Hiibel v. Sixth Judicial District Court: Can Police Arrest Suspects for Withholding Their Names?

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I. Introduction

Suppose that someone calls the police and alerts them to a crime that has been committed. Using the information provided, the police stop you because you fit the description of the person reported. If the police ask your name, must you give it? The United States Supreme Court believes you must if the state you are in has passed a law requiring you to give your name. In a factual situation very similar to this, the United States Supreme Court held in *Hiibel v. Sixth Judicial District Court*[1] that the Nevada law requiring a person to provide his name in this situation does not violate either the Fourth or Fifth Amendment.

This note examines the *Hiibel* decision and its effect on the future. Part II reviews the history behind the Court's current view of Fourth Amendment seizures of person and the Fifth Amendment's prohibition against compelled self-incrimination. Part III examines the majority opinion and dissent of *Hiibel*. Finally, Part IV discusses the effect of the *Hiibel* decision on Fourth and Fifth Amendment jurisprudence.

II. Historical Background of the Fourth and Fifth Amendment Issues Raised By *Hiibel*

A. The Fourth Amendment

The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."[2] However, "what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures."[3]

1. *Terry v. Ohio*

In *Terry v. Ohio*[4], the Court determined "whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for an arrest."[5] The Court in *Terry* held that a police officer may perform a brief frisk of a suspect stopped by a police officer on less than probable cause.[6] The police officer in

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[1] Hiibel v. Sixth Jud. Dist. Ct., 124 S. Ct. 2451, 2461 (2004) [hereinafter *Hiibel*].

[2] U.S. CONST. amend. IV.

[3] Elkins v. United States, 364 U.S. 206, 222 (1960).

[4] 392 U.S. 1 (1968) [hereinafter *Terry*].

[5] *Id.* at 15.

[6] *Id.* at 30. Specifically the Court held that:

Terry had observed petitioner and two cohorts engage in suspicious behavior outside a store window.[7] The officer "suspected the men of 'casing a job, a stick up'" due to his experience as an officer[8]. Based on his suspicion, the officer decided to investigate and approached the three men and identified himself as a police officer. After his inquiries led to mumbled responses, the officer spun Terry around and patted down the outside of his clothing[9]. During the course of the pat down, the officer discovered a revolver.[10]

Petitioner brought suit claiming that the admission of the revolver in evidence violated his Fourth Amendment rights.[11] In rejecting this claim, the Court first determined that the actions in this case did constitute a seizure, in that "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."[12] Accordingly, the frisk must be conducted within the confines of the Fourth Amendment's prohibition against unreasonable searches and seizures.[13] Therefore, the constitutionality of a frisk must be determined by "balancing the need to search [or seize] against the invasion which the search [or seizure] entails."[14] The Court concluded that the governmental interests of crime prevention and security of the officer outweighed the invasion of Terry's personal privacy.[15]

2. *Delaware v. Prouse* and *Brown v. Texas*

Eleven years after the Supreme Court handed down its holding in *Terry v. Ohio*, the Court decided two cases involving investigative stops (*Terry* stops). The decisions of *Delaware v. Prouse*[16] and *Brown v. Texas*[17] both served as extension of the interests served by *Terry.*

In *Delaware v. Prouse*, a police officer stopped a vehicle occupied by defendant in order to check his driver's license and registration.[18] The officer had observed neither traffic nor

> ...where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

Id.

[7] *Id.* at 6. The officer testified that the behavior was an "elaborately casual and oft-repeated reconnaissance of [a] store window." *Id.*

[8] *Id.*

[9] *Id.* at 7.

[10] *Id.*

[11] *Id.* at 7-8.

[12] *Id.* at 16.

[13] *Id.* at 16, n. 12.

[14] *Id.*at 21 (quoting Camara v. Mun. Ct., 387 U.S. 523, 536-37 (1967)) (alterations in original).

[15] *Id.* at 22-23.

[16] 440 U.S. 648 (1979).

[17] 443 U.S. 47 (1979).

[18] *Prouse*, 440 U.S. at 650.

instrument violations prior to the stop.[19] However, upon walking up to the vehicle the officer smelled marijuana smoke and seized marijuana that was in plain view on the car floor.[20] The Court held that spot checks on vehicles conducted without reasonable suspicion were violative of the Fourth Amendment.[21] The Court noted that "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."[22] However, the Court noted that a less intrusive manner of spot checking, such as road-blocks, which do not involve the unconstrained exercise of discretion, would provide a proper balance of governmental and individual interests.[23]

In *Brown v. Texas,* appellant was arrested and subsequently convicted for refusing to comply with a policeman's demand that he identify himself pursuant to Texas Penal Code, which criminalized a failure to respond to a request for identification from a police officer.[24] Prior to arrest, the appellant had been seen in an alley walking away from another man.[25] The officer testified appellant was stopped because he "looked suspicious and [my partner and I] had never seen that subject in that area before."[26] The officers did not claim they suspected appellant of any misconduct or being armed.[27] In reversing appellant's conviction, the Supreme Court unanimously held that the officers lacked any reasonable suspicion that he was involved in criminal conduct.[28] Accordingly, even though the statute aimed to prevent crime, a governmental interest, the Fourth Amendment does not allow it because "the risk of arbitrary and abusive police practices exceeds tolerable limits."[29]

B. The Fifth Amendment

The Fifth Amendment provides that "[n]o person . . . 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."[30] The Fifth Amendment privilege "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used."[31]

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[19] *Id.*
[20] *Id.*
[21] *Id.* at 663.
[22] *Id.* at 654.
[23] *Id.* at 663.
[24] *Brown*, 443 U.S. at 49.
[25] *Id.* at 48.
[26] *Id.* at 49.
[27] *Id.*
[28] *Id.* at 51-52.
[29] *Id.* at 52.
[30] U.S. CONST. amend. V.
[31] Kastigar v. United States, 406 U.S. 441, 445 (1972) (citations omitted).

1. *Hoffman v. United States*

In *Hoffman v. United States*[32], petitioner declined to answer questions as to his occupation, as to when he had last seen another named individual, and the whereabouts of that individual, on the ground that his answers might tend to incriminate him of a federal offense.[33] In a challenge to the petitioner's claim of privilege, the district court found no substantial danger of incrimination and ordered petitioner to answer the questions.[34] Upon refusal to do so, petitioner was adjudged in criminal contempt.[35] The Court of Appeals for the Third Circuit affirmed the decision.[36] On certiorari, the Supreme Court reversed the conviction of the petitioner, holding that, in light of the circumstances, petitioner had a reasonable concern that answering the questions might subject him to criminal liability, thus petitioner was afforded protection under the Fifth Amendment.[37] In support of its holding, the Court stated that "[t]he privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime."[38]

2. *Doe v. United States*

In *Doe v. United States*[39] petitioner was "the target of a federal grand jury investigation... [regarding possible] fraudulent manipulation of oil cargoes and receipt of unreported income."[40] When the federal government questioned Doe regarding certain bank records, Doe invoked his Fifth Amendment privilege against self-incrimination.[41] The federal government then sought a court order compelling Doe to sign twelve consent forms for the disclosure of certain bank records in Doe's suspected control.[42] The motion was denied by the district court,[43] but the Court of Appeals for the Fifth Circuit reversed, holding "that Doe could not assert his Fifth Amendment privilege... because the form 'did not have testimonial significance.'"[44] On

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[32] 341 U.S. 479 (1951)
[33] *Hoffman*, 341 U.S. at 481-82.
[34] *Id.* at 482.
[35] *Id.*
[36] *Id.* at 484.
[37] *Id.* at 489-90.
[38] *Id.* at 486 (citing Blau v. United States, 340 U.S. 159 (1950)). The court went onto state that:

> this protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. . . . [but in order] [t]o sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.

Id. at 486-87 (citations omitted).
[39] 487 U.S. 201 (1988).
[40] *Id.* at 202.
[41] *Id.* at 203.
[42] *Id.*
[43] *Id.*
[44] *Id.* at 205.

certiorari to the Supreme Court, the petitioner contended that "a compelled statement is testimonial if the Government could use the content of the speech or writing, as opposed to its physical characteristics, to further a criminal investigation of the witness."[45] However, the Supreme Court rejected this argument and held that the District Court order compelling petitioner to sign the directive did not violate the Fifth Amendment privilege against self-incrimination.[46] In support of its holding, the Court stated that "in order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information."[47]

III. Background of *Hiibel*

A. Facts

In Humbolt County, Nevada, Sheriff's Deputy Lee Dove drove to the scene of a reported assault.[48] That afternoon a citizen had called the Humbolt County Sheriff's Department and reported seeing a man strike a female passenger inside a red and silver GMC truck on Grass Valley Road.[49] As Dove approached the truck, the officer noticed skid marks in the gravel behind the vehicle, indicating that the vehicle had come to stop in a sudden manner.[50] The officer saw Hiibel standing outside the truck and a young woman inside.[51]

Dove approached Hiibel, explained that he was investigating a fight, and then realized that Hiibel was intoxicated.[52] The officer asked Hiibel if he had "any identification on him," but Hiibel did not comply and asked why Dove needed to see his identification.[53] The officer

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[45] *Id.* at 207.
[46] *Id.* at 219.
[47] *Id.* at 210. The Court went on to clarify this requirement as follows:

> This understanding is perhaps most clearly revealed in those cases in which the Court has held that certain acts, though incriminating, are not within the privilege. Thus, a suspect may be compelled to furnish a blood sample, to provide a handwriting exemplar or a voice exemplar, to stand in a lineup, and to wear particular clothing. These decisions are grounded on the proposition that "the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature." The Court accordingly held that the privilege was not implicated in each of those cases, because the suspect was not required "to disclose any knowledge he might have," or "to speak his guilt." It is the "extortion of information from the accused," the attempt to force him "to disclose the contents of his own mind," that implicates the Self-Incrimination Clause. "Unless some attempt is made to secure a communication -- written, oral or otherwise -- upon which reliance is to be placed as involving [the accused's] consciousness of the facts and the operations of his mind in expressing it, the demand made upon him is not a testimonial one."

Id. at 210-11 (citations omitted).
[48] *Hiibel*, 124 S. Ct. at 2455.
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.* Officer Dove based his belief that Hiibel was intoxicated on Hiibel's "eyes, mannerisms, speech, and odor." Hiibel v. Sixth Jud. Dist. Ct., 59 P.3d 1201, 1203 (Nev. 2002) [hereinafter *Hiibel (Nev.)*].
[53] *Hiibel*, 124 S. Ct. at 2455.

explained that he needed the identification for his investigation.[54] However, Hiibel refused to cooperate and "insisted he had done nothing wrong."[55] Hiibel continued to refuse the officer's requests for identification and "began to taunt the officer by placing his hands behind his back and telling the officer to arrest him and take him to jail."[56] After asking for identification eleven times and warning the man that refusal to comply could lead to arrest, the officer arrested Hiibel.[57]

B. Procedural History

Hiibel was charged for violation of Nevada Revised Statute (NRS) section 199.280 (2003) for "willfully resist[ing], delay[ing], or obstruct[ing] a public officer in discharging or attempting to discharge any legal duty of his office."[58] This charge was based on Hiibel's obstruction of Dover from carrying out his duties under section 171.123, a "stop and identify" statute[59] which enables a police officer to temporarily detain a person suspected of criminal behavior.[60] The Justice Court of Union Township found Hiibel guilty and fined him $250.[61] The Sixth Judicial Court of Nevada affirmed, holding it "reasonable and necessary" for the officer to request identification.[62] The decision of the Sixth Judicial Court rejected Hiibel's argument that application of [section] 171.123 to his case violated the Fourth and Fifth Amendments.[63]

On review, the Supreme Court of Nevada rejected Hiibel's Fourth Amendment challenge, holding that NRS section 171.123(3) was "good law written consistent with the Fourth

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[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.* Officer Dove described the situation as follows:

> During my conversation with Mr. Hiibel, there was a point where he became somewhat aggressive [sic]. I felt based on me not being able to find out who he was, to identify him, I didn't know if he was wanted or what [sic] situation was, I wasn't able to determine what was going on crimewise in the vehicle, based on that I felt he was intoxicated, and how he was becoming aggressive and moody, I went ahead and put him in handcuffs so I could secure him for my safety, and put him in my patrol vehicle.

Hiibel, 59 P. 3d at 1203.
[58] *Hiibel* 123 S. Ct. at 2455 (citing NEV. REV. STAT. § 199.280 (2003)) (alterations in original).
[59] *Id.* at 2456.
[60] NEV. REV. STAT. § 171.123 (2004). The statute provides that:

> 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 identify 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 the peace officer."

Id. (emphasis added).
[61] *Hiibel*, 124 S. Ct. at 2456.
[62] *Hiibel,* 59 P. 3d at 1203.
[63] *Hiibel,* 124 S. Ct. at 2456.

Amendment."[64] The court held that the statute properly balanced privacy concerns, in that "any intrusion on privacy caused by NRS section 171.123(3) is outweighed by the benefits to officers and community safety."[65] The court denied Hiibel's petition for rehearing, based on a Fifth Amendment challenge, without opinion.[66]

The United States Supreme Court granted certiorari and affirmed the judgment of the Nevada Supreme Court.[67] Justice Kennedy, writing for the majority, held that "[t]he stop, the request, and the State's requirement of a response did not contravene the guarantees of the Fourth Amendment."[68] Further, the Court held that the Nevada statute did not violate the Fifth Amendment right against self-incrimination, because "[i]n this case [Hiibel's] refusal to disclose his name was not based on any articulated real and appreciable fear that his name would be used to incriminate him."[69]

IV. Supreme Court Disposition

A. Majority Opinion

Justice Kennedy, writing for a five-justice majority, focused on the precise requirements of the Nevada Statute; specifically, the requirement "that the suspect either states his name or communicates it to the officer by other means."[70] Once a name has been provided, there is no violation under section 171.123(3).[71] The *Hiibel* Court refuted the position taken by the Justice White concurrence in *Terry v. Ohio*, which stated that although a person may be briefly detained and questioned under the proper circumstances, the person stopped is under no obligation to answer and refusal to answer furnishes no basis for arrest.[72] The Court noted that the request for identity satisfies the reasonableness of a seizure under the Fourth Amendment because it is consistent with the "purpose, rationale, and practical demands of a *Terry* stop."[73] Furthermore, the Court stated that the conviction did not violate the Fifth Amendment's prohibition on compelled self-incrimination, because, although the requirement might be arguably testimonial and compelled, the disclosure of petitioner's name "presented no reasonable danger of incrimination."[74]

[64] *Hiibel*, 59 P. 3d at 1207.
[65] *Id.* at 1205.
[66] *Hiibel,* 124 S. Ct. at 2456.
[67] *Id.* at 2461.
[68] *Id.* at 2460.
[69] *Id.* at 2461.
[70] *Id.* at 2457.
[71] *Id.*
[72] *Id.* at 2458-59 (citing *Terry*, 392 U.S. at 34 (White, J. concurring)).
[73] *Hiibel*, 124 S. Ct. at 2459.
[74] *Id.* at 2460.

1. The *Terry* Stop Permits Obtaining a Suspect's Identity under the Fourth Amendment

The Court explained that a police officer is permitted to ask a person for identification without implicating the Fourth Amendment in any manner.[75] Furthermore, in *Terry v. Ohio*, the Court recognized the ability of a law enforcement officer, with reasonable suspicion that a person is involved in criminal activity, to stop a person for a brief time and take steps to investigate.[76] The Court went on to stress that prior decisions "make clear that questions concerning a suspect's identity are a routine and accepted part of many *Terry* stops."[77] The Court reasoned that, besides being routine and accepted, obtaining a suspect's identity serves important governmental interests, such as knowledge of prior violence, warrants for the suspect's arrest, an ability to assess a threat to the officer's own safety, and even to clear a suspect of any suspicion.[78] However, the Court noted that it had been an open question whether a suspect could be prosecuted for refusing to identify himself.[79]

In arriving at its conclusion, the Court rejected Hiibel's claim that prior Court opinions favor a Fourth Amendment violation.[80] Hiibel pointed the Court's attention to Justice White's concurring opinion in *Terry*, which stated a person engaged in what became known as a *Terry* stop is "not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for arrest."[81] This opinion was cited in the dicta of *Berkemer v. McCarty*,[82] a case which explained that a routine traffic stop is not a custodial stop and thus does not require *Miranda*[83] protections.[84] The Court supported its argument by pointing to the "nonthreating character" of *Terry* stops, which is evidenced by the option to respond to questions.[85] The Court, however, did not find the statements controlling.[86] Instead, the Court reasoned that, although the Fourth Amendment may not require a citizen to answer questions, because it "provides rights against the government," the legal duty in this case arises from Nevada law.[87]

The Court also held that the principles of *Terry* allow a State to require a suspect to identify himself during a *Terry* stop.[88] The Court based its decision on the reasonableness of seizure under the Fourth Amendment, which requires a balancing of intruding on an individual's Fourth Amendment guarantees and promoting legitimate governmental interests.[89] The Court

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[75] *Id.* at 2458; *see* INS v. Delgado, 466 U.S. 210, 216 (1984).
[76] *Hiibel,* 124 S. Ct. at 2458; *see Delgado,* 466 U.S. at 216; United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975).
[77] *Hiibel,* 124 S. Ct. at 2458; *see* United States v. Hensley, 469 U.S. 221, 229 (1985); Hayes v. Florida, 470 U.S. 811, 816 (1985); Adams v. Williams, 407 U.S. 143, 146 (1972).
[78] *Hiibel,* 124 S. Ct. at 2458.
[79] *Id.*
[80] *Id.* at 2458-59.
[81] *Id.* (citing *Terry*, 392 U.S. at 34).
[82] Berkemer v. McCarty, 468 U.S. 420 (1984).
[83] Miranda v. Arizona, 384 U.S. 436 (1966).
[84] *Berkemer,* 468 U.S. at 439-40.
[85] *Hiibel,* 124 S. Ct. at 2459 (quoting *Berkemer*, 468 U.S. at 440).
[86] *Hiibel*, 124 S. Ct. at 2459.
[87] *Id.*
[88] *Id.*
[89] *Id.* (citing Delaware v. Prouse, 440 U.S. 648, 654 (1979)).

found a proper balance in that the threat of criminal sanction helped "ensure that the request for identity did not become a legal nullity,"[90] and the fact that the *Terry* stop was essentially unaltered, in that the nature, duration, and location of the stop did not change.[91] Accordingly, requiring disclosure of a suspect's identity is not a violation of the Fourth Amendment prohibition against unreasonable searches and seizures.[92]

The Court also rejected Hiibel's argument that the Nevada statute circumvents the probable cause requirement, in that a person may be arrested for merely being suspicious.[93] The Court referred to the requirements that a *Terry* stop be justified from its inception and be "reasonably related in scope to the circumstances which justified" the initial stop.[94] Accordingly, if an officer is to arrest a suspect for failing to identify himself, the request must be reasonably related to the circumstances which justified the stop.[95] Applying this rationale, the Court determined that the request was a "commonsense inquiry."[96]

2. Application of the Fifth Amendment's prohibition on self-incrimination

After rejecting Hiibel's Fourth Amendment claims, the Court went on to similarly reject Hiibel's Fifth Amendment claim.[97] The Court observed that "[t]o qualify for the *Fifth Amendment* privilege, a communication must be testimonial, incriminating, and compelled."[98] The majority disposed of Hiibel's Fifth Amendment claim on the ground that it failed to present any reasonable danger of incrimination.[99] Citing *Kastigar v. United States*,[100] the Court explained that the disclosure must be the type that the "witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used."[101] Hiibel failed to provide a explanation of how his name might be used against him in a criminal prosecution. Thus, absent a real and appreciable fear that the disclosure would incriminate him, the Fifth Amendment does not take precedence over the Nevada statute.[102] The majority also stated that the narrow scope of the disclosure requirement is important, suggesting that disclosing

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[90] *Hiibel*, 124 S. Ct. at 2459.
[91] *Id.*; *see also* United States v. Place, 462 U.S. 696, 709 (1983) (holding that the seizure cannot continue for an excessive period of time); Dunaway v. New York, 442 U.S. 200, 212 (1979) (holding that the seizure cannot resemble a traditional arrest).
[92] *Hiibel,* 124 S. Ct. at 2459.
[93] *Id.*
[94] *Id.* (quoting *Terry*, 392 U.S. at 20).
[95] *Id.*; *see also* Hayes v. Florida, 470 U.S. 811, 817 (1985) (requiring "a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime").
[96] *Hiibel,* 124 S. Ct. at 2460.
[97] *Id.* However, prior to rejecting Hiibel's arguments, the Court declined to resolve the issue on respondent's argument. Respondent argued that the statements required under NRS § 171.123(3) are nontestimonial, thus outside the scope of Fifth Amendment protection. The Court noted that stating one's name or producing identifying documents may certainly be testimonial, in that they "may qualify as an assertion of fact relating to identity." *Id.* (citing Doe v. United States, 487 U.S. 201, 210 (1988)); *see also* United States v. Hubbell, 530 U.S. 27, 35, 41 (2000).
[98] *Hiibel*, 124 S. Ct. at 2460; *see also* Hubbell, 530 U.S. at 34-38.
[99] *Id.* (citing Brown v. Walker, 161 U.S. 591, 598 (1896) ("noting that where 'the answer of the witness will not directly show his infamy, but only *tend* to disgrace him, he is bound to answer'").
[100] 406 U.S. 441 (1972).
[101] *Hiibel*, 124 S. Ct. at 2460 (quoting *Kastigar,* 406 U.S. at 445).
[102] *Hiibel,* 124 S. Ct. at 2461.

one's name is, generally, "insignificant in the scheme of things."[103] However, the Court left open the possibility that a case may arise in which disclosing one's identity during a *Terry* stop might create a reasonable danger of incrimination and thus invoke the protection of the Fifth Amendment.[104]

B. Stevens' Dissent

In Stevens' view, the scope of the Nevada statute does not circumscribe the Fifth Amendment's "broad constitutional right to remain silent."[105] Stevens suggested that the Fifth Amendment guarantee extends to a criminal trial,[106] a grand jury investigation,[107] and during a custodial interrogation in a police station,[108] and there is no reason why a police interrogation based on suspicion, rather that probable cause, should receive any lesser protection.[109] Further, Justice Stevens argued that the communication of one's name is testimonial in that it is made in response to a question posed by a police officer.[110] Justice Stevens goes on to state that the disclosure of one's name is incriminating.[111] Stevens argues that to be incriminating a statement needs to merely lead to evidence that could lead to other evidence to be used, thus if a name does not furnish a link in the chain of evidence, Stevens asks, "why else would an officer ask for it?"[112] Stevens notes that if the Court is correct in that the refusal to provide one's name will not impede a police investigation, then requiring one to provide it is "nothing more than a useless invasion of privacy."[113] Therefore, Stevens would read the Fifth Amendment to permit the suspect in a *Terry* stop to stand mute.[114]

C. Breyer's Dissent

Justice Breyer, joined by Justices Souter and Ginsburg, also filed a dissent.[115] In Breyer's view, the Court's statement in *Berkemer v. McCarty*[116] was controlling here, because, although dicta, it "is the kind of strong dicta that the legal community typically takes as a statement of the law."[117] Accordingly, if the Court had followed this reasoning, Hiibel would not

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[103] *Id.*; *see* Baltimore City Dep't of Social Serv. v. Bouknight, 493 U.S. 549, 555 (1990) (noting that facts the State may establish would render disclosing one's name insufficiently incriminating); *cf.* California v. Byers, 402 U.S. 424, 432 (1971) (opinion of Burger, C.J.); Pennsylvania v. Muniz, 496 U.S. 582, 601-02 (1990) (opinion of Brennan, J.)

[104] *Hiibel,* 124 S. Ct. at 2461.

[105] *Hiibel*, at 2462 (Stevens, J., dissenting).

[106] *Id.* (citing Carter v. Kentucky, 450 U.S. 288, 299-300 (1981)).

[107] *Id.* (citing Chavez v. Martinez, 538 U.S. 760, 767-68 (2003)).

[108] *Id.* (citing Miranda, 384 U.S. at 467).

[109] *Hibbel*, 124 S. Ct. at 2462.

[110] *Id.* at 2463.

[111] *Id.*. at 2463-64.

[112] *Id.*. at 2464; *see Hubbell*, 530 U.S. at 37 (noting that incriminating means disclosure that could be used in a criminal investigation or *could* lead to other evidence that could be used); Hoffman v. United States, 341 U.S. 479, 486 (1951) ("furnish[ing] a link in the chain of evidence needed to prosecute the claimant for a federal crime").

[113] *Hiibel*, 124 S. Ct. at 2464.

[114] *Id.*

[115] *Id.* (Breyer, J., dissenting).

[116] 468 U.S. 420, 439 (1984) (stating that the detainee in a *Terry* stop is not obliged to respond to an officer's questions).

[117] *Hiibel*, 124 S. Ct. at 2465.

have had to answer, but by not following the enunciation in *Berkemer*, the Court is eroding a clear rule.[118] Breyer also argues that the majority reserves judgment for cases when compulsion might not be permissible, yet the nature of the *Terry* stop does not permit a police officer to distinguish between the ordinary case, such as this case, and the special case reserved for judgment.[119]

V. Conclusion

Although the state of the law has only been changed modestly by the *Hiibel* decision, *Hiibel* makes it clear that when a person is briefly detained and questioned under the proper circumstances, state law may require the person stopped to state his name when questioned and refusal to answer may furnish basis for arrest. However, the Court appears unwilling to clarify Fourth Amendment standards, beyond those of a case-by-case basis, but did extend its rationale in regards to the Fifth Amendment.

For example, one scholar points out that the Supreme Court has a "tendency and present willingness to hold that a search or seizure has been constitutionally commenced, even if lacking in any individualized suspicion, so long as it passes a flexible balancing test in which its law enforcement benefits are deemed to outweigh its constitutional rights costs."[120] Accordingly, this situation begs the question as to the constitutionality of requiring a person to state his name when asked in a otherwise constitutional search that both lacks individualized suspicion and is more invasive then a *Terry* stop, such as a sobriety checkpoint. The *Hiibel* decision does not make an answer clear in this case, as its Fourth Amendment rationale was based on the balancing of the individual's Fourth Amendment rights and the promotion of legitimate government interests.[121]

The *Hiibel* decision extended the Court's Fifth Amendment rationale by noting the narrow scope of the disclosure requirement of the Nevada statute.[122] The Court points out that the statute only requires a person state his name, nothing else. This, the Court believes, is insignificant and only incriminating in unusual circumstances. Even witnesses invoking the Fifth Amendment privilege answer when their name is called to take the stand.[123]

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[118] *Id.* at 2466.
[119] *Id.* at 2465-66
[120] Nadine Strossen, Michigan Department of State Police v. Sitz: *A Roadblock to Meaningful Judicial Enforcement of Constitutional Rights*, 42 HASTINGS L. J. 285, 348-49 (1991) (discussing the recent Supreme Court decision upholding a sobriety checkpoint).
[121] *Hiibel,* 124 S. Ct. at 2459.
[122] *Id.* at 2461.
[123] *Id.*