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SLIPPING DOWN THE SLOPE OF PROBABLE CAUSE: AN UNREASONABLE EXCEPTION TO WHAT WAS ONCE A REASONABLE RULE

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

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Upon receiving a call reporting possible domestic violence, a sheriff's deputy in Humboldt County, Nevada detained Petitioner under the authority of a state statute allowing an officer to "stop and identify" a person suspected of criminal behavior.[1] During the course of the detention, the deputy repeatedly asked Petitioner to identify himself, but Petitioner refused.[2] The deputy then arrested Petitioner for obstructing an officer's legal duty in failing to provide his name.[3] A justice of the peace in Union Township tried and convicted Petitioner, finding that Petitioner's actions violated a state statute.[4] The district court affirmed Petitioner's conviction after finding the public interest in requiring Petitioner to identify himself to be more sacrosanct than the constitutional rights violated.[5] Petitioner

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1. Hiibel v. Sixth Jud. Dist. Court, 124 S. Ct. 2451, 2455 (2004). An officer is permitted to detain a suspicious person who has been stopped by the officer for a brief time and to take steps to investigate further. NEV. REV. STAT. 171.123 (2003); *Hiibel*, 124 S. Ct. at 2458. Under the Nevada "stop and identify" statute, it is an officer's legal duty to detain persons under reasonably suspicious circumstances, and it is an officer's prerogative to demand that the suspects identify themselves. NEV. REV. STAT. 171.123 (2003); *Hiibel*, 124 S. Ct. at 2455-56. The suspicious circumstances noted by the officer in the instant case were skid marks in the gravel behind Petitioner's truck, a tip that an assault had occurred, and the officer's observation that Petitioner may have been intoxicated. Hiibel v. Sixth Jud. Dist. Court, 59 P.3d 1201, 1203 (Nev. 2002), *aff'd*, 124 S. Ct. 2451 (2004).

2. *Hiibel*, 124 S. Ct. at 2455. The detaining officer asked Petitioner to identify himself eleven times, but each time Petitioner refused, putting his hands behind his back and defying the officer to take him to jail. *Id.* Petitioner later claimed that the detaining officer never asked him to identify himself but instead asked for Petitioner's "papers." Larry Dudley Hiibel, Editorial, *He Fought the Law, and the Law Won*, S. FLA. SUN-SENTINEL, June 29, 2004, at 19A. While seemingly a minor issue of fact, the distinction between asking for papers and asking someone to identify himself is a rather large one in Fourth Amendment search and seizure jurisprudence. For a greater discussion of this distinction, see *Hiibel*, 59 P.3d at 1209 (Agosti, J., dissenting) (noting that because Nevada does not allow an officer to seize a person's wallet in order to find identification, an officer should not be able to demand that a suspect pour out the contents of his own mind).

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

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

5. *Hiibel*, 59 P.3d at 1203-04. The court applied a balancing test, weighing the public interest in protection against an individual's interest in autonomy. *Id.* at 1203. The court found that the deputy's request for identification from Petitioner was reasonable and necessary. *Id.*

appealed to the Supreme Court of Nevada, which, sitting en banc, held that the Nevada statute allowed a reasonable and minimal invasion of personal privacy and was constitutional under the Fourth Amendment.[6] Again Petitioner appealed, this time to the United States Supreme Court. The Court granted certiorari,[7] and affirming the line of decisions below, HELD, that a suspect detained on reasonable suspicion who refuses to surrender his identity contrary to state law cannot claim a seizure violative of the Fourth Amendment.[8]

The Fourth Amendment protects against unreasonable searches and seizures.[9] In defining what qualifies as a reasonable search and seizure, courts once followed a bright-line rule requiring probable cause, as the Fourth Amendment seemingly requires.[10] However, the United States Supreme Court's decision in a landmark case signaled the beginning of the Court's willingness to reconsider the traditionally strict limitations of the Fourth Amendment.[11]

Terry v. Ohio, decided in 1968, was the Court's first inquiry into whether a lesser standard of suspicion could satisfy the Fourth

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6. *Id.* at 1206. Petitioner further argued, both before the Supreme Court of Nevada and the United States Supreme Court, that the "stop and identify" statute as construed also violated his constitutional rights under the Fifth Amendment. *Hiibel*, 124 S. Ct. at 2460; *Hiibel*, 59 P.3d at 1203. While the alleged violations of Petitioner's Fifth Amendment rights are beyond the scope of this Case Comment, for a shrewd analysis of those rights, see *Hiibel*, 124 S. Ct. at 2461-64 (Stevens, J., dissenting).

7. *Hiibel*, 124 S. Ct. at 2456. The issue was whether the officer's request was reasonably related to the scope of the circumstances which justified the stop. *Id.* at 2460.

8. *Id.* at 2459. The Court held that a "state law requiring a suspect to disclose his name in the course of a valid *Terry* stop is consistent with Fourth Amendment prohibitions against unreasonable searches and seizures." *Id.*

9. U.S. CONST. amend. IV. The Fourth Amendment states:

> 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.

Id.

10. *See* Terry v. Ohio, 392 U.S. 1, 35 (1968) (Douglas, J., dissenting). The justification for not allowing the detention of a person on less than probable cause was in part based on the fact that allowing a police officer to detain a citizen under such a standard would authorize police to take greater action than could a court of law. *Id.* at 36 n.3 (Douglas, J., dissenting).

11. *See id.* at 35-36 (Douglas, J., dissenting). As a sign of the then-accepted position in Fourth Amendment jurisprudence, Justice Douglas was baffled that the Court would recognize even a minor exception to the bright-line rule of probable cause in allowing search and seizure, arguing that probable cause should not be riddled with exceptions. *Id.* at 38 (Douglas, J., dissenting).

Amendment's requirement of probable cause in effectuating a seizure.[12] In *Terry*, the Court considered whether the public interest in safety allows a police officer to frisk a suspect even though the officer has no probable cause for the suspect's detention.[13] Contrary to years of Fourth Amendment jurisprudence, which had viewed probable cause as an unyielding principle, the *Terry* Court seemed to view the requirement of probable cause as a manipulable continuum, wherein personal liberties could be sacrificed so long as the government interest was substantial. Thus, the Court stated that the new test for a Fourth Amendment seizure required balancing the need for the search against the invasiveness of the search.[14]

The *Terry* Court recognized the serious intrusion upon the sanctity of the person caused when an officer detains an individual and restricts his freedom.[15] However, the Court reasoned that a minor exception to the requirement of probable cause was justified by the possible harm an armed suspect can cause to the public or to the arresting officer.[16] Accordingly, the Court held that when a suspect is believed to be armed and dangerous, an officer has a limited right to detain the individual and ensure his own safety by performing a restricted patdown of the suspect, regardless of whether probable cause exists.[17] Hence, the Court's ruling was simply intended to be a minor exception ensuring the safety of the law enforcement officer. Stressing that the probable cause requirement could not be circumvented arbitrarily by a police officer, the Court failed to address all the limitations that the Fourth Amendment places on governmental intrusion.[18] After abolishing the old bright-line requirement of probable cause, the Court explicitly recognized the difficulty of forming

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12. *Hiibel*, 124 S. Ct. at 2458 (noting that "[b]eginning with *Terry v. Ohio*, the Court has recognized that a law enforcement officer's reasonable suspicion that a person may be involved in criminal activity permits the officer to stop the person for a brief time") (citation omitted).

13. *Terry*, 392 U.S. at 7-8. In *Terry*, a police officer noticed three men involved in suspicious activity and detained and searched the suspects. *Id.* at 6-7. Upon finding that two of the suspects were carrying concealed firearms, the officer arrested them. *Id.* at 7. The suspicious activity noted by the police officer consisted of two men repeatedly walking back and forth in front of a store, surreptitiously glancing into the window. *Id.* at 6. The officer testified that "after observing their elaborately casual and oft-repeated reconnaissance of the store window . . . he suspected the two men of 'casing a job, a stick-up.'" *Id.*

14. *Id.* at 20-21 (citing Camara v. Mun. Court, 387 U.S. 523, 534-37 (1967)).

15. *Id.* at 16-17.

16. *Id.* at 30-31.

17. *Id.* at 30.

18. *Id.* at 29. The Court went on to note that "[t]hese limitations [upon the expansion of the Fourth Amendment] will have to be developed in the concrete factual circumstances of individual cases." *Id.*

a new bright-line rule predicated on a diminished standard of probable cause.[19]

In *Papachristou v. City of Jacksonville*, the Court reconsidered some aspects of Fourth Amendment jurisprudence in light of the discretionary power some states gave law enforcement officers.[20] *Papachristou* involved a municipal ordinance that permitted police officers to arrest citizens on a variety of pretexts, ranging from vagrancy to juggling to living off the earnings of one's own wife.[21] The ordinance, in the guise of a criminal regulation, gave officers nearly unfettered discretion in identifying and arresting suspicious characters.[22] In *Papachristou*, the petitioner and her friends were seen by officers parked in front of a used-car lot.[23] The same used-car lot had been burglarized several times.[24] Suspecting that the petitioner was somehow involved with the previous robberies, the officer arrested the petitioner.[25] The petitioner was then convicted under the Jacksonville ordinance for "prowling by auto."[26] The City of Jacksonville defended its law on the grounds of police efficiency, arguing that vagrancy statutes were desirable because they allowed police to prevent crimes before they occurred.[27]

Striking down the ordinance, the Court noted that the ordinance granted too much discretion to officers, allowing them to arrest suspects without the probable cause demanded by the Fourth Amendment.[28] Whereas the Fourth Amendment was intended to serve as a check on police power, the Jacksonville ordinance was so broad as to allow arrest on nothing more

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19. *Id.* For a discussion of *Terry*'s practical effect on search and seizure, see Scott Lewis, Terry *Tempered or Torpedoed? The New Law of Stop and Frisk*, WIS. B. BULL., Aug. 1988, at 7-8.

20. Papachristou v. City of Jacksonville, 405 U.S. 156, 169 (1972).

21. *Id.* at 158. The Jacksonville ordinance permitted the arrest of such diverse groups of people as rogues, vagabonds, pilferers, and gamblers. *Id.* at 158 n.1 (citing JACKSONVILLE, FLA., ORDINANCE CODE § 26-57 (1972)). One of the common threads underlying the different bases for arrest under the ordinance was the fact that, alone, none of the circumstances would have satisfied the Fourth Amendment requirement of probable cause. *Id.* at 162-63.

22. *See id.* at 165.

23. *Id.* at 158-59.

24. *Id.* at 159.

25. *See id.* at 159, 169.

26. *Id.* at 159. The petitioner was traveling with three friends of mixed racial composition to a nightclub when she was arrested by police officers. *Id.* at 158-59. The police officers alleged that the reason for the arrest was that the car in which the petitioner and her friends were traveling had stopped by a used-car lot that had been recently broken into several times. *Id.* at 159. However, at no time was there any probable cause for the petitioner's arrest. *See id.* at 168-69 (noting that arrest of a citizen could not be grounded on the whim of a police officer or the loose tenets of an overbroad ordinance).

27. *See id.* at 171. The Court opined that "[t]he implicit presumption in these generalized vagrancy standards—that crime is being nipped in the bud—is too extravagant to deserve extended treatment." *Id.*

28. *Id.* at 168-69.

than a vague suspicion of criminal activity.[29] Moreover, the Court noted that "[a]rresting a person on suspicion, like arresting a person for investigation, is foreign to our system."[30] The Court found that the ordinance, in effect, made criminal those activities that by modern standards are typically considered innocuous.[31] Even though the broad terms of the vagrancy ordinance greatly augmented the arsenal of law enforcement, the Court held that the resulting infringement on personal liberties could not be justified on the grounds of deference to governmental interests.[32]

Hayes v. Florida was another instance in which the Court considered the limitation of personal liberties in pursuit of protecting law enforcement power.[33] Suspected of playing a role in a series of burglary-rapes, the petitioner in *Hayes* was detained by police officers, taken to the police station, and fingerprinted.[34] However, during the investigation, the police officers lacked both probable cause and a warrant.[35] At issue in *Hayes* was whether the suspect could be detained on the diminished standard of reasonable suspicion where no danger existed to the arresting officer and where the purpose of the detention was simply to enable police to prosecute criminal activity more effectively.[36]

Applying the *Terry* balancing test, the *Hayes* Court refused to expand the *Terry* doctrine, finding that the interests furthered by the police action were insufficient to overcome the violation of the petitioner's Fourth Amendment liberties.[37] Even though the fingerprinting performed in *Hayes* was a less serious intrusion than other types of imaginable searches and detentions,[38] the Court mirrored the reasoning in *Papachristou*, refusing to uphold a diminished standard of suspicion simply to ensure greater police efficacy.[39] Implicitly recognizing that probable cause can be bent to protect heightened government interests but cannot be broken for the sole

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29. *Id.*

30. *Id.* at 169.

31. *Id.* at 163.

32. *See id.* at 165. The Court stated that "the net cast is large, not to give the courts the power to pick and choose but to increase the arsenal of the police." *Id.* Because it gave too much discretionary power to police, the ordinance was unconstitutional. *Id.* at 168-69.

33. Hayes v. Florida, 470 U.S. 811, 812 (1985).

34. *Id.* at 812-13.

35. *Id.* at 812.

36. *Id.* at 813 (analogizing the facts of *Hayes* to those of *Terry*, where the police officer's actions were grounded on reasonable suspicion).

37. *Id.* at 815-17 (noting that the limits of a seizure under reasonable suspicion would have to be narrowly tailored to ensure protection of personal liberties).

38. *Id.* at 814 (comparing Davis v. Mississippi, 394 U.S. 721, 727 (1969)).

39. *See generally id.* (finding that the goal of greater law enforcement efficiency was worthwhile but was ultimately outweighed by the need to protect the personal liberties that would be trampled en route).

purpose of enabling greater law enforcement efficacy and authority,[40] the *Hayes* court refused to allow another exception to the Fourth Amendment.[41]

In the instant case, the Court relied on the *Terry* test to determine whether the sheriff's deputy had unreasonably seized Petitioner.[42] Balancing the intrusion on Petitioner's Fourth Amendment rights against the promotion of legitimate aims through Petitioner's seizure, the Court found that Petitioner's arrest for failure to identify himself was permissible under the Fourth Amendment.[43] Unlike in *Hayes*, where the Court viewed an investigatory detention without probable cause as a circumvention of the Fourth Amendment, the instant Court embraced the expansion of *Terry* as an effective means of protecting the safety of law enforcement officers and ensuring the efficacy of criminal investigations.[44]

The instant Court began its analysis by recognizing the governmental interests served by requiring a suspect to provide his name while detained in the course of a *Terry* stop.[45] The safety of the police and the public in dangerous situations was the foremost interest the Court recognized.[46] In addition, the instant Court noted that forcing a suspect to provide his name would provide a secondary benefit: it would make the task of police investigation more efficient.[47] Thus, in its reasoning, the Court gave considerable weight to the interests furthered by the detaining officer's learning a suspect's name.

Having found the governmental interests at stake substantial, the Court moved to the second prong of the balancing test: the intrusion on the Petitioner's Fourth Amendment rights.[48] The Court observed that, because the additional act of demanding a suspect's name did not change the basic purpose, rationale, or practical demands of a *Terry* stop, the *Terry* stop remained reasonable.[49] Thus, finding the intrusion in the instant case no greater than it would have been under a normal *Terry* stop, the instant Court stated that requiring a suspect to disclose his name was no great imposition on that individual's rights.[50]

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40. *Id.* at 815 (noting recent precedent in which the Court refused to extend the *Terry* doctrine to allow investigative interrogations at police stations).

41. *Id.* at 815-16. In part, the Court's decision also was predicated on the transportation of a suspect to a police station without the basis of probable cause. *Id.*

42. Hiibel v. Sixth Jud. Dist. Court, 124 S. Ct. 2451, 2459 (2004) (citing Delaware v. Prouse, 440 U.S. 648, 654 (1979)).

43. *Id.*

44. *Compare Hayes*, 470 U.S. at 815, *with Hiibel*, 124 S. Ct. at 2458.

45. *Hiibel*, 124 S. Ct. at 2458.

46. *Id.*

47. *Id.*

48. *Id.* at 2461.

49. *Id.* at 2459.

50. *Id.* at 2461.

Evaluating the prongs of the *Terry* balancing test, the Court determined that the facts of the instant case weighed heavily in favor of protecting the government's interests and allowing a police officer to demand a suspect's identity.[51] Although Petitioner argued that an individual's right to privacy had been tacitly acknowledged by the Court for many years,[52] the Court rejected Petitioner's argument, finding that the right to privacy hinges upon the importance of the governmental interests at stake.[53] Ultimately determining the government interests at stake to be significant and the invasions on personal privacy to be de minimis, the Court affirmed the decisions of lower courts,[54] holding the Nevada statute constitutional.[55]

Joined by Justices Souter and Ginsburg in his dissent, Justice Breyer criticized the majority for straying from recognized limitations on *Terry* stops.[56] Justice Breyer argued that in light of the general right of privacy under the Fourth Amendment, the intrusion on Petitioner's liberty interest was much more insidious than the majority acknowledged.[57] Finally, although conceding the importance of the *Terry* stop exception to the Fourth Amendment, Justice Breyer concluded that probable cause should be inviolable against further exceptions to the Fourth Amendment.[58]

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51. *Id.* at 2459-60.

52. *Id.* at 2459. The Court did not attach significance to dicta from previous cases in its analysis, stating, "we cannot view the dicta in *Berkemer* or Justice White's concurrence in *Terry* as answering the question whether a State can compel a suspect to disclose his name during a *Terry* stop." *Id.* Thus, the Court has examined privacy issues in light of *Terry* stops, *e.g.*, Terry v. Ohio, 392 U.S. 1, 34 (1968) (White, J., concurring), and noted that a policeman may address questions to anyone on the street, but that the person stopped is not obliged to respond and that answers may not be compelled. *Id.* For further analysis of privacy in the context of *Terry*-like stops, see *Berkemer v. McCarty*, 468 U.S. 420, 436-42 (1984), and *Illinois v. Lidster*, 540 U.S. 419, 423-28 (2004).

53. *See Hiibel*, 124 S. Ct. at 2458-59 (implying that the most important aspect of the balancing test is the importance of the government interests at stake); INS v. Delgado, 466 U.S. 210, 223-24 (1984) (finding that, because the government interest at stake was so significant, it overrode minor intrusion on Fourth Amendment liberties).

54. *See supra* notes 4-8 and accompanying text.

55. *Hiibel*, 124 S. Ct. at 2457, 2459.

56. *Id.* at 2464-65 (Breyer, J., dissenting) ("[T]his Court's Fourth Amendment precedents make clear that police may conduct a *Terry* stop only within circumscribed limits. And one of those limits invalidates laws that compel responses to police questioning.").

57. *Id.* at 2465-66 (Breyer, J., dissenting); *cf. Berkemer*, 468 U.S. at 439 ("[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.*") (emphasis added); Brown v. Texas, 443 U.S. 47, 51-52 (1979) (holding that even the government interest in prevention of crime cannot overcome guarantees of the Fourth Amendment).

58. *Hiibel*, 124 S. Ct. at 2465-66 (Breyer, J., dissenting).

The holding in the instant case testifies to the sacrifice of probable cause on the altar of governmental deference.[59] A broader, more reflective analysis of Petitioner's liberty interests in the context of probable cause jurisprudence, would have demanded a conclusion different from that reached by the instant Court.[60] Instead, the instant Court has allowed the seizure of a suspect based on nothing more than a bare suspicion and nothing less than a failure to provide identification. By failing to adequately consider the factual circumstances and accord appropriate weight to these facts when using the *Terry* balancing test, the instant Court unnecessarily broadened the *Terry* exception,[61] and it may have heralded

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59. *See* Hiibel v. Sixth Jud. Dist. Court, 59 P.3d 1201, 1210 (2002) (Agosti, J., dissenting), *aff'd*, 124 S. Ct. 2451 (2004) ("'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.'") (alteration in original) (quoting United States v. Robel, 389 U.S. 258, 264 (1967)); *cf.* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 459 (1990) (Brennan, J., dissenting) ("[T]he Fourth Amendment rests on the principle that a true balance between the individual and society depends on the recognition of 'the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.'") (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). For further analysis of the balance that courts have historically sought to achieve, see *Terry v. Ohio*, 392 U.S. 1, 11-12 (1968), where the majority stated:

> [T]he argument is made that the authority of the police must be strictly circumscribed by the law of arrest and search as it has developed to date in the traditional jurisprudence of the Fourth Amendment. It is contended with some force that there is not—and cannot be—a variety of police activity which does not depend solely upon the voluntary cooperation of the citizen and yet which stops short of an arrest based upon probable cause to make such an arrest. The heart of the Fourth Amendment, the argument runs, is a severe requirement of specific justification for any intrusion upon protected personal security. . . . Acquiescence by the courts in the compulsion inherent in the field interrogation practices at issue here, it is urged, would constitute an abdication of judicial control over, and indeed an encouragement of, substantial interference with liberty and personal security by police officers whose judgment is necessarily colored . . . .

Id. (footnote call number omitted).

60. *Compare* Papachristou v. City of Jacksonville, 405 U.S. 156, 171 (1972) (indicating that the Fourth Amendment would not bear intrusion on individual liberties without heightened government interests being present), *and Terry*, 392 U.S. at 23-24 (recognizing a narrow exception to the demands of probable cause by allowing an officer to ensure his own safety when it appeared he was in imminent danger from a suspect), *with Hiibel*, 59 P.3d at 1210 (Agosti, J., dissenting) ("The majority, by its decision today, has allowed the first layer of our civil liberties to be whittled away. The holding weakens the democratic principles upon which this great nation was founded.").

61. *Hiibel*, 124 S. Ct. at 2465-66 (Breyer, J., dissenting). Justice Breyer argued that, because no evidence was presented that the rule enunciated previously in *Terry* had prevented effective law enforcement, the Court could not forsake its loyalty to the requirements of probable cause. *Id.* at 2466 (Breyer, J., dissenting). One commentator has noted the continuing expansion of the *Terry* doctrine even where significant government interests are not at stake, writing that "the Court has interpreted *Terry* in a way that gives police officers more discretion than *Terry* necessarily

a return to the days of unchecked police discretion exemplified by the Jacksonville ordinance at issue in *Papachristou*.

In neglecting to consider thoroughly the factual circumstances surrounding Petitioner's seizure, the instant Court avoided acknowledging the lack of criminal suspicion surrounding Petitioner's detention.[62] Unlike in *Terry*, where the suspect acted in concert with another individual casing a store for a robbery,[63] Petitioner in the instant case simply was standing by his truck on the roadside.[64] The arresting officer had not personally observed any suspicious behavior prior to making the *Terry* stop in the instant case, although he had received a report of possible domestic violence.[65] According to the officer's own observations, Petitioner's behavior merely appeared suspicious.[66] Petitioner was fully cooperative with but one exception: he refused to provide identification.[67] The record indicates that at no time did the officer fear for his safety.[68] Yet the Court refused to accord the factual situation any weight, instead sanctioning an exception to probable cause simply on the basis of its presumed utility to law enforcement.[69]

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authorizes." Rachel Karen Laser, Comment, *Unreasonable Suspicion: Relying on Refusals to Support* Terry *Stops*, 62 U. CHI. L. REV. 1161, 1172 (1995). The Court seems to have continued that unfortunate trend in the instant case.

62. *See Hiibel*, 124 S. Ct. at 2455-56. Admittedly, the situation in the instant case is not entirely devoid of grounds for suspicion, as was *Brown v. Texas*, 443 U.S. 47, 48-49 (1979), where the suspect was detained and arrested on a hunch. However, the suspicion in the instant case is a far cry from the probable cause demanded by the Fourth Amendment. *Compare Hiibel*, 124 S. Ct. at 2455-56, *with supra* text accompanying note 16 (discussing *Terry*, 392 U.S. at 30-31). For further insight into the Fourth Amendment balancing test performed by the Court and the skewed results that may be achieved in its application, see *INS v. Delgado*, 466 U.S. 210, 228-29 (1984) (Brennan, J., concurring in part and dissenting in part).

63. *Terry*, 392 U.S. at 5-7.

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

65. *Id. Compare id.* (where police officers had received information about possible illegal activity but made no such independent observations aside from the generalized suspicion of Petitioner's intoxication), *with Terry*, 392 U.S. at 23-24 (where the Court noted the danger of the officer's situation).

66. *Hiibel*, 124 S. Ct. at 2455. For Petitioner's own impressions of the events surrounding his arrest, see Hiibel, *supra* note 2, at 19A.

67. Hiibel v. Sixth Jud. Dist. Ct., 59 P.3d 1201, 1203 (Nev. 2002), *aff'd*, 124 S. Ct. 2451 (2004).

68. *See Hiibel*, 124 S. Ct. at 2455 (implicitly noting that the officer never seemed to fear for his own safety although he had received reports of a possible domestic dispute). *But see Hiibel*, 59 P.3d at 1203 (implying that though the arresting officer found that Petitioner seemed to be intoxicated, aggressive, and moody in refusing to answer the officer's request for identification, there was an insufficient basis for the suspect's detention under probable cause).

69. *Hiibel*, 124 S. Ct. at 2458 (inferring possible situations where it would benefit a police officer to know the identity of the suspect he had detained). *But see supra* notes 60-61 (discussing that efficacy of law enforcement should not relate to expansion of the Fourth Amendment).

Mere usefulness, however, does not measure up to the strict *Terry* requirement of imminent danger to an arresting officer in order to evade the necessity of probable cause.[70] The instant Court's reasoning operates under the premise that if an infringement is useful to law enforcement, it is more likely to meet the demands of the Constitution.[71] While technically consistent with the nature of the *Terry* balancing test, the Court's emphasis on weighing that infringement effectively eviscerates the spirit of the Fourth Amendment. The very intention of the Fourth Amendment is to protect against police action performed at the cost of personal liberty.[72] The Court's "useful *ergo* constitutional" analysis thus runs contrary to the strict prohibition embodied in the Fourth Amendment. Even as enunciated by *Terry*, the Fourth Amendment was not meant to allow for inroads into the probable cause requirement where there is no recognized imminent danger to the public or to the arresting officer.[73] Thus, the *Hayes* Court noted that where there is no heightened government interest at stake, *Terry*'s exception does not apply;[74] without heightened government interests, trespass on the Fourth Amendment guaranty of individual autonomy is unjustifiable.[75] In failing to similarly recognize that the

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70. Papachristou v. City of Jacksonville, 405 U.S. 156, 171 (1972) (holding that vagrancy statutes are not constitutional simply because they are effective tools of law enforcement); *see* Terry v. Ohio, 392 U.S. 1, 26 (1968) (stating that the search "must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby"). *Contra supra* note 69 and accompanying text.

71. *See Hiibel*, 124 S. Ct. at 2458.

72. *See* Laser, *supra* note 61, at 1163-64 (arguing that instead of being a tool used to expand police power, "[t]he Fourth Amendment is in large part a check on police discretion"). For an insightful perspective on the historical catalyst of the Fourth Amendment's creation, see generally David E. Steinberg, *The Original Understanding of Unreasonable Searches and Seizures*, 56 FLA. L. REV. 1051 (2004). Steinberg argues that the Fourth Amendment was intended to prevent discretionary police authority. *Id.* at 1062-69. *But see* Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977) (stating that the reasonableness of a seizure depends "'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers'") (quoting United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975)).

73. Most notably, the majority in *Terry* based its exception to the requirement of probable cause largely on the inherent danger a police officer faces. *Terry*, 392 U.S. at 23-24.

74. Hayes v. Florida, 470 U.S. 811, 815 (1985) (refusing to extend the *Terry* exception) (citing Dunaway v. New York, 442 U.S. 200 (1979)); *see also* Hiibel v. Sixth Jud. Dist. Court, 59 P.3d 1201, 1209 (Nev. 2002) (Agosti, J., dissenting), *aff'd*, 124 S. Ct. 2451 (2004) ("The purpose of such a search is to ensure the detainee is not armed with a weapon that could be immediately used against a police officer, not to ensure against a detainee's propensity for violence based upon a prior record of criminal behavior.").

75. *Compare Papachristou*, 405 U.S. at 169 ("A vagrancy prosecution may be merely the cloak for a conviction which could not be obtained on the real but undisclosed grounds for the arrest."), *with Hiibel*, 124 S. Ct. at 2455 (upholding the arrest and conviction although there was insufficient evidence to meet the probable cause standard), *and* Martinelli v. City of Beaumont, 820 F.2d 1491, 1494 (9th Cir. 1987) (disallowing arrest based on reasonable suspicion where it would

interests presented by the government were not "heightened" under the meaning of either *Terry* or *Hayes*, the Court erroneously lowered the threshold for future inquiries into probable cause and reasonable seizure.[76] In so doing, the instant Court has granted law enforcement officials a range of discretion similar to that which it held unconstitutional in *Papachristou*.

In failing to truly consider the factual circumstances of the instant case, the instant Court also failed to concede the importance of the liberty interests at stake.[77] Prior to the instant decision, an officer in the course of a *Terry* stop could frisk a suspect to ensure the suspect was not carrying weapons, but that officer could not demand to see any other object the suspect might be carrying.[78] What the Court now sanctions is an act far more violative of personal liberty than the mere relinquishing of tangible property: a suspect must now empty his mind at the request of a police officer.[79] It has been ably argued that the greatest intrusion a person can bear is being forced to use his mind to assist the Government,[80] and yet it is just such an intrusion that the Court disregarded and even condoned in the instant case.[81]

Yet another liberty interest the instant Court ignored is the right to privacy recognized under the Fourth Amendment.[82] The right to privacy—or the "right to be let alone" in the words of Justice Brandeis—is a fundamental right protected under the Fourth Amendment.[83] When coupled with the right to wander freely and anonymously in society,[84] an

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allow bootstrapping of arrest on less than probable cause).

76. *See supra* notes 56-58 and accompanying text.

77. *See Hiibel*, 124 S. Ct. at 2458-60.

78. *Hiibel*, 59 P.3d at 1209 (Agosti, J., dissenting); *see* Grover C. Trask, II & Timothy J. Searight, *Proposition 8 and the Exclusionary Rule: Towards a New Balance of Defendant and Victim Rights*, 23 PAC. L.J. 1101, 1124 (1992) ("It is difficult to reconcile why a lawfully detained person may be fingerprinted, but that person's wallet or purse or other item where identification might reasonably be kept may not be removed. It is debatable whether such a procedure is more invasive than fingerprinting.").

79. For an interesting perspective on the confluence of Fifth Amendment and Fourth Amendment protections in the context of *Terry* stops, see *Hiibel*, 124 S. Ct. at 2461-64 (Stevens, J., dissenting), arguing that the Nevada statute at issue in the instant case is violative of the Fifth Amendment prohibition against being forced to bear witness against oneself.

80. *See* Doe v. United States, 487 U.S. 201, 219-21 (1988) (Stevens, J., dissenting).

81. *See supra* text accompanying note 51.

82. *Hiibel*, 59 P.3d at 1207-10 (Agosti, J., dissenting).

83. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); *see Hiibel*, 59 P.3d at 1204; Pub. Utils. Comm'n v. Pollack, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting).

84. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972); Union Pac. Ry. v. Botsford, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.").

individual's interest in self-determination seems nearly limitless. While the Fourth Amendment as drafted by the Framers justly sacrifices that interest where police have probable cause to suspect a person of criminal activity,[85] the Court here has allowed for an even greater sacrifice on a far weaker foundation. Ultimately, in holding that probable cause is not necessary to force a suspect to reveal his identity, the instant Court has decided that perhaps the liberty interests protected by the Fourth Amendment are not so great after all.[86]

The instant Court seemingly viewed the exception it created in the instant case as a minor one.[87] However, when coupled with the *Terry* exception, the loophole the Court has created in the instant case can have far-reaching effect.[88] Under the instant case, the detention of an individual is justified on the mere pretext of law enforcement convenience—the precise justification, oddly enough, that the Fourth Amendment was intended to counter.[89] How long can the Fourth Amendment withstand such abuse of its intent and spirit? The Court's pretext for another exception in the instant case does not further protect the significant interests identified in *Terry*.[90] Nor has it been shown that the Court's expansion of its discretion will better arm law enforcement in combating crime.[91] Thus, the very reason the Court allows the expansion is ironically the very aim the Fourth Amendment was constructed to combat: the promotion of police efficacy at the expense of personal liberty.[92]

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85. *See supra* notes 9-11 and accompanying text.

86. *See Hiibel*, 124 S. Ct. at 2458-60; *Hiibel*, 59 P.3d at 1206 ("To hold that a name, which is neutral and non-incriminating information, is somehow an invasion of privacy is untenable. Such an invasion is minimal at best.").

87. *See Hiibel*, 124 S. Ct. at 2461 (finding liberty interest to be minimal and therefore easily sacrificed to government interests at stake).

88. *See supra* notes 62-65 and accompanying text.

89. *See supra* notes 62-65 and accompanying text.

90. *See supra* note 60 and accompanying text.

91. *Hiibel*, 124 S. Ct. at 2466 (Breyer, J., dissenting); *Hiibel*, 59 P.3d at 1209 (Agosti, J., dissenting). However, even if the expansion of the *Terry* doctrine was shown to better enable law enforcement to fight crime, it might still be held unconstitutional under the reasoning in *Papachristou*.

92. Laser, *supra* note 61, at 1163. There is an inherent tension in the Court's holding in the instant case; the Court weakens the protections of the Fourth Amendment for the purpose of increasing police power even though the Fourth Amendment was designed for the express purpose of preventing the exercise of such police powers. *Compare Hiibel*, 124 S. Ct. at 2458 (allowing officer broad discretion to determine what satisfies standard of "reasonable suspicion"), *with* Lewis, *supra* note 19 (analyzing the modern trend in which courts interpret what is reasonable under the Fourth Amendment). Lewis states that, in the wake of *Terry v. Ohio*:

> the stop and frisk rules were fairly straightforward and applied equally to pedestrian and vehicular investigative detention stops, which commonly became known as Terry stops. However, rapidly developing changes in the law of stop and

It may be said that the instant Court too easily sloughed off decades of jurisprudence in christening an expansion of the *Terry* doctrine.[93] Whereas courts have long hesitated to invade the area of probable cause,[94] the instant Court's holding deferred even to weak governmental interests in reducing personal liberty.[95] In failing to consider personal liberties, the instant case may very well be a harbinger of an even greater reduction of personal liberties. Although protecting law enforcement officers and investigating impending crime are certainly important, those governmental interests should not supplant the instant Court's obligation to protect both the Fourth Amendment and Petitioner's rights thereunder.[96] Disturbingly, what began as a bright-line exception in *Terry* has burgeoned into case-by-

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> frisk have diluted the process so much so [sic] that both the U.S. and Wisconsin supreme courts now agree that law enforcement officers can best draw upon their own training and instinct. Officers must balance their zealousness with the public's privacy protections.

Lewis, *supra* note 19, at 7. By predicating its decision largely on the protection of governmental interests for the furtherance of criminal investigation, the Court seems to have missed the most basic reason for the Fourth Amendment: to protect suspects against unreasonable searches and seizures by law enforcement. For a useful historical perspective on the Fourth Amendment, see Jon Eldredge, National Perspective, *Detainment of United States Citizens as Enemy Combatants Under a Fourth Amendment Historical Analysis*, 6 J.L. & SOC. CHALLENGES 19, 21-32 (2004), noting that prior to the Fourth Amendment, American colonists were subject to the vagaries of writs of assistance obtained by customs officers. The writs of assistance themselves were often subject to widespread abuse by customs officers where there was no basis for detention or seizure of a suspect. *Id.* at 24. Eldredge noted that "'customs officers obtained writs of assistance on request as routine accessories to their commissions, without alleging illegal activity as a pretext for them, without judicial superintendence, and without the possibility of refusal.'" *Id.* (quoting William J. Cuddihy, The Fourth Amendment: Origins and Original Meaning 762-63 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School)). The Fourth Amendment was designed, in large part, to guard against "[t]he possibility of a return to general warrants [which] underscored the Framers' concerns about arbitrary police power and the absence of adequate judicial intervention." *Id.* at 28. *See generally* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999) (noting that the Framers' intent in drafting the Fourth Amendment was to avoid the type of discretionary power that America had experienced while a colony of Great Britain). The instant Court's decision, rather than an evolution in the area of Fourth Amendment jurisprudence, is a reversion to a bygone day where police discretion was nearly unfettered by judicial oversight. After over two hundred years of Fourth Amendment jurisprudence, the instant Court has interpreted the requirements of probable cause to be precisely what the Framers sought to avoid.

93. *Hiibel*, 124 S. Ct. at 2465 (Breyer, J., dissenting).

94. *See, e.g.*, Hayes v. Florida, 470 U.S. 811, 814-15 (1985); Brown v. Texas, 443 U.S. 47, 51-53 (1979); *cf.* Miranda v. Arizona, 384 U.S. 436, 479 (1966) (refusing to recognize an exception to the Fifth Amendment by finding the interrogation of a suspect violative of Fifth Amendment rights).

95. *See Hiibel*, 124 S. Ct. at 2458.

96. *Cf.* INS v. Delgado, 466 U.S. 210, 225-43 (1984) (Brennan, J., concurring in part and dissenting in part) (stating that the Court has an obligation to fairly balance liberty interest against state interest).

case avoidance of the Fourth Amendment's requirement of probable cause.[97] Such jurisprudence can only weaken the foundation of probable cause and enfeeble the once-substantial protection of the Fourth Amendment.[98] The Framers would be both appalled by the instant Court's holding and fearful of slipping even further away from the ideals represented by the necessity of probable cause.

97. *See supra* note 19 and accompanying text. For further discussion of the progression of Fourth Amendment erosion and its practical effects, see generally Kenneth Gavsie, Note, *Making the Best of "Whren": The Problems with Pretextual Traffic Stops and the Need for Restraint*, 50 FLA. L. REV. 385 (1998).

98. In *Davis v. United States*, 328 U.S. 582 (1946), Justice Frankfurter noted:

> 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.

Id. at 597 (Frankfurter, J., dissenting); *see also* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 474 (1990) (Stevens, J., dissenting) ("The imposition that seems diaphanous today may be intolerable tomorrow.").