A Bird Called Hiibel: The Criminalization of Silence

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> ''You can know the name of [a] bird in all the languages of the world, but when you're finished, you'll know absolutely nothing whatever about the bird . . . . So let's look at the bird and see what it's *doing*—that's what counts.''[1]

I. Introduction

What's in a name? In *Hiibel v. Sixth Judicial District Court of Nevada*,[2] the Supreme Court decided that there is a great deal in one, and at the same time nothing at all. The Court held that, under the Fourth Amendment, a person can be incarcerated for refusing to give his name when asked for it by a police officer. The Court based its decision on the evidentiary value of a name: If police officers don't have access to names, reasoned the Court, they will not be able to identify suspects and prevent crime. But that rationale is plainly in tension with the Court's Fifth Amendment analysis in the case. There, the Court held that disclosure of a name does not ''tend to'' incriminate a person and therefore is not protected by the amendment's Self-Incrimination Clause. The two rationales contradict one another and illustrate the incoherence of the Court's decision—a decision that serves to dilute Fourth and Fifth Amendment protections[3] and swap clarity for complexity in the law governing search and seizure.

[1]Richard P. Feynman, What Do You Care What Other People Think?, 14 (1988).

[2]124 S. Ct. 2451 (2004).

[3]First Amendment concerns arise as well, although they will not be discussed here. Citizens engaging in legitimate political protest, door-to-door pamphleteering, and other anonymous, constitutionally protected speech may find themselves the targets of *Terry* stops; and if they are subjected to compulsory identification laws as well, the chilling effect could be substantial.

II. Factual Background

It all began on May 21, 2000, a bright, clear evening in Winnemucca, Nevada. Dudley Hiibel stood by the right-hand side of his pick-up truck, parked on a wide dirt shoulder adjoining a field on Grass Valley Road.[4] Patrol Deputy Lee Dove of the Humboldt County Sheriff's Office approached, parking behind Hiibel's truck. Unbeknownst to Hiibel, the sheriff's office had received a report that a man had been seen assaulting a woman in a GMC pick-up truck. Deputy Dove was dispatched to investigate, whereupon a witness pointed him to Hiibel's parked truck.

Exiting his vehicle, Dove informed Hiibel that he had received a report of a fight. Hiibel denied knowledge of any fight. Dove asked Hiibel if he had ''any identification on [him].'' Hiibel said he did not. The female occupant of the truck—Hiibel's teenage daughter—remained inside. A colloquy followed during which Dove explained that he was conducting an investigation and reiterated no fewer than eleven times his demand to ''see some identification.''[5] At one point, Dove indicated that it ''could be a searchable situation.'' For his part, Hiibel steadfastly refused to produce identification, telling Dove that if there was reason to arrest him, Dove ought to just take him to jail. That led Dove to ask, ''Why would I take you to jail if you haven't done anything?'' Indeed, when Hiibel asked with what crime he was being charged, Dove responded, ''You're not being charged with anything. I'm conducting an investigation.''

Finally, after about two-and-a-half minutes, Dove threatened: ''You're facing arrest here if I don't get some identification.'' With Hiibel still refusing to identify himself, Dove handcuffed him and placed him in the back of his patrol car. Soon thereafter, Dove pulled Hiibel's daughter—the alleged victim—from the truck. Two officers forced her to the ground and handcuffed her.

This was *not* a traffic stop. Hiibel was not operating a motor vehicle at the time of his arrest, nor was he charged with any moving violation. Moreover, although trial testimony indicated that Deputy

[4]This factual summary is based on the videotape of Hiibel's arrest, which can be viewed at http://papersplease.org/hiibel/video.html.

[5]Of no small relevance to the Court's decision, Deputy Dove never directly asked Hiibel his name. Rather, he demanded, and expected to be shown, a tangible form of identification.

Dove thought Hiibel might have been intoxicated, he was not arrested, charged, or tried for any alcohol-related offense. Finally, although the written citation issued to Hiibel indicated that the police had charged him initially with a domestic battery offense, Nevada dropped that charge prior to trial.[6]

Thus, the *only* conduct for which Hiibel was tried was declining to identify himself. A Humboldt County justice of the peace held in a written opinion that Hiibel's ''failure to provide identification obstructed and delayed Dove as a public officer.''[7] He fined Hiibel $250. Three years later, Hiibel found himself before the U.S. Supreme Court.

III. ''Stop-and-Identify'' Statutes

To understand how Hiibel's arrest and conviction transpired, one must begin with Nevada's ''stop-and-identify statute,'' which provides in relevant part:

> 1. Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime.
>
> . . .
>
> 3. The officer may detain the person pursuant to this section only to ascertain his identity and the suspicious circumstances surrounding his presence abroad. *Any person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer*.[8]

[6]In addition, during trial, Deputy Dove admitted that when he arrived at the scene, he did not have probable cause to make an arrest for domestic battery. Transcript of Trial at 19, County of Humboldt v. Hiibel, In the Justice Court of Union Township in and for the County of Humbolt (No. xx-69056) (Feb. 13, 2001). The transcripts of the proceedings are available upon request from the author.

[7]Findings of Fact, Conclusions of Law at 3, County of Humboldt v. Hiibel, In the Justice Court of Union Township in and for the County of Humboldt, State of Nevada (No. xx-69056) (Gene Wambolt, Justice of the Peace). A copy is available from the author upon request.

[8]Nev. Rev. Stat. § 171.123 (2003) (emphasis added). The statute also provides that a citizen may not be detained for more than sixty minutes, and that absent arrest, the detention may not extend beyond the immediate vicinity where it was first effected. The Nevada Supreme Court has described this statute as the ''Nevada codification of *Terry*.'' State v. Lisenbee, 13 P.3d 947, 950 (Nev. 2000) (referring to Terry v. Ohio, 392 U.S. 1 (1968)). *Terry* and its progeny are discussed *infra* Section IV.

No consequences for a detainee's failure to identify himself are set forth in the stop-and-identify statute. However, in Nevada, it is a misdemeanor to ''willfully resist[], delay[] or obstruct[] a public officer in discharging or attempting to discharge any legal duty of his office . . . .''[9] Nevada accused Hiibel of ''delaying'' Deputy Dove, within the meaning of the misdemeanor statute, because in declining to identify himself, Hiibel ran afoul of the ''stop-and-identify'' statute.

The question *Hiibel* presented to the Supreme Court was whether the Nevada misdemeanor statute, by forcing a person to identify himself to a police officer under penalty of arrest, violates the Fourth and Fifth Amendments. Since many other states criminalize silence, that question has implications beyond Nevada. Moreover, many of those statutes go well beyond Nevada's, compelling the disclosure of significantly more information.[10] Illinois[11] and New York,[12] for example, allow police officers to ''demand'' a detainee's address and an explanation of his conduct, while Delaware[13] and Rhode Island[14] authorize police to demand a detainee's destination. Moreover, unlike the Nevada statute, most other stop-and-identify statutes do not make clear what information a detainee must provide to avoid arrest on obstruction charges. In New Hampshire, for example, the *loitering* statute provides that a police officer may request a suspect to ''identify himself and give an account for his presence and conduct''—but cautions that ''[f]ailure to identify or account for oneself, absent other circumstances, . . . shall not be grounds for

[9]Nev. Rev. Stat. § 199.280 (2003).

[10]An exception is found in the territory of Guam, where a police officer is permitted to conduct a *Terry* stop to ''ascertain[] the identity of the person detained and the circumstances surrounding his presence abroad . . . .'' However, ''such person shall not be compelled to answer *any* inquiry of the peace officer.'' 8 Guam Code Ann. §§ 30.10, 30.20 (2003) (emphasis added). For an in-depth discussion of the stop-and-identify statutes of various states and localities, see M. Christine Klein & Timothy Lynch, The Tale of the Anonymous Cowboy: And What He Has to Do with Your State's *Terry* Stop Legislation, ALEC Policy Forum: A Journal for State and National Policymakers 34 (Spring 2004). See also Hiibel v. Sixth Judicial Dist. Court of Nevada, 124 S. Ct. 2451, 2456 (2004) (listing various stop-and-identify statutes).

[11]725 Ill. Comp. Stat. 5/107–14 (2004).

[12]N.Y. Crim Proc. Law § 140.50(1) (McKinney 2004).

[13]Del. Code Ann. tit. 11, § 1902 (2003).

[14]R.I. Gen. Laws § 12-7-1 (2003).

arrest.''[15] Yet New Hampshire's stop-and-identify statute—which allows an officer to ''demand'' a detainee's ''name, address, business abroad, and where he is going''—does not provide similar protections.[16] Other statutes, however, do make clear the consequences of a detainee's decision to remain silent: by prescribing arrest. In Massachusetts, for example, police officers ''may examine all persons abroad whom they have reason to suspect of unlawful design, and may demand of them their business abroad and whither they are going.''[17] The statute warns that ''[p]ersons so suspected who do not give a satisfactory account of themselves . . . may be arrested by the police . . . .''[18]

Thus, the concern coming from *Hiibel* goes well beyond the statute before the Court. It is that the decision will be read as authorizing police officers to demand far more than a person's name. Indeed, at oral argument in *Hiibel*, counsel for the United States, arguing as amicus curiae on behalf of the Sixth Judicial District, was asked ''[W]hy do you stop at the name?'' He responded: ''I'm not sure that there's a limitation related to answers to questions.''[19] In all likelihood, therefore, it is only a matter of time before one of the many state statutes that provide broader authority for police to compel responses winds its way to the Supreme Court.

IV. Fourth Amendment Background

The Fourth Amendment provides: ''The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . .''[20] In the landmark case of *Terry v. Ohio*,[21] the Supreme Court recognized that ''[t]his inestimable right of personal security belongs as much to the citizen on the

[15]N.H. Rev. Stat. Ann. § 644:6 (2003).

[16]N.H. Rev. Stat. Ann. § 594:2 (2003).

[17]Mass Gen. Laws ch. 41, § 98 (2003).

[18]*Id*.

[19]Transcript of Oral Argument, Hiibel v. Sixth Judicial Dist. Court of Nevada, 124 S. Ct. 2451 (2004) (No. 03-5554) (argument of Sri Srinivasan), available at 2004 WL 720099, at *55.

[20]U.S. Const. amend. IV. The Fourth Amendment is applicable to the states through the Fourteen Amendment. Mapp v. Ohio, 367 U.S. 643 (1961).

[21]392 U.S. 1 (1968).

streets of our cities as to the homeowner closeted in his study . . . .''[22] Indeed, ''whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person.''[23]

A. The ''Terry *Stop*'': Terry*'s Limited Exception to* ''*Probable Cause*''

Until 1968, courts had ruled that it was necessary, absolutely, that police have probable cause before seizing a person.[24] As the Court explained in *Dunaway v. New York*,[25] ''The standard of probable cause . . . represented the accumulated wisdom of precedent and experience as to the minimum justification necessary to make the kind of intrusion involved in an arrest 'reasonable' under the Fourth Amendment.''[26] But in *Terry*, the Supreme Court ''for the first time recognized an exception to the requirement that Fourth Amendment seizures of persons must be based on probable cause.''[27] In doing so, the Court carved out a lesser standard for investigative seizures that amount to less than a formal arrest: It held that a police officer who has ''reasonable suspicion'' that criminal activity ''may be afoot'' may briefly detain the suspect.[28] *Terry* was a watershed moment in constitutional law. Indeed, the Court would later acknowledge that ''[h]ostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment . . . .''[29]

[22]*Id.* at 8–9.

[23]*Id.* at 16. See also Davis v. Mississippi, 394 U.S. 721, 726–27 (1969) (''Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.'").

[24]Dunaway v. New York, 442 U.S. 200, 208 (1979).

[25]See *supra* note 24.

[26]442 U.S. at 208. See also Kolender v. Lawson, 461 U.S. 352, 363 (1983) (Brennan, J., concurring) (''It has long been settled that the Fourth Amendment prohibits the seizure and detention or search of an individual's person unless there is probable cause to believe that he has committed a crime, except under certain conditions strictly defined by the legitimate requirements of law enforcement and by the limited extent of the resulting intrusion on individual liberty and privacy.''); Terry v. Ohio, 392 U.S. 1, 38 (1968) (Douglas, J., dissenting) (arguing that ''infringement on personal liberty of any 'seizure' of a person can only be 'reasonable' under the Fourth Amendment if we require the police to possess 'probable cause' before they seize him'').

[27]Dunaway, 442 U.S. at 208–09.

[28]Terry, 392 U.S. at 30.

[29]Dunaway, 442 U.S. at 213.

The *Terry* Court authorized stops based on ''reasonable suspicion'' in order to further a state interest in ''effective crime prevention and detection.''[30] As it explained, that interest ''underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest.''[31] The Court emphasized that it did ''not retreat from [its] holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure.''[32] But the Court also recognized that it was ''deal[-ing] [with] necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure.''[33]

Because *Terry* created an exception to the long-standing general rule of probable cause, the Court has been ''careful to maintain'' its ''narrow scope.''[34] The central inquiry, when evaluating the constitutionality of a *Terry* stop, is ''whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.''[35] The Court subsequently has explained that ''the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time.''[36]

[30]Terry, 392 U.S. at 22.

[31]*Id*.

[32]*Id.* at 20.

[33]*Id.* Justice Douglas vehemently criticized this conclusion, arguing that ''[t]o give power to the police to seize a person on some grounds different from or less than 'probable cause' would be handing them more authority than could be exercised by a magistrate in issuing a warrant to seize a person,'' thus ''tak[ing] a long step down the totalitarian path.'' *Id.* at 36 n.3, 38 (Douglas, J., dissenting). Although rejected by the other eight members of the *Terry* Court, Justice Douglas's analysis is helpful to understanding the significance of the inroads made by *Terry* on the Fourth Amendment's historic protections.

[34]Ybarra v. Illinois, 444 U.S. 85, 93 (1979).

[35]Terry, 392 U.S. at 20.

[36]Florida v. Royer, 460 U.S. 491, 500 (1983).

B. Scope of a Terry *Stop: The Weapons Frisk*

When Deputy Dove approached Hiibel, he was effecting what is known as a ''*Terry* stop''—that is, Dove stopped Hiibel based on a ''reasonable suspicion'' that Hiibel was up to no good. Hiibel conceded that Dove's initial approach to investigate was appropriate and did not itself violate the Fourth Amendment. But the Fourth Amendment ''proceeds as much by limitations upon the scope of governmental action as by imposing preconditions upon its initiation.''[37] It was to the ''scope'' of Deputy Dove's investigation that Hiibel objected.

The main focus in *Terry* (as in *Hiibel*) is not on ''whether the officer's action was justified at its inception,''[38] but rather on the limits that must be imposed on a valid seizure conducted under ''reasonable suspicion.'' The officer in *Terry* had conducted a ''pat-down'' frisk for weapons during the course of his investigation; the question the Court faced, therefore, was whether it was constitutionally permissible for him to do so. In holding that the pat-down was permitted, the Court explained that it was concerned with ''*more* than the governmental interest in investigating crime'': It was concerned also with the ''immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him.''[39] Accordingly, the Court held that ''[t]here must be a *narrowly drawn* authority to permit a reasonable search for weapons for the protection of the police officer, where he has *reason to believe that he is dealing with an armed and dangerous individual*,''[40] regardless of whether he has probable cause to arrest the individual for a crime. The Court added, ''[t]he officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.''[41]

But the Court placed limits on the power to frisk. It cautioned that a ''search for weapons in the absence of probable cause to

[37]Terry, 392 U.S. at 28–29.

[38]*Id.* at 20.

[39]*Id.* at 23.

[40]*Id.* at 27 (emphasis added).

[41]*Id*.

arrest . . . must, like any other search, be *strictly circumscribed* by the exigencies which justify its initiation,'' and must therefore be ''limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby. . . .''[42] Moreover, said the Court, ''[t]he *sole* justification of the search . . . is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.''[43] In determining that the specific search at issue in *Terry* was constitutionally valid, the Court observed that the police officer ''confined his search strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he discovered the weapons. He *did not conduct a general exploratory search* for whatever evidence of criminal activity he might find.''[44]

The Court has emphasized subsequently that ''[n]othing in *Terry* can be understood to allow a generalized 'cursory search for weapons' or, indeed, any search whatever for anything but weapons.''[45] And the Court ''invariably'' has recognized that ''a reasonable belief that [a suspect is] armed and presently dangerous'' is a ''predicate to a patdown of a person for weapons.''[46] Thus, not every person subjected to a *Terry* stop will also be subjected to a *Terry* frisk.

Those limits, placed by the Court on a *Terry* stop, are absent from the Nevada scheme Hiibel challenged. In Nevada, every person subjected to a *Terry* stop *will* be compelled, under threat of arrest, to produce identification; and the officer need not have any ''reason to believe that he is dealing with [a] . . . dangerous individual.''[47] Thus, in authorizing police to search for identification even in the absence of a safety concern, the Nevada stop-and-search scheme departs from the principle, articulated in the *Terry* line of cases, that a person must be considered armed and dangerous before he may be subject to a search during a *Terry* stop. That departure indicates

[42]*Id.* at 25–26 (emphasis added).

[43]*Id.* at 29 (emphasis added).

[44]*Id.* at 30 (emphasis added).

[45]Ybarra v. Illinois, 444 U.S. 85, 93–94 (1979).

[46]*Id.* at 92–93.

[47]Terry, 392 U.S. at 27.

the flaw in the analogy between a *Terry* frisk and a *Hiibel* identification demand—drawn, for example, by the Nevada Supreme Court, which reasoned that ''[r]equiring identification is far less intrusive than conducting a pat-down search of one's physical person.''[48] The issue is not whether compelling an individual to identify himself is more or less intrusive than a weapons frisk; rather, it is whether there is a *justification* for the demand, as there was for the frisk. Just as a weapons frisk must be justified by ''more than the governmental interest in investigating crime,''[49] so must a demand for identification. The exigencies that justify a weapons search simply do not arise in the case of compelled identification.

Moreover, the scope of a request for identification is actually greater than the scope of a *Terry* weapons search. While the frisk is a physical intrusion, it is brief in time and limited in scope. Although a demand for identification may be limited in time, it is far more extensive in scope, for at least two reasons.

First, as the dissenting justices of the Nevada Supreme Court noted, during a *Terry* stop, ''an officer's authority to search is limited to a pat-down to detect weapons''; an officer ''may not detect a wallet and remove it for search.''[50] But when identification is compelled, this limitation is circumvented—''the officer can now, figuratively, reach in, grab the wallet and pull out the detainee's identification.''[51] The detainee either must himself furnish identification or, if he refuses to do so, must submit to an arrest under the stop-and-identify and obstruction statutes, pursuant to which the police will conduct a search and acquire his identification.[52]

Second, unlike a frisk, which is limited in duration and simply informs the officer whether or not the suspect is armed, obtaining a person's identity is the tip of the iceberg concerning what an officer

[48]Hiibel v. Sixth Judicial Dist. Court of Nevada, 59 P.3d 1201, 1206 (Nev. 2002).

[49]Terry, 392 U.S. at 23.

[50]Hiibel, 59 P.3d at 1209 (Agosti, J., dissenting).

[51]*Id*.

[52]Moreover, as one commentator has noted: ''If arresting officers are permitted to 'bootstrap' themselves into probable cause, then the intrusion necessitated by a compelled response to a request for identification arguably would be intolerably greater than the intrusion of a brief frisk allowed'' by *Terry*. See Alan D. Hallock, Note: Stop-and-Identify Statutes After Kolender v. Lawson: Exploring the Fourth and Fifth Amendment Issues, 69 Iowa L. Rev. 1057, 1072 (1984).

can then discover. Over thirty years ago, Justice Harlan recognized the ''dynamic growth of techniques for gathering and using information culled from individuals by force of criminal sanctions.''[53] A decade later, a court of appeals explained that the identification of a ''suspicious'' individual ''grants the police unfettered discretion to initiate or continue investigation of the person long after the detention has ended.''[54] In this age of multiple, cross-linked, computerized databases, disclosure of one's name is guaranteed to unleash a torrent of additional information.[55] In his dissent in *Hiibel*, Justice Stevens made this very point, observing 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. And that information, in turn, can be tremendously useful in a criminal prosecution.''[56]

*C. Post-*Terry *Analysis of Demands for Identification*

Prior to *Hiibel*, the Court had not directly ruled whether identification can be compelled during a *Terry* stop. But the Court had provided enough signals such that the only other federal court to review the Nevada stop-and-identify statute held that the right not to identify oneself is ''so clearly established'' that the Nevada stop-and-identify and obstruction statutes did not furnish a reasonable basis for an arrest.[57]

The first signal is found in *Terry* itself, where Justice White wrote a separate concurring opinion to address a matter ''put[] . . . aside''

[53]California v. Byers, 402 U.S. 424, 453–54 (1971) (Harlan, J., concurring).

[54]Lawson v. Kolender, 658 F.2d 1362, 1368 (9th Cir. 1981), aff'd, 461 U.S. 352 (1983).

[55]For an extensive discussion of the constitutional implications of readily accessible public and private databases, see Brief of Amici Curiae Electronic Privacy Information Center (EPIC) and Legal Scholars and Technical Experts, Hiibel v. Sixth Judicial Dist. Court of Nevada, 124 S. Ct. 2451 (2004) (No. 03-5554), available at 2004 WL 22970604 and http://www.abditum.com/hiibel/pdf/epic_amicus.pdf.

[56]Hiibel v. Sixth Judicial Dist. Court of Nevada, 124 S. Ct. 2451, 2464 (2004) (Stevens, J., dissenting).

[57]Carey v. Nevada Gaming Control Board, 279 F.3d 873, 881 (9th Cir. 2002) (Section 1983 case). Although no other federal court had reviewed the Nevada statute specifically, an inter-circuit split existed as to the constitutionality of stop-and-identify statutes generally. See, e.g., Oliver v. Woods, 209 F.3d 1179 (10th Cir. 2000) (holding that a similar Utah statute was constitutionally sound).

by the majority, the ''matter of interrogation during an investigative stop.''[58] He explained:

> There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way. However, given the proper circumstances, such as those in this case, it seems to me the person may be briefly detained against his will while pertinent questions are directed to him. *Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest*, although it may alert the officer to the need for continued observation.[59]

Less than a year after deciding *Terry*, the Court decided *Davis v. Mississippi*,[60] a Fourth Amendment case involving a teenager taken into custody on less than probable cause and forced to undergo fingerprinting. In *Davis*, the Court referred to ''the settled principle that while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer.''[61] Similarly, in *Dunaway v. New York*, decided a decade later, the Court emphasized the ''narrow scope'' of *Terry*, quoting favorably Justice White's *Terry* concurrence that a detainee on reasonable suspicion cannot be compelled to answer questions.[62]

The Court had its first opportunity to decide whether a person could be convicted for refusing to identify himself in *Brown v. Texas*.[63] In *Brown*, as in *Hiibel*, police arrested, charged, and convicted a detainee based on nothing more than the detainee's refusal to identify himself upon demand. The Court, however, avoided reaching the question whether refusal to identify oneself is a ground for arrest.

[58]392 U.S. at 34 (White, J., concurring).

[59]*Id.* (White, J., concurring) (emphasis added).

[60]394 U.S. 721 (1969).

[61]*Id.* at 726 n.6.

[62]Dunaway v. New York, 442 U.S. 200, 210 & n.12 (1979).

[63]443 U.S. 47 (1979).

Instead, it reversed the conviction because the seizure was effected on less than ''reasonable suspicion.''[64]

On the same day *Brown* was decided, the Court decided *Michigan v. DeFillippo*.[65] Police stopped Gary DeFillippo pursuant to a city ordinance similar to the one at issue in *Hiibel*; the ordinance authorized police to execute *Terry* stops and made it ''unlawful'' for a detainee to ''refuse to identify himself, and to produce verifiable documents or other evidence of such identification.''[66] A search incident to DeFillippo's arrest revealed that he was carrying illegal drugs. He was then charged with a drug offense, but not for violation of the stop-and-identify statute.[67]

The state appellate court found that the city ordinance violated the Fourth Amendment and therefore ruled that the arrest and the subsequent search were invalid.[68] The Supreme Court reversed, on the ground that the ''invalidity of the Detroit ordinance . . . does not undermine the validity of the arrest made for violation of that ordinance . . . .''[69] The Court, however, avoided ruling on the constitutionality of the ordinance itself. The Court merely ''[a]ssum[ed], *arguendo*, that a person may not constitutionally be required to answer questions put by an officer in some circumstances.''[70] But the Court did suggest that the ordinance was not ''so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws.''[71]

Justice Brennan, joined by Justices Marshall and Stevens, vigorously dissented, directly addressing the issue of constitutionality that the majority had avoided. Although writing in dissent, Justice Brennan did not contradict the majority on this point but rather elaborated on the assumption the majority had made. Relying in part on Justice White's *Terry* concurrence as well as *Davis v. Mississippi*, Justice Brennan explained that the ''Court's assumption that

[64]*Id.* at 53.

[65]443 U.S. 31 (1979).

[66]*Id.* at 33 & n.1.

[67]*Id.* at 34.

[68]*Id.* at 34–35; see also People v. DeFillippo, 262 N.W.2d 921 (Mich. Ct. App. 1977).

[69]DeFillippo, 443 U.S. at 40.

[70]*Id.* at 37.

[71]*Id.* at 38.

the Detroit ordinance is unconstitutional is well founded; the ordinance is indeed unconstitutional and patently so,'' and reasoned that ''[i]n the context of criminal investigation, the privacy interest in remaining silent simply cannot be overcome at the whim of any suspicious police officer.''[72]

He noted that the ordinance,

> by means of a transparent expedient—making the constitutionally protected refusal to answer itself a substantive offense—sanctions circumvention by the police of *the Court's holding* that refusal to answer police inquiries during a *Terry* stop furnishes no basis for a full-scale search and seizure. Clearly, this is a sheer piece of legislative legerdemain not to be countenanced.[73]

Noting the intersection between the Fourth and Fifth Amendments, Justice Brennan further observed:

> [I]ndividuals who chose to remain silent would be forced to relinquish their right not to be searched . . . while those who chose not to be searched would be forced to forgo their constitutional right to remain silent. This Hobson's choice can be avoided only by invalidating such police intrusions whether or not authorized by ordinance and *holding fast to the rule of Terry and its progeny: that police acting on less than probable cause may not search, compel answers, or search those who refuse to answer their questions*.[74]

Clearly, it was the perception of three justices that the issue had already been decided.

The matter was addressed a few years later in *Florida v. Royer*,[75] where the Court observed:

> [L]aw enforcement officers do not violate the Fourth Amendment by merely . . . asking [a person on the street] if he is willing to answer some questions . . . . The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at

[72]*Id.* at 43 (Brennan, J., dissenting).

[73]*Id.* at 45 (Brennan, J., dissenting) (emphasis added).

[74]*Id.* at 46 (Brennan, J., dissenting) (emphasis added).

[75]460 U.S. 491 (1983).

> all and may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and *his refusal to listen or answer does not, without more, furnish those grounds*.[76]

The same year, the issue of compelled identification arose more directly in *Kolender v. Lawson*.[77] A California statute required ''persons who loiter or wander on the streets to provide a 'credible and reliable' identification and to account for their presence when requested by a peace officer'' pursuant to a valid *Terry* stop.[78] The Court declined to address Fourth and Fifth Amendment issues,[79] instead holding that the statute was ''unconstitutionally vague within the meaning of the Due Process Clause of the Fourteenth Amendment'' because it ''fail[ed] to clarify what is contemplated by the requirement that a suspect provide a 'credible and reliable' identification.''[80]

Although the majority declined to reach Fourth Amendment concerns, Justice Brennan did so at some length in his concurrence. He explained that

> probable cause, and nothing less, represents the point at which the interests of law enforcement justify subjecting an individual to any significant intrusion beyond that sanctioned in *Terry*, including either arrest *or the need to answer questions that the individual does not want to answer* in order to avoid arrest or end a detention.[81]

Accordingly, he reasoned that ''[m]erely to facilitate the general law enforcement objectives of investigating and preventing unspecified crimes, States 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.''[82] He added that because the ''scope of seizures of the person on less than probable cause that *Terry* permits is strictly circumscribed,'' the suspect ''must be free

[76]*Id.* at 497–98 (citations omitted) (emphasis added).

[77]461 U.S. 352 (1983).

[78]*Id.* at 353.

[79]*Id.* at 361 n.10.

[80]*Id.* at 353–54.

[81]*Id.* at 369 n.7 (Brennan, J., concurring) (emphasis added).

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

to leave after a short time and to decline to answer the questions put to him.''[83] Justice Brennan further noted that police officers ''may ask their questions in a way calculated to obtain an answer. But they may not *compel* an answer . . . .''[84]

A year later, *Berkemer v. McCarty*[85] addressed the application of *Miranda*[86] protections to a traffic stop. The Court held that roadside questioning of a motorist detained pursuant to a routine traffic stop does not constitute ''custodial interrogation'' for purposes of *Miranda*.[87] In reaching this conclusion, the Court observed that ''the usual traffic stop is more analogous to a so-called 'Terry stop' than to a formal arrest.''[88] It went on to discuss *Terry* stops, observing that

> [an] officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. *But the detainee is not obliged to respond*. And, unless the detainee's answers provide the officer with probable cause to arrest him, he must then be released.[89]

The Court did not address this topic again for twenty years, when it decided *Hiibel*. In *Hiibel*, the Court made an about-face and rejected its ''lengthy history'' of ''concurring opinions, of references, and of clear explicit statements.''[90]

V. Fifth Amendment Background

The Fifth Amendment's Self-Incrimination Clause provides that ''[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . .''[91] The privilege against self-incrimination is founded on (1) an ''unwillingness to subject those suspected

[83]*Id.* at 364–65 (Brennan, J., concurring).

[84]*Id.* at 366.

[85]468 U.S. 420 (1984).

[86]Miranda v. Arizona, 384 U.S. 436 (1966).

[87]468 U.S. at 442.

[88]*Id.* at 439 (citation omitted).

[89]*Id.* at 439–40 (emphasis added) (footnotes omitted).

[90]Hiibel v. Sixth Judicial Dist. Court of Nevada, 124 S. Ct. 2451, 2465 (2004) (Breyer, J., dissenting). The Court's opinion in *Hiibel* is analyzed *infra* Section VI.

[91]U.S. Const. amend. V. The Fifth Amendment privilege against self-incrimination is applicable to the states through the Fourteen Amendment. Malloy v. Hogan, 378 U.S. 1 (1964).

of crime to the cruel trilemma of self-accusation, perjury or contempt,'' and on (2) ''respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life.'''[92] The Court has directed that the Self-Incrimination Clause ''must be accorded liberal construction in favor of the right it was intended to secure.''[93]

The Fifth Amendment privilege protects a suspect from ''being compelled to . . . provide the State with evidence of a testimonial or communicative nature.''[94] A communication is ''testimonial'' when it ''explicitly or implicitly, relate[s] a factual assertion or disclose[s] information.''[95] The Court has recognized that ''[t]here are very few instances in which a verbal statement . . . will not convey information or assert facts. The vast majority of verbal statements thus will be testimonial and, to that extent at least, fall within the privilege.''[96] On the other hand, certain acts—such as furnishing an incriminating blood sample[97] or handwriting exemplar[98]—may be compelled because they are not ''testimonial.''[99]

Testimonial statements fall within the scope of the Self-Incrimination Clause when those statements are likely to be used in a prosecution, or lead to evidence that may be used in a prosecution.[100] The privilege ''not only extends to answers that would in themselves support a conviction under a . . . criminal statute but likewise embraces those which would furnish a link in the chain of evidence

[92]Doe v. United States, 487 U.S. 201, 212 (1988) (quoting Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52 (1964)).

[93]Hoffman v. United States, 341 U.S. 479, 486 (1951).

[94]Pennsylvania v. Muniz, 496 U.S. 582, 589 (1990) (quoting Schmerber v. California, 384 U.S. 757, 761 (1966)).

[95]496 U.S. at 589 (quoting Doe, 487 U.S. at 210).

[96]Doe, 487 U.S. at 213–14. In that case, the Court held that a suspect could be compelled to sign a consent form waiving a privacy interest in foreign bank accounts that might exist, although he was not required to state whether such accounts actually existed. The Court determined that the suspect was making a ''nonfactual statement.'' *Id.* at 213 n.11.

[97]Schmerber v. California, 384 U.S. 757 (1966).

[98]Gilbert v. California, 388 U.S. 263 (1967).

[99]A rule of thumb for deciding whether a communication is testimonial is to ask whether a lie could be told. George Fisher, Evidence 800 (2002). A suspect can lie about his name, but a fingerprint cannot lie.

[100]Kastigar v. United States, 406 U.S. 441, 445 (1972).

needed to prosecute . . . .''[101] Accordingly, the Fifth Amendment's protection applies whenever compelled statements ''lead to the discovery of incriminating evidence even though the statements themselves are not incriminating and are not introduced into evidence.''[102]

A name is plainly testimonial in this sense. A name ''discloses information or asserts facts.'' A name is a key to discovery of information that could lead to incriminating information or information that may be used in a prosecution. On the basis of these concerns, five out of nine justices concluded in *California v. Byers*[103] that stating one's name can be incriminatory.[104] Similarly, in *DeFillippo*, Justice Brennan, joined by Justices Marshall and Stevens, concluded that in a *Terry*-stop scenario, detainees ''have . . . a right to remain silent, and, as a corollary, a right not to be searched if they choose to remain silent.''[105] And in *Kolender v. Lawson*,[106] analyzing a hypothetical situation in which a jogger not carrying identification might be required to answer questions concerning the route that he followed to arrive at the place he was detained, the Court made this observation:

> To the extent that [the California statute] criminalizes a suspect's failure to answer such questions put to him by police officers, Fifth Amendment concerns are implicated. It is a ''settled principle that while police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer.''[107]

Protecting the ''right to remain silent'' in cases in which police demand identification is not only consistent with precedent but consistent also with our legal traditions. The right is entrenched in

[101]Hoffman v. United States, 341 U.S. 479, 486 (1931).

[102]United States v. Hubbell, 530 U.S. 27, 37 (2000).

[103]402 U.S. 424 (1971).

[104]*Id*. at 448 (Harlan, J., concurring); *id.* at 460 (Black, J., joined by Douglas and Brennan, JJ., dissenting); *id*. at 464 (Brennan, J., joined by Douglas and Marshall, JJ., dissenting). Chief Justice Burger, joined by Justices Stewart, White, and Blackmun, concluded that ''[d]isclosure of name and address is an essentially neutral act,'' at least in the context of a non-criminal regulatory scheme. *Id.* at 432 (plurality opinion).

[105]Michigan v. DeFillippo, 443 U.S. 31, 45 (1979) (Brennan, J., joined by Marshall and Stevens, JJ., dissenting).

[106]461 U.S. 352 (1983).

[107]*Id*. at 360 n.9 (quoting Davis v. Mississippi, 394 U.S. 721, 727 n.6 (1969)).

American law and culture[108] and is easily understood by police and citizens alike. It is incorporated in the ''*Miranda* rights'' that must be read to a person arrested with probable cause. Indeed, when Dudley Hiibel was arrested under Nevada's obstruction statute, he was informed of his ''right to remain silent''—*even though he had just been arrested for exercising that very right.*

VI. The Opinions in *Hiibel*

A. Analysis of the Nevada Supreme Court Opinion

After losing before the Justice Court and the Sixth Judicial District Court, Hiibel took his case to the Nevada Supreme Court on a petition for writ of certiorari, arguing that he had a constitutional right to refuse to identify himself. The Nevada Supreme Court disagreed in a contentious 4–3 decision that addressed Hiibel's Fourth Amendment claim only.[109]

The majority began by recognizing that the ''ability to wander freely and anonymously, if we so choose, without being compelled to divulge information to the government about who we are or what we are doing'' is ''[f]undamental to a democratic society.''[110] This '''right to be let alone'—to simply live in privacy—is a right protected by the Fourth Amendment and undoubtedly sacred to us all.''[111]

This, however, was but lip service. The court quickly put aside that concern and analyzed Hiibel's right to anonymity under a balancing test that proved highly deferential to the government. It explained that ''[r]easonable people do not expect their identities—their names—to be withheld from officers''[112]—even though it is the reasonableness of government action, not citizen action, that matters under the Fourth Amendment. Furthermore, the majority observed

[108]The Supreme Court has recognized this fact. See, e.g., Brogan v. United States, 522 U.S. 398, 405 (1998) (''And as for the possibility that the person under investigation may be unaware of his right to remain silent: In the modern age of frequently dramatized 'Miranda' warnings, that is implausible.'').

[109]Hiibel v. Sixth Judicial Dist. Court of Nevada, 59 P.3d 1201 (Nev. 2002). Hiibel petitioned for rehearing seeking explicit resolution of his Fifth Amendment challenge, but that petition was denied without opinion.

[110]*Id.* at 1204.

[111]*Id.* (footnotes omitted).

[112]*Id.* at 1206.

that ''we reveal our names in a variety of situations every day without much consideration''[113]—even though such quotidian disclosures are voluntary, not made under threat of jail time. The majority concluded that ''any intrusion on privacy . . . is outweighed by the benefits to officers and community safety'' and added that the ''public interest in requiring individuals to identify themselves to officers when a reasonable suspicion exists is overwhelming.''[114] In the course of applying this balancing test, the Nevada Supreme Court gave an enormous degree of deference to the government. The court offered myriad ''worst case'' scenarios involving sex offenders lurking outside day care centers and the need to enforce restraining orders, explaining: ''In these situations, it is the observable conduct that creates a reasonable suspicion, but it is the requirement to produce identification that enables an officer to determine whether the suspect is breaking the law.''[115]

The majority then embarked on a rather remarkable tangent, asserting: ''*Most importantly*, we are at war against enemies who operate with concealed identities and the dangers we face as a nation are unparalleled.''[116] The court specifically invoked the September 11, 2001, terrorist attack, the Columbine school massacre, the anthrax scare, the subsequent (and unrelated) sniper murders in the D.C. area, and concerns about terrorism generally—none of which had anything to do with Dudley Hiibel. After reviewing this parade of horribles, the majority concluded that ''[t]he point of requiring a suspect to provide identification during a lawful investigatory stop has been reached.''[117] So overwrought was the majority's reasoning that a concurring justice wrote separately to preemptively refute criticisms that the majority ''somehow overreacted to the dangers presented by the war against domestic and international terrorism.''[118] The majority concluded by saying that

[113]*Id.* at 1206.

[114]*Id.* at 1205.

[115]*Id.* at 1205–06. That this raises Fifth Amendment concerns is readily apparent, illustrating the dangers of analyzing Fourth Amendment claims in a vacuum.

[116]*Id.* at 1206 (emphasis added).

[117]*Id.* The majority appears to be suggesting that prior to this ''point,'' a suspect could *not* have been compelled to provide identification, but that because of current events, the Fourth Amendment now allows what it once prohibited. This is a peculiar approach to constitutional interpretation indeed.

[118]*Id.* at 1207 (Maupin, J., concurring).

> [t]o deny officers the ability to request identification from suspicious persons creates a situation where an officer could approach a wanted terrorist or sniper but be unable to identify him or her if the person's behavior does not rise to the level of probable cause necessary for an arrest.[119]

The majority's reasoning boiled down to this: Civil liberties can impede effective police work. Police could be even more effective if they were allowed to approach whomever they wished, reasonable suspicion or not, and demand answers to all sorts of questions, including and beyond mere identity. But the Fourth Amendment is not properly viewed as a mere impediment to making an arrest.

Three of seven Nevada Supreme Court justices filed a vigorous dissent:

> As the majority aptly states, the right to wander freely and anonymously, if we so choose, is a fundamental right of privacy in a democratic society. However, the majority promptly abandons this fundamental right by requiring ''suspicious'' citizens to identify themselves to law enforcement officers upon request, or face the prospect of arrest.[120]

B. The U.S. Supreme Court's Opinion: Fourth Amendment

Justice Kennedy wrote the U.S. Supreme Court's majority opinion and was joined by Justices Rehnquist, O'Connor, Scalia, and Thomas. The Court construed its grant of jurisdiction to reach only the question whether Nevada could compel oral identification through the threat of arrest.[121]

[119]*Id*. at 1206.

[120]*Id*. at 1207 (Agosti, J., dissenting).

[121]In its rendition of the underlying facts of the case, the majority explained that it understood Deputy Dove's request for identification ''as a request to produce a driver's license or some other form of *written* identification.'' Hiibel v. Sixth Judicial Dist. Court of Nevada, 124 S. Ct. 2451, 2455 (2004). If that interpretation is correct—and the videotape of the arrest shows that it is—then Hiibel was arrested, *not* for refusing to state his name but for failing to produce it in written form. Yet the Court understood the Nevada Supreme Court as interpreting the stop-and-identify statute ''to require only that a suspect disclose his name'' and therefore construed its appellate jurisdiction to reach only that question. *Id.* at 2457. The majority left open the question whether a statute requiring written identification would be constitutional, as long as it is not unduly vague under *Kolender*. This is a question with urgent real-world significance in light of, for example, the 9/11 Commission Report's recommendation that the federal government ''set standards for the issuance of birth certificates and sources of identification, such as drivers licenses.'' Report of the National Commission on Terrorist Attacks Upon the United States (''9/11 Commission''), released July 22, 2004, at 390, available at http://www.9–11commission.gov/report/911Report.pdf.

1. A Red Herring

The Court quickly established that it meant to work on a blank slate and disregard prior Fourth Amendment precedents. It said first that ''the Fourth Amendment does not impose obligations on the citizen but instead provides rights against the government.''[122] As a result, ''the Fourth Amendment itself cannot require a suspect to answer questions.''[123] But, said the Court, ''This case concerns a different issue . . . Here, the source of the legal obligations arises from Nevada state law, not the Fourth Amendment. Further, the statutory obligation does not go beyond answering an officer's request to disclose a name.[124]

It is instructive to parse this curious bit of legal ''reasoning.'' The observation that the Fourth Amendment ''does not impose obligations on the citizen but instead provides rights against the government'' is a truism. But the inference the Court then draws, that ''[a]s a result, the Fourth Amendment itself cannot require a suspect to answer questions'' is a striking non sequitur. Of course ''the Fourth Amendment itself'' cannot require a suspect to answer questions. To the contrary, as the Court has just noted in the preceding sentence, the Fourth Amendment ''does not impose obligations on the citizen''—at all. Indeed, any obligation to answer questions would not only *not* stem from the Fourth Amendment but would arise as an exception or limitation to the protections offered by the Fourth (and Fifth) Amendment.

The majority's suggestion that this case is ''different'' because ''the source of the legal obligation arises from Nevada state law, not the Fourth Amendment'' is equally curious.[125] Different from what? This is a garden variety case involving the question of whether the Nevada statute, which imposes an obligation on the individual, is consistent with the protections recognized by the Fourth Amendment. Justice Brennan confronted a similar question in his *DeFillippo*

[122]Hiibel, 124 S. Ct. at 2459.

[123]*Id.*

[124]*Id.*

[125]It is not clear what this means. The ''issue'' just raised by the majority—that is, that ''the Fourth Amendment itself cannot require a suspect to answer questions''—is not an issue at all; it is a truism. It is akin to saying that ''the Fifth Amendment itself cannot require a person in any criminal case to be a witness against himself.'' Neither statement raises any discernible ''issue.''

dissent where he explained that the question cannot simply be whether a seizure and search are authorized by state law but whether they are reasonable under the Fourth Amendment.[126] He concluded that the stop-and-identify ordinance at issue in *DeFillippo* ''commands that which the Constitution denies the State power to command and makes 'a crime out of what under the Constitution cannot be a crime.'''[127] Those exact concerns were at issue in *Hiibel*. The Nevada statute requires a *Terry* detainee to state his name. Is that requirement prohibited by the Fourth Amendment, or is it not?

2. Privacy in the Balance: The Government's Interest Trumps

The majority determined that requiring a detainee to state his name, subject to arrest, is not prohibited by the Fourth Amendment. It did so by ''balancing [the Nevada statute's] intrusion on the individual's Fourth Amendment interests against [the statute's] promotion of legitimate government interests.''[128] The majority explained that ''[t]he request for identity has an immediate relation to the purpose, rationale, and practical demands of a *Terry* stop,''[129] and that ''questions concerning a suspect's identity are a routine and accepted part of many *Terry* stops.''[130] The Court added that obtaining a name serves ''important government interests,'' including the officer's interest in assessing ''the threat to [his] own safety,'' the ''possible danger to the potential victim,'' and whether the suspect ''is wanted for another offense, or has a record of violence or mental disorder.''[131]

This rationale is not convincing. At the outset, the concern that law enforcement officers are often killed or wounded in the line of duty by armed criminals was a concern recognized in *Terry*[132] and

[126]Michigan v. DeFillippo, 443 U.S. 31, 43 (1979) (Brennan, J., dissenting). As discussed *supra*, Section IV(C), Justice Brennan's dissent on this issue fleshed out an assumption made by the majority; it did not directly conflict with the majority opinion.

[127]*Id.* at 45 (Brennan, J., dissenting) (quoting Coates v. Cincinnati, 402 U.S. 611, 616 (1971)).

[128]Hiibel, 124 S. Ct. at 1259 (quoting Delaware v. Prouse, 440 U.S. 648, 654 (1979)).

[129]Hiibel, 124 S. Ct. at 1289.

[130]*Id.* at 2458. Of course, the problem is not whether the questions are routine—they undoubtedly are; it is whether answers to those questions can be compelled under threat of arrest.

[131]*Id.*

[132]392 U.S. 1, 23–24 (1968).

addressed by the Court's authorization of a limited frisk for weapons. Moreover, as the Nevada Supreme Court dissent and Justice Breyer's dissent here both explained, there is no ''evidence that an officer, by knowing a person's identity, is better protected from potential violence.''[133] A criminal history simply does not present the same sort of imminent threat as does a gun. Indeed, in *Hiibel*, there was nothing in the record to indicate that if Hiibel had told Deputy Dove his name, the officer would have, from the name alone, been better able to ''assess'' the situation.[134]

Furthermore, even assuming a detainee's name will be generally helpful to the state's criminal investigation, that is not enough to overcome the Fourth Amendment's default protections. As Justice Brennan explained in his concurring opinion in *Kolender*:

> Where probable cause is lacking, we have expressly declined to allow significantly more intrusive detentions or searches [beyond weapons frisks] on the *Terry* rationale, *despite the assertion of compelling law enforcement interests*. ''For all but those narrowly defined intrusions, the requisite 'balancing' has been performed in centuries of precedent and is embodied in the principle that seizures are 'reasonable' only if supported by probable cause.''[135]

To be sure, in some unusual circumstances—perhaps in a very small town, or where the suspect is famous (or infamous) enough that his name will be instantly known—an officer might immediately know from a mere name whether the suspect is ''wanted for another offense,'' or be able immediately to assess ''the threat to [his] own safety.'' As a general rule, however, such information will not be available absent running the detainee's name through one or more databases. But doing so takes time and deliberation and so hardly serves the same protective purpose as a weapons frisk, which will inform the officer of imminent danger of bodily harm. As the Nevada Supreme Court dissent noted, ''[I]t is the observable conduct, not

[133]Hiibel v. Sixth Judicial Dist. Court of Nevada, 59 P.3d 1201, 1209 (Nev. 2002) (Agosti, J., dissenting).

[134]Moreover, Deputy Dove did not conduct a *Terry* frisk on Hiibel, and there is no indication from the videotape of the arrest that he was concerned about any imminent physical threat.

[135]Kolender v. Lawson, 461 U.S. 352, 363 (1983) (quoting Dunaway v. New York, 442 U.S. 200, 214 (1979) (other citations omitted) (emphasis added)).

the identity, of a person, upon which an officer must legally rely when investigating crimes and enforcing the law.''[136]

In this sense, *Hiibel* differs significantly from *United States v. Hensley*,[137] a precedent invoked by Nevada in favor of its stop-and-search regime. In *Hensley*, the police were searching for the alleged driver of a get-away car after an armed robbery; they knew his identity as Thomas Hensley and had distributed a wanted flyer.[138] The Court held that ''where police have been unable to locate a person suspected of involvement in a past crime, the ability to briefly stop that person, ask questions, or check identification in the absence of probable cause promotes the strong government interest in solving crimes and bringing offenders to justice.''[139] By contrast, the government interest in obtaining information in Hiibel is more speculative: In *Hiibel*, Deputy Dove was not looking for ''Dudley Hiibel.'' Thus, unlike in *Hensley*, the name would not have assisted his investigation in any way nor have protected his safety.

Finally, the majority asserts that ''[t]he threat of criminal sanction helps ensure that the request for identity does not become a legal nullity.''[140] That hardly addresses the constitutional question. The threat of criminal sanction might help ensure any number of otherwise discretionary acts. After all, the police can make any number of requests beyond mere identity that a suspect need not answer. Faced with a silent suspect, those requests will also be ''legal nullities.'' Justice Brennan addressed this concern in his *Kolender* concurrence:

> We have never claimed that expansion of the power of police officers to act on reasonable suspicion alone, or even less, would further no law enforcement interests. But 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 forbids such expansion.[141]

[136]Hiibel, 59 P.3d at 1209 (Agosti, J., dissenting).

[137]469 U.S. 221 (1985).

[138]*Id.* at 223.

[139]*Id.* at 229.

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

[141]461 U.S. 352, 365 (1983) (Brennan, J., concurring) (citation omitted).

Against the government's interest, the *Hiibel* majority weighed the intrusiveness of the search. The Court suggested the intrusiveness is negligible, explaining that the ''Nevada statute does not alter the nature of the stop itself'' because it does not change its ''duration'' or its ''location.''[142] Although the statute does not alter the location, it could well alter the duration, because once the officer has the suspect's name, he must then take the next step of running it through a database to gather the very information the majority indicates ''serves important government interests.''[143] Moreover, the statute most certainly does alter the ''nature'' of the stop. A detainee who chooses not to speak, or who does not wish to give his name, will be arrested, tried, convicted, and burdened with a criminal record. A detainee who decides to provide his name will provide the state with the key to an enormous amount of information through a series of computerized, cross-linked databases. Either way, the result is a *de facto* ''suspicious persons registry.'' This is not an insignificant shift in the law of *Terry* stops.

3. The Reasonableness Requirement

With its balancing test, the majority has determined that a *Terry* suspect must provide his name when asked. Or has it? Although such a rule, however incompatible with the Constitution, would have the advantage of setting a ''bright-line,'' the majority quickly moved to blur any such clarity.

The majority recognized Hiibel's concerns that the Nevada statute might effectively ''circumvent[] the probable cause requirement'' by ''allowing an officer to arrest a person for being suspicious,'' thus ''creat[ing] a risk of arbitrary police conduct'' that is not constitutionally permissible.[144] According to the majority, however, those concerns are misplaced:

> Petitioner's concerns are met by the requirement that a *Terry* stop must be justified at its inception and ''reasonably related'' in scope to the circumstances which justified the initial stop. Under these principles, an officer may not arrest a suspect for failure to identify himself if the request for

[142]Hiibel, 124 S. Ct. at 2459.

[143]*Id.* at 2458.

[144]*Id.* at 2459.

> identification is not reasonably related to the circumstances justifying the stop.[145]

Thus, the rule is not simply that a *Terry* suspect must provide his name when asked. The rule is that a *Terry* suspect must provide his name when asked if and only if the request for identification is ''reasonably related to the circumstances justifying the stop.'' Given the majority's reasoning, when might the request for identification *not* be ''reasonably related to the circumstances justifying the stop''? The majority does not say. It is left for police officers and suspects to decide for themselves, on the spot.

The majority provides two possible interpretations of the ''reasonableness'' requirement, but they are of little use, especially when viewed in conjunction:

First, the majority offers up *Hayes v. Florida*.[146] In *Hayes*, police transported a suspect to the police station for fingerprinting, without probable cause, and then arrested him when his fingerprints matched those found at a crime scene.[147] The state court analogized the situation to a *Terry* stop and held that the officers' ''reasonable suspicion'' made their actions appropriate.[148] The Supreme Court reversed because ''transportation to and investigative detention at the station house without probable cause or judicial authorization together violate the Fourth Amendment.''[149] The Court went on, in dicta, to address a hypothetical situation involving a ''brief detention in the field for the purpose of fingerprinting, where there is only reasonable suspicion not amounting to probable cause.''[150] The Court suggested that such a detention was not ''necessarily impermissible under the Fourth Amendment,''[151] explaining:

> 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*

[145]*Id.*

[146]470 U.S. 811 (1985).

[147]*Id.* at 812–13.

[148]*Id.* at 813.

[149]*Id.* at 815.

[150]*Id.* at 816.

[151]*Id.*

> *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.[152]

According to the *Hiibel* majority, this dicta from *Hayes* suggests that ''*Terry* may permit an officer to determine a suspect's identity by compelling the suspect to submit to fingerprinting *only if* there is a 'reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime.'''[153] Is this to be the standard? That is, may a police officer force a suspect to reveal his name under penalty of arrest only if there is a ''reasonable basis for believing that disclosure of the name will establish or negate the suspect's connection with that crime''? This standard seems quite favorable to suspects, and was almost certainly *not* met in Dudley Hiibel's situation.

But, the majority suggested a second interpretation of the ''reasonableness'' requirement, one that is not quite so lenient. The majority asserted that ''[i]t is clear in this case that the request for identification was 'reasonably related in scope to the circumstances which justified' the stop.''[154] Why is it clear? Was there a ''reasonable basis'' for Deputy Dove to believe that the words ''Dudley Hiibel'' would ''establish or negate'' Hiibel's connection with the alleged crime of domestic assault? No—it is clear, said the majority, because ''[t]he officer's request was a commonsense inquiry, not an effort to obtain an arrest for failure to identify after a *Terry* stop yielded insufficient evidence.''[155]

Then is *this* to be the standard: that the request be a ''commonsense'' inquiry? In what circumstances, if any, would it not be ''common sense'' for an officer to ask a *Terry* suspect for his identity? It is difficult to imagine any such circumstances. If those circumstances do not exist, then a detainee's failure to identify himself can result in an arrest at any time, despite the majority's caveat that the request for identification must be ''reasonably related to the circumstances justifying the stop,'' and despite the majority's invocation of *Hayes*.

[152]*Id.* at 817 (emphasis added).

[153]Hiibel v. Sixth Judicial Dist. Court of Nevada, 124 S. Ct. 2451, 2460 (2004) (quoting Hayes v. Florida, 470 U.S. 811, 817 (1985)) (emphasis added).

[154]*Id.*

[155]*Id.*

Hiibel represents a shift in post-*Terry* jurisprudence. The balancing test established by *Terry* was not meant to be anything other than a narrow exception to the default rule of probable cause. As the Court has acknowledged, ''the protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases . . . .''[156] The Court in the past has understood that a ''single, familiar standard is essential to guide police officers,'' and that its ''reluctance to depart from the proved protections afforded by the general rule [probable cause], are reflected in the narrow limitations emphasized in the cases employing the balancing test.''[157] Yet the Court now eschews a ''single, familiar standard,'' and instead has created a veritable waterfall of exceptions to the historic probable cause standard that will be all but impossible for an officer on the beat to apply consistently and correctly.

C. The U.S. Supreme Court's Opinion: Fifth Amendment

As recognized by the majority, to qualify for the Fifth Amendment privilege, ''a communication must be testimonial, incriminating, and compelled.''[158] The majority assumed, without deciding, that stating one's name is testimonial and thus within the Fifth Amendment's scope.[159] But it was careful to hedge its bets, explaining that ''[s]tating one's name *may* qualify as an assertion of fact relating to identity,'' and that ''[p]roduction of identity documents *might* meet the definition as well.''[160] The majority decided against Hiibel solely on the basis that ''disclosure of his name presented no reasonable danger of incrimination.''[161] This saves for another day the question of whether a *Terry* detainee, the disclosure of whose identity clearly presents a ''reasonable danger of incrimination,'' may nonetheless be forced to provide it because it is not ''testimonial.'' The public would have been well-served had the Court simply decided that it is, or at least decided the question one way or another. In his dissent,

[156]Dunaway v. New York, 442 U.S. 200, 213 (1979).

[157]*Id.* at 213–14.

[158]Hiibel, 124 S. Ct. at 2460 (citing United States v. Hubbell, 530 U.S. 27, 34–38 (2000)).

[159]Hiibel, 124 S. Ct. at 2460.

[160]*Id.* (emphasis added).

[161]*Id.*

Justice Stevens addressed the issue the majority avoided, determining that a ''testimonial communication'' was indeed involved.[162] He found of particular significance that ''the communications must be made in response to a question posed by a police officer,'' reasoning that ''[s]urely police questioning during a *Terry* stop qualifies as an interrogation, and it follows that responses to such questions are testimonial in nature.''[163]

Bypassing the ''testimonial'' question, the majority instead reasoned that Hiibel's ''refusal to disclose his name was not based on any articulated real and appreciable fear that his name would be used to incriminate him, or that it 'would furnish a link in the chain of evidence needed to prosecute him.'''[164] Instead, the majority decided that Hiibel ''refused to identify himself only because he thought his name was none of the officer's business,'' not because his name ''could have been used against him in a criminal case.''[165]

According to the majority's reasoning, then, the less guilty one is, the fewer constitutional protections one has. An innocent person subjected to a *Terry* stop can never show that his name might be used to incriminate him, or that it would furnish a link in the chain of evidence needed to prosecute him, because he has done nothing incriminating. In other words, under the majority's decision, the question is not whether a *Terry* detainee's name has the potential to be incriminating in general under the Nevada statute, but whether a particular *Terry* detainee's name might be incriminating. The innocent thus have no constitutional protections at all and can be forced to speak under penalty of arrest and criminal conviction. Ted Bundy has a constitutional right to remain silent when asked for his identity during a *Terry* stop; Justice Kennedy does not. This is a perverse result.

The majority did attempt, however, to generalize the incriminating nature of identity, falling back on what it described as the ''narrow scope'' of the disclosure requirement.[166] The majority reasoned:

[162]*Id.* at 2463 (Stevens, J., dissenting).

[163]*Id.* (Stevens, J., dissenting).

[164]*Id.* at 2461.

[165]*Id.*

[166]*Id.*

> One's identity is, by definition, unique; yet it is, in another sense, a universal characteristic. 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.[167]

The majority observed that ''[i]n every criminal case, it is known and must be known who has been arrested and who is being tried,'' and that ''[e]ven witnesses who plan to invoke the Fifth Amendment privilege answer when their names are called to take the stand.''[168] But at that point, there has been an arrest warrant supported by probable cause, and an indictment supporting trial, in the case of a criminal suspect, or a lawfully-issued subpoena, in the case of a witness. The names of the suspect or witness are already known. Those situations present a far cry from the person stopped on the street, without probable cause, and forced to speak or face arrest; forced to forfeit his anonymity and privacy, or face a criminal record.

Despite brushing off legitimate Fifth Amendment concerns, the majority conceded that ''a case may arise where there is a substantial allegation that furnishing identity at the time of a stop would have given the police a link in the chain of evidence needed to convict the individual of a separate offense.''[169] It reserved until another day its consideration, in such a case, of ''whether the privilege applies, and, if the Fifth Amendment has been violated, what remedy must follow.''[170] Of course, such a test case will arise only as to a person who is guilty. An innocent person, approached by the police without probable cause, simply has no Fifth Amendment right to remain silent.

D. The Conflict in the Majority's View Between the Fourth and Fifth Amendments

Well over a century ago, the Court stated:

> We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the ''unreasonable searches and seizures'' condemned in the

[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] *Id.*

> fourth amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the fifth amendment; and compelling a man ''in a criminal case to be a witness against himself,'' which is condemned in the fifth amendment, throws light on the question as to what is an ''unreasonable search and seizure'' within the meaning of the fourth amendment.[171]

Justice Brennan also alluded to the intersection between the Fourth and Fifth Amendments in his *DeFillippo* dissent, noting that the police officer ''commanded respondent to relinquish his constitutional right to remain silent and then arrested and searched him when he refused to do so.''[172] He added that *Terry* detainees should not be forced to ''choose between forgoing their right to remain silent and forgoing their right not to be searched if they choose to remain silent.''[173]

In its Fourth Amendment analysis, the *Hiibel* majority, referring to *Hayes*, suggested its belief that a police officer may force a suspect to reveal his name under penalty of arrest if there is a ''reasonable basis for believing that [disclosure of the name] will establish or negate the suspect's connection with that crime.''[174] But in that scenario, what is permissible under the Fourth Amendment would be prohibited under the Fifth.

On the other hand, if under the Fifth Amendment a detainee's name is of no moment in either incriminating him or furnishing a link in the chain of evidence needed to prosecute him, what legitimate government interest could there be, consistent with the Fourth Amendment, in obtaining it?

The majority's opinion creates tension between its Fourth and Fifth Amendment analyses: It indicated both that knowing a detainee's name is crucial to the effectiveness and safety of standard police

[171]Boyd v. United States, 116 U.S. 616, 633 (1886). See also Brown v. Illinois, 422 U.S. 590, 592, 601 (1975) (noting, in cases lying ''at the crossroads of the Fourth and the Fifth Amendments, that ''[f]requently . . . rights under the two Amendments may appear to coalesce . . . .'').

[172]Michigan v. DeFillippo, 443 U.S. 31, 46 (1979) (Brennan, J., dissenting).

[173]*Id.*

[174]124 S. Ct. at 2460.

work, and at the same time, that knowing a suspect's name will be of use only rarely, in ''unusual circumstances.''

E. Dissenting Opinions

Justice Breyer, joined by Justices Souter and Ginsburg, dissented, first addressing the majority's Fourth Amendment analysis. Preferring a bright-line, easily administered rule—and one in line with precedent—Justice Breyer explained:

> [T]his Court's Fourth Amendment precedents make clear that police may conduct a *Terry* stop only within circumscribed limits. And one of those limits invalidates laws that compel responses to police questioning.[175]

Reviewing the ''lengthy history'' of concurring opinions, references, ''clear explicit statements,'' and ''strong dicta'' indicating that there is a right not to answer questions posed during a *Terry* stop, Justice Breyer admonished: ''There is no good reason now to reject this generation-old statement of the law.''[176] To the contrary, ''[t]here are sound reasons rooted in Fifth Amendment considerations for adhering to this Fourth Amendment legal condition circumscribing police authority to stop an individual against his will.''[177]

Moving on to those Fifth Amendment concerns, Justice Breyer pointed out some of the more obvious ''[a]dministrative concerns''—concerns that, considering the pervasiveness and variety of stop-and-identify statutes, are not merely academic:

> Can a State, in addition to requiring a stopped individual to answer ''What's your name?'' also require an answer to ''What's your license number?'' or ''Where do you live?'' Can a police officer, who must know how to make a *Terry* stop, keep track of the constitutional answers? After all, answers to any of these questions may, or may not, incriminate, depending upon the circumstances.[178]

Noting the majority's acknowledgement of ''unusual circumstances'' wherein the Fifth Amendment might be violated, Justice

[175]*Id.* at 2464 (Breyer, J., dissenting).

[176]*Id.* at 2465 (Breyer, J., dissenting).

[177]*Id.* (Breyer, J., dissenting).

[178]*Id.* at 2465–66 (Breyer, J., dissenting).

Stevens wondered: ''How then is a police officer in the midst of a *Terry* stop to distinguish between the majority's ordinary case and this special case where the majority reserves judgment?''[179]

Justice Breyer rebuked the majority:

> The majority presents no evidence that the rule enunciated by Justice White and then by the *Berkemer* Court, which for nearly a generation has set forth a settled *Terry* stop condition, has significantly interfered with law enforcement. Nor has the majority presented any other convincing justification for change. I would not begin to erode a clear rule with special exceptions.[180]

Justice Stevens made a similar point in his separate dissent observing: ''Given our statements to the effect that citizens are not required to respond to police officers' questions during a *Terry* stop, it is no surprise that [Hiibel] assumed, as have we, that he had a right not to disclose his identity.''[181]

Justice Stevens addressed only the Fifth Amendment issue. Alluding to the *Byers* analysis, he first noted that the Nevada law imposes a duty to speak upon a narrow class of individuals who are '''inherently suspect of criminal activities.'''[182] Recognizing that the Nevada statute compels a suspect only to identify himself, Justice Stevens observed that ''[p]resumably the statute does not require the detainee to answer any other question because the Nevada Legislature realized that the Fifth Amendment prohibits compelling the target of a criminal investigation to make any other statement.''[183] As discussed above,[184] numerous other states and localities have made no such distinction, and it remains an open question whether Justice Stevens' presumption will prove accurate.

Justice Stevens concluded that ''the broad constitutional right to remain silent . . . is not as circumscribed as the Court suggests, and does not admit even of the narrow exception defined by the Nevada

[179]*Id.* at 2466 (Breyer, J., dissenting).

[180]*Id.* (Breyer, J., dissenting).

[181]*Id.* at 2462–63 (Stevens, J., dissenting).

[182]*Id.* at 2461 (Stevens, J., dissenting) (quoting Albertson v. Subversive Activities Control Board, 382 U.S. 70, 79 (1965)).

[183]Hiibel, 124 S. Ct. at 2462 (Stevens, J., dissenting).

[184]See Section III *supra*.

statute.''[185] He observed that the Fifth Amendment privilege is widely available ''outside of criminal court proceedings'' and is meant to protect persons ''in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves.''[186] Those protected include, inter alia, an indicted defendant at trial, the unindicted target of a grand jury investigation, and an arrested subject during custodial interrogation in a police station.[187] Justice Stevens thus reasoned that ''[t]here is no reason why the subject of police interrogation based on mere suspicion, rather than probable cause, should have any lesser protection,'' and that indeed, the ''Fifth Amendment's protections apply with equal force in the context of *Terry* stops.''[188] Justice Stevens then took issue with the majority's definition of ''incriminating,'' noting that ''our cases have afforded Fifth Amendment protection to statements that are 'incriminating' in a much broader sense than the Court suggests.''[189] He explained:

> The Court reasons that we should not assume that the disclosure of [Hiibel's] name would be used to incriminate him or that it would furnish a link in a chain of evidence needed to prosecute him. But why else would an officer ask for it? And why else would the Nevada Legislature require its disclosure only when circumstances ''reasonably indicate that the person has committed, is committing or is about to commit a crime''? If the Court is correct, then [Hiibel's] refusal to cooperate did not impede the police investigation. Indeed, if we accept the predicate for the Court's holding, the statute requires nothing more than a useless invasion of privacy.[190]

VII. Implications of the *Hiibel* Decision

After *Hiibel*, any citizen approached by police with a demand for identification cannot be certain whether declining to respond is a constitutionally respected right, or a crime. If the approach is not

[185]Hiibel, 124 S. Ct. at 2462 (Stevens, J., dissenting).

[186]*Id.* (Stevens, J., dissenting) (quoting Miranda v. Arizona, 384 U.S. 436, 467 (1966)).

[187]Hiibel, 124 S. Ct. at 2462 (Stevens, J., dissenting).

[188]*Id.* (Stevens, J., dissenting).

[189]*Id.* (Stevens, J., dissenting).

[190]*Id.* at 2464 (Stevens, J., dissenting).

based on ''reasonable suspicion,'' or if the demand for identification is not ''reasonably related'' to the officer's reasonable suspicion (under either the strict *Hayes* ''establish or negate'' standard, or the lenient ''commonsense inquiry'' standard, whichever is ultimately found to apply), then failure to respond *is* a right. If revealing one's identity would lead to a substantial risk of self-incrimination, then failure to respond *might* be a right. Otherwise, failure to respond is a crime.[191] The onus is on the citizen to decide which scenario applies.

The dilemma in which a *Terry* detainee will now find himself was long ago recognized by Justice Brennan, in his *Kolender* concurrence:

> [A]rrest and the threat of a criminal sanction have a substantial impact on interests protected by the Fourth Amendment, far more severe than we have ever permitted on less than probable cause . . . . [T]he validity of such arrests will be open to challenge only after the fact, in individual prosecutions for failure to produce identification. Such case-by-case scrutiny cannot vindicate the Fourth Amendment rights of persons . . . , many of whom will not even be prosecuted after they are arrested . . . . A pedestrian approached by police officers has no way of knowing whether the officers have ''reasonable suspicion''—without which they may not demand identification . . . .—because that condition depends solely on the objective facts known to the officers and evaluated in light of their experience . . . . The pedestrian will know that to assert his rights may subject him to arrest and all that goes with it: . . . [including] the expense of defending against a possible prosecution. The only response to be expected is compliance with the officers' requests, whether or not they are based on reasonable suspicion, and without regard to the possibility of later vindication in court. *Mere reasonable suspicion does not justify subjecting the innocent to such a dilemma*.[192]

[191]That is, it is certainly a crime in those states with stop-and-identify statutes. But it is not at all clear that *Hiibel* applies *only* to states with stop-and-identify statutes. Because those statutes are generally considered codifications of *Terry*, a court could find that a suspect who does not identify himself is delaying or obstructing a police officer in discharging his common law legal duty, as authorized by *Terry*, *Hiibel*, and state court cases adopting their reasoning, to investigate suspicious circumstances.

[192]Kolender v. Lawson, 461 U.S. 352, 367–69 (1983) (Brennan, J., concurring) (emphasis added) (citations and footnotes omitted).

The *Hiibel* decision also raises interesting federalism issues. The question of a ''national ID card'' remains one of substantial import and debate in recent years. States that wish to provide greater civil liberties protections to their citizens may nevertheless find themselves faced with federal law officers stopping those citizens to demand identification.

VIII. Conclusion

The Court has strayed far from the bright-line rules of probable cause and the ''right to remain silent.'' It has replaced clarity with an array of exceptions and exceptions-to-exceptions so internally inconsistent and difficult to apply that the net result is a discernible erosion of constitutional liberties. Now that the Court has rejected a simple rule allowing a person to refuse to answer *any* questions during a *Terry* stop, it is only a matter of time before it has the opportunity to decide, first, whether its rollback of Fourth Amendment protections will be limited to a search for mere identity, or whether the state will be empowered to arrest its citizens for rebuffing a wide variety of intrusive inquiries; and second, whether the Fifth Amendment even matters during a *Terry* stop. One can only hope that, in the line of cases that will inevitably follow *Hiibel*, the Court adheres more closely to constitutional first principles.