, and tackled Catlin off of his motorcycle.<sup>78</sup> At no point did they identify themselves as police officers.<sup>79</sup> Catlin, believing he was under attack by criminals, fought back, broke away, and began running.<sup>80</sup> The officers tackled him again and handcuffed him. Only after Catlin was handcuffed did the police identify themselves. After about

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<sup>70</sup> *Id.*

<sup>71</sup> *St. Hilaire*, 71 F3d at 23 (noting that the incident occurred in 1990 while *Wilson* was decided in 1995).

<sup>72</sup> *Id.* at 23–24.

<sup>73</sup> *Id.* at 27–28.

<sup>74</sup> 574 F3d 361 (7th Cir 2009). Because the issue on appeal was whether to uphold summary judgment against the plaintiff, the Seventh Circuit accepted the plaintiff's version of the facts as true. See *id.* at 364.

<sup>75</sup> *Id.* at 363.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 363–64.

<sup>78</sup> *Catlin*, 574 F3d at 364.

<sup>79</sup> *Id.* at 364 n 2 (expressing some reservation about this factual description because Catlin admitted that the defendants were wearing police badges and that he heard them refer to themselves as police officers).

<sup>80</sup> *Id.* at 364.

twenty minutes, they realized their mistake and released him.<sup>81</sup> The altercation damaged Catlin's motorcycle.<sup>82</sup>

The Seventh Circuit distinguished between the officers' initial failure to identify and their failure to identify themselves after they tackled Catlin from his motorcycle.<sup>83</sup> The court postulated that "there was nothing unreasonable about the defendants' initial failure to identify themselves."<sup>84</sup> The police had a reasonable belief that Catlin was armed and likely to violently resist arrest. The element of surprise was crucial in apprehending him. In addition, the officers were authorized to execute an arrest warrant against a suspect fitting Catlin's description. But the court characterized the continuing failure to identify once Catlin was removed from his motorcycle as "problematic."<sup>85</sup> Thus, it was the execution of the seizure that posed possible Fourth Amendment concerns.

But while this failure to identify was "problematic," the court concluded that it was not firmly established that *Wilson* was applicable to this set of facts.<sup>86</sup> The court pointed out that it was aware of no other circuit court to have extended *Wilson* and that the district courts were divided on the issue.<sup>87</sup> Because the law had not clearly been established at the time of the incident, the Seventh Circuit ruled that qualified immunity applied and affirmed the district court's dismissal.<sup>88</sup>

## B. District Courts Appear Divided over Whether to Extend *Wilson*

District courts have been surprisingly silent on the issue of whether to extend *Wilson*. The only court squarely to address the possible extension of *Wilson* was the Western District of Missouri. In *Johnson v Grob*,<sup>89</sup> police officers in plain clothes set up a roadblock to capture Toni Johnson.<sup>90</sup> When Johnson arrived at the roadblock, the police officers did not identify themselves. Upon seeing the plainclothes officers blocking the road with guns drawn, Johnson panicked and tried to reverse her car in an attempt to flee.<sup>91</sup> Her car crashed into another car and flipped over.<sup>92</sup> A police officer pulled her from the car and handcuffed her.

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<sup>81</sup> *Id.*

<sup>82</sup> *Catlin*, 574 F3d at 364.

<sup>83</sup> *Id.* at 368.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Catlin*, 574 F3d at 368–69.

<sup>87</sup> *Id.* at 369 ("[E]ven if the defendants had consulted a casebook prior to formulating their plans, they still would not have had fair notice.").

<sup>88</sup> *Id.* at 369–70.

<sup>89</sup> 928 F Supp 889 (WD Mo 1996).

<sup>90</sup> *Id.* at 894.

<sup>91</sup> *Id.* at 895.

<sup>92</sup> *Id.*

Johnson sustained cuts, bruises, and other physical injuries as well as posttraumatic stress disorder as a result of the altercation.<sup>93</sup>

The district court held that the test for a proper show of authority is “not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer’s words and actions would have conveyed that to a reasonable person.”<sup>94</sup> The court reasoned that “it would be foolish to require citizens to assume that armed assailants are law enforcement officers rather than malicious hooligans”;<sup>95</sup> most citizens will comply with law enforcement once the officers are identified as such. When the officers did not identify themselves, however, fight or flight are both reasonable and foreseeable reactions when the person is confronted by unidentified persons brandishing weapons.<sup>96</sup> Johnson argued that she would not have tried to flee from the police roadblock if the officers had identified themselves. The fact that the officers did not identify themselves led Johnson to flee the scene, just as she would have had the officers been carjackers.<sup>97</sup>

The court pointed out that *Wilson* rests on precisely this assumption: individuals are more likely than not to comply with police officers. Any time law enforcement officers use their authority to coerce a search or seizure, there are risks to personal safety and property.<sup>98</sup> When citizens flee or fight unidentified police officers, these reactions can result in injury to the police officers effecting an arrest, to the suspect, or to third parties present at the scene.<sup>99</sup> With this in mind, the court held that seizures can be unreasonable under the Fourth Amendment when the arresting officer does not show or declare his authority.<sup>100</sup> The court was careful, however, to hold that a failure to identify is not unreasonable per se; it is simply one factor in the mix of factors considered in the Fourth Amendment’s general reasonableness inquiry.<sup>101</sup> Despite finding a constitutional violation by interpreting *Wilson* to extend to failures to identify, the court granted the police qualified immunity because the law was not firmly established.<sup>102</sup>

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<sup>93</sup> *Johnson*, 928 F Supp at 895.

<sup>94</sup> *Id.* at 898 (“Implicit in this definition is the requirement that the officers reasonably convey that the officers have legal authority to order compliance.”).

<sup>95</sup> *Id.* at 900.

<sup>96</sup> *Id.*

<sup>97</sup> *Johnson*, 928 F Supp at 904–05.

<sup>98</sup> *Id.* at 905 (noting that *Wilson* could not be distinguished on the basis that it occurred within a home).

<sup>99</sup> *Id.* at 906.

<sup>100</sup> *Id.* (noting that fight and flight responses are best avoided whenever possible).

<sup>101</sup> *Johnson*, 928 F Supp at 906 (listing factors such as the officer’s need for quick action, the severity of the crime, the threat of the suspect to others’ safety, and whether the suspect was resisting arrest or attempting to flee).

<sup>102</sup> *Id.* at 909.

The District of Kansas has granted relief in a similar situation. In *Newell v City of Salina*,<sup>103</sup> the plaintiff was walking around her suburban neighborhood at night engaged in an idiosyncratic arm-exercise routine.<sup>104</sup> An officer saw her walking across a deserted street, suspected that she might be intoxicated, and approached her from behind and told her to stop.<sup>105</sup> The plaintiff replied, "No," and began walking toward a lit porch. At this point, the officer grabbed her from behind.<sup>106</sup> The plaintiff broke his hold and continued walking toward the lit porch.<sup>107</sup> A second officer then tackled her to the ground and handcuffed her.<sup>108</sup> Only once the plaintiff was placed into the officers' vehicle did she realize that they were police officers. As a result of the altercation, the plaintiff suffered multiple bruises and claimed that the episode exacerbated a preexisting panic attack condition.<sup>109</sup> The court held that "[i]t would have been objectively reasonable for the officers to have identified themselves as such, prior to using any degree of force to effect the plaintiff's arrest."<sup>110</sup> Furthermore, the court held that it may very well have been objectively unreasonable for police to use an arm bar to subdue a person suspected of intoxication, at night, without identifying themselves. The court allowed this case to proceed to a jury to adjudicate whether the officers' use of force was reasonable.<sup>111</sup>

A possible distinction between this case and the other cases that have been considered thus far is that the officer in *Newell* was in full uniform, not plain clothes. But the incident took place at night and the officer approached from behind, so it is logical to assume that the plaintiff did not know she was dealing with a police officer.<sup>112</sup>

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Only two circuits have addressed whether there is a constitutional duty of officer identification. The First Circuit found itself unable to consider the application of *Wilson* because the events at issue had

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<sup>103</sup> 276 F Supp 2d 1148 (D Kan 2003).

<sup>104</sup> Id at 1151 (explaining the plaintiff's arm exercise routine as consisting of "pumping her arms to her side 16 times, then circling her arms forward 16 times, circling her arms backwards 16 times, then raising her hands until they touched above her head and then back down to her side four times," repeating this motion as she walked).

<sup>105</sup> Id.

<sup>106</sup> Id.

<sup>107</sup> *Newell*, 276 F Supp 2d at 1151.

<sup>108</sup> Id at 1152.

<sup>109</sup> Id.

<sup>110</sup> Id at 1154.

<sup>111</sup> *Newell*, 276 F Supp 2d at 1155.

<sup>112</sup> See id at 1153-54 (noting that the plaintiff's stated intent was to evade the assault of a stranger, not to evade the police).

taken place prior to the issuance of that decision. The Seventh Circuit, meanwhile, was unwilling to be the first court of appeals to analyze fully the constitutionality of the failure to identify. Only one district court has directly addressed the issue, and it has found that *Wilson* does extend. The court in *Newell* did not dismiss the claim and left it for a jury to consider whether the officer's actions were reasonable.

### III. COURTS SHOULD ADOPT A RULE REQUIRING OFFICERS TO IDENTIFY THEMSELVES IN MOST CIRCUMSTANCES

While no one disputes that the police had probable cause to conduct the above seizures, whether they were executed unreasonably under the Fourth Amendment remains unclear. Part III.A argues that the logic of *Wilson* suggests that the seizures were conducted unreasonably, because the protected interests identified by Justice Scalia in *Hudson*—the protection of life, property, and privacy—are all present in the failure-to-identify context. In addition, empirical research on coercion and compliance demonstrates that individuals are more likely than not to comply with an authority's request or demand. Part III.B argues that there is no categorical bar to extending Fourth Amendment protections beyond the home and that officer safety would not be overly burdened by a rule requiring identification. Finally, Part III.C concludes by suggesting that courts should hold that the failure to identify is an unreasonable seizure that, subject to exceptions, violates the Fourth Amendment. This would allow suits to proceed past qualified immunity in order to compensate injured plaintiffs adequately.

#### A. *Hudson's* Articulated Interests Are Implicated in Instances Where an Officer Fails to Identify Himself

Writing for the majority in *Hudson*, Justice Scalia articulated in dicta three vital interests protected by the knock-and-announce rule.<sup>113</sup> The first was the protection of life and limb: an unannounced entry into a home could provoke a violent self-defensive reaction from a suspect who believed his dwelling was being assaulted unlawfully.<sup>114</sup> The second was the protection of property: at common law, the knock-and-announce rule protected suspects' homes from unnecessary damage.<sup>115</sup> The final interest was basic privacy and dignity: the knock-and-announce rule allows suspects an "opportunity to prepare themselves for" an encounter with the police.<sup>116</sup> This Part addresses

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<sup>113</sup> See 547 US at 594.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

these interests in turn and demonstrates that each is implicated when an officer fails to identify himself to a suspect when seizing him.

1. When officers fail to identify themselves, a suspect's confused reaction can result in injury and death.

The failure to identify has resulted in injuries ranging from the mild (abrasions) to the serious (paralysis below the neck). In *Beran v United States*,<sup>117</sup> the plaintiff was driving in front of the White House when the car in front of him began moving very slowly.<sup>118</sup> Unbeknownst to the plaintiff, the car contained two Secret Service agents.<sup>119</sup> After a series of escalating incidents of road rage, the agents pulled in front of the plaintiff and stopped abruptly, causing him to impact their car.<sup>120</sup> A Secret Service agent got out of the vehicle, grabbed the plaintiff's tie through an open window, and began punching the plaintiff in the head.<sup>121</sup> The agent tried forcibly to remove the plaintiff from his car, but failed because of the plaintiff's seatbelt.<sup>122</sup> The plaintiff panicked, put his car into reverse, and dragged the agent for approximately sixty-five feet before the agent let go of the vehicle.<sup>123</sup>

It is easy to see the danger of injury in the *Beran* case. It seems reasonable to hypothesize that James Beran might have avoided angering the agents altogether had he known their identity. Not only was the plaintiff accosted and struck in the head several times by the Secret Service agent, but in reaction to the assault, the plaintiff attempted to flee the scene. A failure by an officer to disclose his identity makes it more likely that a suspect will react unpredictably, and perhaps even violently, when the officer attempts to subdue her during the arrest. When officers fail to identify themselves, not only is there an increased danger to the suspect that they are attempting to apprehend, but there is also a real physical danger to the officers themselves. In *Beran's* case, his flight caught the Secret Service agent on *Beran's* car door, causing him to be dragged for approximately sixty-five feet. It is not hard to imagine that this incident could have resulted in the serious injury, or even death, of the arresting Secret Service agent.

Indeed, such serious injury has resulted from suspects trying to flee from an unidentified officer. The plaintiff in *Gutierrez-Rodriguez v*

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<sup>117</sup> 759 F Supp 886 (DDC 1991).

<sup>118</sup> *Id.* at 888.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 888–89 (narrating an exchange of obscenities leading up to the final collision).

<sup>121</sup> *Beran*, 759 F Supp at 889.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*



*Cartagena*<sup>124</sup> was a twenty-two year old with no criminal record who, with his girlfriend, decided to park his car in a secluded spot to appreciate the lights of distant San Juan.<sup>125</sup> A group of undercover officers happened to be conducting preventative rounds in an effort to disrupt the local drug trade.<sup>126</sup> Upon seeing Gutierrez's car parked with its lights off, the officers exited their car and approached with their guns drawn. At no point did they identify themselves. When Gutierrez saw the unidentified officers approaching his car with their guns drawn, he started his engine and tried to drive away.<sup>127</sup> The officers opened fire, and one bullet struck Gutierrez in the back, causing him to lose control of the vehicle, which flew off the road and landed in a ditch on its side.<sup>128</sup> As a result of the gunshot wound, Gutierrez was permanently paralyzed from the waist down.<sup>129</sup>

The court in *Gutierrez-Rodriguez* upheld an action under § 1983, holding that the indifference to human life exhibited by the officers rose to the level of "being deliberate, reckless, or callous."<sup>130</sup> Despite the plaintiff's success in obtaining recovery against the officers, it is hard to ignore that such recovery would not have been necessary in the first place had the officers identified themselves prior to approaching the plaintiff's vehicle with their guns drawn.<sup>131</sup>

Individuals often react to perceived attempts to deprive them of their life and property with violent self-help.<sup>132</sup> For example, in *Jackson v Sauls*,<sup>133</sup> a failure to identify led to a deadly shootout. After tailing the plaintiffs' car, several undercover police officers developed a suspicion that the car was stolen.<sup>134</sup> When the plaintiffs parked their

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<sup>124</sup> 882 F2d 553 (1st Cir 1989).

<sup>125</sup> *Id.* at 557.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Gutierrez-Rodriguez*, 882 F2d at 557.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 562.

<sup>131</sup> Similar instances of injury resulting from a failure to identify have occurred in numerous other cases. See for example, *Carter v Rogers*, 805 F2d 1153, 1156 (4th Cir 1986); *Newell*, 276 F Supp 2d at 1152; *Johnson*, 928 F Supp at 894.

<sup>132</sup> This right to violent self-help is centered around the home, where there is no duty to retreat in the common law. See D. Benjamin Barros, *Home as a Legal Concept*, 46 Santa Clara L Rev 255, 260–63 (2006) (noting that the common law permits individuals to use deadly force in their homes to repel intruders). Recently, Florida has enacted a statute expanding the right to violent self-defense to include situations where individuals are confronted with aggression in their automobiles as well as their homes. The Florida law also allows violent self-help regardless of whether the threat of force is imminent. See Fla Stat Ann § 776.012–13 (West). See also Anthony J. Sebok, *Florida's New "Stand Your Ground" Law: Why It's More Extreme Than Other States' Self-Defense Measures, and How It Got That Way*, FindLaw (May 2, 2005), online at <http://writ.news.findlaw.com/sebok/20050502.html> (visited Oct 9, 2010).

<sup>133</sup> 206 F3d 1156 (11th Cir 2000).

<sup>134</sup> *Id.* at 1160–61.

car and entered a motorcycle shop, the police followed them to the store.<sup>135</sup> Later, a car crash on the street outside of the shop prompted the plaintiffs and the shop owners to run outside to see what had happened.<sup>136</sup> At that point, the undercover officers drew their weapons, yelled obscenities at the plaintiffs, and told them to get back into the shop.<sup>137</sup> At no point did the officers identify themselves as police.<sup>138</sup> Once the lead officer entered the shop, the shop owner (who was not among the plaintiffs) drew his weapon and opened fire on the officer, hitting him several times.<sup>139</sup> The other officers returned fire and killed one of the plaintiffs who was lying unarmed on the ground.<sup>140</sup>

This case demonstrates the danger when unidentified officers attempt to seize individuals. To the plaintiffs and the shop owner, the police appeared to be common criminals who were attempting to rob the motorcycle shop. Once the officer entered the shop, the shop owner exercised his common law right to defend his property by opening fire. Not only did this injure one of the arresting officers, but it also prompted a violent reaction from the police. This culminated in the death of an innocent plaintiff who was attempting to submit to the armed officers by lying on the ground. By not identifying themselves, not only did the officers endanger the plaintiffs and nearby third parties, but they also risked their own lives unnecessarily and prompted a shootout that arguably would not have taken place had they given notice to those present that they were plainclothes police.

2. In addition to the serious danger to life and limb, when officers fail to identify themselves, unnecessary damage to a suspect's property may occur.

When officers fail to identify themselves and violence becomes necessary to apprehend a suspect, damage to the suspect's property often results. In *Hudson*, Justice Scalia reiterated that an essential interest that the knock-and-announce rule protects is the preservation of a suspect's property.<sup>141</sup> This interest in property preservation was first recognized in *Wilson* when Justice Clarence Thomas pointed out that the common law abhorred the destruction of property and instead

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<sup>135</sup> *Id.* at 1161.

<sup>136</sup> *Id.* at 1162.

<sup>137</sup> *Jackson*, 206 F3d at 1162.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 1173.

<sup>141</sup> 547 US at 594 (noting that breaking into a house without notice would penalize individuals who would otherwise cooperate with the law). See also *Wilson*, 514 US at 931-34 (summarizing the common law history of announcement requirements).

sought to preserve personal property if possible.<sup>142</sup> The damage in question in a knock-and-announce case is typically only that necessary to enter a home—that is, broken windows and doors. In the failure-to-identify context, by contrast, property damage resulting from an officer's failure to identify himself often involves automobiles.

In *Agresta v Gillespie*<sup>143</sup> and *Gutierrez-Rodriguez*, for instance, the plaintiffs both suffered damage to their cars as a result of the police firing upon their vehicles.<sup>144</sup> In *Beran*, as a result of the Secret Service agents' aggressive driving, Beran's vehicle crashed into the agents' vehicle.<sup>145</sup> Finally, in *Johnson*, when the plaintiff attempted to flee from the unidentified officers, she crashed into their vehicle and her car flipped over.<sup>146</sup> What each of these cases demonstrates is that regardless of whether the plaintiffs reacted violently to the police, the confusion resulting from an officer's failure to identify himself can result in flight by the plaintiffs in an effort to avoid capture by an unidentified assailant. This flight can provoke violence from the police, which can in turn cause automobile accidents and damage to vehicles.

If we are to take seriously the Court's articulated interest in avoiding unnecessary damage to suspects' property in the search and seizure context, it seems reasonable to include damage to plaintiffs' vehicles under the umbrella of protected property interests. Indeed, the cost of the damage to the average car is likely to be significantly higher than the cost of damage to the average window or door. In most of the cases examined thus far, an officer's enunciation of her identity as a police officer would likely have mitigated the probability of damage. Once suspects are informed that they are dealing with the police, they must decide whether to cooperate or resist. If suspects choose resistance, subsequent damage to their vehicles may very well be necessary to complete the seizure. If the suspect complies, however, unnecessary damage to her vehicle is easily averted. By disclosing their identities in the process of effecting a seizure, police officers help suspects avoid unnecessary damage to their property by offering them the opportunity to comply with the law.

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<sup>142</sup> *Wilson*, 514 US at 931–33.

<sup>143</sup> 631 A2d 772 (Pa Commw Ct 1993).

<sup>144</sup> See *id* at 774 (describing how when fleeing in his car from unidentified police, Samuel Agresta was killed by a shotgun blast to the head); *Gutierrez-Rodriguez*, 882 F2d at 557.

<sup>145</sup> 759 F Supp at 888–89.

<sup>146</sup> 928 F Supp at 894–95.

3. By unexpectedly accosting suspects, an officer's failure to identify can provoke embarrassing and uncharacteristic reactions from individuals who would otherwise comply fully with law enforcement.

In *Hudson*, Justice Scalia noted that one of the reasons for the knock-and-announce rule was to allow individuals privacy and time to prepare themselves for an encounter with the law.<sup>147</sup> Justice Scalia recognized that when officers unexpectedly burst into a home, individuals can be caught in embarrassing states and that this harm can be easily avoided by requiring officers to announce their presence prior to entering. He reasoned that it was important to allow individuals the opportunity to collect themselves briefly before encountering the law.

Similarly, in the failure-to-identify context, individuals should be allowed to pull themselves together and make informed decisions about how to react to an officer's presence. When individuals are coercively drawn from relative anonymity into the public realm, it is reasonable to require police to let them know that they are dealing with the law and not criminals. By identifying themselves, police officers allow individuals the opportunity to decide on a course of action. Will they comply? Will they fight? Will they run? Many individuals would choose to comply with government action if given the choice. While the dangers to a suspect's privacy and dignity are not nearly as great in public as in the home, individuals still have an interest in maintaining the appearance and sophistication of law-abiding citizens.

#### B. A Rule Requiring Identification Is Not Limited to the Home and Does Not Undermine Officer Safety

This Part proceeds by addressing several arguments against a rule requiring officers to identify themselves when conducting arrests. Part III.B.1 argues that the home's special legal significance does not preclude the extension of Fourth Amendment protections beyond the home. Part III.B.2 asserts that the increased difficulty of identifying the correct suspects in the public arena suggests that officers take even *more* precautions than they do in the home. Finally, Part III.B.3 concludes by demonstrating that police officers' safety would not be undermined by a rule requiring identification, because the holding in *Richards* relaxes the proposed requirement when an officer has a reasonable suspicion that identifying himself would result in increased danger.

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<sup>147</sup> 547 US at 594.

1. Despite the specialized protection of the home, it makes sense to extend the knock-and-announce rule outside of the home.

The home has traditionally enjoyed special protection in the common law. Inside the home, individuals have no duty to retreat when confronted with a dangerous intruder.<sup>148</sup> They are also granted additional privacy rights, free speech protections, and rights against the government's ability to search for illicit and obscene material.<sup>149</sup> But keeping in mind the Supreme Court's famous admonition that the "the Fourth Amendment protects people, not places,"<sup>150</sup> we are able to see that although the home does indeed enjoy special protection, this does not preclude constitutionally recognized protection from extending outside the home.

In an early case involving the wiretapping of a suspect's telephone, *Olmstead v United States*,<sup>151</sup> the Court closely tied Fourth Amendment protection to physical trespass of the home. Writing for the majority, Chief Justice William Howard Taft noted repeatedly that wiretapping a home involved no physical trespass.<sup>152</sup> Taft concluded by explaining that no federal decision had ever held the Fourth Amendment to be violated when there was not an actual physical invasion of a house or its curtilage for the purposes of making a seizure, and that without such a physical invasion, there was no Fourth Amendment violation.<sup>153</sup>

*Katz v United States*<sup>154</sup> overruled *Olmstead*, holding that even if wiretapping did not involve a physical intrusion of the home, individuals were still protected from searches when they had a reasonable expectation of privacy.<sup>155</sup> In *Katz*, the defendant had been wiretapped by the police while making phone calls from a public telephone booth. Justice Potter Stewart asserted that the "Fourth Amendment protects people, not places" and denied the government's efforts to rigidly confine the Fourth Amendment's protection to the home.<sup>156</sup> This

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<sup>148</sup> See Barros, 46 Santa Clara L Rev at 261 (cited in note 132) (explaining that many states have adopted the common law "castle doctrine," which provides that a person has no duty to retreat when attacked in her home).

<sup>149</sup> See id at 259–76.

<sup>150</sup> *Katz v United States*, 389 US 347, 351 (1967) (rejecting the government's attempt to limit the Fourth Amendment's protections to the home).

<sup>151</sup> 277 US 438 (1928).

<sup>152</sup> See, for example, id at 457, 464–66.

<sup>153</sup> Id at 466.

<sup>154</sup> 389 US 347 (1967).

<sup>155</sup> Id at 351–52 (concluding that a person who enters a phone booth, "shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world").

<sup>156</sup> Id at 351.

shows that even though the home *is* an area of heightened legal protection, there is no bar against extending Fourth Amendment protection to the activities of individuals outside of its walls.<sup>157</sup>

Similarly, in the failure-to-identify context, it is certainly true that the knock-and-announce rule was formulated with the special protection of the home in mind. But a close examination of the reasons behind the knock-and-announce rule as articulated in *Hudson*, as well as empirical research on coercion and compliance,<sup>158</sup> demonstrates that the Fourth Amendment should be read broadly to protect “people” who are confronted with an unidentified assailant in the form of a police officer rather than simply the “place” of the home. When the reasons behind protecting the home from unidentified intrusion are the same as those for protecting individuals from arrest by unidentified officers, the Fourth Amendment’s protections logically apply regardless of location. Finally, when the police seek to search the home of a suspect without knocking and announcing their presence, it is largely the suspect’s *privacy* interest that is compromised. In contrast, in the failure-to-identify context it is not a suspect’s privacy interest that is largely at issue, but instead his interest in freedom from an unreasonable restraint on his *liberty*—that is to say, his interest in being free from unreasonable seizure. Just as the law protects the home, so should it not force individuals to remain inside for fear of being unreasonably seized by unidentified individuals.

2. The increased difficulty of identifying suspects in public should compel officers to identify themselves prior to seizing individuals.

When the police conduct searches of homes, they generally must first acquire a warrant from a judge or magistrate and demonstrate probable cause for intruding upon an individual’s home.<sup>159</sup> This often means that the suspect at issue has been the subject of an ongoing investigation and that the police are seeking to take the investigation to the next level. In cases like this, the risk of the police searching the wrong house (and thereby searching completely innocent individuals)

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<sup>157</sup> The location of the home is not dispositive in providing protection under the Fourth Amendment. As seen in *Katz*, a mere glass phone booth can provide Fourth Amendment protection to an individual in public. Likewise, being inside a home does not necessarily guarantee Fourth Amendment protection. See, for example, *Minnesota v Carter*, 525 US 83, 96–97 (1998) (Scalia concurring) (arguing that Fourth Amendment protection in the home does not extend to all guests). Regardless of location, the Fourth Amendment is an individual right and the location of the home is not dispositive regarding whether protection attaches.

<sup>158</sup> See notes 167–73 and accompanying text.

<sup>159</sup> See *Michigan v Fisher*, 130 S Ct 546, 548 (2009) (“[S]earches and seizures inside a home without a warrant are presumptively unreasonable.”).

is relatively small. A suspect's house serves as a valuable landmark for identity and lets police know that when they enter a given home, they are likely to encounter the suspect they are seeking or her associates.

In the case of street arrests, this is simply not the case. Unlike the home, there is no valuable landmark for discerning an individual's identity quickly and safely. This makes it much more likely that police will apprehend (and possibly use force against) innocent people. We have seen examples of this in *Catlin*, *Newell*, *Gutierrez-Rodriguez*, and *Jackson*.<sup>160</sup> In all of these cases, innocent individuals were accosted by the police and injury resulted. The police in *Catlin*, for example, were given a photograph of the suspect they were pursuing and were directed to the area he was known to frequent. Upon seeing Catlin, who looked substantially like the suspect<sup>161</sup> and was riding a motorcycle similar to the suspect's, the police undertook the process of seizing him for arrest. What made the subsequent seizure unreasonable was not that the police misidentified a suspect—indeed, it seems perfectly reasonable for them to have done so, as the description with which they were provided closely matched Catlin. Nor was it unreasonable for the police to attempt to quickly remove a possibly violent individual from the streets. Rather, it was unreasonable for the officers not to have identified themselves as soon as they could safely do so. This would have insured that Catlin knew with whom he was dealing and would have allowed him to act accordingly.

When attempting to apprehend individuals in public, we can expect that from time to time cases of mistaken identity will happen. These reasonable mistakes are the byproduct of the snap decisions required by law enforcement<sup>162</sup> as well as the fallibility of human perception. But this is precisely why a rule requiring identification is normatively desirable. The fact that police officers may be more likely to encounter or injure innocent people while doing undercover street searches for dangerous suspects indicates that they should take greater precautions to make sure that individuals know with whom they are dealing and are given the opportunity to comply. Therefore, while it certainly makes sense to announce one's identity when entering a home as part of a search, the increased likelihood of simply "grabbing

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<sup>160</sup> See *Catlin*, 574 F3d at 363–64; *Newell*, 276 F Supp 2d at 1151–52; *Gutierrez-Rodriguez*, 882 F2d at 557; *Jackson*, 206 F3d at 1161–63.

<sup>161</sup> *Catlin*, 574 F3d at 365 n 4 (finding that the suspect and Catlin had approximately the same age, hair style, weight, race, and facial appearance).

<sup>162</sup> See *Roy v Inhabitants of City of Lewiston*, 42 F3d 691, 695 (1st Cir 1994) (stating that "splitsecond" judgments in "tense, uncertain, and rapidly evolving" circumstances require a "comparatively generous" standard of reasonableness) (quotation marks omitted).

the wrong guy” makes a rule requiring officer identification in public places all the more necessary.

3. A rule requiring officer identification does not undermine officer safety.

The principal argument against requiring officers to identify themselves prior to conducting a public arrest is that such a requirement would be unnecessarily burdensome to police and may place them in danger. Dealing with dangerous suspects often necessitates undercover, plainclothes operations where police must conceal their identities in order to apprehend the suspect safely. Recall *Catlin*:<sup>163</sup> The police were on a manhunt for an individual who was known to be armed and highly dangerous and who had threatened police previously. Secrecy was necessary in order to bring the suspect to justice safely. The Seventh Circuit recognized, however, that it was necessary to draw a distinction between the initial failure to identify and the subsequent failure to disclose police identity once the element of surprise was lost.<sup>164</sup> While it may have initially been necessary to avoid disclosing police identity in order to maintain the element of surprise, it seems reasonable to require the police to identify themselves after the element of surprise has passed. In *Catlin*, after the officers had tackled Catlin from his motorcycle, but before they had placed him in handcuffs, they could have easily disclosed their identity without risking additional harm to themselves. Indeed, this may have prompted Catlin to comply with the police instead of resisting under the belief that criminals were assaulting him.

If, as this Comment suggests, the knock-and-announce rule articulated in *Wilson* should be extended to the failure-to-identify context, it makes sense to incorporate the rest of the Supreme Court’s holdings in the *Wilson* line of cases as well. Officer safety should be a paramount concern of the courts. This includes the rule articulated in *Richards*—allowing officers to suspend the knock-and-announce rule when they have reasonable suspicion that announcing their presence would be dangerous or futile or would inhibit the effective investigation of the crime.<sup>165</sup> Under an extension of *Richards*, when police have

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<sup>163</sup> See notes 74–88 and accompanying text.

<sup>164</sup> *Catlin*, 574 F3d at 368 (describing the officers’ continuing failure to disclose their identities as “problematic”).

<sup>165</sup> *Richards*, 520 US at 394 (allowing police to meet the lower standard of reasonable suspicion rather than probable cause because this allows for the proper balance of law enforcement interests and individual interests).



a reasonable suspicion<sup>166</sup> that a suspect will react to police identification with either violence or an attempt to flee, officers would be able to suspend the normal requirement of identifying themselves prior to effecting an arrest. In most cases, however, it should be reasonable for police to disclose their identities after the element of surprise has been lost. This allows police to maintain the element of surprise for dangerous individuals while simultaneously protecting suspects from confusion over the identity of undercover agents.

Even when officers do not possess reasonable suspicion, empirical evidence shows that their safety is unlikely to be in jeopardy. Empirical research demonstrates that individuals are likely to comply with the request of a police officer even if they have been informed that they have a right to refuse such a request.<sup>167</sup> Indeed, this happens over and over again in cases where a suspect in possession of drugs is informed of her constitutional right to refuse a search yet decides to comply anyway.<sup>168</sup> Janice Nadler has identified two important principles in the social psychology of compliance: authority and social validation.<sup>169</sup> Nadler points out that “[c]omplying with authorities is something that we do quickly, on the spot, without conscious deliberation.”<sup>170</sup> Because decisions to comply with authority typically arise in situations where time is a constant pressure, individuals use symbols of authority as a mental shortcut for quickly making the best decision. Even when individuals might prefer to refuse (and even have the right to do so), symbols of authority are so powerful that they will override individual preference.<sup>171</sup> Similarly, individuals are much more likely to comply with authority when it appears that others have already done

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<sup>166</sup> Reasonable suspicion is a standard used in other criminal contexts as well. See, for example, *Terry v Ohio*, 392 US 1, 21 (1968) (holding that in order to justify a “stop and frisk,” police must be able to justify the intrusion by pointing to specific and articulable facts that, taken together with rational inferences from those facts, reasonably warrant the intrusion). In the failure-to-identify context, police officers would use a similar standard when assessing whether they could suspend the general requirement of informing individuals of their identity.

<sup>167</sup> See Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 S Ct Rev 153, 165–97.

<sup>168</sup> See, for example, *Florida v Bostick*, 501 US 429, 431–33 (1991) (involving a defendant who was informed of his right to refuse a search but nevertheless consented and was revealed to be holding cocaine).

<sup>169</sup> Nadler, 2002 S Ct Rev at 173 (cited in note 167) (arguing that police officers have strong influence over people because “their position of authority signals that they possess information and power that is greater than our own”).

<sup>170</sup> *Id* at 174.

<sup>171</sup> *Id* at 178–79 (discussing several experiments where individuals were coerced into false confessions simply by being shown false evidence from an authoritative figure suggesting that they committed an act).

so.<sup>172</sup> By witnessing what other individuals have already done, people try to “fit in” and achieve social validation through compliance. Nadler even notes that it is not always necessary actually to observe others engaging in compliant behavior; the perception that others comply rather than resist is enough to influence an individual to acquiesce.<sup>173</sup>

What this research suggests for the failure-to-identify context is simple: when confronted with authority, individuals are much more likely to comply than resist. They will comply even though the guilty among them may have every incentive to resist. Because identifying themselves before placing individuals under arrest places little burden on police officers, they should be required to give suspects the chance to comply. As suggested above, in instances where such a chance is likely to be dangerous or futile, the rule in *Richards* would allow officers to maintain the element of surprise and protect themselves from harm.

### C. Imposing Tort Liability through § 1983 Provides Victims with Just Compensation for Their Injuries While Redistributing Negligence Costs from Individual Citizens to Society as a Whole

Courts should adopt a rule requiring officers to identify themselves unless they have a reasonable suspicion that doing so would undermine officer safety. This rule would primarily implicate plaintiffs suing under § 1983 for violations of their Fourth Amendment rights. At present, such suits are dismissed on the basis of qualified immunity, as the law has not been clearly established. Courts should articulate a constitutional violation for failure to identify and clearly define the law so that plaintiffs’ suits are allowed going forward.

In pursuing these claims, plaintiffs have asserted general violations of their constitutional right to be free from unreasonable seizures.<sup>174</sup> Specifically, they allege that when the police fail to identify themselves, the seizure is unreasonable in its manner of execution. Of course, in most Fourth Amendment cases, the failure to identify is simply not an issue, as most police officers are clearly identified as such by their uniforms. But in the subset of cases described in this Comment, this failure results in damage to person and property and should be considered by courts to be compelling evidence of an unreasonable seizure.<sup>175</sup> Police

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<sup>172</sup> *Id.* at 180 (illustrating the phenomenon by noting that bartenders often place tips in their own jars to encourage others to do so).

<sup>173</sup> Nadler, 2002 S Ct Rev at 182 (cited in note 167).

<sup>174</sup> See US Const Amend IV.

<sup>175</sup> See, for example, *Gutierrez-Rodriguez*, 882 F2d at 557 (involving a confrontation resulting in the plaintiff’s paralysis from the waist down); *Johnson*, 928 F Supp at 894–95 (involving a confrontation that resulted in the plaintiff sustaining cuts and bruises as well as damage to the plaintiff’s car).

officers should be permitted to forgo identifying themselves only if they have a reasonable suspicion that doing so would result in a dangerous response from the suspect or aid in the suspect's escape.<sup>176</sup> While there may be exigent factors in some cases allowing officers to avoid identifying themselves, these would be considered by the court when assessing whether qualified immunity should protect the officers' actions as reasonable. Officers would need to be able to point to specific and articulable facts that, taken together with rational inferences from those facts, suggest that identifying themselves would have been dangerous or futile. In any case, allowing these claims to proceed is unlikely to result in a flood of litigation: plaintiffs are likely to bring suit only when the damage resulting from a failure to identify is severe, and such severe cases are by no means commonplace.

At trial, plaintiffs would bring a claim alleging a violation of their Fourth Amendment rights because of an unreasonable seizure. The plaintiff would have to prove to the judge (or at least create a genuine issue of fact) that the officer did not identify himself prior to arresting the plaintiff and that this failure to identify was the cause of her injuries. The failure to identify would not be unreasonable per se, but should substantially tilt the balance in favor of the judge finding that an unreasonable seizure took place—thus overriding the officer's claim to qualified immunity. Once the suit is allowed to proceed to trial, the officer would attempt to prove that he had a reasonable suspicion that the plaintiff was going to respond violently or flee if he had identified himself. This would prove to the jury that the officer's actions were objectively reasonable given the circumstances. If the officer were unable to prove this, the jury would hold him liable for an unreasonable seizure and make him pay compensatory damages. If the resulting injury or constitutional violation were particularly egregious, the jury could award punitive damages.<sup>177</sup>

To be sure, some courts already consider whether an officer identified himself when assessing the overall reasonableness of a seizure,<sup>178</sup> noting correctly that the failure to identify is an important consideration in determining whether a seizure as a whole is reasonable. For example, in *Marshall v West*,<sup>179</sup> the plaintiff was being pursued by plainclothes officers for a traffic violation. The officers claimed to have turned on a light (whether it was working was disputed) and

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<sup>176</sup> See Parts III.B.2 and III.B.3.

<sup>177</sup> See *Smith v Wade*, 461 US 30, 54 (1983) (holding that punitive damages may be available in a § 1983 action “when the defendant’s conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others”).

<sup>178</sup> See, for example, *Johnson*, 928 F Supp at 894.

<sup>179</sup> 559 F Supp 2d 1224 (MD Ala 2008).

pulled alongside the plaintiff's vehicle holding up their badges to identify themselves.<sup>180</sup> The plaintiff did not pull over, and eventually the officers used force to stop his car and apprehend him.<sup>181</sup> The court held that in evaluating the plaintiff's excessive use of force claim, there was a legitimate issue of fact regarding whether the officers identified themselves.<sup>182</sup> This was relevant to the plaintiff's claim: if the officers had not identified themselves, a forcible stop would not have been necessary because the plaintiff would not have been "fleeing" from the police.<sup>183</sup> The court used this failure to identify in conjunction with other factors (including the severity of the crime, the extent of the injuries, and the immediacy of the threat) to conclude that the police officers used excessive force in effecting the seizure.<sup>184</sup>

Ultimately, however, these cases seem to be a small minority. More courts need to recognize that when injury has resulted from a seizure where the officer did not identify himself, this failure to identify provides substantial cause for declaring the seizure as a whole unreasonable. Indeed, in instances such as these, the failure to identify should be given great weight when assessing the totality of the circumstances of a seizure's reasonableness and should weigh heavily against qualified immunity. This will allow these suits to proceed past qualified immunity and permit injured plaintiffs to argue the issue to a jury.

Allowing these suits under § 1983 serves two purposes: it allows injured plaintiffs compensation for the injuries they wrongly suffer, and it provides municipalities<sup>185</sup> with an incentive to train officers to clearly identify themselves as police when conducting arrests. By and large, police officers do not require additional deterrence through personal liability or application of the exclusionary rule to incentivize them to identify themselves. Most officers likely already know that if they do not identify themselves, confusion and violence can result. Police, however, may still make mistakes from time to time and fail to consider seriously the possible ramifications and violence that can result from confusion over their identity as agents of the state. Tort liability would

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<sup>180</sup> Id at 1227.

<sup>181</sup> Id at 1229.

<sup>182</sup> Id at 1237.

<sup>183</sup> *Marshall*, 559 F Supp at 1237.

<sup>184</sup> Id at 1233–40. See also *Jones v Flathmann*, 2008 WL 918702, \*14–15 (MD Ala) (holding that the officers' refusal to identify themselves, coupled with the hoods they were wearing and other factors, militated in favor of denying a qualified immunity defense against an excessive use of force claim).

<sup>185</sup> Many municipalities indemnify officers against § 1983 suits. See John Jeffries, *In Praise of the Eleventh Amendment and Section 1983*, 84 Va L Rev 47, 50 & n 16 (1998) (concluding that state and local officers can count on indemnification or government defense where they are not acting in "extreme bad faith").

incentivize municipalities to take reasonable precautions to prevent failures by police officers to identify themselves. By conducting officer training programs, municipalities could quickly and cheaply inform officers that, not only is there a legal requirement of identification (as this Comment proposes), but it is also in their best interests to identify themselves in most situations. Requiring officers to identify themselves is the epitome of cost-justified precaution, as it requires little additional effort on the officers' part while simultaneously creating the potential to avoid massive and expensive injury to citizens.

The primary reason for providing tort liability, however, is to allow injured plaintiffs an opportunity to receive just compensation for their injuries. Through taxes, society as a whole undertakes the expense of providing a law enforcement system. As with any system, from time to time negligent mistakes will be made when conducting everyday functions. Sometimes these mistakes involve apprehending the wrong individual. There is no evidence to suggest that such failures happen frequently; instead, it appears to be a rather rare occurrence that police do not identify themselves. But when such mistaken arrests do occur, and an individual is injured because of an officer's failure to identify himself, it makes sense to provide the injured party with compensation through the tort system. Such recovery equitably distributes the relatively small risk of negligence by police to society as a whole instead of imposing it unfairly upon one person.<sup>186</sup> While the damages in failure-to-identify cases may occasionally be great, the rare occurrence of such negligence, coupled with the redistribution of costs to the municipality as a whole, would ensure that this additional liability does not dramatically overburden society's ability to provide just compensation to victims.

#### CONCLUSION

When police officers fail to identify themselves when conducting an arrest, suspects might react either by attempting to flee the scene or by using violence in an effort to defend themselves against unidentified individuals. Sometimes, serious injury can result from these reactions. These injuries can take the form of reputational damage, embarrassment, property damage, personal injury, and even death. Requiring officers to identify themselves would guard against unnecessary

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<sup>186</sup> Of course, until a critical mass of courts allow claims alleging a failure to identify, prospective plaintiffs will find themselves frustrated by successful qualified immunity defenses. While this frustration is certainly unfortunate, it is a necessary consequence of the law that allows officers a fair opportunity to understand the law's requirements going forward. For further discussion of how qualified immunity works in this context, see notes 18–24 and accompanying text.

damage to property. In addition, it would help ensure that suspects and police officers are not injured or killed needlessly because of confusion regarding the identity of the officers. Empirical research strongly suggests that individuals are more likely than not to comply when faced with a symbol of authority. A rule requiring identification allows citizens who wish to cooperate with the government to do so and allows individuals to conduct themselves with dignity and restraint when confronted suddenly by the law.

Because this proposed rule could be suspended in cases where the officers have reasonable suspicion that a suspect would react to identification with violence or flight, the burden on police would be slight.<sup>187</sup> Thus, it seems clear that courts should allow tort recovery for plaintiffs who have been injured as a result of a failure to identify. In a free society, it is essential to provide individuals with as much notice as possible of state action against them. This avoids requiring individuals to assume that those who accost them are police officers. Not only does such a requirement prevent confusion on the part of suspects, but it also avoids deadly confrontation with the police. Allowing recovery through the tort system is the best solution for victims of a failure to identify. Such recovery provides the minimal deterrence necessary to incentivize municipalities to instruct their officers of this requirement, while simultaneously shifting the burden of negligence from individual plaintiffs to society as a whole.

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<sup>187</sup> A rule requiring identification should not be overly complicated by requiring officers to disclose a lengthy list of information including their names, badge numbers, units, office affiliations, and so on. Instead, a quick and simple statement identifying themselves as police would suffice to adequately protect suspects, while simultaneously insuring that officers do not lose the often-necessary element of surprise. In addition, police officers need to identify themselves only to the extent that a reasonable citizen would understand he is dealing with the police. Officers would not be required to identify themselves to the satisfaction of idiosyncratic citizen demands. See *Sanchez v City of New York*, 2000 WL 987288, \*4-5 (SDNY) (concluding that the “plaintiff’s particular beliefs are not the relevant constitutional inquiry” when analyzing whether a police officer has identified himself).