

OBVIOUS BUT NOT CLEAR: THE RIGHT TO REFUSE TO COOPERATE WITH THE POLICE DURING A *TERRY* STOP

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This Article answers a question that has confounded the lower federal courts: whether a suspect briefly detained under the doctrine of Terry v. Ohio is obligated to answer police questions posed to her. Although the Supreme Court has never explicitly found a right to remain silent during a Terry stop, it has, through dicta, concurrences, and elsewhere, consistently assumed the existence of such a right. Nonetheless, more than fifty years after Terry was decided, lower federal courts consistently deny recovery to those who allege they were wrongfully arrested for refusing to answer police questions. Interestingly, these courts rarely reject outright the existence of a right to silence in the Terry context. Rather, they simply find that because such a right is not clearly established, officers who arrest suspects for refusing to answer their questions are entitled to qualified immunity.

The unwillingness of courts to recognize a right to silence in the Terry context is inconsistent not just with the Court's repeated pronouncements on the subject but also with the Court's broader conception of the right to remain silent. Those who have not been seized by law enforcement officers have an absolute right to ignore police questions and go about their business; this is in many ways the definition of what it means to be at liberty. And when one is under arrest, the right to silence is so important that a confession is irrebuttably presumed to be coerced under Miranda v. Arizona unless the defendant is apprised of that right and has made a knowing, voluntary, and intelligent waiver of it. It makes no sense that only those in between those two categories—those who have been briefly detained but not yet arrested—have no right

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to remain silent in the face of police questioning. And yet we can find no lower court that has acknowledged the existence of a broad right to silence in the Terry context.

We suggest three solutions to this problem. First, lower federal courts should simply acknowledge that the right exists and is clearly established by Supreme Court precedent. Having done so, they should award money damages against officers who arrest suspects simply for refusing to answer questions put to them during a Terry stop. Second, if courts are unwilling to find this clearly established right in the Supreme Court's jurisprudence, then they should themselves establish that such a right exists. The newly announced right will be clearly established for later cases and will allow recovery for future litigants, if not for the plaintiff in the case establishing the rule. Finally, we encourage state courts and legislatures to determine, as a matter of state law, that their statutes permitting arrest for obstruction of justice or interfering with a police officer are not violated by the mere refusal to answer police questioning.

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INTRODUCTION

In October 2015, New Jersey state patrol officers pulled over Rebecca Musarra on Route 519 near the Delaware border.¹ Musarra, an attorney, provided her license and registration to the officers but otherwise sat mutely behind the wheel as they asked her if she knew why they had pulled her over. The dashboard video of the incident shows that the officers became increasingly frustrated with Musarra's refusal to answer their questions and that they eventually informed her that they would arrest her if she did not cooperate. Musarra expressly asserted her right not to answer any questions but was nonetheless arrested on charges of obstruction of justice under New Jersey law. After a brief detention, Musarra was neither formally charged with a crime nor issued a summons to appear in court. She eventually sued the officers for violating her constitutional rights, and the state settled her case for \$30,000. In doing so, the state neither admitted wrongdoing nor provided Musarra with the apology she had requested.²

It would be easy enough to write off the Musarra incident, as a state patrol spokesperson did,³ as simply a matter of insufficient officer training. However, the federal courts have been extremely unreceptive to most litigants who find themselves in Musarra's position. This is surprising. More than fifty years ago, Justice White wrote in his *Terry v. Ohio*⁴ concurrence that while the police may briefly detain members of the public for investigative purposes based on reasonable suspicion, "[o]f course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest."⁵ Yet what seemed obvious to Justice White seems far less clear to federal trial and appellate courts today. Time and again, courts have found the law in this area sufficiently unsettled to deny recovery to those alleging that they were unconstitutionally arrested for refusing to cooperate with police investigations.

The unwillingness of courts to recognize a right to silence in the *Terry* context is inconsistent not just with the Court's repeated pronouncements on the subject but also with the Court's broader conception of the right to remain silent. Those who have not been

1. S.P. Sullivan, *NJ State Troopers Arrested Her for Staying Silent. Now the State Will Pay.*, NJ.COM (Aug 23, 2017), https://www.nj.com/politics/2017/08/nj_pays_30k_to_woman_arrested_for_staying_silent_d.html [<https://perma.cc/3F25-GH8K>].

2. *Id.*

3. *Id.*

4. 392 U.S. 1 (1968).

5. *Id.* at 34 (White, J., concurring).

seized by law enforcement officers have an absolute right to ignore police questions and go about their business; this is, in many ways, the definition of what it means to be at liberty. When one is under arrest, the right to silence is so important that a confession is irrebuttably presumed to be coerced unless the defendant is apprised of that right and has made a knowing, voluntary, and intelligent waiver of it. It makes no sense that only those in between those two categories—those who have been briefly detained but not yet arrested—have no right to remain silent in the face of police questioning. Yet, no lower court has acknowledged the existence of a broad constitutional right to silence in the *Terry* context.

This Article discusses the constitutional rights possessed by, and the obligations a state may impose upon, a person subject to a brief investigative *Terry* stop. It proceeds in three parts. Part I provides a brief background of the various constitutional rights and procedural rules that intersect and overlap in the context of police questioning during brief investigative stops.⁶ We demonstrate that a long history of statements from the Supreme Court—in dicta, concurrences, and dissents—make clear, although never explicit, that there is no obligation to cooperate with police questioning during a *Terry* stop. Part II discusses the litigation of this issue in the lower federal courts. We show that, notwithstanding the Court's relative clarity on this point, lower courts generally rely on the absence of a single, clear precedent to deny recovery to those claiming a constitutional injury. Because these suits generally arise as civil actions against the investigating officers under 42 U.S.C. § 1983, courts are able to avoid reaching the constitutional claim by finding for defendants on the basis of qualified immunity. Unsettled law leads to a finding of qualified immunity, which obviates the need to clarify the law.

Part III suggests a way forward. Currently, litigation of these cases often results in an endless cycle of undeclared law and victory for government officials, notwithstanding all of the evidence pointing to a right to refuse to answer police questions during a *Terry* stop. Our proposed solution to this problem is threefold. First, the Supreme Court's opinions make clear, although admittedly not explicit, that a person subject to a *Terry* stop is not obligated to provide the police any information other than his name. Lower federal courts considering such a claim should conclude that a right exists and is clearly established, permitting compensation for those who have been wrongly

6. Although this issue seems to arise principally in car stops, we see no reason why the same rules should not apply as well to street encounters and other species of brief investigative stops. See *infra* Part I.A.5 (describing the three "levels" of police stops).

arrested for their silence. Second, to the extent courts find the law on this point to be unclear at the moment, they should create such clarity by announcing that there is a right not to cooperate with police questioning during *Terry* stops. While such a finding may not benefit the plaintiff before the court—because the right was not clearly established at the time the officers in her case acted—it will make the content of the law clear to individuals and law enforcement officials in the future and will make recovery available for later plaintiffs. Finally, if federal courts will not act, the state courts and legislatures should. States should make clear that obstruction of justice statutes, like the one Musarra allegedly violated at the time of her arrest, require more than verbal noncooperation to establish probable cause to arrest. If it is clear as a matter of state law that failure to answer police questions cannot be grounds for arrest, officers will be stripped of their qualified immunity when they do so.

I. THE RELEVANT SUBSTANTIVE AND PROCEDURAL DOCTRINES

As we demonstrate more fully below, courts tend to find the law unsettled with regard to whether an individual briefly stopped by the police for investigation is obligated to answer the officers' questions. One of the reasons for this confusion is that police questioning in this context occurs at the intersection of a number of related but distinct constitutional rights. Those alleging a constitutional violation when arrested for refusing to cooperate with police questioning often allege violations of their First, Fourth, and Fifth Amendment rights.⁷ In this Section, we discuss each of the relevant rights and their interactions, demonstrating that, at least with regard to the Fourth Amendment, the right to silence during *Terry* stops is clearly established. Furthermore, and perhaps equally importantly, we demonstrate that procedural and remedial rules for the adjudication of these rights often conspire to prevent a clear resolution of the rights at issue.

A. *Constitutional Law*

Much of the confusion regarding the right to remain silent during a police stop follows from the overlapping and interconnected constitutional principles that govern police-citizen interactions. This Subsection discusses the Fourth, Fifth, and First Amendment rights that apply to these incidents, demonstrating how the interrelated nature of these rights has confounded courts in this area.

7. See *infra* Sections II.A–C (describing plaintiffs' causes of action in three exemplary cases as based in violations of those three Constitutional amendments).

1. *The Fourth Amendment and Terry stops*

The Fourth Amendment plays a major role in regulating how police officers may interact with members of the public.⁸ Although the Fourth Amendment's text is hardly a model of clarity,⁹ the Supreme Court has generally read it to create certain baseline rules to regulate police conduct. First, the Amendment is seen as creating a preference for warrants issued by neutral and detached magistrates.¹⁰ That is, the Court has read the Amendment as a check on officer discretion, generally requiring officers in the field to seek and receive the approval of a magistrate before they may deprive individuals of their liberty.¹¹ Second, even in those situations that do not require a warrant, the Court has stated that searches and seizures are presumptively unconstitutional in the absence of probable cause.¹² Thus, for example, police must have a warrant before entering a private home

8. The Fourth Amendment states in full, The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. CONST. amend. IV.

9. See, e.g., Sam Kamin, *The Private is Public: The Relevance of Private Actors in Defining the Fourth Amendment*, 26 B.C. L. REV. 83, 89 (2004) (“[A]t its most fundamental levels—the relationship between the Amendment’s two clauses and the degree of suspicion that must be shown before a warrantless search may be conducted—it becomes clear that the Fourth Amendment is hardly self-defining.”).

10. *Katz v. United States*, 389 U.S. 347, 356–57 (1967) (quoting *United States v. Jeffers*, 342 U.S. 48, 51 (1951)) (“[T]his Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes,’ and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.” (internal citation and footnote omitted)).

11. See *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 621–22 (1989) (“An essential purpose of a warrant requirement is to protect privacy interests by assuring citizens subject to a search or seizure that such intrusions are not the random or arbitrary acts of government agents. A warrant assures the citizen that the intrusion is authorized by law, and that it is narrowly limited in its objectives and scope. A warrant also provides the detached scrutiny of a neutral magistrate, and thus ensures an objective determination whether an intrusion is justified in any given case.” (citations omitted)).

12. As the phrase “probable cause” appears only in the warrant clause of the Fourth Amendment, there is reason to question the wisdom of this presumption. For a critique of essentially all of the Supreme Court’s Fourth Amendment jurisprudence, see Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757 (1994) (“The Fourth Amendment today is an embarrassment. . . . Warrants are not required—unless they are. All searches and seizures must be grounded in probable cause—but not on Tuesdays.”). For Amar, the Fourth Amendment is primarily about reasonableness, not the various presumptions the Court has created over the years. *Id.* at 759.

to make an arrest or to search.¹³ But, if they have probable cause, officers may make an arrest in a public space¹⁴ or search a car even without a warrant.¹⁵

a. Terry stops

The Court's presumption in favor of probable cause as a constitutional requirement is also subject to a number of significant exceptions. Principally, for present purposes, in *Terry v. Ohio*, the Court announced that police officers may briefly detain and frisk individuals based upon the lower standard of reasonable suspicion. Officer Martin McFadden observed Terry and two other men who he believed were casing a jewelry store in downtown Cleveland, Ohio.¹⁶ His suspicions aroused, the officer approached the men and asked for their names. When the men "mumbled something" in response to the officer's questions, McFadden grabbed Terry and patted him down. When McFadden felt a handgun in Terry's coat, he removed it. He also patted down Terry's two confederates, removing another handgun from one. He then arrested all three men.

At his trial for unlawful possession of a weapon, Terry challenged the state's introduction of the handgun into evidence, and the Supreme Court eventually upheld McFadden's search and seizure of Terry and his confederates. The Court held that an officer may stop and briefly

13. *Payton v. New York*, 445 U.S. 573, 576 (1980).

14. *United States v. Watson*, 423 U.S. 411, 423–24 (1976).

15. *Carroll v. United States*, 267 U.S. 132, 149 (1925).

It is fair to criticize the Court for applying both of these presumptions quite loosely. As Justice Scalia has written, the exceptions have largely come to swallow the rule. *California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring) ("Even before today's decision, the 'warrant requirement' had become so riddled with exceptions that it was basically unrecognizable. In 1985, one commentator cataloged nearly 20 such exceptions, including 'searches incident to arrest . . . automobile searches . . . border searches . . . administrative searches of regulated businesses . . . exigent circumstances . . . search[es] incident to nonarrest when there is probable cause to arrest . . . boat boarding for document checks . . . welfare searches . . . inventory searches . . . airport searches . . . school search[es]. . . .'). In fact, despite the Court's presumption language, the vast majority of interactions between law enforcement and the public take place without the benefit of either a warrant or probable cause.

16. *Terry v. Ohio*, 392 U.S. 1, 4–6 (1968). Although it is not a part of the Court's opinion, it is clear that the racial make-up of the three men was part of what caught the officer's attention. See Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 957, 967 (1999) ("In his suppression hearing testimony, the officer made a point of referring to the race of each of the participants when he described their contact with each other. The interracial nature of the group apparently also 'didn't look right' to the detective." (footnote omitted)).

detain an individual he reasonably suspects of criminal activity¹⁷ and may frisk a detainee he reasonably believes to be armed and presently dangerous.¹⁸ For the first time, the Supreme Court upheld a search and seizure carried out on the basis of less than the probable cause that would be necessary to arrest under the Fourth Amendment. Although the dissent written by Justice Douglas critiqued the Court for authorizing a search that no magistrate could authorize,¹⁹ the majority was clearly influenced by the realities faced by law enforcement officers in the field. McFadden did essentially what society might expect of police officers in his situation; he acted based on his experience and observations to stop a crime before it was committed. Moreover, he used a graduated approach, confirming his suspicions and conducting a limited search for weapons before escalating the situation to a full custodial arrest.

In an unusually self-conscious move, the Court acknowledged in *Terry* that it was handing law enforcement a powerful tool, one that would be easy for them to misuse.²⁰ To limit the potential for abuse of the *Terry* stop, the Court has held in *Terry* and elsewhere that such stops must be carefully circumscribed: they must be valid both at their inception and in their scope.²¹ The former limitation requires the

17. *Id.* at 22 (“[A] police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest.”).

18. *Id.* at 29 (“The sole justification of [a *Terry* search] is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.”).

19. *Id.* at 36 (Douglas, J., dissenting) (“Had a warrant been sought, a magistrate would . . . have been unauthorized to issue one, for he can act only if there is a showing of ‘probable cause.’ We hold today that the police have greater authority to make a ‘seizure’ and conduct a ‘search’ than a judge has to authorize such action. We have said precisely the opposite over and over again.”).

20. *Id.* at 15 (majority opinion) (“Nothing we say today is to be taken as indicating approval of police conduct outside the legitimate investigative sphere. Under our decision, courts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires. When such conduct is identified, it must be condemned by the judiciary, and its fruits must be excluded from evidence in criminal trials. And, of course, our approval of legitimate and restrained investigative conduct undertaken on the basis of ample factual justification should in no way discourage the employment of other remedies than the exclusionary rule to curtail abuses for which that sanction may prove inappropriate.”).

21. *Id.* at 19–20 (“[I]n determining whether the seizure and search were ‘unreasonable’ our inquiry is a dual one—whether the officer’s action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.”).

police to articulate more than a hunch before they may briefly stop an individual—they must point to specific and articulable facts that support their reasonable suspicion that the suspect was engaging in, or about to engage in, criminal activity.²² In addition, before he may frisk, the officer must reasonably believe that the suspect is armed and dangerous.²³

The restriction on scope limits the way a properly initiated *Terry* stop may be carried out. For example, although the Court has held that an individual may be removed from a car for a *Terry* stop²⁴ and that a drug-sniffing dog may be walked around his vehicle during such a stop,²⁵ an individual may be detained only so long as is necessary to effectuate the investigation.²⁶ More generally, the Court has maintained that officers must move efficaciously during a *Terry* stop and that, at some point, a stop becomes so involved or drawn out that it is tantamount to an arrest and must be supported by probable cause.²⁷

One issue regarding the scope of a *Terry* stop that the Court has not directly addressed—the central question of this Article—is whether an individual is obligated to answer police officer questions during the course of a *Terry* stop.²⁸ Recall that part of what concerned Officer McFadden, and what led to the arrests of his suspects, was their inability to identify themselves and explain their suspicious behavior to him. Justice White, who joined the Court's *Terry* opinion and thus presumably

22. *Florida v. Royer*, 460 U.S. 491, 498 (1983) (plurality opinion) (“*Terry* created a limited exception to [the] general rule: certain seizures are justifiable under the Fourth Amendment if there is articulable suspicion that a person has committed or is about to commit a crime.”).

23. *Adams v. Williams*, 407 U.S. 143, 146 (1972) (“So long as the officer is entitled to make a forcible stop, and has reason to believe that the suspect is armed and dangerous, he may conduct a weapons search limited in scope to this protective purpose.” (footnote omitted)).

24. *Michigan v. Long*, 463 U.S. 1032, 1047–48 (1983) (“[P]olice may order persons out of an automobile during a stop for a traffic violation . . .”).

25. *Illinois v. Caballes*, 543 U.S. 405, 409 (2005) (“[T]he use of a well-trained narcotics-detection dog . . . during a lawful traffic stop generally does not implicate legitimate privacy interests.”).

26. *United States v. Sharpe*, 470 U.S. 675, 682–83 (1985).

27. *Id.* at 686 (explaining that the relevant inquiry in assessing a traffic stop's duration is “whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant”).

28. *See, e.g., Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 186–87 (2004) (questioning whether a suspect who declined to provide identification during a *Terry* stop may constitutionally be arrested under a state statute requiring him to provide such identification).

agreed with it in whole, felt compelled to write separately in that case to clarify a matter not directly addressed by the Court's opinion:

[A]lthough the Court puts the matter aside in the context of this case, I think an additional word is in order concerning the matter of interrogation during an investigative stop. There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. Absent special circumstances, the person approached may not be detained or frisked, but may refuse to cooperate and go on his way. However, given the proper circumstances, such as those in this case, it seems to me the person may be briefly detained against his will while pertinent questions are directed to him. *Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation.*²⁹

Justice White's concurrence—mentioned by none of the other opinions in *Terry*—was meant to clarify what he saw as a truism contained in the Court's opinion: that no one, whether at liberty or subject to police detention, is obligated to speak when a police officer poses questions to him.³⁰ Justice White cited no authority for this point. To him, it was apparently self-evident. That none of his brethren, either those who joined the Court's opinion or those in dissent, took issue with his description of what the Court had done in *Terry* is telling. Over the following half-century, a large number of justices would cite Justice White's concurring opinion favorably, treating it as the kind of noncontroversial statement of law that he intended it to be.³¹ In many

29. *Terry v. Ohio*, 392 U.S. 1, 34 (1968) (White, J., concurring) (emphasis added).

30. Justice Harlan announced a similar principle in his separate concurrence: Any person, including a policeman, is at liberty to avoid a person he considers dangerous. If and when a policeman has a right instead to disarm such a person for his own protection, he must first have a right not to avoid him but to be in his presence. That right must be more than the liberty (again, possessed by every citizen) to address questions to other persons, for ordinarily *the person addressed has an equal right to ignore his interrogator and walk away . . .* *Id.* at 32–33 (Harlan, J., concurring) (emphasis added).

31. *See, e.g., Hiibel*, 542 U.S. at 198 (Breyer, J., dissenting) (finding “no good reason . . . to reject [Justice White’s] generation-old statement of the law”); *Florida v. Royer*, 460 U.S. 491, 497–98 (1983) (plurality opinion) (“[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification. The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions

ways, the Court has treated Justice White's concurrence in *Terry* the same way it treats Justice Harlan's concurring opinion in *Katz v. United States*³²: as a concurrence that provides the heart of the Court's meaning.³³ As we discuss more fully below, the Supreme Court has long assumed the truth of Justice White's concurrence: although an individual may be briefly detained based on reasonable suspicion, the Fourth Amendment prevents law enforcement from arresting that individual for refusing to answer questions during a *Terry* stop.

2. *Miranda v. Arizona and the privilege against compelled self-incrimination*

The Fifth Amendment's privilege against compelled self-incrimination protects an individual from having her coerced statements used against her during a criminal trial. However, because the Fifth Amendment prohibits only the use of those statements in which an individual's will is actually overborn by government coercion, the Supreme Court in *Miranda v. Arizona*³⁴ created a prophylactic rule more extensive than the Fifth Amendment itself in order to afford greater protections to criminal suspects. This Section examines how both the Fifth Amendment and the *Miranda* rule protect individuals questioned by the police during brief investigative stops.

a. *The Fifth Amendment*

The Fifth Amendment is both an obvious place in which to ground a right not to speak to the police and a difficult doctrinal fit.³⁵ The Amendment is principally understood as a trial right,³⁶ the Supreme

at all and may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds." (citations omitted)).

32. 389 U.S. 347 (1967).

33. See, e.g., Richard Sobel et al., *The Fourth Amendment Beyond Katz, Kyllo and Jones: Reinstating Justifiable Reliance as a More Secure Constitutional Standard for Privacy*, 22 B.U. PUB. INT. L.J. 1, 14 ("Although the *Katz* majority's assertion that 'the Fourth Amendment protects people, not places' is cited in numerous opinions, it is typically followed by an application of Justice Harlan's concurrence test based on reasonable expectations of privacy.").

34. 384 U.S. 436 (1966).

35. See U.S. CONST. amend. V. ("No person . . . shall be compelled in any criminal case to be a witness against himself . . .").

36. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) ("The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial." (citations omitted)).

Court has held that the Fifth Amendment is not violated until compelled statements obtained from a criminal suspect are introduced against him at trial.³⁷ In such circumstances, a defendant must show three things to demonstrate a Fifth Amendment violation. First, the compulsion complained of must be at the hands of a government actor rather than internal to the defendant or exerted by a third party.³⁸ Second, only the compulsion of testimonial communications violates the privilege.³⁹ Criminal defendants are often compelled to provide the government with incriminating evidence: their fingerprints, their blood, their DNA, their handwriting, and so on.⁴⁰ These compulsions do not violate the privilege because they do not implicate the cruel trilemma that the Fifth Amendment was designed to prevent: the choice between perjuring oneself, being held in contempt, or making incriminating statements.⁴¹ Third, the privilege applies only to those “disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.”⁴² These requirements obviously impose great difficulty on one raising a Fifth Amendment challenge after being arrested for noncompliance with police questioning. The Fifth Amendment generally prohibits the introduction of compelled statements in Court, and in these cases, there are neither compelled statements nor a criminal prosecution in which those statements could be introduced.

However, the Supreme Court has also held that the government cannot burden the invocation of the Fifth Amendment privilege. So, for example, in *Griffin v. California*,⁴³ the Court held that prosecutors could not comment upon at trial, or invite jurors to draw negative inferences from, the fact that a defendant had invoked the Fifth Amendment privilege not to testify.⁴⁴ Surely, if a jury cannot be

37. *United States v. Patane*, 542 U.S. 630, 636–37 (2004) (holding that the introduction of the physical fruits of a *Miranda* violation at trial violates neither *Miranda* nor the Fifth Amendment itself).

38. *Colorado v. Connelly*, 479 U.S. 157, 166 (1986) (“The most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible . . .”).

39. *Schmerber v. California*, 384 U.S. 757, 761 (1966) (“We hold that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature . . .”).

40. *Id.* at 764–65 (excluding blood test from Fifth Amendment privilege and reaffirming that fingerprinting and writing samples receive no Fifth Amendment protection).

41. *See Andresen v. Maryland*, 427 U.S. 463, 476 (1976).

42. *Kastigar v. United States*, 406 U.S. 441, 445 (1972).

43. 380 U.S. 609 (1965).

44. *Id.* at 613–15.

directed to the fact that a defendant has invoked his right, it would seem that the government cannot impose other negative consequences—such as arrest and formal charges—when a suspect invokes her rights in the face of police questioning.⁴⁵ Yet, the law on this point, as we shall see below, is surprisingly unsettled.⁴⁶

Part of the reason that there is little settled law on the meaning of the Fifth Amendment in the interrogation context is that a Fifth Amendment right must be asserted expressly in order to be effective. In 2013, a plurality of the Supreme Court held in *Salinas v. Texas*⁴⁷ that silence and evasion in the face of police questioning was not an invocation of the Fifth Amendment privilege, and thus, a prosecutor could comment upon it at trial.⁴⁸ Because the suspect merely remained silent rather than stating he was invoking his Fifth Amendment rights, a fact that might have several plausible explanations, the plurality held he had not expressly invoked his privilege.⁴⁹ Thus, it would seem, an individual who sits mute in response to police questioning has not even invoked her Fifth Amendment rights and cannot claim that the state imposed consequences upon the exercise of that right.

b. Miranda v. Arizona

Perhaps because the Fifth Amendment has been read narrowly—applying only to incriminating statements introduced in court and only when the defendant has clearly invoked the privilege, etc.—the Supreme Court in *Miranda* created a prophylactic rule whose scope is

45. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 444–45, 467 (1966) (“Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves.”).

46. See, e.g., Orin Kerr, Opinion, *Can the Police Retaliate Against a Citizen for Refusing to Answer Police Questions?*, WASH. POST (Apr. 19, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/04/19/can-the-police-retaliate-against-a-citizen-for-refusing-to-answer-police-questions>.

47. 570 U.S. 178 (2013) (plurality).

48. *Id.* at 189.

49. *Id.* (finding the suspect’s silence “insolubly ambiguous” rather than an unequivocal invocation of his Fifth Amendment privilege (quoting *Doyle v. Ohio*, 426 U.S. 610, 617 (1976))).

The Supreme Court came to a similar conclusion with regard to the right to remain silent in *Berghuis v. Thompkins*, 560 U.S. 370, 387–89 (2010). Thompkins remained silent for hours under police questioning; the Court ultimately ruled that this was not an invocation of his right to remain silent and that his interrogators were not required to cease questioning and obtain a waiver of Thompkins’ right to remain silent before interrogating him. *Id.*

broader than that of the Fifth Amendment privilege itself.⁵⁰ After surveying the kinds of police interrogation practices then in place—which called for a suspect to be isolated and made vulnerable but not directly threatened or coerced⁵¹—the Court concluded that it needed to expand the protections enjoyed by criminal defendants in the interrogation room. Given the inherently coercive nature of custodial interrogation, the Court held that the Fifth Amendment right against compelled self-incrimination required the police to apprise suspects of their rights prior to the commencement of such questioning.⁵² The now-ubiquitous warnings—that an individual has the right to remain silent, the right to have an attorney present, the right to appointed counsel—apply to any individual subject to custodial interrogation.⁵³ A statement taken in the absence of these procedures and a voluntary, knowing, and intelligent waiver of the specified rights is irrebuttably presumed to be coerced.⁵⁴ The Court created the *Miranda* in part because the Fifth Amendment itself provided little protection outside of its narrow terms.

Although the *Miranda* Court described the custody that triggered the warnings as any significant interference with an individual's autonomy,⁵⁵ it has since chosen to narrow the definition of custody.

50. 384 U.S. 436, 455 (1966); see *United States v. Patane*, 542 U.S. 630, 639 (2004) (concluding that *Miranda*'s prophylactic rule "necessarily sweep[s] beyond the actual protections of the Self-Incrimination Clause").

51. *Miranda*, 384 U.S. at 455. The Court explained,

From these representative samples of interrogation techniques, the setting prescribed by the manuals and observed in practice becomes clear. In essence, it is this: To be alone with the subject is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe. Patience and persistence, at times relentless questioning, are employed. To obtain a confession, the interrogator must "patiently maneuver himself or his quarry into a position from which the desired objective may be attained." When normal procedures fail to produce the needed result, the police may resort to deceptive stratagems such as giving false legal advice. It is important to keep the subject off balance, for example, by trading on his insecurity about himself or his surroundings. The police then persuade, trick, or cajole him out of exercising his constitutional rights.

Id. (footnote omitted).

52. *Id.* at 444–45.

53. *Id.*

54. *Oregon v. Elstad*, 470 U.S. 298, 307 (1985). *But see* *New York v. Quarles*, 467 U.S. 649, 653 (1984) (holding that there is a "public safety" exception to the *Miranda* requirement).

55. *Miranda*, 384 U.S. at 444 ("By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.").

For our purposes, the most important example is the Supreme Court's 1984 decision in *Berkemer v. McCarty*,⁵⁶ holding that *Miranda* does not apply to run-of-the-mill traffic stops.⁵⁷ The Court concluded that police need not read a suspect his *Miranda* rights prior to questioning him during such a stop because such stops are not custodial.⁵⁸ Writing for a unanimous Court, Justice Marshall reasoned that *Miranda* was concerned with the inherently coercive nature of incommunicado interrogations that take place within the secrecy and isolation of police stations.⁵⁹ By contrast, automobile stops are necessarily brief, take place in view of the public, and thus raise fewer coercion concerns.⁶⁰

The *Berkemer* Court was careful to point out that freeing investigating officers of the shackles of *Miranda* did not leave them free to run roughshod over the rights of motorists. In particular, the Court unanimously endorsed Justice White's *Terry* concurrence, citing it positively and stating that:

Under the Fourth Amendment, we have held, a policeman who lacks probable cause but whose "observations lead him reasonably to suspect" that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly in order to "investigate the circumstances that provoke suspicion." "[T]he stop and inquiry must be 'reasonably related in scope to the justification for their initiation.'" Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. *But the detainee is not obliged to respond.* And, unless the detainee's answers provide the officer with probable cause to arrest him, he must then be released.⁶¹

56. 468 U.S. 420 (1984).

57. *Id.* at 437–40.

58. *Id.* at 439–40 ("[T]he usual traffic stop is more analogous to a so-called 'Terry stop' than to a formal arrest. . . . The comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that *Terry* stops are subject to the dictates of *Miranda*.").

59. *Id.* at 440. Of course, in *Berkemer*, the Court merely held the prophylactic rule created in *Miranda* did not apply to traffic stops. *Berkemer* did not authorize, and in fact could not authorize, the police to engage in coercive conduct that would have run afoul of the Fifth Amendment prior to *Miranda*. Although the police need not read a suspect her *Miranda* rights during traffic stops, they obviously cannot coerce an individual into making statements against their will.

60. *Id.* at 437–38 (justifying the lack of a requirement for *Miranda* warnings during traffic stops because they are temporary, brief, and public, thereby making them less coercive than stationhouse interrogations).

61. *Id.* at 439–40 (citations omitted) (emphasis added).

The Court's unanimous endorsement of this view of *Terry* cannot be overstated. Although later courts might write off this language as dicta (Berkemer did not, in fact, refuse to speak to the officers), a clearer endorsement of a right to silence during *Terry* stops is difficult to imagine. The Court's final point, that the state cannot arrest an individual without probable cause, leads directly into the final substantive area raised by refusal to answer questions during traffic stops: the First Amendment.

3. *The First Amendment*

Because police questioning during a traffic stop involves the defendant's speech—or lack thereof—the First Amendment seems an obvious place to ground constitutional protections against compelled communications. As we shall see, however, courts have been unwilling to find a right not to speak to the police in the free speech clause.

a. *The right not to answer police questions*

The First Amendment protects not only the right to speak but also the right not to have one's speech compelled. So, for example, in *Wooley v. Maynard*,⁶² the Maynards, two members of the Jehovah's Witness faith, argued that the New Hampshire state motto "live free or die" was repugnant to their beliefs and that they could not be compelled to display it on their license plate.⁶³ After cutting the words "or die" off his license plate, Maynard was convicted under a statute prohibiting the defacing of license plates, served his fifteen-day sentence, and then sued to enjoin further enforcement of the state statute. The Supreme Court agreed with him, finding "New Hampshire's statute in effect requires that appellees use their private property as a 'mobile billboard' for the State's ideological message—or suffer a penalty, as Maynard already has."⁶⁴ Similarly, the Court recently found merit in a suit brought by California women's health organizations against a state law that would require them to display certain information about in-state abortion providers.⁶⁵ The Court found the statute impinged on the First Amendment rights of those required to display the information because the required messages amounted to more than "purely factual and uncontroversial

62. 430 U.S. 705 (1977).

63. *Id.* at 706–08.

64. *Id.* at 707–08, 715.

65. Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2376 (2018) (finding the plaintiffs likely to succeed on the merits in their constitutional challenge to two notice requirements imposed by the state).

disclosures.”⁶⁶ It noted, “California cannot co-opt the licensed facilities to deliver its message for it. ‘[T]he First Amendment does not permit the State to sacrifice speech for efficiency.’”⁶⁷

The implications of this right against compelled speech for police-citizen interactions might seem obvious. A reading of the First Amendment that protects an individual from having her speech compelled as well as from having it silenced would seem to prohibit police officers from forcing answers from those with whom they interact. However, the Supreme Court has generally invoked the compelled speech doctrine only when the government is dictating the *content* of an individual’s speech rather than simply requiring them to speak truthfully.⁶⁸ In fact, neither the Court itself nor, as this Article will show,⁶⁹ the lower federal courts have ever applied the First Amendment to bar law enforcement officers from compelling answers to their questions.⁷⁰

b. Retaliatory arrest

The principal way, therefore, that the First Amendment factors into the *Terry* stop context is with regard to retaliatory arrest—a topic that has found itself on the Supreme Court’s docket with surprising regularity of late.⁷¹ Most recently, the Court considered the case of Russell P. Bartlett, who sued two police officers after they arrested him at Alaska’s 2014 Arctic Man festival.⁷² Bartlett objected to the officers’ questioning of some nearby teenagers but would not speak with the officers when they tried to

66. *Id.*

67. *Id.* (quoting *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988)).

68. *See, e.g.*, *United States v. Sindel*, 53 F.3d 874, 878 (8th Cir. 1995) (“It is true that ‘the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.’ A First Amendment protection against compelled speech, however, has been found only in the context of governmental compulsion to disseminate a particular political or ideological message.” (citation omitted)).

69. *See infra* Sections II.A–B.

70. As one widely cited district court held, “Plaintiffs cite no authority to support the application of the First Amendment protection against government-compelled ideological or political speech into the context of police interviews, which are covered by the more specific protections of the Fourth, Fifth, and Sixth Amendments.” *McFadyen v. Duke Univ.*, 786 F. Supp. 2d 887, 949 (M.D.N.C. 2011), *aff’d in part, rev’d in part, dismissed in part sub nom*, *Evans v. Chalmers*, 703 F.3d 636 (4th Cir. 2012).

71. In the last thirteen years, the Court has decided four such cases: *Nieves v. Bartlett*, 139 S. Ct. 1715, 1720 (2019); *Lozman v. City of Riviera Beach, Florida*, 138 S. Ct. 1945, 1949 (2018); *Reichle v. Howards*, 566 U.S. 658, 660 (2012); and *Hartman v. Moore*, 547 U.S. 250, 254 (2006).

72. *Bartlett*, 139 S. Ct. at 1720.

talk with him.⁷³ After Bartlett confronted the officers, one of them pushed Bartlett away before the other arrested him. He alleged that during the arrest the officer told him “bet you wish you would have talked to me now.”⁷⁴ Bartlett sued under § 1983, alleging that the arrest was in retaliation for his intervention in the officers’ questioning and his refusal to speak with them when confronted.⁷⁵

The Court began by reiterating that police officers may not arrest in retaliation for a valid exercise of speech rights.⁷⁶ But the Court granted certiorari to decide a narrower issue that had confounded the lower courts: whether a demonstration of probable cause to arrest would always defeat a retaliatory arrest claim.⁷⁷ The Court held that, in most circumstances, it would.⁷⁸ Rather than focusing on the subjective intent of the officers, the Court reasoned, the focus in a retaliatory arrest case should generally be on whether there were legal grounds to make the arrest.⁷⁹ As in many Fourth Amendment contexts, the Court held that objective factors—such as the existence of probable cause to arrest—were a better basis of decision than subjective factors—like the malevolent intent of the officers.⁸⁰

73. *Id.* at 1721 (“We are asked to resolve whether probable cause to make an arrest defeats a claim that the arrest was in retaliation for speech protected by the First Amendment.”).

74. *Id.* As with the lower court *Terry* decisions discussed below, in *Bartlett*, the state dismissed the charges against the arrestee.

75. Though it might seem to raise the issue at the heart of this Article, *Bartlett* was decided on the ground that the officers had probable cause to arrest the plaintiff because he was drunk and belligerent with one of the officers. Although the officer’s statement was evidence that refusal to speak with him formed part of the basis for his decision to arrest, the Court did not rely on that fact in resolving the case. Quoting the Court of Appeals, the Court concluded “a reasonable officer in Sergeant Nieves’s position could have concluded that Bartlett stood close to Trooper Weight and spoke loudly in order to challenge him, provoking Trooper Weight to push him back.” *Id.* at 1728.

76. *Id.* at 1722 (“[A]s a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions’ for engaging in protected speech.” (quoting *Hartman v. Moore*, 547 U.S. 250, 256 (2006))).

77. *Id.* at 1721.

78. *Id.* at 1724–25.

79. *Id.*

80. *Id.* at 1724 (“[B]ecause probable cause speaks to the objective reasonableness of an arrest, its absence will—as in retaliatory prosecution cases—generally provide weighty evidence that the officer’s animus caused the arrest, whereas the presence of probable cause will suggest the opposite.”). The only exception, the Court announced, would be in those “circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so. In such cases, an unyielding requirement to show the absence of probable cause could pose ‘a risk that some police officers may exploit the arrest power as a means of suppressing speech.’” *Id.* at 1727 (“For example, at many intersections, jaywalking is endemic but rarely results in arrest.

c. Obstruction of justice statutes

Bartlett points out the importance of state obstruction of justice statutes in determining the validity of arrests for failure to comply with police questioning. If such a statute does not provide probable cause to arrest an individual for refusing to answer police questioning, an officer violates the Fourth Amendment (and likely the First Amendment as well) if he nonetheless arrests a suspect for failure to answer his questions. Because there is no probable cause to arrest in such circumstances, a claim of retaliation is cognizable.

All states have statutes on their books that criminalize interfering with or obstructing an officer in the execution of her official duties or engaging in disruptive conduct.⁸¹ When applied to speech—or, in our case silence—these statutes can obviously raise constitutional concerns.⁸² For example, in *Norwell v. City of Cincinnati*,⁸³ the United States Supreme Court reversed *Norwell*'s conviction for disorderly conduct under Ohio law, holding that a state may not punish an individual for nonprovocatively voicing an objection to a police officer's conduct.⁸⁴ Following *Norwell*, a number of states, either as a matter of statutory interpretation, constitutional avoidance, or interpretation of the First Amendment and its state analogues, have read their state obstruction of justice statutes to prohibit arrest based solely on verbal disagreement with an officer carrying out her duties.⁸⁵

If an individual who has been vocally complaining about police conduct is arrested for jaywalking at such an intersection, it would seem insufficiently protective of First Amendment rights to dismiss the individual's retaliatory arrest claim on the ground that there was undoubted probable cause for the arrest.”).

81. See, e.g., John F. Decker, *The Varying Parameters of Obstruction of Justice in American Criminal Law*, 65 LA. L. REV. 49, 76–77 (2004) (“The fifty states and the District of Columbia have taken a variety of statutory approaches to prohibit the obstruction of justice.”).

82. See *id.* at 112 (“Generally, a person's words alone are not an obstruction of justice under the various state statutes. This is primarily due to constitutional concerns of vagueness and overbreadth.”).

83. 414 U.S. 14 (1973) (per curiam).

84. *Id.* at 16 (clarifying that the use of fighting words or abusive language towards the officer could have resulted in a different outcome).

85. See, e.g., *State v. Smith*, 671 N.E.2d 594, 598 (Ohio Ct. App. 1996). In concluding that the state's obstruction statute was not meant to include verbal opposition to police conduct, the state court of appeals noted that a contrary holding would raise grave constitutional concerns. *Id.* (“If we were to hold that true oral statements are ‘acts’ for purposes of R.C. 2921.31(A), R.C. 2921.31(A) would likely be susceptible to charges of overbreadth for prohibiting a substantial amount of constitutionally protected conduct. Alternatively, if we were to hold that boisterously spoken comments regardless of their veracity were an ‘act,’ R.C. 2921.31(A) would likely be unconstitutionally vague for providing no clear guideline to the

For example, Colorado's obstruction statute states the following:

A person commits obstructing a peace officer . . . when, by using or threatening to use violence, force, physical interference, or an obstacle, such person knowingly obstructs, impairs, or hinders the enforcement of the penal law or the preservation of the peace by a peace officer, acting under color of his or her official authority⁸⁶

In *Dempsey v. People*,⁸⁷ the Colorado Supreme Court agreed with the majority of states that found that verbal confrontations with the police could, under appropriate circumstances, form an obstacle sufficient to constitute obstruction of a peace officer.⁸⁸ The Court concluded, however, that while the defendant's speech may be a factor in determining whether the defendant obstructed the enforcement of the laws, mere verbal opposition to police cannot be the sole factor on which an arrest is made.⁸⁹

Fewer states have clarified, by statute or as a matter of statutory or constitutional interpretation, whether silence and refusal to cooperate will suffice to make out a case of obstruction. Some, in fact, have made clear that failure to speak to officers *can* constitute obstruction of justice.⁹⁰ Obviously, a state cannot authorize its officials to violate the Constitution; a statute that criminalizes objecting to an officer's conduct would not pass constitutional muster after *Norwell*. Nor would a statute that permits officers to arrest an individual who refuses to answer questions, if, as we argue, there is a constitutional right not to answer such questions. On the other hand, if a state does *not* authorize arrest for refusal to cooperate with a police investigation, officers who

impermissible volume that hampers a public official. Our interpretation of R.C. 2921.31(A) avoids these pitfalls." (footnotes omitted)); *see also* *Harris v. State*, 726 S.E.2d 455, 457 (Ga. Ct. App. 2012) (deciding on statutory grounds that Harris' refusal to cooperate with the police did not constitute obstruction, thus obviating the need to decide Harris' constitutional challenge to the statute).

86. COLO. REV. STAT. § 18-8-104(1)(a) (2019).

87. 117 P.3d 800 (Colo. 2005) (en banc).

88. *Id.* at 811 ("Although no cases exactly address the facts presented in this case, the consensus among courts grappling with similar statutes is that where the statute punishes both 'threats' and 'use' of physical interference and obstacle, neither 'physical contact' nor actual physical interference is required.").

89. The *Dempsey* court held that "although mere verbal opposition alone may not suffice, a combination of statements and acts by the defendant, including threats of physical interference or interposition of an obstacle can form the crime of obstruction." *Id.*

90. *See, e.g., State v. Carney*, 663 S.E.2d 606, 611 (W. Va. 2008) (per curiam) ("Only when such silence occurs after the police officer has indicated why the individual's name is being sought in relation to official police duties or in connection with an express statutory directive can non-speech amount to the offense of obstruction . . .").

do so necessarily violate the Constitution. Because such an arrest is without probable cause—the state has made explicit that the underlying facts do not make out an offense under the laws of the state—an officer who conducts such an arrest opens herself to suit. As we argue in our concluding section, both state legislatures and state courts have a role to play in clarifying whether an individual is obligated to answer police questions.⁹¹

4. *Putting the pieces together: Hiibel v. Sixth Judicial District*

To date, the closest the Court has come to weighing in on the obligation to speak to police during a *Terry* stop is its 2001 decision in *Hiibel v. Sixth Judicial District Court*.⁹² Larry Hiibel was involved in an altercation by the side of a rural route in Nevada with a woman who was later determined to be his daughter. When sheriff's deputies arrived on the scene, in response to a domestic violence call involving the pair, they demanded identification from Hiibel who repeatedly refused to comply.⁹³ The officer, frustrated with Hiibel's intransigence, arrested him under a state statute that prohibited "willfully resist[ing], delay[ing] or obstruct[ing] a public officer in discharging or attempting to discharge any legal duty of his office."⁹⁴ The state convicted Hiibel and fined him \$250, and he appealed his case all the way to the Supreme Court.⁹⁵

The Court acknowledged that Hiibel raised an issue that prior precedents left "open": whether a suspect is obligated to answer questions posed to him during a *Terry* stop.⁹⁶ Hiibel maintained that Justice White's opinion in *Terry* and the language quoted above from the unanimous decision in *Berkemer* made clear that, although an individual may be briefly detained and questioned pursuant to *Terry*,

91. *See infra* Part III.

92. *Hiibel v. Sixth Jud. Dist. Court*, 542 U.S. 177 (2004).

93. Hiibel posted a video of the stop to a website, and it is now widely available online. *See, e.g.*, Dudley Hiibel, *Watch the Video*, PAPERS PLEASE (July 9, 2004), <https://papersplease.org/hiibel/index.html> [<https://perma.cc/FNV3-8KMR>]; Felix Tam, *Encounter Between Larry Hiibel & Nevada Highway Patrol*, YOUTUBE (May 2, 2007), <https://www.youtube.com/watch?v=APynGWWqD8Y> [<https://perma.cc/JG29-T98G>]. It shows him refusing, as many as eleven times, to provide the officers with his identification. It is clear from his demeanor that he firmly believed he had a right to refuse to identify himself absent probable cause for an arrest.

94. *Hiibel*, 542 U.S. at 181–82 (quoting NEV. REV. STAT. ANN. § 199.280 (West 2019)).

95. *Id.*

96. *Id.* at 186–87 ("Although it is well established that an officer may ask a suspect to identify himself in the course of a *Terry* stop, it has been an open question whether the suspect can be arrested and prosecuted for refusal to answer.").

he cannot be compelled to cooperate with the officers during that stop.⁹⁷ The Court disagreed, describing the importance to law enforcement of knowing the identity of the person with whom they were dealing: “Knowledge of identity may inform an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder. On the other hand, knowing identity may help clear a suspect and allow the police to concentrate their efforts elsewhere.”⁹⁸ The language in *Terry* and *Berkemer*, the Court continued, which expressed the view that one cannot be arrested for failing to answer officers’ questions, cannot be seen as “answering the question whether a State can compel a suspect to disclose his name during a *Terry* stop.”⁹⁹

The Court also found that Hiibel’s arrest did not violate the Fifth Amendment.¹⁰⁰ The Court declined to answer whether giving one’s name is testimonial rather than more akin to giving a writing exemplar or a blood sample; the latter may be coerced without running afoul of the privilege against compelled self-incrimination, while the former may not.¹⁰¹ Rather, it resolved the Fifth Amendment issue on the ground that one’s name will rarely be incriminating:

Even today, petitioner does not explain how the disclosure of his name could have been used against him in a criminal case. While we recognize petitioner’s strong belief that he should not have to disclose his identity, the Fifth Amendment does not override the Nevada Legislature’s judgment to the contrary absent a reasonable belief that the disclosure would tend to incriminate him.¹⁰²

97. *Id.*

98. *Id.* at 186. In affirming the constitutionality of Hiibel’s arrest, the Supreme Court distinguished its prior decision in *Brown v. Texas*, 443 U.S. 47, 52 (1979) (per curiam), in which it had held that an individual cannot be arrested simply for failing to identify himself to the police when asked. *Hiibel*, 443 U.S. at 184–85. The Nevada statute, unlike the Texas statute permitted arrest for failure to identify oneself only in the course of an otherwise lawful stop (one for which reasonable suspicion already existed) while the Texas statute allowed officers to demand identification without first articulating reasonable suspicion for detaining an individual. *Id.*

99. *Id.* at 187.

100. *Id.* at 189.

101. *See, e.g.,* *Schmerber v. California*, 384 U.S. 757, 764–65 (1966) (“[B]oth federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling ‘communications’ or ‘testimony,’ but that compulsion which makes a suspect or accused the source of ‘real or physical evidence’ does not violate it.”).

102. *Hiibel*, 443 U.S. at 190–91.

It is important to see how the Court cabined its conclusion in *Hiibel* that officers can compel an individual subject to an investigative stop to identify himself under penalty of arrest. The Court distinguished questions about identity—which may be necessary for officer safety and which are incredibly unlikely in themselves to be incriminating—from other police questioning. Identity, it seemed for the Court, was *sui generis*:

Obtaining a suspect's name in the course of a *Terry* stop serves important government interests. Knowledge of identity may inform an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder. On the other hand, knowing identity may help clear a suspect and allow the police to concentrate their efforts elsewhere. Identity may prove particularly important in cases such as this, where the police are investigating what appears to be a domestic assault. Officers called to investigate domestic disputes need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim.¹⁰³

Perhaps more significantly, sharing one's identity is unlike answering other questions because one's name is uniquely unlikely to be incriminating. Unlike the questions typically asked in a traffic stop—"Have you been drinking tonight?" "Do you have any contraband in the car?" "Where are you coming from?"—being compelled to give one's name is vanishingly unlikely, in and of itself, to require one to incriminate oneself.

Although the *Hiibel* Court did not find itself bound by Justice White's concurrence in *Terry* or what it termed the dicta of *Berkemer*, its conclusion does nothing to repudiate those opinions. Rather, the Court simply did not find the general principle contained in those opinions to be dispositive of the narrower question: whether *identification* could be compelled. As the four-member *Hiibel* dissent pointed out:

This lengthy history—of concurring opinions, of references, and of clear explicit statements—means that the Court's statement in *Berkemer*, while technically dicta, is the kind of strong dicta that the legal community typically takes as a statement of the law. And that law has remained undisturbed for more than 20 years.¹⁰⁴

As this dissent makes clear, over the years, many justices have expressed the view that one is not obligated to answer police questioning, often citing Justice White's *Terry* concurrence with approval. For example, in *Davis v. Mississippi*,¹⁰⁵ decided just one year after *Terry*, a seven-member majority wrote:

103. *Id.* at 186.

104. *Id.* at 198 (Breyer, J., dissenting).

105. 394 U.S. 721 (1969).

The State relies on various statements in our cases which approve general questioning of citizens in the course of investigating a crime. But these statements merely reiterated the settled principle that while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer.¹⁰⁶

In addition, a four-justice plurality in *Florida v. Royer*¹⁰⁷ favorably cited Justice White's concurrence for the proposition that:

[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.¹⁰⁸

Moreover, Justices Brennan, Marshall, and Stevens favorably cited both Justice White's *Terry* concurrence and the *Davis* decision in their dissent in *Michigan v. DeFillippo*¹⁰⁹:

Furthermore, while a person may be briefly detained against his will on the basis of reasonable suspicion "while pertinent questions are directed to him . . . the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest . . ." *Terry v. Ohio, supra*, at 34 (White, J., concurring). In the context of criminal investigation, the privacy interest in remaining silent simply cannot be overcome at the whim of any suspicious police officer. "[W]hile the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer." *Davis v. Mississippi*, 394 U.S. 721, 727 n.6 (1969).¹¹⁰

The Court's decision in *Kolender v. Lawson*¹¹¹ is also emblematic. A seven-member majority cited *Davis*'s "settled principle" language in expressing constitutional doubts about a California statute that would criminalize the failure to answer police questions.¹¹² Justice Brennan, who joined the majority, concurred to offer a broader understanding of a person's Fourth Amendment right to silence during a *Terry* stop.

106. *Id.* at 727 n.6 (citations omitted).

107. 460 U.S. 491 (1983) (plurality opinion).

108. *Id.* at 497.

109. 443 U.S. 31 (1979) (Brennan, J., dissenting).

110. *Id.* at 44.

111. 461 U.S. 352 (1983).

112. *Id.* at 360, n.9 ("It is a 'settled principle that while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer.'" (quoting *Davis v. Mississippi*, 394 U. S. 721, 727, n.6 (1969))).

In concurring with the judgment finding California's stop-and-identify statute void for vagueness, Justice Brennan explained:

[U]nder the Fourth Amendment, police officers with reasonable suspicion that an individual has committed or is about to commit a crime may detain that individual, using some force if necessary, for the purpose of asking investigative questions. They may ask their questions in a way calculated to obtain an answer. But they may not compel an answer, and they must allow the person to leave after a reasonably brief period of time unless the information they have acquired during the encounter has given them probable cause sufficient to justify an arrest.

California cannot abridge this constitutional rule by making it a crime to refuse to answer police questions during a *Terry* encounter, any more than it could abridge the protections of the Fifth and Sixth Amendments by making it a crime to refuse to answer police questions once a suspect has been taken into custody.¹¹³

In other words, the Court has repeatedly cited with approval the idea that one stopped by the police for investigation cannot be compelled to answer questions put to him. As the Court noted in *Hiibel*, it had not previously (and has not since) been asked to directly address the question of whether there is a right to ignore police questioning during a *Terry* stop.¹¹⁴ However, a long history of Supreme Court dicta clearly endorses such a right. Perhaps more importantly, there appears to be *no* contrary precedent or conflict from the Court on this point. We were unable to find a single Justice in a single case contesting the validity of Justice White's *Terry* concurrence; each time a member of the Court has referenced the opinion he or she has done so positively.

* * *

This reading of *Terry* and its progeny comports with the overall structure of the Supreme Court's treatment of police-suspect interactions. The Court has identified three levels of citizen-police interactions: consensual encounters, investigative stops, and arrests. The right to remain silent during consensual encounters with the police is uncontested. In fact, the power to ignore police questions and go about one's business is one of the definitions of a consensual encounter.¹¹⁵ Furthermore, the Supreme Court's entire *Miranda*

113. *Id.* at 366–67 (Brennan, J., concurring) (footnotes omitted).

114. *Hiibel v. Sixth Jud. Dist. Court*, 542 U.S. 177, 186–87 (2004).

115. *See, e.g., Florida v. Bostick*, 501 U.S. 429, 434, 437 (1991) (“We have said before that the crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would ‘have communicated to a

jurisprudence is premised on the notion that the right of individuals in custodial interrogations to refuse to answer questions is so important that the individual must be apprised of it explicitly.¹¹⁶ If an individual subject to custodial interrogation invokes the right not to answer police questioning, questioning must cease.¹¹⁷ It is only for the middle category of encounters, brief investigatory stops, that the Supreme Court has not yet explicitly held that the right to remain silent is clearly established. If those at liberty need not speak to the police and those under arrest need not either, it is impossible to justify requiring those who find themselves between these two extremes to speak to the police under penalty of arrest. The only explanation for the lack of clarity on this point is that the Supreme Court has not had a case directly raising this question—perhaps because the answer to the question has seemed obvious for two generations.

The right to silence during *Terry* stops is just one example of the Court's consistent position that the state cannot impose negative consequences on a suspect for invoking her constitutional rights. For example, in *Florida v. Bostick*,¹¹⁸ the Supreme Court stated that the refusal to consent to a search cannot, without more, be the basis for increased suspicion regarding the area searched.¹¹⁹ In *Griffin*, the Court held that the decision to invoke the right to silence cannot be used to create a negative inference regarding the defendant's guilt.¹²⁰ The Court has also held that, although a court may impose a higher sentence on remand following a successful criminal appeal, that higher sentence must reflect something other than vindictiveness of

reasonable person that he was not at liberty to ignore the police presence and go about his business.” (quoting *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988))).

116. *Miranda v. Arizona*, 384 U.S. 436, 492 (1966) (“*Miranda* was not in any way apprised of his right to consult with an attorney and to have one present during the interrogation, nor was his right not to be compelled to incriminate himself effectively protected in any other manner. Without these warnings the statements were inadmissible.”).

117. *Id.* at 473–74 (“Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.”).

118. 501 U.S. 429 (1991).

119. *Id.* at 437 (“We have consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure.”); see also Kenneth J. Melilli, *The Consequences of Refusing Consent to a Search or Seizure: The Unfortunate Constitutionalization of an Evidentiary Issue*, 75 S. CALIF. L. REV. 901, 903–04 (2002) (pointing out that courts have consistently found “routine refusal to consent to a search or seizure may not be admitted as . . . supporting a determination of probable cause” or for “supporting a determination of reasonable suspicion for a *Terry* stop”).

120. *Griffin v. California*, 380 U.S. 609, 615 (1965).

the sentencing judge against a defendant's assertion of her rights.¹²¹ All of these cases stand for a proposition that having a right means the opportunity to exercise that right unfettered.¹²²

Together, all of these factors—the Court's repeated approval of Justice White's *Terry* concurrence, the fact that there is no obligation to speak with the police in other contexts, and other areas in which the Court has made clear that exercising one's rights cannot be punished—clearly indicate that there is no obligation to answer police questions during a *Terry* stop.

B. The Procedural Realities of Litigating a Right Not to Speak

Thus far, we have focused solely on the substantive law that applies to the police-suspect interaction during *Terry* stops. However, an important point of this Article is that the ultimate merits of a constitutional claim are rarely even reached by lower federal courts adjudicating these claims, largely because of the procedural rules for evaluating such claims.

Theoretically, the issue of whether police can attempt to compel answers to their questions during a *Terry* stop can arise in at least three distinct procedural contexts. First, police may arrest an individual for failure to answer questions, and that individual may bring a constitutional challenge when charged with the crime of obstruction or interference with an officer. Recall that this is what happened in *Hiibel*: Hiibel fought his \$250 fine all the way to the United States

121. See, e.g., *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969) (“Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial.”), *overruled by* *Alabama v. Smith*, 490 U.S. 794, 801–03 (1989).

122. The most glaring exception to this is likely the so-called trial penalty in criminal prosecutions. See, e.g., David S. Abrams, *Putting the Trial Penalty on Trial*, 51 DUQ. L. REV. 777, 777 (2013) (“The ‘trial penalty’ is a concept widely accepted by all the major actors in the criminal justice system: defendants, prosecutors, defense attorneys, court employees, and judges. The notion is that defendants receive longer sentences at trial than they would have through plea bargain, often substantially longer. The concept is intuitive: longer sentences [given after trial] are necessary in order to induce settlements and without a high settlement rate it would be impossible for courts as currently structured to sustain their immense caseload.”); Andrew Chongseh Kim, *Underestimating the Trial Penalty: An Empirical Analysis of the Federal Trial Penalty and Critique of the Abrams Study*, 84 MISS. L.J. 1195, 1197 (2015) (“The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to trial by a jury of their peers. Today, however, the vast majority of convictions are obtained by guilty pleas, in which defendants forgo their right to trial and simply admit their guilt in open court. The conventional wisdom is that this shift was caused by increasingly large trial penalties and the rise in plea bargaining.”).

Supreme Court, arguing that the Nevada statute that permitted his arrest for failing to identify himself was unconstitutional. Such cases are rare,¹²³ however, because the stakes are relatively low; most people are not willing to fight a small fine all the way to the Supreme Court.¹²⁴ Furthermore, the state may always moot such a claim by choosing not to charge an individual with obstruction at all or to drop those charges in the face of a constitutional challenge. Second, the issue may arise in the context of a motion to suppress evidence obtained from an illegal arrest. If it is unconstitutional to arrest based on refusal to cooperate with police questioning, then evidence seized directly incident to that arrest is likely to be suppressed.¹²⁵ Reported cases with this posture are rare, likely because successful suppression motions, if not appealed by the government, are unlikely to result in reported cases. Lastly, and most commonly, a person who has been arrested (but has either not been charged or has had the case dismissed) can bring a civil lawsuit against the arresting officers and others under § 1983.¹²⁶ This was the posture in both *Bartlett* and the Musarra example that led off this

123. Outside of the federal courts, there are some exceptions. *See, e.g.,* *People v. Howard*, 408 N.E.2d 908, 910, 914 (N.Y. 1980) (suppressing evidence seized after a defendant failed to stop to answer police questions when asked to do so).

124. As one commentator has noted, it is often extremely difficult to know exactly how widespread arrests for obstruction of justice are in the United States. Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 GEO. L.J. 1435, 1471 (2009) (“[U]ncovering records of stop-and-identify arrests prove even more elusive. The stop-and-identify arrest will often serve as an entry point to search or interrogate a suspicious person in the hopes of obtaining more information. If incriminating information does not materialize, then the stop-and-identify charge may also dissipate; if it does, then the charge is apt to get lost in the bargaining process.”).

125. *See, e.g.,* *United States v. Crews*, 445 U.S. 463, 470 (1980) (“[T]he exclusionary sanction applies to any ‘fruits’ of a constitutional violation . . . [that occurs] during an illegal arrest and detention.”). *But see* *Utah v. Strieff*, 136 S. Ct. 2056, 2059 (2016) (holding that the existence of a valid arrest warrant can save evidence obtained from an arrest that began unconstitutionally).

126. That statute reads, in relevant part,

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. § 1983 (2012).

Article,¹²⁷ one we will see time and again in the cases discussed below.¹²⁸ Understanding the procedural reality of litigating these claims is crucial to understanding why we are still asking fundamental questions about *Terry* stops more than fifty years after *Terry* was decided.

1. Section 1983 litigation

A plaintiff bringing a suit under § 1983¹²⁹ faces a number of procedural hurdles.¹³⁰ Principally, suing a local official for money damages requires a plaintiff to overcome the officer's qualified immunity. The judicially-created doctrine of qualified immunity reflects the Supreme Court's view that public officials should not be personally liable for their actions unless it would have been clear to a reasonable officer in their place that their actions were unconstitutional at the time that they acted.¹³¹ The Court has reasoned that without qualified immunity to protect public officials, the threat of liability might overdeter them in exercising their discretion in the field.¹³² In *Saucier v. Katz*,¹³³ the Supreme Court laid out the twin showings a § 1983 plaintiff seeking money damages must make in order to recover: she

127. See *supra* text accompanying notes 1–3.

128. See *infra* Section I.B.1.

129. Although the Supreme Court held in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 397 (1971), that a similar cause of action was available against federal officials, we have discovered no such cases and refer throughout only to § 1983. However, the analysis for a *Bivens* action would be largely identical.

130. See, e.g., Alex Reinert, *Procedural Barriers to Civil Rights Litigation and the Illusory Promise of Equity*, 78 UMKC L. REV. 931 (2010) (reasoning that pleading barriers and qualified immunity have led to the Court's preference of equitable and injunctive relief over monetary compensation).

131. See, e.g., John M. Graebe, *A Better Path for Constitutional Tort Law*, 25 CONST. COMMENT. 189, 196 n.31 (2008) (“The Court feared that without an immunity that shields state actors from liability when they have acted reasonably, ‘executive officials would hesitate to exercise their discretion in a way injuriously affect[ing] the claims of particular individuals even when the public interest require[s] bold and unhesitating action.’” (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 744–45 (1982))).

132. *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) (“The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. But where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken ‘with independence and without fear of consequences.’” (quoting *Pierson v. Ray*, 386 U.S. 547, 554 (1967))).

133. 533 U.S. 194 (2001).

must establish (1) that a constitutional violation occurred,¹³⁴ and (2) that the law was clearly established at the time of the violation.¹³⁵

The *Saucier* Court went further and held that lower courts should always determine the first prong—whether a constitutional violation occurred—before proceeding to the “clearly established” issue.¹³⁶ The reason for mandating this sequence requirement was straightforward:

In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law’s elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer’s conduct was unlawful in the circumstances of the case.¹³⁷

As one author of this Article has argued, *Saucier*’s merits-first order of decision making in constitutional tort litigation is necessary to prevent the stagnation of constitutional law:

[I]f the entitlement to qualified immunity were determined before the merits of the underlying case, difficult issues and close cases would almost never be decided on the merits in damages actions. To say that a case is close is to say that the law is not well established; to say that the law is not well-established is to say that the defendant is entitled to qualified immunity; to say that the defendant is entitled to qualified immunity is to say that the Court need not resolve the merits of the close case. This nearly circular analysis could serve to stagnate the substance of constitutional law almost indefinitely. It is

134. *Id.* at 201 (“A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer’s conduct violated a constitutional right? This must be the initial inquiry.”).

135. *Id.* (“If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. On the other hand, if a violation could be made out on a favorable view of the parties’ submissions, the next, sequential step is to ask whether the right was clearly established. This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition . . .”).

136. *Id.* Prior to *Saucier*, the Court stated that reaching the merits first was the better approach but did not mandate the lower courts to do so. *See, e.g.,* *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 841 (1998) (“[T]he better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all. Normally, it is only then that a court should ask whether the right allegedly implicated was clearly established at the time of the events in question.” (citing *Siegert v. Gilley*, 500 U.S. 226, 232 (1991))).

137. 533 U.S. at 201.

only when the Court first looks at the substance of each constitutional claim brought before it and then looks to whether the plaintiff will be entitled to benefit that qualified immunity can have [a] progressive influence on the law¹³⁸

Without an incentive to reach the merits, courts are inclined to decide close cases in favor of public official defendants on the basis of qualified immunity. Because the law is unclear, public officials are entitled, at an early stage, to dismissal of the claims against them. What is more, later cases will be no more favorable to plaintiffs than earlier ones; because a grant of qualified immunity does not address the merits of the claim, the second or third case will be as easy to resolve on qualified immunity as the first.¹³⁹

Yet, the Supreme Court unanimously retreated from this mandatory order of decision making when it decided *Pearson v. Callahan*¹⁴⁰ in 2009. Specifically, *Pearson* held that, “while the sequence set forth [in *Saucier*] is often appropriate, it should no longer be regarded as mandatory.”¹⁴¹ After *Pearson*, lower courts were left to decide for themselves the most efficient way to decide constitutional tort cases. The *Pearson* Court conceded that the lower federal courts had chafed at being required to reach the merits of every constitutional tort claim and acknowledged that busy trial courts are loath to engage in constitutional adjudication ultimately unnecessary to resolve the cases before them.¹⁴² While *Saucier*

138. Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 49 (2002) (footnotes omitted); see also John M.M. Greabe, *Mirabile Dictum!: The Case for “Unnecessary” Constitutional Adjudication in Civil Rights Damages Actions*, 74 NOTRE DAME L. REV. 403, 410 (1999) (noting that requiring the plaintiff to first prove the merits of his claim stagnates civil rights development in constitutional law). The field can only expand by confronting novel issues which by definition are not “clearly established.” A civil rights damages actions which sets forth a novel claim against a public official is doomed at the outset if the defendant asserts the qualified immunity defense because a novel claim can never be “clearly established.” Lower courts are likely to dismiss these types of cases on qualified immunity grounds while assuming without deciding that the constitutional claim is valid. Greabe, *supra*, at 410.

139. See, e.g., Michael L Wells, *The “Order-of-Battle” in Constitutional Litigation*, 60 S.M.U. L. REV. 1539, 1559–60 (“[L]eaving the state of the law in flux permits defendants to escape liability for damages for constitutional violations for an indefinite period of time, to the detriment of persons who have suffered constitutional injuries and cannot recover for them. Besides the harm to victims, leaving constitutional tort issues undecided impedes the public interest in building a coherent and effective body of constitutional tort law.”).

140. 555 U.S. 223 (2009).

141. *Id.* at 236.

142. *Id.* at 236–37 (explaining that the strict *Saucier* rule requires lower courts to expend extensive time and resources to consider complex constitutional questions that ultimately

promoted the development of constitutional principles, *Pearson* characterized the two-step requirement as an often “academic exercise” for busy judges “with heavy caseloads.”¹⁴³

However, the Court did not completely reverse course in *Pearson*. It simply announced that *Saucier* protocol was no longer mandatory, leaving lower courts the opportunity to determine what the appropriate order of decision-making should be under the specific facts and procedural posture of a case.¹⁴⁴ As we discuss, the intuition the Court expressed in *Saucier* and its predecessors¹⁴⁵—that busy courts would generally decide close cases in favor of defendants rather than reaching the merits—has been borne out in this context.¹⁴⁶ In the principal cases discussed in Part II, courts use the lack of a controlling precedent on point as a ground for resolving the case in favor of the defendant with little or no analysis of the merits.¹⁴⁷

have no bearing on the outcome of the case, and that therefore it is not surprising that the lower courts are unenthusiastic about what often seems to be an “academic exercise”).

143. *Id.* at 237.

144. *Id.* at 236.

145. *Saucier* was hardly a bolt from a blue sky. The Court had been extolling the virtues of merits-first decision making for many years before it mandated the practice. *See, e.g., Conn v. Gabbert*, 526 U.S. 286, 290 (1999) (“[A] court must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation.”); *City of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998) (“The District Court granted summary judgment to Smith on the basis of qualified immunity, assuming without deciding that a substantive due process violation took place but holding that the law was not clearly established in 1990 so as to justify imposition of § 1983 liability. We do not analyze this case in a similar fashion because, as we have held, the better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all. Normally, it is only then that a court should ask whether the right allegedly implicated was clearly established at the time of the events in question.”).

146. *See infra* Part II (discussing litigating the right to silence in the lower courts).

147. *See infra* Part II (exploring key cases in this area that decline to decide the case on the merits). Alternatively, if a litigant seeks injunctive relief rather than damages—perhaps to avoid the specter of qualified immunity—she runs into another procedural hurdle. In *Lyons v. City of Los Angeles*, 461 U.S. 95 (1983), the Supreme Court held that one seeking injunctive relief must demonstrate that she is likely to encounter the same kind of harm again in the future. *Id.* at 105–06, 111. In *Lyons*, the plaintiff, who had been injured by the use of a prohibited police choke hold, was unable to demonstrate that he was likely to suffer such an injury again and thus did not have standing to allege a constitutional violation. *Id.* at 111. Taken together, these rules operate as an enormous obstacle to reaching a resolution of the question presented in this Article. It will be very unusual indeed for a litigant to demonstrate in an injunctive suit that she is likely to once again be subject to a traffic stop where she is questioned and she refuses to comply.

2. *Other contexts for litigating the right to refuse police questioning*

We were surprised to find so few cases litigating the right to remain silent during *Terry* stops in the context of motions to exclude evidence from a criminal case. The exclusionary rule and its adjutant the fruit of the poisonous tree doctrine prohibit the introduction in the government's case in chief of any evidence seized in violation of the Fourth Amendment as well as any evidence that derives from such a violation. For most of its life, the exclusionary rule was seen as an automatic remedy for all Fourth Amendment violations—if the evidence derived from a violation of the Fourth Amendment it was inadmissible *per se*.¹⁴⁸ In recent years, however, the Court has greatly relaxed this rule, creating a number of exceptions.

For example, in *Hudson v. Michigan*,¹⁴⁹ the Court announced that as a general matter, balancing would be applied in each case to determine whether the “substantial social costs” of exclusion are outweighed by a benefit to society.¹⁵⁰ Largely disregarding an unbroken history of automatic exclusion of evidence following a Fourth Amendment violation, the Court wrote that “[s]uppression of evidence . . . has always been our last resort, not our first impulse.”¹⁵¹ The Court has also held that when officers reasonably rely on a statute later invalidated,¹⁵² a court opinion later overturned,¹⁵³ or a magistrate's incorrect conclusion that a warrant is supported by probable cause,¹⁵⁴ there is insufficient deterrence to merit application of the exclusionary rule.

Similarly, even in the absence of reliance, the Court has held that police misconduct must be sufficiently flagrant to justify exclusion. For example, in *Herring v. United States*,¹⁵⁵ the Court held that an unconstitutional arrest based on a previously withdrawn arrest warrant did not merit exclusion of the evidence seized incident to that arrest.¹⁵⁶ The Court emphasized that a court should not automatically suppress

148. *Mapp v. Ohio*, 367 U.S. 643, 655–56 (1961).

149. 547 U.S. 586 (2006).

150. *Id.* at 591.

151. *Id.* As the *Hudson* dissent pointed out, *Hudson*'s was the first case in more than 40 years in which the Court did not suppress the introduction of evidence seized from a home in violation of the Fourth Amendment. *Id.* at 626 (Breyer, J., dissenting) (citing *Mapp*, 367 U.S. at 655 (1961)).

152. *Illinois v. Krull*, 480 U.S. 340, 341, 359–60 (1987).

153. *See Davis v. United States*, 564 U.S. 229, 249 (2011) (holding that the exclusionary rule does not apply when police conduct a search in objectively reasonable reliance on binding appellate precedent).

154. *Leon v. United States*, 468 U.S. 897 (1984).

155. 555 U.S. 133 (2009).

156. *Id.* at 147–48.

evidence when a public official violates an individual's Fourth Amendment rights. Rather, it must consider the culpability of law enforcement and whether similar conduct could be deterred in the future. Because Herring's case involved an instance of isolated negligence, the Court held "the jury should not be barred from considering all the evidence."¹⁵⁷

There is an obvious parallel between the limits the Court has placed on § 1983 litigation and on the operation of the exclusionary rule. In both areas, the Court's focus is now not on whether or not a constitutional injury occurred but rather on the flagrancy of police misconduct. To the extent the officer's conduct was close to the line—because the line was blurry, because the officer had been misinformed about where the line lay, or because the officer was merely careless rather than venal—no remedy will be available to one asserting a constitutional injury.

Of the various contexts in which the right to remain silent during traffic stops can be litigated, the only one that foregrounds the merits of the claim is a constitutional challenge to an obstruction of justice prosecution. In such a challenge, the question before the Court is simply whether the statute infringes on a constitutional right; there are few, if any, procedural obstacles to reaching the merits of that claim. Of course, as we discuss in the next section, it is easy enough for the state to avoid such litigation by simply dropping the charges against the defendant, forcing her to become a plaintiff and to litigate her claims in civil court (and subject to procedural impediments).

II. LITIGATION OF THE RIGHT TO SILENCE IN THE LOWER COURTS

With that complex substantive and procedural backdrop, this section will discuss the three most prominent federal appellate cases litigating the right to remain silent in the face of police questioning. As we have alluded throughout, relatively few cases directly address the issue. Notwithstanding—or, perhaps, because of—the relative clarity of the Fourth Amendment law governing this question, claimants rarely litigate the issue and courts reach the merits even less often.

A. Koch v. City of Del City

The first, and by far most cited, appellate case to address the right to refuse to answer questions during a *Terry* stop is the Tenth Circuit's 2011 opinion in *Koch v. City of Del City*.¹⁵⁸ In *Koch*, the plaintiff had assumed the care of an elderly woman but was later subject to a court

157. *Id.* at 137.

158. 660 F.3d 1228, 1233, 1241–46 (10th Cir. 2011).

order requiring her to “immediately tell” the woman’s family about her whereabouts.¹⁵⁹ An Oklahoma police officer received a “pick-up order” issued for the elderly woman and was instructed to look for her at the Koch’s residence.¹⁶⁰ When the officer arrived and questioned Koch, however, she refused to tell the officer where the elderly woman could be found.¹⁶¹ After repeated nonresponsiveness to his questions, the officer arrested Koch under an Oklahoma statute prohibiting willfully obstructing an officer carrying out her duties.¹⁶² The charges, along with a charge of assaulting a police officer, were eventually dismissed when the whereabouts of the missing person were discovered by other means.

Koch subsequently brought claims against the officer and city¹⁶³ under § 1983, asserting that her arrest for failing to comply with the officers’ questions violated her First, Fourth, and Fifth Amendment rights. The district court entered summary judgment for the defendant officers on the basis of qualified immunity, and Koch appealed to the Tenth Circuit Court of Appeals.¹⁶⁴ The Tenth Circuit panel began by describing the initial encounter between the officers and Koch as a *Terry* stop because the officers were investigating the possibility that a crime had been committed:

Having decided that the encounter at issue constituted a *Terry* stop, the question becomes whether, as a matter of law, an individual subject to a *Terry* stop has the right to refuse to answer an officer’s questions. In our view, this question not only implicates the Fourth Amendment’s right against unreasonable seizures, but potentially

159. *Id.* at 1233.

160. *Id.* at 1234.

161. *Id.*

162. *Id.*; see Okla. Stat. tit. 21, § 540 (2019) (providing that “[e]very person who willfully delays or obstructs any public officer in the discharge or attempt to discharge any duty of his or her office, is guilty of a misdemeanor”).

163. Municipal corporations are persons who can be sued under § 1983. See *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 (1978) (“Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress did intend municipalities and other local government units to be included among those persons to whom § 1983 applies. Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body’s officers.”). While cities are not entitled to qualified immunity, they are only liable for the conduct of their employees if the employees followed a pattern or practice of violating constitutional rights. There is no respondeat superior liability under § 1983. *Id.* at 691 (finding legislative history did not indicate Congress intended for municipalities to be liable under § 1983 for the constitutional torts of employees under respondeat superior theory).

164. *Koch*, 660 F.3d at 1233.

also the First Amendment's right of free speech and the Fifth Amendment's right against self-incrimination. Specifically, if the First Amendment's right not to speak or the Fifth Amendment's right not to be a witness against oneself apply in the context of a *Terry* stop, then this seems to compel the conclusion that a *Terry* detainee cannot, under the Fourth Amendment, be required to answer an officer's questions.¹⁶⁵

Except for the excessive-force claim, which is not directly relevant to our inquiry,¹⁶⁶ the court then found the same deficiency with each of Koch's claims: that at the time that the officers acted, neither the First, Fourth nor Fifth Amendment clearly established the right not to answer police questions during a *Terry* stop.¹⁶⁷ In determining whether Koch had a clearly established right not to answer, the court asked whether a reasonable officer under the specific circumstances of the case could have believed Koch was legally obligated to respond to the police officer's questions about the elderly woman's whereabouts and that her refusal "would constitute obstruction."¹⁶⁸

Regarding the Fourth Amendment claim, the court cited *Hiibel* for the proposition that law enforcement can compel an individual to identify himself during a traffic stop.¹⁶⁹ The court noted, however, that it is unclear whether law enforcement may impose additional requirements upon an individual during a *Terry* stop.¹⁷⁰ Rather than attempting to resolve this question on the merits, however, the *Koch* court simply found that ambiguity precluded recovery against the arresting officers. In the final sentence of its Fourth Amendment analysis, the court stated, "Ms. Koch has pointed to no authority—nor could we find any—clearly establishing a right under the Fourth

165. *Id.* at 1242 (footnotes omitted).

166. *Id.* at 1246. The excessive force inquiry was not into whether Koch could be arrested by the officers but rather into whether the way they conducted the arrest violated the Fourth Amendment. The outcome of that claim does not depend on the probity of the initial arrest for refusing to reveal the location of the woman within Koch's care. *See id.* at 1246–47.

167. *Id.* at 1242–46.

168. *Id.* at 1241. The court asserted that the officer's inability to recall whether he knew of the court order precluded the court from factoring the order into the probable cause analysis. However, the court still held that "a reasonable officer could believe that [the plaintiff] had information regarding [the elderly woman's] location, that under the circumstances [the plaintiff] was required to convey this information, and thus that her refusal to do so constituted obstruction." *Id.* at 1246.

169. *Id.* at 1243.

170. *Id.* ("[A]lthough *Hiibel* answered the question of whether an individual may be required to provide identification during the course of a *Terry* stop, the question of whether an individual may be required to answer other questions remains unsettled.").

Amendment to refuse to answer an officer's questions during a *Terry* stop."¹⁷¹ Without a case directly on point, Koch's Fourth Amendment claim was doomed in the court's eyes.

Turning to the First Amendment issue, the court found even less support for Koch's claims. It cited a Tenth Circuit case in which a First Amendment right not to cooperate with the police was dismissed on the basis of qualified immunity because the plaintiff could point to no case clearly establishing such a right.¹⁷² Unironically, the court then noted that nothing had changed since that case had been decided: "[W]e again have found no authority recognizing a First Amendment right to refuse to answer questions during a *Terry* stop. In fact, several courts have declined to recognize a First Amendment right not to speak in analogous contexts."¹⁷³ Rather than establishing a precedent that might break the cycle of mystery surrounding the application of the First Amendment in the investigatory detention context, the court simply kicked the can further down the road.

Finally, the court rejected Koch's Fifth Amendment claim. Again, the court did not find that the claim was invalid; it simply held that no other court had ever upheld such a claim. Citing the Supreme Court's convoluted plurality decision in *Chavez v. Martinez*¹⁷⁴ that the Fifth Amendment cannot be violated absent the admission of a coerced confession at trial, the court noted that *Chavez* had left a number of

171. *Id.*

172. *Id.* at 1243–44 (“[I]n *Albright v. Rodriguez*, an officer arrested the plaintiff when the plaintiff refused to produce identification in response to officer's requests. 51 F.3d 1531, 1533 (10th Cir. 1995). The plaintiff sued under § 1983, contending, *inter alia*, that the officer's actions violated his First Amendment right not to speak. The district court denied the defendant's motion for summary judgment based on qualified immunity, but we reversed. We concluded that because we could find no case ‘recognizing a First Amendment right to refuse to identify one's self to a police officer during a lawful investigative stop,’ any such right under the First Amendment was not clearly established and thus the officer was entitled to qualified immunity.” (citation omitted)). It is worth noting that *Albright* predated *Hibel* by a decade.

173. *Id.* at 1244 (citing *McFadyen v. Duke Univ.*, 786 F. Supp. 2d 887 (M.D.N.C. 2011), *aff'd in part, rev'd in part, dismissed in part sub nom*, *Evans v. Chalmers*, 703 F.3d 636 (4th Cir. 2012)). In *McFadyen*, the district court rejected the plaintiff's argument that declining to speak to police officers during a criminal investigation raises First Amendment concerns. 786 F. Supp. 2d at 949. The district court held that the law surrounding this novel issue was not clearly established at the time of the incident and that a reasonable officer could not have known that the First Amendment prohibited their conduct. *Id.* The court stressed that protections against government-compelled speech during police interviews more accurately falls within the protections of the Fourth, Fifth, and Sixth Amendments. *Id.*

174. *Chavez v. Martinez*, 538 U.S. 760 (2003).

questions unanswered.¹⁷⁵ For example, “the plurality in *Chavez* explicitly declined to decide ‘the precise moment when a “criminal case” commences’ for the purposes of the Fifth Amendment right against self-incrimination.”¹⁷⁶ As it did when considering the First Amendment claim, the court again noted previous Tenth Circuit cases that raised a Fifth Amendment right not to speak to the police but in which the law had been determined to be unsettled.¹⁷⁷ Accordingly, the Court concluded that at the time of Koch’s arrest, it was not clearly established that an individual has a Fifth Amendment right to refuse to answer an officer’s questions during a Terry stop.¹⁷⁸

For each of Koch’s claims, therefore, the court found the absence of a case on point to be a sufficient basis for denying recovery with virtually no examination of the merits. Although such an approach is certainly consistent with the Court’s decision in *Pearson*—it in fact is the logical result of the Court’s flexible approach to order of decision-making—the perversity of this outcome should now be clear. The *Koch* court did not treat her claims as novel; it acknowledged that many of these claims had been raised previously, both before the court and elsewhere. However, the court refused to address them, largely on the basis that no court had previously addressed them. As a result, the issues raised by those claims were no closer to resolution after *Koch* than they were before it.

B. *Alexander v. City of Round Rock*

The Fifth Circuit, citing extensively to *Koch*, came to a very similar conclusion in *Alexander v. City of Round Rock*.¹⁷⁹ Although the facts of the case differ significantly from those of *Koch*, the structure of both the questions presented and the means of resolving them are strikingly

175. *Koch*, 660 F.3d at 1244–46.

176. *Id.* at 1245 (citing *Chavez*, 538 U.S. at 766–67). Although the Court would go on to discuss arguments made at oral argument, it was clear after its citation to *Chavez* that Koch’s claim was doomed. “Thus, it is unclear in this case whether Officer Beech’s conduct potentially violated Ms. Koch’s Fifth Amendment rights, where Ms. Koch’s refusal to answer Officer Beech’s questions was used as a basis to arrest her for obstruction, but she ultimately was not prosecuted on this charge.” *Id.*

177. See, e.g., *Pallottino v. City of Rio Rancho*, 31 F.3d 1023, 1026 (10th Cir. 1994). In *Pallottino*, the Court rejected the plaintiff’s Fifth Amendment claim, but the facts were quite different. Decided before *Hiibel*, *Pallottino* rejected the plaintiff’s assertion that he was wrongfully arrested for failing to give his name to an investigating officer. It is now clear that claim is not cognizable. Furthermore, *Pallottino* is complicated by the fact that in addition to refusing to give his name, the plaintiff told the officer “he was going to get a bullet in the head.” *Id.* at 1025.

178. *Koch*, 660 F.3d at 1245.

179. 854 F.3d 298 (5th Cir. 2017).

similar. In *Alexander*, officers observed the plaintiff, Alexander, drive into a hotel parking lot, exit his vehicle to briefly walk around, and then reenter his vehicle.¹⁸⁰ The officers considered this to be suspicious activity and flashed their patrol car lights signaling Alexander to stop. Upon request, Alexander gave the officers his driver's license. However, when the officers asked him what he was doing, Alexander informed them that he would not answer any of their questions.¹⁸¹

At this point, one of the officers radioed for backup, citing "noncompliance."¹⁸² When backup arrived, one of the officers told the Alexander to exit his vehicle. Alexander stated that he did not believe he was legally required to exit the vehicle and the officers then forcefully pulled the plaintiff from his car, with at least three officers piling on top of him.¹⁸³ Once handcuffed, one of the officers asked the plaintiff, "[a]re you ready to talk to me now?"¹⁸⁴ Alexander again refused, this time using an unspecified expletive. The officers then shackled Alexander's legs, and he suffered a number of injuries while restrained. Although an officer informed Alexander that they were arresting him under the state's disorderly conduct statute for uttering an expletive where the public could hear him, the officer's police report stated that Alexander was arrested for resisting a search and arrest.¹⁸⁵ The state did not ultimately bring criminal charges against Alexander.

Alexander then sued the officers and city under § 1983 for violating his First, Fourth, and Fifth Amendment rights. The district court dismissed all of his claims, some on the merits, some on the basis of qualified immunity, and Alexander appealed to the Fifth Circuit Court of Appeals.¹⁸⁶ The appellate court found that Alexander had properly pled both that he was seized by the officers without reasonable suspicion and that he was subsequently arrested without probable cause.¹⁸⁷ Central to the latter holding was the fact that the Texas obstruction statute cited by the officers as the basis for arrest required

180. *Id.* at 301.

181. *Id.* at 302.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*; see TEX. PENAL CODE ANN. § 38.03(a) (West 2019) ("A person commits an offense if he intentionally prevents or obstructs a person he knows is a peace officer or a person acting in a peace officer's presence and at his direction from effecting an arrest, search, or transportation of the actor or another by using force against the peace officer or another.").

186. *Alexander*, 854 F.3d at 301.

187. *Id.* at 307.

more than passivity in order to provide probable cause.¹⁸⁸ The court reasoned further that because that reading of the statute was longstanding, no reasonable officer could have believed that refusal to answer police questioning constituted resistance under the statute.¹⁸⁹

The court based its probable cause determination on the statute, not the broader constitutional question of whether one can ever be arrested for refusing to answer police questioning. That is, because the Texas courts had made clear that some level of physical resistance was necessary to make out a violation of the statute, the court was not faced with the same question as the *Koch* court: whether it is constitutional to arrest a suspect under a statute that criminalizes refusal to cooperate with an ongoing investigation.¹⁹⁰

The constitutional issue was properly raised, however, by the First Amendment retaliation claim that Alexander also brought against the officers.¹⁹¹ Alexander alleged that his arrest was in retaliation for his assertion of his right not to speak to the officers and that it violated his constitutional rights for that reason as well.¹⁹² This required the *Alexander* court to determine whether the refusal to talk to police officers during a *Terry* stop was protected First Amendment conduct. If not, there could be no valid retaliation claim based on that conduct.

188. § 38.03(a); *Alexander*, 854 F.3d at 305–07 (“Texas courts have stressed that this section ‘applies only to resistance by the use of force.’ Thus, under Texas law, simply ‘refusing to cooperate with being arrested’ is not sufficient to support an arrest for resisting a search—there must be some use of force.” (citation omitted)).

189. *Id.* at 307 (“The plain meaning of Section 38.03(a)’s text and the ample and longstanding Texas case law interpreting the statute’s use of force element indicate that, absent some physical force directed at a law enforcement official, there can be no violation for resisting a search or arrest. It is telling that, in their brief, the defendants point to no Texas case interpreting the statute otherwise.”).

190. *Id.* The Oklahoma courts, unlike those in Texas, had made no such limiting construction of their statute. *Koch v. City of Del City*, 660 F.3d 1228, 1239 (10th Cir. 2011) (examining an individual’s refusal to cooperate under Oklahoma law (citing OKLA. STAT. tit. 21, § 540 (2019))).

191. The court also concluded, as did the *Koch* court, that the Fifth Amendment does not provide any recourse because Alexander was never charged with a crime. *Alexander*, 854 F.3d at 307 (“[T]he Fifth Amendment protects a defendant from being coerced into making an incriminating statement, and then having that statement used against him at trial. But Alexander was never tried. His Fifth Amendment right against self-incrimination was not violated.”); see *Koch*, 660 F.3d at 1245–46.

192. Alexander also alleged that he was arrested in retaliation for using an unidentified expletive, but the court found insufficient allegations in his complaint to support this claim. *Alexander*, 854 F.3d at 308.

The court cited the *Koch* decision and an oft-cited district court case¹⁹³ for the proposition that the First Amendment has never been held to apply to police-citizen interactions.

We hold that Alexander's claim on this point cannot overcome the officers' qualified immunity, because "it was not clearly established that an individual has a First Amendment right to refuse to answer an officer's questions during a *Terry* stop." Surprisingly few courts have ruled on this precise issue; the parties point to no cases from this circuit directly on point. The sparse case law that does exist, however, indicates no consensus that a defendant has a First Amendment right not to answer an officer's questions during a stop like the one at issue here.¹⁹⁴

Alexander's inability to point to a case indicating that he should prevail was sufficient to keep the court from even examining the merits.

Finally, with regard to the Fifth Amendment claim, the court was, if anything, more dismissive. Although it did not cite *Chavez*, as the *Koch* court did, it simply found the fact that Alexander was never prosecuted to be dispositive of the Fifth Amendment claim: "In other words, the Fifth Amendment protects a defendant from being coerced into making an incriminating statement, and then having that statement used against him at trial. But Alexander was never tried. His Fifth Amendment right against self-incrimination was not violated."¹⁹⁵ In one of the few academic commentaries on *Alexander*, Professor Orin Kerr found the court's Fifth Amendment reasoning, if not incorrect, then certainly eye-opening:

Alexander seems to have invoked his right properly, and at least according to the complaint he was punished for doing so. It may be that the Fifth Amendment has nothing to say with that: As long as Alexander wasn't prosecuted, maybe the government can retaliate against him for not speaking so long as it does so within Fourth Amendment bounds in terms of detaining him and using force. Maybe the idea that you have a "right to remain silent" is itself inaccurate, as you have much more limited rights than such a broad phrase would suggest. But my sense is that there are difficult issues lurking in the court's Fifth Amendment ruling that didn't come out in the short passage in the opinion.¹⁹⁶

In sum, the three claims Alexander raised were identical to those raised by Koch. However, while the *Koch* court dismissed all three

193. *Id.* at 309 (citing *McFadyen v. Duke Univ.*, 786 F. Supp. 2d 887 (M.D.N.C. 2011), *aff'd in part, rev'd in part, dismissed in part sub nom*, *Evans v. Chalmers*, 703 F.3d 636 (4th Cir. 2012)).

194. *Id.* at 308 (quoting *Koch*, 660 F.3d at 1244).

195. *Id.* at 307.

196. Kerr, *supra* note 46.

claims on the ground that the rights alleged were not clearly established and therefore could not form the basis of recovery, the *Alexander* court was more willing to at least consider the merits. It found the Fourth Amendment claim valid on the basis of Texas's reading of its obstruction statute, found against the Fifth Amendment claim on the merits, and then decided that the First Amendment claim was insufficiently well established to form a basis for recovery. The court found the law there to be well settled not because there was Fifth Circuit precedent on point (there was not) but because the underlying state law issue was so clear. As we discuss, even if courts insist on determining a defendant's entitlement to qualified immunity before looking to the merits of a plaintiff's constitutional claim, where states clarify that a defendant cannot be arrested for simply refusing to answer police questioning, federal courts will strip officers who do so of their qualified immunity.

C. Kaufman v. Higgs

In *Kaufman v. Higgs*,¹⁹⁷ which appears to be the only other federal appellate case on point, the Tenth Circuit stripped a police officer of his qualified immunity for arresting an individual who refused to answer any questions. Colorado police officers were investigating a minor traffic incident and discovered that one of the cars involved belonged to the plaintiff, Kaufman.¹⁹⁸ Kaufman voluntarily agreed to meet with the investigating officers to discuss the incident, but when they would not reveal to him what they already knew about the case, he refused to answer any of their questions, citing privilege.¹⁹⁹ After radioing to a supervisor to report Kaufman's intransigence, the officers arrested Kaufman on charges of obstruction of justice under Colorado law.²⁰⁰ Following a now-familiar pattern, the charges were eventually dropped, and Kaufman sued the officers alleging violations of his Fourth and Fifth Amendment rights. The trial court granted the officers

197. 697 F.3d 1297 (10th Cir. 2012).

198. *Id.* at 1298.

199. *Id.* It is not entirely clear what Kaufman meant by this. An attorney, Kaufman may have been stating that the driver was his client and he could not reveal her identity. Alternatively, Kaufman might have been stating that if he were to reveal the driver's identity, it might incriminate him and thus he was invoking his privilege against compelled self-incrimination. Regardless, the outcome does not appear to hinge on the meaning of the phrase in this context.

200. *Id.* at 1299; *see* COLO. REV. STAT. § 18-8-104(1)(a) (2019).

summary judgment on the basis of qualified immunity,²⁰¹ and he appealed only the Fourth Amendment issue to the court of appeals.²⁰²

After setting forth the facts, the Tenth Circuit described its task as two-fold: “First, we ask whether the officers had probable cause to arrest Mr. Kaufman. If we conclude that probable cause was lacking, we then must determine whether Mr. Kaufman’s rights were clearly established, which we approach by asking whether the officers arguably had probable cause.”²⁰³ Although the *Kaufman* court cited *Koch* for the proposition that the inquiry is in two steps, it is important to remember that that is not at all the process that the *Koch* court actually followed.²⁰⁴ Recall that the *Koch* court concluded simply that Koch was not entitled to relief because she could not demonstrate a clearly established right and then made no further attempt to determine whether the right existed. The *Koch* court conflated the two in a way that doomed not just Koch’s entitlement to relief but the claims of others who would come after her.²⁰⁵

By contrast, the *Kaufman* court actually focused first on whether the officers had probable cause to arrest Kaufman when they did so. The court began by describing the important role that state law plays in the adjudication of Fourth Amendment rights.

[W]e think it prudent to clarify one aspect that might seem incongruent—the role played by *state* law in determining whether Plaintiff can show a violation of his *federal* rights. Here, where the context is an alleged false arrest for a purported state offense, state law is of inevitable importance. The basic federal constitutional right of freedom from arrest without probable cause is undoubtedly clearly established by federal cases. But the precise scope of that right uniquely depends on the contours of a state’s substantive criminal law in this case because the Defendants claim to have had probable cause based on a state criminal statute. And as to the interpretation of Colorado’s criminal law, other than the statute itself (which we

201. *Kaufman v. Higgs*, No. 10-cv-00632-LTB-MEH, 2011 WL 3268346, at *4 (D. Colo. July 29, 2011), *rev’d*, 697 F.3d 1297 (10th Cir. 2012). The trial court concluded that a reasonable officer could have believed that the Colorado obstruction statute was violated by Kaufman’s silence. As previously discussed, the 10th Circuit came to a very different conclusion on that point. *Koch v. City of Del City*, 660 F.3d 1228, 1238 (10th Cir. 2011). Although *Koch* involved a traffic stop while *Kaufman* involved a consensual encounter, both cases turned on the question of whether a reasonable officer would understand that a suspect could not be arrested for failure to answer police questioning.

202. *Kaufman*, 697 F.3d at 1298.

203. *Id.* at 1300.

204. *See Koch*, 660 F.3d at 1241 (questioning, for the purposes of a qualified immunity inquiry, whether an individual has a clearly established right to not answer questions from police officers).

205. *See, e.g., id.*

think is quite clear), the Colorado Supreme Court is the ultimate authority. So we look to the Colorado Supreme Court's decisions when inquiring whether the Defendants' interpretation of the obstruction statute was one that a reasonable officer would have held at the time of Mr. Kaufman's arrest.²⁰⁶

The Colorado statute under which the police arrested Kaufman states that an individual obstructs an officer by force, physical interference, or obstacle when that individual knowingly hinders law enforcement.²⁰⁷ The Tenth Circuit parsed the statute, concluding that Kaufman violated the statute if he presented an obstacle to the officers but declining "to read the word 'obstacle' to include the most passive of all acts—remaining silent—when the other criminal acts [set forth in statute] involve *active* impeding of an officer or his investigation."²⁰⁸ The court found Colorado case law confirmed this reading of the terms of the statute and noted that the Supreme Court of Colorado had interpreted the word "obstacle" to mean more than mere verbal opposition.²⁰⁹ From there, the conclusion was straightforward. "The *only* conduct by Mr. Kaufman that is relevant here was a refusal to answer questions and an extraordinarily brief explanation for that refusal. Because words alone are not enough, it follows *a fortiori* that silence is not enough."²¹⁰

206. *Kaufman*, 697 F.3d at 1300–01 (citation omitted).

207. COLO. REV. STAT. § 18-8-104(1)(a) (2019) ("A person commits obstructing a peace officer . . . when, by using or threatening to use violence, force, physical interference, or an obstacle, such person knowingly obstructs, impairs, or hinders the enforcement of the penal law or the preservation of the peace by a peace officer, acting under color of his or her official authority . . .").

208. *Kaufman*, 697 F.3d at 1301.

209. *Id.* at 1302 ("Beyond the text of the statute, the Colorado Supreme Court's interpretation of the statute at issue confirms our understanding of the word 'obstacle.' The Colorado Supreme Court has defined the terms 'obstacle' or 'physical interference' in the obstruction statute: 'The obstacle or physical interference may not be merely verbal opposition.'" (quoting *Dempsey v. People*, 117 P.3d 800, 810–11 (Colo. 2005) (en banc))). Interestingly, the trial court had read the *Dempsey* case as creating ambiguity with regard to whether the statute could be violated by mere noncooperation. The *Dempsey* court found that while remonstrance against the police was itself insufficient, the allegation that the defendant had verbally opposed arrest coupled with his walking away and refusing to remove his hands from his pockets could satisfy the obstruction statute. 117 P.3d at 811–12. "Unlike the defendant in *Dempsey*, Mr. Kaufman took no action at all, obstructive or otherwise. Mr. Kaufman simply refused to speak. Given that Mr. Kaufman could not, under *Dempsey*, be arrested for 'mere[ly] remonstrat[ing],' Mr. Kaufman most certainly could not be arrested for taking the lesser step of declining to speak at all." *Kaufman*, 697 F.3d at 1302.

210. *Id.* at 1302.

Of course, having concluded that the officers had acted in violation of Kaufman's Fourth Amendment rights, the court had more work to do. It then turned to the question of arguable probable cause—not whether probable cause existed but whether the officers could reasonably have believed that probable cause was present.²¹¹ The court was quite clear on this point. It agreed with the state high court that the statute was unambiguous and “clearly established” the Kaufman's rights “[b]ecause no officer could reasonably have thought Mr. Kaufman's silence constituted a criminal act, the Defendants violated his clearly established Fourth Amendment right to be free from unreasonable seizures.”²¹²

Interestingly, the defendants attempted to turn the holding in *Koch* from a shield into a sword, citing it for the proposition that no reasonable officer could have known that it was unconstitutional to arrest an individual for noncompliance with their authority. This argument fundamentally misunderstood *Koch*, however. While it is true that *Koch*, reading Oklahoma law, had found no precedent sufficiently on point to clearly establish a right not to be arrested for silence, that finding is irrelevant to whether the right not to be established for maintaining silence was clearly established *under Colorado law*.²¹³ The Tenth Circuit held accordingly and remanded the case to the district court for trial.

* * *

Although there are significant doctrinal questions regarding whether the First or Fifth Amendment prohibits arrest for refusal to answer questions during a *Terry* stop,²¹⁴ we argue in this Article that that right is clearly established under the Fourth Amendment. Even if the Supreme Court has not yet so held explicitly, it has a long history—in dicta, concurrences, and elsewhere—of presuming such a right. Yet, we were unable to find a single case in the lower federal courts finding such a right to be clearly established under federal law. To be clear, no court rejected outright the existence of such a right. Rather they either found that the right was not clearly established or relied on statutory

211. *Id.* at 1302–04.

212. *Id.* at 1302.

213. The court of appeals distinguished *Koch* on other grounds. It said that the questions the officers asked in *Koch*—about the location of the elderly woman—were likely to lead to incriminating statements and that Koch, unlike Kaufman, was seized at the time he was subject to police questioning. In our opinion, the fact that the two cases analyzed the law of two different states is a far better basis on which to distinguish the two. *Id.* at 1302–04 (contrasting *Koch v. City of Del City*, 660 F.3d 1228, 1246 (10th Cir. 2011)).

214. *See supra* Section I.A.

interpretation to avoid reaching the broader constitutional question.²¹⁵ The three principal cases discussed in this section—*Koch*, *Kaufman*, and *Alexander*—all illustrate the disconnect between the constitutional principle and the way the lower courts have evaluated these claims. Based on the way these courts resolved these cases, we propose three solutions for bringing constitutional principle and the reality of constitutional tort litigation into closer alignment.

III. PROPOSED SOLUTIONS

This Article proposes a three-part solution directed at the question of whether law enforcement can arrest an individual who refuses to answer questions during a Terry stop. First, as many justices have made clear, the “dicta” of *Berkemer*, along with Justice White’s concurrence in *Terry*, Justice Brennan’s dissent in *Kolender*, and a number of other opinions together constitute the kind of “strong dicta that the legal community typically takes as a statement of the law.”²¹⁶ Together, these opinions make clear that, but for a narrow exception created in *Hibel*, it has long been obvious that one cannot suffer negative consequences for refusing to comply with a police investigation.

For this reason, lower federal courts should acknowledge that the law on this point is clearly established and should impose liability under § 1983 when officers act in violation of it. This is the simplest and most straightforward solution to the problem identified in this Article. It acknowledges what the law is, that it has been that way for decades, and that when officers fail to follow this clearly established law, they are obligated to compensate those whose rights they have violated. To those concerned about the chilling effect such a finding might have on officers’ exercise of discretion, it should be borne in mind that nearly all law enforcement officers are indemnified by their

215. We do not argue that courts should decide the constitutional issue if it is clear as a matter of state law that one cannot be arrested for refusing to answer police questioning. The doctrine of constitutional avoidance says otherwise. *See, e.g.*, *Clark v. Martinez*, 543 U.S. 371, 380–81 (2005) (“[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court.”).

216. *See Hibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 198 (2004) (Breyer, J., dissenting) (“This lengthy history—of concurring opinions, of references, and of clear explicit statements—means that the Court’s statement in *Berkemer*, while technically dicta, is the kind of strong dicta that the legal community typically takes as a statement of the law. And that law has remained undisturbed for more than 20 years.”).

employers for constitutional violations the officers might commit.²¹⁷ Currently, the victims of unconstitutional arrest bear the cost of that injury alone; if courts were to find a clearly established right not to answer police questions, that cost would be borne by the municipalities employing the arresting officers rather than by the officers themselves. Placing the burden with those best able to avoid the harm seems more equitable and creates significant incentives for municipalities to educate their officers regarding the permissible scope of a *Terry* stop.

Second, to the extent that courts conclude that the law on this point is ambiguous, they should resolve that ambiguity by finding that there is a Fourth Amendment right not to answer police questions during a *Terry* stop.²¹⁸ When a court admits ambiguity in precedent but chooses to resolve that ambiguity in the case before it, it will likely find that the officers in that case are entitled to qualified immunity, even if they find for a plaintiff on the merits. Although we do not believe that the law is currently ambiguous, we acknowledge that a court that does find it ambiguous should grant qualified immunity to the defendants in the case before it; the court's decision will clarify the law but only for future actors.

Obviously, from the perspective of those alleging a constitutional violation, this is a second-best option to the first. The plaintiff bringing such a claim is no better off financially than she was prior to suit.²¹⁹ But

217. See, e.g., Richard H. Fallon, *Asking the Right Questions About Officer Immunity*, 80 *FORDHAM L. REV.* 479, 495–96 (2011) (stating that most scholars disagree with the Supreme Court's presumption that "that officials, absent immunity, would face the threat of personal liability for constitutional violations committed in the ostensible performance of their official duties"); Joanna C. Schwartz, *Police Indemnification*, 89 *N.Y.U. L. REV.* 885, 912 (2014) (demonstrating that in forty-one jurisdictions between 2006 and 2011, officers had to contribute financially in only 0.41% of cases that ended in plaintiffs' favor).

218. Some critics have written that merits-first adjudication (determining whether a right exists before deciding whether that right is clearly established) is far from a panacea for constitutional tort plaintiffs. See, e.g., Nancy Leong, *The Saucier Qualified Immunity Experiment: An Empirical Analysis*, 36 *PEPP. L. REV.* 667, 702 (2009) (arguing that while the original rationale behind sequencing was to allow injured plaintiffs to recover, data suggest that "no increase in recovery by injured plaintiffs occurred"). But see Ted Sampson-Jones & Jenna Yauch, *Measuring Pearson in the Circuits*, 80 *FORDHAM L. REV.* 623, 628, 639–40 (2011) (finding that over 45% of the time, courts find for plaintiffs on the merits of the constitutional claims and that moving from *Saucier* to *Pearson* affected little and should not be understood as "an unambiguous victory for government official defendants").

219. Given that damages in many of these cases will be nominal—compensating plaintiffs for the harm of being wrongfully arrested and held for a short time before being released uncharged—the acknowledgment that the officers' conduct was unconstitutional may actually be much of what a plaintiff hopes to accomplish through

law enforcement officers will be put on notice by the decision and given an opportunity to comport their conduct to the law. If they fail to do so, later litigants will recover for their injuries because the officers violated their clearly established rights. Even if the law was not clear before it certainly will be after the first case is decided. This is the process of the law's elaboration.²²⁰

The Supreme Court has made clear that there is no Article III concern with a federal court deciding an issue that may not ultimately be applied to the litigants before it.²²¹ For example, in unanimously overturning *Saucier*, the *Pearson* Court did not state that the merits-first order of decision making set forth in *Saucier* created unconstitutional advisory opinions. Rather, it concluded that *Saucier's* mandate was often an inefficient use of judicial resources.²²² The cases discussed above, however, principally *Koch* and *Alexander*, make clear that without an incentive to reach the merits of a constitutional tort case, courts will allow the law to ossify.²²³ In both *Koch* and *Alexander*, the courts noted that the right to silence in the *Terry* context had been before them

suit. *See generally* Fallon, *supra* note 217, at 483–84 (showing the difficulties in establishing a cause of action against federal officials).

220. *See, e.g.*, Wells, *supra* note 139, at 1558–59 (“Failure to articulate the existence of the right in case # 1 will provide no guidance to officers and leave the law uncertain when case # 2 comes up, and so on. To the extent the law does not become more concrete over time, immunity will continue to be available. To the extent cases continue to be resolved by finding immunity, the law will continue to remain less rather than more concrete.”).

221. There are arguments in favor of the constitutionality of the merits-first approach. *See* Jack M. Beerman, *Qualified Immunity and Constitutional Avoidance*, 2009 S. CT. REV. 139, 154 (2009) (“The argument that *Saucier* entails advisory opinions depends on equating all dicta with advisory opinions, which would call into question . . . well-established practices . . .”). *But see* Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847, 853 (2005) (“The rise of unnecessary constitutional rulings is in significant tension with the long-established premises of federal court jurisdiction. In its rejection of advisory opinions, its refusal to adjudicate political questions, and its stringent standing requirements, the Supreme Court traditionally has rejected the view of federal courts as roving expositors of constitutional norms in favor of a dispute resolution model in which the exclusive function of the federal courts—at least at the lower levels—is to decide cases and controversies.”).

222. *Pearson v. Callahan*, 555 U.S. 223, 234–43 (2009).

223. *See, e.g.*, John C. Jeffries, Jr., *Disaggregating Constitutional Tort*, 110 YALE L.J. 259, 271 (2000) (“By denying damages to persons injured by discarded past practices, qualified immunity reduces the cost of innovation . . . It enables courts to adopt new rules without requiring payment to those who did not benefit from the new rule in the past. Without that limitation, the costs of compensation might well prove paralyzing. Requiring full remediation for past failure to comply with newly announced rules would stifle constitutional innovation and risk rigidity and ossification in constitutional law.”).

before and had been found not to be clearly established. Yet, both courts left that issue just as ambiguous as it had been before, finding simply that ambiguity prevented the plaintiff's recovery. While it is worth remembering that the federal courts' dockets are crowded, in the long run, announcement of constitutional principles may facilitate the timely resolution of constitutional tort cases rather than impeding such resolution. Without a clear answer, officers do not know what the law expects of them and will engage in constitutionally uncertain conduct that leads to litigation. With an answer, the metes and bounds of constitutional rights will be drawn and there are likely to be fewer such cases reaching the courts and occupying their time in the long run.

Waiting for the Supreme Court to resolve any perceived uncertainty is not a viable alternative. The Court takes very few cases each year, and that number has only been decreasing in recent years.²²⁴ The likelihood that the Court will take a case to announce what seemed obvious both to the *Terry* Court fifty years ago and to every Justice who has weighed in on the matter since—that one is not obligated to answer police questions during a *Terry* stop—seems extraordinarily unlikely. Moreover, the near term is not likely to produce a circuit split that might entice the Court to take up this issue. Because courts rarely reach the merits of the constitutional issue, there is increasingly little reason to expect a case to be ripe for appeal to the Supreme Court any time soon.²²⁵

Finally, we encourage the states, through either statutory amendment or state constitutional adjudication, to make clear that their obstruction-of-justice statutes are not violated by the refusal of a suspect to answer

224. *Federal Judicial Caseloads, 1789–2016*, FED. JUD. CTR., https://www.fjc.gov/history/exhibits/graphs-and-maps/supreme-court-caseloads-1880-2015#_ftn1 [<https://perma.cc/MKN5-VALW>].

225. The clearly established law requirements of both qualified immunity and the exclusionary rule do not require a Supreme Court precedent directly on point. Compare, for example, habeas corpus. Like a plaintiff seeking relief under § 1983, a habeas petitioner must show that the right he is seeking to enforce was clearly established. However, under the federal habeas statute, there is only one source that can clearly establish law—the United States Supreme Court. That is, if there is not a Supreme Court opinion on point, the law is not clearly established, and a habeas court is not permitted to grant relief. Rather, they require controlling law that sufficiently guides the behavior of officers in the field such that it is fair to impose a sanction when they fail to comply with the law. Contrast that with qualified immunity analysis, wherein courts will find a law to be clearly established if (1) there is a binding Supreme Court or Circuit Court decision on point; or (2) the clearly established weight of authority from other courts has found the law to be as the plaintiff maintains; or (3) the official's conduct was so egregious that a constitutional right was clearly violated, even in the total absence of case law. *See, e.g.*, *Tenorio v. Pitzer*, 802 F.3d 1160, 1163–64, 1174 (10th Cir. 2015); *Hill v. Cundiff*, 797 F.3d 948, 979 (11th Cir. 2015).

officer questions. As the Court in *Hiibel* somewhat cryptically wrote, it was the Nevada statute, not the Fourth Amendment, that required the defendant in that case to identify himself.²²⁶ That is, the only reason the officers were entitled to arrest Hiibel for failing to identify himself was because there was a Nevada statute that authorized them to do so. Absent such a statute, the officers would not have been entitled to arrest Hiibel for noncompliance.

As discussed above,²²⁷ every state has on its books a statute that criminalizes interference with an officer's execution of her duties. Some states have made clear, however, that in order to violate such a statute, a defendant must engage in at least some physical conduct. For example, as the *Kaufman* court noted, Colorado has made clear that words alone cannot constitute a violation of its obstruction statute. If words cannot suffice, surely silence cannot either.²²⁸ If other states made that point clear, more individuals would be protected from arrest for asserting their right not to answer questions put to them by law enforcement.

Obviously, a statutory solution is less satisfying than a constitutional one. It leaves open the question whether, as a general matter, one can ever face arrest for failure to answer police questions. Leaving this question open can lead to the odd result that an individual like Kaufman who lives in Colorado has a clearly established right not to be arrested for refusing to answer an officer's questions, while another Tenth Circuit resident, like Koch in Oklahoma, has no such clearly established right.

However, a state law solution is better than none. A state that makes clear, either through statute or as a matter of statutory interpretation, that refusal to answer police questioning cannot form the basis for arrest puts officers on notice. If they choose to arrest despite the clarity of state law, they will find themselves liable to constitutional tort suit and will be stripped of their qualified immunity. The Supreme Court has often said that one's constitutional rights cannot depend on the vagaries of state law.²²⁹ For example, in *California v. Greenwood*,²³⁰ police officers had a trash collector segregate defendant's garbage for them

226. *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 187 (2004) ("The Fourth Amendment itself cannot require a suspect to answer questions . . . Here, the source of the legal obligation arises from Nevada state law, not the Fourth Amendment.").

227. *See supra* Part I.

228. *Kaufman v. Higgs*, 697 F.3d 1297, 1302 (10th Cir. 2012).

229. *See, e.g.,* *Browning-Ferris Indus. of Vermont v. Kelco Disposal, Inc.*, 492 U.S. 257, 299 (1989) (O'Connor, J., concurring) ("As far as I know, the applicability of a provision of the Constitution has never depended on the vagaries of state or federal law . . .").

230. *California v. Greenwood*, 486 U.S. 35 (1988).

and then went through it without a warrant.²³¹ The Court rejected defendant's argument that, because the officer's conduct was unconstitutional under state law, the evidence should be suppressed in federal court as well. The Court held that while states may read their own statutes or constitutions as more restrictive than the federal constitution, "[w]e have never intimated . . . that whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law of the particular State in which the search occurs."²³² Similarly, in *Oliver v. United States*,²³³ the Court held that the fact that officers were violating a state trespass statute when they came onto the defendant's land to discover his marijuana grow did not render the evidence they uncovered inadmissible in federal court.²³⁴

However, where a state makes clear that there is no probable cause to arrest for a particular set of facts, officers violate the Fourth Amendment when they nonetheless conduct such an arrest. As the Court acknowledged in *Virginia v. Moore*,²³⁵ the crucial question when determining the reasonableness of an arrest is the existence or absence of probable cause.²³⁶ In *Moore*, the defendant was arrested for an infraction that, under state law, permitted only the issuance of a citation and not a full custodial arrest.²³⁷ The Court, nonetheless, found that the evidence discovered incident to Moore's arrest should be admitted against him notwithstanding the officer's failure to follow the procedures set forth by state law. In doing so, the Court determined that the reasonableness of an arrest is not a question of state procedural rules but solely dependent on the existence or absence of probable cause.²³⁸ While a state cannot change federal

231. *Id.* at 37–38.

232. *Id.* at 43.

233. 466 U.S. 170 (1984).

234. *Id.* at 183 (“The law of trespass, however, forbids intrusions upon land that the Fourth Amendment would not proscribe. For trespass law extends to instances where the exercise of the right to exclude vindicates no legitimate privacy interest.”); *see also* *Virginia v. Moore*, 553 U.S. 164, 172 (2008) (“[T]he Fourth Amendment’s meaning did not change with local law enforcement practices—even practices set by rule. While those practices ‘vary from place to place and from time to time,’ Fourth Amendment protections are not ‘so variable’ and cannot ‘be made to turn upon such trivialities.’” (quoting *Whren v. United States*, 517 U.S. 806, 815 (1996))).

235. 553 U.S. 164 (2008).

236. *Id.* at 166, 171.

237. *Id.* at 166–67.

238. *Id.* at 178 (“When officers have probable cause to believe that a person has committed a crime in their presence, the Fourth Amendment permits them to make an arrest, and to search the suspect in order to safeguard evidence and ensure their own safety.”).

constitutional law simply by changing its own rules of search and seizure, it can clearly impact the power of its own officers to arrest through its definition of crimes and infractions.

CONCLUSION

A clearly established right to remain silent exists during both consensual encounters²³⁹ and custodial interrogations.²⁴⁰ There is no sensible reason why only those who find themselves between these two categories—those who are briefly detained for investigation—should be compelled to answer police questions. However, despite a lengthy history of Supreme Court dicta supporting a right to remain silent during a *Terry* stop, lower federal courts have generally refused to find such a right to be clearly established.²⁴¹ Instead, courts have repeatedly concluded that the law is unclear on this point and as a result, the law remains unclear for the next court to conclude the same.

In this Article, we set forth three solutions to the disconnect between the Supreme Court's jurisprudence and the unwillingness of lower federal courts to acknowledge the existence of the right to refuse to answer police questions. Any one of these solutions would have the effect of providing injured plaintiffs with something they currently lack—a meaningful way to recover damages when they are arrested for asserting their constitutional right to refuse to cooperate with a police investigation.

239. *Florida v. Royer*, 460 U.S. 491, 497–98 (1983) (plurality opinion) (“[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification. The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds.”).

240. *Miranda v. Arizona*, 384 U.S. 436, 467–68 (1966) (“[I]f a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent.”).

241. *See, e.g., Alexander v. City of Round Rock*, 854 F.3d 298, 308 (5th Cir. 2017) (finding no case announcing such a right); *Koch v. City of Del City*, 660 F.3d 1228, 1246 (10th Cir. 2011) (same).