

April 2005

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UNREASONABLE SEIZURE AND STOP AND IDENTIFY
STATUTES CREATE AN ILLUSION OF SAFETY BY
SACRIFICING REAL PRIVACY

Hiibel v. Sixth Judicial District Court, 124 S. Ct. 2451 (2004)

*Peter Koclanes**

In the course of a lawful stop,¹ police asked Petitioner, Larry Hiibel, to identify himself, a demand permissible under Nevada's "stop and identify"² statute.³ After refusing to give his name, Hiibel was arrested and subsequently found guilty of violating the "stop and identify" law.⁴ Hiibel appealed, but the Sixth Judicial District Court rejected his argument that the statute violated his Fourth⁵ and Fifth⁶ Amendment rights.⁷ On constitutional review, the Supreme Court of Nevada upheld the conviction,

* J.D. expected, 2006, University of Florida Levin College of Law; B.A. in Political Science, 2003, University of Florida. I dedicate this Case Comment to my sister Athena, who regards me as a role model. Because of her unconditional respect and trust, I constantly strive to be a better person, so that I might live up to that image.

1. The sheriff's department in Humboldt County, Nevada received an afternoon telephone call in which the caller reported seeing a man assault a woman in a truck. *Hiibel v. Sixth Jud. Dist. Court*, 124 S. Ct. 2451, 2455 (2004).

2. As defined by the Supreme Court, the phrase "stop and identify statute" refers to any member of a general class of laws that permit a police officer "to ask or require a suspect to disclose his identity." *Id.* at 2456.

3. In relevant part, the Nevada law provided 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 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. at 2455-56 (quoting NEV. REV. STAT. 171.123 (2003)).

4. *Id.* Hiibel was found guilty and was fined \$250 on the basis that his "refusal to identify himself as required by section 171.123 'obstructed and delayed . . . a public officer in attempting to discharge his duty.'" *Id.* at 2456 (quoting NEV. REV. STAT. 199.280 (2003)).

5. In pertinent part, the Fourth Amendment guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV.

6. The Fifth Amendment Self-Incrimination Clause provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

7. *Hiibel*, 124 S. Ct. at 2456.

agreeing with the Sixth Judicial District Court that the invasion of Hiibel's privacy was slight in comparison to the public's interest in police safety.⁸ The Supreme Court of the United States granted certiorari,⁹ and in affirming the judgment of the Supreme Court of Nevada, HELD, that the Nevada statute did not violate the Fourth or Fifth Amendment of the United States Constitution.¹⁰

The Fourth Amendment ensures the right of the people to be free from unreasonable searches and seizures of their "persons, houses, papers, and effects."¹¹ The key issue in a Fourth Amendment challenge is whether the police action is reasonable; relevant factors in a reasonableness analysis include both the indignity and duration of a search.¹² In determining whether or not a given Fourth Amendment intrusion is reasonable, courts employ a balancing test, weighing three factors: "[1] the gravity of the public concerns served by the seizure, [2] the degree to which the seizure advances the public interest, and [3] the severity of the interference with individual liberty."¹³

In *Brown v. Texas*, a case demonstrating minimum standards of reasonable suspicion, the Supreme Court applied such a three-factor test.¹⁴ In *Brown*, the defendant violated a Texas statute requiring a person to identify himself during a lawful police stop.¹⁵ Reversing the defendant's conviction, the Court found that police did not have any basis for a reasonable suspicion that the defendant was engaged in a crime, and thus

8. *Id.* (citing *Hiibel v. Sixth Jud. Dist. Court*, 59 P.3d 1201, 1205 (Nev. 2002), *aff'd*, 124 S. Ct. 2451 (2004)).

9. *Id.*

10. *Id.* at 2460-61.

11. U.S. CONST. amend. IV.

12. *See Hiibel*, 124 S. Ct. at 2458 (citing *United States v. Place*, 462 U.S. 696, 709 (1983)) (noting that a seizure cannot continue for an excessive period of time); *Terry v. Ohio*, 392 U.S. 1, 17 (1968) (weighing the factor of indignity in a Fourth Amendment seizure because the search involved "a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly"). It is important to note that a seizure that falls short of a full-blown arrest is still governed by the Fourth Amendment. *INS v. Delgado*, 466 U.S. 210, 215 (1984). The United States Supreme Court has held that "the [Fourth Amendment] protection against unreasonable seizures also extends to 'seizures that involve only a brief detention short of traditional arrest.'" *Id.* (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975)). The most lucid test is that a stop constitutes a Fourth Amendment seizure "if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)). The Court restated the inherent sensitivity of the Fourth Amendment's protection against unreasonable seizure in *Terry v. Ohio*, emphasizing that "[i]t must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." 392 U.S. at 16.

13. *Brown v. Texas*, 443 U.S. 47, 51 (1979) (citing *Brignoni-Ponce*, 422 U.S. at 878-83).

14. *Id.* at 51-52.

15. *Id.* at 49.

the stop was unlawful.¹⁶ The Court reasoned that, in the absence of objective facts leading a reasonable person to suspect that the defendant committed a crime, the balance between the public's interest and the defendant's privacy tilted in favor of privacy.¹⁷ The Court found that the public's interest in preventing crime was not compelling because the defendant had done nothing to indicate misconduct and was, in effect, an innocent bystander.¹⁸

Terry v. Ohio contains a more nuanced display of the balancing test in action because, in *Terry*, police had a basis for reasonable suspicion.¹⁹ After witnessing suspicious activity, an officer frisked the defendant and, upon finding weapons, arrested him.²⁰ On writ of certiorari, the Supreme Court agreed that the officer was reasonable in his suspicion that the defendant was about to commit a robbery and might be armed.²¹ The Court applied the balancing test, weighing the governmental interests in crime prevention and police safety against the intrusion upon the defendant's rights.²² Though the privacy intrusion involved in a bodily frisk was admittedly substantial,²³ the Court ultimately held that the frisk served the goal of neutralizing a threat to police and the public.²⁴

16. *Id.* at 51-53.

17. *Id.* at 52.

18. *Id.* The Court noted that even if the public interest had been served by requesting the identification of random bystanders, under such a regime, the "risk of arbitrary and abusive police practices exceeds tolerable limits." *Id.* (citing *Delaware v. Prouse*, 440 U.S. 648, 661 (1979)). For a further discussion of potential abuses under this type of regime, see Daniel J. Steinbock, *National Identity Cards: Fourth and Fifth Amendment Issues*, 56 FLA. L. REV. 697, 708-09 (2004), noting that forcing citizens to carry a national identity card would impose dignitary harms, and that random identification stops are characteristic of totalitarian regimes, leading to oppression and racial discrimination. The article indicates that sometimes even the requirement of reasonable suspicion is not enough to prevent abuse because police can abuse their wide discretion as to what is suspicious and then stop a suspect as a mere "pretext" for identification. *Id.* at 722-24.

19. See 392 U.S. 1, 22-25 (1968). Because the policeman's initial suspicion of criminal activity was reasonable, the Court's analysis suggested that the factors in the balancing test were not clear-cut and that society's safety interest was much stronger than the defendant's Fourth Amendment privacy interest. See *id.* at 24-27.

20. *Id.* at 6-7.

21. See *id.* at 22-25.

22. *Id.* at 24-27.

23. The Court stated that "[e]ven a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." *Id.* at 24-25. According to the Court, the type of search in question, a "frisk," would involve "a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons," and the search also might be "performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised." *Id.* at 16-17. The Court described such a search as "a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly." *Id.* at 17.

24. *Id.* at 30-31. The Court's holding was narrow; specifically, the Court held that when "a
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Hayes v. Florida involved a fairly invasive seizure of the defendant's person, while police sought identifying characteristics other than the defendant's name.²⁵ There, police brought a suspect to the station for fingerprints.²⁶ While investigating a rape, police visited the home of the defendant²⁷ and threatened to arrest him if he did not accompany them to the station for fingerprinting.²⁸ The defendant complied, and when his prints matched those found at the crime scene, he was arrested and subsequently found guilty.²⁹ The state appellate court affirmed the conviction,³⁰ finding that even without sufficient probable cause to arrest the defendant, police nonetheless had the requisite reasonable suspicion to at least seize his prints.³¹ After granting certiorari, the United States Supreme Court reversed, finding no probable cause, no consent, and no warrant.³² Although the Court held that a suspect cannot be brought to the station for fingerprinting without probable cause, it left the door open for

police officer observes unusual conduct which leads him reasonably to conclude" that a person may be engaged in crime and may presently be armed and dangerous, the officer "is entitled for the protection of himself and others . . . to conduct a carefully limited search of the [suspect's] outer clothing . . . to discover weapons which might be used to assault him." *Id.* at 30.

25. See 470 U.S. 811, 813 (1985).

26. *Id.*

27. *Id.* at 812. "[P]olice interviewed [defendant Hayes] along with 30 to 40 other men who generally fit the description of the assailant, [and] the investigators came to consider [Hayes] a principal suspect" even though they had "little specific information to tie [him] to the crime." *Id.*

28. *Id.* When Hayes expressed reluctance to accompany the officers to the station for fingerprinting, one of the officers explained that they would arrest him if he did not do so. *Id.* Hayes, in the words of the investigator, then "blurted out" that he would rather go willingly to the station than be arrested. *Id.*

29. *Id.* at 813. Prior to trial, Hayes moved to suppress the fingerprint evidence, claiming it was the fruit of an illegal detention. *Id.* The trial court denied the motion, and Hayes was convicted. *Id.*

30. *Id.* The Second District Court of Appeal of Florida affirmed Hayes's conviction. *Id.* (citing *Hayes v. State*, 439 So. 2d 896 (Fla. 2d DCA 1983), *rev'd*, 470 U.S. 811 (1985)). Despite affirming the conviction, the appellate court agreed with Hayes's assertion that he had not accompanied police to the station voluntarily. *Id.* (citing *Hayes*, 439 So. 2d at 898). The court questioned the propriety of the officers' conduct and found that it was unlikely that Hayes voluntarily accompanied the officers to the station. *Id.* (citing *Hayes*, 439 So. 2d at 899).

31. *Id.* The district court "analogiz[ed] to the stop-and-frisk rule of *Terry v. Ohio*, . . . [reasoning] that the officers could transport [Hayes] to the station house and take his fingerprints on the basis of their reasonable suspicion that he was involved in the crime." *Id.*

32. *Id.* at 813-14, 817-18. The Supreme Court applied a previous rule under which "detention for the purpose of fingerprinting was subject to the constraints of the Fourth Amendment," and the act of bringing someone to the police station "exceeded the permissible limits of those temporary seizures authorized by *Terry v. Ohio*." *Id.* at 814. The Court stated that even though fingerprinting did not involve harassment or probing into a defendant's private life and was also a less serious intrusion upon personal security than other types of searches and detentions, *id.* at 814, fingerprinting still violated the Fourth Amendment under the facts of the case. *Id.* at 814-15.

exceptions.³³ For example, detaining a suspect in the field for on-site fingerprinting might require only reasonable suspicion,³⁴ but the process would have to be carried out quickly to be considered reasonable.³⁵ Additionally, the action would have to be relevant insofar as it might establish or negate the suspect's connection with the crime.³⁶

The reasonableness balancing test applies to all seizures that might violate the Fourth Amendment,³⁷ and *Terry* expanded the state interest balanced in the first factor of the test by carving out a police safety exception.³⁸ Subsequent cases, such as *Hayes*, considered other factors of the test, illustrating that the outcome could be tipped one way or the other if, for example, the seizure was too long or if the purpose of the seizure did not actually advance the public interest.³⁹ Because the test is controlling authority, some judges concluded that "stop and identify" laws were unconstitutional unless the act of seizing identity advanced the government's interest by establishing or negating the suspect's connection with crime.⁴⁰ Justice White's concurring opinion in *Terry* supports this

33. *Id.* at 817. The Court left open the possibility that the Fourth Amendment might permit a narrowly circumscribed procedure for fingerprinting detentions on less than probable cause. *Id.*

34. *Id.* at 816-17. The Court maintained the view that the Fourth Amendment permits seizures for the purpose of fingerprinting "if there is reasonable suspicion that the suspect has committed a criminal act, if there is a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime, and if the procedure is carried out with dispatch." *Id.* at 817.

35. *See id.* at 816-17.

36. *Id.* at 817. Thus, in *Hayes*, the Supreme Court invoked the same balancing test as in *Brown*, stating that the first factor (valid public concern) will outweigh the privacy interest only so long as the second factor is met (fingerprinting actually advances the public concern by corroborating or negating guilt) and so long as the intrusion is minimal under the third factor (the stop is not overly long). *See id.* at 816-17; *Brown v. Texas*, 443 U.S. 47, 50-52 (1979).

37. Recall that a search or seizure can involve persons, houses, papers, or effects and need not be a full-blown search because the Fourth Amendment balancing test is sensitive and is implicated as soon as the police detain a person in any way. *See supra* notes 5, 12.

38. *See supra* note 24 and accompanying text.

39. *Hayes*, 470 U.S. at 815-17.

40. *Id.* at 817. In one example of a case where a request for identification was found to be impermissible because it was not relevant to the crime being investigated, a Nevada Gaming Control Board agent asked for the identity of a man suspected of cheating in a casino. *See Hiibel v. Sixth Jud. Dist. Court*, 59 P.3d 1201, 1208 (Nev. 2003), *aff'd*, 124 S. Ct. 2451 (2004) (Agosti, J., dissenting) (citing *Carey v. Nev. Gaming Control Bd.*, 279 F.3d 873, 880 (9th Cir. 2002)). After the suspected cheater refused, the Nevada agent arrested him. *Id.* On appeal, the Ninth Circuit "determined that [the defendant's] interest in his personal security outweighed any potential link leading to arrest that could be gleaned from his identity, particularly because [the defendant's] name 'was not relevant to determining whether [the defendant] had cheated.'" *Id.* (quoting *Carey*, 279 F.3d at 880). It should be noted that the "stop and identify" statute at issue in that case was the very same Nevada statute considered in the instant case. *Id.*

position,⁴¹ as do several cases that apply *Terry*.⁴² Thus, the pertinent dicta suggests that a person could legally stand mute when asked his name.

When faced with the specific facts of the instant case, however, the United States Supreme Court feared that giving credence to such prior dicta would jeopardize public safety.⁴³ The instant Court found it necessary to part ways with prior cases indicating that anonymity was protected under the Fourth Amendment.⁴⁴ In the majority opinion written by Justice Kennedy,⁴⁵ the instant Court first reviewed the history of “stop and identify” statutes, demonstrating a well-established state interest in stopping crime and detaining potentially dangerous suspects.⁴⁶ The Court then recognized the following constitutional limitations on such statutes: the initial stop must be based on reasonable suspicion,⁴⁷ and any seizure must be limited in scope so that it relates to the circumstances that justified the stop.⁴⁸

Addressing the Fourth Amendment issue, the instant Court first examined the state interest.⁴⁹ The ability to stop a suspect, ask questions, or check identification allows police to solve crimes and bring offenders to justice.⁵⁰ The Court reiterated the concern that was so important in *Terry*—safety.⁵¹ The instant Court noted that identification may reveal a criminal record or mental disorder, helping police assess threats to themselves and to potential victims.⁵² After framing the debate in this

41. *Terry v. Ohio*, 392 U.S. 1, 34 (1968) (White, J., concurring). In *Terry*, Justice White stated in his concurring opinion that a person detained in an investigative stop can be questioned, but he “is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest.” *Id.* (White, J., concurring).

42. *Hiibel v. Sixth Jud. Dist. Court*, 124 S. Ct. 2451, 2458-59 (2004) (noting that Justice White’s concurring statements in *Terry* supporting a person’s right not to answer any questions had been cited in dicta elsewhere and had thus been given credence by the Court in cases subsequent to *Terry*). The instant Court also noted, however, that this dicta was not controlling. *Id.* at 2459.

43. *See id.* The instant Court had never previously addressed the specific question of the instant case, and although the Court’s prior dicta addressed the issue, *see supra* note 41, the instant Court did not find such prior dicta to be controlling. *Hiibel*, 124 S. Ct. at 2459.

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

45. *Id.* at 2455. Justice Kennedy was joined in his opinion by Chief Justice Rehnquist, as well as by Justices O’Connor, Scalia, and Thomas. *Id.* at 2454.

46. *See id.* at 2456-57.

47. *See id.* at 2457 (citing *Brown v. Texas*, 443 U.S. 47, 51-52 (1979)).

48. *Id.* at 2458 (citing *United States v. Sharpe*, 470 U.S. 675, 682 (1985)); *see also Terry v. Ohio*, 392 U.S. 1, 20 (1968). The instant Court also noted that a “seizure cannot continue for an excessive period of time.” *Hiibel*, 124 S. Ct. at 2458 (citing *United States v. Place*, 462 U.S. 696, 709 (1983)).

49. *Hiibel*, 124 S. Ct. at 2458. A Fifth Amendment self-incrimination right-to-remain-silent challenge was also at issue and addressed by the Court. *Id.* at 2460-61.

50. *Id.* at 2458 (citing *United States v. Hensley*, 469 U.S. 221, 229 (1985)).

51. *Id.*

52. *Id.*

context, the instant Court rejected Justice White's concurring opinion in *Terry*, which indicated that a person could legally refuse to give his name.⁵³ Applying the balancing test anew, the instant Court then weighed the established state interests promoted by the Nevada law against the intrusion upon individual privacy.⁵⁴

The Court noted that under the principles articulated in *Terry*, and later in *Hayes*, "an officer may not arrest a suspect for failure to identify himself if the request . . . is not reasonably related to the circumstances justifying the [initial] stop."⁵⁵ The instant Court found that a request for identification was a "commonsense inquiry," and it was therefore reasonably related to the stop.⁵⁶ Further, the instant Court believed that the seizure had an immediate relation to the needs of society.⁵⁷ As to the countervailing privacy interests being sacrificed, the Court believed that the burden of self-identification was negligible.⁵⁸ Assuming that the initial stop in the instant case was legal,⁵⁹ the officer's request for identification did not waste any more of Petitioner's time than that already being wasted by the initial stop.⁶⁰ Finding the Fourth Amendment invasion to be slight compared to the law's utility in promoting public safety,⁶¹ the instant Court affirmed the judgment of the Supreme Court of Nevada.⁶²

53. *See id.* at 2458-59; *supra* notes 41-43 and accompanying text.

54. *Hiibel*, 124 S. Ct. at 2459 (citing *Delaware v. Prouse*, 440 U.S. 648, 654 (1979)).

55. *Id.* at 2459-60. Recall that in *Hayes*, the Court suggested that *Terry* permits an officer to compel a suspect to submit to fingerprinting only if there is "a reasonable basis for believing that [it] will establish or negate the suspect's connection with [the crime being investigated]." *Hayes v. Florida*, 470 U.S. 811, 816-17 (1985). It is noteworthy that had the instant Court literally applied the *Hayes* reasoning to cases involving identification rather than fingerprints, it might have held instead that an officer could compel a suspect to identify himself only if there is a reasonable basis for believing that *knowing the identity of the suspect* will establish or negate the suspect's connection with the crime being investigated.

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

57. *See id.* at 2458 (reasoning that identification may reveal a criminal record, mental disorder, or other information that helps police assess dangers to public safety).

58. *See id.* at 2459. The instant Court reasoned that "the Nevada statute does not alter the nature of the stop itself: it does not change its duration." *Id.* (citing *United States v. Place*, 462 U.S. 696, 709 (1983)). Nor does the Nevada statute alter the location of the stop. *Id.* (citing *Dunaway v. New York*, 442 U.S. 200, 212 (1979)).

59. The initial *Terry* stop must be justified by reasonable suspicion. *Brown v. Texas*, 443 U.S. 47, 51 (1979).

60. *See supra* note 58. *But cf. Brown*, 443 U.S. at 52 (indicating circumstances where an officer stopped a suspect solely to obtain identity).

61. *See Hiibel*, 124 S. Ct. at 2459. Before concluding its analysis, the Court proceeded to analyze *Hiibel's* Fifth Amendment self-incrimination assertions, but it also rejected them. *Id.* at 2460-61.

62. *Id.* at 2461.

Four Justices dissented from the majority opinion, disagreeing with the majority's treatment of the constitutional challenges.⁶³ Joined by Justices Souter and Ginsburg, Justice Breyer addressed the Fourth Amendment issue.⁶⁴ Justice Breyer viewed the Nevada statute as an unreasonable and unnecessary encroachment on a citizen's right to control his own person.⁶⁵ Recognizing that public safety will require a stop or seizure under certain circumstances,⁶⁶ Justice Breyer indicated that there are still constitutional limits on "when and how."⁶⁷ Justice Breyer quoted Justice White's dicta from *Terry*, stating that a person need not answer any question posed to him.⁶⁸ Justice Breyer then cited several other past cases in which the Court had expressed a position similar to Justice White's.⁶⁹ Justice Breyer felt that such a lengthy history of case law including concurring opinions, explicit statements, and dicta, when considered as a whole, was "the kind of strong dicta that the legal community . . . takes as a statement of the

63. *Id.* at 2454. The instant case had two dissenting opinions: the first was written by Justice Stevens and the second was written by Justice Breyer and joined by Justices Souter and Ginsburg. *Id.* at 2461 (Stevens, J., dissenting); *id.* at 2464 (Breyer, J., dissenting). In the first dissent, which dealt predominantly with the Fifth Amendment issue, Justice Stevens was of the opinion that if a person is required by law to give his name, such an act is clearly testimonial in nature. *Id.* at 2463 (Stevens, J., dissenting). Thus, Justice Stevens believed that, in requiring Hiibel to give his name, the State had compelled him to bear witness against himself and had violated the Self-Incrimination Clause of the Fifth Amendment. *Id.* (Stevens, J., dissenting). Justice Stevens also disagreed with the majority's reasoning that furnishing identification is necessary to allow police to assess safety threats. *See id.* at 2464 n.7 (Stevens, J., dissenting). That concern, he said, is adequately alleviated by the officer's existing ability to perform a *Terry* frisk for weapons under appropriate circumstances. *Id.* (Stevens, J., dissenting).

64. *Id.* at 2464-66. (Breyer, J., dissenting).

65. *See id.* at 2465-66 (Breyer, J., dissenting).

66. *Id.* at 2465 (Breyer, J., dissenting).

67. *Id.* (Breyer, J., dissenting) (citing *Terry v. Ohio*, 392 U.S. 1, 20-22 (1968)).

68. *Id.* (Breyer, J., dissenting). Justice Breyer quoted Justice White's concurrence in *Terry*, which stated: "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." *Id.* (Breyer, J., dissenting) (quoting *Terry*, 392 U.S. at 34 (White, J., concurring)).

69. *Id.* (Breyer, J., dissenting). Justice Breyer noted that Justice White's concurrence in *Terry* seemed to have the effect of law once it was embraced in subsequent cases. *See id.* (Breyer, J., dissenting). As proof, Justice Breyer cited precedent where the Court had stated that "[an] officer may ask the . . . detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. *But the detainee is not obliged to respond.*" *See id.* (Breyer, J., dissenting) (emphasis added) (quoting *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984)). Additional precedent indicated that a *Terry* suspect "must be free to . . . decline to answer the questions put to him." *See id.* (Breyer, J., dissenting) (omission in original) (quoting *Kolender v. Lawson*, 461 U.S. 352, 365 (1983) (Brennan, J., concurring)). Justice Breyer also cited a case which recognized "[an] individual's right to go about his business or to stay put and remain silent in the face of police questioning." *See id.* (Breyer, J., dissenting) (citing *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000)).

law."⁷⁰ As a result, for the past twenty years, much of the legal community had been under the impression that a person could stand mute in the face of police questioning.⁷¹ Justice Breyer saw no reason to deviate from this well-tested policy.⁷² Furthermore, Justice Breyer expressed concerns that the majority's opinion could lead to a slippery slope for Fourth Amendment seizures.⁷³ Stressing that the majority had presented no evidence that anonymity interferes with police safety, Justice Breyer concluded that the majority had eroded a clear rule with "special exceptions."⁷⁴

The instant Court, by upholding the Nevada "stop and identify" statute, carved out an unnecessary exception to the Fourth Amendment. In addition to the already permissible *Terry* stop,⁷⁵ the Court held that the Fourth Amendment also recognizes a state interest in identification that may outweigh both personal privacy and any right to be let alone.⁷⁶ In so

70. *Id.* at 2465 (Breyer, J., dissenting).

71. *Id.* (Breyer, J., dissenting); see *supra* notes 68-69 (referring to Justice White's concurrence in *Terry* that was given so much weight in subsequent cases).

72. *Hiibel*, 124 S. Ct. at 2465 (Breyer, J., dissenting) ("And that law has remained undisturbed for more than 20 years. There is no good reason now to reject this generation-old statement of the law.")

73. *Id.* at 2465-66 (Breyer, J., dissenting). Justice Breyer worried that Fourth Amendment seizures might lead to additional seizures, eventually implicating the Fifth Amendment as well. *Id.* at 2465-66 (Breyer, J., dissenting) ("Can a State, in addition to requiring a stopped individual to answer 'What's your name?' also require an answer to 'What's your license number?' or 'Where do you live?' Can a police officer, who must know how to make a *Terry* stop, keep track of the constitutional answers?").

74. *Id.* at 2466 (Breyer, J., dissenting). Justice Breyer wrote:

The majority presents no evidence that the rule enunciated by Justice White and then by the *Berkemer* Court, which for nearly a generation has set forth a settled *Terry* stop condition, has significantly interfered with law enforcement. Nor has the majority presented any other convincing justification for change. I would not begin to erode a clear rule with special exceptions.

Id. (Breyer, J., dissenting).

75. In his dissent, Justice Stevens found the majority's holding to be an unnecessary addition to the law. See *id.* at 2464 n.7 (Stevens, J., dissenting) (citing *Terry v. Ohio*, 392 U.S. 1, 25-26 (1968)) ("[T]o the extent that officer or public safety is immediately at issue, that concern is [already] sufficiently alleviated by the officer's ability to perform a limited patdown search for weapons.")

76. *Id.* at 2458 ("Obtaining a suspect's name in the course of a *Terry* stop serves important governmental interests."). Fourth Amendment rights previously recognized by the Court have established that "[f]undamental to a democratic society is the ability to wander freely and anonymously, if we so choose." *Hiibel v. Sixth Jud. Dist. Court*, 59 P.3d 1201, 1204 (Nev. 2002), *aff'd*, 124 S. Ct. 2451 (2004) (citing *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972)). Democratic freedom further requires that we are not "compelled to divulge information to the government about who we are or what we are doing." *Id.* (citing *Brown v. Texas*, 443 U.S.

holding, the instant Court has chosen to favor police safety interests at the expense of personal privacy interests.

Police now may require a suspect to identify himself during any stop,⁷⁷ but the degree to which identification must actually help police is not clear.⁷⁸ In *Hayes*, the Court required that the suspect's fingerprinting further the investigation.⁷⁹ The instant Court, however, did not require the request for identification to directly advance the investigation in the same manner.⁸⁰ The Court has thus opened the door to widespread use of compulsory name checks that offer no insight into whether a suspect is guilty of the crime that justified the stop.⁸¹ Instead, such requests only gauge potential dangers.⁸² As in *Brown*, this raises concerns of potential abuse,⁸³ but the instant Court fails to address them.⁸⁴ In *Terry*, the Court cited police fatalities as a justification for frisks,⁸⁵ but the instant Court merely rode on the coattails of those safety concerns.⁸⁶ The Court offered

47, 52-53 (1979)). Thus, the American "right to be let alone"—to simply live in privacy—is a right protected by the Fourth Amendment and undoubtedly sacred to us all." *Id.* (quoting *Pub. Utils. Comm'n v. Pollak*, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting)) (citing *Terry*, 392 U.S. at 9).

77. See *supra* notes 56-58, 61-62 and accompanying text. This assumes, of course, that the initial investigatory stop is reasonable. See *Brown*, 443 U.S. at 50.

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

79. See *supra* notes 34-36 and accompanying text.

80. *Hiibel*, 124 S. Ct. at 2458 (reasoning that where identity might reveal "a record of violence or mental disorder," a "stop and identify" statute can advance safety interests by helping officers "assess the situation, the threat to their own safety, and possible danger to the potential victim").

81. If knowing the name of a suspect does not expedite the officer in his task of investigating a suspected crime, then the process of identification is, in a sense, a "red herring"; although it may help the officer gauge his own safety, the act of identification does not clear a suspect's name and is, therefore, an investigatory dead-end.

82. And indeed, many requests for identification will not even help accurately gauge potential dangers. Every criminal must have a "first time"; thus, a "stop and identify" statute is no substitute for a *Terry* frisk if the goal is to truly ensure officer safety.

83. See *supra* note 18.

84. See *Hiibel*, 124 S. Ct. at 2457-59 (acknowledging that stops are impermissible when they are arbitrary and where abusive powers are too great, but merely concluding without analysis that no risk for abuse exists in the instant case). Justice Breyer, in his dissent, worried that the name check might lead to other compulsory questions or more invasive methods of identification. See *supra* note 73. Further, there is no way of guaranteeing that officers will use a "stop and identify" statute only to identify a suspect's threat level. Given the vast array of databases that are available electronically once the officer knows the name, an officer may be tempted during a stop to use personal safety as an excuse to gain access to such information.

85. See *Terry v. Ohio*, 392 U.S. 1, 23-24 (1968).

86. The connection between a "stop and identify" statute and police safety is more tenuous in the instant case than the connection between frisks and safety was in *Terry*. This is because the suspicious activity predicating a *Terry* frisk would have to be a crime that justified such a search, such as armed robbery. See *supra* note 24. In contrast, the suspicious activity predicating an identification request might not be violent in nature.

no evidence that, in the absence of "stop and identify" laws, more police and victims would be harmed.⁸⁷

While considering the State's safety needs, the instant Court offered no objective evidence that the concern is any more pressing now than it was in the past.⁸⁸ Presumably, the State always has had an interest in police safety, yet respecting a Fourth Amendment right to remain anonymous was never untenable in the past.⁸⁹ Additionally, the instant Court satisfied only the second factor of the balancing test merely by relying on unproven assumptions about the degree that identification actually advances safety.⁹⁰ How many lives will actually be saved by "stop and identify" statutes as opposed to the number of innocent people who will have to endure a seizure?⁹¹ Given that psychology is an inexact science, especially for police in the field, to what extent does a suspect's mental history or "rap sheet" truly offer a reliable warning of danger?⁹² As Justice Breyer's

87. See *supra* note 74 and accompanying text. Additionally, when the case was before the Nevada Supreme Court, Justice Agosti stated that he had not seen "any evidence that an officer, by knowing a person's identity, is better protected from potential violence." *Hiibel v. Sixth Jud. Dist. Court*, 59 P.3d 1201, 1209 (Nev. 2002) (Agosti, J., dissenting), *aff'd*, 124 S. Ct. 2451 (2004). Justice Agosti added that the purpose of a *Terry* search is to ensure that the detainee "is not armed with a weapon that could unexpectedly and fatally be used against [a police officer]." *Id.* (Agosti, J., dissenting). Note that the *Terry* case involved reasonable suspicion of armed robbery. See *Terry*, 392 U.S. at 23. A *Terry* search, then, serves to neutralize a direct and immediate risk to police. See *id.* A *Terry* stop is *not* designed to prevent more vague and indirect risks, such as "a detainee's propensity for violence based upon a prior record of criminal behavior." *Hiibel*, 59 P.3d at 1209 (Agosti, J., dissenting). But the only purpose that identification can serve is to reveal the latter type of indirect risk, and thus, the entire argument for compulsory identification is less compelling than in a dangerous *Terry* situation. See *id.* (Agosti, J., dissenting).

88. The Supreme Court does not explicitly mention acts of terrorism in its opinion. See generally *Hiibel*, 124 S. Ct. 2451 (2004). However, such concerns weighed heavily on the minds of the Nevada justices, as evidenced by their discussion of the dangers posed by terrorists and biological weapons. See *Hiibel*, 59 P.3d at 1206. Given that the instant Court has affirmed the Nevada Supreme Court, it stands to reason that the pressures of terrorism were an implicit consideration of the instant Court. For a discussion of whether concerns over terrorism are overblown, see *Hiibel*, 59 P.3d at 1209-10 (Agosti, J., dissenting) ("The majority further appeals to the public's fear during this time of war 'against an enemy who operates with a concealed identity.'").

89. See *supra* notes 72, 74.

90. See *Hiibel*, 124 S. Ct. at 2458 (reasoning that identification may reveal a criminal record, mental disorder, or other information that helps police assess dangers to public safety).

91. Of course, the majority can construct examples in which identification reveals that the suspect is a "cop killer" or a wanted terrorist, but how often do such best-case scenarios actually happen? For a more thorough discussion of *the burden borne by society versus the number of identity requests which actually prevent harm*, and whether this is a worthwhile tradeoff, see *infra* note 102 and accompanying text.

92. Furthermore, it is not clear that merely requiring a name would work at all because truly dangerous and wanted criminals will lie. It seems rare to find a terrorist foolish enough to give his real name. To be truly effective, any "stop and identify" statute would have to have a degree of

dissent stresses, none of these questions is answered, and no evidence is offered to show that the police force truly needs this new power of seizure to do its job.⁹³

Prior to the instant case, there was a split in federal authority⁹⁴ indicating that not all judges agreed that a name check involves only a trivial intrusion.⁹⁵ The Supreme Court has long recognized that the “right to be let alone” is embodied in the Fourth Amendment⁹⁶ as well as in case law and public opinion.⁹⁷ There is also a dignitary interest not reflected in the instant Court’s analysis. Concerned predominantly with the question of delay, and finding that the suspect’s time was not wasted, the Court overlooked the right of the individual “to be let alone.”⁹⁸ The dissent disagreed that the invasion was trivial, and perhaps if the majority had weighed the intrusion from a more populist perspective, it too might have found that many Americans view a request for identification to be quite invasive, regardless of its brevity.⁹⁹ Hiibel himself found the request annoying, insulting, and unwarranted.¹⁰⁰

verification not contemplated in the instant case. *See Hiibel*, 124 S. Ct. at 2457 (stating that the Nevada statute does not “require a suspect to give the officer a driver’s license or any other document” so long as “the suspect either states his name or communicates it to the officer by other means”). Because more elaborate methods of verifying identity would be more time consuming, such a case might not turn out the same way.

93. *See id.* at 2465-66 (Breyer, J., dissenting). Thus, the instant Court’s holding is effective in increasing safety only under the ideal circumstance where a dangerous felon chooses to answer honestly when asked his name. Given the ease of deception under the Nevada law, the law only wastes the time of countless innocent citizens who will have to endure the seizure while providing little benefit to society because the law rewards deception by allowing liars to get away. Attempting to verify the identification more thoroughly offers little help because, with each degree of verification, the privacy intrusion also increases, making the inquiry less reasonable under the Fourth Amendment (e.g., calling the station, requesting a picture identification or social security number, fingerprinting, analyzing the suspect’s description, etc.).

94. *Hiibel v. Sixth Jud. Dist. Court*, 59 P.3d 1201, 1208 n.7 (Nev. 2002) (Agosti, J., dissenting), *aff’d*, 124 S. Ct. 2451 (2004). As Nevada Supreme Court Justice Agosti noted in his dissent, there was a split in authority over whether a person may be arrested for refusing to identify himself during a *Terry* stop. *Id.* at 1208 n.7 (Agosti, J., dissenting).

95. *See supra* note 40.

96. *See supra* note 76.

97. *See supra* note 76. *See generally* *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972) (finding that inherent within the Constitution is an unwritten right to wander freely and anonymously and that this right is essential to democracy and independence).

98. *See Hiibel*, 124 S. Ct. at 2459. In considering duration as the chief indicator of the invasiveness of a seizure, the instant Court has marginalized the dignitary and self-determination interests embodied in the Fourth Amendment. *See supra* note 76.

99. Several newspaper editorials critically discussed the loss of our “right to be let alone” in response to the holding of the instant case. For an example of public opinion sympathetic to Hiibel, see Editorial, *Court Erodes Right to Remain Silent; Why an Exception to a Constitutional Right?*, ROCKY MOUNTAIN NEWS, June 22, 2004, at 30A. *See also* Stephen Henderson, *Ruling: Police Have Right to Ask for Name*, FORT-WORTH STAR-TELEGRAM, June 22, 2004, at 11.

100. *See* Larry Dudley Hiibel, Editorial, *He Fought the Law, and the Law Won*, S. FLA. SUN, 12

Finally, consider the wide range of stops where the statute applies: police now may demand a name during any lawful stop. However, because the number of police stops in which the act of identification will actually save lives has not been established, the safety benefit may in fact be very small.¹⁰¹ Past Supreme Court decisions have held that it is not good public policy to force a large portion of society to bear a burden if that burden rarely bears fruit and thus weakly advances the public interest.¹⁰²

The instant Court, by holding that a person suspected of a crime must give his name, has departed from a decades-old rule that was elegant in its simplicity.¹⁰³ A more privacy-sensitive holding might have permitted name checks only within certain classes of violent crimes.¹⁰⁴ Another approach could have adhered strictly to *Hayes*'s logic and allowed a name to be "seized" only when it would further the specific police investigation at hand.¹⁰⁵ In choosing to group all crimes together, the instant Court has taken a broad, general view that inevitably tilts the balancing test in favor of police and against individual privacy.¹⁰⁶ In so doing, the Court has

SENTINEL, June 29, 2004, at 19A.

101. There is no evidence of the effect on safety that "stop and identify" statutes have. *See supra* note 74.

102. *See Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 454 (1990) (citing *Delaware v. Prouse*, 440 U.S. 648 (1979)). There the Supreme Court noted that, in *Delaware v. Prouse*, checking the licenses of thousands of drivers to find a handful of people driving on a suspended license was unacceptable. *Id.* The Court in *Prouse* held that "random stops made by Delaware Highway Patrol officers in an effort to apprehend unlicensed drivers" were unreasonable because "[i]t seems common sense that the percentage of all drivers on the road who are driving without a license is very small and that the number of licensed drivers who will be stopped in order to find one unlicensed operator will be large indeed." *Id.* (quoting *Prouse*, 440 U.S. at 659-60). *But cf. id.* at 454-55 (holding that a sobriety checkpoint in which 1.6% of drivers were arrested is good enough to justify the checkpoints when considering both the state interest in curbing tragic car accidents caused by alcohol and also the minimal thirty-second invasion of the checkpoint).

103. *See Hiibel*, 124 S. Ct. at 2465-66 (Breyer, J., dissenting) ("I would not begin to erode a clear rule with special exceptions.").

104. Compulsory identification could have been required only of suspects stopped in relation to crimes that truly outweigh privacy, like terrorism. The instant Court would better preserve the Fourth Amendment by holding that "stop and identify" statutes shall not apply to, for example, white-collar crimes like hacking or embezzling, but obviously shall apply to violent felonies or terrorism (that is, crimes where society's safety interest is most pressing).

105. *See supra* note 40 and accompanying text.

106. When the narrow, slight privacy interest of "anonymity" is weighed against the behemoth concept of "every stop during which police or victims might be hurt," the balancing test is of course won by the government. The instant Court never considered the valid alternative of breaking crimes down into subclasses. In the wake of the instant case, a person stopped for a petty, nonviolent misdemeanor will have to give his name because he "lost" the balancing test—a test the Supreme Court computed while considering not only his specific crime but also every possible crime, including terrorism and armed robbery. Under an alternate system, the crime for which a person is under reasonable suspicion would serve as a gauge of his threat to police and the public. Police would not seize his identification (and all the electronic database information that extends from

limited the scope of the Fourth Amendment, having buckled under the modern sensationalism surrounding terrorism and police fatalities.¹⁰⁷ Viewing such concerns as paramount, the Court ignored the objection that measures are already available, since police may conduct a *Terry* frisk.¹⁰⁸ Thus, the instant Court has consciously given more power to the state. Police now have more ways to detain suspects because they can frisk for weapons¹⁰⁹ or take the parallel measure of identification, which may be used to calculate a suspect's psychological profile or gauge his propensity for violence.¹¹⁰ The Court disregarded poignant objections that such measures are redundant, ineffective, and burdensome.¹¹¹

that) unless the crime was of a sufficiently serious nature. For example, a person suspected of tampering with a payphone, jaywalking, or stealing newspapers would not be classified as possessing the same "threat potential" as a person casing a bank or stalking a young woman. In order to minimize Fourth Amendment intrusion, only suspects of the latter, more dangerous crimes would be subject to compulsory identification. Under such a system, the Court would not need to compute the balancing test for every single codified crime, but instead, it could create general categories.

107. Justice Maupin asserted that the Nevada Supreme Court did not overreact to terrorism in its decision. *Hiibel v. Sixth Jud. Dist. Court*, 59 P.3d 1201, 1207 (Nev. 2002) (Maupin, J., concurring), *aff'd*, 124 S. Ct. 2451 (2004). However, the dissent clearly believed that the Nevada Supreme Court overreacted grossly to the threats of terrorism and that, under such fears, the majority sacrificed precious liberty. *Id.* at 1209-10 (Agosti, J., dissenting).

108. *See Hiibel*, 124 S. Ct. at 2464 n.7 (Stevens, J., dissenting) (citation omitted) (citing *Terry v. Ohio*, 392 U.S. 1, 25-26 (1968)) ("The Court suggests that furnishing identification also allows the investigating officer to assess the threat to himself and others. But to the extent that officer or public safety is immediately at issue, that concern is sufficiently alleviated by the officer's ability to perform a limited patdown search for weapons.").

109. *Id.* at 2458.

110. *See id.* at 2458-60.

111. *See supra* note 108; *Hiibel*, 59 P.3d at 1209 (Agosti, J., dissenting) ("The majority avoids the fact that knowing a suspect's identity does not alleviate any threat of immediate danger by arguing that a reasonable person cannot expect to withhold his identity from police officers"); *id.* at 1210 (Agosti, J., dissenting) (quoting *United States v. Robel*, 389 U.S. 258, 264 (1967)) (alterations in original) ("The majority, by its decision today, has allowed the first layer of our civil liberties to be whittled away. . . . 'It would indeed be ironic if, in the name of national defense, we would sanction the subversion of . . . liberties . . . which make[] the defense of the Nation worthwhile.'").