

TROUBLES WITH HIIBEL:

*How the Court Inverted the Relationship Between
Citizens and the State.**Richard Sobel^{*} and John A. Fennel[†]*

Abstract

This essay shows why the Supreme Court's decision in Hiibel v. Sixth Judicial District of Nevada violates precedent, the Constitution, and the very basis for the relationship between government and the governed. First, the Court has violated the clear limits Terry v. Ohio set on the restricted searches based on reasonable suspicion within the restrictions of the Fourth and Fifth Amendments. By using the power of the state to compel citizens to produce identification, it also violates the First, Fourth, and Fifth Amendments as well as the unenumerated rights that conceptually link the enumerated rights in the Court's jurisprudence. Finally, this country was founded on the belief that government has to justify itself to the citizens, and the Hiibel decision inverts this relationship. To rectify these transgressions, we argue that the Court should return to the bright-line rule articulated in Terry: The officer may ask; the suspect may remain silent.

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“Yet if the individual is no longer to be sovereign,
if the police can pick him up whenever they do not
like the cut of his jib, if they can ‘seize’ and ‘search’
him in their discretion, we enter a new regime”
(*Terry v. Ohio*, 1968)¹

I. Introduction

Can the state, on the basis of reasonable suspicion—a standard lower than probable cause²—arrest citizens for not identifying themselves? According to *Hiibel v. Nevada County*, the answer is yes, if state statute authorizes it.³ Now the police can, with the power of the law, compel citizens to identify themselves or face punishment. With this decision, the Supreme Court has changed the relationship between the citizens and the state, turning the justification for our Constitution upside-down.

This paper argues that, while the Fourth and Fifth Amendment issues are sufficient to show that Nevada’s stop and identify statute is unconstitutional, the mutually reinforcing nature of the First, Fourth, and Fifth Amendments provides a coherent and compelling basis for overturning the law and for understanding the relationship between the citizen and the state under our Constitution. To that end, the Second section gives the facts of *Hiibel* and sketches the arguments to follow. The Third section discusses the limitations on pre-*Hiibel* police interrogatories under *Terry* and how the *Hiibel* decision ignores

¹ 392 U.S. 1, 39 (1968) (J. Douglas, dissent).

² See Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets* 75 COR. L. REV. 1258, 1332-1333 (1999) (contending that there is “no way to meaningfully articulate a standard between probable cause and arbitrariness.”); See also Margaret Raymond, *Down on the Corner, Out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion* 60 OHSLJ 99, 99-102 (1999) (discussing the “incoherent and inconsistent caselaw” for determining the influence of a neighborhood in determining whether or not a suspects behavior can be characterized as “reasonably suspicious.”); See also *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983) (“The concept of reasonable suspicion, like probable cause, is not ‘readily, or even usefully, reduced to a neat set of legal rules.’”));

³ *Hiibel v. Sixth Judicial District of Nevada, Humboldt County*, 124 S.Ct 2451 (2004).

those standards. The Fourth section considers the limitations on unconstitutionally vague statutes under *Kolender*⁴ and the failure of Nevada's stop and identify statute to meet those standards. The Fifth section shows how the Court's transgression of both *Terry* and *Kolender* in *Hiibel* effectively gives the police license to make a *Terry* stop an identification checkpoint. By legitimizing identity checkpoints, as the paper develops those violations in the Sixth section, the *Hiibel* decision runs afoul of First Amendment protections manifesting themselves in unenumerated rights the Court has already recognized.

Furthermore, we consider the philosophical underpinnings of the Constitution as manifested in the Court's previous rulings on unenumerated rights to support finding Nevada's stop and identify statute unconstitutional because it reverses the relationship between state and citizen the Court's jurisprudence hitherto sought to retain. In the Conclusion we contend that restoring the bright-line rule from *Terry* will return the First, Fourth, and Fifth Amendment protections that Nevada's stop and identify statute violates: The police may question, but the suspect may remain silent. Any rule giving police the authority to arrest on the basis of silence without probable cause reverses the relationship between citizens and the state by requiring citizens to assist the police to their own possible detriment. As *Hiibel* has reversed the relationship between citizens and the state, this change requires the Court to reverse its course.

II. Background to *Hiibel*

This fundamental change in the relationship between citizens and the state had its budding in rural Nevada. On May 21, 2000, Humboldt County Sheriff's Deputy Lee Dove responded to a report of an alleged assault: that a man driving a truck was seen hitting a woman passenger.⁵ Following the witness's report, Dove found Dudley Hiibel standing on the passenger side of the road beside a GMC pick-up truck.⁶ As he walked up to Hiibel, Dove said that he

⁴ *Kolender v. Lawson*, 461 U.S. 352 (1983).

⁵ *Hiibel*, 124 S.Ct. at 2455. See also <http://papersplease.org/hiibel/video.html> (last visited Feb. 26, 2006) (offering a video of Hiibel's arrest). In fact, the video indicates that the daughter was driving (and the record suggests that she hit her father.)

⁶ *Id.*

had a report of a fight, and Hiibel said he did not know about a fight.⁷ Dove then asked Hiibel if he had “any identification on [him],” and Hiibel said he did not.⁸ Hiibel was asked eleven times for identification, and he refused each time.⁹ Between requests, Hiibel asked Dove if he was being charged with anything, if he was illegally parked, and suggested arresting him.¹⁰ Hiibel then said something that cannot be discerned from the transcript, and Dove replied that “It could be a searchable situation.” Eventually, Dove threatened to arrest Hiibel if he did not produce any identification.¹¹ Hiibel unwaveringly refused to provide identification and was arrested.¹²

The State of Nevada charged Hiibel with delaying Dove in the execution of his official duties, a misdemeanor.¹³ Hiibel was so charged because he allegedly violated Nevada’s “stop and identify” statute, which requires persons detained under reasonable suspicion to identify themselves:

1. Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime.

.....

3. The officer may detain the person pursuant to this section only to ascertain his identity and the suspicious circumstances surrounding his presence abroad. Any person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer.¹⁴

Hiibel challenged his arrest all the way to the United States Supreme Court, eventually losing his constitutional challenge to Nevada’s “stop and identify” statute. In its ruling, the Court decided 5 to 4 that arresting Hiibel for failing to identify himself while detained under reasonable suspicion for assault does not violate the Fourth or Fifth Amendments. Unfortunately, this ruling neither comports with past Supreme Court precedents nor with the fundamental justification for our democratic government.

⁷ *Id.*

⁸ *Hiibel*, 124 S.Ct. at 2455.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *See supra* note 5, Hiibel video.

¹² 124 S.Ct. at 2455.

¹³ Nev. Rev. Stat. (NRS) § 199.280 (2003).

¹⁴ Nev. Rev. Stat. (NRS) § 171.123 (2003).

In recounting the arrest, the Court notes that Dove asked Hiibel for some identification, “which we understand as a request to produce a driver's license or some other form of written identification.”¹⁵ Later, the Court states that, following the Nevada Supreme Court, the stop and identify “statute does not require a suspect to give the officer a driver's license or any other document. Provided that the suspect either states his name or communicates it to the officer by other means—a choice, we assume, that the suspect may make—the statute is satisfied and no violation occurs.”¹⁶ Discussing the reasons behind Hiibel’s refusal to identify himself, the Court states that “[a]s best we can tell, petitioner refused to identify himself only because he thought his name was none of the officer’s business,”¹⁷ suggesting that a weighing of Hiibel’s reason’s against those of law enforcement is in order.

There is, however, nothing about *Terry* that allows for such a weighing exercise; instead, *Terry* simply gives police the right to ask question that the suspect need not answer and conduct a limited physical search for weapon if the officer has reason to think the suspect is armed. Importantly, this physical search does not aid the police in their investigation; rather, it is to preserve the officer’s safety during the questioning *Terry* authorizes.¹⁸ Moreover, basic constitutional considerations about the structure of our government do not require that citizens justify themselves to police on the basis of reasonable suspicion. Since the Court cannot tell what Deputy Dove asked Hiibel to produce—his name or written identification—it comes as no surprise that the Court made a decision that does not comport with the dicta from the unanimous *Berkemer* Court¹⁹ as well as concurrences from *Terry* and other opinions.²⁰ Ignoring the dicta

¹⁵ *Hiibel*, 124 S.Ct. at 2455.

¹⁶ *Id.* at 2457.

¹⁷ *Id.* at 2461.

¹⁸ *Infra* at 10-12.

¹⁹ *Berkemer v. McCarty*, 468 U.S. 420, 439-40 (1984) (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.”).

²⁰ *Illinois v. Wardlow*, 538 U.S. 119, 125 (2000) (stating that stopping a fleeing suspect “is quite consistent with the individual’s right to go about his business or to stay put and remain silent in the face of police questioning.”); *Kolander v. Lawson*, 461 U.S. 352, 365 (1983) (stating that a *Terry* suspect “must be free to leave after a short time and to decline to answer the questions put to him.”) (J. Brennan, concurring); *Terry*, 392 U.S. 1, 34 (1968) (J. White, concurring) (“However, given the proper circumstances, such as those in this case, it seems to me the person may be briefly detained against his will while pertinent questions are directed to him. Of

and concurrences from these earlier decisions has led the Court to violate their longstanding interpretation of the Fourth and Fifth Amendments.

On the grounds of reasonable suspicion, arresting a suspect for refusing a request for a name violates the Fourth and Fifth Amendment protections established under *Terry* and *Kolender*. According to White's concurrence in *Terry*,²¹ reiterated by the Court in *Berkemer*, "[o]f course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest,"²² because of the Fifth Amendment's protections against self incrimination.²³ Furthermore, under Brennan's concurrence in *Kolender*, a statute may not require a suspect to provide "credible and reliable" identification, for in doing so the statute would circumvent Fourth Amendment protections against unreasonable searches and seizures; specifically, allowing an arrest to occur on less than probable cause, the long held standard for taking someone into custody.²⁴ A requirement for "credible and reliable" information in a stop and identify statute allows the police to arrest a suspect who fails to meet a standard the Court hitherto held only to apply to probable cause.²⁵ While Nevada's stop and identify statute was interpreted by the Court to require a suspect only to provide a name, if there is any question about the suspect's name then the statute becomes pretext for demanding more reliable identification, creating the same violations as in *Kolender*.

For example, the police are unlikely to believe a suspect who claims his name is 'John Doe'. Under the cover of Nevada's stop and identify statute the police cannot use the threat of arrest to elicit proof that the suspect's name is correct without transgressing the

course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation.").

²¹ 392 U.S. 1, 34 (1968) (J. White, concurring).

²² *Id.*

²³ *Berkemer*, 468 U.S. at 440 (explaining that the non-threatening nature of the *Terry* stops—no threat of arrest for not responding to the officer's questions—is the reasoning behind not worrying about Fifth Amendment protections).

²⁴ See Richard Sobel, *The Demeaning of Identity and Personhood in National Identification Systems* 15 HARV. J.L. & TECH 319, 383, note 360 (discussing Justice William Brennan's concurrence in *Kolender*).

²⁵ *Kolender*, 461 U.S. at 367-68 (J. Brennan, concurring) ("[I]t goes without saying that arrest and the threat of a criminal sanction have a substantial impact on interests protected by the Fourth Amendment, far more severe than we have ever permitted on less than probable cause.").

prohibitions from *Kolender* against the compelled production of “credible and reliable” identification. To expect a citizen with a name like ‘John Doe’ to assert his right under *Kolender* against the compelled production of “credible and reliable” identification under the threat of arrest is to substitute Panglossian optimism²⁶ for policy: The bright-line rule must be drawn on the side of restricting police power.

But the clear violations of Fourth and Fifth Amendment jurisprudence from *Kolender* and *Terry* is just part of the Court’s error in *Hiibel*. Under the penumbra cast by the First Amendment, there are rights citizens have that are necessary for exercising of the right specified by that amendment. *A fortiori*, maintaining liberty requires more than just the rights enumerated in the Constitution; liberty and the enumerated rights also require privacy. Without privacy, there are chilling effects on liberty because of the repercussion for proponent of unpopular views. Likewise, without privacy, the extension of Fourth Amendment protections to phone tapping in *Katz*²⁷ does not make sense. Privacy as a penumbral rights is the factor that both justifies and protects liberty as well as undergirding the enumerated rights in constitutional jurisprudence.

For example, the Due Process clause has been interpreted by the Supreme Court to allow the right for unmarried couples to use contraception, a consequence of recognizing a right to privacy.²⁸ Likewise, as we shall argue, the right to freedom of expression requires that the government allow people to move about without disclosing their identity unless the state has a compelling interest. Unenumerated privacy is the right that underlies many of the rights actually enumerated in the Constitution, for without privacy there is no freedom of expression, liberty, or protection against unreasonable search.

By excluding a name from those things covered by privacy, the state enhances its power to require a person to justify herself to government instead of it constituting an entity that proves its worth to

²⁶ VOLTAIRE, *CANDIDE* (John Butt, trans., Penguin Books 1947).

²⁷ *Katz v. United States*, 389 U.S. 347 (1967) (holding that the government’s electronic listening to the defendant’s conversation on a public telephone booth violate the defendant’s privacy); overruling the physical intrusion test of *Olmstead v. United States* and affirming the right to privacy. 277 U.S. 438, 478 (J. Brandeis, dissenting) (“[The makers of our Constitution] conferred, as against the Government, the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men.”).

²⁸ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

citizens: This thereby undermines the very premise upon which our country was founded as stated in the Preamble to the Constitution—to “secure the blessings of liberty to ourselves and our posterity.” The Bill of Rights affords persons in the United States certain protections against the government. Before *Terry*, the probable cause requirement of the Fourth Amendment was the level of justification necessary for the state to seize and search someone.

Now, the state does not need this justification. Under reasonable suspicion, the state can now arrest someone for not providing a name. Instead of being left alone until the state has the justification necessary to interfere, citizens can now be questioned by police and arrested for not volunteering information. Without probable cause, the state can arrest citizens who do not provide what it desires. We can no longer live free from unwanted government inference. Simply not giving the state what it wants—something the state has not proved it needs to the standards of the Fourth Amendment—can lead to an arrest. To stay out of jail we must *do* what the state wants, reversing the relationship between the government and the people as conceived at the founding.

III. Pre-*Hiibel Terry* Stops

In *Terry*, the Supreme Court ruled that police need not have probable cause to seize a person.²⁹ Instead, *Terry* allowed police to briefly detain a suspect on the basis of “reasonable suspicion.”³⁰ The concerns that motivated the Court to curtail requirements for probable cause stemmed from the state’s interest in “effective crime prevention and detection,” the interest that motivated the police officer in *Hiibel*.³¹ By recognizing the need for “swift action predicated upon on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subject to the warrant procedure,”³² the Court has allowed states to pass laws that enable the police, with reasonable suspicion, to use “the least intrusive means reasonably available to verify or dispel the officer’s suspicion in a short period of time.”³³

²⁹ *Terry*, 392 U.S. 1.

³⁰ *Id.*

³¹ *Id.* at 22.

³² *Id.* at 20.

³³ *Florida v. Royer*, 460 U.S. 491, 500 (1983).

What constitutes “the least intrusive means reasonably available to verify or dispel the officer’s suspicion in a short period of time” is defined by the situation. Actions officer can undertake on the basis of reasonable suspicion are limited by the Fourth Amendment.³⁴ In *Terry*, the officer in question “took hold of [petitioner] and patted down the outer surfaces of his clothing” to search for a weapon.³⁵ The officer executing the frisk was concerned with more than “the government interest in investigating the crime,” and the Court took this into consideration by expressing worries about “the police officer taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could be unexpectedly and fatally used against him.”³⁶ To meet the officer’s interest in safety, the Court held that when there is reasonable suspicion, “the proper balance that has to be struck in this type of case leads us to conclude that there must be a *narrowly drawn* authority to permit a reasonable search for weapons for the protection of the police officer.”³⁷

The Court defined reasonable suspicion as “whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.”³⁸ Assuming this antecedent condition is in place, the Court then explored the “reasonable search” allowed by constitutional protections. The Court acknowledged that, like the determination that there is reasonable suspicion, a reasonable search is also dependent on “the concrete factual circumstances of individual cases.”³⁹ Such a search must “be confined in scope to an intrusion reasonably defined to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.”⁴⁰ For example, extending the *Terry* analysis to other situations, the Court has concluded that if, during the cursory search, the officer finds what feels like drugs, the officer cannot then compel the suspect to produce the suspected drugs: “Nothing in *Terry* can be understood to allow a generalized ‘cursory search for weapons’ or, indeed, any search whatever for anything but weapons.”⁴¹

³⁴ *Id.* at 499-500.

³⁵ *Terry*, 392 U.S. at 19.

³⁶ *Id.* at 23.

³⁷ *Id.* at 27 (emphasis added.)

³⁸ *Id.*

³⁹ *Id.* at 29.

⁴⁰ *Id.*

⁴¹ *Ybarra v. Illinois*, 444 U.S. 85, 93-94 (1979). See also *Dunaway v. New York*, 442 U.S. 200, 209-10 (1979) (“Thus, *Terry* departed from traditional Fourth Amendment analysis in two respects. First, it defined a special category of Fourth Amendment ‘seizures’ so substantially less intrusive than arrests that the general

Thus a *Terry* stop allows for a brief weapons search that is predicated on the officer's reasonable suspicion that a crime is afoot and confined to cursory measures to ensure the officer's safety. Subsequent opinions affirmed these limitations: In *Minnesota v. Dickerson*, the Court ruled that *Terry* frisks instigated for purposes other than safety are illegitimate.⁴² Any evidence obtained outside the scope of a search authorized by *Terry* is inadmissible unless that evidence falls under the "plain-view" doctrine, meaning that if the evidence is found through a frisk for weapons and, while not a weapon, is unmistakable contraband, that evidence is admissible.⁴³ So expanding the scope of the search in a *Terry* stop requires

rule requiring probable cause to make Fourth Amendment 'seizures' reasonable could be replaced by a balancing test. Second, the application of this balancing test led the Court to approve this narrowly defined less intrusive seizure on grounds less rigorous than probable cause, but only for the purpose of a pat-down for weapons."); *U.S. v. Brignoni-Ponce*, 422 U.S. 873, 880 (1974) ("In *Terry v. Ohio*, the Court declined expressly to decide whether facts not amounting to probable cause could justify an 'investigative seizure' short of an arrest, but it approved a limited search--a pat-down for weapons--for the protection of an officer investigating suspicious behavior of persons he reasonably believed to be armed and dangerous. The Court approved such a search on facts that did not constitute probable cause to believe the suspects guilty of a crime, requiring only that 'the police officer . . . be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant' a belief that his safety or that of others is in danger.") (citations omitted).

⁴² 508 U.S. 366 (1993) ("Under the State Supreme Court's interpretation of the record before it, it is clear that the court was correct in holding that the police officer in this case overstepped the bounds of the 'strictly circumscribed' search for weapons allowed under *Terry*. Where, as here, 'an officer who is executing a valid search for one item seizes a different item,' this Court rightly 'has been sensitive to the danger . . . that officers will enlarge a specific authorization, furnished by a warrant or an exigency, into the equivalent of a general warrant to rummage and seize at will.' Here, the officer's continued exploration of respondent's pocket after having concluded that it contained no weapon was unrelated to '[t]he sole justification of the search [under *Terry*] . . . the protection of the police officer and others nearby.' It therefore amounted to the sort of evidentiary search that *Terry* expressly refused to authorize, and that we have condemned in subsequent cases.") (citations omitted).

⁴³ *Id.* ("We think that this doctrine has an obvious application by analogy to cases in which an officer discovers contraband through the sense of touch during an otherwise lawful search. The rationale of the plain-view doctrine is that if contraband is left in open view and is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy and thus no 'search' within the meaning of the Fourth Amendment--or at least no search independent of the initial intrusion that gave the officers their vantage point.")

disregarding the Court's previous holding that a *Terry* stop is simply a narrow search for weapons predicate upon the officer's safety.⁴⁴

Justice Harlan's concurrence makes this point clear: "Concealed weapons create an immediate and severe danger to the public, and though that danger might not warrant routine general weapons checks,

⁴⁴ While Tracey Maclin argues that the *Terry* rationale has been expanded to cover a variety of searches beyond safety, each of the cases he enumerates rests on different grounds: *Minnesota v. Dickenson*, 508 U.S. 366 (1993) (holding that police may seize contraband found in a *Terry* frisk that is distinguishable as contraband through the *Terry* search alone because such evidence falls under plain-feel, a doctrine analogous to the plain-view doctrine); *Alabama v. White* 496 U.S. 325 (1990) (holding that anonymous tip constituted reasonable suspicion for a stop that resulted in a consensual search); *Maryland v. Buie*, 494 U.S. 325 (1990) (holding that the Fourth Amendment allows for a protective sweep of a residence where an arrest occurs when the officers have reasonable suspicion that there are others present in the residence who could pose a threat to the officers' safety); *United States v. Sokolow*, 490 U.S. 1 (1989) (fitting a "drug courier profile" constitutes reasonable suspicion); *New York v. Class*, 475 U.S. 106 (1986) (holding that while an officer removing papers obscuring a vehicle identification number was a search under the Fourth Amendment, a weapon in plain view observed during the search could be admitted as evidence); *Hayes v. Florida*, 470 U.S. 811, 817 (1985) (acknowledging an open question as to whether all fingerprinting is prohibited, stating that there "is thus support in our cases for the view that the Fourth Amendment would permit seizures for the purpose of fingerprinting, if there is reasonable suspicion that the suspect has committed a criminal act, if there is a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime, and if the procedure is carried out with dispatch." The Court held that the fingerprinting violated the suspect's Fourth Amendment rights); *United States v. Hensley*, 469 U.S. 221 (1985) (allowing the seizure of evidence in plain-view seen after a legitimate *Terry* stop); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (holding that the school environment allows for searches on less than probable cause); *Florida v. Rodriguez*, 469 U.S. 1 (1984) (holding that even if the suspect was seized under *Terry* the search was consensual, so the evidence could be admitted); *United States v. Place*, 462 U.S. 696, 707 (1983) (allowing a canine "sniff test" on the basis of less reasonable suspicion because the sniff test is *sui generis*, only indicating the presence of illegal drugs, and does "not constitute a 'search' within the meaning of the Fourth Amendment."); *Michigan v. Long*, 463 U.S. 1032 (1983) (holding that the search of the passenger compartment of a motor vehicle during a *Terry* stop for the officers' safety is reasonable); *Michigan v. Summers*, 452 U.S. 692 (1981) (holding that officers executing a valid search warrant on a resident can seize the person who lives in the residence while the search is conducted); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (ruling that the officer's auto stop and *Terry* frisk were reasonable). See Maclin, *When the Cure for the Fourth Amendment is Worse than the Disease* 68 S. Cal. L. Rev. 1, 35 (1994) ("Predictably, [the *Terry*] narrow exception has been stretched and distorted so that government intrusions are now permitted in a variety of contexts that have nothing to do with the safety of patrol officers or the circumstances at issue in *Terry*." (citation omitted)).

it could well warrant action on less than a 'probability'."⁴⁵ Harlan's line of thought contends that "[o]nce that first encounter was justified, however, the officer's right to take suitable measures for his own safety followed automatically."⁴⁶ The majority holding affirms these limits:

We merely hold that where a police officer observes unusual conduct which leads him to reasonably conclude in the light of his experience that criminal activity may be afoot and that the person he is dealing with may be armed and presently dangerous... ..he is entitled for protection of himself and others in the area to conduct a *carefully limited* search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.⁴⁷

The point that the search authorized by *Terry* is limited to weapons for the officer's safety is further established by considering what was at issue between the justices in the decision itself. In his dissent, Justice Douglas argues against allowing any kind of detention under reasonable suspicion, contending that

it is a mystery how that "search" and that "seizure" can be constitutional by Fourth Amendment standards, unless there was "probable cause" to believe that (1) a crime had been committed or (2) a crime was in the process of being committed or (3) a crime was about to be committed.⁴⁸

Considering the majority opinion against the dissent makes apparent that the Court's major concern was how to allow the police officer's physical search in *Terry* while upholding the protections of the Fourth Amendment. The Court did this by predicating the search on the officer's safety and *limiting* the search to weapons that might threaten the officer's safety. The searches *Terry* allows are justified by police safety during the encounter and limited to weapons that threaten safety; any extension of the scope of allowable searches goes beyond what *Terry* allows. Furthermore, there never was any contemplation that the suspect could be compelled to answer *any* question the officer asks during the encounter.

⁴⁵ *Terry*, 392 U. S. at 31-31. (J. Harlan, concurring).

⁴⁶ *Id.* at 34. (J. Harlan, concurring).

⁴⁷ *Terry*, 392 U.S. 30 (emphasis added).

⁴⁸ *Id.* at 35 (dissent, J. Douglas).

In comparing *Terry* to *Hiibel*, the first elision in the Court’s opinion is the complete disconnect between the types of searches allowed by each case. The *Hiibel* Court acknowledges that Justice White, concurring in *Terry*, stated that “a person detained in an investigative stop can be questioned but is ‘not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest’.”⁴⁹ In *Hiibel*, the petitioner is arrested for not giving his name. However, the Court maintained that *Terry* did not foreclose the question of whether a person detained under reasonable suspicion may be compelled by arrest to supply a name.⁵⁰

First, the Court rejects the view of Justice White, contending that the threat of arrest is necessary to prevent the request for a name from “becom[ing] a legal nullity.”⁵¹ The Court’s concern to avoid a legal nullity oversteps their prior affirmation of Justice White in the unanimous *Berkemer* Court,⁵² *Royer*,⁵³ and *Davis*⁵⁴ held to comprise the constitutional limits on police questioning under reasonable suspicion—that the police can ask for a name but the suspect need not answer.⁵⁵ To support its rationale that the request for identity not become a legal nullity, the Court gives some general policy reasons divorced from the safety concerns in *Terry*: “identity may inform an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder.”⁵⁶ In *Hiibel*, the Court concludes that “[t]he officer’s request was a commonsense inquiry”⁵⁷ and “was ‘reasonably related in scope to the concern which justified’ the stop.”⁵⁸ However, the scope and concern is not what justifies searches in *Terry*. Instead, *Terry* searches are limited to the officer’s safety.

⁴⁹ *Hiibel*, 124 S.Ct. at 2459, quoting *Terry*, 392 U.S. at 34 (Justice White, concurring).

⁵⁰ *Hiibel*, 124 S.Ct. at 2459, quoting *Brown v. Texas*, 443 U.S. 47, 53, n. 3 (“We need not decide whether an individual may be punished for refusing to identify himself in the context of a lawful investigatory stop which satisfies Fourth Amendment requirements.”).

⁵¹ *Id.* at 2459.

⁵² *Supra* note 20.

⁵³ *Royer* 460 U.S. at 497-8 (affirming Justice White’s contention in *Terry* that a suspect need not answer questions)

⁵⁴ *Davis v. Mississippi*, 394 U.S. 721, 729 n. 6 (1969) (noting the “settled principle” that police officers may not compel answers to questions about unsolved crimes).

⁵⁵ *See supra* 5-6

⁵⁶ *Id.* at 2458.

⁵⁷ *Id.* at 2460.

⁵⁸ *Id.* (quoting *Terry* at 20).

The Court maintains that “[t]he principles of *Terry* permit a State to require a suspect to disclose his name in the course of a *Terry* stop.”⁵⁹ In making this assertion, the Court ignores the security rationale in *Terry*; instead, the Court contends that the reasonableness of requiring a name passes the balancing test articulated in *Delaware v. Prouse*⁶⁰ because the “request for identity has an immediate relation to the purpose, rationale, and practical demands of a *Terry* stop.”⁶¹ However, as explained above, the purpose and rationale of the search permitted by a *Terry* stop is to ensure safety. And the practical demands of the *Terry* decision were to ensure that the methods of the search do not violate the Fourth Amendment.

As our analysis of the *Terry* majority and concurrences shows, the *Terry* Court took pains to set limits on what *kinds* of searches *Terry* allows, leaving latter opinions to determine the intricacies of the details regarding permissible and impermissible searches for weapons.⁶² So there is no question that the officer may not use the *Terry* stop to search for drugs or anything other than weapons. The extension of the *Terry* search in *Hiibel* comes from new cloth, not *Terry*.⁶³

The limited scope of searches allowed on reasonable suspicion under *Terry* clarifies the faults of the *Hiibel*. Even assuming that the suspect in *Hiibel* poses a threat because of the police report, nothing in the *Terry* allows the officer to perform a search to determine that the suspect “is wanted for another offense.” Furthermore, while a suspect with “a record of violence or mental disorder” might well pose an additional threat to an officer, nothing in *Terry* allows for an officer to make an inquiry into this issue on reasonable suspicion unless the suspect volunteers an answer. Instead, what *Terry* allows for is a search for *weapons*. Because the *Hiibel* search was for

⁵⁹ *Id.*, 2460.

⁶⁰ 440 U.S. 648, 654 (1979).

⁶¹ *Hiibel*, 124 S.Ct. at 2459.

⁶² *Terry*, 392 U.S. at 29 (“We need not develop at length in this case, however, the limitations which the Fourth Amendment places upon a protective seizure and search for weapons.”)

⁶³ Drawing on case in which additional circumstances were present, one could argue that *Terry* permits searches for more than weapons; however, the Supreme Court cases that permit more intrusive searches all have added factors that increase the law enforcement interest or meet the Court’s “special needs” doctrine. For example, *Illinois v. Caballes*, 125 S.Ct. 834 (2005) and *U.S. v. Sharpe*, 470 U.S. 675 (1985), concern searches of motor vehicles while *U.S. v. Montoya de Hernandez*, 473 U.S. 531 (1985) concern searches at boarder crossings and *Florida v. Rodriguez*, 469 U.S. 1 (1984) a consensual search. *See also supra* note 44.

something different than weapons, it cannot be claimed to follow the precedent from *Terry*.

IV. *Kolender* Analysis

In *Kolender*, the Court held a statute requiring “credible and reliable” identification unconstitutional because the law was impermissibly vague under the Due Process clause.⁶⁴ While the Court did not reach the constitutional question of whether the statute violated the Fourth Amendment, Justice Brennan’s concurrence did. He stated that the Fourth Amendment prevents the police from compelling identification for crime prevention when the crime is unspecified.⁶⁵ Moreover, the Ninth Circuit’s analysis of *Kolender*,⁶⁶ as affirmed in *Carey v. Nev. Gaming Control Bd.*,⁶⁷ contradicts the Supreme Court’s analysis of the “commonsense” inquiry into identity furthers the state interest in crime prevention that allows for *Terry* stops.

In holding that the Nevada Gaming Control Board Agent acted unreasonably in interpreting the same Nevada law at issue in *Hiibel*,⁶⁸ the Ninth Circuit worried about a bootstrapping problem with Nevada’s stop and identify statute.⁶⁹ Because a suspect can be *Terry* stopped for less than probable cause, an officer demanding identification and not getting it under a stop and identify statute could arrest a suspect on less than probable cause.⁷⁰ Thus the situation in which a suspect is arrested on less than probable cause exists simply because a suspect does not sufficiently justify herself to the state: this gives the government a power the Ninth Circuit decided transgressed the constitutional foundations of the Fourth Amendment.⁷¹ To reiterate the point, the state now has the power to arrest a person

⁶⁴ 461 U.S. 352 (1983).

⁶⁵ *Id.* at 362 (“Merely to facilitate the general law enforcement objectives of investigating and preventing unspecified crimes, States may not authorize the arrest and criminal prosecution of an individual for failing to produce identification or further information on demand by a police officer.”).

⁶⁶ *Lawson v. Kolender*, 658 F.2d 1362 (9th Cir. 1981).

⁶⁷ *Carey v. Nev. Gaming Control Bd.*, 279 F.3d 873 (9th Cir. 2002).

⁶⁸ *Id.* at 882.

⁶⁹ *Id.* at 880.

⁷⁰ *Id.* (quoting *Kolender*, 658 F.2d at 1366-67).

⁷¹ *Id.* at 881.

without meeting its obligation under the Fourth Amendment simply because the person detained chooses to withhold her name.

Besides the bootstrapping problem, stop and identify statutes also represent the problem of “mission creep.” If the officers initiating the *Terry* stop are not satisfied with the suspect’s name, the *Terry* stop will expand to satisfy the police. However, such an investigation is prohibited by previous Court rulings. Even allowing that compelling a name is permissible, follow-up questions to confirm the name would be impermissible because the police do not have the authority to compel answers to other questions.⁷² For example, the reasoning behind the Supreme Court’s finding in *Kolender* that a California law’s requirement for “credible and reliable” information “encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute.”⁷³ The same concerns apply for the Nevada stop and identify statute.

Suppose an officer detains a suspect under a legitimate *Terry* stop. The officer asks for the suspect’s name. A skillful criminal will not give the correct name because that might be incriminating, allowing the officer to make an arrest for an outstanding warrant. A suspect with an unusual name, a nickname, or a name similar to a person with an outstanding arrest warrant might lead the officer to request more than a simple name.⁷⁴ The only assistance the stop and identify statute offers police is for those suspects who give their real names and there is information in a police database linking that person to information that enables the officer to take the necessary precautions for safety. The savvy criminal will simply give a false name to avoid a trap.

Consider the situation in which the Court’s decision in *Hiibel* leaves us. For the suspect with an unusual name, the officer might now desire credible information to ensure that the suspect is not lying. This puts the officer in clear violation of the Fourth Amendment because now the unusual name has caused the officer to seek credibility for the identification, a power that outstrips the officer’s

⁷² See *supra* notes 21-24 an accompanying text.

⁷³ *Kolender*, 461 U.S at 361.

⁷⁴ Consider the situation that arises when a passenger name matches a name on the government’s “no fly” list. The individual must then prove that she is not the person whose name appears on the government list. So a simple request for a name can quickly become complicated. Leigh A. Kite, Note *Red Flagging Civil Liberties and Due Process Rights of Airline Passengers: Will a Redesigned CAPPS II System Meet the Constitutional Challenge?* 61 WASH. & LEE L. REV. 1385, 1421-22 (2004).

authority under *Kolendar*. Alternately, for the suspect who lies, the officer has no capacity to determine that the suspect is lying without “credible and reliable” identification. Thus, without verifying the identity offered by the suspect, the stop and identify statute is of extremely limited use to law enforcement. So, in the name of crime control, the next case under the *Hiibel* decision will concern the steps officers can take to verify the identity offered unless the Court withdraws the power granted in *Hiibel*.

Under *Hiibel*, the Court recognized a law enforcement interest in ensuring a suspect is not “wanted for another offense, or has a record of violence or mental disorder” to facilitate police safety. For police to further the interests identified in *Hiibel*, the identity a suspect offers must be credible. For the identity to be reliable, it must be backed up by more than the suspect’s attestation that the name is correct. Thus the officer, in advancing the law enforcement interests in *Hiible*, will ask for proof of identification, bringing *Hiibel* into conflict with *Kolender*. Considering how *Hiibel* made short work of *Terry*, we have no assurance that the protections against requiring people to produce “credible and reliable” identification from *Kolender* will stand. Indeed, *Kolender* is on a collision course with *Hiibel*. Because of the prospect that police will demand IDs and criminals lie, the Court’s agenda that the request for a name “not become a legal nullity”⁷⁵ speaks in favor of allowing a requirement for “credible and reliable” identification.

Thus the Ninth Circuit’s worry in *Carey* that stop and identify statutes will allow suspects to be arrested on less than probable cause is the natural result of the Court’s crime prevention and safety interests upon which the *Hiibel* decision is predicated. If the suspect has an unusual name, the suspect could be asked for credible identification; failure to produce that identification could lead to an arrest on less than probable cause. The “commonsense” need for police to ensure that names are reliable is just a case away from allowing the police to arrest suspects on less than probable cause for failure to produce reliable identification. So the Court’s policy interest in *Hiibel*, if followed, would allow the police to arrest on less than probable cause for failure to possess the right kind of name or produce the right kind of ID. In short, this renders *Terry* stops identity checkpoints that can bootstrap an arrest on less than probable cause.

⁷⁵ *Hiibel*, 124 S.Ct. at 2459.

V. Identity Checkpoints and the Constitution

Identity checkpoints are at odds with basic liberties in the United States. Travel and freedom of movement are basic freedoms under the Constitution,⁷⁶ recognized in *Chicago v. Morales*⁷⁷ and *Terry* as falling under the First Amendment. An identity checkpoint inhibits freedom of movement because citizens are required to disclose their identity in circumstances in which they have not broken the law and do not want their identity known. Requiring citizens to do so, even under reasonable suspicion, results in a chilling effect on freedom of movement, violating the privacy of those who wish to travel anonymously, thus violating the right to travel.

Calling the request for a name predicated on reasonable suspicion an identity checkpoint is not hyperbole. The term fits because the kind of search allowed by *Terry* prior to *Hiibel* was predicated on the officer's safety. *Hiibel* extends beyond what falls under the officer's safety to purposes that give the police more power against suspects. While it certainly is true that allowing identity checks predicated on reasonable suspicion could facilitate law enforcement, law enforcement cannot advance at the expense of a constitutional right. A seminal example of this is *Miranda v. Arizona*, in which the Court held that evidence obtained in custodial investigations when defendant has not been advised of rights and privileges against self-incrimination is inadmissible.⁷⁸ Citizens have a fundamental right to go about their lives without having to justify themselves to government. This is what a right to privacy affords—"the right to be let alone."⁷⁹ *Hiibel* authorizes a police power to violate this right.

⁷⁶ *Saenz v. Roe*, 526 U.S. 489, 499 (1999) ("The word 'travel' is not found in text of the Constitution. Yet the 'constitutional right to travel from one State to another' is firmly embedded in our jurisprudence."); *Shapiro v. Thompson*, 394 U.S. 618, 643 (1969) ("[The right to travel] is a right broadly assertable against private interference as well as government action. Like the right of association, *NAACP v. Alabama*, it is a virtually unconditional personal right, guaranteed by the Constitution to us all." (citations omitted)). *Kent v. Dulles*, 357 U.S. 116, 125 (1958) ("The right to travel is part of the 'liberty' of which the citizen cannot be deprived without due process under the Fifth Amendment."). The Articles of Confederation also provided for freedom of travel in Article IV: "and the people of each State shall free ingress and regress to and from any other State."

⁷⁷ 527 U.S. 41, 53-54 (1999).

⁷⁸ 384 U.S. 436 (1966).

⁷⁹ Louis Brandeis & Samuel Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). See also *Olmstead v. United States*, 277 U.S. 438, 478 (J. Brandeis,

When discussing the government intrusion into the lives of citizens, Justice Kennedy says that a request for identity “is likely to be so insignificant in the scheme of things as to be incriminating only in unusual circumstances.”⁸⁰ Here Justice Kennedy’s speculation on what is significant is misplaced. While for some the disclosure of a name is may be insignificant, for others the disclosure is the beginning of significant consequences. For those for whom the disclosure is significant, if the disclosure violates the Fifth Amendment right against self-incrimination, then the Constitution protects the individual to refrain from disclosing the information unless the state offers immunity. Had Officer Dove learned that the alleged assault he was investigating involved two Hiibels—Dudley and his daughter—Hiibel’s name would have served as evidence of a relationship subject to Nevada’s domestic violence laws. In Nevada, when there is probable cause to believe that domestic battery has occurred, Nevada law requires arrest of the suspect unless mitigating circumstances are present.⁸¹ Thus Hiibel’s situation was exactly the situation Justice Kennedy erroneously thought he had deferred to the next case: Hiibel’s fulfillment of Officer Dove’s demand for a name would constitute a “disclosure that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might so be used.”⁸²

But even in the absence of incriminating circumstances the compelled disclosure of a name violates the Constitution. The

dissenting) (“The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men.”).

⁸⁰ *Hiibel*, 124 S.Ct. at 2461.

⁸¹ Nev. Rev. Stat. (NRS) § 171.137 (1) (Except as otherwise provided in subsection 2, whether or not a warrant has been issued, a peace officer shall, unless mitigating circumstances exist, arrest a person when he has probable cause to believe that the person to be arrested has, within the preceding 24 hours, committed a battery upon his spouse, former spouse, any other person to whom he is related by blood or marriage, a person with whom he is or was actually residing, a person with whom he has had or is having a dating relationship, a person with whom he has a child in common, the minor child of any of those persons or his minor child.) See Brief for Petitioner at 37, *Hiibel v. Sixth Judicial District of Nevada, Humboldt County*, 124 S.Ct 2451 (2004) (No. 03-5554) (discussing the relationship between Nevada’s domestic violence law (Nev. Rev. Stat. 33.018) and self-incrimination).

⁸² *Hiibel*, 124 S.Ct. at 2454 (citation omitted.)

fundamental right a legally sanctioned demand for a name predicated on the threat of arrest implicates extends beyond the enumerated rights specified in the Constitution. According to an enumerated rights analysis, the only rights that the Constitution protects are those rights specified in the text. Of course, contrary to Justice Scalia's protestations,⁸³ the Supreme Court does not engage in strict enumerated rights analysis, for ours is a constitution of reserved rights and enumerated powers. Instead, another tradition of constitutional interpretation claims there are rights related to those enumerated in the Constitution, which exist because the exercise of the enumerated rights cannot occur without the exercise of unenumerated rights; these are embodied in general notions like liberty and substantive due process. The *locus classicus* of privacy literature captures this more fruitful way of understanding rights in the Constitution:

[I]n very early times, the law gave a remedy only for physical interference with life and property, for trespass *vi et armis*. Then the "right to life" served only to protect the subject from battery in its various forms; liberty meant freedom from actual constraint; and the right to property secured the individual his lands and his cattle. Later, there came a recognition of man's spiritual nature, his feelings and his intellect. Gradually the scope of these rights broadened; and now the right to life has come to mean the right to enjoy life,—the right to be let alone; the right to liberty secures the exercise of extensive civil privileged; and the term "property" has grown to comprise every form of possession—intangible as well as tangible.⁸⁴

The tradition of finding rights in the Constitution other than those enumerate employed in previous decisions like *Wolf v. Colorado*⁸⁵

⁸³ Justice Scalia is a vocal and sophisticated proponent of this view. Consider his comments in *Lawrence v. Texas*: "But there is no right to 'liberty' under the Due Process Clause, though today's opinion repeated makes that claim." 539 U.S. 558, 591 (2003) (J. Scalia, dissenting.) A consequence of Scalia's view is that a state can, through the democratic process, outlaw anything not specifically stated in the constitution. See also SCALIA, A MATTER OF INTERPRETATION, ed. Amy Gutmann (1998).

⁸⁴ *The Right to Privacy*, *supra* note 79.

⁸⁵ 338 U.S. 25, 27 (1949) ("The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society.").

and *NAACP v. Alabama*,⁸⁶ reached maturity in Justice Douglas's opinion in *Griswold v. Connecticut*. There, Douglas said that "the First Amendment has a penumbra where privacy is protected from government intrusion."⁸⁷ Locating a right like privacy in the First Amendment is predicated on the notion that privacy is required for the First Amendment to be meaningful. Through the unfolding of history, the Court found the First Amendment afforded more protections than those captured in a simple reading of the text and what the Framers thought the text meant. The Court has used this method to ensure that the Constitution captures the conceptual import of notions like freedom of association instead of limiting the terms to an understanding to what the individual writers actually thought at the time the Constitution was written.⁸⁸ For example, even though some drafters of the Constitution and the Thirteenth and Fourteenth Amendments did not hold opinions about *Plessy v. Ferguson* doctrine of "separate but equal," a full understanding of the Constitution allowed *Brown v. Board of Education* to overturn this unfortunate result.⁸⁹

Without privacy, an individual's ability to express unpopular views, join controversial organization, or support unpopular causes is inhibited. The consequences an unrestrained majority might visit upon those expressing minority views leads those expressing the unpopular views to do so privately. Without the protection privacy affords, the majority can more easily chill free speech. Reading privacy into the Constitution best captures how to understand the implications of the concepts the Framers employed when writing the Constitution.

⁸⁶ 357 U.S. 449, 462 (1958) ("This Court has recognized the vital relationship between freedom to associate and privacy in one's associations.").

⁸⁷ 381 U.S. 479, 483 (1965).

⁸⁸ In the literature, this way of interpreting the constitution is ably defended by Ronald Dworkin: "If we are trying to make best sense of the Framers speaking as they did in the context in which they spoke, we should conclude that they intended to lay down abstract not dated commands and prohibitions. The Framers were careful statesmen who knew how to use the language they spoke. We cannot make good sense of their behavior unless we assume that they meant to say what people who use the words they used would normally mean to say--that they used abstract language because they intended to state abstract principles. They are best understood as making a constitution out of abstract moral principles, not coded references to their own opinions (or those of their contemporaries) about the best way to apply those principles." *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve* 65 *Fordham L. Rev.* 1249, 1253 (1997)

⁸⁹ 347 U.S. 483 (1954).

Consider the Court's opinion in *NAACP v. Alabama*, in which the state of Alabama wanted to obtain the membership roles of the NAACP. Relying on decisions in previous opinions such as *Schware v. Board of Examiners*, the Court recognized that the First Amendment also protects the right to freedom of association, even though the First Amendment does not specifically mention association.⁹⁰ Taking the next step in *NAACP v. Alabama*, Justice Harlan authored a unanimous opinion for the Court linking association and privacy: "This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. ...Inviolability of privacy in group associations may in many circumstances be indispensable to freedom of association, particularly where a group espoused dissident beliefs."⁹¹ By linking the right to privacy with the First Amendment the Court raised the level of scrutiny to which any state action abridging the right to privacy is subject. Although Justice Douglas does refer to *NAACP v. Alabama* in linking privacy to the First Amendment, the case does not provide much guidance when the state has a legitimate purpose since Alabama did not advance a legitimate state purpose for acquiring the NAACP membership roles.

Drawing on the method used in *NAACP v. Alabama*, *Griswold v. Connecticut* found a Connecticut law banning the sale of contraceptive devices unconstitutional. In his majority opinion, Douglas mined past cases to show how rights implicit within those enumerated in the Constitution have been recognized in past cases and used to strike down state laws that abridge those rights. For example, he referred to cases like *Pierce v. Society of Sisters*⁹² and *Meyer v. Nebraska*⁹³ to show that the First Amendment protected the right for parents to choose schools for their children and the right for the study of the German language in private schools: These are all rights not enumerated in the First Amendment yet they are recognized by the Court as penumbral protections under the First Amendment. While these rights derived from the conceptual and practical implications of the enumerated right may be peripheral rights, prohibiting peripheral right infringes on the enumerated right:

⁹⁰ *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957).

⁹¹ 357 U.S. at 462.

⁹² 268 U.S. 510 (holding that parents have the right to send their children to private schools instead of public schools).

⁹³ 262 U.S. 390 (holding that parents have the right to choose that their children are taught German in private schools).

“Without those peripheral rights the specific rights would be less secure.”⁹⁴

By referring to these past decisions, Douglas established that the rights enumerated in the Constitution do not stand on their own; rather, “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”⁹⁵ Of particular importance for Douglas’s opinion are what he called the “zones of privacy” created by the First Amendment.⁹⁶ A zone of privacy covers an aspect of a citizen’s life, protecting that domain from government inquiry unless the citizen allows the disclosure.⁹⁷ In *Griswold*, Douglas found a zone of privacy for the marital relationship: “Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.”⁹⁸ Therefore the Court ruled that the Connecticut law banning the sale of contraceptives intruded upon this private relationship and was therefore unconstitutional.

The unifying idea for all of these recognitions of privacy is an even more basic idea that the majority in *Terry* affirmed:

this Court has always recognized, “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.”⁹⁹

The right to be left alone is the foundation unifying the zones of privacy found in the Bill of Rights; individual rights enumerated in the Bill of Rights are particular manifestations of these rights. Its persistence is undermined by the power not to let persons alone.

The Court has extended the privacy rights identified in *Griswold* to the nondisclosure of information. This right began in *NAACP v. Alabama*, allowing the NAACP to refuse to release its membership

⁹⁴ *Griswold*, 381 U.S. at 482-83.

⁹⁵ *Id.* at 479.

⁹⁶ *Id.* at 484 (“Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen.”).

⁹⁷ Likewise, in the *Miranda* decision, the Court recognized that custodial interrogations require informing a prisoner of the right to remain silent even though the Constitution provides no such requirement in the text. But the Fifth Amendment protects against self-incrimination. *See infra* note 119.

⁹⁸ *Id.* at 485-86.

⁹⁹ 392 U.S. at 8 (quoting *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

roles. After *Griswold*, *Whalen v. Roe*¹⁰⁰ and *United States Department of Justice v. Reporters Committee for Freedom*¹⁰¹ affirmed the existence of this right to nondisclosure. This is line of jurisprudence under which *Hiibel* fails: There is a right to nondisclosure for private matters. The state cannot inquire into an individual's private business under the threat of arrest without probable cause. A name is private because it relates the identity of a person to a private matter the person is undertaking, e.g., a political gathering. Any effort to learn a citizen's name through identity checkpoints, absent probable cause, is a constitutional violation. But this unconstitutional result is exactly what *Hiibel* allows. In the next section, we provide a further exploration of the importance of a name to an individual's liberty as protected by the Constitution.

VI. What's in a Name?

In his majority opinion, Justice Kennedy seems perplexed about why *Hiibel* did not want to disclose his name to the police: "Even today, petitioner does not explain how the disclosure of his name was none of the officer's business."¹⁰² This analysis assumes that *Hiibel*, perhaps as in the necessity to invoke the Fifth Amendment in court or in Congress, has a positive duty to explain why he does not want to disclose his name. There are many reasons someone might not want to disclose a name, and it should not be incumbent upon a citizen to provide a reason for failing to do so to the officer or the Court absent probable cause. Instead, after recognizing the constitutional right entitling the suspect not to have their privacy invaded, what the law should do is set policy to err on the side of protecting the constitutional right. Indeed, since our Constitution embodies this general policy interest, it is the duty of the Court to ensure that laws do not illegitimately infringe on that constitutional right. This is the

¹⁰⁰ 429 U.S. 589, 598-99 (1977) ("The cases sometimes characterized as protecting "privacy" have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters."). (footnote omitted.)

¹⁰¹ 489 U.S. 749, 767 (1988) ("In addition to the common-law and dictionary understandings, the basic difference between scattered bits of criminal history and a federal compilation, federal statutory provisions, and state policies, our cases have also recognized the privacy interest inherent in the nondisclosure of certain information even where the information may have been at one time public.").

¹⁰² *Hiibel*, 124 S.Ct. at 2461.

process of judicial review has been the *raison d'être* of the Court since *Marbury v. Madison*.¹⁰³

Recognizing the place of a policy interest preventing the disclosure of a name under reasonable suspicion begins by realizing the importance of anonymity in the founding of the United States. The history of this country began with the founders using pseudonyms for political purposes. For example, during “the first twenty years of American constitutional government, six men who would later be president wrote under pen names.”¹⁰⁴ The Court has stated that the “tradition [of anonymity in support of political causes] is most famously embodied in the Federalist Papers, authored by James Madison, Alexander Hamilton, and John Jay, but signed ‘Publius.’”¹⁰⁵ The need for anonymity to separate the opinion from the person expressing the view is known to the Court and anyone who votes:

[There is] a respected tradition of anonymity in the advocacy of political causes. This tradition is perhaps best exemplified by the secret ballot, the hard-won right to vote one’s conscience without fear of retaliation.¹⁰⁶

The Court’s concern to allow people to separate their identity from unpopular opinions has manifested itself in numerous opinions: For example, in *Brown v. Socialist Workers’ 74 Campaign Comm.*, the Court said that the “Constitution protects against the compelled disclosure of political associations.”¹⁰⁷ The Court did so because “[s]uch disclosures ‘can seriously infringe on privacy of association and belief guaranteed by the First Amendment’.”¹⁰⁸ In *NAACP v. Alabama* the Court made the same point.¹⁰⁹ Likewise, in *Bates v. City of Little Rock*, the Court held that the NAACP did not have to disclose membership lists.¹¹⁰ In making its ruling, the Court noted that freedom of

¹⁰³ 5 U.S. 137 (1803).

¹⁰⁴ JOHN W. JOHNSON, *GRISWOLD V. CONNECTICUT: BIRTH CONTROL AND THE CONSTITUTIONAL RIGHT OF PRIVACY* (2005) at 55.

¹⁰⁵ *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 343, note 6 (1995).

¹⁰⁶ *Id.* at 342-43 (quoting *Talley v. California*, 362 U.S. 60, 62 (1960) (citations omitted)).

¹⁰⁷ 459 U.S. 87, 91 (1982).

¹⁰⁸ *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 64 (1976), citing *Gibson v. Florida Legislative Comm.*, 372 U.S. 539 (1963)).

¹⁰⁹ See *supra* notes 86-96 and accompanying text.

¹¹⁰ 361 U.S. 516 (1960).

association and freedom of speech “are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.”¹¹¹ Finally, in *Joint Anti-Fascist Refugee Comm. v. McGrath*, Justice Black’s concurring opinion noted the fear that dominate groups will suppress deviant views and his hope in the constitution to prevent such injustices.¹¹²

In short, the Court has recognized that compelling the disclosure of identity can chill the exercise of civil liberties.

We are not unmindful that the damage done by disclosure to the associational interests of the minor parties and their members and to supporters of independents could be significant. These movements are less likely to have a sound financial base and thus are more vulnerable to falloffs in contributions. In some instances fears of reprisals may deter contributions to the point where the movement cannot survive. The public interest also suffers if that result comes to pass, for there is a consequent reduction in the free circulation of ideas both within and without the political arena.”¹¹³

If those in power can link the speech they do not like with the person who speaks then those with power can use their authority to make life more difficult for the speaker: “The evidence offered need show only a reasonable probability that the compelled disclosure of a party’s contributors’ names will subject them to threats, harassment, or reprisals from either Government officials or private parties.”¹¹⁴ The Court has recognized this as a general policy concern behind the First Amendment.¹¹⁵ As such, there is no need for the speaker in a particular case to explain why he or she desires to keep his or her identity secret; instead, the Court recognizes that people sometimes do want to keep their persons secret, and allowing the government to

¹¹¹ *Id.* at 523.

¹¹² 341 U.S. 123, 145 (1951) (Black, J., concurring) (“In this day when prejudice, hate and fear are constantly invoked to justify irresponsible smears and persecution of persons even faintly suspected of entertaining unpopular views, it may be futile to suggest that the cause of internal security would be fostered, not hurt, by faithful adherence to our constitutional guarantees of individual liberty.”).

¹¹³ *Brown*, 459 U.S. at 93 (quoting *Buckley v. Valeo*, 424 U.S. 1, 71 (1976)).

¹¹⁴ *Id.* at (quoting *Buckley*, 424 U.S. at 74).

¹¹⁵ *Id.*

compel the speaker's identity would chill citizens' exercise of their liberties.

There may be policy concerns that the state might advance by requiring citizens to disclose their identities to police. For example, requiring writers to disclose their identities would promote responsible authorship. If authors had to sign their names to everything they wrote, there would be fewer false statements printed.¹¹⁶ Of course, such a policy decision has a cost, and the cost would be the suppression of important political speech critical of those in power anonymity facilitates. This is a cost that the Court has previously understood the Constitution holds as more important than the social good of fewer false publications.¹¹⁷

Laws that compel citizens to identify themselves on the basis of reasonable suspicion fail under a similar analysis. To be sure, compelling citizens to identify themselves would help law enforcement. Stopping a suspect on reasonable suspicion and eliciting the suspect's identity could result in an arrest because of an outstanding warrant. Likewise, learning that a suspect stopped on reasonable suspicion has previously assaulted police officers would allow officers to take additional steps to ensure their own safety, another legitimate policy concern. While arresting those with outstanding arrest warrants and informing police when additional safety measures are worthy goals, such goals cannot be pursued if they illegitimately transgress a civil liberty under the Constitution. And this is precisely what laws compelling suspects to disclose their identity do. Consider again the domestic violence example in which merely providing a name is incriminating when the last name matches the victim's because it is evidence of a domestic relationship.¹¹⁸ And, *pace* Justice Kennedy, this was exactly the case in *Hiibel*.¹¹⁹

¹¹⁶ This motivation was given by the City of Los Angeles in *Talley v. California*, 362 U.S. 60 (1960). In that case, a city ordinance requiring the names and addresses of those who prepare handbills printed upon the handbills. The Court struck down the city ordinance, noting that anonymity serves a vital political purpose in promoting Free Speech: "Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all." *Id.* at 64.

¹¹⁷ *Id.*

¹¹⁸ See *supra* note 81 and accompanying text.

¹¹⁹ Indeed, the question Justice Kennedy thought he could defer was manifest: "Still, a case may arise where there is a substantial allegation that furnishing identity at the time of a stop would have given the police a link in the chain of evidence needed to convict the individual of a separate offense. In that case, the court can then consider

Even ignoring the specific transgression of the Fifth Amendment in this case, the *Hiibel* inverts the fundamental relationship between the government and the governed under our Constitution. The error in Justice Kennedy's analysis of Hiibel's complaint begins exactly when he asks why Hiibel did not want to disclose his name. The analysis recognizes that suspects have no duty to disclose their identity regardless of the consequences. The constitutional protections afforded through free speech protections do not require that anyone justify herself to the state unless the state has already satisfied its burden of probable cause; namely, that the individual in question is a threat to others and must be deprived of liberty. Probable cause is the standard for satisfying this burden. Reasonable suspicion has been carved out by *Terry* for allowing a lower standard of proof for briefly detaining suspects for a limited search for weapons for the officer's safety and questions that the suspect need not answer.¹²⁰ Placing any duty on citizens to disclose their identities hinders free speech.¹²¹ In asking the question about why Hiibel does not want to disclose his name, Justice Kennedy gets the relationship between citizens and the state exactly backwards. Hiibel does not have to justify himself to the state and the state cannot take action against him unless it has compelling justification. From silence alone the state is not entitled to infer probable cause for an arrest.¹²²

Of course, as Holmes' cliché about not shouting fire in a crowded theater when there is no fire indicates, free speech has limits.¹²³ However, what this truism recognizes is a *specific* exception to the

whether the privilege applies, and, if the Fifth Amendment has been violated, what remedy must follow. We need not resolve those questions here." *Hiibel*, 124 S.Ct. at 2461.

¹²⁰ See *supra* 7 – 10.

¹²¹ Of course, any positive duty to disclose identity would also violate their Fourth Amendment right preventing unlawful search and seizure and Fifth Amendment right against self incrimination. Like the right to free speech, these rights also cast their shadows on privacy—the right to be left alone.

¹²² For a discussion of how the right to remain silent in the First and Fifth Amendments combine with the Fourth Amendment prohibitions against unreasonable searches to render law compelling the possession and presentation of identification unconstitutional, see Sobel, *supra* note 25 at 372-73.

¹²³ Justice Holmes asserted this in *Schenck v. United States*, 249 U.S. 47 (1919). Later, the Court modified *Schenck* in *Brandenburg v. Ohio*, 385 U.S. 444 (1969) (stating that speech can only be barred when it was direct and likely to incite imminent lawlessness). In *Schenck*, Holmes majority opinion compared distributing flyers opposing the draft in World War I to shouting fire in a crowded theater. Critics of Holmes' opinion contended that the flyers were intended to keep people out of the raging fire in Europe.

general right. Specific exceptions to general rights are permissible in light of a recognizable threat; people panic to cries of fire, so the law tries to reduce a likely harm. In contrast, the Nevada law picks out no specific threat. To justify the law, the Supreme Court imagines hypothetical threats that would only exist in special conditions with certain suspects, not conditions that exist with any crowded theater. Restrictions on fundamental rights like free speech require specific threats that trigger unthinking responses, and these are the restrictions the law embodies.¹²⁴ Under *Hiibel*, the police need not find any specific threat to hinder free speech; instead, under *Hiibel* the chilling effect is unchecked.

Laws like Nevada's stop and identify statute that permit the state to arrest citizens on the basis of reasonable suspicion for not identifying themselves puts citizens in the position of having to identify themselves to authorities when they would rather travel or express themselves anonymously. Recognizing the nature of restraints the Court previously upheld for free speech permits an understanding of the inherent criticisms leveled against laws that allow police to arrest citizens who do not identify themselves:

As an impressionable lad growing up in the '40s in a sleepy Wisconsin burg where the local cinema was the principal source of amusement, I consumed a steady diet of World War II movies, where I saw essentially the same scene time and again: in some area under the Nazi thumb, some hapless traveler would be stopped by the authorities, at which point the man in charge would inevitably say, "Ve vant to zee your papers." The traveler would produce his credentials and then would be subjected to a thorough grilling about where he was going, where he had been, why he was about, etc. Each time I watched such a scene, shivers went down my spine, and it was then that I concluded that one of the most striking differences between a free and a totalitarian society was that in the former scenes like

¹²⁴ *Edenfield v. Fane*, 507 U.S. 761 (1993) (Government regulation of speech must address a real, not hypothetical, harm and must directly mitigate that harm.); *NAACP v. Clairtowne Hardware Co., Miss.*, 458 U.S. 886 (1982); *see also* *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (explaining that "'fighting words'—'those which by their very utterance inflict injury or tend to incite an immediate breach of the peace' are not protected by the constitution."). Even though the 'fighting words' doctrine is regarded as dead, this is a move towards allowing speech and does not affect the point, for the point is that restrictions on speech require a specific threat.

that could not happen. We certainly have come a long way, unfortunately in the wrong direction!¹²⁵

With this sentiment, Michigan law Professor LaFave laments the erosion of Fourth Amendment rights to law enforcement. As we have argued, the rights enumerated in the amendments are conceptually related to each other and others based on the unenumerated rights like the right to privacy. Furthermore, the First, Fourth, and Fifth Amendments and the conceptually related unenumerated rights provide protections against identity checkpoints. Against the First Amendment, identity checkpoints intrude on free speech for the sake of an unspecified threat. Anyone traveling to an unpopular event, perhaps an event that many members of the local community do not support, would fear the consequences of linking identity with unpopular views. The chilling effect that such laws have on First Amendment rights runs counter to the Supreme Court's jurisprudence. As such, we know why identity checkpoints send "shivers" down our spines—they resonate with a regime that we have to justify ourselves to, not a state that must justify itself to its citizens.¹²⁶ Democratic government derives from the consent of the governed, not the other way around.

Thus Justice Kennedy's demand that Hiibel do more than affirm that his identification was not the police's business is misguided. It is not the place of the Court to engage in an exercise weighing the amount of a fundamental right that can be restricted for the sake of a hypothetical threat. Instead, the Court should have followed its rational for other infringements on First and Fourth Amendment rights by prohibiting restrictions absent a real, specified threat actually related to the restriction.

VII. Conclusion: The Bright-line

Arguing that the First, Fourth, and Fifth Amendments prohibit laws that compel citizens to identify themselves on reasonable

¹²⁵ Wayne R. LaFave, *The 'Routine Traffic Stop' From Start to Finish: Too Much 'Routine,' Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1890-91 (2004).

¹²⁶ For another take on this difference with reference to the Fifth Amendment, see Privacy Activism, amicus brief for *Hiibel*, available at http://www.abditum.com/hiibel/pdf/privacyactivism_amicus.pdf, (last visited Feb. 27, 2006) at 5-6.

suspicion, the analysis here of the First Amendment parallels previous approaches to the Fourth and Fifth Amendments.¹²⁷ For all of these accounts, the proper remedy is a bright-line that prohibits the state to compel a citizen to provide a name unless the person has been identified as a specific threat to the state on the basis of probable cause.

Justice Kennedy's questionable assertion that a request for identification is less intrusive than a frisk for weapons allowed the Court to transgress a fundamental right persons possess under the Constitution. However, the "commonsense" obtrusive nature of the intrusion is not what is significant. Instead, what matters is that a weapons frisk under reasonable suspicion is predicated on a threat to the officer's safety; officers undertaking a *Terry* weapons frisk cannot use any information gained in those frisks to arrest citizens except for contraband discovered through "plain-feel."¹²⁸ A bright-line existed between what *Terry* said the officer could do for safety and any additional inquiry: The officer could ask, but the suspect may remain silent. *Hiibel* erases that bright-line, inverting the constitutional relationship, by empowering the state to employ the force of law to compel citizens to give information to the police, presenting citizens with a state that can intrude further on their rights under the Constitution.

The Court needs to reestablish the line that existed before *Hiibel*. Taking away the ability of the state to compel citizens to identify themselves will restore the rights courts should recognize under the First, Fourth, and Fifth Amendments. Restoring this line will allow citizens to express their First Amendment rights to silence without having to fear repercussions for not being able to comport themselves anonymously. Moreover, maintaining the line will help ensure that the proper balance between citizens and the state under the Constitution; the government will have to justify itself to citizens instead of improperly conscripting the citizens to incriminate themselves under state powers.

¹²⁷ See, for example, Shelli Calland, *Hiibel v. Sixth Judiciary District Court: Stop and Identify Statutes Do Not Violate the Fourth or Fifth Amendments* 40 HARV. C.R.-C.L. L. REV. 251 (2005) (arguing for the restoration of the bright-line rule from *Terry*). Our analysis goes beyond Calland's timely article by linking the Fourth and Fifth Amendment violations with the First Amendment and the general structure of the Bill of Rights.

¹²⁸ See *supra* notes 42-44 and accompanying text.