

3-22-2005

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### Recommended Citation

E. M. Estrada, *Criminalizing Silence: Hiibel and the Continuing Expansion of the Terry Doctrine*, 49 St. Louis U. L.J. (2005).

Available at: <https://scholarship.law.slu.edu/lj/vol49/iss2/3>

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**CRIMINALIZING SILENCE: *HIIBEL* AND THE CONTINUING  
EXPANSION OF THE *TERRY* DOCTRINE**

E. MARTIN ESTRADA\*

I. INTRODUCTION

It has not gone unnoticed that the *Terry* doctrine has expanded well beyond its original delimitations as set forth by the Supreme Court in 1968.<sup>1</sup> Whereas a *Terry* stop was originally conceived as a narrow exception to the requirement that all governmental seizures be accompanied by probable cause—a nominally innocuous “stop and frisk”—the Supreme Court and its lower-court counterparts have since granted police officers broad arrest-like powers in executing a *Terry* stop. These powers include the authority to move suspects and their passengers to different locations, detain suspects for extended periods of time, handcuff and point weapons at suspects, and force suspects to lie prone on the ground.<sup>2</sup> This expansion has been criticized as a pernicious broadening of police investigatory powers by some,<sup>3</sup> while heralded as an important means of allowing for effective law enforcement by others.<sup>4</sup>

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1. *United States v. Perdue*, 8 F.3d 1455, 1464 (10th Cir. 1993) (stating that “[t]he last decade . . . has witnessed a multifaceted expansion of *Terry*.”); *United States v. Chaidez*, 919 F.2d 1193, 1198 (7th Cir. 1990) (stating that in recent years, the *Terry* doctrine has “expanded beyond [its] original contours, in order to permit reasonable police action when probable cause is arguably lacking.”); Robert Weisberg, *A New Legal Realism for Criminal Procedure*, 49 BUFF. L. REV. 909, 913 (2001) (observing that “the courts have found ample help in *Terry* in expanding search-and-detention power.”); Gregory Howard Williams, *The Supreme Court and Broken Promises: The Gradual but Continual Erosion of Terry v. Ohio*, 34 HOW. L.J. 567, 578 (1991) (arguing that subsequent Supreme Court cases have led to “the ultimate destruction of *Terry* as conceived by its creators.”).

2. *See infra* Part II.B.

3. *See* David A. Harris, *Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality under Terry v. Ohio*, 72 ST. JOHN’S L. REV. 975, 1013

In *Hiibel v. Sixth Judicial District Court of Nevada*,<sup>5</sup> the Court, by holding that officers could compel suspects detained pursuant to a lawful *Terry* stop to identify themselves without violating the constitutional protections afforded by the Fourth Amendment, wrote another chapter in the *Terry* doctrine's unyielding expansion. *Hiibel*, however, is not a mere furtive advance of the *Terry* doctrine. Rather, it represents a sea change in our understanding of the very nature of a *Terry* stop.<sup>6</sup> Unlike prior *Terry*-stop cases, *Hiibel* extends the *Terry* doctrine over terrain previously considered sacrosanct and absolute: the right not to speak. Although the Court has chiefly addressed the right to not speak through the guise of the First Amendment, the Court in earlier days had indicated that a key premise underlying its creation of the *Terry* doctrine and its complicity in the *Terry* doctrine's expansion was that officers would not be permitted to compel speech. The *Hiibel* Court's departure from the traditional right to not speak evinces the stark metamorphosis that the *Terry* stop has undergone since its original, limited inception.

In favoring governmental law enforcement interests over core individual privacy interests, the *Hiibel* decision may be the doctrinal flood waters precipitating a slippery slope of eroding Fourth Amendment rights, predicted and feared by dissenting Justices in previous *Terry* doctrine cases. *Hiibel* discards earlier *Terry* search limitations that tethered searches and seizures to officer safety and ensured that all investigations would be as respectful of privacy interests as possible. With *Hiibel*, the *Terry* stop is evolving into a far more encompassing constitutional creation than originally contemplated by the

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(1998) (discussing the dangers in lower courts' "increasing use of broad categorical judgments in place of particularized, individual suspicion" in applying the *Terry* doctrine); Tracey Maclin, *When the Cure for the Fourth Amendment is Worse than the Disease*, 68 S. CAL. L. REV. 1, 35 (1994) (stating that *Terry*'s "narrow exception has been stretched and distorted so that government intrusions are now permitted in a variety of contexts that have nothing to do with the safety of patrol officers or the circumstances at issue in *Terry*."); Williams, *supra* note 1, at 583–84 (stating that due to the *Terry* doctrine's expansion, race continues to be a divisive factor in police-community relations).

4. See Stephen A. Saltzburg, *Terry v. Ohio: A Practically Perfect Doctrine*, 72 ST. JOHN'S L. REV. 911, 951–52 (1998) (lauding the clarity of the *Terry* doctrine as developed in subsequent Supreme Court cases); Christo Lassiter, *The Stop and Frisk of Criminal Street Gang Members*, 14 NAT'L BLACK L.J. 1, 21–22 (1995) ("The expansion of *Terry* to include greater invasions of Fourth Amendment liberty interests in privacy and property quite properly reflect a changing panorama in the deteriorating mores in society and its crime fighting needs.").

5. 124 S. Ct. 2451 (2004).

6. See Shaun B. Spencer, *Nevada Case Threatens to Expand Terry Stops*, 48 BOSTON B. J. 27, 28 (2004) (stating, prior to the Court's issuance of *Hiibel*, that to accept any of Nevada's arguments in favor of permitting officers to compel a detained individual to identify herself "would effect the most dramatic expansion in the *Terry* doctrine's thirty-five-year history."); David L. Hudson, Jr., *'Nevada Cowboy' Loses Privacy Showdown*, A.B.A. J. E-Report, June 25, 2004 (presenting contrasting attorney views describing *Hiibel* as either "a grave loss for privacy or an important victory for the police.").

Court in *Terry*. As such, the Court has critically altered the *Terry* doctrine landscape and further widened the Fourth Amendment hinterland that lies between freedom and traditional arrest.

This article seeks to highlight *Hiibel*'s significance in expanding the *Terry* doctrine.<sup>7</sup> Part II provides some important background to *Hiibel*: the *Terry* doctrine's inception and the Court's later expansion of the *Terry* doctrine. Part III briefly outlines the legal history of "stop and identify" statutes and discusses their triumph in *Hiibel*. Part IV discusses *Hiibel*'s conflict with the right not to speak under the First Amendment and Fourth Amendment and argues that *Hiibel* undercuts a central premise in the Court's creation of the *Terry* doctrine—that officers would not be permitted to compel speech during a *Terry* encounter. Part V addresses the *Hiibel* Court's minimization of the weapon-based rationale for searches and seizures that featured so prominently in *Terry* and later cases. This part also argues that *Hiibel* greatly expands the peculiar legal gap between freedom and arrest now occupied by *Terry*. Part VI proposes an approach to curbing the erosion on individual rights through Fourth Amendment reasonableness analysis—properly valuing privacy interests. Part VII concludes.

## II. THE BACKDROP: *TERRY* AND THE REMARKABLE EXPANSION OF THE *TERRY* DOCTRINE

### A. *The Terry Doctrine's Humble Beginning*

In *Terry v. Ohio*,<sup>8</sup> the Warren Court confronted the constitutionality of a "stop and frisk" investigation, a law-enforcement technique in which an officer temporarily detains and searches a suspect without probable cause.<sup>9</sup> As a preliminary matter, the Court rejected the contention that a "stop and frisk"

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7. This article does not analyze the Fifth Amendment aspects of *Hiibel*. *Miranda* issues, though, were an important feature of the decision. See *Hiibel*, 124 S. Ct. at 2460–61 (discussing the inapplicability of *Miranda* to the compelled statements at issue), and *id.* at 2463 (Stevens, J., dissenting) (stating that "the compelled statement at issue in this case is clearly testimonial" and thus protected by the Fifth Amendment).

8. 392 U.S. 1 (1968).

9. The Court's notion of what a "stop and frisk" encompassed was far from naive. The Court described a "stop and frisk" as a "procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised." *Id.* at 16–17. Eschewing delicacy, the Court went into further detail on the intricacies of a "stop and frisk": "Consider the following apt description: '[T]he officer must feel with sensitive fingers every portion of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet.'" *Id.* at 17 n.13 (quoting L.L. Priar & T.F. Martin, *Searching and Disarming Criminals*, 45 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 481, 481 (1954)).

investigation falls wholly outside the purview of the Fourth Amendment.<sup>10</sup> “[W]henver a police officer accosts an individual and restrains his freedom to walk away,” the Court stated, “he has ‘seized’ that person.”<sup>11</sup> Furthermore, the Court described the conclusion that a police pat-down is not a search as “nothing less than sheer torture of the English language.”<sup>12</sup> The Court recognized that even frisking an individual’s outside clothing for weapons “constitutes a severe, though brief, intrusion upon cherished personal security,” and “an annoying, frightening, and perhaps humiliating experience.”<sup>13</sup>

Nevertheless, the Court modified its previous Fourth Amendment jurisprudence,<sup>14</sup> and analyzed the police officer’s conduct under the “Fourth Amendment’s general proscription against unreasonable searches and seizures,”<sup>15</sup> a method that involved a balancing of the governmental interests in the search and seizure against the invasion of privacy entailed by the search and seizure.<sup>16</sup> Given the societal importance of allowing police officers to investigate nascent criminal activity and the physical dangers inherent in confronting suspected criminals in the streets, the Court opined that it was reasonable under the Fourth Amendment for officers to briefly detain individuals suspected of criminal conduct for investigatory purposes and

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10. Professor Corinna Barrett Lain has pointed out that neither the State nor its amicus curiae supporters raised the contention that a “stop and frisk” is not covered by the Fourth Amendment during *Terry*’s litigation before the Supreme Court. Rather, they argued that the “stop and frisk” at issue was justified by something approximating reasonable suspicion. Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court’s Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1442–43 (2004). The Court itself suggested that this position was put forward by the Ohio Court of Appeals. *Terry*, 392 U.S. at 16 n.12.

11. *Terry*, 392 U.S. at 16.

12. *Id.*

13. *Id.* at 24–25.

14. Commentators have described the *Terry* Court’s determination that a “stop and frisk” is covered under the Fourth Amendment, yet not subject to the requirements of the Warrant Clause, as a compromise. E.g., Tracey L. Meares & Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733, 777 (2000) (stating that in *Terry*, the Court sided with neither the State nor the defense); David A. Harris, *Frisking Every Suspect: The Withering of Terry*, 28 U.C. DAVIS L. REV. 1, 12–13 (1994) (describing *Terry* as “a series of compromises”); Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1269 (1990) (stating that in *Terry*, “[t]he Court attempted to satisfy everybody with its ends-oriented decision.”); Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383, 422 (1988) (describing the *Terry* decision as a “general compromise”). *But see* Lain, *supra* note 10, at 1443 (arguing that *Terry* was not truly a compromise between opposing positions on whether the Fourth Amendment applies to a “stop and frisk,” but instead was “a profoundly pro-law enforcement decision that gave to the police almost all they had asked of the Court”).

15. *Terry*, 392 U.S. at 20.

16. *Id.* at 20–21.

search the outside of their clothing for weapons: “[W]e cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest.”<sup>17</sup> At the same time, however, the Court circumscribed police authority to detain and frisk individuals without probable cause, characterizing its holding as establishing “narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer.”<sup>18</sup> Only where an officer is possessed of a reasonable suspicion that “criminal activity may be afoot” and has a “reasonable fear for his own or others’ safety”<sup>19</sup> may the officer pat-down the suspect, and even then “the officer’s action [must be] reasonably related in scope to the circumstances which justified the interference in the first place.”<sup>20</sup> The Court stressed that the “sole justification” for the instant search was “the protection of the police officer and others nearby,” and it was therefore necessary that the frisk of the suspect be correspondingly confined to detecting weapons.<sup>21</sup>

Concurring in the opinion, Justice White cautioned that the Court’s approval of the “stop and frisk” in *Terry* should not be understood to signal an erosion of existing Fourth Amendment protections. While noting that “[t]here is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets[,]” Justice White stressed that a suspect does not forfeit her right to not speak merely by virtue of her having raised the reasonable suspicion of an officer.<sup>22</sup> Even during a *Terry* stop, the Fourth Amendment protected a suspect from being compelled to answer an officer’s inquiries: “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.”<sup>23</sup>

In *Dunaway v. New York*,<sup>24</sup> the Court elucidated its holding in *Terry*. The Court explained that central to its approval of the “stop and frisk” at issue in *Terry* was its determination that “the intrusion involved in a ‘stop and frisk’ was so much less severe than that involved in traditional ‘arrests[.]’”<sup>25</sup> It was willing in *Terry* to suspend the Fourth Amendment’s probable cause requirement for seizures with respect to a “stop and frisk” because of a *Terry* stop’s “less intrusive” qualities.<sup>26</sup> The narrow exception to the probable cause

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17. *Id.* at 24.

18. *Id.* at 27.

19. *Id.* at 30.

20. *Terry*, 392 U.S. at 20.

21. *Id.* at 29.

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

23. *Id.*

24. 442 U.S. 200 (1979).

25. *Id.* at 209.

26. *Id.* at 210.

requirement was justified in *Terry* and later *Terry* doctrine cases, the Court stated, “only because these intrusions fell far short of the kind of intrusion associated with an arrest.”<sup>27</sup> Given this summary of the *Terry* doctrine, the Court held in *Dunaway* that the officers departed from the “narrowly defined intrusions involved in *Terry* and its progeny” by removing the defendant to an interrogation room in a police station.<sup>28</sup>

#### B. *Terry’s Great Push Forward*

Since *Terry* and *Dunaway*, the Court has continued to stress that *Terry* represents a “limited exception” to the general rule that a seizure must be justified by probable cause and to emphasize the differences between a *Terry* stop and a traditional arrest.<sup>29</sup> The Court in *United States v. Place*, en route to holding that a ninety-minute seizure of luggage went beyond the limits of a *Terry* stop and thus rendered a subsequent property seizure unconstitutional, noted that “the *Terry* exception to the probable-cause requirement is premised on the notion that a *Terry*-type stop of the person is substantially less intrusive of a person’s liberty interests than a formal arrest.”<sup>30</sup> Similarly, in *Illinois v. Wardlow*, the Court explained that the risk of detaining innocent individuals through a *Terry* stop is an acceptable risk precisely because a *Terry* stop falls far short of an arrest: “The *Terry* stop is a far more minimal intrusion, simply allowing the officer to briefly investigate further. If the officer does not learn facts rising to the level of probable cause, the individual must be allowed to go on his way.”<sup>31</sup>

Yet, despite its repeated representations that *Terry* stops are limited in scope and constitute a far less intrusive breed of seizure than an arrest supported by probable cause, the Court has steadily expanded the authority of officers to impose upon individual liberties during a *Terry* encounter. In *Pennsylvania v. Mimms*, officers effecting a routine traffic stop for an expired license plate ordered Mimms to exit his car and stand alongside it.<sup>32</sup> After Mimms exited his vehicle, officers frisked him and discovered a concealed weapon.<sup>33</sup> Observing that it was undisputed that the officers were entitled under *Terry* to briefly detain the vehicle, the Court held that the “additional intrusion” of further ordering Mimms out of his automobile could “only be described as *de minimis*.”<sup>34</sup> Justice Marshall criticized the majority’s *de minimis* approach as a sharp departure from *Terry*’s requirement that any

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27. *Id.* at 212.

28. *Id.* at 213.

29. *Florida v. Royer*, 460 U.S. 491, 498 (1983).

30. 462 U.S. 696, 705 (1983).

31. 528 U.S. 119, 126 (2000).

32. 434 U.S. 106, 107 (1977) (per curiam).

33. *Id.*

34. *Id.* at 111.

intrusion on an individual's personal liberty be accompanied by individualized suspicion.<sup>35</sup> The reasons for the officers' initial seizure of *Mimms*, Justice Marshall pointed out, had "no relation at all" to the officers' order that he exit the car to be frisked.<sup>36</sup> Justice Stevens similarly accused the majority opinion of eviscerating the requirement of individualized suspicion and "leav[ing] police discretion utterly without limits."<sup>37</sup> Justices Marshall's and Stevens' sober forewarning that *Mimms* would lead to a slippery slope of *Terry* doctrine expansion proved prescient. The Court temporarily expanded the scope of a *Terry* stop in *Michigan v. Summers*, where it held that a *Terry* stop may extend in duration beyond the brief time period approved of in *Terry* itself.<sup>38</sup> In *Maryland v. Wilson*, the Court extended *Mimms* to hold that officers may order passengers as well as drivers out of vehicles detained pursuant to *Terry*.<sup>39</sup> Although the Court acknowledged that "there is not the same basis for ordering the passengers out of the car as there is for ordering the driver out," in light of concerns for officer safety, the Court—echoing its *de minimis* approach in *Mimms*—held that "the additional intrusion on the passenger is minimal."<sup>40</sup>

Building upon the Court's flexible approach to *Terry*, the lower courts have taken license to expand the scope of a *Terry* stop far "beyond [*Terry*'s] original contours."<sup>41</sup> This expansion has been "multifaceted" and broad.<sup>42</sup> Officers executing a *Terry* stop may now handcuff a suspect and draw their weapons in the suspect's direction,<sup>43</sup> force a suspect to lie prone,<sup>44</sup> and move a

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35. *Id.* at 113 (Marshall, J., dissenting).

36. *Id.* at 114.

37. *Mimms*, 434 U.S. at 122 (Stevens, J., dissenting). Another key fault in the majority opinion cited by Justices Marshall and Stevens was the manner in which the Court adjudicated *Mimms*: in a per curiam summary reversal, without oral argument, and solely on the basis of certiorari papers. *See id.* at 114 (Marshall, J., dissenting), 116 (Stevens, J., dissenting).

38. 452 U.S. 692, 700 & n.12 (1981).

39. 519 U.S. 408, 415 (1997).

40. *Id.* at 414–15. Justice Stevens, joined by Justice Kennedy, again dissented, cautioning that the Court's holding unwarrantedly expanded the scope of *Terry* stops by allowing an officer to order car passengers out of a vehicle without any individualized suspicion that the passenger poses a risk to the officer. *Id.* at 416 (Stevens, J., dissenting).

41. *United States v. Chaidez*, 919 F.2d 1193, 1198 (7th Cir. 1990).

42. *United States v. Perdue*, 8 F.3d 1455, 1464 (10th Cir. 1993). *See also* Mark A. Godsey, *When Terry Met Miranda: Two Constitutional Doctrines Collide*, 63 *FORDHAM L. REV.* 715, 728–733 (1994) (discussing the *Terry* doctrine's expansion within the lower courts).

43. *United States v. Vargas*, 369 F.3d 98, 102 (2d Cir. 2004) (stating that use of handcuffs did not transform *Terry* stop into arrest since such force was "reasonable under the circumstances"); *United States v. Navarrete-Barron*, 192 F.3d 786, 789–91 (8th Cir. 1999) (holding that officers did not exceed limits of *Terry* stop by drawing weapons and handcuffing suspect whom they suspected was armed); *Alexander v. County of Los Angeles*, 64 F.3d 1315, 1320 (9th Cir. 1995) ("It is well settled that when an officer reasonably believes force is necessary to protect his own safety or the safety of the public, measures used to restrain individuals, such as stopping them at gunpoint and handcuffing them, are reasonable."); *United*



suspect to a different location.<sup>45</sup> As a practical matter, therefore, a modern *Terry* stop bears little resemblance to the “stop and frisk” at issue in *Terry* itself.<sup>46</sup> In fact, a *Terry* stop is oftentimes scarcely distinguishable from a traditional arrest.<sup>47</sup> As the Seventh Circuit has observed, “[f]or better or for worse, the trend has led to the permitting of the use of handcuffs, the placing of suspects in police cruisers, the drawing of weapons and other measures of force more traditionally associated with arrest than with investigatory detention.”<sup>48</sup>

The *Terry* doctrine’s rapid expansion within the lower courts is hardly surprising in light of the Court’s creation in *Terry* of a boundless “reasonable suspicion” standard—a standard established by facts observed by an officer and inferences derived from those facts that, considered as a whole, “reasonably warrant [the] intrusion.”<sup>49</sup> While the Warrant Clause previously controlled Fourth Amendment analysis,<sup>50</sup> with *Terry*, subjective

States v. Crittendon, 883 F.2d 326, 329 (4th Cir. 1989) (use of handcuffs to prevent suspect from fleeing did not automatically convert *Terry* stop into an arrest).

*But see* United States v. Miles, 247 F.3d 1009, 1012 (9th Cir. 2001) (“Under ordinary circumstances, drawing weapons and using handcuffs are not part of a *Terry* stop.”); United States v. Acosta-Colon, 157 F.3d 9, 18 (1st Cir. 1998) (stating “that the use of handcuffs, being one of the most recognizable indicia of traditional arrest, ‘substantially aggravates the intrusiveness’ of a putative *Terry* stop.”).

44. United States v. Tilmon, 19 F.3d 1221, 1227–28 (7th Cir. 1994) (“When a suspect is considered dangerous, requiring him to lie face down on the ground is the safest way for police officers to approach him, handcuff him and finally determine whether he carries any weapons.”); Courson v. McMillian, 939 F.2d 1479, 1492–93 (11th Cir. 1991) (acceptable to make suspect lie prone on the ground during a *Terry* stop); United States v. Jacobs, 715 F.2d 1343, 1346 (9th Cir. 1983).

45. United States v. Gori, 230 F.3d 44, 56 (2d Cir. 2000) (stating that “it is well established that officers may ask (or force) a suspect to move as part of a lawful *Terry* stop.”); Halvorsen v. Baird, 146 F.3d 680, 684–85 (9th Cir. 1998) (approving of officers forcibly moving a *Terry* suspect from one location to another); United States v. Vega, 72 F.3d 507, 515 (7th Cir. 1995); United States v. Blackman, 66 F.3d 1572, 1576–77 (11th Cir. 1995).

46. See Harris, *supra* note 3, at 1021 (stating that “the Supreme Court of 1968 . . . might not recognize *Terry* as lower courts apply it.”).

47. See Omar Saleem, *The Age of Unreason: The Impact of Reasonableness, Increased Police Force, and Colorblindness on Terry “Stop and Frisk,”* 50 OKLA. L. REV 451, 452 (1997) (stating that the line between a *Terry* stop and an arrest has become blurred and “[t]his blur is the result of the lower courts expansion of the *Terry* decision and the Supreme Court’s reliance on an artificial reasonableness standard and colorblind constitutionalism.”); Godsey, *supra* note 42, at 733 (“*Terry* stops—as a whole—have become much more intrusive than they were just a few years ago. It is commonplace for these investigatory detentions to involve handcuffs, drawn weapons, the lying-prone position, the removing of the suspects to police cruisers, and other forms of force that used to be appropriate only for full-scale arrests.”).

48. *Tilmon*, 19 F.3d at 1224–25.

49. *Terry v. Ohio*, 329 U.S. 1, 21 (1968).

50. Sundby, *supra* note 14, at 386–91 (describing predominance of the Warrant Clause prior to *Terry*).

reasonableness “emerged as the central Fourth Amendment mandate and touchstone,”<sup>51</sup> engendering “a whole new benchmark of individualized suspicion.”<sup>52</sup> Although commentators differ in their evaluation of the ascent of reasonableness analysis via *Terry*,<sup>53</sup> even calling for a more explicit proportionality approach to determining whether a search runs afoul of the Fourth Amendment,<sup>54</sup> it is clear that the reasonable suspicion standard lends itself to broad applicability.<sup>55</sup> What we are left with, then, is a haphazard, yet one-directional, broadening of police authority during a *Terry* stop.

The growing similarity of a *Terry* stop to an arrest is unsettling. The courts have made clear that the constitutional safeguards afforded to an individual during an arrest are diluted in the *Terry*-stop context. First and foremost, the standard of proof necessary to justify a *Terry* stop is far less burdensome: reasonable suspicion rather than probable cause. Although the probable cause requirement is by no means a substantial investigative hurdle,<sup>56</sup> reasonable suspicion requires far fewer objective observations to justify a seizure. Whereas probable cause requires information justifying a reasonable belief that a crime has been committed by the person seized,<sup>57</sup> a reasonable suspicion for

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51. Akhil Reed Amar, *Terry and Fourth Amendment First Principles*, 72 ST. JOHN'S L. REV. 1097, 1098 (1998).

52. Sundby, *supra* note 14, at 397.

53. Compare Amar, *supra* note 51, at 1118–20 (approving of *Terry*'s role in establishing reasonableness as the central Fourth Amendment measuring stick, partly because of the standard's malleability in governing a “vast and protean set of governmental action”), with Scott E. Sundby, *An Ode to Probable Cause: A Brief Response to Professors Amar and Slobogin*, 72 ST. JOHN'S L. REV. 1133, 1136 (1998) (favoring Fourth Amendment analysis with probable cause as the centerpiece and stating that “[a] broadly defined reasonableness balancing test . . . largely places the citizen's Fourth Amendment fate in the hands of others.”).

54. See generally Christopher Slobogin, *Let's Not Bury Terry: A Call for Rejuvenation of the Proportionality Principle*, 72 ST. JOHN'S L. REV. 1053 (1998) (calling for a proportionality approach to the Fourth Amendment such that the lawfulness of a particular search and seizure is analyzed by weighing the degree of invasiveness of the search against the strength of the governmental interests involved); Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1 (1991).

55. See *infra* notes 57–62 and accompanying text.

56. See *United States v. DiNapoli*, 8 F.3d 909, 915 (2d Cir. 1993) (characterizing probable cause as a low standard of proof); Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951, 996 (2003) (stating that probable cause is a “percentage nestled somewhere between .01% and 51%.”); Paul Wake, *Helping Children Through the Juvenile Justice System: A Guide for Utah Defense Attorneys*, 15 BYU J. PUB. L. 31, 47 n.68 (2000) (describing probable cause as a “low standard”).

57. Although there is no rigid formulation of probable cause, this general definition has been applied by the Court. See *Zurcher v. Stanford Daily*, 436 U.S. 547, 557 n.6 (1978) (“[P]robable cause for arrest requires information justifying a reasonable belief that a crime has been committed and that a particular person committed it . . . .”) (internal quotation marks omitted). Other definitions roughly follow this formulation. See, e.g., *United States v. Fladten*, 230 F.3d 1083, 1085 (8th Cir. 2000) (“Probable cause exists when, given the totality of the circumstances,

*Terry* purposes requires only a “minimal level of objective justification for making the stop.”<sup>58</sup> Reasonable suspicion can be established by information that is “different in quantity or content than that required to establish probable cause,” and that is “less reliable.”<sup>59</sup> The Court has noted that “‘reasonable suspicion’ is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence.”<sup>60</sup> Further, the Court has made clear that courts are to give deference to a police officer’s inferences of reasonable suspicion drawn from her law enforcement experiences<sup>61</sup> and that reviewing courts must give “due weight to inferences drawn from those facts by resident judges and local law enforcement officers.”<sup>62</sup> The layers of deference make it difficult to second-guess an initial finding of reasonable suspicion.<sup>63</sup> Considering the relatively flimsy objective basis needed to justify a determination that reasonable suspicion exists and the deference to be accorded that determination, *Terry*’s reasonable suspicion standard can hardly be deemed insurmountable.<sup>64</sup>

Moreover, in *Berkemer v. McCarty*, the Court noted that the “comparatively nonthreatening character” of *Terry* stops “explains the absence of any suggestion in our opinions that *Terry* stops are subject to the dictates of *Miranda*.”<sup>65</sup> Based on this statement in *Berkemer*, courts have held that officers are generally not obligated to give suspects *Miranda* warnings during a

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a reasonable person could believe there is a fair probability that contraband or evidence of a crime would be found in a particular place.”); *United States v. Naugle*, 997 F.2d 819, 823 (10th Cir. 1993) (stating that “probable cause merely requires that the facts available to the officer would warrant a man of reasonable caution in the belief that certain items may be . . . useful as evidence of a crime”) (internal quotation marks omitted); *Hopkins v. City of Sierra Vista*, 931 F.2d 524, 527 (9th Cir. 1991) (“Probable cause requires ‘a reasonable belief, evaluated in light of the officer’s experience and the practical considerations of everyday life,’ that a crime has been, is being, or is about to be committed.”) (quoting *United States v. George*, 883 F.2d 1407, 1412 (9th Cir. 1989)).

58. *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000).

59. *Alabama v. White*, 496 U.S. 325, 330 (1990).

60. *Wardlow*, 528 U.S. at 123. See also *United States v. Arvizu*, 534 U.S. 266, 274 (2002) (stating reasonable suspicion “falls considerably short of satisfying a preponderance of the evidence standard”).

61. *Arvizu*, 534 U.S. at 273; *Ornelas v. United States*, 517 U.S. 690, 700 (1996).

62. *Ornelas*, 517 U.S. at 699.

63. Cf. Frank Rudy Cooper, *The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and Arvizu*, 47 VILL. L. REV. 851, 889–93 (2002) (discussing the levels of discretion afforded a finding of reasonable suspicion on appellate review).

64. See Martin H. Belsky, *Random vs. Suspicion-Based Drug Testing in the Public Schools—A Surprising Civil Liberties Dilemma*, 27 OKLA. CITY U. L. REV. 1, 19 (2002) (stating that “[t]he courts will most likely accept any articulated basis for a showing of reasonableness.”); William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2170 (2002) (stating that “*Terry*’s requirements are easily met.”).

65. 468 U.S. 420, 440 (1984).

*Terry* stop in order to render a suspect's answers to interrogation admissible during trial.<sup>66</sup> In contrast, *Miranda* warnings are generally obligatory for admitting the fruit of a post-arrest interrogation.<sup>67</sup> Rendering *Miranda* inapplicable to *Terry* stops substantially augments the peril to personal liberty created by *Terry*'s expansion since a broader realm of police investigatory conduct is shielded from *Miranda* protections.<sup>68</sup>

Accordingly, the courts have overseen a steady expansion of the *Terry* doctrine. Although police authority during a *Terry* stop still bears significant restrictions,<sup>69</sup> it is clear that the *Terry* doctrine had evolved far beyond its original conceptualization as a narrow exception to the probable cause requirement.<sup>70</sup> *Hiibel* represents a salient step in the *Terry* doctrine's continuing expansion.

### III. THE RISE, STUMBLE, AND TRIUMPH OF "STOP AND IDENTIFY" STATUTES

*Hiibel* involved the constitutionality of a state "stop and identify" statute.<sup>71</sup> A "stop and identify" statute typically requires that when a police officer detains an individual under suspicion of criminal activity, the individual must

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66. *United States v. Pelayo-Ruelas*, 345 F.3d 589, 592 (8th Cir. 2003) (stating that "most *Terry* stops do not trigger the detainee's *Miranda* rights."); *United States v. Trueber*, 238 F.3d 79, 92 (1st Cir. 2001) (stating that *Terry* stops do not generally implicate *Miranda*); *United States v. Leshuk*, 65 F.3d 1105, 1109–10 (4th Cir. 1995); *United States v. Burns*, 37 F.3d 276, 281 (7th Cir. 1994); *but see United States v. Newton*, 369 F.3d 659, 673 (2d Cir. 2004) (stating that whether an individual is "in custody" for *Miranda* purposes is a separate inquiry from whether a seizure is unreasonable under *Terry*); *United States v. Kim*, 292 F.3d 969, 976 (9th Cir. 2002); *United States v. Perdue*, 8 F.3d 1455, 1464–65 (10th Cir. 1993).

In *Hiibel*, the Court held that the State did not violate *Hiibel*'s Fifth Amendment rights by compelling him to give his identity during the *Terry* stop but declined to address the issue of whether such an action could ever violate the Fifth Amendment. *See* 124 S. Ct. 2451, 2461 (2004).

67. *See Missouri v. Seibert*, 124 S. Ct. 2601, 2608 (2004) (plurality opinion) ("[F]ailure to give [*Miranda*] warnings and obtain a waiver of rights before custodial questioning generally requires exclusion of any statements obtained."); *Jackson v. Giurbino*, 364 F.3d 1002, 1008 (9th Cir. 2004) ("Miranda rights vest in the context of custodial interrogations."); *United States v. Johnson*, 56 F.3d 947, 955 (8th Cir. 1995) (*Miranda* warnings mandatory for post-arrest interrogation).

68. *See Godsey*, *supra* note 42, at 747–48 (stating that the expansion of *Terry* creates a constitutional dilemma by narrowing the realm of seizures affected by *Miranda*).

69. A *Terry* stop requires articulable facts justifying an "objective justification for making the stop," not merely a hunch that criminal activity has occurred. *See Wardlow v. Illinois*, 528 U.S. 119, 123 (2000). Furthermore, although there is no defined time limit for a *Terry* stop, the Court has stated that the length of a detention can convert a *Terry* stop into an arrest. *United States v. Place*, 462 U.S. 696, 709–10 (1983).

70. *See supra* note 1 and accompanying text.

71. 124 S. Ct. at 2456.

provide the officer with some form of identification.<sup>72</sup> “Stop and identify” statutes are an outcropping of common law vagrancy and loitering provisions,<sup>73</sup> laws that were intended to deter “idlers” from engaging in criminal activity and to create a source of cheap labor for regional land owners.<sup>74</sup> The modern source of the various state manifestations of the “stop and identify” requirement is the Uniform Arrest Act of 1941, an illustrative precursor to the *Terry* doctrine, which provides that an officer may detain any person “who he has reasonable grounds to suspect is committing, has committed, or is about to commit a crime, and may demand of him his name, address, business abroad and whither he is going[.]” and that failure to provide identification authorizes further detention.<sup>75</sup>

Prior to *Hiibel*, the Supreme Court’s treatment of “stop and identify” statutes was critical. In *Brown v. Texas*, the Court reversed a conviction under a Texas “stop and identify” statute where the defendant had refused to identify himself after officers detained him without any specific suspicion of wrongdoing.<sup>76</sup> Because the initial seizure was “not based on objective criteria” and thus created “the risk of arbitrary and abusive police practices,” the Court held that application of the Texas “stop and identify” statute at issue violated the Fourth Amendment.<sup>77</sup> The Court, however, expressly reserved the question of “whether an individual may be punished for refusing to identify himself in

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72. See 1 JOSEPH G. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED § 3:7 (3d ed. 1996) (stating that “stop and identify” statutes authorize “the detention of individuals under suspicious circumstances and require the person so detained to provide identification and an explanation for his or her conduct”). See also *Hiibel*, 124 S. Ct. at 2456 (citing various state “stop and identify” statutes).

73. *Hiibel*, 124 S. Ct. at 2456; Alan D. Hallock, Note, *Stop-and-Identify Statutes After Kolender v. Lawson: Exploring the Fourth and Fifth Amendment Issues*, 69 IOWA L. REV. 1057, 1059 n.18 (1984) (stating that “[t]he origin of modern stop-and-identify statutes can be traced to vagrancy and loitering provisions”).

74. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 161–62, 161 n.4 (1972) (noting that vagrancy laws were a remnant of archaic feudal laws designed to discourage movement of workers and to prevent idlers from engaging in criminal activity); Ahmed A. White, *A Different Kind of Labor Law: Vagrancy Law and the Regulation of Harvest Labor, 1913–1924*, 75 U. COLO. L. REV. 667, 677–78 (2004) (stating that English vagrancy laws held “labor-regulating functions” by forcing the poor to work while preventing them from traveling in search of better wages); Joel D. Berg, Note, *The Troubled Constitutionality of Antigang Loitering Laws*, 69 CHI.-KENT L. REV. 461, 462–64 (1993) (discussing the history of English vagrancy laws and stating that vagrancy laws of the Eighteenth Century, upon which American models were based, were designed to prevent crime and to put able bodies to work).

75. UNIF. ARREST ACT OF 1941 § 2, reprinted in Sam B. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 320–21 (1942). See also COOK, *supra* note 72, at § 3.7 n.66 (quoting section 2 of the Act).

76. 443 U.S. 47, 49 (1979).

77. *Id.* at 52–53.

the context of a lawful investigatory stop which satisfies Fourth Amendment requirements.”<sup>78</sup>

Thereafter, the Court in *Kolender v. Lawson* invalidated a conviction under California’s “knock and announce” statute making it a misdemeanor for anyone “[w]ho loiters or wanders upon the streets” to refuse “to identify himself and to account for his presence” upon an officer’s request.<sup>79</sup> Because the California state courts had interpreted the statute to require that an individual present “credible and reliable” identification, the Court held that the California statute was unconstitutionally vague in that it failed “to establish standards by which the officers may determine whether the suspect has complied with the subsequent identification requirement.”<sup>80</sup> Again, the Court declined to reach the issue of whether compelling an individual to identify herself runs afoul of the Fourth Amendment.<sup>81</sup>

Justice Brennan, concurring in the decision, however, did address the Fourth Amendment challenge, and he did so unfavorably to the “stop and identify” requirement. “States,” he concluded, “may not authorize the arrest and criminal prosecution of an individual for failing to produce identification or further information on demand by a police officer.”<sup>82</sup> This conclusion, Justice Brennan stated, followed from the strict limitations the Court had imposed on *Terry* stops, including Justice White’s concurring statement in *Terry* that “refusal to answer furnishes no basis for an arrest.”<sup>83</sup> While acknowledging that compelling suspects to identify themselves would serve important law enforcement interests, Justice Brennan opined that “the balance struck by the Fourth Amendment between the public interest in effective law enforcement and the equally public interest in safeguarding individual freedom and privacy from arbitrary governmental interference” weighed against expanding police power in this manner.<sup>84</sup>

With *Brown* and *Kolender*, combined with Justice White’s concurrence in *Terry*, the constitutionality of “stop and identify” statutes hovered in doubt.<sup>85</sup> Not surprisingly, following the Court’s issuance of these decisions, some lower courts determined that officers were forbidden under the Fourth Amendment

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78. *Id.* at 53 n.3.

79. 461 U.S. 352, 353–54, 353 n.1 (1983) (quoting CAL. PENAL CODE § 647(e) (1970)).

80. *Id.* at 361.

81. *Id.* at 361 n.10.

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

83. *Id.* at 364–65 (Brennan, J., concurring) (quoting *Terry v. Ohio*, 392 U.S. 1, 34 (1968) (White, J., concurring)).

84. *Kolender*, 461 U.S. at 365 (Brennan, J., concurring).

85. Hallock, *supra* note 73, at 1075–80 (discussing uncertain constitutionality of the “stop and identify” requirement).

from compelling individuals to identify themselves during *Terry* encounters.<sup>86</sup> Others, noting that the Supreme Court had reserved the issue, held otherwise,<sup>87</sup> or deemed the issue unsettled.<sup>88</sup>

With the precedential indications signaling the imminent demise of “stop and identify” statutes, the Court dramatically changed course in *Hiibel*, where it resolved the lower-court split in favor of the constitutionality of “stop and identify” statutes. The facts in *Hiibel*, taken from the Court’s opinion, relate an unremarkable occurrence. After receiving an afternoon telephone call reporting a possible roadside assault, a sheriff’s deputy was dispatched to investigate.<sup>89</sup> The deputy discovered a man, later identified as Hiibel, on a Nevada road standing alongside his truck while a young woman (Hiibel’s daughter) sat inside the truck’s cabin.<sup>90</sup> The deputy approached Hiibel, who appeared to be intoxicated, in order to investigate the criminal report.<sup>91</sup> It was undisputed that the deputy possessed reasonable suspicion to detain Hiibel based on the domestic assault report. During the course of the encounter, the deputy requested that Hiibel produce identification. Hiibel refused and asked why the officer wanted his identification, to which the deputy responded that he was conducting an investigation. Thereafter, Hiibel refused the officer’s repeated requests for identification.<sup>92</sup> Instead, Hiibel placed his hands behind his back, challenging the officer to arrest him and take him to jail. Unfortunately for Hiibel, the officer accepted his challenge and arrested him.<sup>93</sup>

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86. *Carey v. Nevada Gaming Control Bd.*, 279 F.3d 873, 881 (9th Cir. 2002) (holding that under the Fourth Amendment, officers may not “compel[] an individual to identify himself during a *Terry* stop”); *Martinelli v. City of Beaumont*, 820 F.2d 1491, 1494 (9th Cir. 1987) (holding that “arrest[ing] a person for refusing to identify herself during a lawful *Terry* stop violates the Fourth Amendment’s proscription against unreasonable searches and seizures.”); *Timmons v. City of Montgomery*, 658 F. Supp. 1086, 1093 (M.D. Ala. 1987) (agreeing with Justice Brennan and the Ninth Circuit that compelling identification violates the Fourth Amendment); *State v. White*, 640 P.2d 1061, 1069 (Wash. 1982) (holding, based on Justice White’s concurrence in *Terry*, that “a detainee’s refusal to disclose his name, address, and other information cannot be the basis of an arrest.”).

87. *Oliver v. Woods*, 209 F.3d 1179, 1189 (10th Cir. 2000) (holding that because officers were constitutionally permitted to ask for identification, officers did not violate the Constitution by arresting Oliver for failing to present identification in violation of a Utah “stop and identify” statute); *Hiibel v. Sixth Judicial Dist. Ct. ex rel. Humboldt*, 59 P.3d 1201, 1206 (Nev. 2002) (holding that because “[s]uch an invasion is minimal at best[,]” officers did not violate the Fourth Amendment in arresting an individual for failing to identify himself during a *Terry* stop).

88. At least four circuits had held, based on the Supreme Court’s reservation of the issue, that the right to refuse to identify oneself during a *Terry* stop is not clearly established. See *Risbridger v. Connelly*, 275 F.3d 565, 572 (6th Cir. 2002) (discussing circuit positions).

89. 124 S. Ct. 2451, 2455 (2004). See also *Hiibel*, 59 P.3d at 1203 (recounting facts).

90. 124 S. Ct. at 2455.

91. *Id.*

92. *Id.*

93. *Id.*

Hiibel was later convicted of resisting a public officer by not identifying himself as required under section 171.123 of the Nevada Revised Statutes, a “stop and identify” statute which provides that any person lawfully detained by an officer “shall identify himself.”<sup>94</sup>

Applying Fourth Amendment reasonableness analysis and balancing Hiibel’s individual privacy interests against the State’s law-enforcement-related interests in coercing him to identify himself, the Court determined that the scales tipped in the State’s favor. The Court noted that “[a]sking questions is an essential part of police investigations,” and that its prior decisions “make clear that questions concerning a suspect’s identity are a routine and accepted part of many *Terry* stops.”<sup>95</sup> Compelling an individual to identify himself during a *Terry* stop, the Court stated, serves important governmental interests because “[k]nowledge of identity may inform an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder.”<sup>96</sup> In the specific context at issue, a domestic violence investigation, the Court observed that officers “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.”<sup>97</sup>

The Court devoted little discussion to the other end of the balancing test, individual privacy interests, except to state that “the Nevada statute does not alter the nature of the stop itself.”<sup>98</sup> Its dour view of the privacy interests implicated by “stop and identify” statutes was revealed in the opinion’s discussion of the Fifth Amendment issues: “Answering a request to disclose a name is likely to be so insignificant in the scheme of things as to be incriminating only in unusual circumstances.”<sup>99</sup> Tipping the balance in favor of the State, the Court concluded that the Fourth Amendment was not offended when the deputy arrested Hiibel for failing to identify himself.<sup>100</sup>

*Hiibel*’s holding is not without potential limitations. The Court pointed out that the Nevada statute requires only that a suspect divulge her name and that it did not understand the statute to compel a suspect to turn over any documentation, including a driver’s license.<sup>101</sup> This may indicate that the Court would not look favorably upon a statute that compels a *Terry* suspect to disclose more information than a name or to produce some sort of documentation. Furthermore, the Court stressed that the identification

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94. NEV. REV. STAT. § 171.123 (2003).

95. *Hiibel*, 124 S. Ct. at 2458 (citing *United States v. Hensley*, 469 U.S. 221, 229 (1985); *Hayes v. Florida*, 470 U.S. 811, 816 (1985); *Adams v. Williams*, 407 U.S. 143, 146 (1972)).

96. *Id.*

97. *Id.*

98. *Id.* at 2459.

99. *Id.* at 2461.

100. *Hiibel*, 124 S. Ct. at 2461.

101. *Id.* at 2457.



requirement did not alter the duration or location of the detention,<sup>102</sup> and that the request for identification had to be “reasonably related to the circumstances justifying the stop.”<sup>103</sup> It should be noted, however, that these are questionable limitations. After all, it is difficult to imagine when compelling answers to other inquiries, such as destination or residency, will ever significantly affect the duration or location of a *Terry* stop. Also, under the Court’s broad view of the governmental interests furthered by identification, including advancing the investigation and allowing an officer to assess the dangerousness of the suspect, compelling identification will almost always be “reasonably related to the circumstances justifying” a *Terry* stop. Thus, at this point it remains an open question how a more intrusive “stop and identify” statute would fare before the Court.

There is little doubt that the Court’s approach in *Hiibel* lends itself to broader applicability. Given the Court’s emphasis on the importance of permitting police questioning and investigation, and its rather dismissive posture towards individual privacy interests, it would not be surprising if, extending *Hiibel*, the Court were to approve of a more searching “stop and identify” statute.<sup>104</sup> With *Hiibel*, then, the Court delivered “stop and identify” statutes their long awaited legal triumph. This was no small feat considering the shroud of constitutional uncertainty surrounding “stop and identify” statutes following *Brown* and *Kolender*. In so doing, the *Hiibel* Court effected a dramatic moment in the expansion of the *Terry* doctrine, and, in the process, jarred the previously stalwart notion of an absolute right to not speak in public.

#### IV. *HIIBEL* AND THE RIGHT TO NOT SPEAK

##### A. *The First Amendment*

The Court in *Hiibel* did not explicitly address the First Amendment’s role in a *Terry* stop, and the Court’s First Amendment decisions are distinct from its cases analyzing the Fourth Amendment. Nonetheless, it is instructive that in authorizing police officers to compel answers to questions regarding identification, *Hiibel*’s outcome stands at odds with the well-established First Amendment right to not speak. That the robust constitutional tradition of protecting the right to not speak was not heeded in *Hiibel* suggests a potential weakening in the right, at least at the margins of constitutionally protected speech. *Hiibel*’s conflict with the right to not speak is more telling, however, in demonstrating how great an expansion of police power the decision

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102. *Id.* at 2459.

103. *Id.*

104. *See infra* notes 169–72 and accompanying text (discussing possible extensions of *Hiibel*).

represents. In order to appreciate this, it is helpful to consider the solid body of precedential authority buttressing the right to not speak.<sup>105</sup>

In *West Virginia State Board of Education v. Barnette*, the Court entertained a challenge to a West Virginia statute requiring, under threat of criminal prosecution, that teachers and students participate in a patriotic salute honoring the United States and its flag.<sup>106</sup> The Court summed up the issue at hand: “[W]e are dealing with a compulsion of students to declare a belief. . . . The issue here is whether this slow and easily neglected route to aroused loyalties constitutionally may be short-cut by substituting a compulsory flag salute and slogan.”<sup>107</sup>

The Court answered this question in the negative, noting that the Framers recognized objections to coerced acceptance of political ideas.<sup>108</sup> Writing in the wake of political fascism’s apex and during the United States’s participation in World War II, the Court cautioned, “Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.”<sup>109</sup> Such undesirable possibilities were what the Framers feared and what the First Amendment was designed to avoid, the Court wrote.<sup>110</sup> Accordingly, West Virginia’s attempts to forcibly indoctrinate children, while more subtle, fell astray of the Constitution: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”<sup>111</sup>

In *Wooley v. Maynard*, the Court made more explicit the constitutional right to not speak developed in *Barnette*.<sup>112</sup> There, the Court held that New Hampshire acted in contravention of the Constitution in criminalizing obstruction of the state motto, “Live Free or Die,” on state license plates. En route to reaching this holding, the Court instructed that “the right of freedom of

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105. For a general overview of the First Amendment right to not speak cases, see generally KATHLEEN M. SULLIVAN & GERALD GUNTHER, *FIRST AMENDMENT LAW* 356–369 (1999); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 804–06 (2d ed. 1988); Robert D. Kamenshine, *Reflections on Coerced Expression*, 34 *LAND & WATER L. REV.* 101 (1999) (surveying development of cases). This line of authority is also referred to as the “compelled speech” doctrine. See SULLIVAN & GUNTHER, *supra*, at 356; Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts after Eldred*, 44 *Liquormart, and Bartnicki*, 40 *HOUS. L. REV.* 697, 728 (2003); James P. Madigan, *Questioning the Coercive Effect of Self-Identifying Speech*, 87 *IOWA L. REV.* 75, 101 (2001).

106. 319 U.S. 624, 626 (1943).

107. *Id.* at 631 (footnote omitted).

108. *Id.* at 633.

109. *Id.* at 641.

110. *Id.*

111. *Barnette*, 319 U.S. at 642.

112. 430 U.S. 705 (1977).

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.”<sup>113</sup> This was a fundamental tenet of the First Amendment’s broad aegis: “The right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind.’”<sup>114</sup>

The Court dispelled the notion that the right to not speak developed in *Barnette* and *Wooley* occupied secondary constitutional status in *Riley v. National Federation of the Blind*.<sup>115</sup> There, North Carolina defended its regulation of professional-fundraiser fees by contending that the First Amendment interests in compelled speech are qualitatively less significant than the interests implicated in suppressing speech, such that state-sponsored schemes compelling silence ought to be reviewed under a more deferential test.<sup>116</sup> The Court rejected this contention, stating, “There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees ‘freedom of speech,’ a term necessarily comprising the decision of both what to say and what *not* to say.”<sup>117</sup>

Significantly, the *Riley* Court noted that the First Amendment’s prohibition on compelled speech included statements of fact, as well as statements of opinion. Previous precedential authority stating that the First Amendment protects the right not to speak, the Court wrote, “cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of ‘fact’: either form of compulsion burdens protected speech.”<sup>118</sup> Thus, North Carolina’s attempts to compel communication of factual information related to professional-fundraiser fees conflicted with the constitutional right to not speak just as plainly as did New Hampshire’s attempts to compel opinion in *Wooley*.<sup>119</sup>

The prohibition against compelled speech carries over to factual information regarding identity, where the line between idea and fact becomes blurred. In *Talley v. California*, the Court held unconstitutional an ordinance requiring that a handbill distributed publically contain the name and address of

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113. *Id.* at 714.

114. *Id.* (quoting *Barnette*, 319 U.S. at 637). *Accord* Harper & Row, Publishers, Inc. v. Nation Enter., 471 U.S. 539, 559 (1985) (“There is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.”) (quoting *Estate of Hemingway v. Random House, Inc.*, 23 N.Y.2d 341, 348 (1968)).

115. 487 U.S. 781 (1988).

116. *Id.* at 796.

117. *Id.* at 796–97.

118. *Id.* at 797–98.

119. *See id.* at 798.

its sponsor.<sup>120</sup> The Court expressed its high regard for anonymity. Recalling the important role played by anonymous speech in the Revolutionary War, the Court stated that “[i]t is plain that anonymity has sometimes been assumed for the most constructive purposes.”<sup>121</sup> The Court reaffirmed the First Amendment sanctity of anonymous speech thirty-five years later in *McIntyre v. Ohio Elections Commission*.<sup>122</sup> There, the Court invalidated an Ohio election law prohibiting the distribution of anonymous leaflets in connection with political campaigns. Especially with regard to public, political speech, the Court opined that “[a]nonymity is a shield from the tyranny of the majority.”<sup>123</sup>

Through these cases and others, the Court has stressed the constitutional centrality of the right to not speak, a right that takes no second chair to the affirmative right to speak. The Court has made clear that the right to not speak is rooted in autonomy over one’s public image, as well as autonomy over one’s thoughts.<sup>124</sup> The First Amendment right to not speak recognizes factual statements,<sup>125</sup> and protects anonymity.<sup>126</sup> Thus, it would seem that, generally speaking, the First Amendment would prohibit the practice of compelling factual information of identity in public.<sup>127</sup> Until *Hiibel*, the Court’s decisions treated the right to not speak as sacrosanct and intimated no suggestion that this right might suffer erosion. Indeed, if anything, the Court’s more recent language in support of the right to not speak resonated with the righteousness of *Barnette* and *Wooley*.<sup>128</sup> *Hiibel*, though, represents a sharp departure from

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120. 362 U.S. 60, 65 (1960).

121. *Id.*

122. 514 U.S. 334 (1995).

123. *Id.* at 357.

124. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (invalidating requirement that the State motto be displayed on license plates because it would force an objector to be “a ‘mobile billboard’ for the State’s ideological message”); Kari M. Dahlin, Note, *Actions Speak Louder than Thoughts: The Constitutionally Questionable Reach of the Minnesota CLE Elimination of Bias Requirement*, 84 MINN. L. REV. 1725, 1737–39 (2000).

125. *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 797–98 (1988). *See also* Madigan, *supra* note 105, at 127 (asserting that *Riley*’s most striking aspect was its recognition that compelled statements of fact burden speech).

126. *See McIntyre*, 514 U.S. at 357.

127. The general right to refrain from answering a police officer’s questions during an ordinary police-civilian street encounter seems unperturbed by *Hiibel*. *See infra* notes 190–93 and accompanying text.

128. *See Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 481 (1997) (Souter, J., dissenting) (stating that one of the principles of the First Amendment is “that compelling cognizable speech officially is just as suspect as suppressing it, and is typically subject to the same level of scrutiny.”); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995) (“‘Since all speech inherently involves choices of what to say and what to leave unsaid,’ one important manifestation of the principle of free speech is that one who

the trend toward safeguarding the right to not speak, whether as to opinion or to fact. What this portends in the First Amendment arena remains to be seen. In the Fourth Amendment context, *Hiibel*'s departure from the right to not speak represents a turning of the tide.

*B. The Fourth Amendment*

*Hiibel*'s impact on the right to not speak cannot be dismissed by pointing out that *Hiibel* addresses only a Fourth Amendment challenge rather than a First Amendment claim. A key premise underlying the Court's creation of the *Terry* doctrine and permissive acceptance of its expansion was the idea that an individual detained during a *Terry* stop, while susceptible to a wide array of police questioning, cannot be obligated to respond to an officer's inquiries and cannot be arrested for maintaining her silence in the face of persistent questioning.<sup>129</sup> *Hiibel* is all the more significant an expansion of the *Terry* doctrine in that it parts company with the Court's earlier statements regarding compelled speech during a *Terry* encounter.

Originally, the Court's approval of the "stop and frisk" at issue in *Terry* was qualified by Justice White's caution that while officers may ask questions of the detainee, "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."<sup>130</sup> What the Court had approved in *Terry*, the White concurrence indicated, was a temporary seizure for investigative purposes and a limited search for weapons, not the annulment of the probable cause requirement.<sup>131</sup>

Justice White's words might have been marginalized more persuasively due to their concurring status had the Court not later adopted them in *Berkemer*. As support for its holding that the *Miranda* requirement bars admission of post-arrest statements made by an arrestee but not pre-arrest statements made a detainee during roadside questioning by a police officer, the Court in *Berkemer* emphasized the relatively "nonthreatening character" of a *Terry* traffic stop in comparison to a formal arrest.<sup>132</sup> One aspect of a *Terry* stop's "nonthreatening character," the Court explained, is 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

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chooses to speak may also decide 'what not to say.')

(citation omitted) (quoting *Pac. Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 11 (1986) (plurality opinion)).

129. See *Hiibel v. Sixth Judicial Dist. Ct. of Nevada*, 124 S. Ct. 2451, 2465 (2004) (Breyer, J., dissenting).

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

131. *Id.* Arguably, however, this is exactly what the Court did. See *Amar*, *supra* note 51, at 1118–20; *Sundby*, *supra* note 14, at 395.

132. See *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984).

provide the officer with probable cause to arrest him, he must then be released.”<sup>133</sup> *Berkemer* thus made clear that the right not to answer an officer’s questions is a fundamental premise in permitting officers to detain and question individuals without probable cause under *Terry*.

Given these prior statements by the Court disapproving of compelled speech in the *Terry* context, the persuasiveness of the Court’s decision in *Hiibel* turned on its ability to distinguish Justice White’s concurrence in *Terry* and *Berkemer*’s adoption of that concurrence. In this regard, the Court’s opinion came up short. First, the *Hiibel* Court summarily concluded that Justice White’s concurrence and *Berkemer*’s adoption of it were dicta and therefore not controlling.<sup>134</sup> This conclusion, however, is disputable. Under the commonly used definition, dictum is a statement “made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential.”<sup>135</sup> Arguably, the Court’s statement in *Berkemer* that a “detainee is not obliged to respond”<sup>136</sup> to an officer’s inquiries during a *Terry* stop is not dictum because it was necessary to demonstrate the “nonthreatening character” of a *Terry* stop, which the Court was analogizing to a traffic stop. The Court based its holding that a traffic stop is immune from the dictates of *Miranda* based partly on this “nonthreatening character.”<sup>137</sup> Without the statement that a detainee is not obligated to respond to an officer’s questions, the “nonthreatening character” of a *Terry* stop and traffic stop would certainly not have been as clear. Furthermore, as Justice Brennan once noted, the fact that a particular statement is dictum is not an affirmative basis for

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133. *Id.* at 439–40 (emphasis added) (citing *Terry*, 392 U.S. at 34 (White, J., concurring)).

134. 124 S. Ct. at 2459.

135. BLACK’S LAW DICTIONARY 1100 (7th ed. 1999). *See also In re Hearn*, 376 F.3d 447, 453 (5th Cir. 2004) (adopting Black’s definition of dictum); *Best Life Assurance Co. v. Comm’r*, 281 F.3d 828, 834 (9th Cir. 2002) (same).

Judge Kozinski has etched out a more limited interpretation of what constitutes dictum by defining legal precedent broadly: “[W]here a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense.” *United States v. Johnson*, 256 F.3d 895, 914 (9th Cir. 2001) (Kozinski, J., concurring). Judge Kozinski’s interpretation was adopted by at least one panel of the Ninth Circuit. *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1186 (9th Cir. 2003) (per curiam). This fact was not lost on Judge Kozinski. *See Miller v. Gammie*, 335 F.3d 889, 901 (9th Cir. 2003) (Kozinski, J., concurring). Judge Kozinski added that the Black’s definition “is now so riddled with lesions and encrustations we can never be quite sure which portions of our case law are holdings and which dicta, unless and until the Oracle at Pasadelphi tells us.” *Id.* at 901 n.1 (Kozinski, J., concurring).

136. *Berkemer*, 468 U.S. at 439.

137. *Id.* at 440.

adopting the alternative.<sup>138</sup> Indeed, in many instances, dicta and concurring opinions have later been adopted as law by the Court.<sup>139</sup>

Second, the *Hiibel* Court stated that the relevant passages in the White concurrence and *Berkemer* were not opinions as to the illegality of compelling responses to police inquiries under all circumstances, but rather they were recognitions that “the Fourth Amendment does not impose obligations on the citizen but instead provides rights against the government.”<sup>140</sup> Because the source of the identification obligation in *Hiibel* was Nevada law and not the Fourth Amendment, the Court opined that the statements in the White concurrence and *Berkemer* regarding the illegality of compelling answers from *Terry* suspects were inapposite: “As a result, we cannot view the dicta in *Berkemer* or Justice White’s concurrence in *Terry* as answering the question whether a State can compel a suspect to disclose his name during a *Terry* stop.”<sup>141</sup>

The *Hiibel* Court’s interpretation of the White concurrence and *Berkemer* rendered them redundant and nonsensical. Again, the relevant language from the White concurrence: While “[t]here is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets . . . the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest . . . .”<sup>142</sup> Under the *Hiibel* Court’s interpretation of this statement, Justice White began by discussing the Fourth Amendment as a protective mechanism (which does not prevent officers from questioning a suspect) but then sharply shifted the analytical paradigm, characterizing the Fourth Amendment as a font of obligations upon the citizen (which does not obligate citizens to answer questions). This interpretation is absurd. Even at the time *Terry* was decided, it was well-established that the Fourth Amendment functions as a restriction on

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138. *Wainwright v. Witt*, 469 U.S. 412, 455 (1985) (Brennan, J., dissenting).

139. *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (adopting the two part test for determining whether a Fourth Amendment search has occurred set forth in Justice Harlan’s concurrence in *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)); Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422, 1476-78 (1995) (discussing the Court’s adoption in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 655 (1989), of dicta written in the plurality opinion in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988), reallocating the burden of proof in Title VII cases); Gary E. Newberry, Note, *Constitutional Law: International Society for Krishna Consciousness, Inc. v. Lee: Is the Public Forum a Closed Category?*, 46 OKLA. L. REV. 155, 156 n.8 (1993) (stating that in *Commonwealth v. Davis*, 167 U.S. 43 (1897), where the Court affirmed the conviction of a preacher who had violated a city ordinance regulating speech in the Boston common, “[t]he Court adopted dicta from then Massachusetts Supreme Judicial Court Judge Oliver Wendell Holmes’ decision in the lower court.”).

140. *Hiibel v. Sixth Judicial Dist. Ct. of Nevada*, 124 S. Ct. 2451, 2459 (2004).

141. *Id.*

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

governmental invasion of individual rights, not a source of obligations upon the citizenry. One year after issuing its *Terry* opinion, the Court stated, “The Fourth Amendment to our Constitution prohibits ‘unreasonable’ governmental interference with the fundamental facet of individual liberty: ‘[t]he right of the people to be secure in their persons, houses, papers, and effects.’”<sup>143</sup> Indeed, from the founding of the nation, the Framers intended the Fourth Amendment to limit government, not the rights of the people.<sup>144</sup> The Court’s decisions have repeatedly recognized the Fourth Amendment as a protective constitutional provision.<sup>145</sup> For Justice White to have devoted his concurrence to the obvious, well-established, and somewhat trivial point that the Fourth Amendment does not compel individuals to speak would have been as odd as it was unnecessary.

This is especially evident focusing on the phrase “refusal to answer furnishes no basis for arrest.” It would follow under the *Hiibel* Court’s reading of this passage that Justice White was communicating his view that the Fourth Amendment itself furnishes no basis for arresting individuals for failing to provide identification. The Fourth Amendment, however, *never* functions as a basis for arrest. It instead restricts governmental investigations and seizures, which themselves are based on some underlying proscriptive statute.<sup>146</sup> Thus, Justice White’s statement under *Hiibel*’s interpretation would be wholly meaningless, as would *Berkemer*’s citation and adoption of Justice White’s concurrence. This is not distinguishment, but rather disfigurement. Logically, it would follow that Justice White intended to describe the Fourth Amendment in protective terms throughout his statement—to declare that the Fourth Amendment does not prohibit officers from asking questions but does protect

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143. *Alderman v. United States*, 394 U.S. 165, 202 (1969) (alteration in original). The *Hiibel* Court, itself, noted this truism. See 124 S. Ct. at 2459 (“[T]he Fourth Amendment does not impose obligations on the citizen but instead provides rights against the government.”).

144. ANN FAGAN GINGER, *THE LAW, THE SUPREME COURT AND THE PEOPLE’S RIGHTS* 378 (1977) (stating that the Framers wrote the first ten amendments with the intent to limit the new federal government that had been created); David A. Harris, *Using Race or Ethnicity as a Factor in Assessing the Reasonableness of Fourth Amendment Activity: Description, Yes; Prediction, No*, 73 MISS. L.J. 423, 438–39 (2003) (stating that the history of the Fourth Amendment reveals that it was intended to serve as a limit on arbitrary government action).

145. See *Minnesota v. Dickerson*, 508 U.S. 366, 380 (1993) (Scalia, J., concurring) (stating that the constitutional purpose of the Fourth Amendment was to preserve “respect for the privacy of persons and the inviolability of their property”); *California v. Acevedo*, 500 U.S. 565, 589 n.5 (1991) (Stevens, J., dissenting) (stating that exceptions to the warrant requirement impinge on “the protective purpose of the Fourth Amendment”) (emphasis added); *Stanford v. Texas*, 379 U.S. 476, 482 (1965) (noting that the Fourth Amendment was “the product of contemporary revulsion against a regime of writs of assistance,” and that its adoption “reflected the culmination in England a few years earlier of a struggle against oppression which had endured for centuries.”); *Weeks v. United States*, 232 U.S. 383, 390 (1914) (stating that the Court has recognized the “principle of protection” captured in the Fourth Amendment) (emphasis added).

146. See U.S. CONST. amend. IV; *supra* note 144.



suspects from being forced to answer those questions, even in the face of statutory authority to the contrary.<sup>147</sup> In rendering the White concurrence and *Berkemer*'s adoption of it illogical, the *Hiibel* Court's interpretation essentially disregards the Court's prior language in favor of its contrary conclusion.

By cavalierly distinguishing the Court's previous statements that an individual detained pursuant to *Terry* cannot be compelled to answer an officer's inquiries, the Court has disavowed a fundamental premise underlying the Court's creation and expansion of the *Terry* doctrine—that *Terry* suspects cannot be compelled to answer officer inquiries. The *Hiibel* dissent noted this in stating that, while the White concurrence and *Berkemer*'s adoption of it were “technically dicta,” they were “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.”<sup>148</sup> Furthermore, the *Hiibel* Court completely ignored Justice Brennan's concurrence in *Kolender*, in which Justice Brennan opined, based on the White concurrence, that the Fourth Amendment does not permit an officer to compel a *Terry* suspect to identify herself.<sup>149</sup> Thus, long undisturbed language disapproving of compelling speech during *Terry* stops was discarded in *Hiibel*. Had earlier members of the Court known that *Terry* suspects would one day be compelled to answer an officer's inquiries, it is altogether possible that they would not have acquiesced to the *Terry* doctrine's expansion and immunization from the safeguards accompanying arrest, such as *Miranda* warnings. By unbridling the *Terry* doctrine from its earlier restrictions, the *Hiibel* Court has thrust open the door to the *Terry* doctrine's further expansion into new Fourth Amendment frontiers.

## V. *HIIBEL* AND THE FOURTH AMENDMENT HINTERLAND

### A. *The Expansion of Searches and Seizures under Hiibel*

#### 1. An Oral Communication of Identification as a Search

The question of whether or not a search has occurred centers on privacy. In general, a search occurs when “an expectation of privacy that society is

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147. Indeed, generally, in interpreting legal language, the more logical reading is favored. See, e.g., *United States v. Errol D., Jr.*, 292 F.3d 1159, 1168 (9th Cir. 2002) (Brunetti, J., dissenting) (favoring interpretation of Major Crimes Act that is most logical); *Callas Enters., Inc. v. Travelers Indem. Co. of Am.*, 193 F.3d 952, 957 n.5 (8th Cir. 1999) (favoring logical interpretation of complaint); *Triad Assocs., Inc. v. Chicago Hous. Auth.*, 892 F.2d 583, 593 (7th Cir. 1989) (favoring logical interpretation of the Supreme Court's language).

148. *Hiibel v. Sixth Judicial Dist. Ct. of Nevada*, 124 S. Ct. 2451, 2465 (2004) (Breyer, J., dissenting).

149. See *Kolender v. Lawson*, 461 U.S. 352, 362 (1983) (Brennan, J., concurring).

prepared to consider reasonable is infringed.”<sup>150</sup> The Fourth Amendment, the Court has stated, “protects people, not places.”<sup>151</sup> What is and is not private is determined by a combination of subjective expectation and societal acceptance of that expectation.<sup>152</sup> While there is no reasonable expectation of privacy in that which is exposed to the public, “what [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”<sup>153</sup> Although oral communications of identity are not as commonly associated with search and seizure as are narcotics or documents, the Court has instructed that the Fourth Amendment’s prohibition on unreasonable searches extends to intangible oral communications irrespective of the “ancient niceties of tort or real property law.”<sup>154</sup>

Surely, many people would have no problem providing police officers with identifying information, as well as other information, upon request. The first prong of the *Katz* test, however, is subjective. So long as an individual has a personal expectation of privacy in her identifying information, part one of the *Katz* test is satisfied.<sup>155</sup> Applying the second part is more complicated—would society consider an expectation of privacy in identifying information

150. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

151. *Katz v. United States*, 389 U.S. 347, 351 (1967). Professor Sundby has proposed that the Fourth Amendment be understood as having a broader aim of fostering reciprocal trust between the citizenry and the Government, rather than merely as an outpost for privacy. Scott E. Sundby, “*Everyman’s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*,” 94 COLUM. L. REV. 1751, 1777 (1994). Focusing exclusively on privacy, he argues, makes the Fourth Amendment too speculative, “rising or falling in both scope and protection” as society’s notions of what is private have changed. *Id.* at 1758, 1760. It bears mentioning that under this citizen-government trust framework, compelling identification from a *Terry* suspect would also constitute a search since it connotes a lack of governmental regard for the dignity of the citizen in maintaining silence. Arresting an individual for not providing adequate identification sounds in totalitarianism. *Id.* at 1792–93.

152. *Katz*, 389 U.S. at 361 (Harlan, J., concurring) (“[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”).

153. *Katz*, 389 U.S. at 351.

154. *Silverman v. United States*, 365 U.S. 505, 511 (1961). *See also* *Alderman v. United States*, 394 U.S. 165, 179–80 (1969) (stating that the Fourth Amendment’s prohibition on unreasonable searches covers covert recording of oral communications); *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 304 (1967) (“The premise that property interests control the right of the Government to search and seize has been discredited.”). Courts have held various governmental confiscations of intangible material to be searches and seizures under the Fourth Amendment. *E.g.*, *Caldarola v. County of Westchester*, 343 F.3d 570, 574 (2d Cir. 2003) (images captured on videotape); *United States v. Villegas*, 899 F.2d 1324, 1334–35 (2d Cir. 1990) (images captured on photograph); *United States v. Freitas*, 800 F.2d 1451, 1456 (9th Cir. 1986) (visual inspection).

155. *See* *Bond v. United States*, 529 U.S. 334, 340 (2000); *Smith v. Maryland*, 442 U.S. 735, 740 (1979).

reasonable?<sup>156</sup> If the strong public reaction to *Hiibel* is any indication,<sup>157</sup> it seems that modern society recognizes as reasonable an expectation of privacy in identifying information. The fact that people do not readily surrender their names or identities when in public underscores this point.<sup>158</sup> The advent of mass solicitation, identity theft, and stalking crimes highlight the security and privacy interests tied to identification.<sup>159</sup> Protecting identifying information is especially valuable in the internet age where the use, and abuse, of personal information abounds.<sup>160</sup> Indeed, Congress has recognized the important individual privacy interests held in personal identifying information.<sup>161</sup> While it may be that society has not always been so protective of identifying

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156. *Smith*, 442 U.S. at 740.

157. J.D. Ducas, *Letter to the Editor*, BOSTON HERALD, June 24, 2004, at 42 (stating that with *Hiibel*, “[w]e’re beginning to resemble communist China more than freedom-loving America.”); Louis Kwall, *Supreme Court Is Chipping Away at Our Rights Series: Letters*, ST. PETERSBURG TIMES, June 24, 2004, at 15A (stating that, with *Hiibel*, “we are allowing the terrorists to win in that they are causing us to change not only our way of life, but also our core values.”); Commentary, *What’s In a Name? Police Power*, ORANGE COUNTY REG., June 22, 2004 (stating that *Hiibel* erodes Fourth Amendment protections and “is a serious undermining of privacy rights.”); Editorial, *Having to “Kowtow”*, ST. LOUIS POST-DISPATCH, June 22, 2004 (stating that the *Hiibel* decision “is just the latest of many ways in which the court has poked holes in our cherished right of privacy.”); Opinion, *Court Erodes Right to Remain Silent; Why an Exception to a Constitutional Right?*, ROCKY MTN. NEWS, June 22, 2004, at 30A (telling readers that, with *Hiibel*, “[t]he U.S. Supreme Court took away a tiny bit of your independence Monday, a little piece of the individual autonomy that sets Americans apart from the citizens of so many other nations.”). See also Editorial, *Don’t Make Criminals of Citizens Who Remain Silent*, DETROIT NEWS, Mar. 27, 2004, at 5 (prior to issuance of the *Hiibel* opinion, urging Court to side with *Hiibel*).

158. Lee Tien, *Who’s Afraid of Anonymous Speech? McIntyre and the Internet*, 75 OR. L. REV. 117, 117 (1996) (stating that people generally prize their anonymity and “selectively reveal information about [them]selves to some and withhold it from others.”); Carol Brooks Gardner, *Access Information: Public Lies and Private Peril*, 35 SOC. PROBS. 384, 387 (1988) (stating that anonymity is normal behavior that aids in our interactions, especially with strangers).

159. In fact, the Department of Justice’s public educational materials on identity theft cautions that one should “[b]e stingy about giving out your personal information to others unless you have a reason to trust them, regardless of where you are.” U.S. Department of Justice website, at <http://www.usdoj.gov/criminal/fraud/idtheft.html> (last visited Sept. 30, 2004). Although many people would not fear that police officers would misuse their information, *Hiibel*, apparently, lacked a reason to trust the sheriff’s deputy who ordered him to identify himself.

160. See Harry A. Valetk, *Mastering the Dark Arts of Cyberspace: A Quest for Sound Internet Safety Policies*, STAN. TECH. L. REV. para. 119 (2004) (stating that “as more of us become more comfortable with using the Internet for everyday activities, we become more vulnerable to new types of privacy invasions.”); Vera Bergelson, *It’s Personal but is it Mine? Toward Property Rights in Personal Information*, 37 U.C. DAVIS L. REV. 379, 422–24 (2003) (highlighting significant costs expended in protecting privacy in the internet).

161. See The Driver’s Privacy Protection Act of 1994, 18 U.S.C. §§ 2721–2725 (2004) (regulating the disclosure of personal information contained in the records of state motor vehicle departments).

information, the Court has recognized that notions of what constitute acceptable privacy interests can evolve over time, mirroring changes in societal norms.<sup>162</sup>

Furthermore, surrendering identifying information to governmental authorities is qualitatively different from giving a name to some private party (a marketer, new acquaintance, etc.). First, of course, providing a private party with identifying information is consensual, which is not the case where officers compel identification through a “stop and identify” statute. Even a successful request for identification under those circumstances would be based on “no more than acquiescence to a claim of lawful authority”<sup>163</sup> and thus be involuntary. Second, the Government has the capacity to use your name or other nonpublic identifying information to access unparalleled amounts of personal information.<sup>164</sup> The Court has indicated that while the use of technology to enhance investigatory capabilities does not automatically establish a search,<sup>165</sup> it is more likely that a search has occurred within the meaning of *Katz* when that technology is “not in general public use”<sup>166</sup> and circumvents the protections of the Fourth Amendment.<sup>167</sup> The informational databases available to governmental authorities in conducting background checks are not in general public use. Although it will be pointed out that the personal information is already stored with various governmental agencies before police officers obtain a suspect’s name, merely possessing personal information is significantly different from linking that information to a name and face. In this sense, it is important not to lose sight of the context: a

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162. See *Kyllo v. United States*, 533 U.S. 27, 33–34 (2001) (recognizing technology has affected the “degree of privacy secured to citizens by the Fourth Amendment”).

163. *Bumper v. North Carolina*, 391 U.S. 543, 548–49 (1968).

164. See *Hiibel v. Sixth Judicial Dist. Ct. of Nevada*, 124 S. Ct. 2451, 2464 (2004) (Stevens, J., dissenting) (stating that “[a] name can provide the key to a broad array of information about the person, particularly in the hands of a police officer with access to a range of law enforcement databases.”); Martin Finucane, *For Police, It’s Gun, Badge and Blackberry — Use of Hand-held Devices to Access Databases Stirs Privacy Concerns*, STAR-LEDGER (Newark, N.J.), June 25, 2004, at 10 (stating that police departments are purchasing hand-held wireless devices for use on patrols that permit officers to access “computerized dossiers on people on demand.”). The *Hiibel* Court acknowledged as much, stating that “[k]nowledge of identity may inform an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder.” 124 S. Ct. at 2458.

165. See *California v. Ciraolo*, 476 U.S. 207, 214 (1986) (stating that use of airplane to conduct search of curtilage did not establish a search); *Dow Chem. Co. v. United States*, 476 U.S. 227, 238–39 (1986) (approving of use of enhanced aerial photography of an industrial complex).

166. *Kyllo*, 533 U.S. at 40.

167. Cf. John J. Brogan, *Facing the Music: The Dubious Constitutionality of Facial Recognition Technology*, 25 HASTINGS COMM. & ENT. L.J. 65, 84–85 (2002) (arguing that when officers use facial-scanning technology to obtain personal information that would otherwise not be available to them and thus make “an end run around the Fourth Amendment[.]” a search has occurred).

criminal investigation. Officers will tie the personal information to an individual as a possible perpetrator of criminal activity. Perhaps because of the substantial personal information governmental authorities can access using a name, it is not uncommon for those who come in contact with the police, both as victims and suspects of crimes, to refuse to identify themselves.<sup>168</sup>

Considering a police officer's technological superiority in using identification to access wider information on a suspect's background, compelling a *Terry* suspect to identify herself under penalty of arrest through a "stop and identify" statute is only a few degrees removed from an officer threatening a suspect with arrest unless she opens the trunk of her car. It is an act that forces an individual to expose personal information. Not every person will consider providing identification to be substantially intrusive, just as not every person objects strongly to allowing officers to view the automobile trunk. All the same, in light of the potential to uncover sensitive information, both acts implicate expectations of privacy that society would consider reasonable.<sup>169</sup> Therefore, compelling identification during a *Terry* stop is a search and seizure under the Fourth Amendment.

## 2. Broadening a *Terry* Search and Seizure

Although it sanctions the seizure of identifying information, the *Hiibel* decision devotes little discussion to the original rationale for permitting a nonconsensual search and seizure during a *Terry* encounter: discovery of concealed weapons to protect officers. Instead, *Hiibel*'s central concern is the important investigatory interests furthered by compelled identification.<sup>170</sup> The opinion mentions officer safety only to say that investigating officers "need to know whom they are dealing with."<sup>171</sup> *Terry*, however, does not grant such wide latitude to search. In *Terry*, the Court stated that a search must "be

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168. Karen Abbott, *Warnings Precede Party Conventions; FBI, Police Visits to Young People Rile ACLU Official*, ROCKY MTN. NEWS, July 24, 2004, at 4A (reporting on Denver-area activists who refused to give their names to police officers, who in turn refused to give their names to the activists); Dan Chapman, *Give Name or Go to Jail: Court Upholds Power to Arrest*, ATLANTA J.-CONST., June 22, 2004, at A1 (discussing protestors' refusal to give names during the civil rights movement and anti-abortion demonstrations in 1988); *Law & Order*, PLAIN DEALER (Cleveland), Oct. 25, 2002, at B3 (reporting that a shooting suspect refused to give his name to police but was later identified through fingerprints); Dan Benson, *Firework Debris May Have Fallout*, MILWAUKEE J.-SENTINEL, July 11, 2002, at 3B (reporting on victim who did not want to give her name to police); *Law & Order*, STAR-LEDGER (Newark, N.J.), Mar. 29, 2002, at 35 (reporting on a robbery and assault victim who refused to give his name to police); Ed Hayward, *Several Hospitalized in Hub Following Weekend Melees*, BOSTON HERALD, Apr. 12, 1999, at 13 (reporting on weekend melees in which one injured man refused to give his name to the police).

169. See *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

170. See *Hiibel v. Sixth Jud. Dist. Ct.*, 124 S. Ct. 2451, 2458 (2004).

171. *Id.*

confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.”<sup>172</sup> In *Michigan v. Long*, the Court reaffirmed that the *Terry* doctrine permits searches intended to protect the officer, but only for the purpose of discovering weapons.<sup>173</sup> Indeed, the Court has cautioned that “[i]f the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed.”<sup>174</sup> *Terry* thus created “a limited right of ‘self defense’ for a police officer who in carrying out her duties comes across someone whom she reasonably believes is armed and dangerous.”<sup>175</sup>

*Hiibel*, though, takes a different path by advancing a non-weapons-based officer safety justification for the search and seizure: information regarding a suspect’s background. However, whatever the safety advantages afforded by compelling identification, they are too attenuated from a search for weapons to be justified under *Terry*’s weapon-based rationale for protective searches. If *Hiibel* is to serve as a blueprint for future *Terry* doctrine cases, the Court has swept aside a significant restriction on *Terry* searches. *Hiibel*, therefore, signals the arrival of a breed of *Terry* search that is far broader than the “stop and frisk” approved of in *Terry*.

Moreover, *Hiibel* makes no mention of the requirement that a *Terry* investigation be “confined in scope.”<sup>176</sup> In *Florida v. Royer*, the Court stated that in carrying out a *Terry* stop, the “investigative methods employed should be the least intrusive means reasonably available to verify . . . the officer’s suspicion in a short period of time.”<sup>177</sup> Yet, the *Hiibel* Court disregarded this admonition, instead emphasizing the de minimis aspect of the compelled identification and thus harkening to the per curiam approach in *Mimms*.<sup>178</sup> Surely, considering *Royer*’s admonition, there were less intrusive means to verify or dispel the deputy’s suspicions than forcing *Hiibel* to identify himself under penalty of arrest and prosecution.<sup>179</sup> Although a history of prior criminal acts might have indicated that *Hiibel* was statistically more likely than a person without a criminal record to engage in future criminal activity,<sup>180</sup> the presence

172. *Terry v. Ohio*, 392 U.S. 1, 29 (1968).

173. 463 U.S. 1032, 1049 (1983) (stating that under *Terry* “protection of police and others can justify protective searches”).

174. *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993).

175. Sundby, *supra* note 53, at 1135.

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

177. 460 U.S. 491, 500 (1983).

178. *Hiibel v. Sixth Jud. Dist. Ct.*, 124 S. Ct. 2451, 2461 (characterizing the disclosure of a name as vastly “insignificant in the scheme of things”).

179. There is no indication in the decision of whether the deputy attempted to question the daughter or to look for visible evidence of domestic assault.

180. JOHN MONAHAN, PREDICTING VIOLENT BEHAVIOR: AN ASSESSMENT OF CLINICAL TECHNIQUES 104–05 (1981) (concluding that violent crime in particular is the most reliable

or absence of such a record would not answer the specific investigative inquiry of whether Hiibel had committed domestic assault and thus would have required further investigation in any case. The Court, however, expressed no interest in determining whether the State's arrest and prosecution of Hiibel was the "least intrusive means reasonably available" for investigating the domestic violence report. In ignoring the rule that a *Terry* investigation be restricted in scope, *Hiibel* grants broad investigatory license to officers at the expense of *Terry* suspects.

*Hiibel* can thus be understood to represent the triumph of the de minimis approach within *Terry* jurisprudence. As manifested in *Hiibel*, the *Mimms* dissenters' fear of a precipitous slippery slope eroding the Fourth Amendment's probable cause requirement for seizures has proven prescient. Under the majority's analysis, it is no chimerical stretch to conclude that other identifying factual information such as a suspect's address, ultimate destination of travel, or residency status may be compelled in the future.<sup>181</sup> Such information has just as tangential a connection to officer safety as the name at issue in *Hiibel*. It is not hard to imagine what other sorts of investigative methods police might lawfully pursue during a *Terry* stop under the de minimis approach: fingerprinting,<sup>182</sup> demanding production of documents,<sup>183</sup>

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indication of future violent crime); Andrew R. Klein, *Re-Abuse in a Population of Court-Restrained Male Batterers: Why Restraining Orders Don't Work*, in *DO ARRESTS AND RESTRAINING ORDERS WORK?* 193–202 (Eve S. Buzawa & Carl G. Buzawa eds., 1996) (stating that age and prior criminal history are statistically significant in indicating future domestic violence); Roger C. Park, *Character at the Crossroads*, 49 *HASTINGS L.J.* 717, 721–22 (1998) ("Recidivism data, whatever its faults and shortcomings, at a minimum shows that someone who has been convicted and imprisoned for a criminal offense is many times more likely to commit a similar offense than a person chosen at random."). *Cf. id.* at 721 n.10 (noting that "prediction of future crime based on prior offenses is fraught with difficulties").

181. Based on *Hiibel*, the Fourth Circuit has already seemingly approved of compelling information regarding immigration status, though the facts given in the opinion were sparse. *United States v. Castillo-Cuevas*, No. 04-4155, slip op. at 2, 3 (4th Cir. Aug. 3, 2004) (*per curiam*).

182. The Court, in *Hayes v. Florida*, suggested in dictum that on-site fingerprinting absent probable cause is permissible under the Fourth Amendment:

There is thus support in our cases for the view that the Fourth Amendment would permit seizures for the purpose of fingerprinting, if there is reasonable suspicion that the suspect has committed a criminal act, if there is a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime, and if the procedure is carried out with dispatch.

470 U.S. 811, 817 (1985).

183. Even before *Hiibel*, some courts had approved of searching a suspect's wallet during a *Terry* stop. *E.g.*, *United States v. Garcia*, 942 F.2d 873, 877 (5th Cir. 1991) (stating that a search of a defendant's wallet during a *Terry* stop was reasonable when border patrol agents had reasonable suspicion that the defendant was an illegal alien and the defendant refused to disclose his identity or citizenship status); *People v. Loudermilk*, 241 Cal. Rptr. 208, 210, 212 (Cal. Ct. App. 1987) (permitting search of wallet during *Terry* stop). Most courts that have addressed the

skin and hair sampling,<sup>184</sup> or facial scanning.<sup>185</sup> With these sorts of investigative tactics lurking on the horizon, it becomes problematic to sincerely characterize a *Terry* stop as a “far more minimal intrusion” than a traditional arrest.<sup>186</sup>

*B. The Growing Fourth Amendment Hinterland Between Freedom and Arrest*

In first authorizing “stop and frisk” searches, the Supreme Court stressed that it was creating a limited exception to the overarching constitutional requirement that probable cause accompany any seizure and search. Since then, however, the Court has expanded the breadth of a *Terry* stop well beyond its original, limited beginnings. In this sense, the *Hiibel* decision is another step in the Court’s steady expansion of governmental power and authority during a *Terry* stop. By divorcing a *Terry* suspect from well-established constitutional rights that would otherwise be available, however, *Hiibel* is a particularly significant step in the continuing journey of *Terry* expansion. *Hiibel* deepens the chasm between ordinary street encounters with police and *Terry* stops. At the same time, *Terry* stops remain distinct from traditional arrests. *Hiibel* and its predecessors have created, through the *Terry* doctrine, a sort of Fourth Amendment hinterland permitting suspension of fundamental constitutional rights and arrest-like seizures based on reasonable suspicion alone.

The general right to not speak has developed into an entrenched constitutional right as applied to both opinion,<sup>187</sup> and fact.<sup>188</sup> In the Fourth Amendment context, the Court has observed that the right to not speak holds during ordinary police-civilian street encounters. Justice Harlan, concurring in *Terry*, opined that, just as an officer does not offend the Fourth Amendment by

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issue, however, have held that officers may not search a suspect’s wallet during a *Terry* stop. *E.g.*, *State v. Webber*, 694 A.2d 970, 972 (N.H. 1997); *Baldwin v. State*, 418 So. 2d 1219, 1220 (Fla. Dist. Ct. App. 1982); *State v. Newman*, 637 P.2d 143, 146 (Or. 1981); *Schraff v. State*, 544 P.2d 834, 851 (Alaska 1975). The *Hiibel* Court’s limiting language that it did not understand the Nevada statute to compel a suspect to turn over any documentation, *see Hiibel*, 124 S. Ct. at 2457, gives no insight into how it would rule on a *Terry* search of a wallet.

184. *See* D.H. Kaye, *The Constitutionality of DNA Sampling on Arrest*, 10 CORNELL J.L. & PUB. POL’Y 455, 461 (2001) (arguing that the Fourth Amendment does not preclude DNA sampling from arrestees, but that such a sampling system would have to “incorporate stringent controls on the scope of the information extracted from the samples and the dissemination of that information.”).

185. *See* Brogan, *supra* note 167, at 67–69 (discussing facial scanning technology and arguing that wide area facial scans are unconstitutional per se, while focused facial scans are constitutional if accompanied by reasonable suspicion).

186. *See* *Illinois v. Wardlow*, 528 U.S. 119, 126 (2000).

187. *Wooley v. Maynard*, 430 U.S. 705, 714–15 (1977).

188. *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 797–98 (1988).



addressing questions to others she encounters, “ordinarily the person addressed has an equal right to ignore his interrogator and walk away.”<sup>189</sup> Moreover, in *Florida v. Royer*, the Court noted that, absent reasonable suspicion or probable cause, an individual approached by a police officer “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.”<sup>190</sup> This remains the law, even after *Hiibel*.

Apart from ordinary police-civilian street encounters, however, the well-settled constitutional right to not speak does not apply during a *Terry* stop. Under *Hiibel*, officers may compel any person whom they reasonably suspect of unlawful activity to identify themselves.<sup>191</sup> This establishes a stark contrast of liberty rights between a *Terry* stop and non-obligatory street encounters where an individual “need not answer any question put to him.”<sup>192</sup> While *Terry* stops have always been understood to be a restriction on liberty,<sup>193</sup> the Court has described a *Terry* stop as a “minimal” and “limited” intrusion upon individual liberty.<sup>194</sup> With *Hiibel* permitting offhanded revocation of constitutional rights during a *Terry* stop, however, it cannot be said that a *Terry* stop is only a marginal imposition on personal liberty. A *Terry* stop has thus become sharply severed from ordinary street life.

At the same time, *Hiibel* maintains the increasingly untenable doctrinal divide between a *Terry* stop and a formal arrest. If the facts in *Hiibel* had occurred against the backdrop of a formal arrest, the deputy would have been required to possess probable cause and would have likely read *Hiibel* his *Miranda* warnings before forcing him to speak in order to preserve any potentially incriminating comments for trial.<sup>195</sup> Paradoxically, these additional protections were unavailable to *Hiibel* precisely because officers possessed a lesser degree of suspicion of wrongdoing and seized *Hiibel* in a manner that, in theory, is less intrusive than an arrest. Given the additional individual safeguards and procedural hurdles accompanying a formal arrest, it is not difficult to surmise that, if they had their druthers, police officers would prefer

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189. *Terry v. Ohio*, 392 U.S. 1, 32–33 (Harlan, J., concurring).

190. *Florida v. Royer*, 460 U.S. 491, 498 (1983). *See also Wardlow*, 528 U.S. at 125 (reaffirming *Royer*’s holding that “when an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business.”).

191. *Hiibel v. Sixth Jud. Dist. Ct.*, 124 S. Ct. 2451, 2458 (2004).

192. *See Royer*, 460 U.S. at 498.

193. *Terry*, 392 U.S. at 16.

194. *Wardlow*, 528 U.S. at 126 (describing a *Terry* stop as a “minimal intrusion”); *United States v. Sharpe*, 470 U.S. 675, 689 (1985) (describing a *Terry* stop as “brief and narrowly circumscribed”); *Kolender v. Lawson*, 461 U.S. 352, 366 n.4 (1983) (describing a *Terry* encounter as “limited”); *Terry*, 392 U.S. at 26 (describing a *Terry* stop as a “wholly different kind of intrusion upon individual freedom”).

195. *See Berkemer v. McCarty*, 468 U.S. 420, 434 (1984) (stating that *Miranda* warnings are required for post-arrest custodial interrogation).

to initially approach a suspect possessing only reasonable suspicion rather than probable cause.<sup>196</sup>

On the whole, then, *Hiibel* broadens the gray area, largely barren of constitutional safeguards, between freedom and arrest. A dexterous and amorphous creature, distinct from freedom and divorced from arrest, the *Terry* stop thrives in this peculiar no-man's land. With the power to suspend the fundamental constitutional right to not speak, it is clear that a *Terry* stop is far removed from the freedom an individual enjoys before arousing suspicion. On the other hand, a *Terry* stop is unburdened by the heightened proof requirements and Fifth Amendment protections applicable to a formal arrest. Considering the state of the *Terry* doctrine following *Hiibel*, it is apparent that the *Terry* stop has morphed into an existence far removed from its humble "stop and frisk" origins. With officers able to compel individuals reasonably suspected of committing a crime to identify themselves under *Hiibel*, the notion that the *Terry* doctrine might "swallow the general rule that Fourth Amendment seizures are 'reasonable' only if based on probable cause[.]"<sup>197</sup> as earlier feared by members of the Court,<sup>198</sup> is far from fanciful.

#### VI. AN ALTERNATIVE APPROACH: REVALUING INDIVIDUAL PRIVACY INTERESTS

It is apparent from the Nevada Supreme Court's opinion that the intensified post-9/11 security paradigm played a key role in the court's decision. The Nevada Supreme Court issued its decision in *Hiibel* on December 20, 2002, a little more than fifteen months following the terrorist attacks on the World Trade Center and Pentagon on September 11, 2001. In holding that the Nevada "stop and identify" statute did not violate the Fourth Amendment, the court, identifying the significant governmental interests served by compelled identification, observed, "[m]ost importantly, we are at war against enemies who operate with concealed identities and the dangers we face as a nation are unparalleled."<sup>199</sup> The court referred to the terrorist attacks of September 11th, the Washington, D.C. sniper killings, and the white-powder Anthrax scares that followed. Quoting the President, the Court stated that "[i]t cannot be stressed enough: 'This is a different kind of war that requires a different type of approach and a different type of mentality.'"<sup>200</sup> The court thus suggested that in the post-9/11 world the manner of evaluating individual

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196. Cf. Susan Bandes, *Terry v. Ohio in Hindsight: The Perils of Predicting the Past*, 16 CONST. COMMENT. 491, 494 (1999) (stating that the *Terry* doctrine's expansion has "permit[ted] numerous police practices to flourish, unaccompanied by probable cause, a warrant, or, in many cases, any level of suspicion at all.").

197. *Dunaway v. New York*, 442 U.S. 200, 213 (1979).

198. See, e.g., *Florida v. Royer*, 460 U.S. 491, 510 (1983) (Brennan, J., concurring).

199. *Hiibel v. Sixth Jud. Dist. Ct. ex rel. Humboldt*, 59 P.3d 1201, 1206 (Nev. 2002).

200. *Id.*

privacy rights under the Bill of Rights had been inexorably altered. Given the looming terrorist threat, the court would accordingly afford greater deference to police officers investigating suspicious activity during a *Terry* stop.<sup>201</sup>

Undoubtedly, the terrorist attacks of September 11th created a momentous shift in the nation's collective security outlook. Significant measures were taken both internationally and domestically to address the terrorist threat, including the creation of an executive agency, the Department of Homeland Security, which subsumed and reorganized previously existing administrative agencies and is charged with coordinating domestic security.<sup>202</sup> Although the Supreme Court's *Hiibel* opinion did not refer to the September 11th terrorist attacks, the United States, arguing as amici in support of Nevada, noted the Nevada Supreme Court's reference to the 9/11 terrorist attacks and mentioned identification of persons on terrorist "watch lists" as an important justification for the Nevada "stop and identify" statute.<sup>203</sup> Whether the terrorist attacks of September 11th affected the Court's decision in *Hiibel* is unknown. Clearly, however, the dramatic post-9/11 shift in governmental attitudes towards security did not pass unnoticed.<sup>204</sup> That the traumatic events of September 11th would affect the balancing of governmental interests and privacy interests in evaluating the validity of a Fourth Amendment claim is understandable and permissible.<sup>205</sup> The more perilous security conditions brought to light by the terrorist attacks, however, do not justify broad infringements on the individual rights secured by the Constitution.<sup>206</sup> In this sense, the Court's comments over

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201. *Id.*

202. See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002) (current version at 6 U.S.C. § 101 (2004)).

203. Brief of Amicus Curiae United States Supporting Respondent at 14-15, *Hiibel v. Sixth Jud. Dist. Ct.*, 124 S. Ct. 2451 (2004) (No. 03-5554).

204. Docketed on the same 2003 term and argued approximately one month after *Hiibel* were two cases involving the indefinite detention of U.S. citizens suspected of terrorist activity, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), and *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004), and one case involving the legal status of enemy combatants held at the U.S. naval base in Guantanamo Bay, Cuba, *Rasul v. Bush*, 124 S. Ct. 2686 (2004).

205. See Ronald M. Gould & Simon Stern, *Catastrophic Threats and the Fourth Amendment*, 77 S. CAL. L. REV. 777, 777-78 (2004) (stating that traditional Fourth Amendment analysis is inadequate "in an age of weapons of mass destruction and potential terrorism," and proposing an extension of the "special needs" exception to the probable cause requirement to account for this inadequacy). See also Richard S. Frase, *What Were They Thinking? Fourth Amendment Unreasonableness in Atwater v. City of Lago Vista*, 71 FORDHAM L. REV. 329, 417 (2002) (stating that if the Court were to grant police officers broader investigative authority in the name of combating terrorism, "it will face increased pressure to impose additional limitations on police powers in very minor cases" because reasonableness analysis "cannot be allowed to become a 'one way street, to be used only to water down' Fourth Amendment rights" (quoting *Gooding v. United States*, 416 U.S. 430, 495 (1974) (Marshall, J., dissenting))).

206. See Gould & Stern, *supra* note 205, at 830 (warning, in proposing an exception to the probable cause requirements in the case of catastrophic threats, that "courts as well as citizens

half-a-century ago in *Barnette*, decided after the Japanese attack on Pearl Harbor and during the tumultuous national emergency of World War II, are instructive. Although the *Barnette* Court acknowledged the importance of promoting patriotism among the population, especially during wartime, the Court warned that the noble aim of strengthening the nation could not be achieved at the cost of waylaying the Bill of Rights.<sup>207</sup> Constitutional rights, the Court instructed, were not impediments to national strength and unity, but rather vehicles towards that end: “Government of limited power need not be anemic government. Assurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support.”<sup>208</sup> Certainly, the present “war against terror” is unlike the United States’s previous military struggles. *Barnette*’s admonition, however, still serves as a relevant reminder of the importance of Constitutional rights.

In considering a remedy for the potential evils of unchecked expansion of the *Terry* doctrine, a measured approach is appropriate. It makes little sense to suggest discarding the Fourth Amendment reasonableness analysis that formed the basis for the *Terry* doctrine’s expansion and sowed the seeds of the *Hiibel* decision.<sup>209</sup> It is similarly foolish to imagine that the necessities of law enforcement will not play a critical role in future *Terry* stop cases, especially given the post-9/11 security context.<sup>210</sup> Any plausible approach, therefore, should weave into the existing reasonableness framework. This does not imply limitation, but rather possibility. Indeed, one of the principal virtues of reasonableness analysis is its ability to accommodate a variety of factual

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must be mindful to avoid the risk, if possible, that a solution designed to prevent wholesale destruction of life and property does not destroy the basis values that undergird our civic life.”); Marc Jonathan Blitz, *Video Surveillance and the Constitution of Public Space: Fitting the Fourth Amendment to a World that Tracks Image and Identity*, 82 TEX. L. REV. 1349, 1364–65 (2004) (stating that the Fourth Amendment challenge posed by the war on terror is “to assure that, even as courts allow government officials to hunt more vigorously for evidence of criminal activity or signs of terrorist threats, and use new technologies to do so, they do not compromise those core privacy protections that are integral to a free society.”).

207. *W. Va. State Bd. Of Educ. V. Barnette*, 319 U.S. 624, 636–37 (1943).

208. *Id.* at 636.

209. Sundby, *supra* note 53, at 1134 (acknowledging that “[t]he Reasonableness Clause is now an important part of Fourth Amendment analysis and it is unrealistic and, perhaps, unwise to urge a return to the pre-*Terry* days when the Reasonableness Clause largely served as a redundant way of saying a ‘warrant based on probable cause.’”).

210. See WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 222 (1998) (“In any civilized society the most important task is achieving a proper balance between freedom and order. In wartime, reason and history both suggest that this balance shifts . . . in favor of order—in favor of the government’s ability to deal with conditions that threaten the national well-being.”).

scenarios and at the same time account for evolving societal norms.<sup>211</sup> With regard to halting the steady expansion of the *Terry* doctrine that ultimately produced *Hiibel*, it is not the mere use of the reasonableness balancing test that must be reevaluated but the manner in which courts employ the reasonableness test: Individual privacy interests must be given due weight as they are balanced against governmental law enforcement interests.

Individual privacy interests have not been adequately accounted for over the course of the *Terry* doctrine's expansion.<sup>212</sup> Governmental interests have generally trumped individual privacy interests in the name of furthering law enforcement needs.<sup>213</sup> In effect, what is reflected in *Hiibel* and other *Terry*-doctrine expansion cases is the triumph of the de minimis approach, first articulated in *Mimms*.<sup>214</sup> Following *Mimms*, the Court has justified extensions of police authority during a *Terry* stop as "minimal"<sup>215</sup> or "insignificant"<sup>216</sup> intrusions on individual privacy interests.<sup>217</sup> This is problematic. Use of the de minimis approach overly minimizes the individual privacy interests at stake during a *Terry* encounter. Over time, any privacy interest can be overcome by incremental application of the de minimis approach. The de minimis approach is not neutral; it favors governmental interests over privacy interests.<sup>218</sup> Courts have not employed the de minimis approach to justify "minor" restrictions on police authority—a sort of negative de minimis approach; rather the de minimis approach operates only to augment police authority.

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211. See Amar, *supra* note 51, at 1118 (stating that reasonableness's spacious quality "is one of its virtues."). Cf. Kathryn R. Urbonya, *Rhetorically Reasonable Police Practices: Viewing the Supreme Court's Multiple Discourse Paths*, 40 AM. CRIM. L. REV. 1387, 1418–25 (2003) (arguing that reasonableness is a shifting concept in Supreme Court Fourth Amendment jurisprudence).

212. Cooper, *supra* note 63, at 892–93 (discussing the levels of discretion afforded a finding of reasonable suspicion on appellate review and arguing that, based on the discretion accorded a finding of reasonable suspicion, "we cannot say individuals' privacy interests have any real weight in the [*Terry*] balancing test.").

213. See Yale Kamisar, *The Fourth Amendment: The Right of the People to Be Secure in Their Persons, Homes, Papers, and Effects*, in A TIME FOR CHOICES 31, 33 (Claudia A. Haskel & Jean H. Otto eds., 1991) (arguing that it is not surprising that government interests prevail when the balancing test is used since "[t]his is usually the result when the Court utilizes what the dissenters aptly called 'a formless and unguided "reasonableness" balancing inquiry"'); Charles A. Reich, *The Individual Sector*, 100 YALE L.J. 1409, 1417 (1991) (stating that in the 1989-90 Supreme Court term, individual privacy interests were typically minimized when contrasted with State interests).

214. See *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977).

215. See *Maryland v. Wilson*, 519 U.S. 408, 414–15 (1997).

216. See *Hiibel v. Sixth Jud. Dist. Ct.*, 124 S. Ct. 2451, 2461 (2004).

217. Trappings of the de minimis approach were also evident before *Mimms* in *United States v. Martinez-Fuerte*, where the Court stated that the intrusion on privacy interests caused by a routine check-point stop "is quite limited." 428 U.S. 543, 557 (1976).

218. E.g., *Wilson*, 519 U.S. at 414–15; *Mimms*, 434 U.S. at 111.

Fourth Amendment reasonableness analysis cannot function so disproportionately. Individual privacy interests must be properly valued in assessing the reasonableness of an officer's coercive power during a *Terry* stop. To pay short shrift to privacy interests contravenes the very purpose of the Fourth Amendment: to safeguard the people from unwarranted governmental intrusion.<sup>219</sup> Perhaps Justice Jackson, who served as the chief U.S. prosecutor before the Nuremberg war crimes tribunal, was in the best position to articulate the importance of upholding the rights conferred by the Fourth Amendment in the midst of a crisis of unprecedented political upheaval. Justice Jackson's legal jurisprudence was profoundly influenced by World War II and his experiences in Nuremberg,<sup>220</sup> which he deemed "the most important, enduring, and constructive work of my life."<sup>221</sup> His views on the Fourth Amendment following his return to the Court are enlightening:

[The rights ensured by the Fourth Amendment], I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowering a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police.<sup>222</sup>

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219. See Harris, *supra* note 144, at 439 (stating that the historical evidence shows that "the Fourth Amendment was intended to limit government action and discretion to conduct . . . searches and seizures without warrants."); Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 228–29 (1993) (arguing that the "historical evidence" suggests that the "broad principle embodied in the Reasonableness Clause is that discretionary police power implicating Fourth Amendment interests cannot be trusted."); Donald L. Doernberg, *The Right of the People: Reconciling Collective and Individual Interests Under the Fourth Amendment*, 58 N.Y.U. L. REV. 259, 260 (1983) ("The fourth amendment was intended both to protect the rights of individuals and to prevent the government from functioning as in a police state."). See also Thomas B. McAfee & Michael J. Quinlan, *Bringing Forward the Right to Keep and Bear Arms: Do Text, History, or Precedent Stand in the Way?*, 75 N.C. L. REV. 781, 829–30 (1997) (stating that the first eight amendments to the Constitution "stemmed from a general fear that the national government was empowered by the Constitution to invade well-established rights of importance to the people.").

220. Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 842 (1994) (stating that "Justice Jackson returned to the Supreme Court a fervent believer in the warrant requirement."); Dennis J. Hutchinson, *Justice Jackson and the Nuremberg Trials*, 1996 J. SUP. CT. HIST. 105, 114 (1996).

221. Robert H. Jackson, *Introduction* to WHITNEY R. HARRIS, *TYRANNY ON TRIAL: THE EVIDENCE AT NUREMBERG* xxxvii (1954).

222. *Brinegar v. United States*, 338 U.S. 160, 180–81 (1949) (Jackson, J., dissenting).

Reasonableness analysis must take account of the central, privacy-guarding function the Fourth Amendment has played in U.S. jurisprudence. Fundamentally, the reasonableness balancing test must disavow the de minimis approach altogether so that both governmental law enforcement interests *and* individual privacy interests are weighed against each other, independent of any built-in, doctrinal bias. Mindful of the high value historically placed on constitutional rights, individual privacy interests must be properly valued in the balancing test. By no means does this suggest that privacy interests should always trump governmental interests. Such a myopic focus on individual privacy interests would be just as wrongheaded as a reasonableness analysis perpetually favoring governmental interests.<sup>223</sup> Rather what is needed is an impartial balancing test in which there is no intimation that the outcome is predetermined.<sup>224</sup>

Just as the Court in *Barnette* and Justice Jackson in *Brinegar* recognized the importance of upholding individual constitutional rights at the height of one of the most significant struggles in U.S. history, the profound value of the Constitution's safeguards on individual privacy interests should not be lost upon us now. The country has undergone grave challenges in the past yet maintained its adherence to the ideals expressed in the Bill of Rights. As we deal with the challenges presented in the present era, we should heed the Court's instruction and Justice Jackson's views that the rights conferred upon the people by the Constitution are a source of strength, not a vulnerability.

## VII. CONCLUSION

*Hiibel's* impact on the *Terry* doctrine cannot be overstated. Although it is only one of many cases to have extended the original boundaries of a *Terry* stop, *Hiibel* affects a privilege previously thought to have been left intact by *Terry*: the right not to speak. In reaching this result, *Hiibel* overrides prior language from the Court suggesting that police officers violate the Fourth Amendment by compelling *Terry* suspects to identify themselves.

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223. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963) (stating that “while the Constitution protects against invasions of individual rights, it is not a suicide pact.”).

224. Commentators have suggested that the current reasonableness balancing test implicitly favors governmental interests over individual privacy interests. *See, e.g.*, William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 554 (1992) (stating that when reasonableness analysis “applies, the government wins, save perhaps for a few egregious cases.”); Stephen J. Schulhofer, *On the Fourth Amendment Rights of the Law-Abiding Public*, 1989 SUP. CT. REV. 87, 109 (stating that “[d]eference to alleged governmental interests now appears to be the rule.”); Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173, 1188–89 (1988) (stating that use of the balancing test contributes to the erosion of Fourth Amendment rights); Sundby, *supra* note 14, at 400–01 (arguing that the balancing test favors government intrusion).

Perhaps the most significant aspect of *Hiibel* for Fourth Amendment purposes is its potential to broaden the scope of permissible searches and seizures during a *Terry* encounter. By minimizing the rule that a *Terry* search must be limited to a search for weapons and confined in scope, the door is open to increasingly sweeping *Terry* searches. At this historical juncture, the balance of governmental law-enforcement interests and individual privacy interests seems skewed in favor of enhancing investigatory power.

*Hiibel*'s significant contribution to the steady expansion of the *Terry* doctrine is illustrative of the broadening Fourth Amendment hinterland between freedom and arrest now occupied by the *Terry* doctrine. While described as "less intrusive of a person's liberty interests than a formal arrest[.]"<sup>225</sup> or "a far more minimal intrusion"<sup>226</sup> than an arrest, a *Terry* stop, as it develops more arrest-like attributes and permits a wide range of law enforcement activity, has grown well beyond its Warren Court briches. The Court's endorsement of compelled identification in *Hiibel* has elevated a *Terry* stop to a unique position in Fourth Amendment law. Far removed from freedom where the constitutional right to not speak is by all indications intact, yet unfettered by the restrictions applicable to formal arrest, the *Terry* doctrine now grants officers the authority to compel identification. Indeed, by loosening the *Terry* doctrine from its original moorings, *Hiibel* may be the harbinger of a revamped *Terry* doctrine that would scarcely be recognizable to the *Terry* Court.

If the continuing expansion of the *Terry* doctrine is to be reined in and future broad extensions of police authority such as *Hiibel* are to be avoided, Fourth Amendment reasonableness analysis cannot continue to operate in a disparate manner. The use of the de minimis approach in reasonableness balancing only works to augment police authority during a *Terry* stop. In order to accord proper deference to the high historical value placed in the Fourth Amendment and to return to the Court's original intent in *Terry* of strictly circumscribing police authority during a *Terry* stop, the de minimis approach must be renounced. An unbiased reasonableness balancing approach must weigh governmental law enforcement interests equally against individual privacy interests. Only then can the slippery slope of eroding individual rights, steepened by *Hiibel*, be leveled to parity.

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225. *United States v. Place*, 462 U.S. 696, 705 (1983).

226. *Illinois v. Wardlow*, 528 U.S. 119, 126 (2000).



