All or Nothing: The Supreme Court Answers the Question What's in a Name

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ALL OR NOTHING: THE SUPREME COURT ANSWERS THE QUESTION “WHAT’S IN A NAME?”

Hiibel v. Sixth Judicial District Court of Nevada, Humboldt County, 124 S. Ct. 2451 (2004)

I. INTRODUCTION

In Hiibel v. Sixth Judicial District Court of Nevada, Humboldt County, the United States Supreme Court affirmed the constitutionality of Nevada Revised Statute (NRS) Section 171.123. This statute required an individual to identify himself in response to a police officer’s inquiry, or face arrest. Petitioner argued that his arrest pursuant to Section 171.123 violated his Fourth Amendment right to be free from unreasonable searches and seizures and deprived him of the Fifth Amendment’s protections against self-incrimination. The Court, after balancing the intrusion on petitioner’s rights against the legitimate government interests served by the search, reiterated that questions concerning a suspect’s identity are permitted during an investigative stop allowed by Terry v. Ohio; it then held that petitioner could be compelled to answer the inquiry. The Court also held that the requirement of the Nevada statute did not violate petitioner’s Fifth Amendment right to be free from self-incrimination because “disclosure of his name presented no reasonable danger of incrimination.”

This Note first argues that the Hiibel Court wrongly decided petitioner’s Fourth Amendment claim. In Hiibel, the Court determined the reasonableness of the search by balancing the individual’s right to be free from intrusion against the legitimate government interests promoted by the search. Accepting the Court’s own test, however, petitioner’s arrest for refusal to identify himself under Section 117.123 was unconstitutional. The

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3 Hiibel, 124 S. Ct. at 2455.
4 Id. at 2458-59.
5 Id. at 2460.
minimal government interest served by the requirement for identification was outweighed by the breach of Hiibel’s right to be secure in his person "against unreasonable searches and seizures."\(^6\)

Secondly, this Note argues that a person’s identity may indeed be incriminating evidence; thus, the Court wrongly held that petitioner’s arrest pursuant to Section 117.123 did not violate his Fifth Amendment right to be free from self-incrimination. While seeking to justify the constitutionality of the statute with regard to both the Fourth and Fifth Amendments, the Court made two mutually exclusive arguments, which call into question the soundness of its reasoning and thus the constitutionality of the Nevada Statute.

II. BACKGROUND

A. FOURTH AMENDMENT

*Hiibel* is the latest in a line of cases interpreting the scope of the law enforcement stops permitted by the Court in *Terry v. Ohio*.\(^7\) In the nearly forty years since *Terry*, the Court has set forth a test for determining whether a particular action by law enforcement in connection with a *Terry* stop violates the Fourth Amendment: whether the intrusion upon the individual’s rights is justified by the countervailing government interest implicated by the intrusion.\(^8\)

1. *Terry v. Ohio*

   The Fourth Amendment to the Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."\(^9\) In *Terry v. Ohio*, the Court addressed whether a police officer had violated the suspects’ Fourth Amendment rights when he, lacking probable cause, patted down suspects in a search for weapons.

   In that case, a police officer noticed three suspicious individuals milling about the front of a store.\(^10\) Concerned that they were planning a robbery, and fearing that they were armed, the officer stopped them and

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\(^6\) *Id.* at 2459.

\(^7\) 392 U.S. 1 (1968).


\(^9\) *U.S. CONST.* amend. IV.

\(^10\) *Terry*, 392 U.S. at 6.
patted them down. During the search, he discovered that two of the men had pistols, and he placed each under arrest. At trial, the defendants made a motion to suppress the guns as evidence, which the trial court denied. The county court of appeals affirmed, and the Ohio Supreme Court dismissed the appeal. The U.S. Supreme Court granted certiorari and affirmed the conviction.

The Court held that a law enforcement official lacking probable cause can, for the protection of himself and others, conduct a limited search of a suspect's outer clothing in order to discover weapons, when he has observed conduct that leads him to believe that the person stopped may be armed and dangerous. The relevant standard is "reasonable suspicion;" the police officer must "be able to point to specific and articulable facts" combined with the inferences reasonably drawn from those facts, which create reasonable suspicion. The Court acknowledged that the protections of the Fourth Amendment do not cease once an individual leaves the home, but are fully available to the citizen on the street. In addition, it was held that an individual is "seized" for purposes of the Fourth Amendment when a police officer restricts his freedom to walk away, and that the exploration of the exterior of a person's clothing constitutes a "search."

The key issue in the case was whether there was justification for the officer's intrusion upon petitioners' rights. In the Court's view, the Fourth Amendment was implicated every time a public agent intruded upon an individual's personal security, and the scope of the intrusion was central to the determination of reasonableness. In order to justify an intrusion upon "constitutionally protected interests," the governmental interests at stake must outweigh those being encroached upon. In addition, the Court held that the search and seizure in question were "reasonably related in scope to the justification for their initiation," and the resulting evidence

11 Id. at 7.
12 Id.
13 Id. at 7-8.
14 Id. at 8.
15 Id.
16 Id. at 30-31.
17 Id. at 21.
18 Id. at 8-9.
19 Id. at 16.
20 Id. at 17.
21 Id. at 23.
22 Id. at 19 n.15.
23 Id. at 21.
could therefore be admitted without violating petitioners' Fourth Amendment rights.\textsuperscript{24}

The Court justified the search and seizure by pointing to the governmental interests at stake, not least of which was the officer's personal and immediate interest in his own safety.\textsuperscript{25} The Court cited the tradition of armed violence by the country's criminals, often directed toward law enforcement officers, as evidence that the search was necessary for the officer's protection.\textsuperscript{26} Although the Court allowed the search and seizure in these narrow circumstances, it refused to further "develop... the limitations which the Fourth Amendment places upon a protective seizure and search for weapons."\textsuperscript{27}

In his concurrence, Justice White wrote in order to clarify the scope and purpose of the holding.\textsuperscript{28} Justice White acknowledged that nothing precludes a police officer from posing questions to anyone on the street, and that given the proper circumstances, as in \textit{Terry}, an individual may be detained while such questions are asked.\textsuperscript{29} "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."\textsuperscript{30}

2. \textit{Subsequent Development of Terry's Fourth Amendment Standard}

The following term, in \textit{Davis v. Mississippi}, the Court held that fingerprint evidence obtained during an illegal search under the Fourth and Fourteenth Amendments should have been excluded at trial.\textsuperscript{31} In the course of reaching this conclusion, the Court criticized the State for relying on cases which approve "general questioning of citizens" during investigation of a potential crime.\textsuperscript{32} By its own admission, the Court's statements in these cases "merely reiterated the settled principle that while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer."\textsuperscript{33}

\begin{footnotesize}
\textsuperscript{24} \textit{Id.} at 29; see \textit{Warden v. Hayden}, 387 U.S. 294, 310 (1967) (Fortas, J., concurring).
\textsuperscript{25} \textit{Terry}, 392 U.S. at 22-24. Central to the Court's determination of the police officer's individual interests in his own safety were statistics describing the number of officers killed in the line of duty by weapons, and the ready availability to criminals of firearms. \textit{See id.} at 24 n.21.
\textsuperscript{26} \textit{Id.} at 23-24.
\textsuperscript{27} \textit{Id.} at 29.
\textsuperscript{28} \textit{Id.} at 34 (White, J., concurring).
\textsuperscript{29} \textit{Id.} (White, J., concurring).
\textsuperscript{30} \textit{Id.} (White, J., concurring).
\textsuperscript{31} 394 U.S. 721, 728 (1969).
\textsuperscript{32} \textit{Id.} at 727 n.6.
\textsuperscript{33} \textit{Id.}
\end{footnotesize}
Ten years later, in Brown v. Texas, two police officers, cruising in their patrol car, had observed one man walking away from another in an alley known for its heavy drug traffic. One of the officers testified that the man was stopped because the situation "looked suspicious," although the officers did not suspect him of any specific misconduct. When approached, the suspect refused to identify himself, and was arrested for violation of a Texas statute which criminalized such refusal during a lawful stop. The statute read in relevant part: "A person commits an offense if he intentionally refuses to report or gives a false report of his name and residence address to a peace officer who has lawfully stopped him and requested the information."

The Court held that when the officers detained the person for the purpose of obtaining his identity, they had seized him for purposes of the Fourth Amendment. The Court, consistent with its analysis in Terry, sought to determine the search's reasonability by balancing the public's interest in preventing crime against the individual's right to be free from unreasonable searches and seizures; this test required that a seizure be justified by "specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or ... a plan embodying explicit, neutral limitations on the conduct of the individual officers." However, the Court found that the arrest was not based on objective criteria—the suspicion had been a baseless hunch—and therefore the Texas statute had been improperly applied to appellant. It refrained from deciding "whether an individual may be punished for refusing to identify himself in the context of a lawful investigatory stop which satisfies Fourth Amendment requirements."

The Court went on to hold, in Kolender v. Lawson, that a California statute requiring a suspect to provide "credible and reliable" identification under the threat of arrest was unconstitutionally vague under the Due Process Clause of the Fourth Amendment. In his concurrence, Justice Brennan reiterated that brief seizures permitted by Terry must still be

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35 Id. at 48-49.
36 Id. at 49.
37 TEXAS PENAL CODE ANN. § 38.02(a) (Vernon 1974); Brown, 443 U.S. at 49.
38 § 38.02(a).
39 Brown, 443 U.S. at 50.
40 Id. at 50-51.
41 Id. at 51 (citing Delaware v. Prouse, 440 U.S. 648, 663 (1997)).
42 Id. at 53.
43 Id. at 53 n.3.
"strictly circumscribed" to limit intrusiveness, and described several characteristics of such seizures, including, "most importantly, the suspect must be free to leave after a short time and to decline to answer the questions put to him." A year later, the Court indirectly addressed the issue of whether suspects could be required to answer the questions posed to them by law enforcement officers. In dicta accompanying the Court’s decision in Berkemer v. McCarty—a case interpreting the scope of Miranda protections—Justice Marshall wrote that an officer did have the ability to ask a suspect a “moderate number” of questions in order to ascertain his identity for the purpose of confirming or assuaging the officer’s suspicions. However, “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.”

Shortly thereafter, the Court held in United States v. Hensley that a police officer, in addition to being able to stop an individual suspected of a previously committed crime under the circumstances delineated in Terry, could also check that person’s identification in the absence of probable cause. In that case, the suspect was wanted for a bank robbery, and was stopped by police on the basis of a “wanted flyer” issued by a neighboring jurisdiction which had a reasonable suspicion based on specific and articulable facts. While they awaited confirmation from a dispatcher regarding a warrant for respondent’s arrest, two officers who were familiar with the flyer pulled respondent over and asked him and his passenger to step out of the car. Upon doing so, one of the officers spotted a revolver sticking out from beneath the seat. Both men were arrested. The Court found that the stop was within the parameters set forth by Terry, and that the reasonable suspicion “justified the length and intrusiveness of the stop.” Again, the Court weighed the government’s interests against the constitutional rights of the individual. The Court concluded that “the ability

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45 Id. at 364–65 (Brennan, J., concurring).
46 Id. at 365 (Brennan, J., concurring).
48 Id. at 439.
49 Id. at 439-40.
51 Id. at 229.
52 Id. at 232.
53 Id. at 224.
54 Id.
55 Id. at 225.
56 Id. at 235.
to . . . check identification in the absence of probable cause promotes the strong governmental interest in solving crimes and bringing offenders to justice," and that those interests outweighed those of the individual.\textsuperscript{57}

B. FIFTH AMENDMENT

The Fifth Amendment privilege against self-incrimination "serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves."\textsuperscript{58} In order to qualify for this protection, a communication must have three characteristics: it must be testimonial, incriminating, and compelled.\textsuperscript{59}

The communication of an accused is testimonial when it "explicitly or implicitly, relate[s] a factual assertion or disclose[s] information."\textsuperscript{60} However, the Court had held that a suspect could be compelled to provide a sample of his blood,\textsuperscript{61} handwriting,\textsuperscript{62} or voice\textsuperscript{63} without implicating the protections of the Fifth Amendment because these actions were not testimonial. These communications were not testimonial because the suspect's compelled disclosures did not constitute "the contents of his own mind"\textsuperscript{64} or "knowledge he might have."\textsuperscript{65} On the other hand, actions are not as a class excluded from being testimonial—"the act of production' itself may implicitly communicate 'statements of fact."\textsuperscript{66} Most recently, the Court held in the context of Sixth Amendment’s Confrontation Clause that the term "testimonial" covers responses to police interrogations, if nothing else.\textsuperscript{67}

A communication that is both compelled and testimonial must also be incriminating in order to invoke the protections of the Fifth Amendment.\textsuperscript{68} The Court has held that a communication was incriminating when there was a real and appreciable danger of incrimination: a danger greater than "some extraordinary and barely possible contingency."\textsuperscript{69} In addition, the witness must reasonably believe that the information divulged could either be used

\textsuperscript{57} Id. at 229.
\textsuperscript{58} Miranda v. Arizona, 384 U.S. 436, 467 (1966).
\textsuperscript{60} Doe v. United States, 487 U.S. 201, 210 (1988).
\textsuperscript{63} United States v. Dionisio, 410 U.S. 1, 7 (1973).
\textsuperscript{64} Curcio v. United States, 354 U.S. 118, 128 (1957).
\textsuperscript{65} United States v. Wade, 388 U.S. 218, 222 (1967).
\textsuperscript{68} Hubbell, 530 U.S. at 37-38.
\textsuperscript{69} Brown v. Walker, 161 U.S. 591, 599 (1896) (internal quotations omitted).
to prosecute him, or lead to evidence which could be used in such a prosecution.\textsuperscript{70} Hence, the privilege may be invoked when an individual reasonably believes that his answers will “furnish a link in the chain of evidence needed to prosecute” him.\textsuperscript{71}

Prior case law, therefore, left the issues at stake in \textit{Hiibel} well-defined, yet undecided. A law enforcement officer could stop an individual suspected of a crime based upon reasonable suspicion instead of probable cause, and had the ability to request identification from the suspect.\textsuperscript{72} The Court had stated—although not directly held—that the suspect was free to decline that request.

\textbf{C. CAREY V. NEVADA GAMING CONTROL BOARD}

The Ninth Circuit had previously ruled on the constitutionality of the statute in question in \textit{Hiibel}, NRS Section 171.123. In \textit{Carey v. Nevada Gaming Control Board},\textsuperscript{73} the Ninth Circuit held the statute to be unconstitutional when applied to an individual who refused to identify himself after being arrested at a casino on suspicion of cheating.\textsuperscript{74} The court found that the Nevada Gaming Control Board Agent had lawfully detained Carey in accordance with \textit{Terry}.\textsuperscript{75} However, the court’s previous holding in \textit{Lawson v. Kolender}\textsuperscript{76}—that compelling an individual to identify themselves violated the Fourth Amendment—remained controlling in the circuit, and therefore Carey’s arrest under the statute was held to violate his Fourth Amendment rights.\textsuperscript{77} The Ninth Circuit supported its holding by reasoning that “the serious intrusion on personal security outweighs the mere possibility that identification might provide a link leading to arrest.”\textsuperscript{78}

\textsuperscript{70} Kastigar v. United States, 406 U.S. 441, 445 (1972).

\textsuperscript{71} Hoffman v. United States, 341 U.S. 479, 486 (1951).


\textsuperscript{73} 279 F.3d 873 (9th Cir. 2002).

\textsuperscript{74} Id. at 876, 881.

\textsuperscript{75} Id. at 880.

\textsuperscript{76} 658 F.2d 1362 (9th Cir. 1981), aff’d, 461 U.S. 352 (1983). The Supreme Court later affirmed the Ninth Circuit’s holding on the grounds that the statute was unconstitutionally vague, but declined to review the Ninth Circuit’s holding that NRS Section 171.123 violated the Fourth Amendment. Kolender v. Lawson, 461 U.S. 352, 361-62 (1983).

\textsuperscript{77} Carey, 279 F.3d at 880.

\textsuperscript{78} Id. (quoting Lawson, 658 F.2d at 1366-67).
III. FACTS & PROCEDURAL HISTORY

A. FACTS

On the evening of May 21, 2000, the Humboldt County, Nevada, sheriff’s department responded to a tip reporting that a man was assaulting a woman in a red and silver GMC truck on Grass Valley Road. Deputy Lee Dove was informed of the incident by police dispatch, and drove to investigate. Upon arrival, Deputy Dove spoke with the caller, who directed him toward a truck parked on the side of the road. As he approached the truck, Dove observed skid marks in the gravel leading to the truck, which suggested that it had been parked very suddenly. He saw Larry D. Hiibel standing outside the truck, and observed Hiibel’s seventeen-year-old daughter inside the cab. Dove approached Hiibel and told him he was investigating a report of a fight. Dove believed him to be intoxicated based on the appearance of his eyes, his odor, his speech, and his mannerisms, and asked him to produce identification.

Hiibel refused and asked Dove why he needed identification. Dove informed Hiibel that he was conducting an investigation and needed to see his identification. At that point, Hiibel became upset and insisted that he had done nothing wrong. “The officer explained that he wanted to find out who the man was and what he was doing there.” As he continued to request identification, and Hiibel continued to refuse to produce it (a total of eleven times), Hiibel placed his hands behind his back and challenged the deputy to arrest him. Deputy Dove described the situation in his report of the incident:

79 The police videotape of the stop can be found at www.papersplease.org/hiibel/video.html.
81 Id.
83 Id.
84 Hiibel, 124 S. Ct. at 2455; Hiibel, 59 P.3d at 1203.
85 Hiibel, 124 S. Ct. at 2455.
86 Hiibel, 59 P.3d at 1203.
87 Hiibel, 124 S. Ct. at 2455.
88 Id.
89 Id.
90 Id.
91 Id.
During my conversation with Mr. Hiibel, there was a point where he became somewhat aggressive [sic].

I felt based on me not being able to find out who he was, to identify him, I didn’t know if he was wanted or what is [sic] situation was, I wasn’t able to determine what was going on crimewise in the vehicle, based on that I felt he was intoxicated, and how he was becoming aggressive and moody, I went ahead and put him in handcuffs so I could secure him for my safety, and put him in my patrol vehicle.\textsuperscript{92}

Hiibel was arrested and charged with violating NRS Section 199.280, "willfully resisting, delaying, or obstructing a public officer in discharging or attempting to discharge any legal duty of his office," as well as a misdemeanor domestic battery.\textsuperscript{93} The government reasoned that his violation of Section 199.280 was premised on his violation of NRS Section 171.123(3): refusing to identify himself to a police officer.\textsuperscript{94}

B. PROCEDURAL HISTORY

1. Trial Court

At trial in the Justice Court of Union Township, the court found that by refusing to identify himself as required by Section 171.123(3) Hiibel had "obstructed and delayed Dove as a public officer in attempting to discharge his duty."\textsuperscript{95} He was convicted for violation of Section 199.280 (the domestic battery charge was dismissed) and fined $250.\textsuperscript{96}

2. Sixth Judicial District Court

Hiibel appealed to the district court, contending that his arrest pursuant to Section 171.123 violated his Fourth and Fifth Amendment rights.\textsuperscript{97} The court affirmed the conviction, holding that it was "reasonable and necessary" for Deputy Dove to request Hiibel’s identification.\textsuperscript{98} The district court considered evidence beyond Hiibel’s failure to identify himself in justifying his arrest and conviction, including his apparent intoxication and the corresponding possibility that he had been driving under the influence.\textsuperscript{99} The court also balanced the public interests against the individual interests

\textsuperscript{92}Hiibel v. Sixth Judicial Dist. Court of the State of Nev., 59 P.3d 1201, 1203 (Nev. 2002).
\textsuperscript{93}Id.; Hiibel, 124 S. Ct. at 2455.
\textsuperscript{94}Hiibel, 124 S. Ct. at 2455.
\textsuperscript{95}Id. at 2456.
\textsuperscript{96}Id.
\textsuperscript{97}Hiibel, 59 P.3d at 1203.
\textsuperscript{98}Id.
\textsuperscript{99}Id.
at stake in the case and concluded that the public's interest in Dove's safety—to which it was "crucial... to know the identity of a person suspected of battery, domestic violence, and driving under the influence"—outweighed Hiibel's interests in not identifying himself.  

3. Supreme Court of Nevada

The Supreme Court of Nevada, after concluding that its jurisdiction was proper and that the constitutionality of NRS Section 171.123 was an issue of first impression, went on to address the merits of Hiibel's appeal. It noted that the general issue at stake—whether a person reasonably suspected of a crime may be required to identify himself—remained unresolved (and the subject of a circuit split), as it had been twice passed on by the United States Supreme Court. The court announced that it would undertake "an independent analysis of the constitutionality" of NRS Section 171.123.

The decision began by stating that the right "to wander freely and anonymously" and the "right to be let alone— to simply live in privacy" are sacred and are afforded protection under the Fourth Amendment. However, the court wrote, these rights include limitations—chief among them reasonableness. Indeed, the reasonableness of an intrusion into an individual's privacy has been the key question in cases implicating the Fourth Amendment, and it was in this case as well. On the side of the public interest, the court considered "the gravity of the public concerns served by the seizure, [and] the degree to which the seizure advances" those interests; on the other side of the scale was "the severity of the interference with individual liberty."  

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100 Id. at 1203-04.
101 Id. at 1204.
102 See id. The Tenth Circuit Court of Appeals had, in Oliver v. Woods, 209 F.3d 1179, 1190 (10th Cir. 2000), upheld a Utah statute requiring individuals to identify themselves during investigatory stops, whereas the Ninth Circuit, in Carey v. Nevada Gaming Board, 279 F.3d 873, 881 (9th Cir. 2002), held NRS Section 171.123 to violate the Fourth Amendment.
103 Hiibel, 59 P.3d at 1204.
104 Id.
105 Id.
106 Id.; see U.S. CONST. amend. IV. ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ").
107 Hiibel, 59 P.3d at 1204-05.
108 Id. at 1205.
The court concluded that, when weighed against the intrusion allowed by the statute, the evidence was “overwhelming” in favor of the public’s interest in requiring individuals to identify themselves to police officers. The primary evidence cited in favor of the public’s interest was the danger faced by law enforcement officers in the line of duty—particularly in the course of an investigative stop. The court took judicial notice that in 2000, fifty-one officers were murdered in the line of duty, including thirteen murdered during traffic stops or pursuits, twelve during arrests, and six during investigations of suspicious persons. The court reasoned that some of those incidents may have been avoided if the officers had been able to determine the identity and criminal history of their attackers, for “knowing the identity of a suspect allows officers to more accurately evaluate and predict potential dangers that may arise during an investigative stop.”

A police officer must be allowed to protect himself from an individual when he has reasonable suspicion that the individual has committed a crime, and obtaining the suspect’s identity is essential to that protection, according to the court. In addition, there are other situations where the state has an interest in requiring identification from suspects: a sex offender loitering outside a daycare center, the enforcement of restraining orders, the enforcement of curfews, and perhaps the most compelling policy, the challenge of defending the nation against terrorism.

In closing, the majority reiterated that the protections of the Fourth Amendment are not absolute; they are limited by “principles of policy” when those policies become important enough to outweigh the individual rights, as they had in this case. Aside from the promotion of these policies, the court concluded that the requirements of the statute were reasonable, pointing out that “we reveal our names in a variety of situations every day without much consideration”—when one introduces oneself to others or disseminates one’s name through credit card transactions, checks, and business cards—not to mention the gauntlet of security faced by airline passengers each day. A name, according to the court, is “neutral and non-incriminating information,” and providing one’s name is a minimal and

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109 Id.
110 Id.
111 Id.
112 Id.
113 Id.
114 Id. at 1205-06.
115 Id. at 1206.
116 Id.
ultimately reasonable intrusion. Thus, the court held that Deputy Dove had acted reasonably when, based on the sum of his observations, he repeatedly asked Hiibel to identify himself and, faced with repeated refusals and challenges to arrest Hiibel, Dove proceeded to do so. The court concluded that the application of Section 171.123 to Hiibel’s case did not violate his Fourth Amendment rights.

Hiibel petitioned for rehearing, in order to obtain resolution of his Fifth Amendment claim. The Nevada Supreme Court denied the petition without opinion. The United States Supreme Court granted certiorari in order to decide whether the application of Section 171.123 to Hiibel’s case violated his Fourth and Fifth Amendment rights.

IV. SUMMARY OF OPINIONS

A. JUSTICE KENNEDY’S OPINION

After tracing the history and development of so-called “stop and identify” statutes, the majority opinion, authored by Justice Kennedy, found that the Nevada statute was reasonable for purposes of the Fourth Amendment and did not compel self-incrimination in violation of the Fifth Amendment. The Court began its Fourth Amendment analysis by observing that “asking questions is an essential part of police investigations.” It asserted that interrogation relating to one’s identity does not automatically implicate the Fourth Amendment, and since Terry, it has recognized that when a law enforcement officer has reasonable suspicion that a person has been, is, or is about to be involved in criminal activity, the officer can stop that individual and take reasonable steps to investigate such activity. In fact, the Court wrote, its previous decisions—particularly United States v. Hensley, Hayes v. Florida, and

\[117\] Id.
\[118\] Id. at 1207.
\[119\] Id.
\[121\] Id.
\[122\] Id.
\[123\] Id. at 2454. Justice Kennedy’s majority opinion was joined by Chief Justice Rehnquist and Justices O’Connor, Scalia, and Thomas.
\[124\] Id. at 2460-61.
\[125\] Id. at 2458.
\[126\] Id. (quoting INS v. Delgado, 466 U.S. 210, 216 (1984)).
\[127\] Id. at 2458.
Adams v. Williams—"make clear that questions concerning a suspect's identity are a routine and accepted part of many Terry stops." The required reasonableness is attained if the officer's measure is "justified at its inception, and . . . reasonably related in scope to the circumstances which justified the interference in the first place."

Justice Kennedy anticipated the balancing test previously employed by the Supreme Court and applied by the lower courts to this case when he pointed out that learning a suspect's identity serves several government interests: informing the officer of the suspect's record of crime, violence, or mental instability, and allowing an officer to either arrest a suspect or clear his name. The latter concern is particularly germane in domestic violence cases such as this one, according to Justice Kennedy; officers faced with such a situation "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."

Next, the majority opinion set the stage for an examination of the relevant precedent. Although the Court has established that an officer may request identification during a Terry stop, it remains an "open question whether the suspect can be arrested and prosecuted for refusal to answer." Justice Kennedy also sought to preempt Hiibel's marshaling of language found in previous cases—such as Justice White's concurrence in Terry and statements in Berkemer v. McCarty, where the Court stated that an individual subject to a Terry stop had no obligation to respond to questions. Justice Kennedy dismissed these statements as not controlling. He supported the Berkemer Court's conclusion that because the Fourth Amendment provides rights against the government as opposed to obligations on the individual, the Fourth Amendment cannot compel a suspect to answer questions. However, Justice Kennedy noted, the case at bar did not raise this issue, because the legal obligation arose out of the

131 Hiibel, 124 S. Ct. at 2458.
133 Id. at 2458.
134 Id.
135 Id.
136 Id. at 2458-59.
137 Terry, 392 U.S. at 34.
139 Hiibel, 124 S. Ct. at 2459.
140 Id.
Nevada statute, not the Fourth Amendment. Because a state law was at issue, Kennedy reasoned, the statements in Terry and Berkemer did not prohibit a state from requiring a suspect to provide his name during a Terry stop.

This issue could only be decided through application of the test set forth in Terry and its progeny: balancing the government’s interest in preventing crimes against the intrusion on the individual’s Fourth Amendment rights. The Court wrote that NRS Section 171.123 satisfied the reasonableness standard because “[t]he request for identity has an immediate relation to the purpose, rationale, and practical demands of a Terry stop,” and the threat of arrest and punishment encouraged obedience without altering the duration or location of the stop. The majority acknowledged petitioner’s argument that the Nevada statute allows the police to make an arrest in the absence of probable cause, thereby encouraging arbitrary police conduct, in contravention of the Fourth Amendment. However, the Court reasoned that this danger was avoided by the requirement that the request for identification have a reasonable relation to the circumstances surrounding the stop, a requirement which it held was met in the present case (with minimal justification, except a characterization of the officer’s inquiry as “commonsense”). The Court stated its holding generally: “A state law requiring a suspect to disclose his name in the course of a valid Terry stop is consistent with Fourth Amendment prohibitions against unreasonable searches and seizures.”

The majority proceeded to analyze Hiibel’s next claim—that his arrest for refusal to identify himself compelled him “to be a witness against himself” in violation of the privileges accorded him by the Fifth Amendment. In order for a communication to implicate the Fifth Amendment, it must be testimonial, incriminating, and compelled. Although the respondent asserted that the identification required by Section

141 Id.
142 Id.
143 Id.
144 Id.
145 Id.
146 Id.
147 Id.
148 Id. at 2460.
149 Id. at 2459.
150 U.S. CONST. amend. V; Hiibel, 124 S. Ct. at 2460.
171.123 is nontestimonial, and therefore outside the scope of the Fifth Amendment, the Court declined to decide that issue.\textsuperscript{152} It did, however, conclude that the communication at issue was not incriminating.\textsuperscript{153} The Court relied on its statement in \textit{Brown v. Walker} that a claimant must show a ""reasonable ground to apprehend danger to the witness from his being compelled to answer"" and such danger must be ""real and appreciable . . . not a danger . . . so improbable that no reasonable man would suffer it to influence his conduct.""\textsuperscript{154} The Court then cited its development of this standard in \textit{Kastigar},\textsuperscript{155} where it held that in order for the Fifth Amendment privilege to be invoked, the compelled disclosure must be one that the witnesses reasonably believe could either be used against him in a criminal proceeding, or lead to further evidence which could be used in a proceeding.\textsuperscript{156}

Applying these standards to the facts at hand, the Court found that Hiibel had no ""real and appreciable"" fear that his identity would be used against him in a criminal prosecution.\textsuperscript{157} Instead, the Court concluded, the reason for Hiibel's refusal was simple: "he thought his name was none of the officer's business."\textsuperscript{158} According to the majority, Hiibel's ""strong belief"" did not outweigh the legislature's conclusion that identifying oneself was not incriminating for purposes of the Fifth Amendment.\textsuperscript{159}

And although one's identity is unique, it is universal in the sense that everyone has one, and thus its disclosure is ""likely to be so insignificant in the scheme of things as to be incriminating only in unusual circumstances."\textsuperscript{160} Indeed, reasoned the majority, it is known in every criminal proceeding who is being prosecuted, and ""even witnesses who plan to invoke the Fifth Amendment privilege answer when their names are called."\textsuperscript{161} The Court held out the possibility that a case may arise where the requisite ""unusual circumstances"" exist so that one's identity may serve to incriminate them, either directly or by providing ""a link in the chain of

\textsuperscript{152} \textit{Hiibel}, 124 S. Ct. at 2460.
\textsuperscript{153} \textit{Id}.
\textsuperscript{154} \textit{Hiibel}, 124 S. Ct. at 2460 (quoting \textit{Brown v. Walker}, 161 U.S. 591, 599-600 (1896)) (internal quotations omitted).
\textsuperscript{155} \textit{Kastigar v. United States}, 406 U.S. 441 (1972).
\textsuperscript{156} \textit{Hiibel}, 124 S. Ct. at 2460-61.
\textsuperscript{157} \textit{Id}.
\textsuperscript{158} \textit{Id}.
\textsuperscript{159} \textit{Id}.
\textsuperscript{160} \textit{Id}.
\textsuperscript{161} \textit{Id}.
The present case was not such a situation, and the Court accordingly deferred its decision.\textsuperscript{163}

B. JUSTICE STEVENS' DISSENT

Justice Stevens would have invalidated Hiibel's arrest because the Nevada Statute compelled him to incriminate himself.\textsuperscript{164}

In my judgment, the broad constitutional right to remain silent, which derives from the Fifth Amendment's guarantee that '[n]o person... shall be compelled in any criminal case to be a witness against himself' is not as circumscribed as the Court suggests, and does not admit even of the narrow exception defined by the Nevada statute.\textsuperscript{165}

Justice Stevens began his analysis by appealing to statements made in previous Supreme Court opinions. In \textit{Miranda v. Arizona},\textsuperscript{166} the Court stated that the protections of the Fifth Amendment apply to "persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves."\textsuperscript{167} In \textit{Davis v. Mississippi},\textsuperscript{168} it referred to the "settled principle" that "the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes" but "have no right to compel them to answer."\textsuperscript{169} Justice Stevens also pointed out that defendants at trial and unindicted targets of grand jury investigations both receive protection under the Fifth Amendment.\textsuperscript{170} If these suspects who are the subject of criminal investigations based on probable cause have the benefit of the Fifth Amendment, Justice Stevens asked, should those being investigated based upon mere suspicion not receive the same protections?\textsuperscript{171} Justice Stevens went on to cite the Court's statements, which the majority characterized as dicta, from \textit{Berkemer v. McCarty} ("the detainee is not obliged to respond")\textsuperscript{172} and Justice White's concurrence in \textit{Terry} ("Of course, the person stopped is not obliged to answer").\textsuperscript{173}

\textsuperscript{162} Id.
\textsuperscript{163} Id.
\textsuperscript{164} Id. at 2462 (Stevens, J., dissenting).
\textsuperscript{165} Id. (Stevens, J., dissenting) (internal quotations omitted) (alteration in original).
\textsuperscript{166} 384 U.S. 436 (1966).
\textsuperscript{167} Id. at 467.
\textsuperscript{168} 394 U.S. 721 (1969).
\textsuperscript{169} Id. at 727 n.6.
\textsuperscript{170} Hiibel, 124 S. Ct. at 2462 (Stevens, J., dissenting).
\textsuperscript{171} Id. (Stevens, J., dissenting).
\textsuperscript{172} Id. (Stevens, J., dissenting) (quoting Berkemer v. McCarty, 468 U.S 420, 439 (1984)).
\textsuperscript{173} Id. (Stevens, J., dissenting) (quoting Terry v. Ohio, 392 U.S. 1, 34 (1968) (White, J., concurring)).
Justice Stevens then wrote that the communication at issue was a testimonial one (a point the majority passed on deciding) and therefore met that requirement for enjoyment of the Fifth Amendment privilege.\textsuperscript{174} A testimonial communication, according to Supreme Court precedent, is the "'extortion of information from the accused,' the attempt to force him 'to disclose the contents of his own mind.'"\textsuperscript{175} The majority of verbal statements meet this test, and although many physical acts are not protected by the privilege, "'in all instances, we have afforded Fifth Amendment protection if the disclosure in question was being admitted because of its content rather than some other aspect of the communication.'"\textsuperscript{176} Justice Stevens reasoned that the statement at issue here—identification—was "clearly testimonial," primarily because it was required in response to a police officer's inquiry, and the Court had recently held that the term "testimonial" applied "'at a minimum . . . to police interrogations.'"\textsuperscript{177} He concluded that because police questioning during a Terry stop constitutes interrogation, any required response is testimonial.\textsuperscript{178}

Justice Stevens criticized the majority for rushing past the issue of whether the communication in this case was testimonial in order to decide that it was not incriminating, a holding with which he disagreed.\textsuperscript{179} He argued that with regard to incrimination, the Court has afforded "protection to statements that are 'incriminating' in a much broader sense" than the majority would admit.\textsuperscript{180} The accepted meaning of "incriminating" in the Court's Fifth Amendment jurisprudence had been any disclosure that "could be used in a criminal prosecution or could lead to other evidence that might be so used."\textsuperscript{181}

Applying this definition of "incriminating" to the facts at hand, Justice Stevens found that the Fifth Amendment protected petitioner from being compelled to identify himself under Section 171.123.\textsuperscript{182} He took issue with the Court's statement that disclosure of Hiibel's identity would not necessarily be used to incriminate him or lead to incriminating evidence.\textsuperscript{183}

\textsuperscript{174} Id. at 2463 (Stevens, J., dissenting).
\textsuperscript{175} Id. (Stevens, J., dissenting) (quoting Doe v. United States, 487 U.S. 201, 211 (1988)).
\textsuperscript{176} Id. (Stevens, J., dissenting).
\textsuperscript{177} Id. (Stevens, J., dissenting) (quoting Crawford v. Washington, 124 S.Ct. 1354 (2004)).
\textsuperscript{178} Id. at 2463 (Stevens, J., dissenting).
\textsuperscript{179} See id. (Stevens, J., dissenting).
\textsuperscript{180} Id. (Stevens, J., dissenting).
\textsuperscript{181} Id. (Stevens, J., dissenting) (quoting Kastigar v. United States, 406 U.S. 41, 445 (1972)).
\textsuperscript{182} Id. (Stevens, J., dissenting).
\textsuperscript{183} Id. (Stevens, J., dissenting).
If this were the case, "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'?" Justice Stevens argued that if one were to accept the majority's construction—that identification of a suspect is not incriminating—then petitioner did nothing to impede a police investigation under NRS Section 199.280, he should never have been arrested, and the statute's requirement is rendered "nothing more than a useless invasion of privacy." Justice Stevens reasoned that, to the contrary, the intent of the Nevada Legislature must have been to create for its officers a useful mechanism for investigating suspicious circumstances, and therefore "the very existence of the statute demonstrates the value of the information it demands."

According to Justice Stevens, divulging one's identity falls into the category—held to be protected in *Hubbell*—of being incriminating "even if the [name] itself is not inculpatory." Practically speaking, providing one's name can be useful in the hands of a police officer with access to a computerized law enforcement database, "and that information, in turn, can be tremendously useful in a criminal prosecution." The dissent concluded that the majority erred when it suggested that the revelation of one's identity would only rarely be incriminating. Instead, petitioner "acted well within his rights when he opted to stand mute."

C. JUSTICE BREYER'S DISSENT

Justice Breyer argued that any law which compels a response to police questioning during a *Terry* stop—as Section 171.123 does—is invalidated by the Court's Fourth Amendment precedent. The dissent began by outlining the Court's opinion in *Terry*. Justice Breyer also cited Justice White's statement in his *Terry* concurrence that "refusal to answer furnishes no basis for an arrest." He went on to describe the Court's decision in

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184 *Id.* (Stevens, J., dissenting).
185 *Id.* (Stevens, J., dissenting).
186 *Id.* (Stevens, J., dissenting).
187 *Id.* (Stevens, J., dissenting) (quoting United States v. *Hubbell*, 530 U.S. 27, 38 (2000)).
188 *Id.* (Stevens, J., dissenting).
189 *Id.* (Stevens, J., dissenting).
190 *Id.* (Stevens, J., dissenting).
191 *Id.* at 2464 (Breyer, J., dissenting). Justice Breyer's dissent was joined by Justices Souter and Ginsburg.
192 See *id.* at 2465 (Breyer, J., dissenting).
193 *Id.* (Breyer, J., dissenting) (quoting *Terry v. Ohio*, 392 U.S. 1, 34 (1968)).
Brown v. Texas, in which the Court stated that it "need not decide the matter" of whether one could be arrested for refusal to answer a police officer's inquiries.\textsuperscript{194} He then cited the Court's statement in Berkemer five years later that a suspect was not obliged to answer an officer's questions.\textsuperscript{195} He concluded his survey of Supreme Court precedent by referring to Justice Brennan's concurrence in Kolender v. Lawson (a Terry suspect "must be free to . . . decline to answer the questions put to him")\textsuperscript{196} and the Court's decision in Illinois v. Wardlow (referring to "the individual's right to go about his business or to stay put and remain silent in the face of police questioning").\textsuperscript{197}

"This lengthy history," wrote Justice Breyer, "- of concurring opinions, of references, and of clear explicit statements—means that the Court's statement in Berkemer, while technically dicta, is the kind of strong dicta that the legal community typically takes as a statement of the law. And that law has remained undisturbed for more than twenty years."\textsuperscript{198} He continued, "[t]here is no good reason now to reject this generation-old statement of the law."\textsuperscript{199}

Justice Breyer then raised a policy objection to allowing a state to compel identification during a Terry stop—it could be an administrative nightmare.\textsuperscript{200} Could a state requiring identification also require an address or a driver's license number?\textsuperscript{201} Would the police officer then be burdened with "keep[ing] track of the constitutional answers? After all, answers to any of these questions may, or may not, incriminate, depending on the circumstances."\textsuperscript{202}

Justice Breyer also criticized the majority for acknowledging that a name itself will sometimes provide the link necessary to provide evidence needed for a conviction, while refusing to decide whether compelling identification would be permissible in such a circumstance.\textsuperscript{203} This would leave an investigating police officer in an awkward position: unsure of whether his situation is one in which the suspect's identity is not incriminating—and thus may be constitutionally compelled—or one in

\textsuperscript{194} See id. (Breyer, J., dissenting) (quoting Brown v. Texas, 443 U.S. 47, 53 (1979)).
\textsuperscript{195} Id. (Breyer, J., dissenting) (citing Berkemer v. McCarty, 468 U.S. 420, 439 (1984)).
\textsuperscript{196} Id. (Breyer, J., dissenting) (quoting Kolender v. Lawson, 461 U.S. 352, 365 (1983) (Brennan, J., concurring)).
\textsuperscript{197} Id. (Breyer, J., dissenting) (quoting Illinois v. Wardlow, 528 U.S. 119, 125 (2000)).
\textsuperscript{198} Id. (Breyer, J., dissenting).
\textsuperscript{199} Id. (Breyer, J., dissenting).
\textsuperscript{200} See id. at 2465-66 (Breyer, J., dissenting).
\textsuperscript{201} Id. (Breyer, J., dissenting).
\textsuperscript{202} Id. at 2466 (Breyer, J., dissenting).
\textsuperscript{203} Id. (Breyer, J., dissenting).
which the identity might lead to incriminating evidence—a situation the constitutionality of which the Court has refused to determine. 204

Justice Breyer's dissent concluded that the majority had failed to justify a change in the widely accepted precedent, set forth in Terry and Berkemer, and had failed to show that the precedent had acted as an impediment to the law enforcement community's execution of justice. 205 He "would not begin to erode a clear rule with special exceptions." 206

V. ANALYSIS

The Court erred in concluding that Hiibel's arrest pursuant to NRS Section 171.123 was constitutionally permissible. The application of Section 171.123—requiring a suspect to identify himself in response to a police officer's inquiry—to petitioner's case violated both his Fourth Amendment right to be free from unreasonable search and seizure and his Fifth Amendment privilege against self-incrimination. 207

The Court discarded its Fourth Amendment precedent in finding that petitioner's Fourth Amendment rights were not violated as a result of his arrest. The line of cases following Terry, compel the conclusion that a citizen, even one suspected of criminal activity, is free to go about his business or refuse to respond to a police officer's questions. 208 Petitioner was therefore denied the protection of the Fourth Amendment in the present case.

The Court also erred by failing to extend to Hiibel the right to be free from compelled self-incrimination under the Fifth Amendment. 209 Petitioner's identity was testimonial, compelled, and incriminating. His name furnished the "link in a chain of evidence" which could have been used to convict him. 210 The Court seems to take solace in the fact that it was not used for this purpose, but this myopic approach is fraught with negative policy implications. 211

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204 Id. (Breyer, J., dissenting).
205 Id. (Breyer, J., dissenting).
206 Id. (Breyer, J., dissenting).
207 Brief of Amici Curiae American Civil Liberties Union at 9-10, Hiibel (No. 03-5554).
208 Hiibel, 124 S. Ct. at 2462 (Stevens, J. dissenting).
210 See id.
A. FOURTH AMENDMENT

1. Supreme Court Precedent Prohibits Compelling a Suspect to Provide Identification

In its 1968 opinion in *Terry*, the Court explicitly limited its holding that pat-down searches based on reasonable suspicion were justified by important government interests, refusing to further "develop... the limitations which the Fourth Amendment places upon a protective seizure and search for weapons."\(^{211}\) The separate concurrences by Justice White\(^{212}\) and Justice Harlan,\(^{213}\) though not binding, explicitly reject the constitutionality of compelled identification during a *Terry* stop. One year later, in a footnote to its decision in *Davis v. Mississippi*, a majority of the Court characterized as "settled principle" the notion that although law enforcement officers are free to ask questions of citizens, responding to such a question was entirely voluntary, and police "have no right to compel them to answer."\(^{214}\)

A decade and a half later, that principle remained settled, as evidenced by majority opinions in *Berkemer v. McCarty* ("the detainee is not obliged to respond")\(^{215}\) and *Florida v. Royer*, where the Court set forth explicit and narrow limits of time and degree for *Terry* stops, and wrote that although a police officer is free to inquire of the suspect, the detainee "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."\(^{216}\) Justice Brennan weighed in on the issue again, concurring in *Kolender v. Lawson* ("the suspect must be free... to decline to answer the questions put to him").\(^{217}\) As recently as 2000, the majority in *Illinois v. Wardlow* (referring to "the individual’s right to... remain silent in the face of police questioning") reinforced this conclusion.\(^{218}\)

The dissenters in *Hiibel* supported this reading of Supreme Court precedent. Justice Stevens cites *Davis*, *Berkemer* and the *Terry* concurrences in support of the proposition that this is a settled question—

\(^{211}\) *Terry v. Ohio*, 392 U.S. 1, 29 (1968).

\(^{212}\) *Id.* at 34 (White, J., concurring) ("[T]he person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest . . . ").

\(^{213}\) *Id.* at 32-33 (Harlan, J., concurring) ("[O]rdinarily the person addressed has an equal right to ignore his interrogator and walk away . . . ").

\(^{214}\) *Davis v. Mississippi*, 394 U.S. 721, 727 n.6 (1969).


settled in direct opposition to the majority’s holding.\textsuperscript{219} Justice Breyer, citing Berkemer and Wardlow opinions as well as Justice Brennan’s Kolender concurrence, described this “undisturbed” line of persuasive precedent as the type of language “that the legal community typically takes as a statement of the law, and as such, should remain undisturbed.”\textsuperscript{220}

The majority attempted to circumvent this mountain of persuasive language.\textsuperscript{221} The opinion distinguished between those previous statements, which “recognize[d] that the Fourth Amendment does not impose obligations on the citizen but instead provides rights against the government,”\textsuperscript{222} and the present case, arising out of the Nevada statute rather than the Fourth Amendment.\textsuperscript{223} Indeed, the Fourth Amendment does provide rights against the government, as the majority states.\textsuperscript{224} It provides citizens with the right to be free from unreasonable searches and seizures, regardless of whether they are mandated by state statute.\textsuperscript{225}

The majority must have sensed it was on weak ground here; neither of the dissents thinks it consequential that “the source of the legal obligation [arose] from Nevada state law.”\textsuperscript{226} The Court sought to bolster its dismissal of its previous statements as irrelevant by pointing out that “the statutory obligation does not go beyond answering an officer’s request to disclose a name.”\textsuperscript{227} The Court implied that the question “What is your name?,” or an accompanying request for physical identification have a special constitutional status—a suspect can refuse to answer any question posed to him by a police office except that one. The Court failed to support this conclusion.

The majority strains to free itself from the strictures of precedent, but the commonsense approach to interpreting the Court’s previous statements on this issue—the approach taken by the dissenters—is to take them at face value: a suspect is free to refuse to answer any question posed to him by a police officer, including questions about his identity. In reaching its holding in Hiibel—that a statute compelling those stopped upon reasonable suspicion to identify themselves in response does not violate the

\textsuperscript{220} Id. at 2465 (Breyer, J., dissenting).
\textsuperscript{221} See id. at 2459.
\textsuperscript{222} Id.
\textsuperscript{223} Id.
\textsuperscript{224} See U.S. CONST. amend. IV.
\textsuperscript{225} See id.
\textsuperscript{226} Hiibel, 124 S.Ct. at 2459.
\textsuperscript{227} Id.
individual’s Fourth Amendment right to be free from searches and seizures—the Court clearly ignored its own precedent requiring the opposite conclusion.

2. Compelling an Individual Detained Pursuant to a Terry Stop to Identify Himself Violates His Fourth Amendment Right to Be Free from Unreasonable Searches and Seizures

Even if one ignores nearly forty years of statements, dicta, and holdings, and grants that the Court should undertake its own independent analysis of the constitutionality of NRS Section 171.123, one finds serious flaws in the Court’s reasoning. In the present case, the majority properly sought to determine reasonableness by balancing the government’s interest in investigating potential criminal activity against the intrusion upon Hiibel’s Fourth Amendment rights. It simply misapplied the balancing test to the facts at hand and thereby reached the wrong conclusion.

With regard to the first category to be balanced—the degree of intrusion upon Hiibel’s interests—the Court found the intrusion to be minimal, because its requirement “has an immediate relation to the purpose, rationale, and demands” of the stop. However, the Court’s flawed and occasionally circular reasoning in reaching this conclusion was an abdication of its duty to properly apply the balancing test. Taken together, the three propositions cited to support the reasonableness of the statute were only marginally helpful to determining the degree of intrusiveness of the seizure. Granted, the proposition that the request for identity is closely related to the purpose of the stop satisfies one of the limits prescribed by the Court in Terry, and the limited nature of the stop is probative (though not determinative) of lessened intrusiveness. However, the Court’s contention that the threat of arrest prevents the request “from becoming a legal nullity” is meaningless: the request should become a legal nullity if it serves no governmental interest, and is therefore unconstitutional.

The Court’s final statement in determining intrusiveness pointed out that the statute’s requirement altered neither the duration nor the location of the stop. In fact, the statute’s existence extended Hiibel’s Terry stop by several minutes at least (recall that Deputy Dove requested—and was refused—Hiibel’s identity eleven times before he placed Hiibel under

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228 Id.
229 Id.
231 Hiibel, 124 S. Ct. at 2459.
232 Id.
Although the Court took extensive pains to minimize this intrusion, it should not be taken lightly, for Justice Brandeis observed that the Fourth Amendment protects an individual’s “right to be let alone”—one of the “most comprehensive of rights and the right most valued by civilized men.” Even if one grants that the Court has established that the statute requires only a minimum amount of intrusiveness, that intrusiveness must still be weighed against the legitimate government interest promoted by the extension of the *Terry* doctrine.

The application of the balancing test is made easier in this case because of the absence of a legitimate government interest in requiring an individual reasonably suspected of criminal activity to identify himself in response to a police officer’s request. The Court contended that there were several governmental interests at stake in requiring an individual to identify himself: an officer may discover that the suspect is wanted for other crimes or, by the same token, may clear the suspect of any wrongdoing; in domestic violence cases, 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.” However, *Terry* stops were set forth as an exception to the probable cause requirement for the sole purpose of preserving the safety of the investigating officer. The governmental interests delineated by the majority in *Hiibel* impermissibly expand the scope of *Terry* stops. There is no doubt that requiring suspects to identify themselves in response to police inquiries would be a convenient rule for the law enforcement community. It would result in more arrests when those individuals who are subject to a *Terry* stop are found to be wanted in connection with another crime, and more efficient use of police time in cases where those same individuals are cleared of criminal activity.

Convenience is not a compelling reason to infringe on an individual’s constitutional rights. The Court’s contention that officers dealing with domestic disturbances have a special need for the identity of those involved is unfounded. Why do officers need this information? In what way could it even make their jobs simpler, let alone serve an important government interest? They do not need to know the names of those involved in order to “assess the situation.” There are a host of other questions an officer would also need answered in order to properly “assess a situation”—none of which, the majority would presumably agree, anyone is obligated to

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233 *Hiibel*, 124 S. Ct. at 2455.
235 *Hiibel*, 124 S. Ct. at 2458.
237 *Hiibel*, 124 S. Ct. at 2458.
answer. Nor would knowing a suspect's identity lessen "the threat to their own safety" (this threat could be eliminated by conducting a pat down for weapons, the degree of search allowed by Terry), or even ascertain "possible danger to the potential victim." Weapons threaten safety. Names, taken alone, do not. Knowledge of a suspect's name by the investigating officer furthers none of these objectives.

The Court ended up weighing the convenience to the law enforcement community of obtaining a suspect's identity (the only legitimate governmental interest at stake) against the intrusion upon petitioner's Fourth Amendment interests resulting from the requirement. The Court concluded that the governmental interest outweighed the intrusion, but invalidating a citizen's right "to be let alone"—a legitimate Fourth Amendment privilege—for the purpose of law enforcement convenience eviscerates the protections of the Fourth Amendment, contradicting precedent and the proper conclusion of the required balancing test.

B. FIFTH AMENDMENT

The reasoning behind the Court's dismissal of petitioner's Fifth Amendment claim was also flawed. In order to invoke the Fifth Amendment's privilege against compelled self-incrimination, a communication must be testimonial, incriminating, and compelled. The majority assumed the testimonial and compelled nature of the communication in the present case, focusing on whether or not petitioner's identity was incriminating. It held that in order for Hiibel's identity to be incriminating, there must have been a real and appreciable danger of incrimination as a result of being compelled to answer the officer's inquiries, as required by Brown v. Walker. It concluded that in the present case no such danger to petitioner was present, because petitioner did not refuse to answer out of a fear, but simply "because he thought his name was none of the officer's business," and petitioner had not offered an

\[\textit{Id.}\]
\[\textit{Id.}\]
\[\textit{Id.}\]
\[\textit{Id.}\]
\[\textit{Id.}\]
\[\textit{Id.}\]
\[\textit{Id.}\]
\[\textit{Id.}\]
\[\textit{Brown v. Walker, 161 U.S. 591, 599 (1896) (internal quotations omitted).}\]
\[\textit{Hiibel, 124 S. Ct. at 2461.}\]
explanation for how his identity would have been used to convict him of anything, as required by *Hoffman v. United States.*

Justice Stevens' dissent appropriately took the majority to task for this holding. According to Justice Stevens, the "broad constitutional right to remain silent" deriving from the Fifth Amendment does not allow for the exception granted by the Nevada Legislature. Supreme Court precedent supports this conclusion. In *United States v. Hubbell,* the Court found that a name carries incriminating value, "even if the information itself is not inculpatory." Justice Stevens points out that if petitioner's name carried no incriminating value—if it was of no use to the officer in the execution of his duty or the prosecution of petitioner—"why else would the 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'?"

This observation is damning to the majority, for it highlights an important, perhaps fatal, inconsistency in the Court's decision. In its analysis of petitioner's Fourth Amendment claim, the majority opinion found that the intrusion was justified by the important governmental interests served, including allowing an officer to determine whether the suspect is wanted for a crime, and its corollary, allowing an officer to clear a suspect's name, thereby relieving him of his status as suspect. Neither of these possibilities was present in Hiibel's case; had he complied and identified himself, Dove would not have discovered that Hiibel was wanted for a separate crime. Neither would his identity, taken alone, have served to clear him of any wrongdoing. The Court was generalizing, making a broader policy argument for the governmental interests at stake. This approach is useful.

However, when the Court reached its analysis of Hiibel's Fifth Amendment claim, it refused to generalize by considering whether one's identity could ever be incriminating. The Court merely found that upon these facts, petitioner lacked any "real and appreciable fear" of self-

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246 *Id.* (quoting *Hoffman v. United States,* 341 U.S. 479, 486 (1951)) (noting that a communication is incriminating if it serves to "furnish a link in the chain of evidence needed to prosecute").

247 *Id.* (Stevens, J., dissenting).

248 *Id.* (Stevens, J., dissenting).


251 *Id.* at 2458.

252 *Id.* at 2461.
incrimination,\textsuperscript{253} and therefore a case "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" was beyond the scope of the present inquiry, and would be considered when it arises.\textsuperscript{254}

The Court's dance around the inescapable conclusion that Hiibel's arrest was unconstitutional ultimately collapses under its own weight. The majority cannot have it both ways. One conclusion drawn by the Court was that Hiibel's identity, if revealed, would have been useful to the officer, and thus an important governmental interest was present, thereby outweighing the intrusion and justifying the stop for Fourth Amendment purposes. By the same token, however, Hiibel's identity, by the very fact of its usefulness to the police officer, must have borne incriminating worth. Either the name "Hiibel" was useful to the Deputy Dove, or it was not. If it was useful, then the Nevada statute compelled Hiibel to incriminate himself in violation of his Fifth Amendment rights. If it was not useful, then there was no governmental interest justifying the intrusion, it failed the Court's balancing test, and was therefore a violation of Hiibel's right under the Fourth Amendment to be secure in his person "against unreasonable searches and seizures."\textsuperscript{255}

The Court attempted to avoid this conclusion through the rhetorical trick of analyzing petitioner's Fourth Amendment claim in the abstract, thereby discovering several "important governmental interests" which justified the stop (even though none of those interests was at stake in this case), while restricting its Fifth Amendment analysis narrowly to the facts at hand, and concluding that Hiibel had no realistic fear of incrimination (certainly as an abstract concept, requiring identification will often serve to incriminate those subject to a \textit{Terry} stop).\textsuperscript{256} This sleight of hand robbed Hiibel of the protections afforded him and every other citizen by the Constitution.

\textsuperscript{253} Id.  
\textsuperscript{254} Id.  
\textsuperscript{255} U.S. CONST. amend. IV.  
\textsuperscript{256} As a policy point with regard to the Court's Fifth Amendment analysis, the majority seems to expect clairvoyance from the police officer on the street. How else is he to know beforehand whether a suspect's identity will be incriminating (in which case he is in danger of having violated the suspect's Fourth Amendment rights, for the Court, in the present case, declined to decide this point) or not (in which case, according to the majority, the inquiry is constitutionally valid)?
VI. CONCLUSION

The Court’s conclusion in *Hiibel* was flawed. The application of NRS Section 171.123—requiring the suspect of a *Terry* stop based on reasonable suspicion to identify himself to a police officer or face arrest—to petitioner’s case violated his Fourth Amendment right to be free from unreasonable searches and seizures. The majority applied the proper test when it sought to balance the government interests served by the inquiry against its intrusiveness upon petitioner’s Fourth Amendment rights. However, the Court reached its conclusion after a minimum of analysis, and with little precedential basis. The majority proceeded to analyze petitioner’s Fifth Amendment claim, but in its attempt to justify the Nevada statute under both the Fourth and Fifth Amendments, tied itself in its own reasoning. For the purposes of its Fourth Amendment analysis, the Court held that important governmental interests were served by the statute’s requirements—primarily by making it easier for law enforcement to catch and prosecute criminals. However, in its Fifth Amendment analysis, the Court found that the communication of petitioner’s identity was not incriminating. These two holdings cannot be reconciled, and as such, Hiibel’s arrest under Section 171.123 was unconstitutional.

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