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"What Hath Hiibel Wrought?": The Constitutionality of Compelled Self-Identification

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"What Hath *Hiibel* Wrought?"[1]: The Constitutionality of Compelled Self-Identification

I. INTRODUCTION

What hath *Hiibel* wrought? It is morning, and you settle down at your kitchen table with your coffee and newspaper. Glancing at the front page, you see the headline "Osama bin Laden and General Colin Powell Arrested in Separate Incidents in Nevada, Each with a Dead Body in the Trunk of

1. "What hath God wrought" is the text of the first message sent via telegraph, by its inventor Samuel F. B. Morse. The Library of Congress, Today in History: May 24, http://memory.loc.gov/ammem/today/may24.html (last visited Dec. 14, 2004). It is taken from a biblical verse in *Numbers* 23:23. *Id.* Originally, this verse was associated with awe and wonder at what God had created, but today it is more commonly associated with terror and fear. Grace Cathedral, What Hath God Wrought!, http://www.gracecathedral.org/enrichment/brush_excerpts/brush_20040901.shtml (last visited Dec. 14, 2004).

their Rented Cars—Allegedly." In disbelief, you read on to learn that they were each driving a blue sedan of similar make and model. Further, both were stopped with reasonable suspicion based on an Amber Alert advising police to be on the lookout for such a blue sedan which was suspected of being used in a kidnapping. Aghast, you find out that both were arrested by separate officers for their failure to identify themselves pursuant to Nevada's stop-and-identify statute, found to be constitutional in *Hiibel v. Sixth Judicial District Court*.[2] Subsequently, the officers performed searches incident to their arrests and found bodies in the trunk of each of their rented cars. "Eureka, imagine the odds!!" you exclaim to your dog, Eureka.

Fast forward a year and both murder cases are at trial. Again settling into your morning coffee and paper, you see the paper's headline reads this time, "Osama bin Laden Charges Tossed; General Powell Trial Continues." You scratch your head only to find out that bin Laden was allowed under the Court's holding in *Hiibel* to withhold his name from police because he had a reasonable belief that his self-identification would be incriminating. Therefore, his arrest for failure to provide his name pursuant to the stop-and-identify statute was unconstitutional, and all of the evidence relating to the body in his trunk was excluded as fruit of the poisonous tree. The "Most Trusted" General Powell,[3] however, was not so lucky. Having lived an honorable and unimpeachable life (despite the body found in his car), he had no reason to believe that his simple self-identification was incriminating, and hence he was compelled to provide his name under the statute. His arrest was constitutional and therefore valid, and all the evidence found pursuant to the search incident to arrest was allowed at trial. Poor General Powell. "Well," you say to Eureka, "at least Osama will get his comeuppance when the local authorities hand him off to the feds." Eureka yawns and rolls over.

The United States Supreme Court's decision in *Hiibel v. Sixth Judicial District Court* has been called "the criminalization of silence."[4] The Court's decision allows the State of Nevada, under penalty of fine or imprisonment, to compel a person stopped with reasonable suspicion to give his or her name to the police.[5] This is the kind of decision that sends ardent civil libertarians up in arms about the imminent loss of our freedoms.[6]

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2. Hiibel v. Sixth Judicial Dist. Court, 124 S. Ct. 2451, 2460-61 (2004) (reserving the possibility of arriving at a different result "where there is a substantial allegation that furnishing identity at the time of a stop would have given the police a link in the chain of evidence needed to convict the individual of a separate offense").

3. General Powell has been called "The Most Trusted Man in America." CBS News, The Most Trusted Man in America, http://www.cbsnews.com/stories/2003/02/04/opinion/main539298.shtml (last visited Dec. 14, 2004).

4. M. Christine Klein, *A Bird Called* Hiibel*: The Criminalization of Silence*, 2004 CATO SUP. CT. REV. 357, 357 (2004), *available at* http://www.cato.org/pubs/scr/docs/2004/birdcalledhiibel.pdf.

5. It is important to note that constitutional concerns are implicated in analyzing this state statute because both the Fourth and Fifth Amendments have been applied to the states through the Fourteenth Amendment. *See Hiibel*, 124 S. Ct. at 2455.

6. *See* American Civil Liberties Union, *"Your Papers, Please:" ACLU Urges Supreme Court to Protect Right to Remain Anonymous*, Mar. 22, 2004, http://www.aclu.org/court/court.cfm?ID=15283&c=261; Timothy Lynch, *Is it a Crime to Keep*

Hiibel addresses the classic constitutional balancing act between the acceptable degree of intrusion upon personal rights on the one hand, and the public need for that intrusion on the other.[7] While personal rights are sacrosanct, the Court has found they are not absolute. Accordingly, *Hiibel* grants the public need greater latitude, if only slightly, in such public concerns that implicate officer safety in the officer's ability to perform his or her job effectively.[8] The Court concluded in *Hiibel* that when one is stopped with reasonable suspicion, the State of Nevada's seizure of one's name does not violate the Fourth Amendment prohibition against unreasonable searches and seizures.[9] Additionally, that individual cannot remain silent by invoking his or her Fifth Amendment right against self-incrimination except in cases the Court deems to be "unusual circumstances," though this phrase is left undefined.[10] As we shall see, what facts the post-*Hiibel* Court determines as fitting under the rubric of "unusual circumstances" will establish whether those facts present constitutional problems.

Hiibel definitively erased a powerful symbolic line seemingly supported by a wealth of Supreme Court dicta, namely, the right of an individual not to respond to questions asked by a police officer.[11] While the practical results of this case will most likely not be significant to the average person, the implications of this decision should raise the brow of any individual concerned about his or her civil liberties.

This note will examine the Court's decision in *Hiibel* and discuss its implications. Part II traces the history of the Court's decisions regarding

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Quiet?, CHI. SUN TIMES, Mar. 22, 2004, http://www.cato.org/dailys/03-24-04-2.html; Mark Moller, *The End of "The Right to Remain Silent,"* LIBERTY MAG., July 8, 2004, http://www.cato.org/research/articles/moller-040708.html; Dept. of Justice, *Supreme Court: Police have a Right to stop anyone for no reason at all, Demand their name and Jail them if they refuse to comply*, DOJGOV.NET NEWSWIRE, June 21, 2004, http://www.dojgov.net/supreme_court_privacy.htm; Will Baude, *Bad ID*, THE NEW REPUBLIC ONLINE, June 22, 2004, http://www.tnr.com/doc.mhtml?i=express&s=baude060224.

7. For discussions of the Fourth Amendment balancing of interests, see *Hiibel*, 124 S. Ct. at 2459; Atwater v. City of Lago Vista, 532 U.S. 318, 347-54 (2003); Delaware v. Prouse, 440 U.S. 648, 654-55 (1979); Terry v. Ohio, 392 U.S. 1, 21-27 (1968). For balancing of interests regarding the Fifth Amendment, see United States v. Balsys, 524 U.S. 666, 690-98 (1998); Baltimore City Dep't of Soc. Servs. v. Bouknight, 488 U.S. 1301, 1304 (1988); California v. Byers, 402 U.S. 424, 427-31 (1971).

8. *Terry*, 392 U.S. at 9-11. For example, one such limitation to the right of privacy is reasonableness, as the Fourth Amendment protects only against "unreasonable" searches and seizures by the government. Hiibel v. Sixth Judicial Dist. Court, 59 P.3d 1201, 1204 (Nev. 2002) (citing *Terry*, 392 U.S. at 9). The court is mindful of the fact that "all rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded." *Id.* at 1206 (citing Hudson Water Co. v. McCarter, 209 U.S. 349, 355 (1908) (internal quotations omitted)).

9. *Hiibel*, 124 S. Ct. at 2460.

10. See *infra* notes 162-64 and accompanying text for the *Hiibel* majority's discussion of "unusual circumstances."

11. See *infra* note 48 for the history of Court dicta on this issue.

stop-and-identify statutes, the Fourth Amendment prohibition against unreasonable seizures, and the Fifth Amendment right against self-incrimination.[12] Part III summarizes the facts of *Hiibel*.[13] Part IV notes and analyzes the Court's majority and two dissenting opinions.[14] Part V discusses the significance of the Court's decision and concludes this note.[15]

II. HISTORICAL BACKGROUND

A. Stop-and-Identify Statutes Generally

Stop-and-identify statutes generally permit an officer to ask, or require a suspect to disclose, the suspect's identity.[16] These statutes have their roots in English laws forbidding vagrancy, which permitted the police to arrest a person unless they gave "a good Account of themselves."[17] Given the wide variance of activities which an officer could reasonably consider as constituting vagrancy, these laws have traditionally been found void for vagueness based upon two factors: i) they do not provide potential offenders with proper notice of the behaviors that would subject a suspect to the threat of arrest; and ii) as a result of this lack of proper notice, they permit unfettered police discretion in the determination of what precise behaviors violate these vagrancy laws.[18] The Court has acknowledged that this excessive discretion creates the impermissible risk that these laws would be used to "cloak . . . a conviction which could not be obtained on the real but undisclosed grounds for the arrest."[19]

Like these laws forbidding vagrancy, laws ordering suspects to produce identification upon a lawful police request[20] cannot be vague, as this vagueness would allow potentially indiscriminate behavior on the part of police.[21] Such was the case in *Kolender v. Lawson*, where the Court determined that a California statute requiring a suspect to produce "credible

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12. *See infra* notes 16-60 and accompanying text.

13. *See infra* notes 61-74 and accompanying text.

14. *See infra* notes 75-245 and accompanying text.

15. *See infra* notes 246-60 and accompanying text.

16. Hiibel v. Sixth Judicial Dist. Court, 124 S. Ct. 2451, 2456 (2004).

17. *Id.* at 2457.

18. Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972). The *Papachristou* Court noted that the statute at issue employed both "archaic language" and classifications in its definition of vagrants. *Id.* at 161. The Court specifically pointed out that laws must be evenly applied to all, minorities and majorities, rich and poor alike. *Id.* at 171. The Court warned that this maxim is not fully honored when the police have too much discretion in their determination of what constitutes criminal conduct. *Id.* at 170. For example, the Court cited that the Jacksonville, Florida ordinance at issue made "nightwalking" a criminal activity. *Id.* at 163. Florida construed the statute, in an equally ambiguous way, as criminalizing only the "habitual wanderer." See *id.* at 163-64 for a discussion on the matter. *See also* Alan D. Hallock, Note, *Stop-and-Identify Statutes After Kolender v. Lawson: Exploring the Fourth and Fifth Amendment Issues*, 69 IOWA L. REV. 1057, 1058-62 (1984) (discussing the doctrinal foundations of the "Void-for-Vagueness" Doctrine).

19. *Papachristou*, 405 U.S. at 169 (citing People v. Moss, 131 N.E.2d 717 (N.Y. 1955)).

20. See generally *infra* notes 28-38 for information on what constitutes a lawful police request.

21. *See generally* Kolender v. Lawson, 461 U.S. 352 (1983) (stating that a law with an unclear scope may be used as a "tool" by police to further discriminatory purposes).

and reliable" identification was void for vagueness.[22] The Court said that this "credible and reliable" standard was not constitutionally adequate because the officer had too much discretion to define that standard.[23] Nevertheless, in its decision, the Court clearly implied that there could be an identification statute that would pass its vagueness test.[24]

B. Fourth Amendment

"'No right is held more sacred, or is more carefully guarded, by the common law, than 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.'"[25] The Fourth Amendment guarantees that a person shall be secure against unreasonable searches or seizures.[26] The touchstone of the Fourth Amendment is objective "reasonableness," determined by examining the totality of circumstances; consequently, the Court has eschewed applying bright-line rules for this

22. *Id.* at 353-54, 355-56, 361. Specifically, the Court noted that this statute was more than a stop-and-identify statute, as it required that "the individual provide a credible and reliable identification that carrie[d] a reasonable assurance of its authenticity, and that provide[d] means for later getting in touch with the person who ha[d] identified himself." *Id.* at 359 (internal quotations omitted). However, the dissent thought that the statute was clear "in many of its applications," and argued that "a criminal statute is not unconstitutionally vague on its face unless it is 'impermissibly vague in all of its applications.'" *Id.* at 370, 374 (White, J., dissenting) (quoting Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497 (1982)). Justice White said that because the majority used the vagueness doctrine in this case, the state will be in "a quandary as to how to draft a statute that will pass constitutional muster." *Id.* at 374.

23. *Id.* at 361-62. The *Kolender* Court therefore noted that this statute provided a "convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure." *Id.* at 359 (internal quotations omitted). Similar to *Papachristou*, this "discriminatory enforcement" could provide police with an excuse to prevent a person from leaving (i.e., by arresting an individual) without probable cause. *See also Papachristou*, 405 U.S. at 169 (stating that the Constitution prevents police from arresting a suspicious-looking person without probable cause, even when the arrest is for past crimes committed). Since the Court determined the *Kolender* statute was void for vagueness, the Court did not resolve any of the Fourth or Fifth Amendment issues. *See* Hallock, *supra* note 18, at 1058-62.

24. *See Kolender*, 461 U.S. at 361. The Court noted that it did not "require 'impossible standards' of clarity" in order to render the statute specific enough to not offend the suspect's due process rights, and that clarification of the language of the statute at issue was not "impossible or impractical." *Id.* (quoting United States v. Petrillo, 332 U.S. 1, 7-8 (1947) (internal citations omitted)).

25. Terry v. Ohio, 392 U.S. 1, 9 (1968) (quoting Union Pac. R.R. v. Botsford, 141 U.S. 250, 251 (1891)).

26. 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, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

determination and instead has emphasized the fact-specific nature of this reasonableness inquiry.[27]

The Court has said that Fourth Amendment considerations come into play before an arrest.[28] In the landmark case *Terry v. Ohio*, the Court allowed a limited seizure with "reasonable suspicion," a new standard not as stringent as "probable cause;" that is, some seizures were allowed with a "reasonable *suspicion* to believe [the suspect] was engaged or had engaged in criminal conduct" because police safety concerns were implicated.[29] Central to this Fourth Amendment inquiry is the determination of whether the seizure is "unreasonable;" that is, whether the officer's action was justified at its inception.[30] The Court noted that there is no ready test for making such a determination,[31] and that therefore the Court makes it based

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27. *See* Ohio v. Robinette, 519 U.S. 33, 39 (1996); Florida v. Royer, 460 U.S. 491, 506-07 (1983) (stating "[w]e do not suggest that there is a litmus-paper test . . . for determining when a seizure exceeds the bounds of an investigative stop . . . . [T]here will be . . . so much variation that it is unlikely that the courts can reduce to a sentence or a paragraph a rule that will provide unarguable answers to the question whether there has been an unreasonable search or seizure in violation of the Fourth Amendment."); Ker v. California, 374 U.S. 23, 33 (1963) (opining that "[t]here is no formula for the determination of reasonableness" and that "the reasonableness of a search is in the first instance a substantive determination to be made . . . from the facts and circumstances of the case and in the light of the 'fundamental criteria' laid down by the Fourth Amendment and in opinions of this Court applying that Amendment.") (internal quotations omitted).

28. *Terry*, 392 U.S. at 19; Davis v. Mississippi, 394 U.S. 721, 727 (1969). Historically, however, the *Terry* "stop-and-frisk" has not been subject to the Fourth Amendment's warrant clause. Hallock, *supra* note 18, at 1064-65 (citing *Terry*, 392 U.S. at 20).

29. Brown v. Texas, 443 U.S. 47, 47 (1979) (discussing *Terry*) (emphasis added); *Terry*, 392 U.S. at 30-31. The Court thought it unreasonable to deny an officer the ability to determine whether the person whose suspicious behavior he is investigating was armed and therefore potentially dangerous. *Terry*, 392 U.S. at 24. The majority noted that this type of situation is dealt with in "an entire rubric of police conduct" which cannot have, and historically has not, been subjected to the warrant procedure: the swift action which may be necessary based upon on-the-scene officer observations. *Id.* at 20. However, Justice Douglas's dissent vigorously denied the utility of the reasonable suspicion standard, stating that only probable cause warrants these intrusions upon an individual's Fourth Amendment rights. *Id.* at 37-38 (Douglas, J., dissenting). Of course, the Court has allowed the use of suspicionless stops to check identification for certain non-criminal purposes, such as border control. Daniel J. Steinbock, *National Identity Cards: Fourth and Fifth Amendment Issues*, 56 FLA. L. REV. 697, 700 (2004).

30. *Terry*, 392 U.S. at 19-20. The application of the "reasonableness" standard to the states, however, was not without its dissenters. Justice Harlan, concurring in *Ker v. California*, noted that prior to the Court's decision in *Ker*, federal searches and seizures have been subject to the requirement of Fourth Amendment "reasonableness," while state searches and seizures "have been judged, and in my view properly so, by the more flexible concept of 'fundamental' fairness, of rights 'basic to a free society,' embraced in the Due Process Clause of the Fourteenth Amendment." *Ker*, 374 U.S. at 44 (Harlan, J., concurring). Justice Harlan thought that the "further extension of federal power over state criminal cases," as was provided by the majority's decision in *Ker*, was "quite uncalled for and unwise" as states should not be "put in a constitutional strait jacket" or subject to the "atmosphere of uncertainty" created by the Court's unpredictable decisions involving searches and seizures. *Id.* at 45. Justice Harlan would continue to follow the Fourteenth Amendment concepts of fundamental fairness when judging state searches and seizures. *Id.* at 46.

31. The Court noted that there is "no ready test [to determine the constitutionality of a seizure] other than by balancing the need to search (or seize) against the invasion which the search (or seizure) entails." *Terry*, 392 U.S. at 21; *see also Brown*, 443 U.S. at 50 (stating that "the reasonableness of seizures that are less intrusive than a traditional arrest depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.'") (internal citations omitted).

upon the specific, objective circumstances of the particular seizure,[32] and whether the seizure was "reasonably related in scope to the circumstances which justified the interference in the first place."[33]

The Court clearly stated that to allow a limited seizure during a stop based upon reasonable suspicion,[34] the officer must have a justification, an exigency, beyond general law enforcement needs.[35] As we shall see, this principle will ultimately be the reason why the Nevada Statute at issue in *Hiibel* passes Fourth Amendment muster: the Court performed the balancing test and determined that the governmental interest in compelling identification under the facts of *Hiibel* outweighed the individual interests implicated by allowing such compelled identification.[36] However, this

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32. *Terry*, 392 U.S. at 21-22, 21 n.18. Officers justifying the intrusion "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21. The Court said an officer's subjective "good faith" is not enough to justify the intrusion and that good faith alone cannot guarantee that Fourth Amendment protections survive. *Id.* at 22. The Court believed that Fourth Amendment protections are only meaningful when there is some assurance that the conduct of law enforcement officers will, at some point, be "subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances." *Id.* at 21. Therefore, such an evaluation must be made against an objective standard. *Id.* at 21-22.

33. *Id.* at 20. A determination of reasonable suspicion "must be based on commonsense judgments and inferences about human behavior," and not a "scientific certainty" where none exists. Illinois v. Wardlow, 528 U.S. 119, 125 (2000).

34. Regarding the "limited" nature of such a seizure, in *Delaware v. Prouse*, the Court reiterated the proposition that stopping a car and detaining its occupants is a seizure, even if the stop is brief and its purpose is limited. 440 U.S. 648, 653 (1979). In examining this case in which police stopped a vehicle to check the driver's license and registration, the Court balanced the level of intrusion against the governmental interest for such an intrusion, and determined that the state interest in safe highways was not sufficient to justify the random stop. *Id.* at 650, 658-59.

35. *See Brown*, 443 U.S. at 52; Hallock, *supra* note 18, at 1067, 1074. As mentioned, in *Terry*, the justification was officer safety. *Terry*, 392 U.S. at 24. The *Terry* Court said that this exception must be narrowly drawn, i.e., "'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Id.* at 19 (quoting Warden v. Hayden, 387 U.S. 294, 310 (1967)). *Terry*, in ruling that the stop-and-frisk was constitutional, reserved comment on whether a stop for interrogation or detention purposes was constitutional, and as such did not give complete approval to all investigative seizures supported by reasonable suspicion. Hallock, *supra* note 18, at 1065 (citing *Terry*, 392 U.S. at 19 n.16). However, Hallock continued, the Court in *United States v. Mendenhall* indicated that a majority would support such an investigatory stop with reasonable suspicion without an officer safety exigency, as did a plurality in *Florida v. Royer*. *See* Hallock, *supra* note 18, at 1068-69.

36. *See infra* notes 87-88 and 154-60 and accompanying text. A brief discussion of Justice Brennan's concurrence in *Kolender* is warranted here. Justice Brennan noted that the government simply cannot prosecute in the absence of probable cause for failure to produce identification, no matter how narrowly the statute is drawn. Kolender v. Lawson, 461 U.S. 352, 362-63 (1983) (Brennan, J., concurring). He said that requiring such answers to identification requests denies the person stopped the ability to leave after a brief period because it gives police the power to seize the person until he has responded to the officer's satisfaction. *Id.* at 364. Further, Justice Brennan noted that the lower burden of reasonable suspicion does not justify placing the innocent in the dilemma of determining "whether the officers have 'reasonable suspicion,'—without which they may not demand identification . . . ." *Id.* at 368-69. In such a case, he is forced to either refuse the demand at his peril or acquiesce to the demand, even though no basis for reasonable suspicion exists. *Id.* However, this argument is not compelling because a pedestrian is in the same dilemma under

determination begs the question of whether a demand for identification constitutes a seizure under the Fourth Amendment.

The Court has resolved that when an officer detains an individual for the purpose of identification, he has performed a seizure of the individual's "person," subject to the strictures of the Fourth Amendment.[37] A detention for investigation purposes "must be temporary and last no longer than is necessary to effectuate the purpose of the stop."[38]

In *Brown v. Texas*, the Court addressed the validity of a man's conviction for not complying with an officer's demand for identification pursuant to the Texas Penal Code criminalizing such non-compliance.[39] The Court said that although the man's detention was only a brief one, it was nevertheless a seizure because it "restrain[ed] his freedom to walk away."[40] Therefore, in order to be constitutional, a seizure such as this must be reasonable using *Terry* balancing and not at the "unfettered discretion" of police officers.[41] Ultimately, the Court determined that the seizure was not justified at its inception by objective facts (i.e., the officers lacked reasonable suspicion) and hence was unreasonable and therefore unconstitutional.[42]

The Court has suggested, however, that even though the reasonable suspicion exception for pat-down searches and seizures carved out by *Terry* was a narrow one justified only by the officer safety exigency, the Court would still allow certain other seizures with reasonable suspicion. For example, the Court noted that the Fourth Amendment does not prevent the seizure of a person's fingerprints based only upon reasonable suspicion.[43] In such a case, the officer must have a "reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with [a particular] crime," and additionally, the procedure must be "carried out with dispatch."[44]

Terry—namely, how does the pedestrian know that he has to stop, or subject himself to a frisk? How does he know the officer has sufficient reasonable suspicion to support these actions? He does not. The Court permitted Brennan's "innocent's dilemma" in *Terry*, because the exigency/governmental interest of officer safety was implicated. *See Terry*, 392 U.S. at 24. So, the key question here is whether the governmental interest justifies placing the innocent in that dilemma.

37. *Brown*, 443 U.S. at 50.

38. Florida v. Royer, 460 U.S. 491, 500 (1983). The Court also said that the investigative methods used in the detention should be the "least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Id.*

39. *Brown*, 443 U.S. at 48.

40. *Id.* at 50. The Court reiterated the necessity of balancing the public interest with the individual's right to be free of such officer interference for seizures that are "less intrusive than a traditional arrest." *Id.*; *see also* INS v. Delgado, 466 U.S. 210, 215 (1984) (holding that the Fourth Amendment "protection against unreasonable seizures also extends to 'seizures that involve only a brief detention short of traditional arrest'") (quoting United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975)).

41. *See Brown*, 443 U.S. at 50-52. This balancing would include a "weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Id.* at 50-51.

42. *Id.* at 51-52.

43. Hayes v. Florida, 470 U.S. 811, 817 (1985).

44. *Id.* This finding is supported by the Court's holding in *Davis v. Mississippi*, where the Court acknowledged, in dicta, that officers might be able to fingerprint without probable cause within

The Court, until *Hiibel*, had never directly addressed the issue of whether it is permissible for a state to compel self-identification under the Fourth Amendment's protection against unreasonable searches and seizures.[45] There had been a long line of cases suggesting that such compelled disclosures were forbidden; but, until the instant case, such discussion had come only in dicta. For example, the *Berkemer v. McCarty* Court concluded that an individual stopped during a traffic stop was not "in custody" for purposes of *Miranda* because, at least with regard to custody issues, a traffic stop was analogous to a *Terry* stop.[46] The Court noted that during a *Terry* stop, an officer may ask a detainee a few questions "to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is *not obliged to respond*."[47] Many other cases have adhered to this principle, but merely in dicta.[48]

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certain narrow circumstances and still be in compliance with the Fourth Amendment, although the circumstances were not satisfied in that particular case. 394 U.S. 721, 727 (1969). Also, Justice Harlan, in his *Davis* concurrence, said that there may be circumstances, unmet in *Davis*, "where compelled submission to fingerprinting would not amount to a violation of the Fourth Amendment even in the absence of a warrant." *Id.* at 728-29 (Harlan, J., concurring). As relevant to this discussion, the *Davis* majority acknowledged the "unique nature of the fingerprinting process," in that fingerprinting i) was not a serious intrusion; ii) could not be employed to harass an individual since police needed to obtain only one set; iii) was an effective and reliable crime-solving tool not subject to abuses; and iv) presented no danger of destruction. *Id.* at 727. Unfortunately, the *Davis* Court did not specify the "narrow circumstances" in which it would allow the taking of fingerprints in the absence of probable cause, nor did it make this determination in the circumstances of that case because there were numerous other Fourth Amendment violations upon which the Court rested its holding. *Id.* at 728. The dissent in *Hayes* acknowledged that the majority's decision, unlike the majority in *Davis*, virtually held that "on-site fingerprinting without probable cause or a warrant is constitutionally reasonable." *Hayes*, 470 U.S. at 819 (Brennan, J., dissenting). However, Justice Brennan disagreed with this "regrettable assault on the Fourth Amendment" and thought that the majority "reach[ed] beyond any issue properly before [the Court in this case]...." *Id.* The majority in *Hiibel* discussed fingerprinting not in this context, but only insofar as the requirements attendant to fingerprinting with reasonable suspicion provided a useful parallel for the Court's finding that an officer may not arrest a suspect for failure to provide identification "if the request for identification is not reasonably related to the circumstances justifying the stop." Hiibel v. Sixth Judicial Dist. Court, 124 S. Ct. 2451, 2459 (2004). The Court said that this finding eliminated Hiibel's concern that the statute allowed the officer to arrest Hiibel merely for being "suspicious," thereby circumventing the probable cause requirement for arrest. *Id.* The *Hiibel* Court noted only that this was similar to the limitation attendant to fingerprinting in *Hayes*, where the Court suggested that *Terry* may allow an officer "to determine a suspect's identity by compelling . . . fingerprinting only if there is 'a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime.'" *Id.* at 2459-60 (quoting *Hayes*, 470 U.S. at 817).

45. Or, as the *Hiibel* majority framed the question, whether the Fourth Amendment establishes a "right to refuse to answer questions during a *Terry* stop." *Hiibel*, 124 S. Ct. at 2459.

46. *See* 468 U.S. 420, 439, 442 (1984). The Court noted that a traffic stop had a "noncoercive aspect" which was similar to a *Terry* stop's "comparatively nonthreatening character." *Id.* at 440.

47. *Id.* at 439 (emphasis added).

48. These cases include Terry v. Ohio, 392 U.S. 1, 34 (1968) (White, J., concurring); INS v. Delgado, 466 U.S. 210, 227 (1984) (Brennan, J., concurring); Kolender v. Lawson, 461 U.S. 352, 366 (1983) (Brennan, J., concurring); *Davis*, 394 U.S. at 727 n.6 (noting that it was a "settled principle that while the police have the right to request citizens to answer voluntarily questions

C. *Fifth Amendment*

The Fifth Amendment privilege against self-incrimination provides that a person cannot be compelled to give a statement or a writing if that statement is both testimonial and self-incriminating.[49] A communication is testimonial if the government can use its *content*, as opposed to merely its "characteristics," to further a criminal investigation of the person making the statement.[50] In order to be testimonial, the communication must "relate a factual assertion or disclose information,"[51] and must rely on "the accused's consciousness of the facts and the operations of his mind . . . ."[52] "If a compelled statement is 'not testimonial . . . it cannot become so because it will lead to incriminating evidence.'"[53]

In *Hoffman v. United States*, the Court held that a communication is incriminatory if it would support a conviction under a criminal statute and "furnish a link in the chain of evidence" needed to prosecute the claimant.[54]

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concerning unsolved crimes they have no right to compel them to answer"); Florida v. Royer, 460 U.S. 491, 497-98 (1983) (addressing the self-incrimination issue in the context of a "police encounter"). It is important to note that this Fifth Amendment privilege against self-incrimination can be invoked in any proceeding, criminal or civil, administrative or judicial, where the answers may be incriminating in future criminal proceedings. Chavez v. Martinez, 538 U.S. 760, 770 (2003). However, as author Alan Hallock has noted, for due process vagueness issues, the standard of clarity required for criminal statutes "is much higher than for statutes that prescribe a civil sanction." Hallock, *supra* note 18, at 1059-60 (citing Winters v. New York, 333 U.S. 507, 515 (1948)).

49. U.S. CONST. amend. V (reading in part that no person "shall be compelled in any criminal case to be a witness against himself"). The Court has said that this guarantee against compelled self-incrimination is to be given a liberal construction "in favor of the right it was intended to secure." Hoffman v. United States, 341 U.S. 479, 486 (1951); *see* Doe v. United States, 487 U.S. 201, 207 (1988). The Court noted that a witness "is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified." *Hoffman*, 341 U.S. at 486. The Court in *Doe* held that, in addition to communications, Fifth Amendment principles apply to certain "acts," such as producing documents in compliance with a subpoena. *Doe*, 487 U.S. at 209-10.

50. *Doe*, 487 U.S. at 207-10. For a further discussion of *Doe*, *see infra* notes 215-18 and accompanying text. Additionally, in another case, the Court noted that an individual may not invoke his Fifth Amendment privilege against self-incrimination and may be compelled to answer questions that only "have a tendency to disgrace him or bring him into disrepute" if the proposed evidence is "material to the issue on trial." Brown v. Walker, 161 U.S. 591, 598 (1896).

51. *Doe*, 487 U.S. at 210. The Court noted that the question of whether a compelled communication is testimonial for Fifth Amendment purposes "often depends on the facts and circumstances of the particular case." *Id.* at 214-15. A person may be compelled to provide non-testimonial communications, such as blood samples, Schmerber v. California, 384 U.S. 757, 765 (1966), or voice exemplars, United States v. Dionisio, 410 U.S. 1, 7 (1973); United States v. Wade, 388 U.S. 218, 222-23 (1967). The reason for this is that, as the Court noted in *United States v. Hubbell*, "there is a significant difference between the use of compulsion to extort communications from a defendant and compelling a person to engage in conduct that may be incriminating" such as "provid[ing] a blood sample or handwriting exemplar, or [making] a recording of his voice." 530 U.S. 27, 35 (2000). The Court compared this "conduct" with producing documents under a subpoena, noting that since the "papers had been voluntarily prepared prior to the issuance of the summonses, they could not be said to contain compelled testimonial evidence." *Id.* at 35-36 (quoting Fisher v. United States, 425 U.S. 391, 409-410 (1976)).

52. *Doe*, 487 U.S. at 211.

53. *Id.* at 208 n.6 (quoting *In re* Grand Jury Subpoena, 826 F.2d 1166, 1172 n.2 (Newman, J., concurring)).

54. *Hoffman*, 341 U.S. at 486; *see also Hubbell*, 530 U.S. at 37-38 (holding that though the Fifth Amendment "might have been read to limit its coverage to compelled testimony that is used against

In order for the Fifth Amendment privilege against self-incrimination to be applicable, the person providing such a communication must have "reasonable cause to apprehend the danger from a direct answer."[55]

However, a plurality Court in *California v. Byers* noted that under the Court's holdings "the mere possibility of incrimination is [sometimes] insufficient to defeat the strong policies in favor of a disclosure."[56] The Court said that in order to invoke the Fifth Amendment's privilege against self-incrimination, an individual must show not only the risk of incrimination, but also that "the compelled disclosures will *themselves* confront the [individual] with '*substantial hazards* of self-incrimination.'"[57]

In upholding the constitutionality of a statute mandating that an individual involved in an automobile accident must stop at the scene of the accident and provide his name and address, the Court noted that these

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the defendant in the trial itself . . . . It has, however, long been settled that its protection encompasses compelled statements that lead to the discovery of incriminating evidence even though the statements themselves are not incriminating and are not introduced into evidence.").

55. *Hoffman*, 341 U.S. at 486; *see also* Mason v. United States, 244 U.S. 362, 365 (1917) (stating that the Fifth Amendment protection against self-incrimination "is confined to real danger, and does not extend to remote possibilities out of the ordinary course of law"). The Court in *Mason* said that the danger must be "real and appreciable, with reference to the ordinary operation of law in the ordinary course of things . . . . [A] merely remote and naked possibility . . . should not be suffered to obstruct the administration of justice." *Id.* at 365-66.

56. California v. Byers, 402 U.S. 424, 428 (1971); *see also* Baltimore City Dep't of Soc. Servs. v. Bouknight, 493 U.S. 549, 556-58 (1990) (citing *Byers* and noting that "[t]he Court has on several occasions recognized that the Fifth Amendment privilege [against self-incrimination] may not be invoked to resist compliance with a regulatory regime constructed to effect the State's public purposes unrelated to the enforcement of its criminal laws."). The *Byers* Court stated that serious questions arise when presented with the state's desire for disclosures coupled with the Fifth Amendment right against self-incrimination, and that these questions must be resolved "in terms of balancing the public need on the one hand, and the individual claim to constitutional protections on the other." *Byers*, 402 U.S. at 427.

57. *Byers*, 402 U.S. at 429 (emphasis added). The Court noted that this burden was not met in the *Byers* case. *Id.* at 433-34. This determination sparked a lengthy concurrence/dissent from Justice Harlan, and vociferous dissents from Justices Brennan and Black. Justice Harlan asserted that though the facts of *Byers* were sufficient to support a risk of incrimination, that risk was not sufficient to extend the Fifth Amendment's privilege to regulatory schemes like the one in the instant case. *Id.* at 439 (Harlan, J., concurring). He argued that to so extend the Fifth Amendment's privilege would be to mandate the availability of the privilege in every instance where the government relies on self-reporting. *Id.* at 451-52. Justice Harlan asserted that the determination of whether to extend the privilege was a matter of "degrees" that required an evaluation of the non-criminal governmental purpose for the statute, the necessity of self-reporting to get the information needed, and the nature of the disclosures. *Id.* at 454. Justice Harlan concluded that after Byers identified himself, the state must bear the burden of making an *additional* case against Byers for any criminal violations. *Id.* at 457. Justice Black supported a "use" limitation for criminal purposes on this compelled information, and claimed that Justice Harlan's balancing merely diluted constitutional guarantees. *Id.* at 463 (Black, J., dissenting). Justice Brennan, going even further than Justice Black, supported only immunity in this case and said that a "use" limitation was not enough. *Id.* at 478 (Brennan, J., dissenting). Justice Brennan was incredulous at the fact that the plurality did not find a substantial hazard of incrimination here, because Byers was also charged with a violation of a criminal statute (illegal passing). *Id.* at 470.

compelled admissions were not testimonial.[58] It stated that "[d]isclosure of name and address is an essentially neutral act," and that such a disclosure, whatever the "collateral consequences," concerned merely the State's power to regulate the use of motor vehicles.[59] Therefore, this disclosure implicated an almost exclusively civil, and not criminal, governmental interest. Consequently, the Court rationalized that such a release of personal identity and address information was "no more incriminating than a tax return;" that is, it did not in and of itself implicate anyone in criminal conduct, but merely identified an individual.[60]

III. FACTS

Police were dispatched to investigate a report of a man striking a female passenger in a red and silver GMC truck on Grass Valley Road.[61] At the scene, the officer spoke to the citizen who had placed the call.[62] The citizen directed the officer to the truck, parked on the side of the road with a man standing by it and a young woman sitting inside.[63] There were skid marks in the gravel indicating the truck had come to a sudden stop.[64]

The officer approached the man, who appeared to be intoxicated, and informed him that he was investigating a report of a fight.[65] The officer asked for identification and the man, asking why the officer wanted to see

58. *Id.* at 432-33.

59. *Id.* at 432; *see* Hiibel v. Sixth Judicial Dist. Court, 59 P.3d 1201, 1206 (Nev. 2002) ("To hold that a name, which is neutral and non-incriminating information, is somehow an invasion of privacy is untenable. Such an invasion is minimal at best."). The *Byers* Court noted that it is possible that compliance with this statute might lead to prosecution for some "contemporaneous criminal violation of the motor vehicle code if one occurred, or an unrelated offense, always provided such offense could be established by independent evidence." *Byers*, 402 U.S. at 432. But, the Court stated that this statutory purpose affected only the legal activity of driving and therefore did not necessarily impinge upon the realm of criminal conduct because it was not a crime under California law to be a driver who was involved in an accident. *See id.* at 431.

60. *Byers*, 402 U.S. at 434. It is important to note that such a release of information in this case may result in civil penalties, though not necessarily criminal ones. *See id.* at 430-32, 434. The plurality stated that though this compelled identification may lead to arrest and charge for criminal conduct, that result depended upon different facts and evidence; as the Court stated, there is no constitutional right to "flee the scene of an accident in order to avoid the possibility of legal involvement." *Id.* at 434. In arriving at its conclusion, the Court suggested that identifications which may lead to future prosecutions do not necessarily mandate constitutional protections. *Id.* Justice Harlan concluded, with no explanation, that this stop-and-identify statute was testimonial. *Id.* at 435-36 (Harlan, J., dissenting). Justice Black wondered what evidence could be more testimonial than that offered here—namely, "a man's own statement that he is a person who has just been involved in an automobile accident inflicting property damage." *Id.* at 462-63 (Black, J., dissenting). Justice Brennan asserted that the plurality, by determining the communication was non-testimonial, illegitimately adopted a construction at odds with the one adopted by the California Supreme Court. *Id.* at 473 (Brennan, J., dissenting). He then equated the plurality's non-testimonial determination with believing that "a statute requiring all robbers to stop and leave their names and addresses with their victims would not involve the compulsion of 'communicative or testimonial' evidence." *Id.*

61. Hiibel v. Sixth Judicial Dist. Court, 124 S. Ct. 2451, 2455 (2004); *Hiibel*, 59 P.3d at 1203.

62. *Hiibel*, 59 P.3d at 1203.

63. *Hiibel*, 124 S. Ct. at 2455; *Hiibel*, 59 P.3d at 1203. The young woman was Hiibel's minor daughter. *Hiibel*, 59 P.3d at 1203.

64. *See Hiibel*, 124 S. Ct. at 2455; *Hiibel*, 59 P.3d at 1203.

65. *Hiibel*, 124 S. Ct. at 2455.

his identification, refused the officer's request.[66] The officer responded that the identification was necessary to the investigation, after which "[t]he unidentified man became agitated and insisted he had done nothing wrong."[67] The officer asked for identification numerous times and was refused each time, after which the man began to taunt the officer, challenging the officer to take him to jail.[68] After warning the man that he would be arrested if he did not comply with the officer's request, the officer placed the unidentified man under arrest.[69]

The government charged and convicted the man, Larry Dudley Hiibel, with preventing a public officer from carrying out the officer's duties in violation of NEV. REV. STAT. § 199.280 (2003),[70] which compels a person to identify him or herself when stopped by a police officer with reasonable suspicion.[71] Hiibel was convicted and fined $250.[72] The Sixth Judicial District Court affirmed Hiibel's conviction,[73] as did the Supreme Court of Nevada in a divided opinion.[74]

IV. ANALYSIS & CRITIQUE OF THE COURT'S OPINION

A. Justice Kennedy's Majority Opinion, Joined by Justices O'Connor, Rehnquist, Scalia, and Thomas

In this 5-4 Supreme Court decision, the *Hiibel* Court affirmed the judgment of the Nevada Supreme Court and held that Hiibel's conviction

66. *Id.*

67. *Id.*

68. *Id.*; *Hiibel*, 59 P.3d at 1203. The record shows the officer asked for identification eleven times and was refused each time. *Hiibel*, 124 S. Ct. at 2455; *Hiibel*, 59 P.3d at 1203.

69. *Hiibel*, 124 S. Ct. at 2455. The officer stated that he "felt [Hiibel] 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." *Hiibel*, 59 P.3d at 1203.

70. *Hiibel*, 59 P.3d at 1203. The court determined that Hiibel's failure to provide identification "obstructed and delayed [the] public officer in attempting to discharge his duty." *Id.* NEV. REV. STAT. § 199.280 provides criminal penalties for "willfully resist[ing], delay[ing], or obstruct[ing] a public officer in discharging or attempting to discharge any legal duty of his office." *Hiibel*, 124 S. Ct. at 2455.

71. *See Hiibel*, 124 S. Ct. at 2455. NEV. REV. STAT. § 171.123 (2003) states that any peace officer may detain any person under reasonable suspicion, and further, that "[a]ny person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer." *Id.* at 2455-56.

72. *Id.* at 2456.

73. In affirming Hiibel's conviction by balancing the public interest in Hiibel's self-identification with his Fifth Amendment right to remain silent, the district court held that it was "reasonable and necessary" for the officer to request Hiibel's identification given that the officer had evidence that Hiibel drove under the influence and was suspected of battery and domestic violence. *Hiibel*, 59 P.3d at 1203.

74. *Hiibel*, 124 S. Ct. at 2456; *Hiibel*, 59 P.3d at 1207-08.

under Nevada's stop-and-identify statute did not violate either his Fourth Amendment rights or his Fifth Amendment privilege against self-incrimination.[75] After a brief discussion of the history of stop-and-identify statutes and their roots in vagrancy statutes, the majority asserted that *Hiibel* began where *Brown v. Texas* and *Kolender v. Lawson* left off.[76] The majority concluded that the statute in *Hiibel*, unlike the one in *Kolender*, was not vague because it required the suspect to disclose only his name; and, that the *Terry* stop in *Hiibel*, unlike the one in *Brown*, was proper because the arresting officer possessed the requisite reasonable suspicion of criminal activity.[77]

1. Fourth Amendment

The majority decided that, contrary to Hiibel's contentions, neither the officer's stop and request for identification nor Nevada's stop-and-identify statute violated Hiibel's Fourth Amendment rights.[78] It noted that *Terry* allowed brief stops with reasonable suspicion, as well as questioning regarding the identity of the person stopped.[79] The Court remarked that such questions were a "routine and accepted part of many *Terry* stops" and served several important governmental interests such as: i) informing the officer that the suspect is wanted for another offense;[80] ii) helping the officer clear the suspect, therefore allowing the police to put their law enforcement efforts elsewhere; and iii) enabling an officer to know with whom they are dealing in order to properly assess the situation for threats to the officer's own safety and the safety of others.[81]

While acknowledging that it is permissible for a police officer to ask a person for identification without implicating Fourth Amendment concerns, the majority recognized the unresolved question of whether the individual, stopped by an officer with reasonable suspicion, can be *arrested and prosecuted* for his refusal to answer the officer's identification request.[82] Although the Court acknowledged dicta addressing the issue in its previous decisions, the majority did not find those statements controlling.[83]

In an interesting turn, the majority interpreted the dicta as standing for the proposition that the Fourth Amendment itself cannot *compel* a suspect to

75. *See Hiibel*, 124 S. Ct. at 2460-61.

76. *Id.* at 2457. The majority reminds us that the Court in these cases did not reach the Fourth or Fifth Amendment constitutionality of the stop-and-identify statutes themselves, because the *Kolender* statute's "credible and reliable" language was void for vagueness and the initial stop by police in *Brown* was not based upon reasonable suspicion. *Id.*

77. *Id.*

78. *Id.* at 2457, 2460.

79. *Id.* at 2458.

80. Compelling the release of information which lets the officer know if the suspect is wanted for an offense may implicate Fifth Amendment self-incrimination issues. *See infra* notes 166-67 and accompanying text.

81. *Hiibel*, 124 S. Ct. at 2457-58.

82. *Id.* at 2458.

83. *Id.* at 2458-59. See *supra* note 48 for the history of Court dicta on this issue.

answer questions.[84] Therefore, because the legal obligation for Hiibel to answer questions did not arise from the Fourth Amendment specifically, but rather from Nevada State law, the majority asserted that the dicta was not applicable because it did not directly address the question of "whether a *State* [compelling] a suspect to disclose his name" during a *Terry* stop violated the Fourth Amendment.[85] The Court claimed that the *Hiibel* case concerned "a different issue" than the one to which the dicta applied.[86]

Because the Nevada statute was the source of the compulsion of identification, the majority noted that to determine whether requiring a suspect to identify himself in the course of a *Terry* stop is allowable under the Fourth Amendment, one must look at the "reasonableness" of this seizure under the Fourth Amendment's balancing test, weighing the State's "intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests."[87] The Court concluded the Nevada statute satisfied that standard because the Court believed that i) the request for identification had an "immediate relation" to the *Terry* stop; ii) the threat of criminal sanction ensured that the identification request did not become a "legal nullity;" and iii) the statute did not alter the duration, location, and nature of the stop.[88]

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84. *Hiibel*, 124 S. Ct. at 2459. M. Christine Klein called this "curious bit of legal 'reasoning'" a "striking non sequitur," as the majority noted that the Fourth Amendment does not impose obligations on the citizen, but yet finds it appropriate to draw the obvious inference that the Fourth Amendment "itself" cannot require a suspect to answer questions. Klein, *supra* note 4, at 378. Klein continued, with a hearty "of course" this is the case, that any obligations to answer questions would "not only *not* stem from the Fourth Amendment but would arise as an exception or limitation to the protections offered by the Fourth (and Fifth) Amendment." *Id.*

85. *Hiibel*, 124 S. Ct. at 2459 (emphasis added).

86. *Id.* While the majority asserted that this case was "different" than one where it would be necessary to interpret whether the Fourth Amendment can compel such answers (because the question of whether a state can compel a suspect to disclose his name needed to be addressed), Klein, disagreeing, said *Hiibel* is simply a "garden variety case" to determine whether a state statute is consistent with Fourth Amendment protections. Klein, *supra* note 4, at 378. Even though Klein finds the *Hiibel* majority's analysis here a "curious bit of legal 'reasoning,'" Justice Harlan's concurring opinion in *Terry* employs a similar bit of reasoning by noting the different justifications of a protective frisk: one predicated upon a state's general authority in directing its officers and one predicated upon Fourth Amendment reasonableness. *Id.*; *see* Terry v. Ohio, 391 U.S. 1, 31-33 (1968). Justice Harlan held that if Ohio had authorized that officers could, on a reasonable suspicion standard, "frisk and disarm persons thought to be carrying concealed weapons," he would certainly find such actions constitutionally permissible. *Id.* at 31. However, he noted that since the Ohio courts did not base the constitutionality of this frisk upon any general authority over officers, this analysis could not be applied here. *Id.* at 32. Justice Harlan based his determination of the officers' "right to frisk" upon the Fourth Amendment reasonableness of his forcible stop. *Id.* at 33.

87. *Hiibel*, 124 S. Ct. at 2459. Considerations involve the "weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." Hiibel v. Sixth Judicial Dist. Court, 59 P.3d 1201, 1205 (2002) (citing Brown v. Texas, 443 U.S. 47, 50-51 (1979)).

88. *Hiibel*, 124 S. Ct. at 2459.

With regard to the duration of the stop, an officer would most likely need to run the suspect's name through his database of criminal history records if the officer did not immediately recognize any potential danger from the suspect's self-identification.[89] In fact, other than the pat-down protections provided under *Terry*, this "recognition" is essential to the officer being aware of any risk the suspect posed to previous officers or others. Although these technologies may provide information "instantaneously,"[90] any problem that would delay the speed of this determination of potential risk, such as a computer malfunction, could potentially increase the time of detention past that which the Court would consider "brief," rendering such a stop unconstitutional.

In addition, the benefit of these advanced criminal history checks to officer safety is somewhat negated by the fact that an officer must first approach the vehicle of persons stopped under *Terry before* the officer is able to determine whether the individual poses a risk by running his name through the database. Therefore, in order to assess the risk posed by a *Terry*-stopped individual, the officer must, to a limited extent, assume the very risk that allowing such compelled self-identification is designed to mitigate.[91]

It would therefore be useful to know what percentage of the officers killed or injured during a *Terry* stop were attacked upon first contact with the suspect, and what percentage were attacked only later when the stop escalated into a dangerous situation. If the latter situation is more prevalent, then it makes sense, in light of Fourth Amendment balancing, to allow the initial contact in order to establish the suspect's identity. This information would help us to ascertain whether the contact would implicate the public interest of officer safety sufficiently enough to outweigh private Fourth Amendment considerations. Of course, we would still be unable to know if the request for identity would likely *create* a violent situation out of

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89. Klein noted that an officer would immediately know if the suspect was a potential danger only in a small town or in the case where the suspect is infamous enough that his name will be instantly known; otherwise a database would be necessary. Klein, *supra* note 4, at 380. However, police have noted that it is standard protocol to "know the identity and character of as many persons in [the officer's] district or beat as possible." Brief Amicus Curiae of the National Association of Police Organizations in Support of Respondents at 6-7, Hiibel v. Sixth Judicial Dist. Court, 124 S. Ct. 2451 (2004) (No. 03-5554) [hereinafter Police Organizations Amicus]. To such an end, officers are routinely advised on a daily basis of names or descriptions of potentially dangerous persons they may encounter. *Id.* at 7. But, the police also stated that "identification by sight recognition" is quite limited, especially in "metropolitan areas with large, transient populations." *Id.* Database technologies enable the officer to access "comprehensive criminal history records" reflecting the individual's "current and past involvement with the criminal justice system . . . including arrests, the leading indicators of a propensity to assault police officers." *Id.* (internal quotations omitted). "One common denominator found among victim officers is that they did not perceive their attacker to be a serious threat until it was too late." *Id.* at 9 (internal quotations omitted).

90. Police Organizations Amicus, *supra* note 89, at 8 (noting that the Court, in *Arizona v. Evans*, 514 U.S. 1, 3 (1995), acknowledged that police cars equipped with these database technologies conduct "instantaneous searches of criminal history using only detainee names"). For example, the Los Angeles County Consolidated Criminal History Reporting System can retrieve information in less than 2.5 seconds. *Id.* at 7.

91. See *infra* notes 125-30 and accompanying text for a full discussion of risks to police during *Terry* stops.

circumstances that would otherwise not have escalated to the point of violence against the officer.

The majority did not accept Hiibel's argument that the statute circumvented the Fourth Amendment's probable cause requirement by enabling an officer "to arrest a person [merely] for being suspicious."[92] This, said Hiibel, created the very risk of arbitrary police conduct the Fourth Amendment was designed to prohibit.[93] However, the Court said that this concern was alleviated by the fact that "a *Terry* stop must be justified at its inception and 'reasonably related in scope to the circumstances which justified' the initial stop."[94] Therefore, an officer could arrest a suspect for failing to identify himself only if, pursuant to *Brown*,[95] the officer had reasonable suspicion for the stop, and the identification request was "reasonably related" to the circumstances justifying the stop.[96] The majority concluded that the officer's request that Hiibel identify himself was a "commonsense inquiry" which was "reasonably related" to the circumstances of the *Terry* stop and not merely an effort to obtain an arrest after the stop yielded insufficient evidence.[97]

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92. *Hiibel*, 124 S. Ct. at 2459.

93. *See id.*

94. *Id.* (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)). The Court noted that this limitation was similar to the one in *Hayes* governing fingerprinting, which "compell[ed] the suspect to submit to fingerprinting only if there is 'a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime.'" *Id.* at 2459-60 (quoting Hayes v. Florida, 470 U.S. 811, 817 (1985)).

95. See *supra* notes 39-42 and accompanying text for a discussion of the *Brown* case.

96. *See Hiibel*, 124 S. Ct. at 2459.

97. *Id.* at 2460. In the Nevada Supreme Court *Hiibel* case, the court questioned the ramifications of *not* legally allowing such a "commonsense inquiry" as identification when the officer had reasonable suspicion: "[W]hat could an officer do if a suspicious person were loitering outside a daycare center or school? Perhaps that person is a sex offender. How are officers to enforce restraining orders? Or, how are officers to enforce curfew laws for minors without a requirement to produce identification?" Hiibel v. Sixth Judicial Dist. Court, 59 P.3d 1201, 1205 (Nev. 2002). In response, the dissent noted that the majority failed to recognize that "it is the observable conduct [of an individual], not [his] identity . . . upon which an officer must legally rely when investigating crimes and enforcing the law." *Id.* at 1209 (Agosti, J., dissenting). The majority countered by stating "it is the observable conduct that creates reasonable suspicion, but it is the requirement to produce identification that enables an officer to determine whether the suspect is breaking the law." *Id.* at 1205-06. Additionally, the court noted that, in this post-9/11 era of terrorism, denying officers the right "to request identification from suspicious individuals creates a situation where an officer could approach a wanted terrorist or sniper but be unable to identify him or her if the person's behavior does not rise to the level of probable cause necessary for an arrest." *Id.* at 1206. The concurrence noted that the majority did not "overreact[]" to the dangers of terrorism in its decision. *Id.* at 1207 (Maupin, J., concurring). However, the dissent called this reasoning an "emotional appeal based upon [the] fear and speculation" that police would be unable to protect children from molesters, or to enforce restraining orders or curfews. *Id.* at 1209 (Agosti, J., dissenting). And further, the dissent maintained that the court should not be "blinded by fear," and that the court appealing to public fear during this time of terrorism, instead of vigilantly guarding the public's constitutional rights, would "sound the call of retreat and begin the erosion of civil liberties." *Id.* at 1209-10.

This determination appears to be a bit self-serving, however, 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.[98] 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.[99] 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.[100]

The Court's decision in *Hiibel* clearly expanded *Terry's* narrow search and seizure exception of allowing a limited pat-down search for the purpose of officer safety when a suspect is stopped with reasonable suspicion.[101] But as we have seen, there have been chinks in the *Terry* armor even before *Hiibel*; for example, in both *Davis v. Mississippi* and *Hayes v. Florida*, the Court entertained the possibility of seizing the fingerprints of a stopped individual with a standard less than probable cause.[102]

Since *Terry* allowed only a brief "intrusion" in light of Fourth Amendment concerns, the Fourth Amendment "reasonableness" balancing test for compelled self-identification must necessarily consider the extent of the identification "intrusion."[103] It is useful to examine, in addition to the duration and location of each of these seizures (or "intrusions"),[104] the nature and extent of the seizure, and to compare the seizure with constitutional *Terry* pat-down frisks and compelled fingerprinting (which, as we have seen,

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98. *See Hiibel*, 124 S. Ct. at 2458-60. Steinbock believed it was "unworkable to ask the officer on the street to distinguish between stops where identification would further the investigation and those in which it would not" and that a bright-line rule would make sense here. Steinbock, *supra* note 29, at 718.

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

100. "Law enforcement experts have long recognized that, when an officer conducts a field interview, his 'greatest hazard is the unknown.'" Police Organizations Amicus, *supra* note 89, at 5.

101. Klein, *supra* note 4, at 385; *cf.* Brief for the American Civil Liberties Union as Amicus Curiae in Support of Petitioner at 7, Hiibel v. Sixth Judicial Dist. Court, 124 S. Ct. 2451 (2004) (No. 03-5554) [hereinafter ACLU Amicus] (noting the "exceedingly narrow" stop and frisk exception to the Fourth Amendment's probable cause requirement in *Terry*).

102. See *supra* notes 43-44 and accompanying text for the *Hayes* and *Davis* cases. In addition, in a case questioning whether an officer stopping an individual had the required reasonable suspicion if the officer was acting pursuant to a flyer issued by another officer who had reasonable suspicion, the Court allowed even this identification stop under *Terry* because the stop promoted a strong governmental interest in solving crimes and bringing offenders to justice. United States v. Hensley, 469 U.S. 221, 229 (1985). The Court performed its requisite Fourth Amendment balancing test and determined that the police interests simply outweighed the individual's interests in this case. *See id.*

103. *Hiibel*, 124 S. Ct. at 2459.

104. *See supra* notes 37-40, 78-81 and accompanying text.

the Court suggested was permissible with reasonable suspicion and within narrow circumstances under the Fourth Amendment).[105]

In *Hiibel*, the Nevada Supreme Court believed that requiring identification was less intrusive than conducting a pat-down search, as requesting identification does not require physical "touching."[106] However, author M. Christine Klein worried that while this may be true, the *scope* of the seizure is much greater in a compelled self-identification, as obtaining a person's identity is merely "the tip of the iceberg."[107] An officer in possession of a person's identity, while using police databases, may obtain a virtual "torrent" of information about that person, whereas a seized weapon could not unleash such personal information.[108] Presumably, a seized weapon which an officer determined was lawfully owned and possessed by the person from whom it was seized would be returned to its owner after the stop was completed and, unlike a person's identity, could not subsequently be used to obtain additional information not directly related to the circumstances creating the reasonable suspicion in the first place—such as information that could be obtained from ballistics testing to see if a seized gun was used in the crime being investigated (or in any other crime), or personal information which could be obtained from "running" the weapon's serial number.[109]

Also, it is likely that a compelled self-identification based on reasonable suspicion would occur in a substantially greater number of cases than a pat-down search, as every individual stopped has a name, whereas fewer would be suspected of carrying a weapon which would necessitate a pat-down search. So, in these respects, a compelled self-identification could potentially intrude further than a *Terry* frisk upon a person's personal circumstances, situation, history, etc.

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105. *See* Davis v. Mississippi, 394 U.S. 721, 727 (1969); Hayes v. Florida, 470 U.S. 811, 816-17 (1985).

106. Hiibel v. Sixth Judicial Dist. Court, 59 P.3d 1201, 1206 (Nev. 2002). *See generally* JAMIE FELLNER, PUNISHMENT AND PREJUDICE, RACIAL DISPARITIES IN THE WAR ON DRUGS, CHAPTER VII. RACIALLY DISPROPORTIONATE DRUG ARRESTS (2000), http://www.hrw.org/reports/2000/usa/Rcedrg00-05.htm (including as a problem the discriminatory uses of the "pat-and-frisk") (last visited Dec. 14, 2004); Injuryboard.com, Police Misconduct Overview, http://www.injuryboard.com/view.cfm/TOPIC=125 (last visited Dec. 14, 2004).

107. *See* Klein, *supra* note 4, at 366-67.

108. *Id.* at 367. Klein references Justice Stevens's similar point in the Justice's *Hiibel* dissent. *Id.* (citing *Hiibel*, 124 S. Ct. at 2464 (Stevens, J., dissenting) (stating a name "can provide the key to a broad array of information about the person, particularly in the hands of a police officer with access to a range of law enforcement databases. And that information, in turn, can be tremendously useful in a criminal prosecution.")).

109. *See* MISSISSIPPI OFFICE OF THE ATTORNEY GENERAL, MISSISSIPPI PROSECUTOR'S MANUAL: CHAPTER 10 – SEARCH AND SEIZURE, at 41, *available at* http://www.ago.state.ms.us/divisions/prosecutors/downloads/Prosman10.pdf (last visited Dec. 14, 2004).

Somewhat mitigating the "intrusion" into one's Fourth Amendment rights resulting from compelled self-identification is the fact that states, in exchange for an individual's use of public roads, can currently compel the individual to purchase and post license plates on one's motor vehicle.[110] License plates allow the police to "intrude" upon the registered owner of a vehicle, without *any* reasonable suspicion whatsoever, by entering the number on the plate into police databases in order to obtain the registered owner's identity, address, and possible criminal history.[111] This enables an officer to obtain any information that a compelled self-identification of the registered owner of the vehicle would provide. The government here is not so concerned with the fact that this scheme may, like the hypothetical at the beginning of this note, furnish greater protections to the car thief (whose personal information could not be ascertained from a car license database search) than to the law-abiding registered owner of the car. The fact that state license plate schemes have not been shown to be unconstitutional, despite this government "intrusion" upon the persons, houses, papers, and/or effects of honest motor vehicle owners, is linked to the states' interest in having such schemes to facilitate traffic management and safety.[112] Likewise, the Fourth Amendment may permit similar "intrusions" and the potential torrents of information they unleash upon those stopped by officers with reasonable suspicion, if the intrusion sufficiently implicates important governmental interests.

Also, the "intrusion" created by compelled fingerprinting, which the Court might allow with reasonable suspicion in certain narrow circumstances, is certainly as great as the "intrusion" of compelled self-identification. Fingerprints are an even more unique form of "identity" than

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110. See Nevada Department of Motor Vehicles, Nevada License Plates, http://www.dmvnv.com/platesmain.htm (last visited Dec. 14, 2004) [hereinafter Nevada License Plates] for the Nevada Department of Motor Vehicles website information section on license plates.

111. *See* David Patch, *Test Devices to Serve as Snooper Troopers,* TOLEDO BLADE, Aug. 11, 2004, http://tbrnews.org/Archives/a1055.htm (describing a recently implemented Ohio police program which automatically scans the license plate of every car which uses the Ohio Turnpike, and then cross-references the information with criminal databases). However, the Court has acknowledged that "[a]n individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation." Delaware v. Prouse, 440 U.S. 648, 662 (1979) (finding that stopping an automobile and detaining its driver solely to check his driver's license and vehicle registration is unreasonable under the Fourth Amendment).

112. *See* Nevada License Plates, *supra* note 110. The Court has also noted the states' "vital interest" in efficient and safe management of vehicular traffic, in such manifestations as "ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that the licensing, registration, and vehicle inspection requirements are being observed." *Prouse*, 440 U.S. at 658. However, as the Court noted, this interest may not always be sufficient to justify the intrusion upon Fourth Amendment interests of such stops. *See id.* at 659-60. In addition to concerns regarding traffic safety, the Court has determined that the state has a legitimate concern stemming the tide of illegal immigration. United States v. Brignoni-Ponce, 422 U.S. 873, 879 (1975). The Court stated that this interest enabled officers, with reasonable suspicion that a specific vehicle might contain illegal aliens, to briefly stop those vehicles and question the occupants about their citizenship, immigration status, and any suspicious circumstances. *See id.* at 879-80, 884. However, as the Court only addressed the constitutionality of the stop itself, it did not resolve whether the answers to such officer-posed questions may be compelled. *See id.* at 885-87.

one's name, as two people or more can have the same name but not the same fingerprints.[113] Fingerprints may also be referenced against government databases to obtain similar "floods" of information about the individual as that available to officers by one's identity, provided the individual's fingerprints are recorded in such databases.[114]

However, the circumstances under which the Court purported to allow fingerprinting without probable cause are not necessarily analogous to those under which a person's identity might be obtained.[115] Although the process of obtaining a suspect's identity could clearly be "carried out with dispatch," it is less clear whether officers would have a "reasonable basis for believing that [identification would] establish or negate the suspect's connection with [the] crime [being investigated]."[116] In order for officers to have such a reasonable basis, the facts would have to be similar to those in *United States v. Hensley*, in which the Court upheld a stop for the purposes of identification with reasonable suspicion based only on a flyer issued with reasonable suspicion by another police department.[117] There, officers stopped the suspect to check identification to determine whether he was the specific person in the flyer for whom they were searching.[118] This

113. *See* Peel Regional Police, Fingerprints, http://www.peelpolice.on.ca/FIS/FIS-Print.html (last visited Dec. 14, 2004). Fingerprints are left by the patterns of ridges and furrows on the skin which assist traction; through its pores the skin discharges water, salts, and other organic matter which are left behind when one touches an object, and when the water evaporates, those other materials are left behind as "fingerprints" to be potentially found by police and used for identification purposes in a criminal investigation. *Id. See generally* Katherine Ramsland, *Fingerprints and Other Impressions, Chapter 4: The Techniques*, http://www.crimelibrary.com/criminal_mind/forensics/fingerprints/4.html?sect=21 (last visited on Aug. 28, 2005) (noting the techniques and long history of fingerprinting as a crime-solving tool).

114. *See* Martin Stone, *FBI's Online Fingerprint Database*, COMPUTERUSER.COM, Aug. 11, 1999, http://www.computeruser.com/newstoday/99/08/11/news6.html; Paul Roberts, *Fed Fingerprint Database Spreads Across U.S.*, CIO MAGAZINE, May 15, 2004, http://www.cio.com/archive/051504/tl_justice.html.

115. *See supra* notes 43-44 and accompanying text.

116. Hayes v. Florida, 470 U.S. 811, 817 (1985).

117. 469 U.S. 221, 232 (1985). The majority thought such a rule "common sense" in a time when "criminal suspects are increasingly mobile and increasingly likely to flee across jurisdictional boundaries" because it allows officers in one jurisdiction to act quickly "in reliance on information from another jurisdiction." *Id.* at 231.

118. *Id.* at 223-24. The Court noted that it is in the public interest, particularly in crimes involving a threat to the public safety, that the suspect be captured as promptly as possible and that "[r]estraining police action until after probable cause is obtained would not only hinder the investigation, but might also enable the suspect to flee in the interim and to remain at large." *Id.* at 229. The Court continued that the law enforcement interest in the circumstances of this case "outweigh the individual's interest to be free of a stop and detention that is no more extensive than permissible in the investigation of imminent or ongoing crimes." *Id.* The Court did not find the distinction significant that police can more justifiably rely on a "report that a magistrate has issued a warrant than on a report that another law enforcement agency has simply concluded that it has a reasonable suspicion sufficient to authorize an investigatory stop," because the intrusion here upon personal security is "minimal," while the law enforcement interests promoted by this rule are "considerable." *Id.* at 232. Justice Brennan in his concurrence noted that "in the case of intrusions

compelled self-identification allowed the officers to instantly determine whether the individual stopped was the specific individual whom police were seeking, and if he was not, to quickly allow the individual to go about his business.

This was not the case in *Hiibel*, as police were not looking to eliminate or confirm Hiibel as being a specific suspect, but rather were investigating a general call regarding an alleged assault.[119] It is unclear how *Hiibel* revealing his name would establish or negate his connection with the claimed assault, even if police subsequently determined he had a criminal record.[120] Additionally, as noted by author Klein, this *Hensley* prerequisite to compelling identification—establishing or negating the individual's connection with the offense—countered the majority's own assertion that under the facts of *Hiibel*, "[t]he officer's request was [merely] a commonsense inquiry, not an effort to obtain an arrest for failure to identify after a *Terry* stop yielded insufficient evidence."[121]

In addition to the degree of intrusion upon an individual, the other side of the Fourth Amendment "reasonableness" balancing test is the promotion of legitimate governmental interests.[122] The governmental interests cited by the majority may have some merit.[123] While it is unlikely that an individual's compelled self-identification would help "clear a suspect and allow the police to concentrate their efforts elsewhere," it could certainly inform the officer that the suspect is wanted for another offense or has a record of violence or mental disorders, provided that the officer uses the police databases created for these purposes.[124]

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properly classifiable as full-scale arrests for Fourth Amendment purposes, no such balancing test is needed" as such "arrests," even under *Terry*, are governed by the probable-cause standard in the Fourth Amendment text. *Id.* at 237 (Brennan, J., concurring). However, it must be noted that as *Hensley* was a case questioning whether the police could adequately rely on a flyer issued by *another* police department who had reasonable suspicion, again the Court did not address whether the suspect could be compelled to identify himself. *See id.* at 231-32.

119. *See* Hiibel v. Sixth Judicial Dist. Court, 124 S. Ct. 2451, 2455 (2004).

120. Police were investigating a third-party citizen's report of an assault, and thus were not even certain a crime had been committed. *Id.* at 2460 (quoting Hayes v. Florida, 392 U.S. 811, 817 (1985)).

121. Klein, *supra* note 4, at 384 (citing *Hiibel*, 124 S. Ct. at 2460) (internal quotations omitted).

122. *Hiibel*, 124 S. Ct. at 2459.

123. However, the ACLU believes that the Court "fails to substantiate any *specific* law enforcement interest that might justify such a serious abridgement of . . . rights." ACLU Amicus, *supra* note 101, at 5. Another governmental interest implicated in compelling identification, but not mentioned by the majority, is the "possibility that widespread noncompliance with requests for identification by law enforcement officers would impair law enforcement beyond the point of a general interest." Hallock, *supra* note 18, at 1074. However, as Hallock notes, whether this rises to the level of a significant governmental interest is problematic. *Id.* at 1075. He mentions Justice Brennan's *Kolender* concurrence, which posited that an officer could most likely secure compliance with a request for identification, even without the proper statutory authority, by a "'show of authority' or posing his requests in a manner calculated to elicit a response." *Id.* at 1074. However, it is not unreasonable to assume that those who would not comply with an officer's request for identification, if such a request was not supported by the full force of law, might likely be those persons who would pose the greatest risk to officer safety, such as those with some experience in the criminal justice system, or those that are anti-social or inebriated, like Hiibel.

124. *See Hiibel*, 124 S. Ct. at 2458. This compelled self-identification, in light of the possibility of being wanted for another offense, creates clear Fifth Amendment self-incrimination issues which are addressed in *infra* Part IV.A.2.

Also, while it is true that "[t]he exigencies that justify a weapons search simply do not arise in the case of compelled identification,"[125] a compelling case may be made that officers who possess the requisite reasonable suspicion in stopping an individual are subjected to a significant enough risk to justify the limited seizure of a person's identity under the Nevada statute. "[I]nformation about the stopped person's dangerousness or past violent activity can save [an] officer's life."[126] In one study, of the six hundred-plus officers killed in the last decade, one hundred and five were killed "investigating suspicious people or circumstances in a *Terry*-type situation."[127] According to another study, seventy-two percent of the individuals who killed police officers over a fourteen-year period had been arrested at least once in the past[128] and though it is not clear how many of those killings occurred during a traffic stop, instant access to records of those arrests, if in the police databases, could serve as an extraordinarily valuable tool for mitigating the risk to officer safety.[129] Also, individuals who assault officers have traditionally used hand-to-hand combat, automobiles, or the officer's own gun in such assaults, none of which could be guarded against by a *Terry* frisk.[130]

These considerations cannot be lightly dismissed, although the Court reasons that "[c]ivil liberties can impede effective police work."[131] Even *Terry*, that constitutional bulwark of police procedure, can be painted with a similarly terse brush as it most certainly curtailed many important civil liberties; in particular, the individual's right to not be physically touched or grabbed by the police under a standard of less than probable cause.[132] So, the relevant concern in *Hiibel* was not whether civil liberties could be

125. Klein, *supra* note 4, at 366. The rationalization is "a reasonable belief that [an individual stopped under reasonable suspicion] was armed and presently dangerous." Ybarra v. Illinois, 444 U.S. 85, 92-93 (1979).

126. Police Organizations Amicus, *supra* note 89, at 5 (citing a U.S. Department of Justice report). The Police Organizations Amicus Brief notes that the threat to police is not limited to "obviously risky situations such as hot pursuit of drug suspects or burglars," but rather "[e]ven seemingly routine police work, performed by foot patrolmen and traffic officers, can be fatal." *Id.* at 4-5.

127. *Id.* The Amicus notes that, therefore, officer safety interests are "very much implicated by brief, but personal, investigative encounters like the one in this case." *Id.* at 5.

128. *Id.* According to this study, some fifty-three percent of those who killed officers "had a prior criminal conviction . . . . And one-fourth of those individuals were on parole or probation at the time of the killing." *Id.* (internal citations omitted).

129. The "objective evidence linking past arrests and convictions to officer safety threats cannot be dismissed as 'speculative.'" *Id.* at 6.

130. *Id.*

131. Klein, *supra* note 4, at 377 (noting that police could maximize their effectiveness if they were allowed to "approach whomever they wished, reasonable suspicion or not, and demand answers to all sorts of questions, including and beyond mere identity. But the Fourth Amendment is not properly viewed as a mere impediment to making an arrest.").

132. Terry v. Ohio, 392 U.S. 1, 27 (1968).

impeded for the sake of effective and safe police work (they were under *Terry* and other cases), but rather whether the police safety exigency, or indeed any other exigency, could justify the limited seizure for which the Nevada statute provides—the seizure of a person's identity.

In *DeFillippo v. Michigan*, the Court upheld the lawfulness of an arrest where the officer believed the defendant's conduct violated a valid city ordinance compelling self-identification—an ordinance later declared unconstitutional for vagueness.[133] The Court said that since there was no controlling precedent which clarified the constitutionality of the ordinance, the ordinance was presumptively valid.[134] The Court continued that officers themselves must not speculate as to the constitutionality of the laws they are enforcing, "with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws."[135] Therefore, because the officer in *DeFillippo* did not question the ordinance before acting upon it[136] and because the Court found the officer's action reasonable,[137] we may infer that the Court found this self-identification ordinance not to be, on its face, such a "grossly and flagrantly unconstitutional" law.[138]

But *DeFillippo* was important in another respect. Justice Brennan, in his dissent, illustrated a dilemma facing the individual stopped under reasonable suspicion and compelled to identify himself or herself.[139] Brennan said that this ordinance forced such individuals "who chose to remain silent . . . to relinquish their right not to be searched [pursuant to a search incident to arrest]."[140]

Author Alan Hallock described this "bootstrapping" as "charg[ing] the person [stopped] with failing to dispel [the officer's] reasonable suspicion concerning the underlying circumstances that justified the initial stop, [and] basing the seizure on 'probable cause' to believe that the detainee has refused to produce identification."[141] Essentially, if the officer stops a person with reasonable suspicion and the particular state has a stop-and-identify statute, the person must identify himself accordingly. If he does not, the officer may arrest the person for a violation of that statute and

133. 443 U.S. 31, 33-34 (1979).

134. *Id.* at 37.

135. *Id.* at 38. The Court noted that "[s]ociety would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement." *Id.*

136. *Id.* at 33-34.

137. *See id.* at 37. However, the dissent said that the Court focused upon the wrong question in determining whether evidence seized could be included—the question was not whether the search or seizure was authorized by state law, but rather whether the search or seizure was reasonable under the Fourth Amendment. *Id.* at 43 (Brennan, J., dissenting). Justice Brennan believed the ordinance was clearly unconstitutional. *Id.*

138. *Id.* at 38. In *DeFillippo*, in order to assess the propriety of the officer's actions, the Court merely assumed, *arguendo* and without resolving the issue, that contrary to the specifications of the stop-and-identify statute which provided the officer with his authority to arrest, "a person may not constitutionally be required to answer questions put by an officer in some circumstances." *Id.* at 37.

139. *Id.* at 46 (Brennan, J., dissenting); *see* Klein, *supra* note 4, at 370.

140. *DeFillippo*, 443 U.S. at 46 (Brennan, J., dissenting).

141. Hallock, *supra* note 18, at 1072.

perform a search pursuant to arrest. If any evidence is found relating to the crime for which the officer legally stopped the individual, or another crime, the officer could "bootstrap" the initial arrest for violation of the stop-and-identify statute on to subsequent criminal charges based upon this evidence. Indeed, the arrest for failure to identify could 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 "first cause" in this chain of events is that the person stopped must refuse to identify him or herself in violation of a stop-and-identify statute—without a stop-and-identify statute and the person's refusal to abide by it, any search of the person is invalid unless the officer can develop probable cause from some other circumstance surrounding the stop.

Justice Blackmun, in his *DeFillippo* concurrence, addressed Justice Brennan's concern that the Court's decision will allow the State to "circumvent the probable-cause requirement of the Fourth Amendment."[142] He acknowledged that this ordinance could escape constitutional review if arrestees were released for lack of evidence as a result of the search incident to arrest.[143] However, Justice Blackmun stated that there was no evidence the "ordinance [was] being used in such a pretextual manner."[144] He continued speculating that if evidence showed police routinely arresting, but not prosecuting, individuals under the ordinance, any police claim of good-faith reliance on the ordinance's constitutionality would be rebutted.[145] If the Court subsequently concluded that the ordinance was unconstitutional, the arrestee could have the evidence obtained in the search incident to arrest suppressed.[146]

This apparent "Hobson's choice," as Justice Brennan called it,[147] is in the end simply a "reasonable suspicion" gremlin created and solved by *Terry*. How is it that an individual stopped pursuant to *Terry* knows that an officer has reasonable suspicion sufficient to justify the officer's stop or a pat-down search of the individual? *Terry* subjects individuals who refuse to be stopped and frisked—even though officers have only reasonable

142. *DeFillippo*, 443 U.S. at 40 (Blackmun, J., concurring).

143. *Id.* at 40-41.

144. *Id.* at 41.

145. *Id.*

146. *Id.*

147. *Id.* at 46 (Brennan, J., dissenting). Justice Brennan posed this same scenario in his *Kolender* concurrence. *See* Kolender v. Lawson, 461 U.S. 352, 368-69 (1983) (Brennan, J., concurring). He noted that "[m]ere reasonable suspicion does not justify subjecting the innocent to such a dilemma" and that only

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

Id. at 369, 369 n.7 (emphasis added).

suspicion—to a similar Hobson's choice as the one illuminated by Justice Brennan: face a pat-down frisk or face search incident to arrest.[148] The *Terry* Court said that the governmental interests in "swift action predicated upon the on-the-spot observations of the officer on the beat," as well as officer safety, justified subjecting individuals who may be innocent to such police actions.[149] Even though under the statute at issue in *Hiibel*, an individual is forced to speak (as opposed to being forced to stop and be frisked per *Terry*), it is not a stretch to believe similar governmental interests could justify the majority's decision in *Hiibel*, especially given the very specific and "limited" intrusion[150] under the Nevada statute.[151]

2. Fifth Amendment

The Court said that in order for Mr. Hiibel to be entitled to the Fifth Amendment protection against self-incrimination, his communication must be "testimonial, incriminating, and compelled."[152] However, the Court declined to resolve whether stating one's name or producing identification documents is testimonial, i.e., an "assertion of fact."[153] The Court said that even assuming *arguendo* that the disclosure was testimonial, Hiibel's case failed as the disclosure presented "no reasonable danger of incrimination."[154] The Court stated that Hiibel was not successful in explaining how disclosing his name would be used against him in a criminal case,[155] and that "absent a reasonable belief that [his] disclosure would tend to incriminate him,"[156] the

148. *See generally* Terry v. Ohio, 392 U.S. 1, 25-27 (1968) (concluding that "there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime").

149. *Id.* at 20, 24.

150. See *infra* notes 158-60 and accompanying text for a discussion on the limited nature of the intrusion associated with requiring identification.

151. Therefore, *Hiibel*, finding constitutional a statute compelling the disclosure of a person's name only when that person is stopped with reasonable suspicion under *Terry*, hardly warrants the moniker Klein assigned to the majority's decision – "The Criminalization of Silence." Klein, *supra* note 4, at 357.

152. Hiibel v. Sixth Judicial Dist. Court, 124 S. Ct. 2451, 2460 (2004). Steinbock found it surprising that the *Hiibel* Court did not cite the fact that under *Miranda*, compelled and testimonial "booking questions" (i.e., questions normally attendant to arrest and custody), designed to obtain biographical information for administrative reasons, are exempt from the usual interrogation rules. Steinbock, *supra* note 29, at 720. He noted that in another case, eight justices concluded that "responses to these 'booking question[s]' . . . are an exception to the Miranda rules" and that "applying this administrative question exception to 'core' Fifth Amendment compulsion" might have implications for the officer's similar compulsion for Hiibel's identification. *Id.* (citing Pennsylvania v. Muniz, 496 U.S. 582, 601-02 (1990)).

153. *Hiibel*, 124 S. Ct. at 2460.

154. *Id.*

155. *Id.* at 2461. The Court noted that "[a]s best we can tell, [Hiibel] refused to identify himself only because he thought his name was none of the officer's business." *Id.*

156. *Id.* As precedent, the *Hiibel* majority cites *Kastigar v. United States*, 406 U.S. 441 (1972) (quoting Brown v. Walker, 161 U.S. 591, 599-600 (1896)), stating that to invoke the Fifth Amendment self-incrimination privilege, an individual must have a "reasonable ground to apprehend danger . . . from his being compelled to answer . . . . [This] danger . . . must be real and appreciable[,] . . . not a danger of an imaginary and unsubstantial character . . . so improbable that no reasonable man would suffer it to influence his conduct." *Hiibel*, 124 S. Ct. at 2460.

Fifth Amendment did not trump the will of the Nevada legislature in enacting the stop-and-identify statute.[157]

The majority then noted the importance of the narrow scope of the statute's disclosure requirement for identification, as well as the uniqueness and universality of one's identity.[158] It claimed that revealing one's identity is "so insignificant in the scheme of things as to be incriminating only in unusual circumstances."[159] In addressing this "insignificance" of identity to criminal prosecution, the Court reasoned that "who has been arrested and who is being tried" is known in criminal cases; indeed, "[e]ven witnesses who plan to invoke the Fifth Amendment [still] answer when their names are called to take the stand."[160]

Side-stepping the issue of whether revealing one's identity is testimonial,[161] however, the Court declined to address the "unusual circumstances" under which revealing one's identity would be incriminating.[162] For example, they neglected to answer the question of whether the Fifth Amendment privilege against self-incrimination would apply in a case where furnishing one's identity during a *Terry* stop "would have given the police a link in the chain of evidence needed to convict the individual of a separate offense," and if so, "what remedy must follow."[163] It is possible in such a situation that the Court could impose either a use remedy or a more strict immunity remedy.[164]

Though the Court did not make the stretch, it is not difficult to envision the "unusual circumstance" where providing one's name to police would provide police with such "a link in the chain of evidence." Ironically, the majority cites this particular "unusual circumstance" as one of the strong governmental interests 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."[165]

In such a case, it is likely that a suspect would have knowledge of the crimes he or she committed and for which crime he or she is wanted, and could therefore have a reasonable belief that his or her self-identification disclosure would be incriminating. And as long as that compelled self-identification disclosure is testimonial, an issue that the *Hiibel* majority declined to resolve, the suspect purportedly would have a Fifth Amendment

157. *Hiibel*, 124 S. Ct. at 2461.
158. *Id.*
159. *Id.*
160. *Id.*
161. See *infra* notes 203-18 and accompanying text for a complete discussion of issues relating to whether a name is "testimonial."
162. *See Hiibel*, 124 S. Ct. at 2461.
163. *Id.*
164. See *supra* note 57 for a discussion of such possible remedies in the *Byers* case.
165. *Hiibel*, 124 S. Ct. at 2458.

right not to be compelled to respond to police, thereby rendering the statute unconstitutional in such a situation.[166] So, under the Nevada statute, provided the Court concludes the substance of giving one's name is not "testimonial," the innocent have no such Fifth Amendment privilege and must provide such identity information, while the "wanted" most likely can decline the officer's command.[167]

B. Justice Stevens's Dissent

Justice Stevens's dissent is largely based upon Fifth Amendment concerns.[168] He asserted that the statute singles out "a highly selective group inherently suspect of criminal activities,"[169] namely those that, because they are stopped under *Terry's* requirement of reasonable suspicion, are already the focus of a criminal investigation.[170] Justice Stevens maintained that the constitutional "right to remain silent" should encompass those individuals who are the subject of such focus.[171] He suggested the Fifth Amendment right against self-incrimination is not so "circumscribed" as to allow the compulsion of even the narrow identification exception that the Nevada statute mandated and the majority allowed.[172]

The *Byers* Court, however, in upholding the constitutionality of a stop-and-identify statute whereby participants in auto accidents were compelled by law to stop and leave their names and addresses at the scene of the accident, discussed this singling out of a "highly selective" group.[173] *Byers* noted that the Fifth Amendment privilege "applied *only* in 'an area permeated with criminal statutes,'"[174] and "not in 'an essentially noncriminal and regulatory area of inquiry.'"[175] It is logical that statutes which compel disclosure in an area "permeated with criminal statutes" would present the higher risk that the disclosure would be incriminating and therefore unconstitutional.

In *Byers*, however, even though an individual in a traffic accident might have committed criminal acts and his self-identification might lead to criminal prosecution, the individual could not claim the Fifth Amendment right to remain silent because, unlike those in areas "permeated with criminal statutes," the statute "was not intended to facilitate *criminal* convictions but to promote the satisfaction of civil liabilities arising from

166. *See id.* at 2460-61.

167. This point is explored further in the analysis of Justice Stevens's dissent. *See infra* notes 195-97 and accompanying text.

168. *See Hiibel*, 124 S. Ct. at 2461-64 (Stevens, J., dissenting).

169. *Id.* at 2461 (quoting Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 79 (1965)).

170. *Id.*

171. *Id.* at 2462.

172. *Id.*

173. California v. Byers, 402 U.S. 424, 429 (1971) (citing as examples *Albertson*, 382 U.S. at 79 and Marchetti v. United States, 390 U.S. 39, 47 (1968)).

174. *Id.* at 430 (emphasis added). These areas permeated with criminal statutes included registration of members of a Communist organization, federal gambling tax and registration, and firearm registration. *See* Hallock, *supra* note 18, at 1077.

175. *Byers*, 402 U.S. at 430.

automobile accidents."[176] The *Byers* Court noted that the required self-reporting was essential to this non-criminal statutory purpose.[177] Thus, the "highly selective" group moniker was not applicable for Fifth Amendment purposes where the goal was non-criminal.

Likewise, if it could be said that the primary concern of the Nevada statute in *Hiibel* is non-criminal and not meant primarily "to facilitate criminal convictions,"[178] then Justice Stevens's assertion that the Fifth Amendment should apply because the statute is not directed "'at the public at large,' but rather 'at a highly selective group inherently suspect of criminal activities,'"[179] is without merit. However, in Justice Stevens's favor is the fact that the Nevada stop-and-identify statute, indeed all such statutes, apply in the realm of *Terry* stops, in which an officer must have reasonable suspicion that a suspect has committed or is about to commit a *criminal offense*. Hence, the Nevada statute could be characterized as relating much more closely to the "facilitat[ion of] criminal convictions" than to regulating settlement of civil penalties in auto accidents, as in *Byers*.[180]

The majority upheld the statute at issue in *Hiibel* despite these Fifth Amendment "incrimination" concerns.[181] They reasoned that Hiibel's "refusal to disclose his name was not based on any articulated real and appreciable fear that his name would be used to incriminate him or . . . 'furnish a link in the chain of evidence needed to prosecute' him."[182] The facts indicate that Hiibel simply had no such belief.[183] If he did entertain this belief, the question of whether his belief was reasonable would have to

176. *See id.* at 428-31, 434 (emphasis added). The defendant could not claim the privilege because the Court noted the individual was not confronted with the "*substantial* hazard[] of self-incrimination" by being compelled to reveal his information in a non-criminal area of inquiry. *See id.* at 429, 433-34 (emphasis added).

177. *Id.* at 431.

178. *Id.* at 430. But see *supra* notes 80-81 and accompanying text for the governmental interests implicated in *Terry* stops. The majority implied that these governmental interests were necessary to properly analyze the Nevada stop-and-identify statute at issue in *Hiibel* when the Court noted that "[t]he principles of *Terry* permit a State to require a suspect to disclose his name in the course of a *Terry* stop." Hiibel v. Sixth Judicial Dist. Court, 124 S. Ct. 2451, 2459 (2004). However, one would be hard-pressed to explain how the governmental interest in informing the stopping officer that the suspect is wanted for another offense implicates a primarily "non-criminal" concern.

179. *Hiibel*, 124 S. Ct. at 2461 (Stevens, J., dissenting) (quoting Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 79 (1965)).

180. The Court has said that an individual's ability to invoke the privilege against self-incrimination is reduced "[w]hen a person assumes control over items that are the legitimate object of the government's noncriminal regulatory powers . . . ." Baltimore City Dep't of Soc. Servs. v. Bouknight, 493 U.S. 549, 558 (1990). Therefore, it might be possible to strengthen the Court's rationale in *Hiibel*, where the *Terry* stop occurred in and around Hiibel's vehicle, by invoking the state's power to regulate motor vehicles and ensure traffic safety.

181. *Hiibel*, 124 S. Ct. at 2460-61.

182. *Id.* at 2461 (quoting Hoffman v. United States, 341 U.S. 479, 486 (1951)).

183. *Id.*

be answered before the disclosure could be said to be "incriminating." Therefore, even though a compelled disclosure may occur in an area potentially permeated with criminal statutes (in *Hiibel* the stop was to investigate a criminal assault), it is still only incriminating pursuant to *Hoffman v. United States* where the person so compelled has reasonable cause to apprehend the danger from a direct answer.[184] Justice Stevens found the disclosure incriminating,[185] while the majority would have so found only if it determined Hiibel's reason for not answering was based upon a reasonable belief that giving his name would result in self-incrimination.[186]

Justice Stevens, citing *Davis* and later Justice White's concurrence in *Terry*, continued by claiming that it was settled law that police cannot compel citizens to answer their questions regarding unsolved crimes.[187] He noted that an individual such as Hiibel, who was subjected to questioning based upon reasonable suspicion, should not have lesser protection than an individual who is subjected to questioning based upon probable cause or an individual who is indicted and on trial (or "the unindicted target of a grand jury investigation").[188]

First though, one must not lose sight that the "questioning" of which Justice Stevens spoke is extraordinarily circumscribed here in *Hiibel*: the officer merely requested the individual's name, the answer to which is not even clearly testimonial.[189] Second, because probable cause is a higher standard than reasonable suspicion, one may think of conditions indicating probable cause as more akin to the majority's "unusual circumstances."[190] Where an officer has probable cause, the suspect would probably meet the *Byers* burden of having a reasonable belief that sharing his identity with police in such a situation would subject the suspect to a "substantial hazard[] of self-incrimination."[191] If, for example, an officer has probable cause to arrest a specific individual, and seeks out him or her, then the individual providing identification information would subject him or herself to arrest and imminent prosecution. Therefore, to allow the compulsion of such identification information would likely violate the suspect's Fifth Amendment right against self-incrimination.

But again, whether such compulsion is permitted would depend wholly upon whether the Court determines that such identification is testimonial.[192] For if such a disclosure is not testimonial, then the suspect's belief that

184. *See supra* note 55 and accompanying text; *see also infra* note 196-98 and accompanying text.

185. *Hiibel*, 124 S. Ct. at 2464 (Stevens, J., dissenting).

186. *See id.* at 2461.

187. *Id.* at 2462 (Stevens, J., dissenting).

188. *See id.* (Stevens, J., dissenting).

189. See *infra* notes 203-18 and accompanying text for a discussion regarding whether a disclosure is "testimonial."

190. See *supra* notes 162-65 and accompanying text for a discussion on the *Hiibel* majority's "unusual circumstances."

191. California v. Byers, 402 U.S. 424, 429 (1971). *See supra* notes 56-57 and accompanying text.

192. See *infra* notes 211-22 for a discussion on how the Court could make such a determination.

giving his name would be self-incriminating cannot bar compulsion of self-identification on exclusively Fifth Amendment grounds, even if the compulsion is by an officer acting with probable cause.[193] If self-identification is ultimately determined to be testimonial, then Justice Stevens's concern about "greater" or "lesser protections" here is moot because under the Fifth Amendment, "protections" of testimonial statements clearly hinge upon whether that compelled self-identification statement is incriminating.[194]

Justice Stevens's sentiment is carried further by author Klein's assertion that "[a]ccording to the majority's reasoning, then, the less guilty one is, the fewer constitutional protections one has."[195] Klein worried that "[a]n innocent person subjected to a *Terry* stop can never show that his name might be used to incriminate him . . . because he has done nothing incriminating" whereas a guilty person can make such a showing.[196] Again, this reasoning must assume that identification information is "testimonial," for if it is not, then all persons, whether guilty or not, must comply with the officer's request for identification.[197]

But assuming that such information is testimonial, the Fifth Amendment privilege against self-incrimination, even prior to *Hiibel*, was still subject to a showing that compelled testimonial information sought to be protected is "incriminating" (i.e., "the witness reasonably believe[d such information] could be used in a criminal prosecution or could lead to other evidence that might be so used").[198] Therefore, *only* testimonial statements that a person reasonably believes are incriminating are protected. Klein lamented the "perverse result" of the majority's decision, stating that if Ted Bundy reasonably believes that revealing his name is incriminating, whereas Justice Kennedy holds no such reasonable belief, then "Ted Bundy has a constitutional right to remain silent when asked for his identity during a *Terry* stop; Justice Kennedy does not."[199] Essentially, Klein here tried to

193. *See* United States v. Dionisio, 410 U.S. 1, 7 (1973) (holding that a voice exemplar used only for identification purposes and not for testimonial content did not violate the Fifth Amendment).

194. See *supra* notes 152-60 and *infra* notes 223-29 and accompanying text for a discussion on what constitutes "incriminating" for purposes of the Fifth Amendment privilege against self-incrimination.

195. Klein, *supra* note 4, at 386.

196. *Id.*

197. See *infra* notes 203-18 and accompanying text for a discussion regarding whether a disclosure is "testimonial."

198. Kastigar v. United States 406 U.S. 441, 445 (1972) (citing Hoffman v. United States, 341 U.S. 479, 486 (1951)).

199. Klein, *supra* note 4, at 386. As odd as this possible outcome may appear, the Court has recognized situations where those of dubious character and conduct have apparently been afforded greater protections than those who walk the "straight and narrow." For example, the Court has held that while the government may compel certain business records from its citizenry, the government may not do so from those who have engaged in illegal businesses or behavior. *See, e.g.*, Marchetti v.

undercut the majority decision solely by wondering what the Court would do in the "unusual circumstances" to which the majority referred.

Practically, under the Nevada statute, the officer will compel the self-identification during the *Terry* stop and only later will learn whether the circumstances of the stop were "unusual." When faced with these facts, the Court could resolve this situation with a use restriction on the identification itself and on all of the "fruit" that the identification provided[200] (unless of course the State can show that the "independent source"[201] or "inevitable discovery"[202] doctrines apply). This result may be acceptable if the governmental interest of officer safety is found to be weighty enough, and found to be advanced by the self-identification statute. The officer would then be protected during the stop, while guilty individuals would have the evidence—which was based upon a self-identification that was compelled, testimonial, incriminating, and therefore protected by the Fifth Amendment—tossed out.

Justice Stevens then asserted that the disclosure in *Hiibel* was clearly testimonial, noting that the Court has recognized Fifth Amendment protection "if the disclosure in question was being admitted because of its content rather than some other aspect of the communication."[203] He found it significant that the communication must be made in response to a police officer's question because, in the context of a case involving the Sixth Amendment's confrontation clause, the Court stated that "testimonial" "applies at a minimum" to statements given in response to police interrogations.[204] By extension, Justice Stevens claimed that police

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United States, 390 U.S. 39 (1968). In *Marchetti*, the Court allowed an individual, residing in a state where gambling was illegal, to invoke his right against self-incrimination and refuse to declare his earnings from gambling sought by the Internal Revenue Service. *Id.* at 60-61. The Court concluded that under these circumstances, the mere completion of Marchetti's tax form and payment of his tax created for him a "real and appreciable" risk of self-incrimination. *Id.* at 48. One could therefore lament that this precedent would afford to Al Capone rights not enjoyed by Justice Kennedy or General Powell. This disparity is not a judicial interpretation problem, but rather a difficulty inherent within the Fifth Amendment's right against compelled self-incrimination. The compelling of "required records" is but one situation where a government-imposed obligation does not create the impermissible risk of self-incrimination for the law-abiding (and is therefore permitted), yet nonetheless does so for those whose compelled disclosure would likely expose their illegal acts. Still, as plain as this seems in the area of paying one's taxes, it is less so where an individual subjected to the immediate stress of being stopped by a police officer is compelled under penalty of arrest to identify him or herself.

200. A use restriction would likely resolve the self-incrimination issues given the Court's decision in *Chavez v. Martinez*, stating that, contrary to the view of the Ninth Circuit, it is not until the compelled statements are *actually used* in a criminal case that a violation of the Fifth Amendment's self-incrimination clause occurs. 538 U.S. 760, 767-69 (2003). Of course, such compelled statements may still violate the Fourteenth Amendment's due process clause, even if not "used" at trial. *See id.* at 774.

201. *See* Segura v. United States, 468 U.S. 796, 805, 813-16 (1984).

202. *See* Nix v. Williams, 467 U.S. 431, 440-48 (1984).

203. Hiibel v. Sixth Judicial Dist. Court, 124 S. Ct. 2451, 2463 (2004) (Stevens, J., dissenting). The Court has said that "[t]here are very few instances in which a verbal statement . . . will not convey information or assert facts. The vast majority of verbal statements thus will be testimonial and, to that extent at least, will fall within the [Fifth Amendment] privilege [against self-incrimination]." Doe v. United States, 487 U.S. 201, 213-14 (1988).

204. *See Hiibel*, 124 S. Ct. at 2463 (Stevens, J., dissenting) (quoting Crawford v. Washington, 541 U.S. 36, 68 (2004)). Regarding interrogation in a Fourth Amendment context, the Court has said

questioning during a *Terry* stop is an interrogation and, therefore, answers to those questions are testimonial.[205]

This determination of whether revealing one's identity is testimonial, as we have seen in the case of an "unusual circumstance," is the linchpin of figuring out whether the Fifth Amendment privilege applies.[206] Though Justice Stevens believed that this determination in *Hiibel* must be answered in the affirmative,[207] the Court has thus far not resolved this issue, despite having decided a number of cases which bear upon it.[208]

In *United States v. Wade*, the Court found that although a robbery suspect was required to use his voice "within hearing distance of the witnesses" and to utter specific words used by the robber, such use and words acted merely "as an identifying physical characteristic," and did not "speak [of] his guilt."[209] The Court clarified a testimonial statement, unlike the "non-testimonial" compelled words above, would require the suspect "to disclose any knowledge he might have."[210] This presents a problem under the statute in *Hiibel*, for while the statute is limited to requiring a suspect

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that "[i]nterrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure." *Id.* at 2458 (quoting INS v. Delgado, 466 U.S. 210, 216 (1984)). *Delgado* noted that police questioning cannot be considered a "detention" under the Fourth Amendment "[u]nless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded . . . ." *Delgado*, 466 U.S. at 216. And, that if "the police take additional steps . . . to obtain an answer" after a person refuses to answer the questions, it is then that "the Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure." *Id.* at 216-17.

205. *Hiibel*, 124 S. Ct. at 2463 (Stevens, J., dissenting).

206. *See supra* notes 162-67 and accompanying text. As author Hallock noted, a decision clearly finding self-identification non-testimonial would require the Court to "break new ground." Hallock, *supra* note 18, at 1079. Although, as we have seen above, if the person whose identification is sought is also the registered owner of the vehicle in which he was stopped, these considerations would be rendered moot by the fact that the officer would most likely possess the individual's identification information as a result of running a computer check on the individual's license plate. *See supra* notes 110-12 and accompanying text.

207. *See Hiibel*, 124 S. Ct. at 2463 (Stevens, J., dissenting) (stating that the *Hiibel* case concerned a testimonial communication and that "the compelled statement at issue in this case is clearly testimonial.").

208. See *infra* notes 209-22 and accompanying text for a discussion of various inconsistent cases addressing compelled disclosures in this area and attempting to determine how the Court would determine whether or not a compelled self-identification is testimonial.

209. 388 U.S. 218, 222-23 (1967). However, Justice Fortas in his dissent thought that "history and tradition . . . command[ed] that an accused may stand mute," even in this instance, and that compelling him to speak is the kind of forced "volitional act" ("more than passive, mute assistance to the eyes of the victim or of witnesses") within the Fifth Amendment privilege against self-incrimination. *Id.* at 260-61 (Fortas, J., concurring in part and dissenting in part). Justice Fortas thought that the "insidious doctrine" of *Schmerber v. California*, permitting the compulsion of blood evidence from the body of the accused, should not be applied in *Wade*. *Id.* at 261-62.

210. *Id.* at 222. The Court has elsewhere said that "the [Fifth Amendment] privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." Schmerber v. California, 384 U.S. 757, 764 (1966).

only to identify himself, it clearly compels an individual to disclose his knowledge: in this case, the knowledge of his name. However, the information disclosed merely identifies the individual and does not, except in "unusual circumstances," "speak of his guilt" the way compelling answers to other direct police inquiries (such as the question "did you assault this woman?") would.

The Court noted this distinction in the *Byers* plurality. In *Byers*'s statutory reporting scheme, the Court stated that "[d]isclosure of name and address is an essentially neutral act" which "identifies but does not by itself implicate anyone in criminal conduct."[211] The Court allowed the compulsion of such identification information here, although its release might have had "consequences" to the compelled individual, because the *Byers* statute implicated the state's power to regulate automobiles and thus was essentially non-criminal.[212] The Court opined that whether revealing one's identity will "lead to inquiry that in turn leads to arrest and charge . . . depend[s] on different factors and independent evidence."[213] Therefore, using *Wade*, the *Byers* Court rejected the notion that, even if there was a "link in the chain of evidence" to convict the person compelled to release such information, such disclosures are automatically made "communicative or testimonial" where such information, as here, was provided for an essentially non-criminal purpose.[214]

In *Doe v. United States*, the Court again warned that one must not confuse "the requirement that the compelled communication be 'testimonial' [and] the *separate* requirement that the communication be 'incriminating.'"[215] The Court stated plainly, "that, in order to be testimonial, [the] accused's communication must *itself*, explicitly or implicitly, relate a factual assertion or disclose information."[216] In this case, the Court determined that a compelled consent directive did not violate an individual's privilege against self-incrimination even though it, without identifying any records or acknowledging their existence, forced an individual to authorize foreign banks to disclose his records.[217] The Court said that this disclosure was non-testimonial because, like providing "a

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211. California v. Byers, 402 U.S. 424, 432, 434 (1971).

212. *See id.* The Court said that a name, as "linked with a motor vehicle" in this case, "is no more incriminating than [a] tax return . . . ." *Id.* at 433-34.

213. *Id.* at 434. The Court found that

> [h]ere the compelled disclosure of identity could have led to a charge that might not have been made had the driver fled the scene; but this is true only in the same sense that a taxpayer can be charged on the basis of the contents of a tax return or failure to file an income tax form. There is no constitutional right to refuse to file an income tax return or to flee the scene of an accident in order to avoid the possibility of legal involvement.

Id.

214. *See id.* at 432-33.

215. 487 U.S. 201, 208 n.6 (1988) (emphasis added).

216. *Id.* at 210 (emphasis added). The Court reiterated the tenet that the Government must locate the evidence it intends to use against a suspect not by the suspect's deeds or words, but rather "by the independent labor of [the Government's] officers." *Id.* at 215 (internal quotations omitted). If the Government relies on the suspect's "truthtelling," the disclosure is testimonial. *See id.*

217. *Id.* at 203, 219.

handwriting sample or voice exemplar," the suspect was not "compelled [in order] to obtain any knowledge he might have."[218] A compelled statement revealing one's identity, however, relates a fact clearly within the knowledge of the individual, and is therefore *not* "non-testimonial" according to *Doe*.

Given these confusing signals from the Court, how then *would* the Court determine whether or not a compelled self-identification is testimonial? The Court provided a clue with its long-standing principle that protection of the Fifth Amendment privilege is "as broad as the mischief against which it seeks to guard . . . ."[219] Under the facts of *Byers*, the Court determined that the compelled self-identification served the traffic-safety purpose of the statute at issue, and was not intended to aid in the conviction of drivers who violated a criminal statute.[220] Similarly, under the facts of *Hiibel* and given the Court's ruling in *Byers*, it was not unreasonable for the Court to sidestep the issue of whether compelled self-identification is testimonial because the disclosure served officer-safety interests and was not a mischievous attempt merely to facilitate criminal convictions (indicated by the fact that the statute was specifically limited to identification only, and did not compel the person to reveal any additional information).[221] Therefore, because the statute's primary purpose was non-criminal, even if Hiibel *was* convicted of a separate crime as a result of his disclosure, the Court would likely have still determined that neither the testimonial nature of his statement compelled under the statute, nor, as a consequence, the constitutionality of the statute, was implicated.[222]

Turning next to the question of whether the *Hiibel* disclosure was "incriminating," Justice Stevens reiterated the Court's holdings that compelled testimonial disclosures that could lead to incriminating evidence are privileged, and suggested the majority had read the Fifth Amendment's protections too narrowly by not giving due consideration to disclosures which might furnish links in the evidentiary chain.[223] He believed that this statute was merely a useful law enforcement tool to obtain information of

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218. *Id.* at 217 (internal quotations omitted).

219. *Byers*, 402 U.S. at 449 (Harlan, J., concurring) (quoting Miranda v. Arizona, 384 U.S. 436, 459-60 (1966); *see also* Schmerber v. California, 384 U.S. 757, 764 (1966) (quoting Counselman v. Hitchcock, 142 U.S. 547, 562 (1892)).

220. *See Byers*, 402 U.S. at 433-34.

221. *See* NEV. REV. STAT. § 171.123(3).

222. This could be the case even in the "unusual circumstance" of a "wanted" individual if the clear purpose of the statute is non-criminal. *See Byers*, 402 U.S. at 432-33 (stating that complying with the statute at issue "does not provide the State with 'evidence of a testimonial or communicative nature' within the meaning of the Constitution . . . . It merely provides the State and private parties with the driver's identity for, among other valid state needs, the study of causes of vehicle accidents and related purposes, always subject to the driver's right to assert a Fifth Amendment privilege concerning specific inquiries.").

223. *See* Hiibel v. Sixth Judicial Dist. Court, 124 S. Ct. 2451, 2463-64 (2004) (Stevens, J., dissenting).

"incriminating worth."[224] After all, he posited, why else would an officer ask for such information, and the Nevada Legislature require its disclosure, only in circumstances warranting reasonable suspicion?[225] Justice Stevens asserted that any compelling governmental interest in officer and bystander safety, when dealing with individuals who might be or might have been engaged in criminal activities, was "sufficiently alleviated by the officer's ability to perform a limited patdown search for weapons" under *Terry*.[226] However, these statements ring hollow in light of the genuine officer safety concerns during a *Terry* stop, but not directly addressed by *Terry*.[227]

Justice Stevens warned as well that, given the existence of police databases, a name can provide a wealth of information about the suspect that might be useful in criminal prosecution, and not merely in unusual circumstances.[228] However, this incrimination concern is less significant given the Court's holdings that the Fifth Amendment does not apply to the collection of fingerprints or blood (and therefore DNA) evidence, which can also provide a wealth of information given the existence of police databases—though such information may be clearly incriminating—because such items are clearly non-testimonial.[229] So, the fact that self-identification

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224. *Id.* at 2464.

225. *Id.* The Court has previously questioned the state's interest "in putting a man in jail because he doesn't want to answer something." Brown v. Texas, 443 U.S. 47, 54 app. (1979) (emphasis deleted).

226. *Hiibel*, 124 S. Ct. at 2464 n.7 (Stevens, J., dissenting).

227. *See supra* notes 126-30 and accompanying text. Also, the Nevada Supreme Court found that given the frequency of criminal violence and its risk to officer safety, "[t]he public interest in requiring individuals to identify themselves to officers when a reasonable suspicion exists is overwhelming." Hiibel v. Sixth Judicial Dist. Court, 59 P.3d 1201, 1205 (Nev. 2002).

228. *Hiibel*, 124 S. Ct. at 2464 (Stevens, J., dissenting).

229. Schmerber v. California, 384 U.S. 757, 764 (1966); United States v. Wade, 388 U.S. 218, 223 (1967). Blood (and therefore DNA) evidence of a suspect, which may be compelled because such evidence is non-testimonial, may be incredibly incriminating if it is found at a crime scene. The way the FBI analyzes DNA, "the odds of a match . . . are well more than one in a hundred billion . . . . [U]nless you have a twin, you're statistically two thousand times more likely to win the Publisher's Clearinghouse sweepstakes (1 in 50,000,000) than to have a DNA profile that matches anyone else." Ann Meeker-O'Connell, How DNA Evidence Works, http://www.howstuffworks.com/dna-evidence4.htm (last visited Sept. 5, 2005); see also Norah Rudin, DNA Untwisted, http://www.forensicdna.com/DNA_Untwisted.htm (last visited Sept. 5, 2005) (discussing issues pursuant to the use of DNA in the criminal context). In *Schmerber*, the dissent vigorously disagreed that blood evidence was non-testimonial, finding "that the compulsory extraction of [the accused's] blood . . . had both a 'testimonial' and a 'communicative nature.'" *Schmerber*, 384 U.S. at 774 (Black, J., dissenting). Noting that those "words are not models of clarity and precision," Justice Black maintained that the blood evidence was testimonial because it was used "to prove that [the accused] had alcohol in his blood at the time he was arrested," and it was communicative "in that the analysis of [his] blood was to supply information to enable a witness to communicate to the court and jury that [the accused] was more or less drunk." Id. at 774. By quoting Justice Holmes in a case in which he rejected an argument that compelling the accused to submit to the demand that he model a blouse violated the Fifth Amendment privilege against self-incrimination, the majority suggested that Justice Black's rationalization, despite the wholly incriminating nature of the blood evidence when analyzed, was "based upon an extravagant extension of the Fifth Amendment," which "in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof." *See id.* at 763 (internal quotations omitted). Therefore, the Court reiterated the "testimonial" distinction as one where the privilege against self-incrimination is not violated when the suspect is compelled to be the source of "real or physical evidence," but is violated when "communications" or "testimony" is compelled. *Id.* at 764.

provides a wealth of potentially incriminating information does not automatically trigger Fifth Amendment protections unless the Court determines the self-identification is testimonial.

C. *Justice Breyer's Dissent, joined by Justices Souter and Ginsberg*

Justice Breyer asserted that any laws which compelled responses to questions posed by police violated guaranteed Fourth Amendment protections and were therefore invalid.[230] He claimed that the Court's acknowledgement, in *Berkemer v. McCarty*, that a *Terry*-stopped suspect does not have to respond to police questioning,[231] and the Court's twenty-year history of consistent comments on the matter, provided "strong dicta that the legal community typically takes as a statement of the law."[232] He maintained that there were no good reasons to reject this Fourth Amendment precedent, as it was based as well on sound Fifth Amendment jurisprudence and administrative considerations.[233] In addressing these considerations, Justice Breyer invoked the "slippery slope" argument, concerned about how far the State could go in requiring a stopped individual to answer an officer's questions.[234] It is likely the Court will have to address this issue given the wide variance of stop-and-identify statutory language in use by the states employing such statutes.[235]

Additionally, Justice Breyer reiterated the important point by questioning how an officer, during a *Terry* stop, could determine the "unusual circumstances" which would render the disclosure of the detainee's name incriminating.[236] This determination requires the officer to possess facts not within his knowledge or his observational field. In most conceivable cases, an officer simply *cannot* know whether the person he stopped under *Terry* will incriminate himself by releasing his name; it is

230. *Hiibel*, 124 S. Ct. at 2464 (Breyer, J., dissenting).

231. An "officer may ask the [Terry] detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to respond." 468 U.S. 420, 439 (1984).

232. *Hiibel*, 124 S. Ct. at 2465 (Breyer, J., dissenting). See *supra* note 48 for the history of Court dicta on this issue.

233. *Id.* (Breyer, J., dissenting). Justice Breyer would not "begin to erode [this] clear rule with special exceptions." *Id.* at 2466.

234. *See id.* at 2465-66.

235. *See* Klein, *supra* note 4, at 361 (noting that, for example, New Hampshire's stop-and-identify statute allows for an officer to demand the person stopped reveal his "name, address, business abroad, and where he is going") (quoting N.H. REV. STAT. ANN. § 594:2 (2003)); see also Katya Komisaruk, When Do You Have to Give Your Name at the RNC Protests?, http://www.lawcollective.org/article.php?id=204 (last visited Sept. 7, 2004) (comparing the Nevada stop-and-identify statute to a similar one in New York).

236. *Hiibel*, 124 S. Ct. at 2466 (Breyer, J., dissenting). Justice Breyer noted that even in such "unusual circumstances" that would render an identity disclosure incriminating, the majority still reserved judgment about whether such compulsion is allowed. *Id.*

only *after* the officer has run the name through his database and found an outstanding warrant that the officer is made aware of the incriminating nature of the individual's self-identification.[237] The Court can evaluate the validity of the officer's claim of, for example, reasonable suspicion, since the officer must point to specific facts leading him to the conclusion that such reasonable suspicion existed.[238] If the officer cannot point to such facts, the individual's due process rights have been violated, and any information which flows from such a *Terry* stop is disregarded.[239] Similarly, a use limitation could be applied to resolve Justice Breyer's concerns and guarantee an individual's constitutional rights. For example, if self-identification produced incriminating information, that information could be excluded from admission into a criminal proceeding.

Next, Justice Breyer maintained that the majority presented no evidence as to how the *Berkemer* rule has significantly interfered with law enforcement, nor any other convincing reason for changing it.[240] Although it may not be clear how this rule has "significantly interfered" with law enforcement, it is apparent, contrary to Justice Breyer's rationale, that there are serious officer safety concerns during a *Terry* stop not addressed by *Terry*.[241]

It is interesting to note that Justice Brennan's *Kolender* concurrence acknowledged, in a backhanded way, the possible need for greater protections than *Terry* offered, noting that "[w]here probable cause is lacking, we have expressly declined to allow *significantly* more intrusive detentions or searches on the *Terry* rationale, despite the assertion of compelling law enforcement interests."[242] Justice Brennan implied here that detentions or searches, so long as they were not "significantly" more intrusive than those provided for by *Terry*, might be allowed with compelling law enforcement interests.[243]

The majority performed the Fourth Amendment reasonableness balancing test and concluded in *Hiibel* that the governmental interests are

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237. As we have seen, the Court has reserved for another day the determination of what is to be done in such a case, and, as mentioned above, this will turn largely on the determination of whether self-identification is "testimonial." See *supra* notes 203-18 and accompanying text.

238. *See generally* Brown v. Texas, 443 U.S. 47, 51 (1979) (discussing the Fourth Amendment requirement that seizures be based upon "specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers"). *See also Hiibel*, 124 S. Ct. at 2457.

239. *See Brown*, 443 U.S. at 53 (reversing a conviction based upon the finding that officers had no basis for their reasonable suspicion determination).

240. *Hiibel*, 124 S. Ct. at 2466 (Breyer, J., dissenting). *See supra* note 231 and accompanying text.

241. *See supra* notes 126-30 and accompanying text.

242. Kolender v. Lawson, 461 U.S. 352, 363 (1983) (Brennan, J., concurring) (emphasis added); *see* Klein, *supra* note 4, at 380. This does not conflict with the assertion set forth most clearly by Klein that "[t]he balancing test established by Terry was not meant to be anything other than a narrow exception to the default rule of probable cause." Klein, *supra* note 4, at 385. The important question here is how narrow the exception is and whether, as Justice Brennan may have suggested, there were any others besides Terry.

243. *See* Kolender, 461 U.S. at 363 (Brennan, J., concurring).

compelling enough to warrant the narrow disclosure required under the statute.[244] However, Justice Breyer disagreed, stating that he would not "begin to erode [the] clear rule [of *Terry*] with special exceptions," like the one here in *Hiibel*, allowing the compulsion of one's name by an officer with reasonable suspicion.[245]

V. IMPACT AND SIGNIFICANCE

The *Hiibel* Court, for the first time, allowed officers to compel an answer to their request for identification from an individual stopped with reasonable suspicion.[246] Despite what may be the majority's slight parsing of words, this holding represents a break from the Court's dicta.[247] However, this "crossing of the line," while dramatic in its symbolism, is less so in its practical realities.

As the Court has acknowledged, most individuals do not feel free to refuse to answer questions posed by officers, especially one as innocuous as "what is your name."[248] So, it is likely that there will be no actual difference for the average individual stopped pursuant to the constitutional Nevada stop-and-identify statute. Only those individuals who are more legally savvy and "stand up for their rights,"[249] or those who are more criminally-inclined, inebriated, and/or naturally rebellious, are likely to be disadvantaged by this ruling.

Further challenges to stop-and-identify statutes are inevitable, however, given their inherent constitutional implications and the broad range of such statutes currently "on the books."[250] If answers beyond simple self-identifications are compelled (such as to questions asking for the suspect's address, or the nature and direction of the suspect's actions), these statutes will most certainly be attacked under the Fourth Amendment for the breadth of their seizures.

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244. *See supra* notes 87-88 and accompanying text.

245. *Hiibel*, 124 S. Ct. at 2466 (Breyer, J., dissenting).

246. *See supra* notes 75-77 and accompanying text. *Hiibel* does not expand the scope of a *Terry* stop or provide any other "basis on which to stop and detain persons," nor does it allow officers to "demand proof or documentation of identity," nor does it "permit officers to randomly stop persons and demand that they identify themselves." Beverly A. Ginn, Chief's Counsel: Stop and Identify Laws, THE POLICE CHIEF (Sept. 2004), available at http://policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=382&issue_id=92004.

247. See *supra* note 48 for the history of Court dicta on this issue.

248. *See Kolender*, 461 U.S. at 364.

249. *See* Stephen Henderson, Police Can Require Names, Supreme Court Rules, http://www.officer.com/article/article.jsp?id=14130&siteSection=1 (last visited Dec. 14, 2004).

250. *See* Klein, *supra* note 4, at 359-61.

Even though some may characterize the *Hiibel* decision as a departure from the "brighter" line rule regarding seizures afforded by *Terry*,[251] the pre-*Hiibel* line seems less bright[252] when one considers the exceptions made for blood evidence and fingerprinting.[253] As the Court has acknowledged, Fourth Amendment reasonableness is not amenable to crystal clear doctrine, but must be determined on a case-by-case basis.[254]

Additionally, it is inevitable that the Court will have to address Fifth Amendment concerns of such statutes, and most notably resolve whether the identification or further information sought is "testimonial." Given the vociferous split on the issue of compelled disclosure of even one's identity, it is unlikely the Court will consider as non-testimonial the disclosure of further information requested by police. Also, it is only a matter of time before the Court will be required to clarify the constitutionality of a compelled self-identification in the "unusual circumstances" where the individual has a "reasonable belief" that the identification information he or she is forced to reveal is "substantially incriminating." Though this clarification may be rendered moot if the Court was to determine that self-identification is not testimonial for Fifth Amendment purposes, if the Court does determine self-identification is testimonial evidence, there will be serious Fifth Amendment issues in the enforcement of stop-and-identify statutes generally: the Osama bin Laden and General Colin Powell scenario illustrates only one bizarre example of what could result given the Court's ruling and the issues which remain unclear in *Hiibel*'s wake. It is perhaps the Court's "omissions," appropriate as they may be given the facts of the case, which are the most dramatic and important features of *Hiibel.*

Citizens must always be on guard for Court precedent that seriously and unjustifiably encroaches upon their civil liberties. *Hiibel*, however, as it stands, and despite the inevitable histrionics which have and will accompany the decision, is not one of those cases. Klein is concerned that now "[a]n innocent person, approached by the police without probable cause, simply has no Fifth Amendment right to remain silent."[255] In addressing such concerns, one must only evaluate the Court's past words in light of the current state of civil liberties. In *Byers*, Justice Black was concerned that the plurality's opinion, if agreed to by a majority of the Court, "would practically wipe out the Fifth Amendment's protection against compelled self-incrimination."[256] Justice Brennan's dissent in the same case lamented the "rivers of confusion [which flowed from the plurality's] lake of

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251. *See* Hiibel v. Sixth Judicial Dist. Court, 124 S. Ct. 2451, 2466 (2004) (Breyer, J., dissenting); Klein, *supra* note 4, at 385.

252. In her article, Klein noted the importance the Court placed on the relation between Fourth and Fifth Amendment issues, and cautioned against "the dangers of analyzing Fourth Amendment claims in a vacuum." *See* Klein, *supra* note 4, at 376 n.115, 387-89.

253. *See supra* note 229 and accompanying text.

254. *See supra* note 27 and accompanying text.

255. Klein, *supra* note 4, at 387. Author Klein apparently finds of no import the fact that this lack of the "right to remain silent" only applies to an individual's name, and only for certain in those states that possess such narrowly drawn stop-and-identify statutes as the one in Nevada.

256. California v. Byers, 402 U.S. 424, 459 (1971) (Black, J., dissenting).

generalities."[257] And, notably, Justice Douglas worried that the Court's decision in *Terry* took the United States "a long step down the totalitarian path."[258]

Further, the dissent in the Nevada Supreme Court's *Hiibel* decision noted that the majority's holding "weakens the democratic principles upon which this great nation was founded" and that "[t]he undermining of that foundation is a harm more devastating to our country and to this State than any physical harm a terrorist could possibly inflict."[259] Although these vocal few might disagree, the sky of civil liberties certainly has not fallen as a result of *Terry* and *Byers*. And, as with those cases when they were decided, only time will tell what *Hiibel* hath wrought. Given the extremely circumscribed language of the Nevada statute at issue,[260] the answer might likely be "not much."

Robert A. Hull[261]

257. *Id.* at 469 (Brennan, J., dissenting).

258. Terry v. Ohio, 392 U.S. 1, 38 (1968) (Douglas, J., dissenting).

259. Hiibel v. Sixth Judicial Dist. Court, 59 P.3d 1201, 1210 (Nev. 2002) (Agosti, J., dissenting).

260. The language requires that one stopped with reasonable suspicion must reveal only his name to police. *See supra* notes 70-71 and accompanying text.

261. J.D. Candidate, Pepperdine University School of Law, May 2006. This note is dedicated to my family: my stunning wife Jennifer, the best person I've ever known—love is too small a word; my beautiful daughter Josephine, whom God must have spent extra time perfecting (I have no idea why I have been so rewarded); my late father, a man of such deep character, warmth, and curiosity—I strive to fill his shoes daily, and fall short just as often; my mother, who has such dedication to her children, and a love of goodness and all things beautiful; my sister Geri, excellent and true, smart and searching and loads of fun to boot, for whom doing the right thing is the paramount concern; my adopted family, originally belonging to my wife exclusively, whose hospitality and graciousness is only exceeded by their love for their daughters, granddaughters, and sister; and lastly to Caroline, purveyor of song, who simply cannot be ignored.