Expanding *Terry*: Compulsory Identification in *Hiibel v. Sixth Judicial District Court, Humbolt County*

Trevor Hickey

Follow this and additional works at: https://digitalcommons.law.byu.edu/jpl

Part of the [Fourth Amendment Commons](https://digitalcommons.law.byu.edu/jpl), and the [Law Enforcement and Corrections Commons](https://digitalcommons.law.byu.edu/jpl)

**Recommended Citation**


Available at: https://digitalcommons.law.byu.edu/jpl/vol19/iss2/5

This Casenote is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Brigham Young University Journal of Public Law by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.
Expanding Terry\(^1\): Compulsory Identification in *Hiibel v. Sixth Judicial District Court, Humbolt County*\(^2\)

[We are in danger of forgetting that the Bill of Rights reflects experience with police excesses. It is not only under Nazi rule that police excesses are inimical to freedom. It is easy to make light of insistence on scrupulous regard for the safeguards of civil liberties when invoked on behalf of the unworthy. It is too easy. History bears testimony that by such disregard are the rights of liberty extinguished, heedlessly at first, then stealthily, and brazenly in the end.\(^3\)]

- Justice Frankfurter

**I. INTRODUCTION**

The citizens of the United States enjoy the comfort and convenience of being able to travel freely and enjoy a certain level of privacy while doing so. They also enjoy, with some exceptions, the right to remain silent when encountered by police officers. These freedoms, guaranteed by the Fourth\(^4\) and Fifth Amendments\(^5\) to the United States Constitution, are considered by many to be fundamental rights, not to be easily encroached upon by the government.\(^6\)

---

4. The Fourth Amendment reads:
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.

U.S. Const. amend. IV.

5. The Fifth Amendment reads:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V (emphasis added).

6. Justice Brandeis, dissenting in *Olmstead v. United States*, 277 U.S. 438, 477 (1928), called the “the right to be let alone-the most comprehensive of rights and the right most valued by
Citizens of other nations, however, presently and throughout history, have had to endure the threat of being arbitrarily stopped by government agents who want nothing more than to harass and intimidate. The menacing demand from law enforcement for “Your papers, please!” is a hallmark of a police state. The Gestapo in Nazi Germany and the Committee for State Security, or KGB, in the communist Soviet Union bring to mind police checkpoints, demands for state-issued identification papers, and the threat of imprisonment for anything less than total compliance. These are images that, with the exception of wartime, Americans have not had to endure on their own soil.

While the Supreme Court has placed restrictions and limits on the Fourth Amendment for the purpose of facilitating law enforcement officers in their duties, this right to be free from “unreasonable searches and seizures” has remained intact and is regarded, if not by the judiciary then certainly by the citizenry, as a fundamental civil right. Civil libertarians are put on alert when the government, either through legislation or judicial interpretation, attempts to curtail the Fourth Amendment in favor of increased police power.

Perhaps this is why the seemingly insignificant case of Hiibel v. Sixth Judicial District Court, Humbolt County has garnered so much attention. In Hiibel, a Nevada rancher, Larry D. Hiibel, was charged
with a misdemeanor for obstructing an officer in his duties by refusing to provide identification to the officer who had demanded it. For that, Hiibel was arrested, jailed, charged, convicted, and ordered to pay a fine of $250. Civil libertarian groups, both liberal and conservative, embraced Hiibel’s cause.

One reason for the concern of these usually divergent groups was the fact that the Nevada state laws at issue seemed to contradict what the United States Supreme Court had previously written regarding the compulsive identification of those not meeting the “probable cause” standard. Prior to Hiibel, police could inquire as to the identity of a person who the officer reasonably suspected of a crime, but the officer could not compel the person to answer. The Nevada laws seemed to fly in the face of this “right to remain silent.” In addition, despite the Supreme Court’s prior opinions on the issue, various individual states had, over the years, enacted statutes that attached criminal penalties for refusing to provide one’s name to law enforcement officers upon demand.

In this post-September 11 world it seems that such intrusion into our privacy is not only becoming more common, but is even welcomed by a

---


13. Hiibel, 124 S. Ct. at 2455.
14. Id.
15. For Larry D. Hiibel amicus briefs were submitted by the Electronic Privacy Information Center, the Cato Institute, the American Civil Liberties Union, the National Law Center on Homelessness & Poverty, Privacyactivism, Cyber Privacy Project, freetotravel.org, John Gilmore (a noted civil libertarian who is currently suing John Ashcroft for refusing him the right to travel without showing identification) and the Electronic Frontier Foundation.
19. See Hiibel, 124 S. Ct. at 2456.
large portion of the citizenry. A recent survey found that seventy-four percent of those polled “feel highly or somewhat reassured by having surveillance cameras in public places”\(^{20}\) while seventy-two “percent feel reassured by having cameras in and around private property.”\(^{21}\) While a video camera in a public place may not necessarily violate the Fourth Amendment, this docile encroachment, and the willingness of the citizenry to accept it, is a step towards the slippery slope to a police state.\(^{22}\)

This Note will attempt to show why the decision in *Hiibel* was flawed and why the ramifications of the decision may be detrimental to American citizens’ constitutional rights. Part II of this Note provides a brief background of the jurisprudence for both the Fourth and Fifth Amendments. Part III lays out the facts of the *Hiibel* case and reviews the reasoning of the Court in reaching its decision. Part IV analyzes the Court’s decision, raising points that address the strengths and weaknesses of the Court’s rationale as well as the implications of its decision. The Note concludes with a discussion of the possible ramifications of the *Hiibel* Court’s decision.

II. BACKGROUND FOR FOURTH AND FIFTH AMENDMENT JURISPRUDENCE IN THE UNITED STATES

A. Fourth Amendment Jurisprudence

The Fourth Amendment restricts the government’s power of search and seizure, and had originally been held to apply to the home of the individual.\(^{23}\) However, the Amendment, with all of the attention that it receives in modern criminal courts, lay virtually dormant for the first one hundred and ten years of the United States’ existence.\(^{24}\) Not until 1914,
COMPULSORY IDENTIFICATION

in *Weeks v. United States*, did the Supreme Court begin to recognize the applicability of the Amendment to federal law enforcement officers. In *Weeks*, local police officers, followed by a federal marshal, entered and took documents from the defendant’s home. The Supreme Court ruled that the items obtained by the federal marshal needed to be returned to the defendant and could not be used against him. However, the Court held that the documents taken by the local law enforcement officers did *not* have to be returned since the Fourth Amendment’s reach was limited to the “Federal Government and its agencies.”

State officials did not remain exempt from Fourth Amendment restrictions for long however. Following some intermediary decisions where the Supreme Court held that the states could choose to apply the Fourth Amendment to local law enforcement, the Court in *Mapp v. Ohio* held that the Fourth Amendment was applicable against *all* states through the Fourteenth Amendment. The Court in *Katz v. United States* went a step further in securing the rights of the individual by holding that “the Fourth Amendment protects people, not places,” thereby providing additional protections to people while outside of their homes. However, the Court, in *Elkins v. United States*, recognized that the individual’s right to privacy must sometimes be balanced against governmental interest in providing security for the citizenry. The Court noted, “what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures.” It applied this balancing test, that of individual privacy concerns against compelling governmental interests found in *Elkins*, to the Fourth Amendment when it decided *Terry v. Ohio*, arguably the most influential and well-known Fourth Amendment case in the history of the Supreme Court.

In *Terry*, the question before the Court was “whether it is always unreasonable for a policeman to seize a person and subject him to a

26. GRISWOLD, supra note 24 at 3.
28. *Id.* at 398.
29. *Id.*
32. *Id.* at 655.
34. *Id.* at 351.
35. 364 U.S. 206, 222 (1960) (defendants, after having their conviction for wiretapping upheld by the Ninth Circuit Court of Appeals, were granted their motion to suppress by the Supreme Court, because the search by state officers was illegal and therefore, the evidence was inadmissible in a federal court).
36. *Id.*
limited search for weapons unless there is probable cause for arrest." A police officer searched some young men on a public street that he deemed to be “suspicious.” He found that one of the men had a pistol under his jacket. The Court held that, even where the Fourth Amendment protects individuals from unreasonable search and seizure, the frisk for weapons that could harm the officer or other individuals is permissible. The Court thereby applied the privacy balancing test and found in favor of allowing the warrantless search because of the government’s compelling interest in protecting officers from bodily harm.

_Terry_ is relevant to _Hiibel_ because the concurring opinion of Justice White addresses the question, at least in dictum, that brought _Hiibel_ before the Court in the first place. Justice White noted that:

> [G]iven 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 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.

_Terry_ is not the only case where the Supreme Court addressed the issue of compulsory responses, even if only as an ancillary matter. In _Berkemer v. McCarty_, the Court addressed whether an officer violated a motorist’s Fifth Amendment rights during a traffic stop. The Court, in its explanation of why a traffic stop is not subject to the _Miranda_ rules governing other types of custodial stops, noted that the traffic stop is analogous to the so-called “_Terry_ stop.” Quoting _Terry_, the Court noted:

> [T]he stop and inquiry must be “reasonably related in scope to the justification for their initiation.” Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the

---

38. Id. at 15.
39. Id. at 6. The men had been loitering and pacing in front of a store window for several minutes. The officer thought they might have been “casing a job, a stick-up.” Id.
40. Id.
41. Id. at 30.
42. Id. at 24.
43. Id. at 34 (emphasis added).
45. Id. at 437-39.
officer’s suspicions. But the detainee is not obliged to respond.\textsuperscript{46}

As noted above, the Court’s decisions over the past thirty-six years, while not addressing the issue of compulsory identification head-on, have provided direction for what is and what is not permissible in citizen-police encounters. The \textit{Hiibel} Court used the first part of this jurisprudential analysis to guide its decision regarding compulsory identification.\textsuperscript{47}

\textbf{B. Fifth Amendment Jurisprudence}

The Fifth Amendment,\textsuperscript{48} specifically the portion that prevents self-incrimination has a long rich history dating back to at least the thirteenth century.\textsuperscript{49} The original self-incrimination clause in the Virginia State Constitution stated that “no man could be ‘compelled to give evidence against himself.”\textsuperscript{50} Some have argued, including the respondents in \textit{Hiibel}, that requiring one to identify himself in the course of an encounter with law enforcement is “non-testimonial.”\textsuperscript{51} As such, it would not be covered by the Fifth Amendment. However, the Court’s jurisprudence has developed such that it has held that any communications which could be “testimonial, incriminating, and compelled” are covered by Fifth Amendment protections.\textsuperscript{52} The Fifth Amendment was eventually incorporated against the States through the Fourteenth Amendment’s due process clause by way of \textit{Malloy v. Hogan}.\textsuperscript{53}

The most important Fifth Amendment case regarding detainees is \textit{Miranda v. Arizona}.\textsuperscript{54} In \textit{Miranda}, the Court held that “[p]rior to any questioning, the [suspect] must be warned that he has the right to remain

\begin{flushleft}
\textsuperscript{46} \textit{Id.} at 439-40 (emphasis in original).
\textsuperscript{47} \textit{See generally}, Elkins v. United States, 364 U.S. 206 (1960) (the privacy v. compelling governmental interest test).
\textsuperscript{48} U.S. CONST. amend. V.
\textsuperscript{49} MARK BERGER, TAKING THE FIFTH 1, 3 (1980).
\textsuperscript{50} \textit{Id.} at 22 (citing the Virginia Declaration of Rights, § 8 (1776) as found in 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL ChARTERS, AND OTHER ORGANIC LAWS 3813 (Francis Thorpe ed., W.S. Hein 1993) (1909)) (The original clause was drafted by George Mason).
\textsuperscript{51} \textit{See Brief for Respondent at 30-31, Hiibel v. Sixth Judicial Dist. Court, Humbolt County, 124 S. Ct. 2451 (2004) (No. 03-5554).}
\textsuperscript{53} 378 U.S. 1, 6 (1964) (after refusing to answer questions regarding a gambling operation, the defendant was charged with contempt. The Supreme Court held that the defendant had properly invoked the Fifth Amendment privilege and that it was thus incorporated against the states by the Fourteenth Amendment).
\textsuperscript{54} 384 U.S. 436 (1966).}
\end{flushleft}
silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney . . . ." The Court made clear, however, that *Miranda* rights were limited to custodial interrogations. Custody status is only achieved following an arrest for probable cause. Subsequent decisions bolster that interpretation. The Court has not squarely addressed whether a citizen who is not in a custodial interrogation has the right to remain silent. In the shadow of such precedents, the Court granted certiorari to *Hiibel*.

### III. The Facts of *Hiibel*

On May 21, 2000, Deputy Lee Dove, of the Humbolt County, Nevada Sheriff’s Office was dispatched to follow up on an anonymous report made by a concerned citizen. The citizen reported seeing someone striking a female passenger inside a pickup truck while the truck was parked along a rural roadway. Upon arriving at the scene, Deputy Dove observed a male standing beside a pickup truck, with a female sitting in the passenger seat. The male was Larry D. Hiibel and the female was his teenage daughter, Mimi Hiibel. Deputy Dove observed Mr. Hiibel and noted that based on Mr. Hiibel’s eyes, mannerisms, speech, and odor, Mr. Hiibel might be intoxicated. The deputy’s dash-cam captured the entire incident.

---

55. *Id.* at 444.

56. *Id.* ("By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.")

57. Terry v. Ohio, 392 U.S. 1 (1968). (This differs from one who is simply being detained, under reasonable suspicion, for questioning).

58. See generally Beckwith v. United States, 425 U.S. 341 (1976) (The Court held that IRS agents interrogating a suspect in the suspect’s home are not constrained by *Miranda* as the encounter is not custodial in nature); Oregon v. Mathiason, 429 U.S. 492 (1977) (The defendant had voluntarily gone to the police station, was told he was not under arrest, and then confessed to the crime. The Supreme Court held that the defendant was not in custody because he was not deprived of freedom of action in any significant way and that he was not subject to *Miranda* protections).


60. *Id.*

61. The dash-cam video and written transcript may be accessed online at http://www.papersplease.org/hiibel/video.html.

62. *Id.* Whereas some of the audio of the dash-cam is muffled, unintelligible or otherwise undecipherable, it is so stated. The written transcript of the dash-cam video encounter, when compared to the video itself, appears to have some discrepancies. The following transcript is the author’s own best transcription of the dash-cam video. First, Deputy Dove arrives on the scene and encounters Larry Hiibel. Mr. Hiibel then engages the officer:

*Hiibel: How’s it going sheriff?*

*Deputy: How you doin’?*

*Hiibel: (unintelligible)*

---
Deputy: Well?
Hiibel: Looks like I’m parked okay . . .
Deputy: Well, I got a report that there’s been a fight going on between you two tonight.
Hiibel: Well, I don’t know about that . . .
Deputy: Why don’t you come over here with me . . .
Hiibel: I’m parked on the side of the road . . . *(unintelligible)* . . .
Deputy: You’ve got any identification on you?
Hiibel: No, why should I have any I.D.?
Deputy: The thing of it is . . . we’re conducting an investigation, okay, and I need to see some identification.
Hiibel: Naw, I just suppose you take me to jail.
Deputy: I need to see some identification.
Hiibel: I don’t, I don’t think I’ve . . .
Deputy: Sir, come here.
Hiibel: Sir, don’t grab onto me . . .
Deputy: I won’t grab you if you’ll come back over here. Come over here, come here.
Hiibel: Alright, fine, I’m over here. Am I off the road?
Deputy: I need to see some identification.
Hiibel: Why?
Deputy: Because I’m conducting an investigation.
Hiibel: Investigating what?
Deputy: I’m investigating . . .
Hiibel: Am I legal? I’m illegal? I am . . . am I illegally parked?
Deputy: How much alcohol have you had to drink?
Hiibel: That don’t matter . . . is it against the law to drink?
Deputy: It could be a searchable situation . . .
Hiibel: Okay then, take me to jail.
Deputy: I didn’t say that.
Hiibel: Alright then. I’m not illegally parked . . .
Deputy: Okay . . .
Hiibel: I wanna know what I’m charged with.
Deputy: I’m . . . you’re not being charged with anything. I’m conducting an investigation.
Hiibel: I don’t know what you want with me . . .
Deputy: I’m conducting an investigation . . .
Hiibel: Why?
Deputy: Because I want to find out who you are and I want to find out what I got going on here.
Hiibel: *(unintelligible)*
Deputy: Let me see your identification.
Hiibel: Take me to jail.
Deputy: Let me see your identification.
Hiibel: No.
Deputy: Show me your identification.
Hiibel: Go ahead and, and cuff me.
Deputy: Let me see your identification.
Hiibel: I’m being . . . I’m um being cooperative with you . . . I . . .
Deputy: Let me see some I.D.
Hiibel: I’m cooperating.
Deputy: Let me see some I.D.
Hiibel: Cuff me and take me to jail.
Deputy: Let me see some I.D. then we’ll talk okay?
Hiibel: I don’t want to talk . . . *(unintelligible)* . . . I’ve broke no laws, take me to jail, I don’t care.
Deputy Dove asked or demanded to see “identification” from Mr. Hiibel, making such a demand eleven times. Not once was Mr. Hiibel asked to state his name or to verbally identify himself. Mr. Hiibel was convicted of a misdemeanor, that of resisting a public officer in violation of Nevada Revised Statutes 199.280.63

Mr. Hiibel unsuccessfully appealed his misdemeanor conviction to the Sixth Judicial District Court of the State of Nevada, in and for the County of Humbolt.64 He then filed a writ of certiorari in the Supreme Court of the State of Nevada.65 In that petition, Mr. Hiibel requested the court declare unconstitutional the portion of Nevada Revised Statutes.171.123 that requires persons who are subject to a Terry stop to identify themselves.66 The Nevada Supreme Court was split in its

---

63. NEV. REV. STAT. 199.280 (2002) reads, in pertinent part:
A person who, in any case or under any circumstances not otherwise specially provided for, willfully resists, delays, or obstructs a public officer in discharging or attempting to discharge any legal duty of his office shall be punished . . . where no dangerous weapon is used in the course of such resistance, obstruction, or delay, for a misdemeanor.

The basis for the conviction was that Mr. Hiibel, during a Terry stop, had failed to identify himself to a police officer upon request, in violation of NEV. REV. STAT. 171.123 (2001) which reads in pertinent part:
1. Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing, or is about to commit a crime . . . 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.

Id.

65. Id.
66. Id.
decision to uphold the statute.67 The Supreme Court of the United States
granted certiorari on October 20, 2003.68 The Court, by a 5-4 vote,
upheld the conviction on both Fourth Amendment and Fifth Amendment
analyses, with Justice Stevens dissenting and Justices Breyer, Souter, and
Ginsburg joining in a separate dissent.69 A petition for a rehearing was
filed, but also denied on August 23, 2004.70

IV. THE COURT’S REASONING

A. Fourth Amendment Analysis

The Court held that the process of asking questions is an essential
part of police investigations and that an officer, with reasonable
suspicion of an individual, has the right to detain a person to investigate
the matter more fully.71 The Court noted that several states have, in their
criminal code, “stop and identify” statutes.72 While these statutes vary
somewhat in their approach, “all permit an officer to ask for, or require a
suspect to disclose, his identity.”73 As long as the Terry stop is limited
and the officer’s action is “reasonably justified at its inception and
reasonably related in scope to the circumstances which justified the
interference in the first place” the officer is permitted to demand the
person’s name.74

The Court indicated that the oft-referenced “balancing test” between
the individual’s right to privacy and the government’s compelling
interest leans in favor of the “strong government interest in solving

67. Hiibel v. Sixth Judicial Dist. Court, 118 Nev. 868 (Nev. 2002) (The court was split four
to three on Hiibel.) Interestingly enough, much of the argument the majority relied upon related to
the war on terror and the government’s need to know with whom it is dealing. Id. at 874. The dissent
refuted that argument and noted that the precarious time in our country’s history is “precisely the
time when our duty to vigilantly guard the rights enumerated in the Constitution becomes most
important.” Id. at 880.
69. Hiibel v. Sixth Judicial Dist. Court, Humboldt County, 124 S. Ct. 2451, 2457, 2460
(2004).
71. Hiibel, 124 S. Ct. at 2458.
72. Id. at 2546. See ALA. CODE § 15-5-30 (2003); ARK. CODE ANN. § 5-71-213(a)(1) (2004);
COLO. REV. STAT. § 16-3-103(1) (2003); DEL. CODE ANN. tit. 11, §§ 1902(a), 1321(6) (2003); FLA.
STAT. ANN. § 856.021(2) (2003); GA. CODE ANN. § 16-11-36(b) (2003); ILL. COMP. STAT. 5/107-14
(2004); KAN. STAT. ANN. § 22-2402(1) (2003); LA. CODE CRIM. PROC. ANN. art. 215.1(A)
(2004); MO. REV. STAT. § 84.710(2) (2003); MONT. CODE ANN. § 46-5-401(2)(a) (2003); NEB.
REV. STAT. § 29-829 (2003); N.H. REV. STAT. ANN. §§ 594-2, 644-6 (2003); N.M. STAT. ANN. § 30-22-3
(2004); N.Y. CRIM. PROC. § 140.50(1) (Consol. 2004); N.D. CENT. CODE § 29-29-21 (2003); R.I.
GEN. LAWS § 12-7-1 (2003); UTAH CODE ANN. § 77-7-15 (2003); VT. STAT. ANN. tit. 24, § 1983
(2003); WIS. STAT. § 968.24 (2003).
73. Hiibel, 124 S. Ct. at 2546.
74. Id. (citing United States v. Sharpe, 470 U.S. 675, 682 (1985)).
crimes and bringing offenders to justice.” The Court found that knowledge of identity also serves the government’s interests in providing officer safety, where the officer may discover the individual has outstanding warrants or has a record of violence or a mental disorder. The Court also observed that where the police are investigating cases of domestic assault knowledge of identity is particularly important to assess the situation, the threat to the officer’s safety, and the possible danger to the potential victim.

The Court noted that it had previously addressed the issue of whether a person could be compelled to identify himself to an officer who had less than probable cause. However, it dismissed its prior analyses as “dicta” and declined to be bound by them. The Court distinguished Hiibel from the issues in those cases by stating that the previous cases dealt with Fourth Amendment issues and the rights that citizens have against the government. Mr. Hiibel’s obligation to reveal his name arose out of Nevada state law, not the Fourth Amendment.

The Court expanded the scope of Terry, permitting “a State to require a suspect to disclose his name in the course of a Terry stop” (a stop predicated on reasonable suspicion, not probable cause). To justify the expansion of Terry, the Court invoked the privacy balancing test stating, “[t]he request for identification has an immediate relation to the purpose, rationale, and practical demands of a Terry stop. The threat of criminal sanction helps to ensure that the request for identity does not become a legal nullity.” As the duration of the Terry stop is kept short, the nature of the stop is not altered by the statute and does not violate the Fourth Amendment rights of the individual.

According to the Court, the petitioner’s concerns of arbitrary police stops followed by arrests for “being suspicious” are unwarranted. The Court noted Terry stops are guided by strong principles, namely that the “stop [must] be justified at its inception and be ‘reasonably related in scope to the circumstances which justified’ the initial stop.” In other

75. Hiibel, 124 S. Ct. at 2546. (citing Hayes v. Florida, 470 U.S. 811, 816 (1985)).
76. Id. at 2546.
77. Id.
79. Hiibel, 124 S. Ct. at 2459.
80. Id.
81. Id.
82. Id.
83. Id.
84. Id. at 2454.
85. Id.
86. Id.
words, “[the] officer may not arrest a suspect for failure to identify himself if the identification request is not reasonably related to the circumstances justifying the stop.”

B. Fifth Amendment Analysis

The Court recognized that for a communication to qualify for Fifth Amendment privilege, the “communication must be testimonial, incriminating, and compelled.” While the respondents argued that the disclosing of one’s identity did not qualify as “testimonial,” the Court held that disclosures of identity may indeed be testimonial, but did not make a definitive ruling on that issue. The Court avoided this issue because it found that the mere disclosure of one’s name presented no reasonable danger of incrimination. The Court reasoned that since the disclosure of one’s name is not per se incriminating, meaning that if “the answer of the witness will not directly show his infamy, but only tends to disgrace him, he is bound to answer.” Since Hiibel’s name alone would not incriminate him, it was not protected by the privilege.

Perplexingly, the Court seemed to expand Fifth Amendment protections by citing Kastigar v. United States. According to Kastigar, the Fifth Amendment privilege “protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might so be used.”

The Court held that the petitioner’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 that it ‘would furnish a link in the chain of evidence used to prosecute’ him.” The petition had simply “not explain[ed] how the disclosure of his name could have been used against him in a criminal case.”

The Court minimized the importance of the disclosure of one’s identity “in the scheme of things” so as only to be significant in “unusual circumstances.” The Court did note that a case may arise where a

87. Id.
88. Id. at 2460.
89. Id.
90. Id.
91. Id. (citing Brown v. Walker, 161 U.S. 591, 598 (1896)).
92. Id. at 2460.
95. Hiibel, 124 S. Ct. at 2461 (citing Hoffman v. United States, 341 U.S. 479, 486 (1951)).
96. Id.
97. Id.
person, in the course of a *Terry* stop, fears that providing his name to the police may give them “a link in the chain of evidence needed to convict the individual of a separate offense,” and the Court can then decide if the Fifth Amendment privilege applies and what remedy must follow. 98 Thus, the Court declined to decide that issue definitively in *Hiibel*. 99

**C. The Dissenting Opinions**

1. **Justice Stevens**

Justice Stevens’s dissent argued that even with the Nevada legislature curtailing the statute to compel only disclosure of the suspect’s name it still violated the suspect’s Fifth Amendment rights. 100 Fifth Amendment protections are “directed squarely” at those that are under the scrutiny of the government for a criminal investigation and therefore any person who is being questioned by the police under “reasonable suspicion” has a right to refuse to provide information to the police. 101 The Fifth Amendment’s protections apply in *Terry* stops, where the “officer’s inquiry must be reasonably related in scope to the justification for [the stop’s] initiation.” 102 Justice Stevens noted the *Berkemer* Court’s analysis that the “detainee is not obliged to respond” to an officer’s inquiry into the suspect’s identity. 103 He also noted that generally, the Court’s prior decisions have not required a person to provide an officer with his name or face arrest. 104 Justice Stevens wrote, “it is no surprise that petitioner assumed, as have we, that he had a right not to disclose his identity.” 105

Justice Stevens also contests that, despite the majority’s refusal to answer the question, the communication was in fact testimonial. 106 In *Doe v. United States*, 107 the Court found that a “testimonial communication” is the “‘extortion of information from the accused’, the

---

100. *Id.* at 2464 (Stevens, J., dissenting).
101. *Id.* at 2462.
102. *Id.* (citing *Berkemer* v. *McCarty*, 468 U.S. 420, 439 (1984)).
103. *Hiibel*, 124 S. Ct. at 2463.
104. *Id.*
105. *Id.*
106. *Id.* at 2464.
107. 487 U.S. 201, (1988). (*Doe* found that a suspect of a grand jury investigation can be compelled by the court to authorize foreign banks to disclose records of his accounts, without acknowledging the existence of those documents, without violating the Fifth Amendment. *Id.* at 214).
attempt to force him ‘to disclose the contents of his own mind’ that implicates the Self-Incrimination Clause.”

Justice Stevens also noted that the Court had recently decided that “whatever else the term [‘testimonial’] covers, it applies at a minimum . . . to police interrogations.”

Justice Stevens noted that the majority focused on the “incrimination factor” of the communication to find that it is not protected by the Fifth Amendment. He reminded the majority that the Court has found that “[c]ompelled testimony that communicates information that may ‘lead to incriminating evidence’ is privileged even if the information itself is not inculpatory.”

Justice Stevens then posed the question: Why would an officer ask a person’s name if not to incriminate him or provide a link in the chain of evidence? Further, “why else would the Nevada Legislature require its disclosure only when circumstances ‘reasonably indicate that the person has committed, is committing, or is about to commit a crime?’ If the Court is correct, then petitioner’s refusal to cooperate did not impede the police investigation, . . . [the statute] requires nothing more than a useless invasion of privacy.”

The fact that the officer will use that information provided to him to compare it to a database and ultimately use that information in a criminal prosecution demonstrates the importance of the person’s name to the police and the citizen’s interest in not providing it to the them.

2. Justices Breyer, Souter, and Ginsburg

The remaining dissenting Justices began their analysis by noting that the Terry case, while allowing for “stop and frisk” searches, was conditional upon “reasonable suspicion.” Furthermore, Justice White, in that same opinion, wrote that “answers [to questions by the police to a suspect], may not be compelled, and refusal to answer furnishes no basis for arrest, although it may alert the officer to the need for continued observation.” The dissent noted that, ten years after Terry, the Court had declined to answer the question of “what’s the State’s interest in

108. Hiibel, 124 S. Ct. at 2463 (citing Doe, 487 U.S. at 211).
110. Hiibel, 124 S. Ct. at 2463.
111. Id. at 2464 (citing, ultimately, Doe, 487 U.S. at 208 n.6).
112. Hiibel, 124 S. Ct. at 2464.
113. Id. See also NEV. REV. STAT. 171.123(1) (2001).
114. Hiibel, 124 S. Ct. at 2464.
115. Id.
116. Id. at 2465.
117. Id. (citing Terry v. Ohio, 392 U.S. 1, 34 (1968)) (White, J., concurring).
putting a man in jail because he does not want to answer” when asked to identify himself.118 Five years later, the Berkemer Court held that, while the police may detain a suspect to try and obtain more information, the person is “not obliged to respond.”119 In 1983, in Kolender v. Lawson,120 Justice Brennan’s concurrence stated that a Terry suspect “must be free to decline to answer the questions put to him.”121 As recently as 2000, the Court held that “allowing officers to stop and question a fleeing person ‘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.’”122

The dissenting Justices argued further that these statements, which have stood for the past twenty years, are the type that the legal community typically takes as statements of law.123 They postulated that the efforts of law enforcement have been considerably hampered by these long-standing rules and the dissenting Justices saw no need to change that now.124

V. ANALYSIS

A. “Your papers please!": To I.D., or Not to I.D.

While there has been a considerable debate about the constitutionality of Nevada Revised Statutes 171.123(3), it may be “much ado about nothing.” When the facts of Hiibel are scrutinized, it can be found that there is not a constitutional issue. It appears that Larry D. Hiibel did not even violate the statute in the first place.125

In an attempt to rebuff Mr. Hiibel’s assertions that the government’s purpose in upholding this law essentially advocates the implementation of a “national identification system,”126 the respondents contended that the government does not require the production of a driver’s license or

---

121. Id.
122. Hiibel, 124 S. Ct. at 2465 (citing Illinois v. Wardow, 528 U.S. 119, 125 (2000)).
123. Hiibel, 124 S. Ct. at 2465.
124. Id.
   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.
presumably any other written form of identification by a person detained under reasonable suspicion. The Respondents noted that:

This requirement [to hold a written form of identification] reduces the person’s discretion as to how he or she chooses to comply with Nev. Rev. Stat. 171.123(3). In addition, it is more intrusive than merely requiring a person to state their name to an officer. Allowing the person to choose how to comply with this requirement maintains a correct balance between the Fourth and Fifth Amendments.

The majority opinion seemed to concur when it stated:

[a]s we understand it, the 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.

Under the Court’s and the State of Nevada’s mutual understanding, Nevada Revised Statutes 171.123(3) requires the suspect to state his name if asked for it by law enforcement, but the statute does not explicitly provide that the suspect must produce identification for law enforcement.

A review of the dialogue between Deputy Dove and Mr. Hiibel reveals that Deputy Dove did not afford Mr. Hiibel the opportunity to identify himself by simply stating his name. Instead, Deputy Dove demanded eleven times, to “see some I.D.,” to be “show[n] some identification” or “risk being arrested.” In Mr. Hiibel’s Petition for a Rehearing, he argued, inter alia, that the statute did not require him to produce identification to the officer, but rather to state his name if so demanded by the officer. Deputy Lee Dove never demanded to know Mr. Hiibel’s name. Unfortunately, the issue was never addressed by the Court as the petition for a rehearing was denied.

While the facts of this case may have been erroneously applied, the Court chose to rule on whether to expand the government’s privacy

127. Brief for Respondent at 33, Id.
128. Id. (emphasis added).
129. Hiibel, 124 S. Ct. at 2457.
130. See supra note 62.
131. Id.
balancing test. The fact that the Court may have answered a question that
was errantly postulated does not diminish the significance or the strength
of the Court’s decision regarding the “balancing test” and *Terry*.\(^{134}\)

**B. The Fourth Amendment Question**

1. The “balancing test”

   The majority set the standard that “an officer may not arrest a
   suspect for failure to identify himself if the request for identification is
   not reasonably related to the circumstances justifying the stop.”\(^{135}\) In
   other words, the reasons for the *Terry* stop itself must necessitate the
   officer’s knowledge of a person’s identity for the officer to have grounds
   to apply, for example, Nevada Revised Statutes 171.123(3) and have
   grounds to arrest him for failure to identify himself.

   This rationale is somewhat problematic. First, it requires the officer
to inform the suspect of the reasons for the stop. Second, the officer must
allow the suspect to decide for himself whether his identity is necessary
knowledge for the officer’s investigation into the matter as it was
explained to him by the officer. Third, even if the layperson suspect is
able to navigate this morass of legal complexity, it is difficult to think of
a situation in which a person’s identity would *not* be useful to the officer
in his encounter with the suspect. The Court provided some examples of
such usefulness such as a warrant check or to see if the suspect had a
history of violence or mental disorders.\(^{136}\) However, these reasons are
themselves problematic, as even the Court’s own examples cannot meet
this new *Hiibel* standard.

2. Warrant check

   The standard for compulsive identification is that “an officer may not
arrest a suspect for failure to identify himself if the request for
identification is not reasonably related to the circumstances justifying the
stop.”\(^{137}\) This standard is based on the fact that knowledge of the
suspect’s identity serves “important government interests.”\(^{138}\) The Court

---

134. “The reasonableness of a seizure under the Fourth Amendment is determined ‘by
balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of
legitimate government interests.’” *Hiibel*, 124 S. Ct. at 2459 (citing Delaware v. *Prouse*, 440 U.S.
648, 654 (1979)).


136. *Id.* at 2458.

137. *Id.* at 2459.

138. *Id.* at 2458.
uses the example of discovery of outstanding warrants as being an important government interest that would justify the compulsory identification. While there is no doubt that discovery of outstanding warrants serves an important government interest, the question is whether a warrant search meets the standard.

An example serves to illustrate the point. A hypothetical police officer receives a call over his radio that a convenience store has just been robbed at gunpoint. The store clerk obtained a good description of the suspect and the description is dispatched to the officer. Moments later the officer sees a man matching the suspect’s description walking away from the direction of the convenience store. The officer stops the man. What may the officer do to further his investigation of the crime? The suspect is most likely armed and therefore it is reasonable for the officer to conduct a “felony” or “high-risk” stop, draw his service weapon, and demand that the suspect render himself compliant to the officer’s demands. The officer may also conduct a Terry frisk for weapons. But, under the ruling of the majority, the officer may not compel the suspect to identify himself. Even if the officer wants to run the suspect’s name for warrants, “an important government interest,” he may not demand the name because the warrant check has nothing to do with the robbery, which was the reason for the initial stop. Unless the store clerk was familiar with the suspect and could provide the officer with his name, any demand for the name would be, as the dissent called it, “nothing more than a useless invasion of privacy.” On this point, at least, the majority and dissent seem to agree.

Under this standard, an officer may not demand a person to reveal their name simply because the officer would like to see if he can find an outstanding warrant. When a person is under reasonable suspicion for criminal activity, a warrant search is not going to reveal to the officer any information that will further his investigation into that particular criminal event. Even if it does reveal information that is pertinent to the investigation, the Fifth Amendment privilege would then apply. Therein lies a constitutional “Catch-22.” The suspect cannot be required to furnish information to the police that will further an investigation and incriminate the suspect.

3. Officer safety

In situations where the suspect’s identity is not important to the

139. Id.
140. E.g., “I was robbed by one of my customers, his name is Robert.”
141. Hibel, 124 S. Ct. at 2464.
investigation at hand an “officer safety reason” may be invoked by the police officer to require the suspect to furnish his name. The Court noted that a person’s criminal record might reveal a history of violence that could be useful to the officers in maintaining their own safety.142 This argument fails on two points. First, it is a “catch-all” and essentially eviscerates any distinction the Court meant to draw when establishing an officer’s rights to know a suspect’s identity. Every situation in which an officer comes into contact with a potential law-breaker or anyone else for that matter, the officer is faced with a potential safety risk and thus can justify demanding the individual’s name. The privacy versus compelling government interest balancing test becomes moot if everyone has their name processed for warrants in the name of “officer safety.”

Second, while a history of violence is a better predictor than nothing at all, a history of violence is anything but conclusive. Even mental health professionals conducting in-depth psychological analysis of their patients are wrong in their predictions of violence two out of three times.143 Even the psychological tests used in the screening process of police officers themselves have had limited success in predicting violence.144 A history of violence does not compel the suspect to lash out at the officer without control. The converse is also true: the absence of a history of violence or aggression does not guarantee the officer’s safety in that particular moment.

In Hiibel, Deputy Dove was in close contact with Larry D. Hiibel for approximately two minutes and ten seconds before the deputy placed him under arrest.145 The deputy should have done a Terry frisk for weapons if the deputy truly feared for his safety. Instead, Deputy Dove demanded identification from Mr. Hiibel. The Court has long allowed this type of “pat-down” search to protect the officer from potential danger.146 Ironically, if Deputy Dove had performed this search, he would have discovered the knife that Mr. Hiibel had in his pocket.

However, it would appear from Deputy Dove’s actions on the dash-cam video that the primary reason for his demand of identification was not because he feared for his safety. The purpose of his demand for identification was that he wanted to “find out who [Mr. Hiibel was]” and

---

142. Id. at 2458.
to find out "what we got going on here,"¹⁴⁷ The same can be generalized to the majority of other Terry stops. Knowledge of a person’s name is simply a search for a possible threat, whereas searching a person for weapons is a search for a probable threat.

The balancing test devised by the Court, namely balancing the security of the officer and the community against the privacy of the individual, is based on this notion of possible versus probable. While violence against an officer is possible in any encounter with members of the public, the question remains, does reasonable suspicion give rise to the probability of a threat? If not, should officers be allowed to intrude upon the privacy interests of the individual based on mere possibilities?

If the Court meant to answer this question with its decision in Hiibel, then American citizens truly have reason to fear for their privacy interests. Such reasoning could, with the proper impetus or tragic event like that of September 11 lead the Court to allow even more intrusive and sweeping legislation to take effect. Today the constitutionality of having to divulge one’s name when under reasonable suspicion is argued, tomorrow it may be an argument about preventing compulsive DNA sampling of the general public by government agencies under a standard even less than that of reasonable suspicion.¹⁴⁸

C. The Fifth Amendment Question

The majority held that for a communication to be afforded Fifth Amendment protection, it must be “testimonial, incriminating, and compelled.”¹⁴⁹ Mr. Hibbel’s communication met all three requirements.¹⁵⁰ As there is no question that the statute compels a suspect to reveal his name to the officer¹⁵¹ the analysis will focus primarily upon the first two prongs of the test.

1. Is the communication testimonial?

The majority’s opinion does not rule out the possibility that an officer’s compelling a suspect to reveal his identity is considered

---

¹⁴⁷. See supra note 62.
¹⁴⁸. Recently, in the small town of Truro, Massachusetts, police have asked all the local men in the town to voluntarily submit to DNA sampling to help solve a three year old murder. “DNA sweeps” are rare so far in the United States, but Britain has had 292 since 1987 and Germany boasts the largest sweep, 16,000 men, in 1998. Amanda Ripley, The DNA Dragnet. To find a killer, a town asks all its men to give a sample. Savvy policing or invasion of privacy?, TIME, Jan. 24, 2005, at 39.
¹⁵⁰. Hiibel, 124 S. Ct. at 2460-61.
The majority concedes that to qualify as testimonial the communication “must itself, explicitly or implicitly, relate a factual assertion or disclose information.” A person’s name certainly qualifies as “factual information” that is “disclosed.”

Justice Stevens contended that the demand for a person’s name is testimonial. He noted that the standard stated by the majority for Fourth Amendment Terry stops, that of the officer’s inquiry being reasonably related in scope to the justification for [the stop’s] initiation, is what grants Fifth Amendment protections to those interrogated by the police under mere suspicion. The suspect is not required to respond to the officer’s inquiries to determine his identity. This has long been the standard held by the Court.

The demand for a person’s name is testimonial. It requires a person to divulge personal information of a factual nature. Information that is not testimonial does not necessarily have a foundation in truth. But a person’s name is a fact that may be used against them. If there is any doubt as to the testimonial nature of one’s name, one need only examine the various state statutes for providing a false name to a law enforcement officer.

2. Incrimination

The Justices agree that being compelled to identify one’s self is, at the very least, plausibly testimonial. Where they differ is in the notion of incrimination. The majority conceded that this prong was fact sensitive and that each situation would be different, but did not rule out the possibility of one’s name being incriminating. Justice Stevens questioned why a police officer would want a person’s name if not to use it in an effort to determine that person’s identity.

152. Hiibel, 124 S. Ct. at 2460.
153. Id. (citing Doe v. United States, 487 U.S. 201, 210 (1988)).
154. Hiibel, 124 S. Ct. at 2462.
155. Id. (citing Berkemer v. McCarty, 468 U.S. 420, 439 (1984)).
156. Hiibel, 124 S. Ct. at 2462.
157. This proposition was first put forth in Davis v. Mississippi, 394 U.S. 721, 727 (1969).
158. Most, if not all, states have criminalized the act of providing a false name to a police officer. E.g., GA. CODE ANN. § 16-10-25 (2003). (A person who gives a false name, address, or date of birth to a law enforcement officer in the lawful discharge of his official duties with the intent of misleading the officer as to his identity or birth date is guilty of a misdemeanor); FLA. STAT. ch. 901.36 (1999) (It is unlawful for a person who has been arrested or lawfully detained by a law enforcement officer to give a false name, or otherwise falsely identify himself or herself in any way, to the law enforcement officer or any county jail personnel . . . any person who violates this . . . commits a misdemeanor of the first degree).
159. Hiibel, 124 S. Ct. at 2460, 2463.
160. Id. at 2461.
it against him in some fashion.  

But perhaps what is most bothersome about both the majority and the dissenting opinions is that neither recognizes that Mr. Hiibel had, in fact, real reason to fear that the police would use his own name against him. Both the petitioner’s brief and petition for a rehearing state that Mr. Hiibel’s name could have been used to implicate him in the crime of domestic battery. Given that he and his minor daughter share the same last name, providing his name to the deputy would have given the deputy information that could have then been used against Mr. Hiibel for the prosecution of the crime of domestic battery or child abuse. Neither the majority nor the dissent acknowledges this fact.

D. What’s in a Name? Why Hiibel’s Struggle for Anonymity is Important.

Some may fail to see the importance of Mr. Hiibel’s struggle to maintain his right to refuse to produce identification. The police discovered Mr. Hiibel’s name anyway and had they chosen to charge him with the crimes of domestic battery or child abuse they could have then used that information against him. The point, then, may seem moot. However, Mr. Hiibel’s argument is grounded in sound constitutional principles. The right to be free from unreasonable search and seizure and the right to remain silent are simple, powerful human rights that should not be curtailed. The State of Nevada’s compulsory identification statute represents a dangerous encroachment on Fourth Amendment rights. This expansion of police powers under *Terry* is not something that should be easily dismissed by concerned citizens. For as police powers expand, liberties diminish.

This expansion of the *Terry* doctrine fundamentally alters the citizen-police relationship. No longer is a citizen under mere suspicion free to remain silent in the face of police interrogation. He must fully cooperate with the police until such a time as he has sufficiently condemned himself and the police have probable cause to arrest him. Only then may he exercise his right to remain silent. The amicus brief of the Cato Institute noted that this irony was not lost on Judge Prettyman in

161. *Id.* at 2464.


163. “The Cato Institute seeks to broaden the parameters of public policy debate to allow consideration of the traditional American principles of limited government, individual liberty, free markets and peace. Toward that goal, the Institute strives to achieve greater involvement of the intelligent, concerned lay public in questions of policy and the proper role of government.” *Available at* http://www.cato.org/about/about.html.
District of Columbia v. Little. Judge Prettyman noted that to say that a citizen who is suspected of a crime has the right to remain silent, but that a citizen who is not suspected of a crime has no such right is a “fantastic absurdity.”

Hiibel, like many citizens who encounter police, found himself in that twilight zone of legal protection: caught between innocent bystander and suspect. In the hazy legal realm of “reasonable suspicion” the Court found that, despite it being “a fantastic absurdity,” the right to remain silent does not apply to those under reasonable suspicion.

VI. CONCLUSION

While civil libertarians are disappointed and concerned with the Court’s holding in Hiibel, most individuals will probably see little initial change in their interactions with law enforcement. After all, laws that compel the disclosure of a person’s identity have been on the books in several states for years. If we trust the reasoning of the Hiibel Court, we could very well believe that civil libertarian’s fears of police abuse are unfounded. The Court noted that the police are only allowed to compel identification of those who are under reasonable suspicion of a crime where permitted by state statute.

Nevertheless, the Court’s analysis creates a new level of uncertainty of individual civil rights for citizens who encounter the police. Does a suspect of a crime have the right to remain silent? That depends. How about a witness to a crime? How about someone who casually encounters the police on the street and engages them in conversation? What about persons who may find themselves in questionable situations, such as protest marches, rallies, or at meetings of other dissidents? While most people will probably err on the side of caution and willingly surrender identification upon demand, there are those “rebellious” few who will still hold on to the notion that one’s identity is no business of the police unless there is probable cause to arrest them for a crime.

Perhaps the most sobering idea, one that appears to have been lost on

164. 178 F.2d 13 (D.C. Cir. 1949).
165. Id. at 17; Amicus Brief of the Cato Institute, Hiibel v. Sixth Judicial Dist. Court, Humbolt County, 124 S. Ct. 2451 (2004) (No. 03-5554).
166. Id.
167. For example, Alabama’s (ALA. CODE § 15-5-30 (2003)) and Arkansas’s (ARK. CODE ANN. § 5-71-213(a)(1) (2004)) corresponding codes have been in place since 1975. Colorado’s (COLO. REV. STAT. § 16-3-103(1) (2003)) since 1983, and Delaware’s (DEL. CODE ANN. tit.11, §§ 1902(a), 1321(6) (2003)) since 1953.
the Court, is that even if the surrender of a person’s name may be a relatively insignificant inconvenience, history has shown us that the imposition of tyranny usually begins with slow, incremental infringements on the liberties of the citizenry. If the Hiibel decision is indicative of the post-September 11 Court’s mindset regarding civil liberties, there is no telling how long it will be before police may compel citizens to surrender other forms of personal information. It might not be to far off when law enforcement may successfully argue it has a compelling interest in knowing a person’s travel itinerary, home address, Social Security number, and/or medical information.

The descent from a free state to a police state is usually not abrupt. Liberties and freedoms are usurped quietly, out of “necessity”, and usually with the consent of the citizens. For that reason, the struggle of Larry D. Hiibel to remain silent in the face of authority is important. Representative Ron Paul (R-TX.) made this observation about the citizenry to Congress: “[t]olerance of inconvenience to our liberties is not uncommon when both personal and economic fear persists. The sacrifices being made to our liberties will surely usher in a system of government that will please only those who enjoy being in charge of running other people’s lives.”

Any American citizen who does not take their privacy rights for granted should be concerned about the Hiibel holding and the logic used to arrive at it. Any American citizen who expects to be able to keep silent in the face of menacing government authority should likewise be concerned about Hiibel. The slippery slope to totalitarianism and the police state is not as far as one might think. All we, as citizens, need do to hasten our arrival at that dark place is to allow those constitutional safeguards, such as the Fourth and Fifth Amendments, to be whittled away, little by little; a willing sacrifice upon the alter of liberty in exchange for the promise of safety and security.


170. Whatever physiological or psychological malformation may occur in one individual human being, may potentially occur in any other. The same applies to whole nations: the lesson of Nazi Germany and Soviet Russia is not how far Germans or Russians could fall, but how far human beings-all of us-can fall, if critical rationalism, traditional ethics, religious values, or constitutional government have been sufficiently weakened or destroyed. RICHARD VETTERLI & WILLIAM E. FORT, JR. THE SOCIALIST REVOLUTION 3 (1st ed. 1968) (citing WILLIAM EBENSTEIN, TOTALITARIANISM, NEW PERSPECTIVES 4 (1st ed. 1962)).

The author is a former juvenile probation officer for the State of Utah and is currently a Juris Doctoral candidate at the J. Reuben Clark Law School at Brigham Young University. He has a B.S. in psychology from Brigham Young University. He would like to thank his parents for their support and encouragement, his wife Edie for her devotion and patience, and his children Joshua, Melissa, and Samantha for giving him the desire to advocate for liberty.

---

172. The author is a former juvenile probation officer for the State of Utah and is currently a Juris Doctoral candidate at the J. Reuben Clark Law School at Brigham Young University. He has a B.S. in psychology from Brigham Young University. He would like to thank his parents for their support and encouragement, his wife Edie for her devotion and patience, and his children Joshua, Melissa, and Samantha for giving him the desire to advocate for liberty.