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WHAT'S IN A NAME? COMPELLED IDENTIFICATION STATUTES AND VIOLATIONS OF THE FOURTH
AND FIFTH AMENDMENTS

by

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WHAT'S IN A NAME? COMPELLED IDENTIFICATION STATUTES AND VIOLATIONS OF THE FOURTH AND FIFTH AMENDMENTS

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I. INTRODUCTION

The holding by the United States Supreme Court in *Hiibel v. Sixth Judicial Dist. Court*¹ dangerously expanded the scope of searches and seizures permitted under the Fourth Amendment. The holding also critically circumscribed individual rights against self-incrimination protected by the Fifth Amendment. The *Hiibel* Court held that under the Fourth Amendment, a person may be incarcerated for refusing to give his name when a police officer

¹ 542 U.S. 177 (2004).

demands it.² Simultaneously, the Court held that the disclosure of a name does not “tend to” incriminate a person such that the individual’s Fifth Amendment rights are violated by forcing them to identify himself.³

The *Hiibel* decision overtly violates our basic constitutional rights. Moreover, the Court’s analysis is wholly inconsistent – specifically, the Court first indicates that knowing a detainee’s name is “crucial” to the effectiveness and safety of standard police work.⁴ However, the Court rationalizes that a name is not intrusive because it feels that knowing a suspect’s name will be of use only rarely, in “unusual circumstances.”⁵ These two propositions are in direct contradiction with each other, and render unclear the court’s justifications for holding the statute that required disclosure of a name constitutional.

In any event, the “unusual” circumstances the Court indicates are sufficient to render the statute in *Hiibel* in plain violation of the Fifth Amendment.⁶ Additionally, although the Supreme Court has recognized exceptions to the Fourth Amendment, these narrow holdings are not nearly broad enough to include the Nevada statute. In addition to problematic Constitutional violations, in practice, police officers and individuals are hard-pressed during the moment of contact to determine whether a specific inquiry is constitutional. *Hiibel* requires that officers and civilians choose between an illegitimate arrest and the sacrifice of important constitutional rights.

² *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 185 (2004).

³ *Id.* at 180.

⁴ See M. CHRISTINE KLEIN, CATO SUPREME COURT REVIEW, A BIRD CALLED HIIBEL: THE CRIMINALIZATION OF SILENCE (2004), www.cato.org/pubs/scr/2004/birdcalledhiibel.pdf.

⁵ *Id.*

⁶ *Hiibel*, 542 U.S. at 191.

II. RULE OF STOPPING AND QUESTIONING

A. Levels of Police Contact

The public's interactions with police personnel can be broken up into three very broad levels of communication. First, everyday conversation generally does not implicate one's constitutional rights. Greeting an officer in public or a request for the time of day or general directions to a place are not generally interactions that warrant a constitutional protection analysis.

The next level of communication is not quite an arrest, but carries similar characteristics. This level is best illustrated in the context of a "Terry stop," a type of encounter first recognized by the United States Supreme Court in *Terry v. Ohio* in 1968.⁷ Terry stops permit a police officer to detain an individual for an investigation based upon a reasonable suspicion that a crime has been or is about to be committed.⁸ Unlike the lowest level of police contact, important constitutional rights are implicated in a Terry stop.⁹

The pinnacle of police contact is usually an arrest. In order to arrest an individual, an officer must have probable cause that a crime has been committed.¹⁰ This scenario activates the full scope of the Fourth Amendment right against unreasonable searches and seizures, as well as the Fifth Amendment right against self-incrimination.

B. Limits of Terry Stops

In *Terry v. Ohio*, an experienced officer assigned to patrol a Cleveland neighborhood for shoplifters and pickpockets observed two individuals standing in an intersection. The officer

⁷ 392 U.S. 1 (1968).

⁸ *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

⁹ *Id.*

¹⁰ *People v. Hamilton*, 638 N.W.2d 92 (Mich. 2002) ("constitutional validity of an arrest depends on whether probable cause to arrest existed at the time the arrest was made").

watched each individual repeatedly walk by store windows and peer in.¹¹ He noticed that a third man approached the pair once and then abruptly departed.¹²

Based on his experience, he suspected a stick-up, fearing also that the individuals “[might] have a gun.”¹³ When they stopped in front of the store window to speak with the third man again, the officer approached them, identified himself as a police officer, and asked for their names.¹⁴ When one of the men “mumbled something” in response to his questions, the officer spun him around and patted him down. The officer discovered guns on two of the men.¹⁵

The two individuals were charged with violating an Ohio statute that made it illegal for a person other than a law enforcement officer to carry a gun.¹⁶ The statute provided in part that “no person shall carry a pistol, bowie knife, dirk, or other dangerous weapon concealed on or about his person,” although an express exception is made for properly authorized law enforcement officers.¹⁷ At trial, each defendant made a motion to suppress the guns, arguing they were obtained pursuant to an illegal search and seizure because at the time of the pat-down, the officer did not have probable cause to arrest them.¹⁸ The trial court held that although it would be “stretching the facts beyond reasonable comprehension” to find that the officer had probable cause to arrest the men, the officer still possessed “reasonable cause to believe... that the defendants were conducting themselves suspiciously.”¹⁹ The court found that the frisk was essential to the proper performance of the officer’s duties and that for his own protection, he had the right to pat down the men whom he reasonably had cause to believe were armed. The Ohio

¹¹ *Terry*, 392 U.S. at 6.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 7.

¹⁵ *Id.*

¹⁶ *Id.* at 5.

¹⁷ Ohio Rev. Code § 2923.01 (1953).

¹⁸ See *Terry*, 392 U.S. at 5-8.

¹⁹ *Id.* at 7-8.

Court of Appeals affirmed, and the Supreme Court of Ohio dismissed defendant's appeal on the ground that no substantial constitutional question was involved.²⁰

On certiorari, the United States Supreme Court upheld the Ohio Supreme Court's conviction for felon in possession of a deadly weapon over the defendant's objections that probable cause for the search did not exist, as required under the Fourth Amendment.²¹ In its analysis, the Court noted that "[t]he Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the station house and prosecution for crime – 'arrests' in traditional terminology," and held that a person is "seized" whenever a police officer accosts an individual and restrains his freedom to walk away.²² The Court found it indisputable that a "careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons" is a "search" that also must not be undertaken lightly.²³ The Court held that the officer both "seized" petitioner and subjected him to a "search" when he stopped him, took hold of him, and patted down his clothing.²⁴

The Court noted an important state interest in "effective crime prevention and detection," as well as a state interest in an officer "assur[ing] himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him."²⁵ Acknowledging that "[e]ven a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security," the Court formulated a two-step test to be used in making the determination that the pat-down did not violate the Fourth Amendment: (1) the officer had reasonable suspicion of criminal activity; and (2) the officer had

²⁰ 214 N.E.2d 114 (Ohio 1966). One defendant died during the appeal proceedings, so the Supreme Court addressed the conviction of the remaining defendant only. See *Terry*, 392 U.S. at 5.

²¹ *Id.* at 5-6.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 19, 30.

²⁵ *Id.* at 23.

reasonable suspicion of danger.²⁶ The Court recognized that stops must be based on “reasonable suspicion” – basically, “the officer’s action must be justified at its inception, and it must be reasonably related in scope to the circumstances which justified the interference in the first place.”²⁷ The Court decided both reasonable suspicion of criminal activity and reasonable suspicion of danger were present on the facts in *Terry* because of the defendant’s suspicious behavior around the store. The Court also noted the officer’s reasonable articulated suspicion that they “[might] have a gun.”²⁸ Thus the “protective seizure and search for weapons” formulated as a frisk of the outer clothing did not violate the Fourth Amendment probable cause requirement.²⁹

Although the Court recognized that the officer “seized” the defendants when they restrained their freedom to walk away and asked them questions, the Court did not directly address whether the defendants were required to answer the police officer. The Court instead focused its analysis on the physical pat-down search, holding that while “investigating [unusual conduct] he identifies himself as a policeman and makes reasonable inquiries, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons.”³⁰ However, Justice White noted the issue in his concurrence, writing that although “given the proper circumstances . . . the person may be briefly detained against his will while pertinent questions are directed to him,” he “is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest.”³¹

²⁶ *Id.* at 20.

²⁷ *Id.*

²⁸ *Id.* at 6, 30.

²⁹ *Id.* at 20, 29.

³⁰ *Id.* at 30.

³¹ *Id.* at 34-35 (White, J., concurring).

The Supreme Court in *Terry*, after careful analysis, created a narrow exception to the Fourth Amendment right against unreasonable searches and seizures. In creating this exception, the Court did not trample over the integrity of the Fourth Amendment. Rather, the Court expressly made the standard especially high, requiring that reasonable suspicion of both criminal activity *and* danger be present to justify the intrusion.

C. The Rule in *Hiibel*

In *Hiibel v. Sixth Judicial Dist. Court*,³² an officer received a report from an anonymous caller that a man was assaulting a woman in a vehicle. Investigating the location the caller indicated, the officer observed a man in a truck with a female passenger.³³ The officer approached the man, told him that he was investigating an assault and then asked for the individual's name.³⁴ The defendant, Larry Hiibel, refused to divulge his identity, instead asking the officer why his identification was needed.³⁵ The officer repeated that he was conducting an investigation and "wanted to find out who [he] was and what he was doing there."³⁶ Hiibel continued to refuse to divulge his identity, insisting he had done nothing wrong.³⁷

This exchange went on for several minutes, until Hiibel was ultimately arrested by the officer. Hiibel was charged with obstruction of the police officer's duties because his refusal to comply violated Nevada Revised Statute § 199.280, which prohibited the "willful[] resist[ance], delay or obstruct[ion of] a police officer in discharging or attempting to discharge any legal duty to his office."³⁸ At trial, the government argued that Hiibel had obstructed the officer in carrying

³² 542 U.S. 177, 181 (2004).

³³ *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 180 (2004).

³⁴ *Id.* at 181.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* In total, the officer's twelve requests were met by twelve refusals.

³⁸ Nev. Rev. Stat. § 199.280.

out his duties under Nevada Revised Statute § 171.123, which defines the legal rights and duties of a police officer in an investigative stop.”³⁹ The statute states, in pertinent 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.⁴⁰

* * *

(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.*⁴¹

The Justice Court of Union Township, where Hiibel was initially tried, held that his refusal to identify himself as required by § 171.123 “obstructed and delayed [the officer] in attempting to discharge his duty” in violation of § 199.280. Hiibel’s appeal on Fourth Amendment grounds was denied at the state court level, and his petition for rehearing to resolve his Fifth Amendment challenge was denied without opinion.⁴²

On certiorari, the United States Supreme Court held that the statute did not violate the Fourth Amendment, declaring simply that under *Terry*, the demand for a name had an “immediate relation to the purpose, rationale, and practical demands of a Terry stop.”⁴³ The Court held that a law enforcement officer’s reasonable suspicion that a person may be involved in criminal activity permits the officer to stop the person for a brief time and take additional steps to investigate further.⁴⁴ When faced with the Fifth Amendment challenge, the Court responded

³⁹ *Hiibel*, 542 U.S. at 181.

⁴⁰ Nev. Rev. Stat. § 171.123.

⁴¹ Nev. Rev. Stat. § 171.123 (emphasis added).

⁴² *Hiibel v. Sixth Judicial Dist. Court*, 59 P.3d 1201 (Nev. 2002).

⁴³ *Hiibel*, 542 U.S. at 188.

⁴⁴ *Id.*

that the disclosure of his name presented no reasonable danger of incrimination, and therefore the statute did not violate his Fifth Amendment rights.⁴⁵

III. ORIGIN AND DEVELOPMENT OF IDENTIFICATION STATUTES

A. Vagrancy Laws and the Uniform Arrest Act

Stop-and-identify statutes like the Nevada statute in *Hiibel* “have their roots in English laws forbidding vagrancy, which permitted the police to arrest a person unless they gave ‘a good Account of themselves.’”⁴⁶ Courts have traditionally found laws that allow a law enforcement officer to ask – or require a person to disclose – the person’s identity, void for vagueness.⁴⁷ Because of the wide range of activities that an officer could reasonably decide constitute “vagrancy,” the statutes did not provide individuals with proper notice of which behaviors would subject a suspect to the threat of arrest, permitting unfettered police discretion.⁴⁸

For example, recently, the United States Supreme Court in *Kolender v. Lawson*⁴⁹ struck down for vagueness an identification statute that required a suspect to provide “credible and reliable” identification. The Court held that the officer had too much discretion to define the standard for “credible and reliable.”⁵⁰ Like vagrancy laws, “laws ordering suspects to produce identification upon a lawful police request [may not] be vague, as this vagueness would allow potentially indiscriminate behavior on the part of police.”⁵¹ Although the Court clearly implied

⁴⁵ *Id.* at 189.

⁴⁶ Robert A. Hull, “What Hath *Hiibel* Wrought? The Constitutionality of Compelled Self-Identification,” 33 PEPP. L. REV. 185, 188 (2005).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ 461 U.S. 352 (1983).

⁵⁰ Hull, *supra* note 46, at 188-89.

⁵¹ *Id.* at 188.

in dicta that there *could* be a compelled identification statute that would pass its vagueness test, the statute at issue in the case did not.⁵²

Despite the overall judicial disfavor for “stop and identify” statutes, the *Hiibel* Court upheld the Nevada statute. In doing so, the Court rationalized that states with “stop and identify” statutes have modeled their statutes on the Uniform Arrest Act.⁵³ The Uniform Arrest Act is a model act drafted by the Interstate Commission on Crime, compiled by suggestions of committee members that included police officers, prosecutors, attorneys general, judges, defense attorneys, and law teachers.⁵⁴ On the topic of compelled identification, the Uniform Arrest Act states in part:

(1) A peace officer may stop any person abroad whom he has reasonable ground to suspect is committing, has committed or is about to commit a crime, and *may demand of him his name, address, business abroad and whither he is going.*

(2) Any person so questioned who fails to identify himself or explain his actions to the satisfaction of the officer may be detained and further questioned and investigated.

(3) The total period of detention provided for by this section shall not exceed two hours. *Such detention is not an arrest and shall not be recorded as an arrest in any official record.* At the end of the detention the person so detained shall be released or be arrested and charged with a crime.⁵⁵

There are serious problems with the *Hiibel* Court’s assertion that the Nevada statute is implicitly endorsed by the Uniform Arrest Act (UAA). First, the UAA permits an officer to stop

⁵² *Id.* at 189 (“Appellants stress the need for strengthened law enforcement tools to combat the epidemic of crime that plagues our Nation. The concern of our citizens with curbing criminal activity is certainly a matter requiring the attention of all branches of government. As weighty as this concern is, however, it cannot justify legislation that would otherwise fail to meet constitutional standards for definiteness or clarity. Section 647(e), as presently construed requires that ‘suspicious’ persons satisfy some undefined identification requirement, or face criminal punishment. Although due process does not require ‘impossible standards’ of clarity, this is not a case where further precision in the statutory language is either impossible or impractical”).

⁵³ *Hiibel*, 542 U.S. at 183.

⁵⁴ Sam B. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 316 (1942).

⁵⁵ *Id.* at 320-21 (emphasis added).

a person and “demand of him his name, address, business abroad, and whither he is going.”⁵⁶

However, a careful reading of the Act indicates that even if the person refuses to identify himself, the officer may only detain him for a slightly longer period.⁵⁷ Moreover, the UAA expressly declares this detention is *not* an arrest and may not be recorded as such.⁵⁸ The Nevada statute cannot permit the arrest of *Hiibel* for a simple refusal to identify himself and still be consistent with the UAA. Because the statute is distinct from these requirements of the Uniform Arrest Act, the *Hiibel* Court’s reliance on it is misplaced.

B. Compelled Identification Statutes in Various States

Despite the constitutional problems facing compelled identification statutes, these statutes are not uncommon among the states. Delaware⁵⁹ and Rhode Island⁶⁰ authorize police to demand a detainee’s destination. Illinois⁶¹ and New York⁶² even go so far as to permit police officers to demand a detainee’s address and an explanation of his conduct.

Some identification statutes are even bolder. In New Hampshire⁶³ for example, a statute allows an officer to “demand” a detainee’s name, address, business abroad, and destination. In Massachusetts,⁶⁴ 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,” warning that “[p]ersons so suspected who do not give a satisfactory account of themselves . . . may be arrested by the police.”⁶⁵ The Massachusetts statute in particular comes treacherously close to vagueness because it leaves open the definition of “satisfactory” and

⁵⁶ *Hiibel*, 542 U.S. at 183.

⁵⁷ *See Warner, supra* note 54, at 36.

⁵⁸ *See id.*

⁵⁹ Del. Code Ann. Tit. 11, 1902 (2003).

⁶⁰ R.I. Gen. Laws 12-7-1 (2003).

⁶¹ 725 Ill. Comp. Stat. 5/107-14 (2004).

⁶² N.Y. Crim. Proc. Law 140.50(1) (2004).

⁶³ N.H. Rev. Stat. Ann. § 594.2 (2003).

⁶⁴ Mass. Gen. Laws ch. 41, 98 (2003).

⁶⁵ *Id.*

allows for greater danger of harassment and racial profiling. With its broad holding that the inquiry was related to the purpose and practical demands of a Terry stop, the *Hiibel* decision likely sanctions these other states' statutes as well, thereby authorizing police officers to demand far more than a person's name. The *Hiibel* Court's endorsement of the Nevada statute's demand for a name has very wide implications, going far beyond the narrow, two-pronged scope of the *Terry* exception to the Fourth Amendment.

C. Other Contexts of Compelled Identification

One context in which identification statutes have not faced significant constitutional challenge is when the statute requires disclosure of an offender's name following a traffic accident. In *Durney v. Doss*,⁶⁶ for example, the court recognized an officer's right to arrest an individual based on his "reason to believe that [the defendant] was violating the law by refusing to provide information to them or to Jones" following a traffic accident. Presented with a situation similar on the facts in *Hiibel*, the court in *Durney* issued its holding in light of a state statute prohibiting the obstruction of a law-enforcement officer in the performance of his lawful duties⁶⁷ and another statute requiring drivers who damage unattended property to provide the owner of such property with their name, address, driver's license number and vehicle registration number.⁶⁸

The Nevada statute and the vehicular accident statutes, however, arise from entirely distinct situations. In the latter case, the statutory language presupposes that there is no dispute as to whether an incident or crime has taken place. The statute is activated under the assumption that the crime has already taken place and its perpetrators are already known and/or evident. The individual in these cases is not a "suspect." The *Durney* statute is not of an investigatory nature,

⁶⁶ 106 Fed. App'x 166, 170 (2004).

⁶⁷ Va. Code Ann. § 18.2-460.

⁶⁸ Va. Code Ann. § 46.2-896.

like the Nevada statute. Because of this critical distinction, a reliance on these types of statutes is misplaced.

IV. THE FOURTH AMENDMENT VIOLATION: BEYOND THE SCOPE OF *TERRY*

The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,” and ensures that “no Warrants shall issue, but upon probable cause”⁶⁹ “No right is held more sacred, or is more carefully guarded, by the common law,” than the Fourth Amendment, which represents “the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”⁷⁰ The sanctity of the Fourth Amendment requires the exceptions be narrowly defined.⁷¹

Arguably the most well-established exception was recognized by the United States Supreme Court in *Terry v. Ohio*.⁷² Acknowledging both the need to protect the immediate safety of law enforcement actors and the relatively brief nature of the physical intrusion involved in a pat-down search for weapons, the Court in *Terry* carefully delineated an exception to the Fourth Amendment.⁷³ Although it circumvents the Fourth Amendment probable cause requirement, the *Terry* holding specifically notes that its exception has a narrow scope and, accordingly, develops an analysis reflecting this philosophy.⁷⁴ The *Hiibel* Court’s holding violates the Fourth Amendment because it goes far beyond the scope of the exception recognized in *Terry*.

Terry painstakingly crafted a two-step analysis to determine the constitutionality of a stop in order to preserve the sanctity of the Fourth Amendment.⁷⁵ More specifically, *Terry* held that a

⁶⁹ U.S. CONST., amend. IV.

⁷⁰ *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

⁷¹ *See, e.g., Terry v. Ohio*, 392 U.S. 1 (1968).

⁷² *Id.*

⁷³ *Id.* at 30.

⁷⁴ *Id.*

⁷⁵ *Id.* at 30-31.

law enforcement officer's reasonable suspicion that a person may be involved in criminal activity, *along with* his belief that petitioner was presently armed, dangerous, and posed a threat to him and to others, justified the "stop" and the "frisk."⁷⁶ The Court described a "seizure" for purposes of the Fourth Amendment as any situation where a police officer accosts an individual and restrains his freedom to walk away, and recognized that the Terry defendants were "seized" when they were searched for weapons.⁷⁷ Thus, *Terry* can be used as precedent for both questionable seizures and problematic searches.

The attempt to obtain a suspect's name is a "search" because it is an effort to draw out information that is not readily available to the officer. It requires active investigation by the officer to compel a person – who, notably, is not under arrest – to disclose a fact. The search also morphs into a seizure because the threat of arrest is imminent. The individual being questioned has an option between answering the officer's orders and getting arrested, so he or she has no real choice at all. Because his freedom to walk away is effectively restrained, the search for a name also constitutes a seizure under the language of the *Terry* holding.⁷⁸ The Court in *Hibel* also recognized the demand for a name had characteristics of both search and seizure, holding that a law enforcement officer with reasonable suspicion is permitted to stop a person for a brief time and ask questions (a *search*) and that "the resulting *seizure* is constitutionally reasonable" if the officer's action is "reasonably related in scope to the circumstances which justified the interference in the first place."⁷⁹

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 30-31.

⁷⁹ *Id.* at 20.

The *Terry* Court construed a “weapons frisk” as within this “scope,” because the officer’s action was reasonable to protect his own safety.⁸⁰ The holding in *Hiibel*, however, steps far outside the bounds of its holding in *Terry* because it does not analyze the demand for a name under *Terry*’s two-step rule. *Hiibel* ignores the fact that the *Terry* exception to the warrant requirement is a strict standard, requiring that “the investigative method employed [] be the *least intrusive* means reasonably available to verify or dispel the officer’s suspicion in a short period of time.”⁸¹

The Court in *Hiibel* balanced the “intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate government interests.”⁸² In the government’s favor, the *Hiibel* Court reasoned that “[t]he request for identity has an immediate relation to the *Terry* stop’s purpose, rationale, and practical demands, and the threat of criminal sanction helps ensure that the request does not become a legal nullity.”⁸³ However, the practical demands of the *Terry* stop did not require the disclosure of a name. Rather, the practical demands required only a brief physical frisk for weapons because a name would not have immediately indicated the presence of the weapon on the suspect. A name will immediately reveal only an abstract label whereas the search would reveal weapons that present an immediate threat to the safety of the officers and others. In no way was the officer in *Hiibel* presented with an immediate potential threat by not knowing the defendant’s name in the same way the *Terry* officer was threatened by not knowing if the defendant had a weapon. The facts of the *Hiibel* case do not indicate that the officer even had a belief that the defendant was armed and dangerous. Moreover, the tip provided to the officer in *Hiibel* did not include a name, so *Hiibel*’s involvement in any criminal activity would

⁸⁰ *Id.* at 28 (emphasis added).

⁸¹ *Florida v. Royer*, 460 U.S. 491, 500 (1983).

⁸² *Hiibel*, 542 U.S. at 188.

⁸³ *Id.*

not have been confirmed by the disclosure of his name. Therefore, the *Hiibel* holding completely ignores the second element of the *Terry* analysis.

The *Hiibel* Court did address Justice White's concurrence in *Terry*, where he wrote that a person detained in an investigative stop is "not obliged to answer."⁸⁴ The *Hiibel* Court also noted that twenty years earlier, in *Berkemer v. McCarty*,⁸⁵ it described a *Terry* stop as having a "nonthreatening character" because a suspect detained during such a stop "is not obliged to respond to questions." However, the Court in *Hiibel* "[did] not find the statements [] controlling."⁸⁶ Correctly noting that the Fourth Amendment cannot require a suspect to answer questions because it does not "impose obligations on the citizen but instead provides rights against the government," the Court then perplexingly held that because the "source of the legal obligation arises from Nevada state law, not the Fourth Amendment," the Court's prior statements that a suspect cannot be compelled to answer were not binding.⁸⁷

This Fourth Amendment analysis is baffling. If, as the Court notes, the purpose of the Fourth Amendment is to provide rights against the government, then the proper defense against the statute in *Hiibel* is, in fact, a constitutional right. Obviously, the obligation on the citizen cannot arise from the Fourth Amendment. Constitutional rights, for all intents and purposes, places obligations on the government to not violate those rights. The Court's basis for the dismissal of its prior statements in the *Terry* concurrence and in the *Berkemer* majority does not hold water.

⁸⁴ *Id.* at 187, quoting *Terry*, 392 U.S. at 34 (White, J., concurring).

⁸⁵ 468 U.S. 420, 439 (1984).

⁸⁶ *Hiibel*, 542 U.S. at 187.

⁸⁷ *Id.*

The sole justification for the *Terry* Court’s holding is the protection of the police officer and others nearby.⁸⁸ A *Terry* stop should not be a generalized “cursory search for . . . anything.”⁸⁹ For example, the dissenting judges of the Nevada Supreme Court in *Hiibel* noted that because a wallet does not present a physical threat, an officer may not pull it out during a *Terry* search if its identity is evident, and the majority did not refute this assertion at either the state supreme court level or the U.S. Supreme Court level.⁹⁰ Nevertheless, under the statute in *Hiibel*, he is allowed, for all intents and purposes, to do just that by demanding identification.

V. THE FIFTH AMENDMENT VIOLATION: REQUIRING DISCLOSURE OF INCRIMINATING INFORMATION

The text of the Fifth Amendment assures us that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself”⁹¹ This language “[p]rotects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.”⁹² Courts have developed three requirements that a disclosure must meet to qualify for Fifth Amendment privilege – namely, “a communication must be testimonial, incriminating, and compelled.”⁹³

Requiring the disclosure of a name meets the “compelled” requirement. The Supreme Court in *Miranda v. Arizona*⁹⁴ made it clear that a person’s Fifth Amendment rights attach as soon as the individual is deprived of his freedom of action in any significant way. By threatening arrest if a person does not comply with the demand for a name, these statements are

⁸⁸ *Id.*

⁸⁹ *Ybarra v. Illinois*, 444 U.S. 85, 93-94 (1979).

⁹⁰ *Hiibel v. Sixth Judicial Dist. Court*, 59 P.3d 1201, 1209 (2002) (Agosti, J., dissenting).

⁹¹ U.S. CONST. amend. V.

⁹² *Hiibel*, 542 U.S. at 190.

⁹³ *United States v. Hubbell*, 530 U.S. 27, 34-38 (2000).

⁹⁴ 384 U.S. 436, 477 (1966).

not “given freely and voluntarily without any compelling influences,” as *Miranda* requires.⁹⁵

The statute in *Hiibel* thus compels information.

The more difficult issues that arise are whether identity is so unique that it can never be testimonial or incriminating. In *Crawford v. Washington*,⁹⁶ the Court held that statements made in response to police interrogation constitute testimonial statements. The *Hiibel* Court did not directly address whether the defendant’s name was testimonial. Presumably, this is because the fact that a name is testimonial is apparent in light of the fact that the name is used to link a person to a crime. In any event, the disclosure of a name in a police encounter like the one in *Hiibel* is a result of a police questioning and interrogating a suspect. Thus, the name is “testimonial” under *Crawford*.

Despite the fact that the disclosure of a name likely meets both the “compelled” and “testimonial” prerequisites for Fifth Amendment protection, the *Hiibel* Court decided that the defendant’s “challenge must fail because in this case disclosure of his name presents no reasonable danger of incrimination.”⁹⁷ However, a person’s name cannot be very innocuous if one is *required* to disclose it. What, then, is the purpose of asking for a name?

If the caller in *Hiibel* had said Hiibel’s name as part of the description of a crime, then his confirmation of that name would have been incriminating for the *assault* he was sent there to investigate. In other words, if a name is part of the investigatory framework to begin with, it is incriminating because it is directly linking Hiibel to a crime.

The *Hiibel* Court did not address the relevance of Hiibel’s name in connection with the crime under investigation. Instead, the Court rationalized that “[i]nformation about the stopped

⁹⁵ *Miranda v. Arizona*, 384 U.S. 436, 477 (1966).

⁹⁶ 541 U.S. 36, 68 (2004).

⁹⁷ *Hiibel*, 542 U.S. at 189.

person's dangerousness or past violent activity can save [an] officer's life."⁹⁸ The Court states specifically that the "[k]nowledge of identity may inform an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder."⁹⁹ The Court's holding makes it abundantly clear that law enforcement is in fact using the name as incriminating evidence, but for *another crime* – not for the crime or circumstances that justified the *Terry* stop. The requirement under *Terry* is that a legitimate government interest must exist to justify the intrusion upon Fourth Amendment rights. "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."¹⁰⁰ This rationale removes the justification of the stop under *Terry* because there is no reasonable suspicion of the specific crime being investigated. The Court cannot use the information received from the phone call as a justification for the *Terry* stop if the goal of the *Terry* stop was to arrest the suspect for previous crimes, not the crime explained over the phone.

Moreover, the fact that the name may incriminate the suspect for some other crime plainly indicates that by requiring the individuals to disclose the name, the name is, by definition, incriminating information. Compelling its disclosure is therefore a Fifth Amendment violation. Nevertheless, the Court decided against *Hiibel* on the basis that in his case, "disclosure of his name presented no reasonable danger of incrimination."¹⁰¹ Police investigators, when trying to solve a crime, do not automatically know the name of the perpetrator. The identity is simply another piece of evidence, like telephone records or a fingerprint. A name *identifies* a person, connecting him or disconnecting him to the information accessible to the police officer.

⁹⁸ Hull, *supra* note 46, at 207.

⁹⁹ *Hiibel*, 542 U.S. at 186.

¹⁰⁰ Klein, *supra* note 4, at 366.

¹⁰¹ *Id.* at 189.

Additionally, if a person is arrested under one of the statutes in New York, New Hampshire, or Massachusetts, which require divulging an address or destination, the information contained in the responses to this line of questioning even more easily resembles “incriminating” or “testimonial” communications than does just a name. Depending on the circumstances, this kind of information could even more easily implicate an individual than his name could. As the dissent in *Hiibel* pointed out, it is a “settled principle” that “the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes,” but “they have no right to compel them to answer.”¹⁰² The Fifth Amendment protects compelled disclosure of such information, and the Court’s holding in *Hiibel* utterly steamrolls this right.

VI. ILLEGITIMATELY ESTABLISHING PROBABLE CAUSE FOR AN ARREST: THE DILEMMA PRESENTED TO CITIZENS AND POLICE OFFICERS

Under compelled identification statutes, an officer is commanding a person to relinquish his constitutional right to remain silent and then arresting and searching someone if he refuses to do so. The individual is forced to forfeit his anonymity and privacy, or face a criminal record. The arrest for failure to identify can be seen as a way for the officer to establish probable cause and/or gather evidence for the activity for which he had only reasonable suspicion. The person must refuse to identify himself, thereby violating a stop and identify statute. Without the stop and identify statute, however, the identity search of a person is invalid unless the officer can develop probable cause from other circumstances.

The Supreme Court found that “*Hiibel* argue[d] unpersuasively that the statute circumvents the probable-cause requirement by allowing an officer to arrest a person for being suspicious, thereby creating an impermissible risk of arbitrary police conduct.”¹⁰³ Although the

¹⁰² *Id.* at 192-193.

¹⁰³ *Hiibel v. Sixth Judicial Dist. Court*, 159 L. Ed. 2d 292, 298 (2004).

Hiibel Court noted that these familiar concerns underlie *Kolender v. Lawson*,¹⁰⁴ *Brown v. Texas*,¹⁰⁵ and *Papachristou v. Jacksonville*,¹⁰⁶ cases that found similar compelled identification statutes unconstitutional, it held that these concerns are met by “the requirement that a *Terry* stop be justified at its inception and be ‘reasonably related in scope to the circumstances which justified’ the initial stop.”¹⁰⁷ However,

“[t]his determination appears to be a bit self-serving, [] even though it may be technically ‘correct.’ It is difficult to determine exactly when a request for identification is not reasonably related to the circumstances justifying the stop, and the Court does not provide any guidance in resolving this matter. The Court held, under facts where an officer was investigating an alleged assault, that the specific intrusion of compelling *Hiibel* to state only his name did not tip the Fourth Amendment balance in favor of the individual’s right to withhold such information. It is not unreasonable to assume then that an officer can ask for an individual’s name in almost every circumstance where the individual is *Terry*-stopped, because given the requirements for a *Terry* stop, an officer will always have reasonable suspicion to believe a crime has been or is about to be committed and therefore his safety is always at risk in such a potentially criminal situation.”¹⁰⁸

No reason exists why the subject of police interrogation based on mere suspicion, rather than probable cause, should have any lesser protection. The Fifth Amendment’s protections should apply with equal force in the context of a *Terry* stop. The message conveyed by *Hiibel* is that the less guilty one is, the fewer constitutional protections one has.

¹⁰⁴ 461 U.S. 352, 358 (1983) (statute containing “no standard for determining what a suspect has to do in order to satisfy the requirement to provide a ‘credible and reliable’ identification [] vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest”).

¹⁰⁵ 443 U.S. 47, 52 (1979) (“even assuming that [the] purpose [of crime prevention] is served to some degree by stopping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity, the guarantees of the Fourth Amendment do not allow it”).

¹⁰⁶ 405 U.S. 156, 169 (1972) (vagrancy-type law essentially results in “arresting a person on suspicion, like arresting a person for investigation, is foreign to our system”).

¹⁰⁷ *Hiibel*, 542 U.S. at 188.

¹⁰⁸ Hull, *supra* note 46, at 202.

Importantly, the *Terry* majority put aside the issue of whether a person could be compelled to answer questions during a *Terry* detention. In his concurrence in *Terry*, Justice White concluded that they could not: “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 a continued need for observation.”¹⁰⁹ The *Hiibel* Court simply ignores the language in *Terry*.

The statute for obstructing police work that *Hiibel* was convicted of violating was not intended to arrest individuals who refuse to disclose their name in a routine investigation. The language is strong, seeking to punish someone for willfully “resist[ing]” and “obstruct[ing]” police work.¹¹⁰ In the case at hand, *Hiibel* was not interfering – the officer was free to investigate the reported assault by asking him or the woman in the truck about the immediate circumstances. Moreover, even if a court decides that refusing to answer an officer’s identification request constitutes interference with police work in some way, this fact would be irrelevant because the interference was an exercise of a valid constitutional right. By definition, constitutional rights will always interfere with police work. This is not, however, a justifiable reason to deny them. The narrow exception in *Terry* recognized the inestimable integrity of an individual’s constitutional rights.

The question also arises as to the limitations on questioning. Can an officer demand an address or for a driver’s license number?¹¹¹ As Justice Stevens described in *Hiibel*, “[p]resumably the statute [in *Hiibel*] does not require the detainee to answer any other question because the Nevada Legislature realized that the Fifth Amendment prohibits compelling the

¹⁰⁹ *Terry*, 392 U.S. at 34 (White, J., concurring).

¹¹⁰ Nev. Rev. Stat. § 199.280.

¹¹¹ See *Hiibel*, 542 U.S. at 198 (Stevens, J., dissenting).

target of a criminal investigation to make any other statement.”¹¹² The citizen is left on his own to determine the extent of questioning he is required to answer while he faces the highly stressful situation of an offensive police encounter. “Given [the Court’s] statements to the effect that citizens are not required to respond to police officers’ questions during a *Terry* stop, it is no surprise that petitioner assumed, as have we, that he had a right not to disclose his identity.”¹¹³

In addition to the burden on the average American citizen to know the limitations of his constitutional rights in the highly stressful situation of confrontation by an officer, prior to an arrest, the Court’s holding puts a burden on police officers. A police officer is now required to “keep track of the constitutional answers.”¹¹⁴ In addition to eroding the sanctity of our civil rights, this further undermines the integrity of our criminal justice system, causing the public to lose faith and the police departments to lose face in earnest efforts to exercise constitutional rights or enforce the law. The Fourth and Fifth Amendments should not only protect the individual, but also should protect the officers from having to make the sorts of last minute decisions more appropriately reserved for a court of law.

VII. CONCLUSION

Terry requires a narrow scope reasonably related to legitimate government interests. For the pat down search, the legitimate government interest is safety. But the government does not have a legitimate interest in the request for a name. If under the Fifth Amendment a detainee’s name neither incriminates him nor “furnish[es] a link in the chain of evidence needed to prosecute him, there is no legitimate government interest, consistent with the Fourth Amendment, in obtaining it.”¹¹⁵ *Hiibel* thus ignores the critical holding of *Terry* that the search

¹¹² *Id.* at 192.

¹¹³ *Id.* at 193.

¹¹⁴ *Id.* at 198 (Breyer, J., dissenting).

¹¹⁵ *Id.* at 190.

be reasonably related to legitimate government interests.¹¹⁶ The majority cites a strong governmental interest served by obtaining a suspect's name during a Terry stop: "in this era of cross-linked criminal history databases, police could obtain information that "a suspect is wanted for another offense."¹¹⁷ This rationalization, however, ultimately compels information clearly protected by the Fifth Amendment: evidence likely to tend to incriminate. By ignoring its own previous statements and cherry-picking words from the *Terry* holding, the *Hiibel* Court effectively destroys the ability of police officers and civilians alike to determine the extent of the individual constitutional rights held by us as citizens.

¹¹⁶ See *Terry*, 392 U.S. at 26-27.

¹¹⁷ Hull, *supra* note 46, at 211.