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IS SILENCE GOLDEN? NOT AFTER *HIIBEL* v. *SIXTH JUDICIAL DISTRICT COURT OF NEVADA*

I. INTRODUCTION

Imagine a nation whose citizens cannot move about in public unless they are prepared to document their identity and account for their presence upon demand. Imagine a nation where a law abiding citizen who has committed no wrong may be detained by police. Now imagine that this nation is the United States of America.

In a country which prides itself on being a free nation, the right to privacy is among the privileges most valued by society.¹ This right can generally be defined as the right to be left alone and freedom from government intrusion into one's private life.² Despite the widely recognized importance of this fundamental right, the Supreme Court's recent decision in *Hiibel v. Sixth Judicial District of Nevada*,³ which upheld the constitutionality of "stop and identify statutes,"⁴ could jeopardize the liberties afforded by both the Fourth and Fifth Amendments to the Constitution in a most significant way. In addition to representing the erosion of some of our nation's most cherished protections, the Court's holding employs contradictory logic to create a rule with problematic applications.

The Hiibel Case

The man at the center of the controversy is a cowboy named Dudley Hiibel.⁵ One evening, in May of 2000, Mr. Hiibel was standing outside of his pickup truck smoking a cigarette on a long stretch of rural road in Humboldt

1. See Nonnie L. Shivers, *Firing "Immoral" Public Employees: If Article 8 of the European Convention on Human Rights Protects Employee Privacy Rights, Then Why Can't We?*, 21 ARIZ. J. INT'L & COMP. L. 621, 643 (2004) (citing Elizabeth Wilborn, *Revisiting the Public/Private Distinction: Employee Monitoring in the Workplace*, 32 GA. L. REV. 825, 832-33 (1998)); Samuel D. Warren & Louis D. Brandeis, *"The Right to Privacy,"* 4 HARV. L. REV. 193, 193-97 (1890).

2. *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) (citing *Boyd v. United States*, 116 U.S. 616, 630 (1886)); Warren & Brandeis, *supra* note 1, at 195).

3. *Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177 (2004).

4. *Id.* at 190-91.

5. *Id.* at 181; see also Hiibel, <http://www.papersplease.org/hiibel/index2/html> (last visited Oct. 11, 2005).

County, Nevada.⁶ Around this same time, the Humboldt County sheriff's department received a call reporting a disturbance.⁷ An anonymous caller stated that he had observed a man and a woman in an argument, which culminated in an assault against the woman.⁸ A deputy was promptly dispatched to investigate.⁹

When the officer arrived at the scene, he found Hiibel standing outside of his truck, which had been pulled over to the side of the road.¹⁰ The police officer noticed a woman inside the truck.¹¹ The officer also noted that there were skid-marks behind the truck, which supported the inference that the vehicle had come to a sudden stop.¹² Additionally, the deputy suspected that Hiibel had been drinking which aroused his suspicion that Hiibel could have possibly been driving while intoxicated prior to the officer's arrival on the scene.¹³

The deputy accosted Hiibel as he stood on the side of the road beside his vehicle.¹⁴ The deputy asked Hiibel to identify himself, to which Hiibel responded with an inquiry as to why such an action was necessary.¹⁵ The deputy stated that he was conducting an investigation and reiterated his request for Hiibel to identify himself.¹⁶ Hiibel insisted that he had done nothing wrong and repeated that he did not understand why his identification was being demanded.¹⁷ Over the course of the encounter, the officer requested for Hiibel to identify himself eleven times, with Hiibel refusing each time.¹⁸ Hiibel eventually placed his hands behind his back and challenged the officer to arrest him.¹⁹

Finally, the officer decided to place Hiibel under arrest.²⁰ However, Hiibel was not arrested for public drunkenness, disturbing the peace, trespassing, assault, or even because the officer suspected that he had been driving while intoxicated.²¹ To the contrary, Hiibel was arrested only because he would not

6. *Hiibel*, 542 U.S. at 180; *see also* Hiibel, <http://www.papersplease.org/hiibel/index2/html> (last visited Oct. 11, 2005).

7. *Hiibel*, 542 U.S. at 180.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 180.

13. *Hiibel*, 542 U.S. at 180-81.

14. *Id.* at 181.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Hiibel*, 542 U.S. at 181.

20. *Id.*

21. *See id.*

identify himself to a law enforcement officer.²² The arrest was effectuated pursuant to Nevada's version of what is often called a "stop and identify" statute.²³ Nev. Rev. Stat. § 171.123 states:

1. Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime . . .

3. The officer may detain the person pursuant to this section only to ascertain his identity and the suspicious circumstances surrounding his presence abroad. Any person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer.²⁴

Hiibel was charged and convicted of interfering with an officer who was "carrying out his duties under § 171.123."²⁵ Hiibel maintained the "stop and identify" statute in question violated his constitutional liberties, specifically his rights guaranteed under both the Fourth and Fifth Amendments to the Constitution.²⁶ The Sixth Judicial District Court considered the case on appeal and found Hiibel's arguments unpersuasive as it affirmed the trial court's verdict.²⁷ Subsequently, in a divided opinion, Hiibel's Fourth Amendment argument was rejected by the Nevada Supreme Court.²⁸ Hiibel's petition for a rehearing was denied before the Supreme Court of the United States granted certiorari.²⁹

Whether or not one could be arrested solely for refusing to identify one's self to law enforcement officers had been a question previously unaddressed by the Supreme Court. Since several jurisdictions have enactments similar to § 171.123, Hiibel's case provided the Court with an opportunity to address the constitutionality of those provisions.³⁰

The Supreme Court ultimately upheld Hiibel's conviction, holding that the Nevada statute in question did not violate Hiibel's rights under either the Fourth or Fifth Amendments to the Constitution.³¹ In doing so, the Court created a substantial exception to the law governing seizure by essentially

22. *Id.*

23. *Id.* at 182.

24. *Id.* at 181-82 (citing NEV. REV. STAT. § 171.123 (2003)).

25. *Hiibel*, 542 U.S. at 181.

26. *Id.* at 182.

27. *Id.*

28. *Id.*

29. *Id.*

30. *See id.* at 182-84. Alabama, Arkansas, California, Delaware, Florida, Georgia, Illinois, Kansas, Louisiana, Massachusetts, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Mexico, New York, North Dakota, Rhode Island, Utah, Vermont, Virginia and Wisconsin have all enacted "stop and identify" statutes. *See infra* note 34 and accompanying text.

31. *Hiibel*, 542 U.S. at 185, 189-91.

allowing police, in some circumstances, to make arrests even when probable cause is conspicuously absent.³² In addition to creating a regime where innocent persons are afforded less protection than criminals, the Court abolished the well known “right to remain silent” in the context of a *Terry* stop and ignored or failed to fully appreciate the numerous problems that will be associated with the enforcement of its holding. This note will analyze the history of the relevant legal developments surrounding *Hiibel* and explore the constitutional significance and practical applications of the Court’s holding.

II. HISTORY

The *Hiibel* decision hinged on whether traditional “stop and identify” statutes violate the Fourth Amendment protection against unreasonable searches and seizures and/or the right against self incrimination guaranteed by the Fifth Amendment.³³ Several states have enacted versions of a “stop and identify” statute.³⁴ Although there are variations, virtually all such enactments allow law enforcement officers to demand that a suspect identify himself.³⁵

32. See Nicholas C. Harbist, *Stop and Identify Statutes: A New Form of an Inadequate Solution to an Old Problem*, 12 RUTGERS L.J., 585, 614 (1981); see also NEV. REV. STAT. § 171.123; *Hiibel*, 542 U.S. at 188-89.

33. *Hiibel*, 542 U.S. at 182.

34. See ALA. CODE § 15-5-30 (1995); ARK. CODE ANN. § 5-71-213 (1997); CAL. PENAL CODE § 647(e) (Deering 1974); DEL. CODE ANN. tit. 11 § 1321 (2001); DEL. CODE ANN. tit. 11 § 1902 (2001); FLA. STAT. ANN. § 856.021 (West 2000); FLA. STAT. ANN. § 901.151(2) (West 2001); GA. CODE ANN. § 16-11-36 (2003); 725 ILL. COMP. STAT. ANN. 5/107-14 (LexisNexis 2000); KAN. STAT. ANN. § 22-2402(1)(1995); LA. CODE CRIM. PROC. ANN. art. 215.1(A) (2003); MO. REV. STAT. § 84.710 (2000); MONT. CODE ANN. § 46-5-401 (2005); NEB. REV. STAT. § 29-829 (1995); N.H. REV. STAT. ANN. § 594:2 (LexisNexis 2003); N.H. REV. STAT. ANN. § 644:6 (1996); N.M. STAT. § 30-22-3 (2004); N.Y. CRIM. PROC. LAW § 140.50 (McKinney 2004); N.D. CENT. CODE § 29-29-21 (1991); R.I. GEN. LAWS § 12-7-1 (2002); ST. PAUL MINN., LEGIS. CODE § 225.11 (2005), available at <http://www.stpaul.gov/code/lc225.html>; UTAH CODE ANN. § 77-7-15 (2003); VT. STAT. ANN. tit. 24, § 1983 (Supp. 2004); 1998 WIS. STAT. ANN. § 968.24 (West).

35. See *Hiibel*, 542 U.S. at 183. Some such enactments require a suspect to disclose information in addition to identity, such as an address. See ALA. CODE § 15-5-30; CAL. PENAL CODE § 647(e); DEL. CODE ANN., tit. 11, § 1902; 725 ILL. COMP. STAT. 5/107-14; KAN. STAT. ANN. § 22-2402(1); LA. CODE CRIM. PROC. ANN. art. 215.1(A); MO. REV. STAT. § 84.710; MONT. CODE ANN. § 46-5-401(2)(a); NEB. REV. STAT. § 29-829; N.H. REV. STAT. ANN. § 594:2; N.Y. CRIM. PROC. LAW § 140.50(1); N.D. CENT. CODE § 29-29-21; R.I. GEN. LAWS § 12-7-1; ST. PAUL MINN., LEGIS. CODE § 225.11 (2005), available at <http://www.stpaul.gov/code/lc225.html>; UTAH CODE ANN. § 77-7-15; WIS. STAT. ANN. § 968.24; see also MASS GEN. LAWS, ch. 41, § 98 (1958) (providing that police “may examine all persons abroad whom they have reason to suspect of unlawful design, and may demand of them their business abroad,” and that “[p]ersons so suspected who do not give a satisfactory account of themselves . . . may be arrested . . .”).

A. *The Fourth Amendment and the Terry Exception*

The Fourth Amendment protects citizens against unreasonable searches and seizures and authorizes a law enforcement officer to make an arrest only when he has probable cause to believe a crime has been committed.³⁶ In the landmark case of *Terry v. Ohio*, the Court first considered whether or not law enforcement officers have the right to detain a suspect in the absence of probable cause.³⁷ Prior to *Terry*, it was clear that a police officer was precluded from seizing an individual unless he possessed the requisite probable cause to believe the suspect was involved in criminal activity.³⁸

In *Terry*, a plain clothes police officer observed two men acting suspiciously.³⁹ The officer would later explain that in light of his years of experience as a policeman, he felt that the two men “didn’t look right.”⁴⁰ After observing the actions of the two men, the officer concluded the men were planning a burglary.⁴¹ The officer approached the men and identified himself as a policeman before conducting a frisk of one of the suspects, which produced a handgun.⁴² The man was charged and convicted of carrying a concealed weapon.⁴³

The suspect sought to suppress the weapon from evidence on the grounds that the search of his person violated his Fourth Amendment rights.⁴⁴ The Court’s holding represented the first significant exception to the Fourth Amendment protections. It authorized police to conduct a carefully limited search of suspects whom they reasonably suspected to be dangerous, even in the absence of probable cause.⁴⁵ The exception recognized by the Court in

36. U.S. CONST. amend. IV. (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . .”).

37. 392 U.S. 1, 7-9 (1968)

38. *Dunaway v. New York*, 442 U.S. 200, 208 (1979) (“The term ‘arrest’ [is] synonymous with those seizures governed by the Fourth Amendment. While warrants [are] not required in all circumstances, the requirement of probable cause, as elaborated in numerous precedents, [is] treated as absolute.”).

39. *Terry*, 392 U.S. at 5-6.

40. *Id.* (“He explained that he had developed routine habits of observation over the years and that he would ‘stand and watch people or walk and watch people at many intervals of the day.’ He added: ‘Now, in this case when I looked over they didn’t look right to me at the time.’”).

41. *Id.* at 6 (“[A]fter observing their elaborately casual and oft-repeated reconnaissance of the store window . . . he suspected the two men of ‘casing a job, a stick-up . . .’”).

42. *Id.* at 6-7.

43. *Id.* at 4. Two of the suspects were arrested and convicted pursuant to Ohio Rev. Code § 2923.01 (1953), which provides, *inter alia*, that “[n]o person shall carry a pistol, bowie knife, dirk, or other dangerous weapon concealed on or about his person.” *Id.* at 4 n.1, 5, 11 n.2 (quoting OHIO REV. CODE § 2923.01 (1953)).

44. *Id.* at 4-5, 7-8.

45. *Dunaway v. New York*, 442 U.S. 200, 208-09 (1979); *Terry*, 392 U.S. at 30.

Terry is very narrow, and even after *Terry*, law enforcement officers may not arrest a suspect unless the initial reasonable suspicion seasonally develops into probable cause.⁴⁶ The detentions considered by the Court in *Terry* have come to be known as “*Terry* stops.”⁴⁷

Because the Court has the “responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security,”⁴⁸ and because the holding in *Terry* represented a substantial expansion of the investigative authority possessed by police, that Court was careful to define the scope of the exception.⁴⁹ Thus, when considering the reasonableness of the intrusion, that Court mandated that the “scope of the search must be strictly tied to and justified by the circumstances which rendered its initiation permissible.”⁵⁰ Further, that Court was careful to emphasize that the “[s]ole justification [of the officer’s search of a person whom he has no cause to arrest] is 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 assault of [the] officer.”⁵¹

B. “Stop and Identify” Statutes

Because of constitutional concerns, the Supreme Court has imposed significant limitations on traditional vagrancy laws, from which modern “stop and identify” statutes evolved.⁵² The first case, which considered the constitutionality of such laws, was *Papachristou v. Jacksonville* in 1972.⁵³ The case involved eight defendants from different cases who had all been convicted of violating a Jacksonville vagrancy ordinance in a Florida Municipal Court.⁵⁴

46. *See Terry*, 392 U.S. at 30.

47. *See U.S. v. Robinson*, 414 U.S. 218, 253 (1973) (Marshall, J., dissenting).

48. *Terry*, 392 U.S. at 15.

49. *Ybarra v. Illinois*, 444 U.S. 85, 93 (1979).

50. *Terry*, 392 U.S. at 19 (citing *Warden v. Hayden*, 387 U.S. 294, 310 (1967) (Fortas, J., concurring)); *Warden v. Hayden*, 387 U.S. 294, 310 (1967) (Fortas, J., concurring); *see also* *Preston v. United States*, 376 U.S. 364, 367-68 (1964); *Agnello v. United States*, 269 U.S. 20, 30-31 (1925).

51. *Terry*, 392 U.S. at 29.

52. *Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177, 183-84 (2004) (citing 15 Geo. 2, ch. 5, § 2 (1744)).

53. 405 U.S. 156 (1972).

54. *Papachristou*, 405 U.S. at 156, 158. Jacksonville Ordinance Code § 26—57 provided that:

Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object,

At the time of their arrest, four of the defendants had been riding together in the same automobile.⁵⁵ The arresting officer said his suspicion peaked after he observed the group near a car lot, which was frequently burglarized.⁵⁶ Consequently, each defendant was charged with “prowling by auto.”⁵⁷

Two of the other defendants were arrested as they stood on the side of the road early one morning.⁵⁸ The suspects alleged they were waiting for a friend who had agreed to loan them his car.⁵⁹ Local shop owners had observed the two and called police because they felt that the two appeared suspicious.⁶⁰ Although there was no evidence that a crime had transpired, the police arrested the suspects because they had no identification and because the arresting officers did not feel like the suspects had provided a satisfactory account of their presence.⁶¹

The seventh defendant was pulled over early one morning for speeding.⁶² Curiously, the suspect was charged with vagrancy instead of speeding.⁶³ The last defendant was arrested as he left a hotel.⁶⁴ The arresting officer claimed that the defendant had a bad reputation, so he summoned the defendant to his cruiser with the intention of arresting him unless he could offer a satisfactory explanation for what he was up to.⁶⁵ After the suspect approached the car, he was subjected to a search, which yielded a small amount of heroin.⁶⁶ Among other things, he was charged with vagrancy under the Jacksonville ordinance at issue.⁶⁷

habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants and, upon conviction in the Municipal Court shall be punished as provided for Class D offenses.

Id. at 156-57 n.1.

55. *Id.* at 158-59.

56. *Id.* at 159.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Papachristou*, 405 U.S. at 159.

61. *Id.*

62. *Id.* at 160.

63. *Id.*

64. *Id.*

65. *Id.* The officer testified that the suspect had a reputation for being a drug dealer, a thief and a “generally opprobrious character.” *Id.* The officer also testified that he planned to arrest Brown unless he could offer a “good explanation for being on the street.” *Id.*

66. *Id.*

67. *Id.* at 160-61. This defendant was charged with disorderly loitering on the street, disorderly conduct, and resisting arrest under Jacksonville Ordinance Code § 26-57, in addition to a drug charge that was later dropped. *Id.*

The Court ultimately held that the vagrancy statute was unconstitutional and therefore void.⁶⁸ The Court announced that the statute was too vague, because it “fail[ed] to give . . . a person of ordinary intelligence fair notice that his contemplated conduct [was] forbidden”⁶⁹ Further, the statute made certain activities criminal, “which by modern standards are normally innocent.”⁷⁰ The Court reasoned that the average citizen is not aware of the laws against vagrancy and that the law forbade conduct that is viewed by most as honest, like “nightwalking,” for example.⁷¹ Thus, the overly broad nature of the statute made it constitutionally impermissible.⁷²

In addition to finding the statute unconstitutional on vagueness grounds, the Court articulated the concern that the statute “encourage[ed] arbitrary and erratic arrests and convictions”⁷³ because it placed almost “unfettered discretion . . . in the hands of [law enforcement officers].”⁷⁴ The Court likened the Jacksonville ordinance to a law which provides that all suspicious persons are subject to arrest or a law which punishes for “future criminality.”⁷⁵ Accordingly, in addition to being too vague, due to the fact a vagrancy prosecution could often be a pretext for evading the probable cause requirement for arrest, the Jacksonville vagrancy statute was also held to be constitutionally inadequate.⁷⁶

Seven years later, the Court imposed the first limitations on “stop and identify” statutes because of constitutional concerns.⁷⁷ In *Brown v. Texas*, the Court was presented with the opportunity to rule on whether the Constitution allowed a legislative body to enact a statute that makes silence a crime in the midst of a *Terry* stop.⁷⁸ In *Brown*, two police officers observed a man walking through an alley which was known for drug trafficking.⁷⁹ The man was stopped by the police, who demanded that he disclose his identity and explain what he was doing.⁸⁰ The arresting officer maintained that the man appeared suspicious, although he could not articulate any specific wrongdoing and he

68. *Papachristou*, 405 U.S. at 162, 171.

69. *Id.* at 162.

70. *Id.* at 163.

71. *Id.* at 162-63.

72. *Id.* at 162, 165-68, 171.

73. *Id.* at 162 (citing *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Herndon v. Lowry*, 306 U.S. 242 (1937)).

74. *Papachristou*, 405 U.S. at 168.

75. *Id.* at 169.

76. *Id.* at 168-71.

77. *Brown v. Texas*, 443 U.S. 47, 49, 51-53 (1979).

78. *Id.* at 48.

79. *Id.* at 48-49.

80. *Id.*

admitted that he did not suspect that the man was armed.⁸¹ When the man refused to cooperate, he was arrested for “violation of a [Texas statute] which makes it a criminal act for a person to refuse to give his name and address to an officer ‘who has lawfully stopped him and requested the information.’”⁸²

Unfortunately, the Court avoided ruling on the ultimate issue of the constitutionality of the law itself and decided instead to resolve the case on other grounds.⁸³ The Court found that the arresting officer had violated the suspect’s Fourth Amendment rights because the police officer did not have reasonable suspicion to believe that the suspect had committed a crime.⁸⁴ The Court reasoned that the detention of the subject for the purpose of compelling identification constituted a seizure that implicated the Fourth Amendment.⁸⁵ The Court concluded the Fourth Amendment demands that such “a seizure . . . be based on specific, objective facts indicating that society’s legitimate interests require [such action], or that the seizure . . . be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.”⁸⁶

There was no claim that the officers had effectuated the detention based on reasonable suspicion that the suspect was involved in criminal activity.⁸⁷ The Court emphasized that “absent[t] any basis for suspecting . . . misconduct, the balance between the public interest [in crime prevention] and appellant’s right to personal security and privacy tilts in favor of freedom from police interference.”⁸⁸ Ultimately, because the officer was unable to satisfactorily articulate why he made the determination the suspect was “suspicious,” the situation did not warrant a reasonable suspicion that the suspect had been engaged in a crime.⁸⁹ Therefore, the detention was illegal.⁹⁰ In the absence of the requisite reasonable suspicion, the detention and subsequent questioning of the subject pursuant to the state statute amounted to a violation of the suspect’s Fourth Amendment rights.⁹¹

81. *Id.* at 49. One of the arresting officers explained that the circumstances “looked suspicious and we had never seen that subject in that area before.” *Id.*

82. *Id.* (citing TEX. PENAL CODE ANN. § 38.02(a) (Vernon 1974)). TEX. PENAL CODE ANN. § 38.02(a) of 1974 provided in relevant part that “[a] person commits an offense if he intentionally refuses to report or gives a false report of his name and residence address to a peace officer who has lawfully stopped him and requested the information.” *Id.* at 49 n.1 (quoting § 38.02(a)).

83. *See Brown*, 443 U.S. at 53.

84. *Id.*

85. *Id.* at 50.

86. *Id.* at 51 (citing *Delaware v. Prouse*, 440 U.S. 648, 663 (1979)).

87. *Id.* at 51-52.

88. *Id.* at 52.

89. *Brown*, 443 U.S. at 52-53.

90. *Id.* at 53.

91. *Id.*

In 1983, the Court decided *Kolender v. Lawson*, which reaffirmed the limitations imposed by the Court in *Papachristou*.⁹² At issue was a California “stop and identify” statute, which required “persons . . . who wander on the streets to provide a ‘credible and reliable’ identification and to account for their presence when requested by a [police] officer.”⁹³ The statute mandated that anyone on the streets at night must be prepared to articulate a reason for their presence and that refusal to do so or failure to identify one’s self constituted a misdemeanor.⁹⁴ A man named Lawson had been arrested or detained numerous times between 1975 and 1977 pursuant to the California enactment in question.⁹⁵ He maintained his only encounters with law enforcement officers were because of the “stop and identify” statute at issue.⁹⁶

The officers imposing the detentions provided several accounts of the various circumstances justifying the stops.⁹⁷ Essentially, those justifications were the same: police observed Lawson at night in or near vicinities that police classified as high crime areas.⁹⁸ Lawson eventually brought suit in federal court seeking to have the statute declared unconstitutional and to have its enforcement enjoined.⁹⁹

Lawson prevailed on the constitutional issue in district court and the holding was affirmed by the Ninth Circuit Court of Appeals.¹⁰⁰ The Ninth Circuit expressed the view that the California enactment violated the Fourth Amendment’s protection against unreasonable seizures and emphasized that such a statute was prone to arbitrary and discriminatory enforcement.¹⁰¹ The defendant law enforcement agency in question appealed to the Supreme

92. 461 U.S. 352, 357 (1983).

93. *Id.* at 353-54.

94. *Id.* at 353 n.1 (citing CAL. PENAL CODE § 647(e) (West 1979)). The current CAL. PENAL CODE § 647(e) (West 2005), which is similar to the 1970 version, provides:

[e]very person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: . . . (e) Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer to do so, if the surrounding circumstances [are such as to] indicate to a reasonable [man] that the public safety demands [such] identification.

CAL. PENAL CODE § 647(e) (West 2005).

95. *Kolender*, 461 U.S. at 354. Although there was no finding made by the District Court regarding prior detentions of Lawson made pursuant to CAL. PENAL CODE § 647, the record contained testimony of police officers describing the circumstances surrounding stops of Lawson. *Id.* at n.2 354. In general, the justification given by police was that Lawson was walking alone late at night in or around high crime areas. *Id.* (citing the transcript at 207, 266-67).

96. *Id.*

97. *Id.* (citing the transcript at 207, 266-67).

98. *Id.*

99. *Id.* at 354.

100. *Id.* at 354-55.

101. *Kolender*, 461 U.S. at 355.

Court.¹⁰² The Court affirmed, noting that in addition to failing to provide the average citizen with notice as to what was required of them under the statute, the statute was constitutionally problematic because “[any] individual, whom police may think is suspicious but do not have probable cause to believe has committed a crime, is entitled to continue to walk the public streets ‘only at the whim of any police officer’ who happens to stop that individual.”¹⁰³ The Supreme Court noted that it was well established that law enforcement officers cannot force answers to questions and that the statute represented “a convenient tool for ‘harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.’”¹⁰⁴ Thus, the Court’s concerns were similar to those discussed in *Papachristou*.

Interestingly, Justice Brennan authored a concurring opinion in which he stated that although the statute does not pass muster because of vagueness, even if that shortcoming was addressed by a legislative body, the statute would nonetheless violate the Fourth Amendment.¹⁰⁵ While permitting law enforcement officers to arrest an individual solely on the basis of reasonable suspicion would advance the policy objective of the promotion of public safety, that objective must be weighed against the objective of protecting personal liberties.¹⁰⁶ Permitting an arrest in the absence of probable cause might advance the effectiveness of police investigations, but it would also represent a substantial increase in the level of intrusiveness society must be prepared to permit.¹⁰⁷

Justice Brennan emphasized that although law enforcement officers with reasonable suspicion may detain and question someone in order to advance their investigation, per *Terry*,¹⁰⁸

[The police] may not *compel* an answer, and [the police] must allow the person to leave after a reasonably brief period of time unless the information [gained allows the suspicion to develop into] 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.¹⁰⁹

102. *Id.*

103. *Id.* at 353-54, 357-58.

104. *Id.* at 360 n.9 (quoting *Davis v. Mississippi*, 394 U.S. 721, 727 n.6 (1969)); *id.* at 360 (quoting *Papachristou v. Jacksonville*, 405 U.S. 156, 170 (1972)).

105. *Id.* at 362 (Brennan, J., concurring).

106. *See id.* at 365-66.

107. *Kolender*, 461 U.S. at 365-66.

108. *Id.* at 364

109. *Id.* at 366-67.

Accordingly, Justice Brennan concluded, that the statute in question would violate the Fourth Amendment even if its current shortcomings, namely vagueness, were addressed.¹¹⁰

C. *The Fifth Amendment*

The Fifth Amendment provides in relevant part “that “[n]o person shall be . . . compelled in any criminal case to be a witness against himself. . . .”¹¹¹ In order for a statement to implicate the Fifth Amendment, the Court has held that the statement must be “testimonial, incriminating and compelled.”¹¹² The essence of the Amendment’s privilege is to prevent a situation where a suspect must face the “trilemma of self accusation, perjury or contempt.”¹¹³

With respect to the “testimonial” prong of the Fifth Amendment analysis, the Court helped define this term in *Pennsylvania v. Muniz*.¹¹⁴ That Court considered whether certain statements made by a DWI suspect were testimonial and, therefore, protected by the privilege against self incrimination.¹¹⁵ The DWI suspect in *Muniz* was asked a variety of questions including an inquiry about the date of his sixth birthday.¹¹⁶ Some of the suspect’s answers were slurred and the suspect was unable to provide the police with the date of his sixth birthday.¹¹⁷ The Court held that the Fifth Amendment’s safeguards “protect[] an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature,” but not “from being compelled by the State to produce ‘real or physical evidence.’”¹¹⁸ The Court defined a testimonial statement as one that “explicitly or implicitly, relate[s] a factual assertion or disclose[s] information.”¹¹⁹

Accordingly, the Court found that the suspect’s answers to the questions that had been directed at him were not protected merely because the slurred nature of his speech supported the inference that he was intoxicated.¹²⁰ The slurred nature of the suspect’s speech was not testimonial in nature.¹²¹ However, the suspect’s response to the birthday question “was incriminating,

110. *Id.* at 369.

111. U.S. CONST. amend. V.

112. *Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177, 189 (2004) (citing *United States v. Hubbell*, 530 U.S. 27, 34-38 (2000)).

113. *Doe v. United States*, 487 U.S. 201, 212 (1988) (citing *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 55 (1964)).

114. *Pennsylvania v. Muniz*, 496 U.S. 582 (1990).

115. *Id.* at 584.

116. *Id.* at 586.

117. *Id.*

118. *Id.* at 589 (citing *Schmerber v. California*, 384 U.S. 757, 764 (1966)).

119. *Id.* (quoting *Doe v. United States*, 487 U.S. 201, 210 (1988)).

120. *Muniz*, 496 U.S. at 590.

121. *Id.* at 590-91.

not just because of his delivery, but also because [the] . . . *content* [of his answer supported an inference] that his mental state was confused.”¹²² His response was testimonial because he was required “to communicate an express or implied assertion of fact or belief”¹²³

Prior to *Muniz*, our courts had provided some guidance in determining whether certain acts were testimonial in nature.¹²⁴ For example, in *Schmerber v. California*, the Court held that a blood sample taken from a DWI suspect was admissible and not the subject of Fifth Amendment concerns.¹²⁵ This was because the act of giving blood was not “testimonial.”¹²⁶ Similarly, it was held that compelling a handwriting sample did not run afoul of the Fifth Amendment because such an act was not testimonial.¹²⁷

With respect to the “incriminating” prong of the analysis, it has been held that a statement is incriminating, and therefore implicates the Fifth Amendment, if the statement “furnish[es] a link in the chain of evidence needed to prosecute.”¹²⁸ A statement is considered to be incriminating for the purposes of the Fifth Amendment if it is “[likely to be] used in a criminal prosecution or could lead to other evidence that might be [used in a prosecution].”¹²⁹ Thus, it was held that “[the Fifth Amendment’s] protection [applies whenever] compelled statements that ‘lead to the discovery of incriminating evidence even though the statements themselves are not incriminating and are not introduced into evidence.’”¹³⁰

122. *Id.* at 592 (emphasis in original).

123. *Id.* at 597.

124. *See generally* *Gilbert v. California*, 388 U.S. 263, 266-67 (1967); *Schmerber v. California*, 384 U.S. 757, 760-65 (1966).

125. *Schmerber*, 384 U.S. at 761.

126. *Id.* (“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, and that the withdrawal of blood and use of the analysis in question . . . did not involve compulsion to these ends.”).

127. *Gilbert*, 388 U.S. at 266-67. The Court directed that:

The taking of the exemplars did not violate petitioner’s Fifth Amendment privilege against self-incrimination. The privilege reaches only compulsion of “an accused’s communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one’s papers,” and not “compulsion which makes a suspect or accused the source of ‘real or physical evidence’”

Id. at 266 (quoting *Schmerber*, 384 U.S. 757, 763-64). The Court went on to note that “[a] mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside its protection.” *Id.* at 266-67 (citing *United States v. Wade* 388 U.S., 218, 222-23 (1967)).

128. *Hoffmann v. United States*, 341 U.S. 479, 486 (1951).

129. *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972).

130. *United States v. Hubbell*, 530 U.S. 27, 37 (2000).

III. DISCUSSION

A. *The Hiibel Decision*

Hiibel was initially tried in the Justice Court of Union Township, where the court held Hiibel's refusal to identify himself to a police officer constituted a violation of the subject statute.¹³¹ Hiibel was convicted and ordered to pay a fine.¹³² Subsequently, Hiibel appealed to Nevada's Sixth Judicial District Court, which affirmed the lower court holding that Hiibel's conviction under the statute did not violate his constitutional rights under either the Fourth or Fifth Amendments.¹³³ The Nevada Supreme Court rejected Hiibel's Fourth Amendment challenge, holding that the policy objectives promoted by the statute outweighed any intrusion on Hiibel's privacy.¹³⁴ Hiibel asked the Supreme Court of the United States to resolve his Fifth Amendment claim. Certiorari was granted.¹³⁵

1. The Majority Opinion

The Hiibel case represents the first time the Supreme Court has addressed the legality of "stop and identify statutes" since *Kolender*.¹³⁶ The Court's majority opinion was authored by Justice Kennedy.¹³⁷ The opinion began by discussing "stop and identify statutes" generally, noting that the enactments have their roots in vagrancy laws and that there are many versions of such statutes with the penalties for violations varying from being charged with a misdemeanor to no penalty whatsoever.¹³⁸

Justice Kennedy proceeded to distinguish the instant case from other cases, such as *Kolender*,¹³⁹ which found similar enactments constitutionally inadequate.¹⁴⁰ It is noteworthy that although the Court had addressed the legality of laws very similar to the one in question in *Hiibel*, those cases were always resolved on a separate basis such as vagueness.¹⁴¹ Justice Kennedy asserted that the Nevada statute was distinguishable from the California statute

131. *Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177, 182 (2004).

132. *Id.*

133. *Id.*

134. *Hiibel v. Sixth Judicial Dist. Court ex rel. County of Humbolt*, 59 P.3d 1201, 1205 (Nev. 2002) ("[W]e conclude that any intrusion on privacy caused by NRS 171.123(3) is outweighed by the benefits to officers and community safety.").

135. *Hiibel*, 542 U.S. at 182.

136. *See id.* at 184-85.

137. *Id.* at 180.

138. *Id.* at 183.

139. *Id.* at 184-85.

140. *Kolender v. Lawson*, 461 U.S. 352, 353-54, 358, 361 (1983).

141. *See, e.g., id.* at 353-54; *Brown v. Texas*, 443 U.S. 47, 51-53 (1979).

that was at issue in *Kolender*.¹⁴² The cornerstone of the *Kolender* opinion was the fact that the statute was overly vague because it required citizens to give “reliable and credible” information as to their identity, which was undefined by the statute.¹⁴³ It was impossible to ascertain what was meant by “reliable and credible” and, thus, impossible to determine when such a provision had been violated.¹⁴⁴ In contrast, the Nevada statute at the center of the controversy in the instant case was characterized by Justice Kennedy as “narrower and more precise.”¹⁴⁵ All that was apparently required by the Nevada statute was the disclosure of the suspect’s name, not the production of verifying identity documents.¹⁴⁶

After distinguishing the *Hiibel* statute from other statutes previously examined by the Court, the next step in the majority’s analysis focused on *Hiibel*’s Fourth Amendment argument.¹⁴⁷ The Fourth Amendment provides, in relevant part, that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated”¹⁴⁸ In general, law enforcement officers are permitted to ask one to disclose his identity without creating a Fourth Amendment issue because such a request does not qualify as a seizure subject to the amendment’s protections.¹⁴⁹ However, the Court noted that it is well established that the Fourth Amendment precludes law enforcement officers from searching or detaining an individual unless the officer has probable cause to believe that the person has been involved in criminal activity, except under the carefully defined exceptions outlined in *Terry*.¹⁵⁰

With respect to the Fourth Amendment, the reasonableness of a seizure is usually determined through a balancing test which considers the magnitude of the intrusion versus the policy objectives advanced by allowing the seizure.¹⁵¹ The majority stated there were several benefits involved in allowing police to compel disclosure of a suspect’s identity during a *Terry* stop.¹⁵² Such

142. *Hiibel*, 542 U.S. at 184-85.

143. *Kolender*, 461 U.S. at 353-54; *see also* CAL. PENAL CODE § 647(e) (West 2005).

144. *Kolender*, 461 U.S. at 358.

145. *Hiibel*, 542 U.S. at 184.

146. *Id.* at 185.

147. *Id.* at 185-89.

148. U.S. CONST. amend. IV. (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause”).

149. *Hiibel*, 542 U.S. at 185 (citing *INS v. Delgado*, 466 U.S. 873, 881 (1975)).

150. *See id.*

151. *Id.* at 187-88 (“The reasonableness of a seizure under the Fourth Amendment is determined by ‘balancing its intrusion on the individual’s Fourth Amendment rights against its promotion of legitimate government interests.’” (quoting *Delaware v. Prouse*, 440 U.S. 648, 654 (1979))).

152. *Id.* at 186.

information would allow police to determine if the subject was wanted in connection with another, unrelated crime.¹⁵³ Further, allowing police to make inquiries pertaining to identity would promote the policy objective of increasing the safety of law enforcement officers.¹⁵⁴ Such information might alert the officers to conditions such as mental deficiency or violent disposition.¹⁵⁵ This would help police determine what degree of caution was appropriate for a particular situation.¹⁵⁶ The majority contended that, in the instant case, it would have been “particularly” beneficial for the police to know if *Hiibel* had a history of domestic violence.¹⁵⁷ Such information would have aided their determination as to how to proceed with the investigation and as to the level of caution to be used.¹⁵⁸ The majority maintained information pertaining to identity could actually benefit a suspect in some circumstances.¹⁵⁹ The majority found that there were situations where such information would serve to exculpate the individual and allow police to focus their investigation on a different suspect.¹⁶⁰

The majority conceded that numerous historical statements made by the Court in other cases appeared to suggest that police officers cannot compel a suspect to identify himself during a *Terry* stop.¹⁶¹ The Court, however, ultimately rejected *Hiibel*’s Fourth Amendment argument.¹⁶² It should be noted that it was stated in both *Terry*¹⁶³ and *Berkmer*¹⁶⁴ that a suspect cannot

153. *Id.*

154. *Id.*

155. *Hiibel*, 542 U.S. at 186.

156. *Id.*

157. *Id.*

158. *See id.*

159. *Id.*

160. *Id.*

161. *Hiibel*, 542 U.S. at 186.

162. *Id.*

163. *Terry v. Ohio*, 392 U.S. 1 (1968). Here, Justice White declared in his concurrence that “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 . . . 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.

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

164. *Berkemer v. McCarty*, 468 U.S. 420 (1984). With respect to the investigatory stops permitted by *Terry*, the Court directed:

An 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.

Id. at 439-40.

be forced to answer any questions during a *Terry* stop, and that a suspect's refusal to answer questions does not furnish police with a basis for arrest.¹⁶⁵ Similarly, in *Florida v. Royer*, the Supreme Court declared that, while a suspect's Fourth Amendment rights are not violated when an officer accosts him for questioning, no duty to answer attaches.¹⁶⁶ "The person approached . . . 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."¹⁶⁷

In the instant case the Court decided not to treat its above holdings as controlling.¹⁶⁸ The Court reasoned that the requirement that a suspect identify himself during a *Terry* stop was not mandated by the Constitution.¹⁶⁹ Rather, it was mandated by the Nevada "stop and identify" statute in question.¹⁷⁰ Accordingly, the Court further reasoned that the above holdings did not actually address the question then before the Court, which was whether a state could force its citizens to identify themselves to law enforcement officers.¹⁷¹ The Court ultimately declared the Fourth Amendment concerns had to be balanced against the utility provided by the statute in question.¹⁷² It held that any intrusion by the statute on one's Constitutional rights were minimal in light of the legitimate interests the enactment promoted.¹⁷³ Further, the Court emphasized the statute did not fundamentally change the stops allowed by *Terry*, and did not affect the intrusiveness of the stop in any meaningful way.¹⁷⁴ Because the Court felt the governmental interests promoted by the statute outweighed any intrusion on personal privacy, and because the statute did not fundamentally change the nature of a *Terry* stop, the Nevada statute did not violate the Fourth Amendment.¹⁷⁵

In addition to declaring that the statute in question violated the Constitution's prohibition against unreasonable searches and seizures, *Hiibel* also advanced the argument that the statute effectively evaded the requirement that an arrest may not be based on anything less than probable cause.¹⁷⁶ *Hiibel* maintained the Nevada statute basically mandated that a suspect's silence alone was sufficient to evolve suspicion into probable cause and created a pretext for arrest when probable cause did not seasonably develop.¹⁷⁷ The

165. *Terry*, 392 U.S. at 34 (White, J., concurring); see *Berkemer*, 468 U.S. at 439-40.

166. *Florida v. Royer*, 460 U.S. 491, 497-98 (1983).

167. *Id.*

168. *Hiibel*, 542 U.S. at 187.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 187-88 (quoting *Delaware v. Prouse*, 440 U.S. 648, 654 (1979)).

173. *Id.* at 188.

174. *Hiibel*, 542 U.S. at 188.

175. *Id.* at 187-88.

176. *Id.* at 188.

177. *Id.*

Supreme Court disagreed.¹⁷⁸ It addressed this concern by stating “the request for identification was ‘reasonably related in scope to the circumstances which justified’ the stop.”¹⁷⁹ The Court felt the request was a commonsense inquiry and not an effort to procure grounds for an arrest in the face of inadequate evidence.¹⁸⁰ Accordingly, the Court declared “[t]he stop, the request, and the State’s requirement of a response did not contravene the guarantees of the Fourth Amendment.”¹⁸¹

The Court next turned its attention to Hiibel’s Fifth Amendment argument.¹⁸² The Fifth Amendment protects individuals from self-imposed incrimination.¹⁸³ Hiibel’s contention was essentially that compelled identification can constitute a testimonial communication that invokes Fifth Amendment protection.¹⁸⁴ The Respondents challenged the applicability of the Fifth Amendment to such statements by asserting that such communications are not truly “testimonial,” but the Court declined to resolve that issue because the Court felt it was unnecessary.¹⁸⁵

Regardless of whether the communication in question was testimonial, the Court reasoned that the Fifth Amendment challenge was unpersuasive in the instant case because “disclosure . . . presented no reasonable danger of incrimination.”¹⁸⁶ The Court contended the Fifth Amendment was only applicable when “reasonable ground to apprehend danger to the witness from his being compelled to answer” exists, and that “the danger . . . [had to] be real and appreciable . . . not a danger of an imaginary and unsubstantial character.”¹⁸⁷ In the instant case, the Court felt that Hiibel’s refusal to identify himself was not based upon any appreciable danger that the information disclosed would be used to incriminate him.¹⁸⁸ Accordingly, the Court rejected Hiibel’s Fifth Amendment challenge.¹⁸⁹

Interestingly, the majority did acknowledge that:

A case may arise where there is a substantial allegation that furnishing identity at the time of [the] stop would have given the police a link in the chain of evidence needed to convict the individual of a separate offense. In that case, the [C]ourt can then consider whether the

178. *Id.* at 188-89.

179. *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).

180. *Hiibel*, 542 U.S. at 188-89.

181. *Id.*

182. *Id.* at 189-91.

183. U.S. CONST. amend. V; *see also* *United States v. Hubbell*, 530 U.S. 27, 34-38 (2000).

184. *Hiibel*, 542 U.S. at 189.

185. *Id.* at 189.

186. *Id.*

187. *Id.* at 190 (quoting *Brown v. Walker*, 161 U.S. 591, 599-600 (1896)).

188. *Id.*

189. *Id.* at 190-91.

privilege applies, and, if the Fifth Amendment has been violated, what remedy must follow.¹⁹⁰

The Court, however, expressly declined to resolve those questions in the instant case.¹⁹¹

2. Dissent I

A dissenting opinion was authored by Justice Stevens, who concentrated on Fifth Amendment concerns.¹⁹² Because the majority declined to address the issue of the testimonial nature of the statements at issue, Justice Stevens concentrated his analysis on the incriminating nature of the statements.¹⁹³ The majority's central justification for allowing compelled identification in this case was that Hiibel had no reasonable fear that disclosure of his identity would incriminate him.¹⁹⁴ Historically, however, the Court has defined "incriminating" in a much more expansive way.¹⁹⁵ The Court has defined an incriminating statement as one that may lead to evidence that could be used in a criminal prosecution even if the statement "itself is not inculpatory."¹⁹⁶ With respect to the definition historically employed by the Supreme Court, and given that Hiibel was a suspect in a criminal investigation, it seems clear he was merely exercising his Fifth Amendment privilege by refusing to answer questions posed to him by a law enforcement officer.¹⁹⁷

Justice Stevens further asserted that if one is to accept the proposition that the admission of one's name poses no actual and appreciable fear of prosecution, it becomes unclear why disclosure is required in the first place.¹⁹⁸ If knowledge of one's identity fails to further the investigative process in any significant way, surely there can be no justifiable reason to infringe upon or compromise one's constitutional rights.¹⁹⁹ Accordingly, Justice Stevens

190. *Hiibel*, 542 U.S. at 191.

191. *Id.*

192. *Id.* at 191-96 (Stevens, J., dissenting).

193. *Id.* at 195-96.

194. *Id.* at 195.

195. *Id.*; see also, *United States v. Hubbell*, 530 U.S. 27, 38 (2000) (asserting that "testimony that communicates information that may 'lead to incriminating evidence' is privileged even if the information *itself* is not inculpatory." (quoting *Doe v. United States*, 487 U.S. 201, 208 n.6 (1988))) (emphasis added); *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972) (defining incriminating to include any disclosure that "could be used in a criminal prosecution or could lead to other evidence that might be so used."); *Hoffmann v. United States*, 341 U.S. 479, 486 (1951) (noting that communication can be defined as incriminating if it would "furnish a link in the chain of evidence needed to prosecute" the suspect.).

196. *Hubbell*, 530 U.S. at 38 (citing *Doe*, 487 U.S. at 208 n.6).

197. *Hiibel*, 542 U.S. at 195 (Stevens, J., dissenting).

198. *Id.* at 196.

199. *Id.*

believed it seemed illogical to make the refusal to identify one's self a crime if police really did not need the information anyway.²⁰⁰

3. Dissent II

Justice Breyer, joined by Justice Souter and Justice Ginsburg delivered the second dissenting opinion.²⁰¹ This opinion focused on the numerous historical statements made by the Court over the course of decades which clearly indicated disclosure of one's identity could not be compelled during a Terry stop.²⁰² In *Terry*, Justice White wrote that in the case of an investigatory stop, "the person stopped is not obliged to answer, *answers may not be compelled, and refusal to answer [does not furnish a] basis for an arrest.*"²⁰³ Likewise, in *Brown*, the Court noted that the trial court judge said, "I'm sure [the officers conducting a Terry stop] should ask everything they possibly could find out. *What I'm asking is what's the State's interest in putting a man in jail because he doesn't want to answer . . .*"²⁰⁴ Similarly, the Court in *Berkemer v. McCarty* wrote that an "officer may ask the [Terry] detainee a moderate [amount] 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.*"²⁰⁵ In *Kolender*, Justice Breyer stated in his concurring opinion that a Terry suspect "must be free to . . . decline to answer the questions put to him."²⁰⁶

These historical statements and holdings made by the Supreme Court represent decades of established law.²⁰⁷ Justice Brennan stated he was leery of riddling a clear rule with exceptions.²⁰⁸ Thus, he felt there had been a failure by the majority in *Hiibel* to demonstrate a legitimate reason to disturb well settled law.²⁰⁹

IV. AUTHOR'S ANALYSIS

The holding in *Hiibel* represents a failure by the Court to recognize the problems associated with the enforcement of its holding. The decision also

200. *See id.*

201. *Id.* at 197 (Breyer, J., dissenting).

202. *Id.* at 197-98

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

204. *Brown v. Texas*, 443 U.S. 47, 54 (1979) (emphasis in original).

205. *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) (emphasis added).

206. *Kolender v. Lawson*, 461 U.S. 352, 365 (1983) (Brennan, J., concurring).

207. *Hiibel*, 542 U.S. at 198 (Breyer, J., dissenting).

208. *See id.* at 199.

209. *Id.* Justice Breyer asserts in his dissent that historical precedents established by the Court are "while technically dicta. . .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. There is no good reason now to reject this generation-old statement of the law." *Id.* at 198.

exemplifies the continuing emergence of Justice Thomas as a man whose words and personal history diverge in a way that defies explanation. Logic dictates that many facets of the enforcement of “stop and identify” statutes will be problematic and that the new *Hiibel* police power will give law enforcement officers unfettered reign to utilize such laws in discriminatory ways.

One issue presented by the Court’s examination of the *Hiibel* case is its seeming failure to appreciate the problematic applications of its holding. In conducting its Fourth Amendment analysis, the Court observed that “[t]he reasonableness of a seizure under the Fourth Amendment is determined ‘by balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate government interests.’”²¹⁰ The Court held that the statute at issue satisfied this standard and was therefore constitutional because it had “an immediate relation to the purpose, rationale, and practical demands of a *Terry* stop.”²¹¹ The majority declared that allowing compelled disclosure of one’s name, even in the absence of probable cause, “promotes the strong government interest in solving crimes and bringing offenders to justice.”²¹² These statements raise the following question: how is the government’s interest in solving crimes or bringing offenders to justice served by compelling disclosure of information that will do neither except in rare circumstances?

It is important to emphasize that there is absolutely nothing contained in the subject statute which would prevent an individual from providing a law enforcement officer with a false name or giving other false information while the officer is exercising the *Hiibel* powers. Requiring one to provide some type of documentation to verify the information provided would be an obvious safeguard, but the Court was clearly not prepared to interpret the statute as sanctioning such a requirement.²¹³ While Nevada Statute § 171.123(3) does require a suspect to disclose his name under the proper circumstances, the statute also expressly mandates that a suspect “may *not* be compelled to answer any other inquiry of any peace officer.”²¹⁴ Thus, when one considers that all that is required by the statute is disclosure of a name, and that answers

210. *Id.* at 187-88 (quoting *Delaware v. Prouse*, 440 U.S. 648, 654 (1979)).

211. *Id.* at 188.

212. *Id.* at 186 (citing *United States v. Hensley*, 469 U.S. 221, 229 (1985)).

213. *See Hiibel*, 542 U.S. at 185. The United States Supreme Court noted that “the Nevada Supreme Court has interpreted NRS § 171.123(3) to require only that a suspect disclose his name.” *Id.* The Nevada Supreme Court expressly stated that “[t]he suspect is not required to provide private details about his background, but merely to state his name to an officer when reasonable suspicion exists.” *Hiibel v. Sixth Judicial Dist. Court ex rel. County of Humbolt*, 59 P.3d 1201, 1206 (Nev. 2002). The United States Supreme Court continued by asserting that “the statute does not require a suspect to give the officer a driver’s license or any other document. Provided that the suspect either states his name or communicates is to the officer by other means . . . the statute is satisfied and no violation occurs.” *Hiibel*, 542 U.S. at 185 (citing *Hiibel*, 59 P.3d at 1206-07).

214. NEV. REV. STAT § 171.123 (2003) (emphasis added).

to other questions or the production of identity documents cannot be demanded, it is unclear how the statute effectively promotes the policy objective of crime prevention.

Justice Kennedy suggested that public policy objectives are furthered by “stop and identify” statutes because knowledge of a suspect’s identity may actually exculpate a suspect and allow for a more prudent expenditure of limited investigatory resources.²¹⁵ However, it seems clear that mere knowledge of one’s identity, without more, would almost never be sufficient to eliminate that person as a suspect. Obviously, if an individual can demonstrate he is the victim of the crime being investigated, that should be adequate to disqualify him as a suspect. However, from a practical standpoint, merely stating one’s name and claiming to be the victim of the crime being investigated would not be adequate to exculpate a subject. Certainly, some form of verification, or identification, such as a driver’s license, would be required by the law enforcement officer. It is difficult to imagine a situation where a police officer would simply take a suspect’s word for the proposition that he was an innocent victim without requiring more in the way of additional facts or evidence.

As noted, documentation confirming one’s identity is not required by the statute in question.²¹⁶ As the majority stated, “the statute does not require a suspect to give the officer a driver’s license or any other document.”²¹⁷ Thus, it appears, contrary to the holding of the Court, a mere statement of one’s identity will virtually never be enough to absolve an individual who is the target of a criminal investigation. Accordingly, compelled disclosure of identity does not truly serve the purposes the Court says it does. Essentially,

215. *Hiibel*, 542 U.S. at 186 (“[K]nowing identity may help clear a suspect and allow the police to concentrate their efforts elsewhere.”).

216. *See* NEV. REV. STAT. § 171.123 (2003).

217. *Hiibel*, 542 U.S. at 185. Several other jurisdictions have enacted statutes similar to NEV. REV. STAT. § 171.123, which mandate that a suspect must identify himself but do not require the production of identity documents. *See* ARK. CODE ANN. § 5-71-213 (1997); DEL. CODE ANN. tit. 11 § 1321(6) (2001); FLA. STAT. ANN. § 856.021 (West 2001); FLA. STAT. ANN. § 901.151(2) (West 2001); GA. CODE ANN. § 16-11-36 (2003); N.H. REV. STAT. ANN. § 644:6 (1996); N.M. STAT. § 30-22-3 (2004); VT. STAT. ANN. TIT. 24, § 1983 (2004). Some jurisdictions have enactments which require a suspect to disclose both his name and address but do not require the production of identity documents. *See* ALA. CODE § 15-5-30 (1995); CAL. PENAL CODE § 647(e) (West 1999); DEL. CODE ANN., tit. 11, § 1902 (2001); 725 ILL. COMP. STAT. ANN. 5/107-14 (LexisNexis 2000); KAN. STAT. ANN. § 22-2402(1) (1995); LA. CODE CRIM. PROC. ANN. art. 215.1(A) (2003); ST. PAUL MN, LEGIS. CODE § 225.11 (2005), *available at* <http://www.stpaul.gov/code/lc225.html>; MO. ANN. STAT. § 84.710 (West 1998); MONT. CODE ANN. § 46-5-401(2)(a) (2005); NEB. REV. STAT. § 29-829 (1995); N.H. REV. STAT. ANN. § 594:2 (2003); N.Y. CRIM. PROC. LAW § 140.50(1) (McKinney 2004); N.D. CENT. CODE § 29-29-21 (1991); R.I. GEN. LAWS § 12-7-1 (2002); UTAH CODE ANN. § 77-7-15 (2003); WIS. STAT. ANN. § 968.24 (West 1998).

the Court has disregarded the absence of safeguards to prevent one from providing false information and has overestimated the usefulness of a suspect's name absent further verification. The majority failed to recognize, or at least failed to discuss or explain, this problematic application of its holding.

The Court further held that providing a name to police officers served the legitimate interest of crime prevention because the disclosure alone might alert the officer that the suspect is wanted for another, unrelated crime.²¹⁸ Such reasoning overlooks the protections afforded to citizens by the Fifth Amendment's prohibition against self incrimination. Mandating disclosure because disclosure alone may inform police that the suspect is wanted in connection with another crime would seem to clearly violate the protections afforded by the Fifth Amendment.²¹⁹ Thus, the logic employed by the Court is contradictory in that the very justification that is used to argue that the statute does not violate the Fourth Amendment necessarily involves a violation of the Fifth Amendment. Additionally, for the purposes of the Fourth Amendment, the Court maintained that knowledge of a suspect's identity was essential to prevent crime and to promote the safety of police officers.²²⁰ This knowledge was found to be so important that the Court held the policy interests promoted by requiring disclosure outweighed any infringement on a suspect's individual liberties.²²¹ Alternatively, for purposes of the Fifth Amendment, the Court held that knowledge of a suspect's identity was largely inconsequential and was likely to be useful only in "unusual circumstances."²²² Thus, the Court's assessment of the usefulness of one's name changed in order to accommodate its own analysis.²²³

It is difficult to correlate the position that policy favors upholding the statute because compelled disclosure may warn police of the suspect's involvement in unrelated crimes with the fact that the majority expressly

218. *Hiibel*, 542 U.S. at 186.

219. See U.S. CONST. amend. V; see also *Hiibel* 542 U.S. at 199 (Breyer, J., dissenting) ("[A] name itself . . . will sometimes provide the police with 'a link in the chain of evidence needed to convict the individual of a separate offense.'"); *Hoffman v. United States*, 341 U.S. 479, 480, 486 (1951) (citing *Blau v. United States*, 340 U.S. 159 (1950)) (noting that any communication which facilitates a prosecution implicates the Fifth Amendment). Presumably, this would include communications that would aid a conviction of an unrelated offense as well. Cf. *Hoffman*, 341 U.S. at 486-87.

220. See *Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177, 186-88 (2004).

221. *Id.* at 188.

222. *Id.* at 191.

223. For a more detailed discussion of the inconsistent nature of the Court's assessment of the usefulness of a name, see M. Christine Klein, *A Bird Called Hiibel: The Criminalization of Silence*, 2004 CATO SUP. CT. REV. 357 (2004), available at <http://www.cato.org/pubs/scr/docs/2004/birdcalledhiibel.pdf> (last visited Feb. 17, 2006).

declined to address the constitutionality of such a scenario.²²⁴ Justice Kennedy noted that “a case may arise where there is a substantial allegation that furnishing identity at the time of a stop would have given the police a link in the chain of evidence needed to convict the individual of a separate offense.”²²⁵ However, the majority failed to discuss what the appropriate remedy would be in such a case and ignored this issue entirely.²²⁶ What about the “unusual”²²⁷ case where a subject must choose between sanctions under a “stop and identify” statute and incriminating himself? The Court suggests that suspects situated like *Hiibel* should be able to articulate how disclosure of one’s identity could be used against such person.²²⁸ However, it is apparent that any sufficient explanation in this context would *necessarily* be incriminating.

The Court’s holding in *Hiibel* creates the type of dilemma the Fifth Amendment was designed to avoid. Scenarios will inevitably arise wherein a suspect must either maintain silence and be prosecuted pursuant to a “stop and identify” statute or disclose his identity and expose himself to possible sanctions via an incriminating statement. *Hiibel*’s case is distinguishable from other situations where silence can result in criminal sanctions, because in such situations, there is a determination made that the compelled testimony will not be used against the individual, even if it is incriminating.

The Court’s holding in *Hiibel* essentially mandates that police officers must make a determination concerning the incriminating nature of the disclosure of a suspect’s identity. From a practical standpoint, it is impossible for police to accurately make such a determination during a *Terry* stop because Police will have no way of knowing whether the disclosure will “furnish a link in the chain of evidence needed to prosecute” until *after* the disclosure has been made.²²⁹ In such a case, what would be an appropriate remedy? When one’s name may serve to incriminate the suspect, and an officer demands that the suspect reveal it, what should occur thereafter? Although the Court declined to address this issue, it seems unlikely that the Court would allow the suspect to avoid prosecution for the underlying case. Therefore, in the interest

224. *Hiibel*, 542 U.S. at 191 (Justice Kennedy acknowledges that a scenario where disclosure would bolster a conviction for a unrelated offense, but asserts “[w]e need not resolve those questions here.”).

225. *Id.*

226. *Id.* (“In that case, the court can then consider whether the privilege applies, and, if the Fifth Amendment has been violated, what remedy must follow.”).

227. *Id.* at 179.

228. *See id.* at 190. (“[P]etitioner’s refusal to disclose his name was not based on any articulated real and appreciable fear that his name would be used to incriminate him . . . [e]ven today, petitioner does not explain how the disclosure of his name could have been used against him in a criminal case.”).

229. *Id.*

of justice, it would seem fundamental that when it is unclear if any statement made by a suspect would be incriminating, we should proceed under the presumption that it would be in order to be consistent the spirit of the Fifth Amendment.

When the Court announced that the subject statute satisfied its balancing test because it had “an immediate relation to the purpose, rationale, and practical demands of a *Terry* stop,” it appeared to disregard the justification for the *Terry* exception.²³⁰ It is important for one to consider the reasons and rationale behind permitting such an intrusion in the first place. In *Terry*, the Court allowed police to perform a frisk of a suspect in the absence of probable cause in order to protect the safety of the officer.²³¹ The Court was careful to emphasize that a seizure in the absence of probable cause for arrest is justified only if the officer suspects that a subject is armed and dangerous.²³² The purpose of the statute at issue in the instant case, however, seems to be to arm police with a means, which would not otherwise be available, to gather information. The purpose is not to promote the safety of the officer, as in *Terry*.²³³ Giving a name, where one was previously unknown, will not provide probable cause for an arrest, unless the name itself is incriminating or unless it leads to other evidence that is incriminating. This seemingly is what the Fifth Amendment was intended to guard against.

Another question that the majority left unanswered was what constitutes a refusal to identify oneself. Must a person use words that are unequivocal, such as “I refuse” or “I will not,” or can the refusal simply be a matter of hesitancy or equivocation? If a subject responds to an identification request by asking questions, can that be interpreted by law enforcement officers as a refusal to identify? Suppose an individual, after refusing to give his name and after being arrested, changes his mind and voluntarily reveals his identity. Is the individual still subject to arrest? Is he still subject to being confined in jail? Is he still subject to prosecution? Normal principles of criminal law would dictate the answer to all of these questions should be in the affirmative. Surely, no one would advance the argument that one who voluntarily returns stolen property after his arrest should be released or should be able to escape prosecution.

Unlike in the instant case, the exercise of the new *Hiibel* police power will not always involve a videotape of the events, nor will it involve individuals captured on that videotape refusing unequivocally, on multiple occasions, to

230. *Hiibel*, 542 U.S. at 187-88 (quoting *Delaware v. Prouse*, 440 U.S. 648, 654 (1979)).

231. See *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (“[T]his type of case leads us to . . . permit a reasonable search for weapons for the protection of the police officer.”)

232. *Id.* An officer may not subject a *Terry* detainee to a frisk unless the officer suspects that the suspect is armed or fears for his safety. *Id.*

233. See Klein, *supra* note 223, at 366 (noting that “[t]he exigencies that justify a weapons search simply do not arise in the case of compelled identification”).

identify themselves. Rather, it logically follows that the most frequent use of this new law enforcement tool will involve situations where no videotape is made or available. Is it reasonable to believe that an arrest will take place if, and only if, there are multiple unequivocal refusals by an individual to identify himself?

The Court's holding has far-reaching consequences for law-abiding citizens. Once an officer has procured the requisite probable cause for arrest, the protections of the Fifth Amendment are implicated.²³⁴ Additionally, *Miranda v. Arizona* mandates that police are required to apprise suspects of their rights once they are placed under arrest.²³⁵ The holding in *Hiibel* creates a regime where law enforcement officers may compel speech from citizens who are not under arrest.²³⁶ It seems illogical for a court to now hold that a police officer is required to advise a suspect of his right to remain silent only after that officer has first compelled that suspect to make what is an incriminating statement. In this sense, the Court's holding rewards the officer who is subjectively suspicious, but who has no probable cause to arrest, or even to detain an individual further.

Lastly, the *Hiibel* decision continues the emerging trend of Justice Clarence Thomas as a man whose words and actions diverge in a way that defies logic and explanation. While he has always opposed the traditional concepts of affirmative action plans, (see for example his confirmation hearing testimony under the watchful eye of Senator Arlen Specter)²³⁷ he has consistently and steadfastly expressed his opposition to, and humbling experiences with, discrimination, bigotry, and inequality.²³⁸ While the opposition of Justice Thomas to affirmative action programs may be arguably justified by his stated belief that minorities should be given a hand up rather than a hand down, no such justification can be given for his continuing propensity to join with the conservative wing of the Court in limiting or

234. See *Miranda v. Arizona*, 384 U.S. 436, 460-63 (1966).

235. *Id.* at 467-68.

236. See *Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177, 191 (2004) (Stevens, J., dissenting).

237. See *Grutter v. Bollinger*, 539 U.S. 306, 373 (2003) (Thomas, J., dissenting) ("The majority of blacks are admitted to the Law School because of discrimination, and because of this policy all are tarred as undeserving.").

238. Justice Thomas wrote the following in 1986: "I'm a black southerner. I grew up under the heel of segregation. And I have always found it offensive for the government to treat people differently from others because of the color of their skin." *Hearing of the Senate Judiciary Committee on the Nomination of Clarence Thomas to the Supreme Court*, available at <http://tinyurl.com/98bhe> [hereinafter *Nomination of Clarence Thomas*]. When reflecting on his youth, Justice Thomas said in a speech to students at Savannah College, "Not a day passed that I was not pricked by that ever-present trident of prejudice." Nancy Langston, *Clarence Thomas: A Method in His Message?*, available at <http://college.holycross.edu/studentorgs/hcprelaw/clarence.html>.

denying individual liberties. It is particularly troubling when this propensity ends in decisions that will result in the disproportionate enforcement against minorities.

By its decision in *Hiibel*, the majority has given a free and unfettered rein to law enforcement officers to arrest individuals who refuse to reveal their names under what can only be described as less than definitive circumstances. What facts, as per the subject statute, give rise to a reasonable belief that one “is about to commit a crime?” Is it reasonable for an officer to believe that a African American man found on the streets of an all white neighborhood at 1:00 a.m. is about to commit a crime? Is there any doubt but that the newly created *Hiibel* power will be disproportionately utilized against African Americans and other minorities? Contrary to what Justice Thomas may believe, this new power will not be predominantly utilized against white men in the rural areas of a western state, as was the case in *Hiibel*. Rather, logic and intuition dictate that “stop and identify” statutes will be subject to discriminatory enforcement in inner city areas.

Did Justice Thomas really become a lawyer to change the illegitimate and dishonest practices he saw while growing up in the South? Did he really become a lawyer to make sure that minorities were not denied access to society?²³⁹ Does he really believe that there should be aggressive enforcement of civil rights so as to protect individual rights?²⁴⁰ If so, it is suggested that Mr. Justice Thomas consider implementing these principles in the decision-making process he utilizes as a member of this country’s highest Court. Mr. Justice Thomas brings with him to the Supreme Court a perspective and background, which are unlike those of any other member of the Court. His perspective and background are such that one would logically believe he would do all he could to eliminate those societal practices and circumstances which foster discrimination and which sanction a disproportional loss of individual rights. It is unfortunate that Justice Thomas declined to take advantage of the opportunity presented in *Hiibel* to address these issues.

V. CONCLUSION

The Court’s holding in *Hiibel* represents an important development in the history of constitutional law. Sadly, the Court has decided against protecting individual liberty by expanding the exception to the probable cause

239. At his confirmation hearing for the position he held prior to his appointment to the Supreme Court, Justice Thomas testified, “The reason I became a lawyer was to make sure that minorities, individuals who did not have access to this society, gained access.” *Nomination of Clarence Thomas*, *supra* note 238.

240. At his confirmation hearing, Justice Thomas stated he believed that “equality is the basis for aggressive enforcement of civil rights laws and equal opportunity laws designed to protect individual rights.” *Id.*

requirement found in *Terry* and by upholding a law with problematic applications. Without question, a line of cases will arise where our courts will have to decide whether they will sanction the expansion of the investigative authority of our police at the further expense of individual liberties, or whether established Constitutional principles should prevail. Eventually, some court will have to decide a case where a suspect was faced with the choice of self incrimination or the imposition of criminal penalties under a “stop and identify” statute. Hopefully, the Supreme Court will heed the warning issued by one of our nation’s founding fathers over two hundred years ago: “Those who would give up essential liberty, to purchase a little temporary safety, deserve neither liberty nor safety.”²⁴¹

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241. BENJAMIN FRANKLIN, PENNSYLVANIA ASSEMBLY: REPLY TO THE GOVERNOR (1756), reprinted in 6 THE PAPERS OF BENJAMIN FRANKLIN, APRIL 1, 1755 THROUGH SEPTEMBER 30, 1756, at 242 (Leonard Labree et al. eds., 1963).

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