IDENTITY CRISIS: *UNITED STATES V. HIIBEL* AND THE CONTINUED EROSION OF PRIVACY RIGHTS

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I. INTRODUCTION

Compelled identification statutes exist in more than twenty states and United States territories.[1] Nevada's "stop and identify" provision is chapter 171.123 of the Nevada Revised Statutes (NRS), which provides:

> 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.
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> . . .
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> 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.[2]

In some states, a person who refuses to reveal his identity to police is charged with a misdemeanor or civil violation, while other states consider the refusal as a factor in whether a suspect violated loitering laws.[3] These compelled identification laws have their roots in English vagrancy statutes that required vagrants to provide "a good account of themselves" or face arrest.[4]

Until recently, the United States Supreme Court recognized constitutional limitations on these laws, holding that compelled identification statutes similar

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[1] *E.g.*, ALA. CODE § 15-5-30 (2004); ARK. CODE ANN. § 5-71-213(a)(3) (Michie 2004); COLO. REV. STAT. § 16-3-103(1) (2004); DEL. CODE ANN. tit. 11, §§ 1902(a), 1321(6) (2004); FLA. STAT. ANN. § 856.021(2) (2004); GA. CODE ANN. § 16-11-36(b) (2004); 725 ILL. COMP. STAT. 5/107-14 (2004); KAN. STAT. ANN. § 22-2402(1) (2004); LA. CODE CRIM. PROC. ANN. art. 215.1(A) (West 2004); MO. REV. STAT. § 84.710(2) (2004); MONT. CODE ANN. § 46-5-401(2)(A) (2004); NEB. REV. STAT. § 29-829 (2004); NEV. REV. STAT. 171.123 (2004); N.H. REV. STAT. ANN. §§ 594:2, 644:6 (2004); N.M. STAT. ANN. § 30-22-3 (2004); N.Y. CRIM. PROC. LAW § 140.50(1) (McKinney 2004); N.D. CENT. CODE § 29-29-21 (2004); R.I. GEN. LAWS § 12-7-1 (2004); UTAH CODE ANN. § 77-7-15 (2004); VT. STAT. ANN. tit. 24, § 1983 (2004); WIS. STAT. § 968.24 (2004).

[2] NEV. REV. STAT. 171.123 (2004).

[3] Hiibel v. Sixth Judicial Dist. Court, 124 S. Ct. 2451, 2456 (2004).

[4] *Id.* at 2457 (quoting 15 Geo. 2, ch. 5, § 2 (1744)).

to Nevada's were either void for vagueness or so arbitrary that they posed too great a risk for abusive police practices to withstand constitutionality.[5] However, until it heard *Hiibel v. Sixth Judicial District Court* in early 2004, the Court had declined to address whether persons could be punished for refusing to identify themselves during stops for reasonable suspicion.[6]

Larry Hiibel was convicted pursuant to NRS 171.123 and 199.280[7] after he refused to give his name during a roadside investigation for domestic battery.[8] The Nevada Supreme Court upheld his conviction, declaring that the statute was "a commonsense requirement necessary to protect both the public and law enforcement officers . . . consistent with the Fourth Amendment."[9] Remarkably, just ten months prior to the Nevada Supreme Court's decision, the Ninth Circuit Court of Appeals, in *Carey v. Nevada Gaming Control Board*, held that NRS 171.123 was an "egregious" violation of the Fourth Amendment.[10]

In light of this split of authority, the United States Supreme Court granted Hiibel's petition to review the Nevada Supreme Court's decision.[11] However, in a departure from decades of precedent, the United States Supreme Court upheld the constitutionality of the Nevada statute.[12] In a 5-4 decision, the Court declared that the arrest of Hiibel pursuant to NRS 171.123 did not violate the Fourth Amendment prohibition against unreasonable searches and seizures.[13] The Court also held that Hiibel's conviction for refusing to identify himself did not violate his Fifth Amendment right against self-incrimination.[14] Like the Nevada Supreme Court, the United States Supreme Court determined that requiring suspects to reveal their identification is "a commonsense inquiry."[15]

This note argues that compelled identification statutes like NRS 171.123 are anything but commonsense. Part Two of this note details the case history of the *Hiibel* decision. Part Three sets forth the relevant Fourth Amendment case law dealing with privacy and questioning during police stops, followed in Part Four by an explanation of cases interpreting the Fifth Amendment's application to compulsory identification requirements. Finally, Part Five analyzes

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[5] *E.g.*, Kolender v. Lawson, 461 U.S. 352, 361 (1983); Brown v. Texas, 443 U.S. 47, 52 (1979); Papachristou v. Jacksonville, 405 U.S. 156, 162 (1972).

[6] *Brown*, 443 U.S. at 53 n.3; *Kolender*, 461 U.S. at 362 n.10; *Hiibel*, 124 S. Ct. at 2451.

[7] NEV. REV. STAT. 199.280 (2003) provides:

> A person who, in any case or under any circumstances not otherwise specially provided for, willfully resists, delays or obstructs a public officer in discharging or attempting to discharge any legal duty of his office shall be punished:
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> . . .
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> 2. Where no dangerous weapon is used in the course of such resistance, obstruction or delay, for a misdemeanor.

[8] Hiibel v. Sixth Judicial Dist. Court, 59 P.3d 1201, 1203 (Nev. 2002), *cert. granted*, 540 U.S. 965 (2003).

[9] *Id.* at 1207.

[10] Carey v. Nev. Gaming Control Bd., 279 F.3d 873, 881 n.6 (9th Cir. 2002).

[11] Hiibel v. Sixth Judicial Dist. Court, 124 S. Ct. 430 (2003).

[12] Hiibel v. Sixth Judicial Dist. Court, 124 S. Ct. 2451, 2461 (2004).

[13] *Id.* at 2460.

[14] *Id.* at 2461.

[15] *Id.* at 2460.

how the United States Supreme Court erred in holding compelled identification statutes constitutional.

II. *Hiibel* Case History

A. *Factual Background*

On May 21, 2000, Humboldt County Sheriff's Deputy Lee Dove responded to a call that a man was striking a female passenger in a red and silver truck along Grass Valley Road in rural, north-central Nevada.[16] Upon arriving at the scene, Dove spoke with the caller, who pointed to a vehicle parked alongside the road.[17] Dove approached the truck and noticed skid marks in the gravel, suggesting the truck was parked abruptly.[18] He then spotted Larry Hiibel outside the truck and Hiibel's minor daughter sitting inside the vehicle.[19] Based on Hiibel's speech, odor and mannerisms, Dove believed that Hiibel was intoxicated.[20] Dove asked Hiibel for identification, but Hiibel refused.[21] Hiibel placed his hands behind his back, challenging Dove to arrest him because "he did not believe he had done anything wrong."[22] Dove later reported that Hiibel became "aggressive and moody."[23] After eleven requests for identification, Dove arrested Hiibel.[24] While Dove could not determine whether Hiibel had committed a crime, Dove "put him in handcuffs so [Dove] could secure him for [Dove's] safety."[25]

Hiibel was charged with and found guilty of resisting an officer in violation of NRS 199.280.[26] Prosecutors dropped a domestic battery charge and never charged Hiibel with public intoxication or driving under the influence of alcohol.[27] On appeal, the district court affirmed Hiibel's conviction as "reasonable and necessary," holding that it is crucial for officers and possible victims to know the identity of persons suspected of domestic violence and driving under the influence.[28] Hiibel appealed to the Nevada Supreme Court, challenging the constitutionality of NRS 171.123.[29]

B. *The Nevada Supreme Court Decision*

Writing for the majority, Justice Cliff Young acknowledged the importance of wandering freely in society without being compelled to reveal one's identity.[30] Nevertheless, he wrote that the right to privacy is not absolute, but

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[16] Hiibel v. Sixth Judicial Dist. Court, 59 P.3d 1201, 1203 (Nev. 2002).
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*; Nev. Rev. Stat. 199.280 (2003).
[27] *Hiibel*, 59 P.3d at 1203.
[28] *Id.* at 1203-04.
[29] *Id.* at 1204.
[30] *Id.*

limited by reasonableness.[31] The majority concluded that the public interest in requiring persons to identify themselves to police when reasonable suspicion exists is "overwhelming."[32] To support this conclusion, the majority pointed to increased threats from terrorism, school shootings and statistics regarding violence against officers.[33] Knowing a suspect's identity, argued the majority, allows officers to evaluate and predict such dangers.[34]

Moreover, the court stated that NRS 171.123 involves a minimum invasion of privacy, far less than a pat-down frisk.[35] A name is "neutral and non-incriminating information," and reasonable people do not withhold their identities from officers as Hiibel did.[36] Rather, individuals willingly give their names when meeting new acquaintances or giving out business cards, credit cards, checks, and driver's licenses.[37] Furthermore, the majority explained that NRS 171.123 applies only in situations where officers reasonably suspect and can articulate their suspicion that a person has engaged in criminal behavior.[38] Justice A. William Maupin's brief concurrence further stressed the narrow application of the statute, and emphasized the need to protect police and the public in light of the war against terrorism.[39]

Justices Deborah A. Agosti, Miriam Shearing and Robert E. Rose rejected the majority's analysis, arguing that it abandoned the fundamental right to privacy by requiring persons to identify themselves or face arrest.[40] The dissent reiterated the limited holding of *Terry v. Ohio*,[41] which allows police to pat down persons for weapons, but not to detect wallets and remove them to be searched.[42] With the majority decision, an officer could now "figuratively, reach in, grab the wallet and pull out the detainee's identification."[43] The dissent also attacked the majority's use of statistics about police fatalities, arguing that they did not support the assertion that an officer is better protected from violence by knowing a suspect's identity.[44] In the view of the dissenting justices, the majority failed to recognize that officers investigating crimes must rely on the observable conduct of a person, not his identity.[45] Moreover, situations in which persons voluntarily give their names when meeting new acquaintances or business associates are distinguishable from situations in which police force persons to identify themselves or face arrest.[46] The latter are "the type of government intrusion that the Fourth Amendment was designed

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[31] *Id.*
[32] *Id.* at 1205 (citing Brown v. Texas, 443 U.S. 47, 50 (1979) (quoting Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977)); *see* Terry v. Ohio, 392 U.S. 1, 21 (1968).
[33] *Hiibel*, 59 P.3d at 1205-06.
[34] *Id.* at 1205.
[35] *Id.* at 1206.
[36] *Id.* at 1206-07.
[37] *Id.* at 1206.
[38] *Id.* at 1207.
[39] *Id.* (Maupin, J., concurring).
[40] *Id.* at 1207-08 (Agosti, J., dissenting).
[41] Terry v. Ohio, 392 U.S 1, 23 (1968).
[42] *Hiibel*, 59 P.3d at 1209.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*

to prevent."[47] Furthermore, the dissenting opinion argued that the majority risked being "blinded by fear" with its argument about domestic terrorism.[48] For the dissent, the true test of the nation's courage in these times is "our necessary and steadfast resolve to protect and safeguard the rights and principals upon which our nation was founded, our constitution and personal liberties."[49]

Notably, the dissenting opinion relied on *Carey v. Nevada Gaming Control Board*, a Ninth Circuit Court of Appeals decision issued ten months earlier that also addressed the constitutionality of NRS 171.123.[50] James Carey refused to identify himself to a Gaming Control Board Agent who suspected him of illegal card counting at a Laughlin, Nevada casino.[51] Even though the agent determined that there was no probable cause to arrest Carey for cheating, he arrested Carey pursuant to NRS 171.123 and 197.190[52] for not revealing his name.[53] Carey was never charged, but he alleged that the agent, the state of Nevada and the Gaming Control Board violated his Fourth and Fifth Amendment rights by compelling him to identify himself to police during a lawful investigatory detention.[54] The Ninth Circuit agreed with Carey, determining that laws like NRS 171.123 "bootstrap the authority to arrest on less than probable cause, and the serious intrusion on personal security outweighs the mere possibility that identification might provide a link leading to arrest."[55] The *Hiibel* minority agreed, finding the Ninth Circuit's approach "more lucid."[56] In contrast and without elaborating as to its own reasoning, the *Hiibel* majority proclaimed the *Carey* decision was "unpersuasive."[57]

In response to the Nevada Supreme Court's decision, Hiibel filed a petition for a writ of certiorari in the United States Supreme Court, requesting consideration of the question of whether NRS 171.123 violated the Fourth and Fifth Amendments. The Court granted Hiibel's petition in late 2003.[58] Finally, after decades of avoiding the issue, the United States Supreme Court was ready to address whether the constitution permits state law to punish persons for refusing to identify themselves during lawful police stops.

C. *The United States Supreme Court Decision*

Justice Anthony Kennedy began the majority decision by acknowledging the limits on "stop and identify" statutes imposed by the Court for stops based

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[47] *Id.*

[48] *Id.* at 1210.

[49] *Id.*

[50] Carey v. Nev. Gaming Control Bd., 279 F.3d 873 (9th Cir. 2002).

[51] *Id.* at 876.

[52] NEV. REV. STAT. 197.190 (2003) provides:

> Every person who, after due notice, shall refuse or neglect to make or furnish any statement, report or information lawfully required of him by any public officer . . . or who shall willfully hinder, delay or obstruct any public officer in the discharge of his official powers or duties, shall, where no other provision of law applies, be guilty of a misdemeanor.

[53] *Carey*, 279 F.3d at 876.

[54] *Id.*

[55] *Id.* at 880 (quoting Lawson v. Kolender, 658 F.2d 1362, 1366-67 (9th Cir. 1981)).

[56] Hiibel v. Sixth Judicial Dist. Court, 59 P.3d 1201, 1208 n.6 (Nev. 2002), *cert granted*, 540 U.S. 965 (2003) (Agosti, J., dissenting).

[57] *Id.* at 1204.

[58] Hiibel v. Sixth Judicial Dist. Court, 124 S. Ct. 430 (2003).

on less than reasonable suspicion.[59] However, the fact that Deputy Dove had reasonable suspicion to question Hiibel distinguished his stop from those prior cases.[60] Moreover, the Nevada statute is narrower than similar statutes that were held unconstitutionally vague because NRS 171.123 requires suspects to give officers only their names, not their drivers' licenses or other documents.[61]

As for Hiibel's Fourth Amendment argument, the majority stated that the right to question suspects is essential to police investigations, and officers are free to ask for identification as long as they have reasonable suspicion.[62] In fact, questions about a suspect's identity are routine in *Terry* stops and serve important government interests.[63] Justice Kennedy wrote:

> Knowledge of identity may inform an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder. On the other hand, knowing identity may help clear a suspect and allow the police to concentrate their efforts elsewhere. Identity may prove particularly important in cases such as this, where the police are investigating what appears to be a domestic assault. Officers called to investigate domestic disputes need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim.[64]

Still, while officers may ask suspects for their identity, the majority acknowledged that its prior decisions had left open the question of whether suspects may be arrested and prosecuted for refusing to answer.[65] Although Hiibel argued that dicta from earlier decisions supported his argument against prosecution, the Court rejected his argument and stated that it "do[es] not read these statements as controlling."[66] Instead, the Court explained, those statements recognized that the Fourth Amendment cannot require suspects to answer questions.[67] State law, however, may impose such requirements, and here, the source of the legal obligation arises from Nevada state law, not the United States Constitution.[68] The majority stated that NRS 171.123 satisfied the Fourth Amendment reasonableness test, which balances Hiibel's right to privacy against the government's interests, because the request for identification had an immediate relation to the purpose and demands of a *Terry* stop.[69] The majority also rejected Hiibel's argument that NRS 171.123 circumvents the probable cause requirement by allowing an officer to arrest a person for being suspicious, thereby creating a risk for arbitrary police enforcement.[70] That concern, the Court said, is alleviated by the requirement that a *Terry* stop

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[59] Hiibel v. Sixth Judicial Dist. Court, 124 S. Ct. 2451, 2457 (2004) (citing Papachristou v. Jacksonville, 405 U.S. 156 (1972); Brown v. Texas, 443 U.S. 47 (1979); Kolender v. Lawson, 461 U.S. 352 (1983)).

[60] *Id.*

[61] *Id.*

[62] *Id.* at 2458.

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.* at 2459.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

be reasonably related in scope to the circumstances justifying the initial stop.[71] Here, the request for Hiibel's identity was a "commonsense" inquiry, not an effort to obtain an arrest for failure to identify oneself after a *Terry* stop yielded insufficient evidence.[72]

The majority opinion next addressed Hiibel's argument that his conviction violated the Fifth Amendment by forcing him to make disclosures that were testimonial, incriminating and compelled.[73] While the majority agreed that stating one's name may qualify as testimonial, the Court concluded that revealing Hiibel's name presented no reasonable danger of incrimination.[74] Justice Kennedy wrote:

> Petitioner's refusal to disclose his name was not based on any articulated real and appreciable fear that his name would be used to incriminate him, or that it "would furnish a link in the chain of evidence needed to prosecute" him. As best as we can tell, petitioner refused to identify himself only because he thought his name was none of the officer's business.[75]

Furthermore, the majority suggested that answering a request to disclose one's name is likely incriminating only in unusual circumstances.[76] Although the majority recognized Hiibel's belief that he should not be compelled to disclose his identity, the Fifth Amendment cannot override the Nevada Legislature's judgment without a reasonable belief by Hiibel that the disclosure would incriminate him.[77]

Four justices dissented from the majority opinion, expressing their disagreement in two separate opinions based on the Fourth and Fifth Amendments. In his dissent, Justice John Paul Stevens reasoned that the Fifth Amendment right against self-incrimination is not as narrow as the majority or the Nevada statute suggest.[78] Justice Stevens stated that the constitutional privilege extends beyond criminal court proceedings to *Terry* stops, and there was no reason why the subject of an interrogation based on mere suspicion should have less protection than a suspect detained for probable cause.[79] Thus, because a detainee is not obligated to respond to an officer's questions during a *Terry* stop, there is no reason that the suspect must disclose his identity.[80] In addition, Justice Stevens criticized the majority for declining to resolve the question of whether Hiibel's compelled communication was testimonial.[81] He explained that Hiibel's statement, made during a *Terry* stop, qualified as an interrogation and therefore was testimonial in nature.[82] Moreover, Justice Stevens disagreed with the majority's conclusion that the state can compel disclosure of one's

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[71] *Id.*
[72] *Id.* at 2460.
[73] *Id.*
[74] *Id.*
[75] *Id.* at 2461 (quoting Hoffman v. United States, 341 U.S. 479, 486 (1951)).
[76] *Id.*
[77] *Id.*
[78] *Id.* at 2462 (Stevens, J., dissenting).
[79] *Id.*
[80] *Id.* at 2462-63.
[81] *Id.* at 2463.
[82] *Id.*

identity because it is not incriminating.[83] The Fifth Amendment protects compelled testimony that communicates information that may lead to incriminating evidence, and revealing Hiibel's name could provide such a link.[84] Otherwise, Justice Stevens reasoned that the Nevada Legislature would have no reason to require disclosure in circumstances that reasonably indicate that a person is committing or is about to commit a crime.[85] Furthermore, if Hiibel's name would not be used as a link to prosecute him, then the refusal to reveal his name could not impede the police investigation.[86] Thus, Justice Stevens stated that "[a] person's identity obviously bears informational and incriminating worth," and Hiibel acted within his rights by choosing not to reveal his name.[87]

In a separate dissenting opinion, Justice Stephen Breyer, joined by Justices David Souter and Ruth Bader Ginsburg, focused on the Fourth Amendment's invalidation of laws that compel responses to police questions.[88] The dissent cited dicta from past Court decisions that stated when persons are stopped for reasonable suspicion, they are not compelled to answer questions put to them.[89] In Justice Breyer's opinion, "[t]here is no good reason now to reject this generation-old statement of the law."[90] He also expressed concern that states could require individuals to answer questions about their licenses or their addresses, which could provide police with incriminating evidence under the right circumstances.[91] In Justice Breyer's opinion, the majority presented no evidence that withholding a name significantly interfered with law enforcement.[92]

The Court's opinion in *Hiibel* is surprising, given the overwhelming Fourth and Fifth Amendment precedent explicitly rejecting stop and identify statutes like NRS 171.123. These earlier cases suggest that the *Hiibel* outcome is not as "commonsense" as the majority would like to believe.

III. Fourth Amendment Precedent

The Fourth Amendment protects persons from unreasonable searches and seizures.[93] The following cases demonstrate the United States Supreme Court's general disapproval of laws that force persons to relinquish their expectation of privacy and give their names to police during investigatory stops.

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[83] *Id.*

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

[85] *Id.* at 2464.

[86] *Id.*

[87] *Id.*

[88] *Id.* at 2464-65.

[89] *Id.* at 2465 (citing Terry v. Ohio, 392 U.S. 1, 34 (1968) (White, J., concurring)); Brown v. Texas, 443 U.S. 47, 53 n.3 (1979); Berkemer v. McCarty, 468 U.S. 420, 439 (1984); Kolender v. Lawson, 461 U.S. 352, 365 (1983) (Brennan, J., concurring)).

[90] *Id.*

[91] *Id.* at 2465-66.

[92] *Id.* at 2466.

[93] U.S. Const. amend. IV. The Fourth Amendment is applicable to the states through the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643 (1961).

A. Katz v. United States

In *Katz v. United States*, the United States Supreme Court established the predominant test for determining whether an expectation of privacy is reasonable under the Fourth Amendment.[94] Katz was charged with transmitting wagering information by telephone across interstate lines, in violation of a federal statute.[95] At trial, the government introduced evidence of Katz's telephone conversations, overheard by FBI agents who attached an electronic listening and recording device to the public telephone booth from which Katz placed his calls.[96] Katz was convicted, and the court of appeals affirmed the verdict, rejecting Katz's argument that the recordings violated his Fourth Amendment right to privacy.[97]

The United States Supreme Court concluded that the government's activities constituted an unreasonable search and seizure under the Fourth Amendment, but declined to decide whether the public telephone booth was a "constitutionally protected area."[98] Instead, the Court asserted that the Fourth Amendment protects people, not places.[99] The recording was unconstitutional not because of a physical trespass, but because it infringed upon Katz's reasonable expectation of privacy.[100] The majority stated that Katz was entitled to assume that once he closed the door of the phone booth, his conversation would not be broadcast to the world.[101] In his concurrence, Justice Harlan enunciated a two-part test for determining whether a person is entitled to Fourth Amendment protection.[102] First, a person must exhibit an actual, subjective expectation of privacy.[103] Second, that expectation must be one that society is prepared to recognize as reasonable.[104] This test laid the groundwork for subsequent Fourth Amendment privacy cases.

B. Terry v. Ohio

The seminal 1968 case of *Terry v. Ohio* examined the role of the Fourth Amendment in confrontations between police and citizens on the street.[105] Terry and two others were stopped after a detective observed them "casing" a store for a robbery.[106] Believing the men had weapons, the detective patted down their clothes and felt a gun inside Terry's coat.[107] The trial court held

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[94] Katz v. United States, 389 U.S. 347, 350-51, 361 (1967).
[95] *Id.* at 348; (citing 18 U.S.C. § 1084(a) ("Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers . . . shall be fined no more than $10,000 or imprisoned not more than two years, or both.")).
[96] *Katz*, 389 U.S. at 348.
[97] *Id.* at 348-49.
[98] *Id.* at 350.
[99] *Id.* at 351.
[100] *Id.* at 352-53.
[101] *Id.* at 352.
[102] *Id.* at 361.
[103] *Id.*
[104] *Id.*
[105] Terry v. Ohio, 392 U.S. 1, 4 (1968).
[106] *Id.* at 6.
[107] *Id.* at 7.

that the "frisk" was essential to the detective's investigation and convicted Terry of carrying a concealed weapon.[108] The Ohio Supreme Court denied Terry's appeal, stating that the Fourth Amendment was inapplicable to Terry's situation.[109]

The United States Supreme Court affirmed Terry's conviction but disagreed that the Fourth Amendment did not apply.[110] Rejecting the idea that a "frisk" is less than a stop and outside the scope of the Fourth Amendment, the Court declared that "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."[111] Thus, Terry was entitled to Fourth Amendment protection.[112] However, the search of Terry's coat was constitutionally reasonable.[113] The Court stated that reasonableness could be determined only by balancing the officer's need to search or seize against the scope of the invasion upon the individual.[114] The detective suspected that Terry was armed and dangerous, and he did not invade Terry's person beyond the outside of his clothes.[115] Still, the Court limited its holding to circumstances in which an officer can "reasonably conclude in light of his experience that . . . the persons with whom he is dealing may be armed and presently dangerous . . . ."[116]

In his concurrence, Justice White added these significant words about police encounters:

> There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way. However, given the proper circumstances, such as those in this case, it seems to me the person may be briefly detained against his will while pertinent questions are directed to him. Of 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.[117]

The Court adopted Justice White's opinion a decade later, in *Dunaway v. New York*.[118]

C. Dunaway v. New York

In 1971, Rochester, New York police took Dunaway into custody after an informant implicated him in a robbery and murder.[119] Dunaway was not arrested but held in an interrogation room, where he made incriminating statements and drawings.[120] The trial court denied a motion to suppress the state-

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108 *Id.* at 8.
109 *Id.*
110 *See id.* at 16.
111 *Id.*
112 *Id.*
113 *See id.* at 28.
114 *Id.* at 21 (citing Camara v. Mun. Court, 387 U.S. 523, 534-35, 536-37 (1967)).
115 *Id.* at 29-30.
116 *Id.* at 30.
117 *Id.* at 34.
118 Dunaway v. New York, 442 U.S. 200, 211 (1979).
119 *Id.* at 202.
120 *Id.* at 203.

ments and sketches, and Dunaway was convicted.[121] He appealed to the United States Supreme Court, which vacated the conviction and remanded the case for further consideration.[122]

Upon second hearing, the United States Supreme Court held that police had seized Dunaway in violation of the Fourth Amendment.[123] Quoting Justice White's *Terry* concurrence, the Court recognized that persons detained pursuant to *Terry* cannot be compelled to answer questions.[124] The Court then analyzed whether *Terry* applied to the custodial interrogation of Dunaway.[125] Because the frisk in *Terry* fell far short of the intrusion associated with an arrest, the Court applied a balancing test rather than determining if the officer had probable cause.[126] In contrast to *Terry*, Dunaway's detention was indistinguishable from a traditional arrest. Accordingly, the Court held that the detention was unreasonable because police lacked probable cause and only took Dunaway into custody to find evidence.[127]

D. Brown v. Texas

The United States Supreme Court decided *Brown v. Texas* in the same term as *Dunaway*.[128] El Paso, Texas police stopped Brown in a known drug-trafficking area, although the officers did not suspect that he had committed a crime or was carrying a weapon.[129] When Brown refused to identify himself, he was arrested and later convicted pursuant to section 38.02(a) of the Texas Penal Code, which provided that "[a] person commits an offense if he intentionally refuses to report or gives a false report of his name and residence address to a peace officer who has lawfully stopped him and requested the information."[130] The El Paso County Court denied Brown's constitutional appeal.[131]

However, a unanimous Court[132] found that the application of section 38.02(a) to Brown violated the Fourth Amendment because police lacked a reasonable basis for his arrest.[133] The Court recognized the legitimacy of section 38.02(a) to prevent crime but stated that police could not demand identification from persons without believing that they had engaged in criminal activity.[134] Without such suspicion, the balance between public interest and individual privacy favors freedom from police interference.[135] Still, the Court

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[121] *Id.*
[122] *Id.* at 204 (citing Dunaway v. New York, 422 U.S. 1053 (1975)).
[123] *Id.* at 207.
[124] *Id.* at 211 (citing Terry v. Ohio, 392 U.S. 1, 34 (1968)).
[125] *Id.* at 211-13.
[126] *Id.* at 209 (citing *Terry*, 392 U.S. at 22-27).
[127] *Id.* at 212, 218.
[128] Brown v. Texas, 443 U.S. 47 (1979).
[129] *Id.* at 49.
[130] *Id.* (quoting TEX. PENAL CODE ANN. § 38.02(a) (Vernon 1974)).
[131] *Id.* at 49-50.
[132] *Id.* at 50. The rejection of Brown's constitutional claim by the El Paso County Court was a decision by the highest court in the state, giving the United States Supreme Court proper jurisdiction. *Id.*
[133] *See id.* at 52.
[134] *See id.*
[135] *Id.*

did not consider whether persons should be punished for refusing to identify themselves during lawful stops.[136]

E. Kolender v. Lawson

In *Kolender v. Lawson*, the Court considered a facial challenge to section 647(e) of the California Penal Code.[137] The statute provided:

> Every person who commits any of the following acts is guilty of disorderly conduct . . . (e) Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.[138]

As interpreted by the California courts, section 647(e) required persons to show "credible and reliable" identification that carried some reasonable assurance of authenticity and provided police with sufficient contact information.[139]

Between 1975 and 1977, Edward Lawson was arrested approximately fifteen times for violating section 647(e), but he was prosecuted only twice and convicted once.[140] On at least two occasions, the officers who arrested Lawson requested identification because Lawson was loitering in areas known for their criminal activity.[141] After his conviction, Lawson filed a civil lawsuit, arguing that section 647(e) violated the Fourth Amendment.[142] Both the District Court for the Southern District of California and the Ninth Circuit Court of Appeals held the statute unconstitutionally vague and in violation of the Fourth Amendment's proscription against unreasonable searches and seizures.[143]

The United States Supreme Court affirmed the lower courts, ruling that section 647(e) as drafted contained no standard for determining how a suspect satisfied the requirement to provide credible and reliable information.[144] As a result, the law allowed for arbitrary police enforcement by vesting "virtually complete discretion in the hands of police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest."[145] Notably, the Court rejected the state's argument that the statute provided a necessary tool to law enforcement to combat "the epidemic of crime that plagues our Nation."[146] The majority acknowledged the merit of the state's concern, but stated it could not justify legislation that did not meet constitutional standards.[147] In his concurrence, Justice Brennan added that the Fourth Amendment also prohibited enforcement of the statute.[148]

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[136] *Id.* at 53.
[137] Kolender v. Lawson, 461 U.S. 352 (1983).
[138] CAL. PENAL CODE § 647(e) (West 1970).
[139] *Kolender*, 461 U.S. at 356-57.
[140] *Id.* at 354.
[141] *Id.*
[142] *Id.*
[143] *Id.* at 354-55.
[144] *Id.* at 358.
[145] *Id.* at 358-59.
[146] *Id.* at 361.
[147] *Id.*
[148] *Id.* at 369.

Using language similar to Justice White's *Terry* concurrence, Justice Brennan argued that states could not abridge the Constitution by punishing persons who refused to answer questions during lawful stops.[149]

F. Berkemer v. McCarty

In *Berkemer v. McCarty*, the United States Supreme Court considered the application of a Fifth Amendment doctrine to Fourth Amendment *Terry* stops.[150] Specifically, the Court decided whether the warnings prescribed by *Miranda v. Arizona*[151] apply to the context of a routine traffic stop.[152] An Ohio State Highway Patrol trooper stopped Richard McCarty for driving erratically, and while questioning McCarty, determined that he was under the influence of drugs or alcohol.[153] The trooper told McCarty that he could not leave the scene but did not indicate that McCarty was under arrest.[154] The trooper then took McCarty to the station house, where McCarty made incriminating statements to officers during an interrogation.[155] However, the police never informed McCarty of his *Miranda* rights.[156] McCarty was subsequently convicted of operating a motor vehicle under the influence of marijuana.[157]

The United States Supreme Court ultimately rejected McCarty's argument that the trooper violated his rights by not issuing *Miranda* warnings during the roadside interrogation.[158] However, the Court used the decision to clarify the authority of police when conducting *Terry* stops.[159] Justice Marshall, joined by seven other justices, explained that officers may detain persons briefly to "investigate the circumstances that provoke suspicion."[160] In other words:

> The stop and inquiry must be reasonably related in scope to the justification for their initiation . . . . Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obligated to respond. And, unless the detainee's answers provide the officer with probable cause to arrest him, he must then be released.[161]

This "nonthreatening" and "noncoercive" aspect of *Terry* stops supported Justice Marshall's conclusion that police need not give *Miranda* warnings during such detentions.[162]

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149 *Id.* at 366-67.

150 Berkemer v. McCarty, 468 U.S. 420 (1984).

151 Miranda v. Arizona, 384 U.S. 436, 444 (1966) (advising that police must warn suspects that they have the right to remain silent, that anything they say can and will be used against them in court, that they have the right to an attorney; and that if they cannot afford counsel, a lawyer will be appointed to represent them).

152 *Berkemer*, 468 U.S. at 423.

153 *Id.*

154 *Id.*

155 *Id.*

156 *Id.* at 424.

157 *Id.*

158 *Id.* at 441-42.

159 *See id.* at 439-40.

160 *Id.* at 439 (quoting United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975)).

161 *Id.* at 439-40.

162 *Id.* at 440.

The decisions from *Terry* to *Berkemer* illustrate the Court's view that compelled identification laws wrongly allow police to make arrests on less than probable cause and in violation of the Fourth Amendment protection against unreasonable searches and seizures. Other cases demonstrate that these laws also violate a person's self-incrimination rights protected by the Fifth Amendment.[163]

IV. Fifth Amendment Precedent

The Fifth Amendment provides that persons shall not be compelled to be witnesses against themselves in criminal proceedings.[164] In the following cases, the United States Supreme Court articulated a standard for determining whether compelled disclosure statutes violate this constitutional protection.[165]

A. California v. Byers

In *California v. Byers*, the United States Supreme Court addressed the constitutionality of section 20002 of the California Vehicle Code, which requires drivers involved in car accidents that damage property or another vehicle to stop and leave their names and addresses.[166] Byers was charged with violating the statute after a 1966 hit-and-run accident.[167] However, the California Supreme Court held that the statute violated Byers's privilege against compulsory self-incrimination.[168]

The Court reversed, holding that the question of whether the government infringed upon the privilege against compulsory self-incrimination must be resolved by balancing the public need against the individual's claim to constitutional protection.[169] The 5-4 majority ultimately decided that the public need for disclosure outweighed an individual's protection against self-incrimination, by considering the following two factors: whether there is a substantial hazard of self-incrimination; and whether the statement is testimonial in nature.[170]

1. Substantial Hazard of Self-Incrimination

To invoke the Fifth Amendment privilege against self-incrimination, an individual must show that the compelled disclosure confronts the claimant with "substantial hazards of self-incrimination."[171] This is more than a mere possibility of incrimination because it might require an admission of a crucial ele-

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[163] *See* discussion *infra* Part IV.

[164] U.S. Const. amend. V. The Fifth Amendment is applicable to the states through the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1 (1964).

[165] *See* Cal. v. Byers, 402 U.S. 424, 429-34 (1971).

[166] *Id.* at 426. Cal. Veh. Code § 20002(a)(1) (West 1971) provides that a driver "leave in a conspicuous place on the vehicle or other property damaged a written notice giving the name and address of the driver and of the owner of the vehicle involved."

[167] Byers v. Justice Court for the Ukiah Judicial Dist. of Mendocino Co., 458 P.2d 465, 467 (Cal. 1969).

[168] *Id.* at 478.

[169] *Byers*, 402 U.S. at 427.

[170] *See id.* at 428-34.

[171] *Id.* at 429.

ment of the crime.[172] The Court illustrated the substantial hazard test by pointing to four cases from the 1960s.[173]

In *Albertson v. SACB*, the Court held that an order requiring registration by individual members of the Communist Party violated the privilege against self-incrimination.[174] Three years later, in *Marchetti v. United States* and *Grosso v. United States*, the Court held that the Fifth Amendment provided a complete defense to not complying with federal gambling tax and registration requirements.[175] Finally, in *Haynes v. United States*, the Court held that the privilege against self-incrimination protected Haynes from prosecution for not registering a firearm as required by federal statute.[176] In these four cases, compliance with the statutory disclosure requirement confronted the person with the substantial hazard of self-incrimination because:

> The disclosures condemned were only those extracted from a "highly selective group inherently suspect of criminal activities" and the privilege was applied only in "an area permeated with criminal statutes" – not in an "essentially non-criminal and regulatory area of inquiry."[177]

In contrast, the *Byers* Court explained that the California Vehicle Code is regulatory, not criminal, because its intent is to resolve civil liabilities resulting from car accidents, not to facilitate convictions.[178] Moreover, the section of the code in question is not directed at a "highly selective group" but at all California drivers, a group numbering in the millions.[179]

2. *Testimonial in Nature*

Additionally, the *Byers* Court explained that individuals invoking the Fifth Amendment privilege against self-incrimination must demonstrate that the compelled disclosure is testimonial in nature.[180] Testimonial or communicative evidence is distinguishable from real, physical evidence.[181] In *Schmerber v. California*, the Court stated that the Fifth Amendment protects against compelled communications but does not bar the admission of tangible evidence at trial.[182] Accordingly, the Fifth Amendment did not require suppressing blood taken from Schmerber while he was hospitalized after a car accident, nor did it exclude the subsequent chemical analysis that determined Schmerber was intoxicated while driving.[183]

Applying the *Schmerber* standard, the *Byers* Court determined that the requirements of the section of the code did not provide evidence of a testimo-

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[172] *Id.* at 428.
[173] *See id.* at 429.
[174] Albertson v. SACB, 328 U.S. 70, 86 (1965).
[175] Marchetti v. United States, 390 U.S. 39, 61 (1968); Grosso v. United States, 390 U.S. 62, 70 (1968).
[176] Haynes v. United States, 390 U.S. 85, 101 (1968).
[177] *Albertson*, 382 U.S. at 79; *Marchetti*, 390 U.S. at 47.
[178] *Byers*, 402 U.S. at 430.
[179] *Id.*
[180] *See id.* at 431-32.
[181] *See id.* at 432 (citing Schmerber v. California, 384 U.S. 757, 764 (1966)).
[182] *Schmerber*, 384 U.S. at 761.
[183] *Id.* at 765.

nial or communicative nature.[184] The statute required a driver to stop at an accident scene, an act no more testimonial than giving a sample of blood.[185] The Court also rejected Byers's argument that because the duty to stop is imposed only on the driver involved in the accident, complying with the statute is testimonial because stopping leads to the inference that this driver was the one who caused the accident.[186] Such inferences are not testimonial, based on earlier Court precedent.[187] Thus, the requirement that Byers give his name at the scene was not incriminating under the circumstances.[188]

B. Doe v. United States

In 1988, the United States Supreme Court expanded the definition of testimonial evidence in *Doe v. United States*.[189] John Doe, the subject of a federal grand jury investigation into fraud, invoked his Fifth Amendment privilege against self-incrimination when questioned about the existence of banking records.[190] After three foreign banks refused to produce records, citing their countries' privacy laws, the United States Government filed a motion to order Doe to sign a consent that authorized the banks to release their records.[191] The district court denied the order, but when the Fifth Circuit Court of Appeals reversed, the district court ordered Doe to sign.[192] When Doe refused, he was held in contempt of court.[193]

The United States Supreme Court upheld the Fifth Circuit and concluded that the consent form did not violate Doe's Fifth Amendment rights because the signature was not testimonial.[194] In making the determination, the Court clarified the meaning of testimonial.[195] To be testimonial, the Court stated that "an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information."[196] The consent directive did not force Doe to admit that he possessed any bank accounts, nor did the form admit the authenticity of any records produced by the banks.[197] Still, the Court acknowledged that "there are very few instances in which a verbal statement, either oral

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184 *Byers*, 402 U.S. at 432.

185 *Id.* at 431-32.

186 *Id.* at 433.

187 *Id.*; United States v. Wade, 388 U.S. 218, 222-23 (1967). While conducting a lineup to identify the suspect in a bank robbery, police compelled Wade to speak the words of the perpetrator. *Id.* Despite the inference that Wade uttered the words in his normal voice, the Court held that the utterances were not testimonial and thus not protected under the Fifth Amendment, even though Wade's speaking led to his being identified as the robber. *Id.*

188 *Byers*, 402 U.S. at 434.

189 Doe v. United States, 487 U.S. 201 (1988).

190 *Id.* at 202.

191 *Id.* at 203.

192 *Id.* at 205.

193 *Id.* at 205-06.

194 *Id.* at 219.

195 *See id.* at 207-14.

196 *Id.* at 210.

197 *Id.* at 215.

or written, will not convey information or assert facts."[198] Thus, the majority of verbal statements are testimonial and protected by the Fifth Amendment.[199]

C. Pennsylvania v. Muniz

Two years after *Doe*, the Court considered *Pennsylvania v. Muniz*.[200] Inocencio Muniz was arrested for driving under the influence of alcohol.[201] Without being advised of his *Miranda* rights, Muniz answered several questions regarding his identity, including his name and address, on audio and videotape.[202] Police also inquired about the date of Muniz's sixth birthday, which he could not answer.[203] The tapes showing Muniz inebriated were admitted at trial, and he was convicted.[204] However, the Pennsylvania Supreme Court reversed, concluding that the audiotapes should have been suppressed because Muniz's statements were testimonial.[205]

The United States Supreme Court agreed that the answers to the questions were incriminating, testimonial evidence.[206] While the Court acknowledged the state's assertion that the slurring of speech constituted physical evidence, that did not end the inquiry.[207] Rather, the Court looked to the content of Muniz's answers, which implied that his mental state was confused.[208] The incriminating inference did not come from physical evidence but from a testimonial act.[209] The Court distinguished Muniz's situation from *Schmerber*, concluding that if police had asked Schmerber if he was intoxicated rather than taking his blood, his response would have been testimonial.[210] The Court also expanded on its holding in *Doe*:

> The definition of "testimonial" evidence articulated in *Doe* must encompass all responses to questions that, if asked of a sworn suspect during a criminal trial, could place the suspect in the "cruel trilemma" . . . . Whenever a suspect is asked for a response requiring him to communicate an express or implied assertion of fact or belief, the suspect confronts the "trilemma" of truth, falsity or silence, and hence the response (whether based on truth or falsity) contains a testimonial component.[211]

Accordingly, the police question about the date of Muniz's birthday violated his Fifth Amendment privilege against self-incrimination.[212] The coercive environment of the police questioning precluded Muniz from remaining

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198 *Id.* at 213.
199 *See id.* at 213-14.
200 Pennsylvania v. Muniz, 496 U.S. 582 (1990).
201 *Id.* at 585.
202 *Id.* at 585-86.
203 *Id.* at 586.
204 *Id.* at 587.
205 *Id.* at 587-88.
206 *See id.* at 590-600.
207 *Id.* at 590-92.
208 *Id.* at 592.
209 *Id.* at 593.
210 *Id.*
211 *Id.* at 597.
212 *See id.* at 598-600. The questions regarding Muniz's identity, while incriminating, fell within the "routine booking question" exception, which allows for the admission of questions to secure biographical information necessary to complete booking. *Id.* at 601; United States v. Horton, 873 F.2d 180, 181 (8th Cir. 1989).

silent, leaving him with the choice of incriminating himself by admitting he did not know the date of his birthday or giving a false date to police.[213] The content of Muniz's truthful answer supported the inference that his mental capacity was impaired.[214]

In conclusion, the *Byers*, *Doe* and *Muniz* decisions provided the United States Supreme Court with a framework for determining whether compelled identification statutes violate the Fifth Amendment. Unfortunately, the *Hiibel* Court elected not to follow this history.

V. ANALYSIS

Decades of Fourth and Fifth Amendment precedent suggest that the outcome in *Hiibel v. Sixth Judicial District Court* should be different. Although not expressly stated by the majority opinion, it is likely that the recent climate of terrorism and the lingering impact of the September 11, 2001 attacks significantly affected the decision. In fact, the Nevada Supreme Court justified its decision in *Hiibel* by arguing that NRS 171.123 was necessary to protect law enforcement officers as well as the public during a time when "the dangers we face as a nation are unparalleled."[215] Amici briefs submitted to the United States Supreme Court in this case addressed concerns about the war on terrorism.[216] It is also noteworthy that in the same term as *Hiibel*, the Court considered several cases involving the prosecution of enemy combatants and suspected terrorists.[217] If the war on terrorism was a factor in the decision, acknowledging its influence would at least explain why the majority decided to ignore its past criticism of compelled identification statutes. Instead, the Court relied on faulty logic to explain its rejection of Fourth and Fifth Amendment case law.

A. *The Decision is Inconsistent with Fourth Amendment Precedent*

Pursuant to the Fourth Amendment, an arrest typically requires probable cause.[218] However, compelled identification statutes such as NRS 171.123 circumvent this requirement and allow police to bootstrap the authority to arrest on less than probable cause, a concern expressed by the Ninth Circuit Court of Appeals in *Carey v. Gaming Control Board*.[219] Carey's name was inconsequential to determining whether he had cheated while gambling. Similarly, Hiibel's identity did not provide any evidence that he had actually committed domestic battery or was intoxicated. Based on the *Hiibel* majority's own acknowledgment that an officer may not arrest a suspect "if the request for

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[213] *Muniz*, 496 U.S. at 599.

[214] *Id.*

[215] Hiibel v. Sixth Judicial Dist. Court, 59 P.3d 1201, 1206 (Nev. 2002).

[216] *See* Brief of Amicus Curiae Electronic Privacy Information Center, et al. at 12-16, Hiibel v. Sixth Judicial Dist. Court, 124 S. Ct. 2451 (2004) (No. 03-5554); Brief of Amicus Curiae of John Gilmore at 9a, Hiibel v. Sixth Judicial Dist. Court, 124 S. Ct. 2451 (2004) (No. 03-5554).

[217] *E.g.*, Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004); Rasul v. Bush, 124 S. Ct. 2686 (2004); Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004).

[218] *See* United States v. Watson, 423 U.S. 411 (1976); U.S. CONST. amend. IV.

[219] Carey v. Nev. Gaming Control Bd., 279 F.3d 873, 881 (9th Cir. 2002).

identification is not reasonably related to the circumstances justifying the stop," the police action against Hiibel contradicts the Court's holding.[220]

The *Hiibel* decision is also at odds with the Court's holding in *Berkemer*. In that majority opinion, Justice Marshall wrote that if an officer asks questions reasonably related to the circumstances provoking suspicion but does not receive answers that provide the officer with probable cause to arrest, the detainee must be released.[221] Deputy Dove's questions about Hiibel's name did not meet this requirement because they did not relate to the circumstances surrounding the initial investigation. Dove used Hiibel's refusal to provide his identity as an excuse to arrest a person he felt was "aggressive and moody."[222] Deputy Dove lacked probable cause to arrest Hiibel for committing domestic battery or even driving while intoxicated. On the authority of *Berkemer*, Dove should have released Hiibel rather than arrest him for exercising the right to keep his name private.

In fact, all citizens possess a reasonable expectation of privacy in their names, as recognized in *Katz v. United States*.[223] There are numerous reasons why persons choose not to give their names and to remain anonymous. Individuals learn not to reveal their names to strangers for safety reasons or to give personal information to avoid identity theft. Persons also keep their names out of phone books, choose to pay cash and not keep credit cards or checks, and otherwise keep their names private unless they voluntarily elect to reveal them.[224] Larry Hiibel exhibited a subjective expectation of privacy in his own name, which is why he did not think it necessary to reveal his identity to Deputy Dove. The *Hiibel* majority criticized Hiibel for not having a reasonable belief that the disclosure of his name would tend to incriminate him.[225] However, to hold that Hiibel's expectation of privacy was unreasonable is to ignore the reality of modern police investigation. Officers have access to complex government databases, and with just a name, they can learn intimate, incriminating details that are beyond the scope of a reasonable *Terry* stop.[226]

Moreover, United States Supreme Court precedent recognizes that the Fourth Amendment protects persons subject to *Terry* stops from answering any question put to them. In *Dunaway*, the Court adopted Justice White's *Terry* concurrence, declaring that a person stopped under reasonable suspicion "is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for arrest."[227] This protection, cited in subsequent Court deci-

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[220] Hiibel v. Sixth Judicial Dist. Court, 124 S. Ct. 2451, 2459 (2004).

[221] Berkemer v. McCarty, 468 U.S. 420, 439-40 (1984).

[222] Hiibel v. Sixth Judicial Dist. Court, 59 P.3d 1201, 1203 (Nev. 2002).

[223] Katz v. United States, 389 U.S. 347, 361 (1967).

[224] *See* Petitioner's Response Brief at 12, Hiibel v. Sixth Judicial Dist. Court, 124 S. Ct. 2451 (2004) (No. 03-5554).

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

[226] For detailed information about systems such as NCIC, NLETS, MATRIX, DAVID, TWIC and US-VISIT, see Brief of Amicus Curiae Electronic Privacy Information Center, et. al., *passim*, Hiibel v. Sixth Judicial Dist. Court, 124 S. Ct. 2451 (2004) (No. 03-5554).

[227] Dunaway v. New York, 442 U.S. 200, 211 (citing Terry v. Ohio, 392 U.S. 1, 34 (1968) (White, J., concurring)).

sions, says nothing about exceptions for questions about one's identity.[228] In fact, the majority decision in *Berkmeker* specifically states that while an officer may briefly detain a person and ask questions to determine his or her identity, the detainee is not obligated to respond.[229] However, NRS 171.123 as applied to Hiibel contradicts this premise. Hiibel was arrested because he refused to answer an officer's question. The mere fact that the content of the question pertained to his identity is irrelevant pursuant to Fourth Amendment case law. Hiibel or any other person cannot be compelled to answer any questions.

Unfortunately, Hiibel did not raise the statutory vagueness argument found in prior Fourth Amendment cases. The *Hiibel* majority briefly addressed vagueness by noting that NRS 171.123 is more precise than other statutes it has held void for vagueness, because the Nevada Supreme Court has interpreted the law to require only that a suspect disclose his name, not give the officer his driver's license or other documents.[230] However, the *Hiibel* majority ignored the fact that NRS 171.123 contains nearly identical language to the California statute the Court held unconstitutionally vague in *Kolender v. Lawson*.[231] Section 647(e) of the California Penal Code charged a person with a misdemeanor who refused to identify himself "if the surrounding circumstances [were] such as to indicate to a reasonable man that the public safety demands such identification."[232] Similarly, NRS 171.123 refers to an officer's right to detain persons who refuse to identify themselves "under circumstances that reasonably indicate" criminal activity.[233] Like section 647(e), NRS 171.123 offers little guidance to officers to determine which situations require compelling identification, thereby increasing the risk of arbitrary police enforcement. This very concern led the Court to strike down section 647(e) in *Kolender*.[234] Nevertheless, even if Hiibel had argued for statutory vagueness, it appears the Court's erroneous decision in this case would not be different.

B. *The Decision is Inconsistent with Fifth Amendment Precedent.*

The outcome in the *Hiibel* case is also at odds with the Court's Fifth Amendment precedent. In *Byers v. California*, the Court listed two factors to determine whether a compelled disclosure statute violates the privilege against self-incrimination.[235] First, the required disclosure must confront the claimant with the substantial hazard of self-incrimination.[236] The Court in *Byers* determined that the California Vehicle Code did not meet this requirement because it did not compel information from a highly selective group inherently suspected of committing criminal activities.[237] Furthermore, the code was essentially

[228] *See, e.g.*, Kolender v. Lawson, 461 U.S. 352, 360 n.9 (1983) (quoting Davis v. Mississippi, 394 U.S. 721, 727 n.6 (1969)).
[229] Berkemer v. McCarty, 468 U.S. 420, 439 (1984).
[230] *Hiibel*, 124 S. Ct. at 2457.
[231] *Kolender*, 461 U.S. at 358-59.
[232] CAL. PENAL CODE § 647(e) (West 1970) (declared unconstitutional in *Kolender*, 461 U.S. at 361).
[233] NEV. REV. STAT. 171.123 (2003).
[234] *See Kolender*, 461 U.S at 358.
[235] California v. Byers, 402 U.S. 424, 428-34 (1971).
[236] *Id.* at 429.
[237] *Id.* at 430.

regulatory in nature.[238] In contrast, NRS 171.123 allows an officer to compel answers from "any person . . . who has committed, is committing or is about to commit a crime."[239] This group is one inherently suspected of being engaged in criminal activity and does not number in the millions, like the group impacted by the California Vehicle Code. In addition, NRS 171.123 is a criminal statute, listed under Title 14, Procedure in Criminal Cases, in the Nevada Code.[240] The intent of the statute is not to resolve civil liabilities but to facilitate convictions.

Second, the Nevada statutory scheme satisfies the testimonial requirement of *Byers*.[241] As noted in *Doe*, a communication is testimonial if it explicitly or implicitly relates a factual assertion, and most verbal statements are protected by the Fifth Amendment.[242] Disclosing one's name as required by NRS 171.123 certainly relates a factual assertion by forcing individuals to reveal their identities to police. The obligations of the Nevada statute also subject persons like Hiibel to the "cruel trilemma" articulated in *Muniz*.[243] When Deputy Dove asked Hiibel for his name, Hiibel faced the three options of the trilemma. He could remain silent and risk arrest pursuant to the requirements of NRS 171.123. Alternatively, Hiibel could provide a false name to Deputy Dove and face charges of lying to an officer. Finally, Hiibel could disclose his identity and incriminate himself. While the *Hiibel* majority determined that a name "is likely to be so insignificant in the scheme of things as to be incriminating only in unusual circumstances," the reality is that officers can use names to search government databases and learn personal information.[244]

The *Hiibel* majority also stated that knowing a suspect's identity "may inform an officer that a suspect is wanted for another offense" and allows an officer "to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim."[245] Thus, a name provides police with the means to learn details about an individual's background. If a name is being used to discover one's criminal past and propensity for violence, it cannot logically follow that a name is non-incriminating. The name and its history will determine the officer's approach and potentially prejudice his behavior toward the person detained. Furthermore, a name may provide evidence of a relationship that could trigger the application of domestic battery laws.[246] In Hiibel's case, Deputy Dove received a tip that Hiibel had hit his minor daughter.[247] By revealing his name, Hiibel faced increased penalties associated with domestic battery laws, compared to simple

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238 *Id.*

239 NEV. REV. STAT. 171.123(1) (2003).

240 *Byers*, 402 U.S. at 430.

241 *Id.* at 431-32.

242 Doe v. United States, 487 U.S. 201, 210, 213 (1988).

243 Pennsylvania v. Muniz, 496 U.S. 582, 597 (1990).

244 *See* Brief of Amicus Curiae Electronic Privacy Information Center, et. al., *passim*, Hiibel v. Sixth Judicial Dist. Court, 124 S. Ct. 2451 (2004) (No. 03-5554).

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

246 *See* NEV. REV. STAT. 33.018; Petitioner's Brief at 25, Hiibel v. Sixth Judicial Dist. Court, 124 S. Ct. 2451 (2004) (No. 03-5554).

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

battery laws.[248] In sum, the requirements of NRS 171.123 violated Hiibel's Fifth Amendment privilege against compulsory self-incrimination. By holding otherwise, the *Hiibel* Court set a troubling precedent for future cases.

VI. CONCLUSION

Hiibel v. Sixth Judicial District Court required the United States Supreme Court to make a decision it had avoided for three decades. Unfortunately, the Court did not seize the opportunity to declare compelled identification statutes like NRS 171.123 unconstitutional. The Court disregarded decades of precedent that suggested these laws violate the Fourth Amendment by allowing police to make arrests on less than probable cause. Moreover, the Court gave little consideration to the Fifth Amendment implications of a statute that compels persons to reveal their names and potentially incriminate themselves. The result of the *Hiibel* decision is the continued erosion of privacy rights, sacrificed in the marginal hope that police may ferret out dangerous individuals in society. Still, the Court left proponents of civil liberties with a glimmer of hope by stating that a case could arise "in which there is a substantial allegation that furnishing identity at the time of a stop would have given the police a link in the chain of evidence needed to convict the individual of a separate offense."[249] If and when such a case reaches the Court, the justices should restore the rights of persons to wander freely and anonymously.

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[248] *Compare* NEV. REV. STAT. 200.485 (2003) *and* NEV. REV. STAT. 200.481 (2003); *see* Petitioner's Brief at 25-26, Hiibel v. Sixth Judicial Dist. Court, 124 S. Ct. 2451 (2004) (No. 03-5554).

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