By Shaun B. Spencer

# Nevada Case Threatens

## to Expand *Terry* Stops

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This term, the U.S. Supreme Court will review a Nevada decision authorizing police to arrest people for refusing to identify themselves. If affirmed, the decision could reshape how privacy is viewed in the criminal context throughout the United States, and could prompt the Massachusetts Supreme Judicial Court to depart from the Supreme Court's approach to stop-and-frisk cases. The case is *Hiibel v. Sixth Judicial District Court*, 59 P.3d 1201 (Nev. 2002), *cert. granted*, 124 S. Ct. 430 (2003).

In *Hiibel*, a citizen reportedly saw a man strike a woman who was sitting in his truck. A Nevada sheriff's deputy found Larry Hiibel standing outside the truck, apparently drunk, and demanded that Hiibel identify himself. When Hiibel refused, the deputy charged Hiibel with resisting a public officer, based on a Nevada law authorizing officers to compel individuals to disclose their identity during investigatory stops. Nev. Rev. Stat. § 171.123(3). Hiibel was convicted, and the Nevada Supreme Court affirmed.

The state's arguments in *Hiibel* ask the Supreme Court to break from its past approach to stop-and-frisk cases. Under *Terry v. Ohio*, a law enforcement officer may conduct an investigatory stop based on reasonable suspicion that the individual is involved in criminal activity, commonly known as *Terry* stops. 392 U.S. 1, 30 (1968). The officer may frisk the individual for weapons if the officer reasonably believes the individual may be armed and dangerous. *Id.* Although the officer may ask questions to determine the individual's identity and confirm the suspicions of criminal activity, "the detainee is not obliged to respond." *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984).

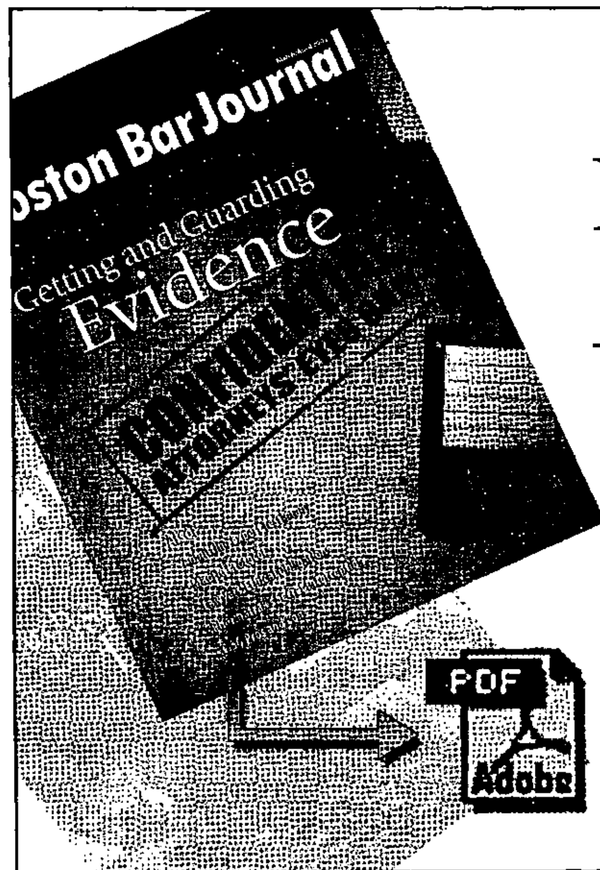
The state maintains that officer safety justifies a demand for identification during any *Terry* stop, to determine whether the individual might be dangerous. *See Hiibel*, 59 P.3d at 1205. The *Terry* doctrine, however, does not allow an assumption of dangerousness. Instead, the frisk must be premised on reasonable belief that the individual is armed and dangerous. *See Terry*, 392 U.S. at 30. This argument also rests on the dubious assumption that identification promotes officer safety as effectively as the weapons frisk. In reality, the individuals most likely to be dangerous would seem to be the least motivated to carry valid identification.

In addition, the state argues that its interest in finding wanted felons and terrorists justifies the demand for identification. *See Hiibel*, 59 P.3d at 1206; Brief in Opposition to Cert. Petition, at 9, *Hiibel*, 124 S. Ct. 430 (2003). This argument turns *Terry* on its head. The sole justification for

a *Terry* stop is the officer's reasonable suspicion of criminal activity. *See* 392 U.S. at 30. Nevada's argument, however, would justify stopping anyone and demanding identification without suspicion, because anyone could be a felon or terrorist. Such an argument fails even to pay lip service to the reasonable suspicion requirement for *Terry* stops.

In its most sweeping argument, the state claims that people have no reasonable expectation of privacy in their identity, because people routinely reveal their names in other contexts. *See Hiibel*, 59 P.3d at 1206. To accept that argument would allow officers to stop anyone and demand their identification. Moreover, it would conflict with cases recognizing important privacy and anonymity interests in one's name. *See, e.g., McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995) (invalidating law prohibiting anonymous distribution of campaign literature); *NAACP v. Alabama*, 357 U.S. 449, 461 (1958) (refusing to compel disclosure of NAACP members' names); *Restatement (Second) of Torts* § 652C (recognizing invasion of privacy by misappropriation of name or likeness).

To accept any of these arguments would effect the most dramatic expansion in the *Terry* doctrine's thirty-five-year history. And it could someday force the Supreme Judicial Court to decide whether Article 14 of the Massachusetts Declaration of Rights confers greater protection during a *Terry* stop than the Fourth Amendment. The SJC has already done so with regard to treatment of *Terry* detainees during automobile stops, refusing to follow Supreme Court precedent on the issue. *See Commonwealth v. Gonsalves*, 429 Mass. 658, 662-63 (1999) (holding that Art. 14 prohibits ordering driver or passengers out of vehicle stopped for traffic violation absent reasonable belief of danger). If the *Hiibel* question reaches the SJC, a concern for privacy and anonymity may lead the court to hew closely to its prior stop-and-frisk cases, and to hold that Article 14 prevents the compelled disclosure of a *Terry* detainee's identity. ■

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