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COMMENT

DOES *HIIBEL* REDEFINE *TERRY*? THE LATEST EXPANSION OF THE *TERRY* DOCTRINE AND THE SILENT IMPACT OF TERRORISM ON THE SUPREME COURT'S DECISION TO COMPEL IDENTIFICATION

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"Because it is my name! Because I cannot have another in my life! . . . How may I live without my name? I have given you my soul; leave me my name!"

—John Proctor, The Crucible[1]

INTRODUCTION

On June 21, 2004, five Supreme Court justices deemed a name, the subject of John Proctor's famous parting lines, to be "so insignificant in the scheme of things" as not to warrant Fourth Amendment protection.[2] The Court's controversial opinion in *Hiibel v. Sixth Judicial District Court of Nevada*[3] held that a state can require a suspect to disclose his name during the course of a valid *Terry* stop, and that if the suspect refuses to answer,

1. ARTHUR MILLER, THE CRUCIBLE 143 (Penguin Books 1996) (1953). This quote illustrates the value of a name; it led the play's protagonist, John Proctor, to choose death rather than soil his reputation by making a false confession.

2. *See* Hiibel v. Sixth Judicial Dist. Court of Nev., 542 U.S. 177, 124 S. Ct. 2451, 2461 (2004) (deciding the case of a Nevada cattle rancher who challenged the constitutionality of the state's "stop and identify" statute).

3. *Id.* Newspaper editorials written in the week after the Court decided *Hiibel* demonstrate the controversial nature of the opinion and the strong viewpoints on either side of the debate. *See, e.g.*, Linda Greenhouse, *Justices Uphold a Nevada Law Requiring Citizens to Identify Themselves to the Police*, N.Y. TIMES, June 22, 2004, at A16 (writing that the split 5-4 decision raises concerns about the boundaries of privacy); *What's in a Name?*, WASH. POST, June 22, 2004, at A16 (warning that carving out exceptions to the Fourth Amendment, even seemingly innocent ones, is a bad idea); *What's in a Name? In the Supreme Court's View, Not Enough to Matter*, PITTSBURGH POST-GAZETTE, June 25, 2004, at A18 (noting that the closeness of the Court's vote is a reminder that *Hiibel* walks a fine line between individual privacy rights and the government's interest in fighting crime). *But see Name, Please: Is That Too Much to Ask?*, ARKANSAS DEMOCRAT-GAZETTE, June 24, 2004, at 6B (arguing that most Americans are willing to give up a minimal intrusion on privacy, such as providing their names when stopped by police, in exchange for security, especially in post-9/11 America).

law enforcement officials can arrest him.[4] Specifically, the Court upheld Nevada's "stop and identify" statute[5] as constitutional, striking down a challenge that the law violated Fourth Amendment prohibitions against unreasonable searches and seizures.[6] The majority also struck down a Fifth Amendment challenge to the statute,[7] noting that "[a]nswering a request to disclose a name is likely to be so insignificant in the scheme of things as to be incriminating only in unusual circumstances."[8] The majority reasoned that the request for identity has "an immediate relation to the purpose, rationale, and practical demands of a *Terry* stop,"[9] and is thus merely a "commonsense inquiry" rather than an attempt to circumvent the Fourth and Fifth Amendments.[10]

In validating the "stop and identify" statute, *Hiibel* moves Fourth and Fifth Amendment case law towards greater authority for the police and, in turn, towards a loss of privacy rights for individuals.[11] Four justices dissented in light of this shift.[12] Justice Stevens' dissent suggests that the Nevada legislature, through its "stop and identify" statute, fully intended to give the state's police officers "a useful law enforcement tool."[13] He points out that, despite the majority's dismissal of a name's significance,[14] such

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4. *See Hiibel*, 542 U.S. at __, 124 S. Ct. at 2459-60 (emphasizing that the Nevada "stop and identify" statute is consistent with the Fourth Amendment).

5. *See* NEV. REV. STAT. § 199.280 (2003) (stipulating that a person who "willfully resists, delays or obstructs a public officer in discharging or attempting to discharge any legal duty of his office" will be punished for a misdemeanor if no dangerous weapon is used); *see also* NEV. REV. STAT. § 171.123 (2003) (defining the legal rights and duties of a police officer in the context of an investigative stop). Under this statute, any officer may detain a person if he or she has reasonable suspicion to believe that the person has committed, is committing or is about to commit a crime. *Id.*

6. *Hiibel*, 542 U.S. at __, 124 S. Ct. at 2460. *See* Brief for the Petitioner at 28, *Hiibel*, 542 U.S. 117 (No. 03-5554) (arguing that an imposition of criminal sanctions for a suspect's refusal to produce identification, when police demand identification without probable cause to believe an offense has been committed, violates individuals' Fourth Amendment privacy rights).

7. *Hiibel*, 542 U.S. at __, 124 S. Ct. at 2460-61. *See* Brief for the Petitioner at 17, *Hiibel*, 542 U.S. 117 (No. 03-5554) (asserting that when a person is detained based only upon a reasonable suspicion of criminal activity, compelled identification violates the privilege against compulsory self-incrimination).

8. *Hiibel*, 542 U.S. at __, 124 S. Ct. at 2461.

9. *Id.* at __, 124 S. Ct. at 2459.

10. *Id.* at __, 124 S. Ct. at 2459-60.

11. *See* Stephen A. Saltzburg, Howrey Professor of Trial Advocacy, Litigation, and Professional Responsibility at the George Washington University Law School, Lecture Before the National Symposium for United States Court of Appeals Judges (Oct. 21, 2002), *in The Supreme Court, Criminal Procedure and Judicial Integrity*, 40 AM. CRIM. L. REV. 133, 134 (2003) (discussing the Court's recent trend of augmenting police officers' authority while curtailing Fourth Amendment protections of privacy and freedom from government intrusion).

12. *Hiibel*, 542 U.S. at __, 124 S. Ct. at 2461 (Stevens, J., dissenting); *id.* at __, 124 S. Ct. at 2464 (Breyer, J., dissenting).

13. *Id.* at __, 124 S. Ct. at 2464 (Stevens, J., dissenting).

14. *See supra* text accompanying notes 7-8 (discussing the majority's holding that disclosing one's name is not sufficient to constitute a Fifth Amendment violation).

information can provide a broad array of data about a person, particularly in the hands of an officer with access to state and federal law enforcement databases.[15]

Moreover, with *Hiibel*, the Court continues its practice of manipulating the *Terry* rationale[16] to reflect the needs of law enforcement officials at various points in history.[17] For example, during the so-called "war on drugs" of the 1980s,[18] the Court expanded *Terry* to allow officers to stop suspected drug couriers at airports and on buses, even though these individuals presented no safety threat to the police.[19] However, while the Court has repeatedly loosened the requirements of the "reasonable suspicion" standard,[20] it had not, until *Hiibel*, vacillated in its position that the scope of a *Terry* stop is limited.[21]

In the 21st century, America's focus has shifted to the "war on terrorism." Law enforcement officials now have the overwhelming burden of apprehending potential terrorists before another catastrophe like that of September 11, 2001 occurs.[22] This Comment argues that although there was no mention of terrorism or September 11 in *Hiibel*, this backdrop likely played a role in the Justices' decision to grant police the authority to

15. *See infra* Part II.B (examining some of the law enforcement databases available to police officers and the information that these databases reveal).

16. *See* Terry v. Ohio, 392 U.S. 1, 24 (1968) (creating a narrow exception to the Fourth Amendment that permits officers who can articulate a reasonable suspicion that a suspect may be armed and dangerous to conduct a limited stop and frisk of that suspect for their safety).

17. *See infra* Part I.B (discussing *Terry*'s progeny and the gradual loosening of the "reasonable suspicion" standard to give law enforcement officials the tools needed to fight the drug war); *see also* William J. Stuntz, Essay, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2153 (2002) (stating that in the roughly thirty years since *Terry* was decided, the Court has given police more leeway in street encounters in response to a sharp rise in urban crime rates).

18. *See infra* Part III.A (providing a brief history of the drug war).

19. *See, e.g.*, United States v. Mendenhall, 446 U.S. 544, 564-66 (1980) (upholding a *Terry* stop in which drug enforcement administration officials approached a woman at an airport because she fit the profile of a drug courier, not because she presented a safety threat to the officers or the public); United States v. Sokolow, 490 U.S. 1, 8 (1989) (expanding the "reasonable suspicion" standard to include a "totality of the circumstances" approach, under which individual actions may be innocent, but when taken together they create a valid reasonable suspicion to justify a *Terry* stop); United States v. Drayton, 536 U.S. 194, 195-98 (2002) (validating police officers' stop of two individuals on a bus and a search of their luggage, which revealed narcotics, because both passengers consented to the stop and subsequent frisk and were not coerced into complying).

20. *See* Elizabeth Ahern Wells, *Warrantless Traffic Stops: A Suspension of Constitutional Guarantees in Post September 11th America*, 34 U. TOL. L. REV. 899, 899 (2003) (opining that the *Terry* "reasonable suspicion" standard has evolved into a virtual "green light for police officers, resulting in a complete disregard for personal security").

21. 392 U.S. at 34-35 (White, J., concurring) (clarifying that a *Terry* interrogation must be brief, the suspect must be free to leave after a short period of time, and the suspect is free to decline to answer questions put to him by the police).

22. *See infra* Part III.C (delineating the history of the modern war on terrorism).

arrest and prosecute an individual for failing to give his name.[23] While the information a name provides may aid police in detaining terrorists and keeping America safe, giving police the power to obtain it may narrow the already-diminished Fourth Amendment protections the Court held so dear in *Terry*.[24] The decision to endorse this police power further raises the question of where the line is, and what aspect of privacy the Court may target next.[25]

Part I of this Comment discusses *Terry* and its progeny, specifically addressing the "reasonable suspicion" standard and the scope of a *Terry* stop. Part II sets out the Court's precedent regarding "stop and identify" statues, and describes the Nevada statute at issue in *Hiibel*, as well as the information that a name can lead to with the use of computer databases. Part II then summarizes the facts of *Hiibel* and examines the Court's reasoning, arguing that the decision represents a departure from long-standing precedent against compelled identification and a redefinition of the principles articulated in *Terry*. Part III provides a brief history of the war on drugs of the 1980s and the current-day war on terrorism. It then compares the war on drugs' impact on Supreme Court jurisprudence to the impact of terrorism on decisions made since September 11. In discussing the analysis employed in *Hiibel*, Part III argues that the Court likely intended to give police officers broader powers to detain potential terrorists, although it consciously chose to omit any discussion of terrorism in its opinion.

This Comment recommends that if the Court intends to expand police authority to reflect current events, such as the war on terrorism, it should at least reject bright line rules and limit the scope of that authority to stops related to terrorism. Otherwise, the face of local policing will change and the erosion of the Fourth Amendment's protections will continue.

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23. *See infra* Part III.C-D (analyzing *Hiibel* in light of the war on terrorism).

24. *See infra* Part III (examining the Court's curtailment of Fourth Amendment protections as a result of the war on drugs and the war on terrorism). Although *Terry* created an exception to the Fourth Amendment that gave police the authority to conduct an investigative stop based upon reasonable suspicion, the Court took great care to emphasize that the exception was very narrow and applied only to cases in which an officer believed criminal activity was afoot. *See* 392 U.S. at 30 (providing a very specific articulation of the *Terry* doctrine).

25. *See Hiibel*, 542 U.S. at __, 124 S. Ct. at 2465 (Breyer, J., dissenting) (querying whether the majority's holding permits a state, in addition to compelling identification, to also require an answer to more probing questions such as "What's your license number?" or "Where do you live?"); *see also* Michael C. Dorf, *Assessing the Supreme Court's Ruling on Giving ID to the Police*, CNN.COM (June 24, 2004), *at* http://www.cnn.com/2004/LAW/06/24/dorf.police.id/index.html (last visited May 30, 2005) (on file with the American University Law Review) (noting that civil libertarians may have good cause to see *Hiibel* as the first step toward a national identification card system, which would undoubtedly sacrifice privacy).

I. BACKGROUND

The Fourth Amendment states that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[26] Since the adoption of the Fourth Amendment in 1791, the Supreme Court has carved out several narrow exceptions to the initial requirement that police obtain a warrant before executing a search and seizure.[27] The most significant of these exceptions arose in the landmark case of *Terry v. Ohio*, decided in 1968 and still relied upon today.[28]

A. The Terry *"Reasonable Suspicion" Standard*

Terry established that the Fourth Amendment does not prohibit the police from stopping a person for investigative purposes when they have a "reasonable suspicion" that the individual may be involved in criminal activity, even when that suspicion does not reach the level of probable cause necessary to make an arrest.[29] In deciding the case, the Court engaged in a painstaking balancing analysis of government goals against privacy rights,[30] and in the end focused on the government's interest in

26. U.S. CONST. amend. IV.

27. *See, e.g.*, *Terry*, 392 U.S. at 21-22 (creating the "reasonable suspicion" exception to the Fourth Amendment); Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (articulating a "consent" exception to the Fourth Amendment); Horton v. California, 496 U.S. 128, 136 (1990) (applying the "plain view" exception, under which an officer can seize evidence in plain view if its incriminating character is immediately apparent); Minnesota v. Dickerson, 508 U.S. 366, 375 (1993) (adding a "plain feel" exception to the list).

28. 392 U.S. at 21-22; *see infra* Part I.A-B (discussing the "reasonable suspicion" standard and reviewing the evolution of that standard in subsequent cases).

29. 392 U.S. at 27. Before *Terry*, the Court viewed the requirement of probable cause as the minimum justification necessary for police to make a reasonable seizure under the Fourth Amendment. *See* Dunaway v. New York, 442 U.S. 200, 208 (1979) (holding that custodial questioning cannot occur on less than probable cause). It was a standard high enough to "safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime." Brinegar v. United States, 338 U.S. 160, 176 (1949). *Terry* for the first time recognized an exception to this "long-prevailing standard." *Dunaway*, 442 U.S. at 208-09.

30. *See Terry*, 392 U.S. at 21 (adopting the balancing test set out in Camara v. Municipal Court, 387 U.S. 523, 534-37 (1967), where the Court evaluates the reasonableness of a particular police activity by weighing the government interest in the activity against the intrusion on individual rights that it entails). For the Court to sanction a police activity that intrudes on individual rights, the police officer must be able to point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21. The Court pointed out that a lower standard would lead to invasions of constitutionally guaranteed rights based on "nothing more substantial than inarticulate hunches." *Id.* at 22. It took the *Terry* Court almost seven pages to perform this balancing analysis, signaling the test's importance whenever the Court seeks to create a new exception to the law. *Id.* at 20-27. *Terry* indicated that courts should perform a balancing analysis on a case-by-case basis, to determine whether the government interest sufficiently justifies an invasion of individual rights. *See* 392 U.S. at 30 (concluding that *Terry* necessitates a fact-driven inquiry).

crime prevention and detection.[31] It found that police should be given a "narrowly drawn authority" to stop a person and conduct a reasonable investigation,[32] including a limited search for weapons, when an officer can list "specific and articulable facts" to suggest that criminal activity is afoot.[33] The Court noted that in making this assessment, officers must judge the facts against an objective standard: "would the facts available to the officer at the moment of the seizure . . . 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?"[34]

In a concurrence designed to clarify parts of the majority opinion,[35] Justice White described the scope of the interrogation that might occur during an investigatory *Terry* stop.[36] While he conceded that nothing in the Constitution prevents the police from addressing questions to anyone on the street, he stressed that an individual who is 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."[37] In so stating, Justice White attempted to highlight the boundaries of the Court's decision, and hence to minimize its impact on Fourth Amendment protections.[38]

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31. *See id.* at 20-22 (citing the police need for a means of "swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subject to the warrant procedure"). The Court also focused on the safety of the officer, citing statistics that illustrate that a significant number of law enforcement officers are killed or assaulted in the line of duty. *Id.* at 24. This led the Court to conclude that an officer's interest in assuring his or her safety is sufficiently important to justify a *Terry* frisk. *Id.* at 24-27.

32. *Id.* at 27.

33. *Id.* at 21, 30. The stop and the frisk, which equate to a Fourth Amendment search and seizure, are separate police acts that each require their own set of facts to meet the reasonable, articulable suspicion standard. *Id.* at 27. The Court described the frisk as a "carefully limited search of the outer clothing of such persons in an attempt to discover weapons" that might be used to assault the officer or a member of the public. *Id.* at 30. In a subsequent case, the Court clarified the boundaries of this protective search: police cannot use it as a means of discovering evidence of a crime; rather, it is strictly limited to ascertaining whether the suspect has a weapon. *See* Minnesota v. Dickerson, 508 U.S. 366, 372-73 (1993) (suppressing the officer's seizure of cocaine from a suspect's jacket because the officer never believed that the lump he felt was a weapon). Instead, he manipulated it until he realized it was contraband, thus exceeding the bounds of a valid *Terry* frisk. *Id.*

34. *Terry*, 392 U.S. at 21-22 (citing Carroll v. United States, 267 U.S. 132, 162 (1925); Beck v. Ohio, 379 U.S. 89, 96-97 (1964)).

35. *Id.* at 34 (White, J., concurring) (writing an "additional word is in order concerning the matter of interrogation during an investigatory stop"). Justice Harlan, in a separate concurrence, also felt obliged to "fill in a few gaps" in the Court's opinion, acknowledging that *Terry* would likely serve as precedent for future decisions. *Id.* at 31-32 (Harlan, J., concurring).

36. *Id.* at 34-35 (White, J., concurring) (pointing out that a frisk by itself will serve *Terry*'s purpose of ascertaining if an individual is armed, regardless of whether or not a suspect responds to police questioning).

37. *Id.* at 34.

38. *Id. But see id.* at 38-39 (Douglas, J., dissenting) (warning that the *Terry* decision will have an immense impact on the Fourth Amendment and takes "a long step down the totalitarian path," watering down constitutional rights by giving police too much authority).

B. Terry*'s Progeny*

In creating a new breed of police investigative stops, *Terry* set forth a standard that proved relatively vague and became vulnerable to lower courts' subjective interpretations.[39] As a result, the Court has been called upon many times since 1968 to clarify its intent regarding the "reasonable suspicion" standard and the principles that *Terry* espoused.[40] Factors the Court has considered in determining what constitutes permissible *Terry* stops include a suspect's behavior patterns,[41] the location of the stop,[42] a suspect's race,[43] and the credibility of an anonymous tip.[44] Even wholly

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Justice Douglas argued that a loosening of the probable cause requirement for police seizures must take place through passage of a constitutional amendment and must be the will of the people, not the Court. *Id.* at 38.

39. *See* United States v. Cortez, 449 U.S. 411, 417 (1981) (noting that lower courts have used a broad array of terms in attempting to describe what constitutes reasonable suspicion, such as "articulable reasons" and "founded suspicion," none of which provide clear guidance that can be applied as a per se rule).

40. *See generally* Rachel Karen Laser, Comment, *Unreasonable Suspicion: Relying on Refusals to Support* Terry *Stops*, 62 U. CHI. L. REV. 1161, 1169 (1995) (articulating that the Court has repeatedly acknowledged that the "reasonable suspicion" standard is not self-evident and has struggled to define it, ultimately deciding on a "totality of the circumstances" approach that defers to police discretion).

41. *See, e.g.*, United States v. Brignoni-Ponce, 422 U.S. 873, 884-85 (1975) (holding for the first time that nervous, evasive behavior is a pertinent factor in determining reasonable suspicion); United States v. Mendenhall, 446 U.S. 544, 564-66 (1980) (upholding a stop based on drug enforcement agents' observations that the defendant appeared nervous and engaged in behavior designed to evade detection); United States v. Sokolow, 490 U.S. 1, 8-9 (1989) (validating a stop in which the defendant's behavior exhibited all the classic aspects of a drug courier); Illinois v. Wardlow, 528 U.S. 119, 124 (2000) (finding that headlong flight is the ultimate act of evasion).

42. *Compare Brignoni-Ponce*, 422 U.S. at 887 (declining to give any weight to the location of the stop), *with* Adams v. Williams, 407 U.S. 143, 147-48 (1972) (including a defendant's presence in a high-crime area as one of the factors that led to the officers' reasonable suspicion of criminal activity), *and Wardlow*, 528 U.S. at 124 (deciding that a location's characteristics are relevant in the "totality of the circumstances" approach to determining if a situation is sufficiently suspicious to warrant further investigation).

43. *See Brignoni-Ponce*, 422 U.S. at 886-87 (holding that Mexican ancestry, standing alone, will not justify a *Terry* stop). *But see* STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE CASES AND COMMENTARY 257 (7th ed. 2004) (explaining that race can be a relevant factor in the "reasonable suspicion" analysis if an officer has a specific description of a suspect that includes his race). For example, if a bank teller describes a robber as an Asian male in his 40s who is wearing a red sweatshirt, an officer can limit his investigation to Asian males fitting this description. *Id.* For a general discussion of the practice of racial profiling, both before and after September 11, *see* Sharon L. Davies, *Profiling Terror*, 1 OHIO ST. J. CRIM. L. 45, 46-49 (2003) (arguing that the nation's general opposition to racial profiling in *Terry* stops has shifted in light of the recent terrorist attacks against the United States).

44. *See, e.g.*, Spinelli v. United States, 393 U.S. 410, 413 (1969) (holding, in a gambling case, that police corroboration of innocent details is not sufficient to validate an anonymous tip); Illinois v. Gates, 462 U.S. 213, 214 (1983) (overruling *Spinelli* and adopting the informant-friendly "totality of the circumstances" approach); Alabama v. White, 496 U.S. 325, 332 (1990) (following the holding of *Gates* in a case involving marijuana and cocaine). *But see* Florida v. J.L., 529 U.S. 266, 272 (2000) (withdrawing slightly from the "totality of the circumstances" approach in a case that involves possession of a firearm, because apart from the tip, officers had no reason to suspect illegal conduct).

innocent factors, when taken together, may add up to reasonable suspicion in certain situations.[45]

While the "reasonable suspicion" standard has continued to evolve with new fact patterns, the Court has held steadfast in its position that the scope of a *Terry* stop is limited: the stop must be brief;[46] the suspect must be free to leave after a short period of time;[47] and, most importantly, the suspect is free to decline to answer questions.[48] Until *Hiibel*, the Court had not drifted significantly from these restraints on the *Terry* doctrine in the thirty-six years since it decided that case.[49]

II. THE CURRENT CONTROVERSY: *HIIBEL*'S DECISION TO COMPEL IDENTIFICATION COMPROMISES *TERRY* AND ERODES PRIVACY RIGHTS

Hiibel forced the Supreme Court to finally take a stance on the constitutionality of state "stop and identify" statutes.[50] In a line of cases that preceded *Hiibel*, the Court had invalidated most such statutes for vagueness, but quietly left the door open for a statute narrow enough to

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See generally Stuntz, *supra* note 17, at 2138 (arguing that the law of criminal procedure varies in response to crime waves, and citing the Court's treatment of confidential informants as an example that reflects the Court's sensitivity to the drug war).

45. *See, e.g.*, *Sokolow*, 490 U.S. at 9-10 (holding that although each of the defendant's actions, by itself, was innocent, the totality of the circumstances were sufficient to provide the officer with reasonable suspicion of a drug crime); United States v. Arvizu, 534 U.S. 266, 270-71 (2002) (involving the following set of factors: the defendant drove a minivan, a type of vehicle often used by smugglers; the driver appeared stiff; he avoided looking at the police officer; the knees of the children in the backseat were unusually high; and the children were waving oddly at the officer). The Court held that while each of these factors, taken alone, has an innocent explanation, when viewed in totality they were sufficient to justify the officer's reasonable suspicion of illegal activity. *Id.* at 277.

46. *See infra* note 47 (listing several cases holding that a *Terry* stop exceeded the original justification for the stop).

47. *See, e.g.*, United States v. Sharpe, 470 U.S. 675, 687 (1985) (stating that an examination of whether a police detention lasted too long to be justified under *Terry* must include whether the officer diligently pursued a means of investigation that was likely to confirm or dispel his suspicions quickly); Florida v. Royer, 460 U.S. 491, 500 (1983) (emphasizing that the "investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop"); United States v. Place, 462 U.S. 696, 709-10 (1983) (invalidating a stop that involved a ninety minute detention of defendant's bag because it went beyond the police officer's narrow authority to briefly detain luggage).

48. *See* Terry v. Ohio, 392 U.S. 1, 34 (1968) (White, J., concurring) (emphasizing that an individual detained based upon reasonable suspicion cannot be required to answer police questions).

49. *See supra* notes 16-21 and accompanying text (clarifying that although the Court has slowly expanded the *Terry* doctrine since 1968, only with *Hiibel* has the Court drastically altered its position regarding the scope of an officer's authority during a *Terry* stop).

50. *See* Hiibel v. Sixth Judicial Dist. Court of Nev., 542 U.S. 117, 124 S. Ct. 2451, 2459 (2004) (stating for the first time that the principles of *Terry* allow a state to require a suspect to disclose his name during the course of a valid *Terry* stop).

pass constitutional muster.[51] In deciding *Hiibel* and validating Nevada's "stop and identify" statute, the Court set the standard by allowing officers to obtain a suspect's name, but nothing more.[52] However, with what it deemed an inconsequential decision, the Court departed from substantial precedent against compelled identification, and in turn redefined *Terry* on several levels.[53]

First, *Hiibel* expands the scope of a *Terry* stop by allowing police to threaten arrest against those suspects who refuse to answer police questions.[54] Second, and most importantly, *Hiibel* permits an investigative stop to go beyond the circumstances which justified it, a principal that was fundamental to the Court's decision in *Terry*.[55] Although the Court noted that its decision validates an officer's request for a name only, the majority chose not to acknowledge that a name can lead to a host of additional information about a suspect.[56] As a result, the case of one small-town cattle rancher from Nevada has redefined a doctrine that had been a pillar of the criminal justice system for over three decades.

A. "Stop and Identify" Statutes

The Nevada law that Mr. Hiibel was charged with violating is called a "stop and identify" statute.[57] Roughly twenty states have varying versions of such statutes, which generally permit an officer to ask or require a suspect to disclose his identity.[58] In some states, a suspect's refusal to

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51. *See infra* note 61 (discussing a number of cases in which the Court found state "stop and identify" statutes unconstitutional because they asked for identification in general, not for a name in particular). The Court deemed this standard too vague because it gave police unlimited discretion in obtaining information. *See infra* note 61.

52. *See* 542 U.S. at __, 124 S. Ct. at 2457 (interpreting Nevada's "stop and identify" statute to require a suspect to either state his name or communicate it to the officer by other means, as the suspect sees fit, but noting that the statute does not require a suspect to hand over his driver's license or other documents).

53. *Infra* Part II.D.

54. *See infra* text accompanying notes 107-110 (observing that the Court signaled its departure from *Terry* by allowing the refusal to answer police questions to result in probable cause for an arrest).

55. *Infra* Part II.D.2.

56. *See infra* Part II.B (describing the personal information available to a police officer through the use of computer database technologies).

57. NEV. REV. STAT. § 199.280 (2003).

58. *E.g.*, ALA. CODE § 15-5-30 (2004); ARK. CODE ANN. § 5-71-213(a)(1) (Michie 2003); COLO. REV. STAT. § 16-3-103(1) (2004); DEL. CODE ANN. tit. 11, §§ 1902(a), 1321(6) (2004); FLA. STAT. ANN. § 856.021(2) (West 2005); GA. CODE ANN. § 16-11-36(b) (2004); 725 ILL. COMP. STAT. 5/107-14 (2004); KAN. STAT. ANN. § 22-2402(1) (2003); LA. CODE CRIM. PROC. ANN. art. 215.1(A) (West 2004); MO. ANN. STAT. § 84.710(2) (West 2005); MONT. CODE ANN. § 46-5-401(2)(a) (2003); NEB. REV. STAT. § 29-829 (2004); N.H. REV. STAT. ANN. §§ 594:2, 644:6 (2003); N.M. STAT. ANN. § 30-22-3 (Michie 2003); N.Y. CRIM. PROC. LAW § 140.50(1) (McKinney 2004); N.D. CENT. CODE § 29-29-21 (2003); R.I. GEN. LAWS § 12-7-1 (2004); UTAH CODE ANN. § 77-7-15 (2003); VT. STAT. ANN. tit. 24, § 1983 (Supp. 2004); WIS. STAT. ANN. § 968.24 (West 2004); *see also* Sam B. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 344 (1942) (noting that some states model their

identify himself is a misdemeanor offense or a civil violation, while in others it is merely a factor police can consider in determining whether the suspect has violated loitering laws.[59] In states without "stop and identify" statutes, a suspect may refuse to identify himself without penalty.[60]

The Supreme Court's prior case law regarding "stop and identify" statutes invalidated vague language that allowed police to request identification in general, but left the door open for a more specific articulation of the rule.[61] *Hiibel* picks up where these cases left off.[62]

B. What's in a Name? The Breadth of Computer Databases

Before addressing the impact of *Hiibel* on Fourth Amendment jurisprudence, it is important to understand the potential array of

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"stop and identify" statutes on the Uniform Arrest Act, an early English model code that permits an officer to stop a person reasonably suspected of a crime and demand his "name, address, business abroad and whither he is going"). Other statutes are based on proposed text in the American Law Institute's Model Penal Code. MODEL PENAL CODE § 250.6 Comment 4 (1980).

59. *Compare* NEB. REV. STAT. § 29-829 (authorizing an officer who has stopped a suspect based on reasonable suspicion to arrest the suspect if he refuses to provide his name, address and an explanation of his actions), *with* ARK. CODE ANN. § 5-71-213(a)(1) (stating that a person commits the offense of loitering if he lingers in a public place and refuses to provide his name or explain why he is there), *and* R.I. GEN. LAWS § 12-7-1 (allowing an officer to detain and question a suspect who refuses to provide his name for up to two hours, but authorizing an arrest only if the officer determines that a crime has indeed been committed). It is noteworthy that many of the state "stop and identify" statutes listed in note 58 are unconstitutional under the *Hiibel* ruling because they allow police officers to demand more than a name. *See, e.g.*, COLO. REV. STAT. § 16-3-103(1) (allowing police to obtain a suspect's name and address, identification if available, and an explanation of his actions); N.H. REV. STAT. ANN. § 594:2 (requiring a suspect to give his name, address, business abroad and where he is going); N.Y. CRIM. PROC. LAW § 140.50(1) (explaining that police can demand a suspect's name, address and an explanation of his conduct).

60. *See* Hiibel v. Sixth Judicial Dist. Court of Nev., 542 U.S. 117, 124 S. Ct. 2451, 2456-57 (2004) (discussing the states' various approaches to a suspect's refusal to identify himself).

61. *See, e.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (holding that a traditional vagrancy law was void for vagueness due to its broad scope and imprecise terms, which denied proper notice to potential offenders and permitted police officers to exercise unlimited discretion in enforcing the law); Brown v. Texas, 443 U.S. 47, 51 (1979) (ruling that the officers' initial stop of the defendant was not based on specific, objective facts establishing reasonable suspicion sufficient to satisfy *Terry*); Kolender v. Lawson, 461 U.S. 352, 360 (1983) (finding California's "stop and identify" statute void because it required a suspect to give "credible and reliable" identification). The Court said this language provides no standard for determining what a suspect must do to comply with it, resulting in "virtually unrestrained power to arrest and charge persons with a violation." *Id.* (citing Lewis v. City of New Orleans, 415 U.S. 130, 135 (1974) (Powell, J., concurring)). However, the Court reserved comment on the constitutional validity of a "stop and identify" statute under the Fourth and Fifth Amendments. *See* Alan D. Hallock, Note, *Stop-and-Identify Statutes After* Kolender v. Lawson*: Exploring the Fourth and Fifth Amendment Issues*, 69 IOWA L. REV. 1057, 1061-63 (1984) (evaluating the language in several state "stop and identify" statutes that failed to survive constitutional scrutiny).

62. *See* 542 U.S. at __, 124 S. Ct. at 2458 (summarizing the evolution of case law, from *Terry* to *Hiibel*, regarding police questioning during a *Terry* stop).

information that a name may reveal when placed in police hands.[63] With the advent of computer database technology, compelled identification permits the government to engage in a far more extensive search of personal information than was contemplated in *Terry*.[64]

1. NCIC database

The National Crime Information Center makes criminal history information widely available to police officers and law enforcement officials across the United States.[65] State and local police access the FBI's NCIC computer database millions of times each day in their normal police activities.[66] According to the statute establishing and governing the NCIC database, there are several categories of information that police can enter and access via the database, including "identification, criminal identification, crime, and other records."[67] Significantly, a large portion of the FBI records on file is inaccurate or incomplete, and some records may not reflect the final outcome of a recently decided case.[68] Nevertheless, courts historically have given substantial deference to information that police obtain through computer databases such as NCIC.[69]

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63. *See id.* at __, 124 S. Ct. at 2464 (Stevens, J., dissenting) (cautioning that "[a] name can provide the key to a broad array of information about the person, particularly in the hands of a police officer with access to a range of law enforcement databases").

64. *See infra* Part II.B (discussing various computer databases that state and local police can access, and the information that each provides with the input of a suspect's name).

65. *See* FEDERAL BUREAU OF INVESTIGATION NATIONAL CRIME INFORMATION CENTER, *at* http://www.fas.org/irp/agency/doj/fbi/is/ncic.htm (last modified Apr. 8, 2003) (on file with the American University Law Review) [hereinafter NCIC WEB SITE] (setting forth the NCIC's purpose, access and use constraints, sources of data, categories of individuals and records included, and safeguards); *see also* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PUB. 187670, USE AND MANAGEMENT OF CRIMINAL HISTORY RECORD INFORMATION: A COMPREHENSIVE REPORT, 2001 UPDATE 30 (2001) [hereinafter BJS REPORT] (reporting that over fifty-nine million offenders were listed in the criminal history files of state central repositories since December 31, 1999), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/umchri01.pdf.

66. NCIC WEB SITE, *supra* note 65.

67. 28 U.S.C. § 534(a)(1) (2004). The personal identification information typically available through the NCIC includes an individual's name, address, birth date, Social Security number, sex, race and physical characteristics. BJS REPORT, *supra* note 65, at 28-29.

68. *See* BJS REPORT, *supra* note 65, at 21 (warning that NCIC "name searches are not fully reliable and existing criminal record files may be inaccurate and incomplete, particularly with respect to case disposition information"). In fact, the BJS REPORT finds that inadequacies in NCIC record accuracy and thoroughness comprise the "single most serious deficiency affecting" the NCIC system. *Id.* at 38. *See also* Brief of Amici Curiae Electronic Privacy Information Center (EPIC) and Legal Scholars and Technical Experts at 8, *Hiibel*, 542 U.S. 117 (No. 03-5554) (suggesting that based on the prevalence of inaccuracies in NCIC records, it is quite likely that misguided decisions will lead to unjustified arrests).

69. *See* Arizona v. Evans, 514 U.S. 1, 16-17 (1995) (upholding the use of evidence obtained from a false arrest record that was the product of a clerical error); United States v. Hines, 564 F.2d 925, 928 (10th Cir. 1977) (finding that reliance upon FBI's NCIC database to supply probable cause for an arrest was acceptable). The Court in *Hines* further noted

2. Other databases—MDT and MATRIX

In addition to the NCIC, there are several newer computer databases that offer police specialized information compiled from various sources. A tool that many state and local police use is the Mobile Data Terminal (MDT), a portable computer that can access data from the Department of Motor Vehicles, the NCIC, and a state's crime information center.[70] The Multi-State Anti-Terrorism Information Exchange (MATRIX) is a state-run system that links together information from public and private databases to give officers data from multiple sources via one efficient query.[71] Available documentation includes criminal history, driver's license and vehicle information, jail records, digitized photographs, and financial data.[72]

Although police use of computer databases to aid in their investigations is increasing, a discussion of this technology is notably absent from the *Hiibel* opinion.[73] Instead, the Supreme Court makes a point of hinging its view that "stop and identify" statutes are constitutional on the fact that they only request a name, and do not seek broader forms of identification.[74] The Court seems to ignore the reality that in the twenty-first century, a name is synonymous with such broader forms of identification due to the widespread use of computers to access information.[75]

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that "[t]here are very few decisions where the reliability of NCIC reports has been challenged." *Id.* at 927.

70. *See* Darlene Cedres, Comment, *Mobile Data Terminals and Random License Plate Checks: The Need for Uniform Guidelines and a Reasonable Suspicion Requirement*, 23 RUTGERS COMPUTER & TECH. L.J. 391, 397 (1997) (analyzing police use of Mobile Data Terminals to obtain a motorist's personal information by conducting random computer searches of license plate numbers). Cedres cautions that because the MDT technology is so new, there are no uniform guidelines governing law enforcement officials' use of the devices, and as a result, citizens remain unprotected against arbitrary police use of such technology computers. *Id.*

71. *See* Brief of Amici Curiae Electronic Privacy Information Center (EPIC) and Legal Scholars and Technical Experts at 11-12, *Hiibel*, 542 U.S. 117 (No. 03-5554) (explaining that MATRIX is a direct response to the September 11 terrorist attacks and is already utilized by one thousand law enforcement agencies in Florida). Funding for MATRIX comes in part from the Department of Justice. The Department of Homeland Security has since offered an additional $8 million for the project. *Id.* at 13. Other states including Connecticut, Michigan, New York, and Pennsylvania are currently working to implement the program. *Id.* at 14.

72. *Id.* at 12-13.

73. *See* Hiibel, 542 U.S. at __, 124 S. Ct. 2451, 2464 (Stevens, J., dissenting) (alluding to the information that a name can lead to with computer databases). Interestingly, the majority opinion in *Hiibel* fails to mention the vast array of information law enforcement officials can obtain merely with the use of someone's name. *Id.*

74. *See id.* at __, 124 S. Ct. at 2457, 2459 (contending that an officer's request for an individual's name is reasonable under the Fourth Amendment because merely asking for a name does not change the nature of the stop).

75. *See* Hiibel v. Sixth Judicial Dist. Court of Nev., 59 P.3d 1201, 1209 (Nev. 2002) (Agosti, J., dissenting) (noting that by upholding Nevada's "stop and identify" statute, an officer can now "figuratively, reach in, grab the wallet and pull out the detainee's identification").

C. The Facts of Hiibel

The facts of *Hiibel* are quite basic for a case that has generated so much controversy. Police in Humboldt County, Nevada, received an afternoon telephone call reporting an assault.[76] In response, a sheriff went to the scene and found a man standing by a truck and a young woman sitting inside.[77] The officer approached them and explained that he was investigating a report of a fight.[78] He then asked the man if he had any identification on him, but the man refused to comply.[79] The officer repeated this request eleven times, but the man continued to refuse, and the officer finally arrested him.[80] This man, Larry Dudley Hiibel, was charged with violating Nevada's "stop and identify" statute and sentenced to pay a fine of $250.[81]

D. Hiibel *Redefines* Terry

The *Hiibel* decision redefines *Terry* even as it bases much of its analysis on the landmark 1968 case. First, the Court's validation of Nevada's "stop and identify" statute deviates from long-standing precedent against compelled identification, and in effect allows an arrest based on less than probable cause.[82] Second, it permits an investigative stop based on reasonable suspicion to go beyond the circumstances that justified it, contrary to a fundamental principle of *Terry*.[83]

1. The court strays from long-standing precedent, creating a new authority for probable cause to arrest during a Terry *stop*

The Court has repeatedly recognized an individual's right not to respond to police questioning during an investigative *Terry* stop because such a stop is predicated only on reasonable suspicion and does not reach the level of probable cause necessary to make an arrest.[84] In *Hiibel*, the majority

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76. *Hiibel*, 542 U.S. at __, 124 S. Ct. at 2454-55. The caller reported seeing a man assault a woman in a red and silver GMC truck on Grass Valley Road. *Id.*

77. *Id.* at __, 124 S. Ct. at 2455. The officer also observed skid marks in the gravel near the vehicle, which led him to believe the truck had come to a sudden stop, thereby heightening his suspicion. *Id.*

78. *Id.*

79. *Id. Compare id.* at __, 124 S. Ct. at 2455 (failing to provide the complete conversation between the officer and Mr. Hiibel), *with* Dudley Hiibel's Official Web Site [hereinafter Dudley Hiibel Web Site], *at* http://www.papersplease.org/hiibel/facts.html (last updated July 9, 2004) (on file with the American University Law Review) (contending that Mr. Hiibel wanted to know what the officer was investigating before he provided his name, but that in response to this question, the officer merely answered "I'm investigating an investigation" and remained elusive).

80. *Hiibel*, 542 U.S. at __, 124 S. Ct. at 2455.

81. *Id.*

82. *Infra* Part II.D.1.

83. *Infra* Part II.D.2.

84. *See supra* notes 29-37 and accompanying text (describing the "reasonable

dismisses this long-standing principle by concluding that the Court's prior statements about compelled identification are not controlling.[85] The Court also brushes aside the value of a name, deeming it an "insignificant" fact.[86] But *Hiibel* is as much about a suspect's failure to give his name as it is about the value of the name itself. By validating an officer's authority to arrest a suspect for refusing to provide identification, the Court allows a suspect's failure to give his name to morph a *Terry* stop into probable cause for an arrest.[87]

A lengthy line of Fourth and Fifth Amendment case law, beginning with *Terry*, shows that individuals detained during a valid *Terry* stop do not have to respond to police interrogation, although officers can always attempt to solicit voluntary responses.[88] Since *Terry*, the Court has both implicitly and explicitly reaffirmed this principle. For example, in *Adams v. Williams*, the Court stated that it may be reasonable for an officer to attempt to determine a suspect's identity during a *Terry* stop.[89] At no point, however, did the Court say that an individual is required to respond.[90] *Adams* addressed the scope of an officer's inquiry during a *Terry* stop; it did not address the obligation of the suspect to cooperate.[91]

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suspicion" standard articulated in *Terry* and its purpose of allowing a brief, investigatory detention to confirm or dispel an officer's suspicions and to protect his or her safety).

85. *See Hiibel*, 542 U.S. at __, 124 S. Ct. at 2458-59 (addressing the defendant's argument that precedent supports a suspect's right to refuse to answer questions during a *Terry* stop, and thus precludes a finding in favor of compelled identification). The majority brushes over some of its past statements that seem to speak against compelled identification and ultimately decides they are dicta, noting "[w]e do not read these statements as controlling." *Id.* at __, 124 S. Ct. at 2459.

86. *Id.* at __, 124 S. Ct. at 2461.

87. *See* Brief for the American Civil Liberties Union as Amicus Curiae in Support of Petitioner at 9, *Hiibel*, 542 U.S. 117 (No. 03-5554) (contending that "the Fourth Amendment precludes the State from legislating a regime in which silence alone is sufficient to transform mere reasonable suspicion into the probable cause necessary to arrest an individual.").

88. *See supra* note 37 and accompanying text (summarizing Justice White's concurrence in *Terry*, which clarifies the scope of police questioning during an investigative stop); *infra* note 96 and accompanying text (discussing Supreme Court cases that demonstrate a consistent position against compelled identification); *see also Hiibel*, 542 U.S. at __, 124 S. Ct. at 2465 (Breyer, J., dissenting) (countering the majority's argument that the Court's prior statements about compelled identification are not controlling). Justice Breyer, joined by Justices Souter and Ginsberg, maintain "[t]his lengthy history—of concurring opinions, of references, and of clear explicit statements . . . while technically dicta, is the kind of strong dicta that the legal community typically takes as a statement of the law." *Id.* They add that this law has remained unchanged for over twenty years, and there is no reason to erode it now. *Id.* at __, 124 S. Ct. at 2465-66.

89. *See* 407 U.S. 143, 146-47 (1972) (upholding a *Terry* stop based on a tip from a known informant that the defendant had a handgun at his waist and was carrying narcotics). In *Hiibel*, the Court used this case to support its position that questions concerning a suspect's identity are a routine part of many *Terry* stops, and serve an important government interest. 542 U.S. at __, 124 S. Ct. 2458.

90. *Adams*, 407 U.S. at 146.

91. *Id.* Moreover, in *Adams* the officer confirmed his suspicions without requesting the suspect's identity and without any need for this information. *See id.* at 148 (noting that once

In *Kolender v. Lawson*, Justice Brennan's concurrence is particularly cautionary, although the Court in *Hiibel* does not acknowledge it.[92] In describing a *Terry* stop, Justice Brennan reiterates the Court's previous statements that such encounters must be brief, police can only conduct physical searches if necessary for their protection, and "most importantly, the suspect must be free to leave after a short time and to decline to answer the questions put to him."[93] He takes the warning one step further by noting that a "[f]ailure to observe these limitations converts a *Terry* encounter into the sort of detention that can be justified only by probable cause."[94] Under Justice Brennan's analysis, "stop and identify" statutes by their very nature violate the limited scope of a *Terry* stop because they compel a response based on the threat of arrest and prosecution, for which probable cause is always required.[95]

The Court's articulations in *Terry* and *Kolender* come in the form of concurrences, but the Court has espoused the same principles in several majority opinions.[96] In *Berkemer v. McCarty*, the Court acknowledged that

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the defendant rolled down the car window, the officer reached into the car and removed the handgun from his waist, where the informant had said it was located). In this case, taking the time to request the suspect's name might actually have hurt the officer, because the suspect could have used the gun during the interrogation. *See* Terry v. Ohio, 392 U.S. 1, 27 (1968) (creating the reasonable suspicion exception to the Fourth Amendment for this very reason—to protect officer safety—and thus limiting the scope of a *Terry* stop to achieve this purpose).

92. 461 U.S. 352, 365 (1983) (Brennan, J., concurring); *see infra* notes 93-95 and accompanying text (analyzing Justice Brennan's concurrence in *Kolender*); *Hiibel*, 542 U.S. at __, 124 S. Ct. at 2458 (discussing past cases that address police questioning during *Terry* stops, but choosing decisions that appear to support the majority's position). Conveniently, *Kolender* is not included in this discussion. *Kolender* is, however, cited in Justice Breyer's dissent as part of the lengthy history of Court opinions that took a consistent stand against compelled identification, *id.* at __, 124 S. Ct. at 2465 (Breyer, J., dissenting).

93. *Kolender*, 461 U.S. 352, 365 (1983) (Brennan, J., concurring).

94. *Id.*

95. *See* Hallock, *supra* note 61, at 1070-71 (explaining that if police have the power to compel identification, a suspect may not be able to prevent invasion of his or her Fourth Amendment privacy rights). For example, a person stopped and threatened with arrest under a state's "stop and identify" statute might not know whether the officer has a justifiable reasonable suspicion for the stop in the first place. *Id.* Therefore, the suspect can either assert his Fourth Amendment rights and risk arrest, or permit a potentially arbitrary governmental invasion of privacy. *Id.* Mr. Hiibel alleges this is exactly what happened in his case. Dudley Hiibel Web Site, *supra* note 79. Mr. Hiibel claims that when the officer approached and requested identification, Mr. Hiibel asked what the officer was investigating. *Id.* The officer's non-response was "I'm investigating an investigation." *Id.* Thus, with no information about why the officer had stopped him, Mr. Hiibel was faced with the choice of either giving his name, thereby risking further intrusion into his privacy, or being arrested. *Id.* He chose to remain silent because he believed he had a constitutional right to do so. *Id.*

96. *See, e.g.*, Illinois v. Wardlow, 528 U.S. 119, 125 (2000) (acknowledging a suspect's right to remain silent during a *Terry* stop); Berkemer v. McCarty, 468 U.S. 420, 439 (1984) (noting that a *Terry* detainee is not obliged to respond to police questioning); Florida v. Royer, 460 U.S. 491, 497-98 (1983) (stating that a suspect has a right not to respond to police interrogation absent probable cause).

during a *Terry* stop an officer may ask some questions to ascertain a suspect's identity and to try to elicit information that will validate or dispel the officer's suspicions.[97] However, the Court explicitly stated that "the detainee is not obliged to respond."[98] Although the *Hiibel* decision declares this statement to be dicta and dismisses it,[99] the context in which it was written is significant. The *Berkemer* Court pointed out that *Miranda* warnings are not required when officers conduct a *Terry* stop precisely because, by its nature, such a stop is brief and should not result in incriminating statements.[100] By implication, if a suspect is compelled to make statements during a *Terry* stop, then *Miranda* warnings would be necessary to protect the suspect's Fifth Amendment right against self-incrimination.[101]

Although the *Hiibel* majority concluded that these statements were not controlling,[102] the Court clearly recognized that by allowing police to compel identification during a *Terry* stop, it was departing from well-established precedent. During oral arguments, the justices grappled with this issue in their questions to the lawyer arguing on behalf of Nevada.[103] They queried: "[I]f we have a repeated series of cases that say [a detainee is not obliged to respond to questions asked during a *Terry* stop], doesn't there have to be a pretty good reason for departing from it?"[104] In the end, the majority circumvented the issue by concluding that although the Fourth Amendment cannot require a suspect to answer police questions during a *Terry* stop, state law can.[105] By so ruling, the Court reversed its position on a principle that has remained unchanged since 1968.

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97. *Berkemer*, 468 U.S. at 439.

98. *Id.*

99. Hiibel v. Sixth Judicial Dist. Court of Nev., 542 U.S. 117, 124 S. Ct. 2451, 2459 (2004).

100. *See* 468 U.S. at 440 (noting that the relatively non-threatening nature of *Terry* stops, compared with other types of detentions, explains *Miranda*'s inapplicability to such investigative stops).

101. *See* Mark A. Godsey, *When* Terry *Met* Miranda*: Two Constitutional Doctrines Collide*, 63 FORDHAM L. REV. 715, 733 (1994) (suggesting that *Miranda* warnings should be required during investigative stops due to the recent expansion of the *Terry* doctrine). The article points out that *Terry* stops have become much more intrusive in recent years and often involve force that suggests a suspect is in custody for purposes of *Miranda*. *Id.* at 728. Thus, requiring *Miranda* warnings during *Terry* stops that become custodial in nature better protects civil liberties. *Id.* at 737-41. However, the article suggests that the *Berkemer* Court, by holding that *Miranda* warnings are not required during *Terry* stops, made clear that such stops should continue to be brief and non-intrusive. *Id.* at 742-43.

102. 542 U.S. at __, 124 S. Ct. at 2459.

103. *See* Oral Argument Transcript at 36, *Hiibel*, 542 U.S. 117 (No. 03-5554) (noting that there are at least four prior cases suggesting police officers cannot require *Terry* suspects to identify themselves).

104. *Id.*

105. *See Hiibel*, 542 U.S. at __, 124 S. Ct. at 2459 (acknowledging that while the Fourth Amendment itself cannot require a suspect to answer questions, precedent does not speak to whether state law can compel identification). The Court balances the government interest in

Moreover, with this reversal, Justice Brennan's warning comes to fruition.[106] The *Hiibel* decision allows a suspect's refusal to cooperate to transform a *Terry* stop, based solely on reasonable suspicion, into probable cause to arrest.[107] Justice White, in his concurring opinion in *Terry*, clearly stated that a refusal to answer police questions "furnishes no basis for an arrest, although it may alert the officer to the need for continued observation."[108] In *Hiibel*, the Court holds the exact opposite, concluding that a suspect's refusal to provide identification furnishes a basis for arrest under a state "stop and identify" statute.[109] Thus, with *Hiibel*, the Court has eroded Fourth Amendment protections by blurring the lines between reasonable suspicion and probable cause.

2. Hiibel *broadens the scope of a* Terry *stop beyond the circumstances which justified it*

Terry's goal in carving out an exception to the probable cause requirement of the Fourth Amendment was to facilitate law enforcement officials' investigation, detection, and prevention of crime.[110] Thus, if an officer had specific facts to suggest a suspect may be engaged in criminal activity, the officer could conduct a brief stop to investigate.[111] However, the Court specified that *Terry* stops should be limited in scope, and that officers who suspect criminal activity must investigate the situation in such a way as to confirm or dispel their suspicions as quickly as possible.[112] The Court's holding in *Hiibel* contradicts these fundamental principles.

Importantly, the Court fails to explain how knowledge of a suspect's name will facilitate officers' investigation of a recent or imminent criminal act. Rather, the majority lists several other government interests served by obtaining a suspect's name during a *Terry* stop.[113] For example, the Court

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obtaining a suspect's name against the activity's intrusion on individual privacy. *See infra* notes 123-125 and accompanying text (discussing the Court's balancing analysis, which finds that the government interest is sufficiently important that a state should be able to require a suspect to identify himself). The Court qualified its decision as applying to statutes that compel disclosure of a name only, rather than those that allow a request for identification in general. *Hiibel*, 542 U.S. at __, 124 S. Ct. at 2459.

106. *See supra* notes 92-95 and accompanying text (discussing Justice Brennan's concurrence in *Kolender*, which warns that absent probable cause, a suspect cannot be forced to answer questions).

107. *Hiibel*, 542 U.S. at __, 124 S. Ct. at 2459.

108. Terry v. Ohio, 392 U.S. 1, 34 (1968) (White, J., concurring).

109. 542 U.S. at __, 124 S. Ct. at 2459-60.

110. Terry v. Ohio, 392 U.S. 1, 22 (1968); *see supra* note 31 (discussing the need for quick action on the part of police officers as a justification for permitting *Terry* stops).

111. *Terry*, 392 U.S. at 21-23; *see supra* note 33 and accompanying test (explaining that the police must have reasonable, articulable facts to support a *Terry* stop).

112. *See supra* note 33 (describing the stop and frisk as a limited search with the sole purpose of determining whether the suspect is armed).

113. *Hiibel*, 542 U.S. at __, 124 S. Ct. at 2458.

argues that if officers know who they are dealing with, they can better assess the threat to their own safety.[114] Without specifically saying so, the Court implies that officers should run an individual's name through a computer database to determine whether the suspect has a past criminal record or an outstanding warrant.[115] However, the majority does not provide any evidence to show that knowing a person's identity or criminal record will better protect an officer from the potential for violence at that particular moment.[116] The fundamental purpose of a *Terry* stop is to detect criminal activity that just took place or is about to take place, not to protect against a suspect's tendency toward criminal activity based upon a prior record of criminal behavior.[117] If an officer is taking the time to run a suspect's name through a computer database, it is difficult to imagine that he fears for his or the public's safety at that moment.[118]

Moreover, *Terry* already addressed officer safety in this context by granting officers the right to conduct a frisk for weapons.[119] The Court allowed a "carefully limited search" so that officers could discover weapons that might be used to assault them.[120] The search was restricted precisely because of the significant intrusion on Fourth Amendment rights that it entailed.[121] *Hiibel*, by justifying compelled identification in furtherance of officer safety, gives the police a chance to obtain a host of

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114. *Id.* Other government interests the Court gives include clearing a suspect and allowing the police to look elsewhere, and assessing the possible danger to the victim. *Id.*

115. *See id.* (stating that knowledge of a suspect's identity might inform an officer that the suspect is wanted for another offense, or has a record of violence). Although the Court does not explicitly say so, it is apparent that police officers cannot obtain this information without running the name through a computer database that provides information on the suspect's criminal record. *See generally* Daniel J. Steinbock, *National Identity Cards: Fourth and Fifth Amendment Issues*, 56 FLA. L. REV. 697, 717 (2004) (noting that the only way to discover outstanding arrest warrants is to check the suspect's identity against a database).

116. *See Hiibel*, 542 U.S. at __, 124 S. Ct. at 2458 (using the word "may" to describe what knowledge of a suspect's identity might reveal, but not providing any specific examples in which knowledge of a suspect's identity and criminal record has prevented violence against officers or members of the public).

117. Terry v. Ohio, 392 U.S. 1, 27 (1968); *see also* Hiibel v. Sixth Judicial Dist. Court of Nev., 59 P.3d 1201, 1209 (Nev. 2002) (Agosti, J., dissenting) (noting that a *Terry* search is purposefully limited to a pat-down for weapons because these are the instruments that lead to immediate violence; an officer could not investigate a soft object like a wallet). The dissent warns that by allowing compelled identification, an officer "can now, figuratively, reach in, grab the wallet and pull out the detainee's identification." *Id.*

118. *See supra* note 91 and accompanying text (noting that requesting identification from a suspect could put an officer in danger).

119. *Terry*, 392 U.S. at 30-31 (holding for the first time that officers can conduct a search of the outer clothing of suspects if they have a reasonable, articulable suspicion that the individual may be armed and dangerous).

120. *Id.*

121. *See id.* at 26 (noting that a frisk is a "brief, though far from inconsiderable, intrusion upon the sanctity of the person").

information that a frisk would not produce,[122] and thus moves well beyond the limits set out in *Terry*.

The *Hiibel* majority also fails to explain the relevance of Mr. Hiibel's name to the circumstances that justified the initial *Terry* stop.[123] In *Hiibel*, officers stopped the suspect based on a telephone call reporting an assault.[124] Although the majority claims that knowing a name in this case would help officers assess the situation, they do not specify how a name or the information it might lead to would help dispel or confirm the officer's suspicions that an assault occurred on that day, or that Mr. Hiibel was even involved.[125] An officer's duty in investigating the circumstances of the assault allegation in *Hiibel* would have been to question the woman in the truck to see if she was hurt, to question the man about the purported assault, and to question any witnesses to discover whether they saw an assault occur.[126]

Furthermore, courts have reiterated the principle that any investigation conducted during a *Terry* stop must be specific to the circumstances which justified the initial stop.[127] If a police officer uses the information obtained

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122. *See supra* Part II.B (detailing the type and amount of information that officers can obtain with a name through the use of computer databases).

123. *See Terry*, 392 U.S. at 19-20 (establishing a two-fold inquiry for determining whether a search is reasonable: (1) was the officer's action "justified at its inception"; and (2) was it "reasonably related in scope to the circumstances which justified the interference in the first place"). While *Terry*'s progeny vacillated on the factors that go into the reasonable suspicion analysis, the Court has never strayed from the principle that the scope of a *Terry* stop must relate to the officer's initial reason for stopping a suspect. *See, e.g.*, United States v. Sharpe, 470 U.S. 675, 682 (1985) (quoting *Terry*, 392 U.S. at 20); United States v. Place, 462 U.S. 696, 709 (1983) (finding a seizure cannot continue for an excessive period of time); Dunaway v. New York, 442 U.S. 200, 212 (1979) (holding that a seizure cannot resemble a traditional arrest). The *Hiibel* Court even acknowledges the longevity of this principle, quoting it twice. 542 U.S. at __, 124 S. Ct. at 2458-59. The Court concludes, however, that the officer's request for identification in *Hiibel* was reasonably related to the circumstances justifying the initial stop. 542 U.S. at __, 124 S. Ct. at 2460.

124. *Hiibel*, 542 U.S. at __, 124 S. Ct. at 2455.

125. *Id.* at __, 124 S. Ct. at 2458; *see, e.g.*, Hiibel v. Sixth Judicial Dist. Court of Nev., 59 P.3d 1201, 1208 (Nev. 2002) (Agosti, J., dissenting) (citing *Carey v. Nev. Gaming Control Bd.*, 279 F.3d 873 (9th Cir. 2002), as an example of a name's irrelevance to a *Terry* investigation). In *Carey*, an officer suspected the defendant of cheating. 279 F.3d at 876. During the course of a *Terry* stop to investigate, the officer asked Carey for his identification, but he refused to provide it. *Id.* The officer then arrested Carey based on the same Nevada "stop and identify" statute at issue in *Hiibel*. *Id.* The Ninth Circuit held the statute violated the Fourth Amendment because the defendant's interest in his personal security outweighed any possibility that identification would provide a link leading to arrest. *Id.* at 880. This was particularly true because Carey's name "was not relevant to determining whether Carey had cheated." *Id.* In *Hiibel*, as in *Carey*, it is equally unclear how knowing the defendant's name would have led the officer to either confirm or dispel his suspicions about whether an assault had occurred. 542 U.S. at ___, 124 S. Ct. at 2458.

126. *See* Dudley Hiibel Web Site, *supra* note 79 (stating that the officer never asked Mr. Hiibel's daughter any questions or even looked at her until she was forced out of the car, thrown to the ground face-first, and handcuffed). Officers charged Mimi Hiibel with resisting arrest, although the charges were later dropped. *Id.*

127. *Terry*, 392 U.S. at 20; *see, e.g.*, United States v. Sharpe, 470 U.S. 675, 682 (1985)

from a computer search of a suspect's name—such as an outstanding warrant—to conduct further investigations unrelated to the initial stop, then the officer has moved beyond what is allowed under *Terry* and must have probable cause.[128]

Finally, *Terry* stipulated that the duration of an investigative stop must be brief.[129] Although the Court has repeatedly declined to establish a bright line rule declaring how long *Terry* stops can last, it generally considers "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly."[130] Conducting a computer search to ascertain a suspect's past criminal record is not a means of investigation likely to confirm or dispel officers' suspicions about an immediate situation.[131] Instead, it is a means of finding additional information about a suspect that may lead officers to an arrest when they would not otherwise have probable cause.[132] Such a practice therefore deviates from the limits on investigative stops established in *Terry* and adds to *Hiibel*'s erosion of the *Terry* doctrine and the Fourth Amendment.

(applying the *Terry* two-part analysis and finding that the thirty to forty minute detention did not meet *Terry*'s brevity requirement).

128. *Compare Hiibel*, 542 U.S. at __, 124 S. Ct. at 2458 (suggesting that obtaining a suspect's name to determine his past criminal record and using this information to arrest him is valid under *Terry*), *with* Arizona v. Hicks, 480 U.S. 321, 325-26 (1987) (observing that the plain view exception to the Fourth Amendment does not permit an officer to move the item into plain view, even slightly, because doing so constitutes an unauthorized invasion of privacy that is not related to the interest that justified the initial intrusion). The *Hicks* Court noted that "taking action, unrelated to the objectives of the authorized intrusion . . . produce[s] a new invasion of respondent's privacy unjustified by the exigent circumstances that validated" the initial search. 480 U.S. at 325. *See also* Minnesota v. Dickerson, 508 U.S. 366, 379 (1993) (holding that a search violated the Fourth Amendment where the officer could not immediately ascertain the nature of an object found during a *Terry* frisk, and only upon a further search did he realize it was contraband). *See generally* Brief for the American Civil Liberties Union as Amicus Curiae in Support of Petitioner at 19, *Hiibel*, 542 U.S. 117 (No. 03-5554) (maintaining that compelling a suspect to identify himself in most cases will not be reasonably justified by the interests that supported the initial intrusion).

129. *See* Florida v. Royer, 460 U.S. 491, 500 (1983) (interpreting *Terry* to mean that an "investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop.").

130. United States v. Sharpe, 470 U.S. 675, 676 (1985); *see also id.* at 691 (Marshall, J., concurring) (noting that regardless of how efficient it is for law enforcement officials to prolong questioning to investigate a crime, "a seizure that in duration, scope, or means goes beyond the bounds of *Terry* cannot be reconciled with the Fourth Amendment in the absence of probable cause").

131. *See* Brief for the American Civil Liberties Union as Amicus Curiae in Support of Petitioner at 18, *Hiibel*, 542 U.S. 117 (No. 03-5554) (concluding that the requirement that an individual identify himself during an investigative stop goes beyond the limited intrusion allowed in *Terry* and its progeny).

132. *See* Martinelli v. City of Beaumont, 820 F.2d 1491, 1494 (9th Cir. 1987) (quoting *Lawson v. Kolender*, 658 F.2d 1362, 1366-67, to show that Nevada's "stop and identify" statute in effect allows officers to "bootstrap the authority to arrest on less than probable cause").

III. THE SILENT IMPACT OF TERRORISM ON THE SUPREME COURT'S DECISION TO COMPEL IDENTIFICATION: A COMPARISON TO THE DRUG WAR

The question remains as to why the Court would overturn years of precedent rejecting compelled identification, and in effect redefine long-standing *Terry* principles,[133] merely to make a suspect identify himself on the rare chance that it might lead to an arrest. The Court purportedly based its decision on the balancing analysis typically applied in criminal procedure cases, ultimately finding that the government interest in preventing crime is more important than privacy interests in a name.[134] However, the Court had the opportunity to apply this reasoning to past cases involving "stop and identify" statutes and refused to do so.[135] The reason for the Court's controversial decision in *Hiibel* is more likely rooted in what it did not say.

A. A Brief History: The War on Drugs

Although the judicial branch of government generally serves as a check on the executive branch, courts often make decisions with current events in mind.[136] The most significant example of politics influencing the Court's decisions occurred in the 1980s and 1990s, when drug trafficking flourished and the use and abuse of illegal narcotics became one of America's gravest problems.[137] Many of the defendants facing drug

133. *See supra* Part II (delineating *Hiibel*'s inconsistency with Supreme Court precedent).

134. *Hiibel*, 542 U.S. at __, 124 S. Ct. 2451, 2459. The Court makes the outcome of the balancing test in this case appear obvious: it reasons that a name serves important government interests, and further that a name is so "insignificant" as to rarely be incriminating. *Id.* at 2461.

135. *See supra* note 61 and accompanying text (discussing several cases in which the Court invalidated state "stop and identify" statutes because they were too vague).

136. *See generally* Stuntz, *supra* note 17, at 2138 (arguing that Fourth and Fifth Amendment rights have varied with crime rates before, and they are likely to do so in the future). The essay points out that *Terry* itself arose from the higher crime rates in the 1960s, and the expansion of the "reasonable suspicion" standard evolved with the war on drugs of the 1980s. *Id.* at 2152, 2140. The essay further suggests that September 11, although it happened all on one day, represents an increased crime wave because of the sheer number of people who died. *Id.* at 2138. Thus, courts likely will respond by giving police increased power. *Id. See also* Barbara Babcock, *Hiibel Revisited: Apocalyptic Constitutional Moment Ahead*, SLATE (Mar. 10, 2004), *at* http://slate.msn.com/id/2096927/ (last visited June 28, 2005) (on file with the American University Law Review) (pointing out that the *Terry* decision came down the year that Robert Kennedy and Martin Luther King, Jr. were assassinated and Richard Nixon was elected president on a law and order platform).

137. *See* Thirty Years of America's Drug War: A Chronology, *at* http://www.pbs.org/wgbh/pages/frontline/shows/drugs/cron/ (last visited July 16, 2005) (detailing the government's efforts to combat the nation's drug problem); *see also* Steven Belenko, *The Challenges of Integrating Drug Treatment Into the Criminal Justice Process*, 63 ALB. L. REV. 833, 834 (2000) (collecting data showing that between 1980 and 1998, the number of arrests nationwide increased forty percent, with arrests for drug possession,

charges were repeat offenders, and the courtrooms began to overflow with cases stemming from the drug trade.[138]

Aware of the increasing threat to the nation, the Nixon administration coined the term "war on drugs" in describing their domestic policies on drugs and drug use.[139] President Ronald Reagan formally initiated the metaphoric war during a radio address in 1982, in which he commented: "[w]e're making no excuses for drugs—hard, soft, or otherwise. Drugs are bad, and we're going after them."[140] President George H. W. Bush also made the war on drugs a focal point of his presidency by urging a policy of "zero tolerance."[141] As such, he signed into law the Anti-Drug Abuse Act of 1988, which created the Office of National Drug Control Policy and provided for harsher criminal justice policies and workplace drug testing.[142]

In general, state and federal law enforcement offices received massive budget hikes during the 1980s and formed a slew of special drug units that increased the number of drug-related arrests.[143] However, local law

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possession for sale of controlled substances, and sales of drugs increasing 168% during this time).

138. *See* Anthony C. Thompson, *Courting Disorder: Some Thoughts on Community Courts*, 10 WASH. U. J.L. & POL'Y 63, 68 (2002) (discussing the history and rationale for drug courts, which emerged as the judicial system's answer to its inability to handle all the drug cases flooding the country's courtrooms).

139. *See* David Holmstrom, *War on Drugs, Two Decades Later: Critics Say It's Failed*, CHRISTIAN SCI. MONITOR, Aug. 27, 1992, at 1 (noting that President Nixon was the first U.S. President to declare a "war on drugs"); *see also* Thirty Years of America's Drug War: A Chronology, *supra* note 137 (noting that in 1971, when Nixon coined the term "war on drugs," Congress also passed the Comprehensive Drug Abuse Prevention and Control Act, which consolidated previous anti-drug laws, provided federal funding for drug-abuse prevention and treatment efforts, and established tough penalties for drug trafficking).

140. President Ronald Reagan, Radio Address to the Nation (Oct. 2, 1982), *in* 18 WKLY. COMP. PRES. DOC., Oct. 11, 1982, at 1250.

141. *See Excerpts from News Session by Bush, Watkins and Bennett*, N. Y. TIMES, Jan. 13, 1989, at D16 (quoting Bush's announcement of a national strategy to target drug trafficking and drug abuse); *see also* Roseanne Scotti, Comment, *The "Almost Overwhelming Temptation": The Hegemony of Drug War Discourse in Recent Federal Court Decisions Involving Fourth Amendment Rights*, 10 TEMP. POL. & CIV. RTS. L. REV. 139, 142-43 (2000) (summarizing America's drug policy over the past two decades).

142. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988); *see also* OFFICE OF NATIONAL DRUG CONTROL POLICY, *at* http://www.whitehousedrugpolicy.gov/about/index.html (last updated Apr. 11, 2003) (on file with the American University Law Review) (characterizing the office's mission as one of establishing policies, priorities, and objectives for the United States' drug control program).

143. Thompson, *supra* note 138, at 68; *see also* Sandra Guerra Thompson, *Did the War on Drugs Die with the Birth of the War on Terrorism? A Closer Look at Civil Forfeiture and Racial Profiling After 9/11*, 14 FED. SENT'G REP. 147, 148 (2002) (compiling data suggesting that since 1988, the total funds received by state and local law enforcement for targeting drugs is at least $3 billion, and probably even several billion dollars higher). The article suggests that a new federal distribution system enacted in 1988—asset forfeiture—gave state and local governments profit incentives to assist federal agents in conducting drug interdiction activities. *Id.* at 147. Thus, federally-funded local drug task forces became prevalent. *Id.* Also, federal funds supported the activities of local police in "High Intensity Drug Trafficking Areas," and the federal government sponsored "Weed and Seed"

enforcement needed more authority to use these resources effectively.[144] As a result, in a series of cases spanning the last two decades, the Supreme Court consistently loosened Fourth Amendment protections in the name of the war on drugs.[145]

B. The Court's Use of Drug War Discourse

In the initial drug war cases, the Court rooted its decisions in criminal procedure, analyzing holdings from past cases and applying established principles to the facts at hand.[146] The Court evolved its analysis in later decisions, however, to employ strong drug war rhetoric, in turn failing to apply an objective balancing analysis and instead deferring to government needs.

An examination of some Supreme Court decisions from the 1980s and 1990s demonstrates this theory. In one line of cases, the Court gradually allowed law enforcement officials to use a "drug courier profile" to satisfy the "reasonable suspicion" standard necessary to make a *Terry* stop.[147] In *United States v. Mendenhall*, the Court embarked on this expansion of the "reasonable suspicion" standard without the use of drug war rhetoric.[148]

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programs to eradicate drug crime in local neighborhoods and revitalize them. *Id.* at 148.

144. *See generally* Stuntz, *supra* note 17, at 2144 (suggesting that when the crime rate rises, police seek a judicial loosening of the rules that restrict them, and thus Fourth and Fifth Amendment protections fluctuate with the incidence of crime).

145. *See* Staci O. Schorgl, Note, *Sacrificing the Fourth Amendment in the Name of Drugs:* State v. Damask, 66 UMKC L. REV. 707, 708 (1998) (noting that courts have repeatedly sacrificed Fourth Amendment principles in exchange for ending the drug war through decisions that endorse random drug testing of student athletes, searches of curbside trash, and searches of passengers on interstate buses, even when there is no suspicion of drug activity).

146. *See, e.g.*, United States v. Mendenhall, 446 U.S. 544, 552-55 (1980) (rooting its decision on Fourth Amendment seizure law); Reid v. Georgia, 448 U.S. 438, 441-42 (1980) (basing its decision on the principles articulated in *Terry*).

147. *Compare Mendenhall*, 446 U.S. at 550, 554-56 (upholding a *Terry* stop in which drug enforcement administration officials approached a woman at an airport because she fit the profile of a drug courier), *with* Terry v. Ohio, 392 U.S. 1, 10-11 (1968) (specifying that the purpose of a *Terry* stop is limited to ascertaining whether a suspect is armed and dangerous). *See also* United States v. Sokolow, 490 U.S. 1, 10 (1989) (stating that just because an officer's articulation of reasonable suspicion relies on a profile, it does not detract from the evidentiary significance of the suspicion). *Sokolow* is significant because it expanded the "reasonable suspicion" standard to include a totality of the circumstances approach. 490 U.S. at 7-8. Accordingly, individual actions such as those comprising a profile may be innocent, but when taken together they can create a valid reasonable suspicion to justify a *Terry* stop, regardless of whether they suggest that an individual may be armed. *Id.* at 10. *See generally* Florida v. Royer, 460 U.S. 491, 494 (1983) (describing the drug courier profile as a set of characteristics found to be typical of people carrying illegal drugs). Among the relevant characteristics are youth, appearing pale and nervous and looking around at other people, paying for a plane ticket in cash with a large number of bills, and writing only a name and destination on the luggage identification card. *Id.*

148. *See Mendenhall*, 446 U.S. at 558 (determining that the suspect, who was approached at the airport because she fit the profile of a drug courier, consented to the search). By finding consent, the Court was able to uphold the search without performing the requisite balancing analysis and without using the war on drugs as a basis for its reasoning.

However, the tide turned in *United States v. Sokolow*, in which the Supreme Court openly cited the drug war as its reason for granting certiorari and ultimately decided to uphold officers' use of a drug courier profile in making *Terry* stops.[149] In *Sokolow*, the careful balancing analysis of earlier Fourth Amendment cases was subsumed by the majority's concern that a failure to uphold the stop in this case would have "serious implications for the enforcement of the federal narcotics laws."[150] Furthermore, the Court concluded that the need to balance competing public and private interests must give way when the police need to make quick on-the-spot stops.[151]

Sokolow avoided substantive discussion of the balancing factors over which the Court agonized in the *Terry* decision.[152] Additionally, it showed a marked change in direction by the Supreme Court, almost turning the *Terry* analysis into the application of a bright line rule.[153] In lieu of weighing and balancing competing factors, the Court indicated that because of the war on drugs, if an individual's behavior is suggestive of criminal activity, then courts likely will uphold police action to stop and investigate.[154]

In a second line of prominent decisions, the Court openly justified workplace and school drug testing using drug war language. In *National Treasury Employees Union v. Von Raab*, the Court, adopting the Drug Screening Task Force's argument, reasoned that "no segment of society is immune from the threat of illegal drug use," and that there was "no room in the Customs Service for those who [broke] the laws prohibiting the

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Id. As a result, *Mendenhall* indicates the Court's early willingness to defer to law enforcement needs in fighting the drug war, although it was not ready to justify its decisions with specific drug war language at that time. 446 U.S. at 558.

149. *See Sokolow*, 490 U.S. at 7 (stating that the reason the Court granted certiorari was because of the case's "serious implications" for the enforcement of recently-enacted drug laws); *see also supra* notes 138-142 and accompanying text (providing a summary of the drug policies enacted in the late 1980s). In 1988, immediately before *Sokolow* was decided, President George H. W. Bush signed into law the Anti-Drug Abuse Act of 1988.

150. *See Sokolow*, 490 U.S. at 7 (adopting a "totality of the circumstances" test to determine whether a drug courier profile satisfies the *Terry* "reasonable suspicion" standard—and determining that it does—rather than engaging in the balancing analysis that the *Terry* Court used and recommended be applied on a case-by-case basis).

151. *Id.* at 11; *see also Terry*, 392 U.S. at 20-21 (1968) (acknowledging that the need for immediate police action was an important factor, but taking the time to balance this need against the privacy rights that were being curtailed).

152. *See supra* notes 149-150 and accompanying text (describing the Court's deference to anti-drug laws in the 1980s).

153. *Sokolow*, 490 U.S. at 9. By implicitly declaring that the use of a drug courier profile was sufficient to satisfy the "reasonable suspicion" standard, the Court in effect departed from *Terry* and set out a rule. *See Terry*, 392 U.S. at 30 (asserting that each subsequent case should be decided on its own facts).

154. *See supra* notes 148-152 and accompanying text (discussing the Court's application of the drug courier profile).

possession and use of illegal drugs."[155] In *Vernonia School District v. Acton*, the Court substituted drug war rhetoric for facts and evidence of drug use among students.[156] It described drug use as an "evil" affecting not only the general public, but also reaching children, for whom the government has a special interest in protecting.[157] The Court, in justifying school drug testing, described the disciplinary problems allegedly caused by drug use as having reached epidemic proportions. However, it dismissed the importance of the rights being curtailed.[158]

Perhaps the Court's strongest admission of its intention to help fight the war on drugs came in *California v. Acevedo*.[159] The dissent in *Acevedo* wryly observed that "[n]o impartial observer could criticize this Court for hindering the progress of the war on drugs."[160] The dissent went on to call the majority "loyal foot soldier[s] in the Executive's fight against crime."[161] Such language, from within the Court itself, was a powerful indicator of the Court's apparent deference to law enforcement officials, and its abandonment of the objective balancing analysis.

C. A Brief History: The War on Terrorism

The modern war on terrorism has replaced the war on drugs as the most salient issue facing the nation.[162] Terrorism presents a much more immediate and dangerous threat to the country than did drug trafficking, but it also has proven to be a graver threat to Americans' fundamental civil liberties due to the nature of the government's response.[163] For example, President George W. Bush's declaration of a national emergency after the September 11 attacks on the World Trade Center and the Pentagon allowed the government to detain over 1,000 people, most of them Muslim, in its

155. 489 U.S. 656, 660 (1989) (holding that requiring U.S. Customs Service employees to undergo urinalysis to screen for drugs did not violate the Fourth Amendment, even though there was no evidence of drug abuse among the employees).

156. 515 U.S. 646, 664-65 (1995) (finding that an Oregon school district's policy of testing student athletes for drugs did not violate the students' Fourth Amendment rights).

157. *Id.* at 662.

158. *Id.* at 663.

159. *See* 500 U.S. 565, 570 (1991) (asserting that police can search a container in an automobile without a warrant if they have probable cause to believe that it may contain drugs).

160. *Id.* at 601 (Stevens, J., dissenting).

161. *Id.*

162. *Cf.* Sandra Guerra Thompson, *supra* note 143, at 147-48 (discussing the effects of terrorism on the war on drugs, and noting that with money diverted to fighting terrorism, there will be a decline in the resources devoted specifically to eradicating drug trafficking).

163. *See generally War on Terrorism, Immigration Enforcement Since September 11, 2001: Hearing Before the Subcommittee on Immigration, Border Security, and Claims of the House Committee on the Judiciary*, 108th Cong., 28-36 (2003) (statement of Laura Murphy, Director, ACLU) (highlighting the constitutional violations of the government's detention policies following September 11, and suggesting a better approach to immigration enforcement that respects civil liberties and fundamental values).

investigation of the hijackings.[164] Most of the detainees were held for several months in jail, often in solitary confinement.[165] The government refused to release the names of those detained, saying it was valuable intelligence that the government would not share with enemies in times of war.[166] In the end, the media revealed that many detainees were held on the flimsiest of evidence, and only one was charged with any offense related to the September 11 attacks.[167]

Congress also moved quickly to grant law enforcement agencies sweeping new powers to combat terrorism. The controversial USA Patriot Act allows the FBI to conduct, among other things, secret searches and surveillance of phone and Internet activity.[168] Many have argued that such extreme measures are inadequate to ferret out terrorists and instead present a more serious threat to our constitutional rights.[169]

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164. *See* AMNESTY INTERNATIONAL USA, AMNESTY INTERNATIONAL'S CONCERNS REGARDING POST SEPTEMBER 11 DETENTIONS IN THE USA, *at* http://www.amnestyusa.org/countries/usa/document.do?id=E7EA69A4BB5FA3B980256B7B006439B7 (last visited May 24, 2005) (on file with the American University Law Review) (evaluating the many detentions that occurred after September 11 and concluding that the government deprived many detainees of certain basic rights guaranteed under international law).

165. *See* Jules Lobel, Symposium Article, *Preventive Detention: Prisoners, Suspected Terrorists and Permanent Emergency*, 25 T. JEFFERSON L. REV. 389, 392-95 (2003) (examining the preventive detention mechanisms utilized by the Bush Administration in its response to the terrorist threat).

166. *See* Hanna Rosin, *Groups Find Way to Get Names of INS Detainees; Presentations on Rights Planned in NJ Facilities*, WASH. POST, Jan. 31, 2002, at A16 (explaining that even though the government refused to release information on the detainees, some civil rights groups took advantage of an existing INS policy that allows them to hold legal presentations in INS facilities, which in turn allows them to compile a list of detainees' names for public dissemination).

167. *See* Laura Parker et al., *Secure Often Means Secret*, USA TODAY, May 16, 2002, at A1 (reporting that only one detainee, Zaccarias Moussaoui, who had been detained prior to September 11, 2001, has been charged with an offense related to the September 11 attacks).

168. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, 345 (2004) (giving the government greater power to track and intercept communications, both for law enforcement and foreign intelligence gathering purposes). The law also provides more authority for the government to reduce foreign money laundering, halt illegal immigration, and detain and remove foreign terrorists from American soil. *See generally* CHARLES DOYLE, CONGRESSIONAL RESEARCH SERVICE, THE USA PATRIOT ACT: A SKETCH *passim* (2002) (providing a summary of the Patriot Act and its legislative history), *available at* http://www.fas.org/irp/crs/RS21203.pdf. *But see* Dan Eggen, *Key Part of Patriot Act Ruled Unconstitutional*, WASH. POST, Sept. 30, 2004, at A16 (reporting that a New York federal judge found a key part of the Patriot Act unconstitutional because it allows the FBI to obtain information from Internet providers without judicial oversight or public review). Judge Victor Marrero found that the provision violates free speech rights by imposing permanent secrecy on the targeted companies. *Id.* According to the news article, the government is reviewing its options but likely will appeal the decision. *Id.*

169. *See generally* AMERICAN CIVIL LIBERTIES UNION, THE USA PATRIOT ACT AND GOVERNMENT ACTIONS THAT THREATEN OUR CIVIL LIBERTIES, *at* http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=11813&c=207 (last visited Oct. 10, 2004) (on file with the American University Law Review) (alleging that the Patriot Act threatens Americans' First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights).

Unlike the war on drugs before it, fighting the war on terrorism is primarily the responsibility of the federal government.[170] To some, this might suggest that Supreme Court decisions will not produce significant legal change as they did in the 1980s, when local police departments played a significant role in fighting the war on drugs.[171] However, even though the FBI is primarily responsible for pursuing specific allegations against potential terrorists, it lacks the manpower to conduct investigations on a local level.[172] In turn, that manpower likely will come from street policing.[173] The Department of Justice has already decided to enlist the help of state and local police in its enforcement of federal immigration laws.[174] Accordingly, Supreme Court decisions affecting ordinary policing can still play an important role in the war on terrorism.[175] *Hiibel* is one of the first cases to reflect this idea.[176]

D. The Lack of Terrorism War Discourse in Hiibel

Although rhetoric about the war is notably absent from the Supreme Court's opinion in *Hiibel*, the terrorism threat against America likely played a key role in the Court's decision.[177] Terrorism was certainly a theme of the 2004 summer session; the Court ruled on three enemy

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170. *See* Stuntz, *supra* note 17, at 2159 (explaining that the allocation of authority to the federal government, through laws such as the USA Patriot Act, distinguishes the September 11 attacks from more ordinary crime waves in which local police bear the brunt of the responsibility). *But see* April McKenzie, *A Nation of Immigrants or a Nation of Suspects? State and Local Enforcement of Federal Immigration Laws Since 9/11*, 55 ALA. L. REV. 1149, 1151 (2004) (pointing out that although the power to regulate immigration generally falls under the purview of the federal government, the government typically will not preempt state and local enforcement activity in this area as long as federal interests are not harmed).

171. *See* Stuntz, *supra* note 17, at 2159 (noting that if federal agents are primarily responsible for dealing with terrorism, courts may not feel pressure to defer to the authority of local police departments).

172. *Id.* at 2160.

173. *Id.*; *see also* McKenzie, *supra* note 170, at 1155 (noting that as security concerns continue to rise, the federal government will turn increasingly to the states for help).

174. *See* McKenzie, *supra* note 170, at 1155-56 (stressing that Attorney General John Ashcroft has asked that local police voluntarily take part in the enforcement of federal immigrations laws, and in particular, that states begin arresting people for violations of criminal provisions of the Immigration and Naturalization Act); *see also* Michael J. Wishnie, *Terrorism and the Constitution, Civil Liberties in a New America: State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1085-87 (2004) (arguing that the Department of Justice's determination that state and local police should help enforce immigration laws is "among the most dangerous" initiatives to result from the September 11 attacks).

175. *See* Saltzburg, *supra* note 11, at 133 (suggesting that the judiciary may be called upon many times during the war on terrorism to address how far the government may go in fighting the war before it infringes upon constitutionally protected privacy rights).

176. Hiibel v. Sixth Judicial Dist. Court of Nev., 542 U.S. 117, 124 S. Ct. 2451 (2004).

177. *See infra* Part III.D (examining the litigation leading up to the *Hiibel* decision, which highlighted the need for police to obtain identification from suspected terrorists as a key reason to uphold Nevada's "stop and identify" statute).

combatant cases just seven days after it decided *Hiibel*.[178] However, while the Court in these cases openly discussed current events and maintained that "a state of war is not a blank check for the President,"[179] the *Hiibel* decision was completely silent on the war, despite the parties addressing it in their various briefs[180] and the lower courts responding in their opinions.[181]

Although it is not the first *Terry* case to be decided since September 11, *Hiibel* is the first to represent a change in the Court's interpretation of the law.[182] The first case since September 11 to invoke the *Terry* doctrine, *United States v. Arvizu*,[183] did not spark any new legal developments,[184] but nonetheless has led many commentators to criticize the Court for eroding the "reasonable suspicion" standard beyond recognition.[185] In *Arvizu*, a unanimous Court upheld a *Terry* stop based on a series of factors that, although separately were susceptible to innocent explanation, in combination were sufficient to justify the officer's reasonable suspicion of criminal activity.[186]

Although terrorism is not mentioned anywhere in the *Arvizu* opinion, the connection is evidenced by some of the justices' statements during oral arguments. Justice O'Connor noted "[w]e live in a perhaps more dangerous age today than we did when this event took place."[187] She

178. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 124 S. Ct. 2633, 2648 (2004) (holding that in seeking to challenge his classification as an enemy combatant, Mr. Hamdi should not be deprived of his constitutional right to due process, which includes receiving notice of the basis for his classification and a having a fair chance to deny the government's assertions before a neutral decision-maker); Rumsfeld v. Padilla, 542 U.S. 426, __, 124 S. Ct. 2711, 2722-25 (2004) (evading the question of whether the President can detain Mr. Padilla militarily by holding that the lower court lacked jurisdiction over his habeas petition); Rasul v. Bush, 542 U.S. 466, __, 124 S. Ct. 2686, 2698 (2004) (ruling that the Guantanamo Bay detainees have access to U.S. courts to challenge their detentions).

179. *Hamdi*, 542 U.S. at __, 124 S. Ct. at 2650.

180. Brief for the Petitioner at 9, 42, *Hiibel*, 542 U.S. 117 (03-5554).

181. Hiibel v. Sixth Judicial Dist. Court of Nev., 59 P.3d 1201, 1206 (Nev. 2002).

182. *Supra* text accompanying notes 129-132, 176.

183. 534 U.S. 266 (2002).

184. *See* Michael R. Stahlman, Article, *New Developments in Search and Seizure: More than Just a Matter of Semantics*, 2002 ARMY LAW. 31, 40 (2002) (noting that the significance of *Arvizu* lies in its facts, because although the case did not change the law, it nonetheless provided officers with a representative fact pattern and the Court's analysis of why those particular facts were sufficient to justify a valid reasonable suspicion).

185. *See* Wells, *supra* note 20, at 913 (cautioning that if a police officer can take a "wholly innocent" factor and turn it into reasonable suspicion, then the reasonable suspicion test does not work to uphold Fourth Amendment guarantees).

186. *Arvizu*, 534 U.S. at 277.

187. Oral Argument Transcript at 32, *Arvizu*, 534 U.S. 266 (No. 00-1519). The stop at issue in *Arvizu* took place in 1998, before the September 11 attacks. 534 U.S. at 268. During oral arguments, Justice O'Connor highlighted the importance of having a loose "reasonable suspicion" standard to fight the war on terrorism through her query: "[A]re we going to back off from totality of the circumstances in an era when it may become very important to us to have that as the overall test?" Oral Argument Transcript at 32, *Arvizu*, 534 U.S. 266 (No. 00-1519).

expressed concern that the Ninth Circuit, in ruling against the government, was applying an excessively rigid form of the "totality of the circumstances" test, and that this rigidity was more than "common sense would dictate today."[188]

The language of the opinion is also noteworthy, primarily because it emphasizes the Court's deference to police judgment.[189] The opinion points out that the totality of the circumstances test allows officers to draw from their own experiences and training to "make inferences from and deductions about the cumulative information available to them."[190] Instead of objectively balancing the interests of the government against individual liberties, as put forth in *Terry*, the Court in *Arvizu* appears to be bowing to the expertise of the police.[191]

Arvizu was a unanimous decision that did not signify a change in the law. In contrast, *Hiibel*, the next *Terry* case to reach the Court, was a splintered 5-4 decision that signaled not only a departure from precedent, but also a repudiation of some of the fundamental principles articulated in *Terry*.[192] While the subject of terrorism was notably absent from the *Hiibel* decision, it pervaded many of the legal documents filed throughout the litigation. For example, terrorism was one of the key bases Nevada relied upon in defending its "stop and identify" statute, and terrorism played a significant role in the Supreme Court of Nevada's decision to uphold the statute as constitutional.[193] In arguments before the Nevada Supreme Court, the State maintained that its interest in finding wanted felons and terrorists justified the demand for compelled identification.[194] The majority agreed, writing:

> [W]e are at war against enemies who operate with concealed identities and the dangers we face as a nation are unparalleled . . . To deny officers the ability to request identification from suspicious persons creates a

188. Oral Argument Transcript at 32, *Arvizu*, 534 U.S. 266 (No. 00-1519).
189. *Arvizu*, 534 U.S. at 277.
190. *Id.* at 273.
191. *See* Wells, *supra* note 20, at 911-13 (arguing that with *Arvizu*, the Court is advocating a deference to police officers in three specific areas: (1) the Court is moving toward a test in which the police officer is viewed as an expert; (2) the Court is allowing "wholly innocent factors" to form part of the "totality of the circumstances" test; and (3) with innocent factors able to satisfy the "reasonable suspicion" standard, officers can stop suspects on little more than a hunch); *see also* Martin A. Schwartz, *Police Investigatory Stops*, 227 N.Y.L.J. 32 (Feb. 19, 2002) (maintaining that *Arvizu* sends a message to the lower courts "that they should not lightly second guess the evaluation by an experienced law officer").
192. Hiibel v. Sixth Judicial Dist. Court of Nev., 542 U.S. 117, 124 S. Ct. 2451, 2461 (2004); *see supra* Parts II.C-D (analyzing the *Hiibel* decision and finding that it ignores a lengthy history of case law taking a position against compelled identification, and for the first time redefines the scope of a *Terry* stop).
193. Hiibel v. Sixth Judicial Dist. Court of Nev., 59 P.3d 1201, 1206 (Nev. 2002).
194. Brief in Opposition to Cert. Petition at 9, *Hiibel*, 542 U.S. 117 (No. 03-5554).

> situation where an officer could approach a wanted terrorist or sniper but be unable to identify him or her if the person's behavior does not rise to the level of probable cause necessary for an arrest.[195]

The state opinion quoted a recent interview in which Senator Tom Daschle admitted that terrorism is "changing the way we live and the way we act and the way we think."[196] It quoted President George W. Bush's statement that terrorism has created "a different kind of war that requires a different type of approach and a different type of mentality."[197] The opinion also discussed the deaths resulting from the September 11 attacks and the sniper attacks in Washington, D.C., as well as the deaths suffered from exposure to mail contaminated with Anthrax.[198] Through its inclusion of these statements and images, it is clear that the Nevada Supreme Court based its decision to uphold the state's "stop and identify" statute squarely on the government's interest in fighting terrorism.[199] Therefore, it is significant that the Supreme Court was aware of this language while deciding *Hiibel*, but consciously chose to leave the terrorism rhetoric out of its opinion and create its own rationale for the decision.[200] The purposeful omission suggests that, although the Court agreed with the notion that police should have the authority to ask for identification, it did not want to base this authority on the war on terrorism, as did the Nevada Supreme Court.[201]

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195. *Hiibel*, 59 P.3d at 1206.

196. *Id.* (quoting Interview with Senator Tom Daschle (Oct. 21, 2002), *at* http://www.foxnews.com/story/0,2933,66236,00.html) (on file with the American University Law Review).

197. *Id.* (quoting President George W. Bush, Speech Before the Media (Oct. 11, 2001), *at* http://archives.cnn.com/2001/US/10/11/gen.bush.transcript/index.html (on file with the American University Law Review).

198. *Id.* (citing the tragic deaths of over "3,000 unsuspecting men, women and children at the hands of terrorists," as well as the deaths of 17 sniper victims—which spanned six states—in support of the court's position that fighting terrorism is an important government interest).

199. *Id.*

200. *See generally* Saltzburg, *supra* note 11, at 133 (suggesting that the Court often defers to the perceived needs of law enforcement). The lecture asserts that the Court has a tendency "to pretend that the world we all know is not the world in which law enforcement operates." *Id.* The lecture suggests that by creating this false dichotomy, the Court can subtly defer to law enforcement needs. *Id.* at 134.

201. *Id.* Analogizing *supra* note 198 to *Hiibel*, it appears that the Court has chosen to delude itself into thinking that the war on terrorism plays no role in police activities. Instead, the Court focuses on the insignificance of a name to the majority of people, thus enabling it to defer to police needs without discussing its underlying motivations. Hiibel v. Sixth Judicial Dist. Court of Nev., 542 U.S. 117, 124 S. Ct. 2451, 2460-61 (2004). *See* Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 206-08 (2002) (contending that the majority in *United States v. Drayton*, 536 U.S. 194 (2002), mistakenly tried to argue that bus passengers actually welcome police requests to search their belongings and their persons because its purpose is to enhance their security). In reality, by basing much of the *Drayton* analysis on its perception of public opinion, the Court succeeded in avoiding a rule that would restrict the ability of police officers to investigate terrorism. *Id.* at 221. In the same way, *Hiibel* bases much of its

Perhaps it is too early in the fight against terrorism for the Court to bring in such rhetoric.[202] In *Mendenhall*, the Court began its unraveling of the *Terry* "reasonable suspicion" standard by grounding its decision in Fourth Amendment seizure law, rather than on the drug war, even though the underlying purpose was evident.[203] The Court waited until the drug war became more pervasive and gained popular support before it became a "loyal foot soldier" in that war.[204]

Similarly, the *Hiibel* Court grounds its analysis in Fourth and Fifth Amendment case law, rather than on the war on terrorism.[205] The Court claims to engage in the requisite objective balancing analysis by noting that obtaining a suspect's identity during the course of a *Terry* stop serves important government interests of officer and public safety.[206] Furthermore, addressing the intrusion on individual liberties, the Court determines that "[a]nswering a request to disclose a name is likely to be so insignificant in the scheme of things as to be incriminating only in unusual circumstances."[207]

However, this analysis leaves several questions unanswered. The Court emphasizes the government interest in obtaining a suspect's name, but it fails to explain why this interest is compelling.[208] Furthermore, the Court glazes over the decision's impact on privacy rights.[209] In the *Vernonia*

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analysis on the insignificance of a name, and thus succeeds in giving police more powers to use in the fight against terrorism. 542 U.S. at __, 124 S. Ct. at 2460-61.

202. *See* Stuntz, *supra* note 17, at 2160 (suggesting that in post-September 11 America, the Court likely will defer to law enforcement needs and sacrifice Fourth Amendment privacy rights not to combat terrorism, per se, but to make investigation of ordinary crimes easier and more efficient, which in turn will free up more officers to deal specifically with terrorism).

203. *See supra* note 148 and accompanying text (noting the Court in *Mendenhall* found that the defendant consented to a search, and thus did not have to employ drug war rhetoric to loosen the "reasonable suspicion" standard at this time).

204. California v. Acevedo, 500 U.S. 565, 601 (1991); *see also* James M. Sokolowski, *Government Drug Testing: A Question of Reasonableness*, 43 VAND. L. REV. 1343, 1343-44 (1990) (noting that the prevailing public perception in the late 1980's was that drug use was an evil that needed to be stopped, even if it meant a great expenditure of public resources and a loss of personal liberties).

205. *See Hiibel*, 542 U.S. at __, 124 S. Ct. at 2457-61 (analyzing both the Fourth and Fifth Amendment challenges to Nevada's "stop and identify" statute).

206. *Id.* at __, 124 S. Ct. at 2485.

207. *Id.* at __, 124 S. Ct. at 2461.

208. *See supra* note 125 and accompanying text (pointing out that the majority does not provide any evidence to show that knowing a person's identity or criminal record will better protect the officer's safety).

209. *See Hiibel*, 542 U.S. at __, 124 S. Ct. at 2460, 2461 (deeming a name a "commonsense inquiry" and "insignificant"). The Court failed entirely to support these statements. *Id. See generally* Shaun B. Spencer, *Vantage Point: Nevada Case Threatens to Expand* Terry *Stops*, 48 B.B.J. 27, 28 (2004) (citing cases that recognize privacy and anonymity interests in a name, such as McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341-42 (1995) and NAACP v. Alabama, 357 U.S. 449, 461 (1958)). The article contends that to accept the Court's argument that a name is an insignificant fact would in effect allow police to stop anyone and demand identification. *Id.*

dissent, Justice O'Connor warns that "the greatest threats to our constitutional freedoms come in times of crisis."[210] She adds that the only way for the Court to evaluate the conflict between a government interest and its intrusion on privacy rights is to "stay close to the record in each case that appears before them, and make their judgments based on that alone."[211]

It is evident that on its face, the *Hiibel* majority attempted to heed O'Connor's words, however, underlying agendas likely played a role. *Hiibel* is similar to many of the drug war cases, where the prevention of drug use was sufficiently important to justify government interests and curtail privacy rights.[212] In *Hiibel*, the hidden assumption seemed to be that the potential for a suspect to be a terrorist is sufficient to justify compelled identification, and that this interest outweighs an individual's right to privacy. This assumption, which is inconsistent with the objective balancing approach[213] prescribed in *Terry*, preordains the outcome of future Fourth Amendment cases involving terrorism.

Justice Stevens hinted at this notion in his dissent.[214] He maintained that in *Hiibel*, the defendant's refusal to cooperate did not impede the police investigation into whether an assault took place, which raised the question of why the government interest was so important.[215] Instead, he observed that the Nevada "stop and identify" statute fully intended to provide police officers with an additional "useful law enforcement tool."[216] It is significant that the utility of this tool, until the war on terrorism became a focal point of government policy, was not apparent to the Court.[217]

IV. RECOMMENDATION

If the Court aims to give police more authority in light of the war on terrorism, it should narrowly tailor the scope of this new power so that it

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210. Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 686 (1995) (O'Connor, J., dissenting).
211. *Id.*
212. *Supra* Part III.B.
213. *Hiibel*, 542 U.S. at __, 124 S. Ct. at 2461-64 (Stevens, J., dissenting).
214. *Id.*
215. *See id.* at __, 124 S. Ct. at 2464 (contending that "if we accept the predicate for the Court's holding, [Nevada's stop and identify] statute requires nothing more than a useless invasion of privacy").
216. *Id.*
217. *See supra* note 61 and accompanying text (listing past cases in which the Court had a chance to uphold various states' "stop and identify" statutes, but instead found them to be unconstitutional). In those cases the Court deemed the statutes too vague because they requested "identification" in general, which the Court said was unclear to both police and potential suspects. *Supra* note 61. However, the Nevada statute is no different; while it outwardly allows police to request just a name, it is apparent that with computer databases, a name can lead to the same information that an officer would get if they asked for identification. *See supra* Part II.B (discussing the various computer databases available to officers and information they can obtain from inputting a suspect's name).

serves government interests without curtailing civil liberties. *Hiibel*'s creation of a bright line rule contradicts Fourth Amendment jurisprudence, which has "consistently eschewed" such rules and instead advocated for a case-by-case approach.[218] The Court has repeatedly emphasized that the reasonableness of a search or seizure depends on the totality of the circumstances and is intensely fact-specific.[219] Despite this position, critics suggest that the Court has been too quick to adopt bright line rules in the Fourth Amendment context in an effort to offer more guidance to law enforcement officials.[220]

It is clear that apprehending terrorists serves an important government interest, especially in post-September 11 America.[221] Thus, if police have a valid reasonable suspicion that someone is a wanted felon or terrorist, then having the authority to run their name through a computer database may be valuable.[222] However, to apply this tactic to ordinary police encounters, where learning a suspect's name has nothing to do with investigating the crime at hand, unnecessarily infringes on privacy rights, upends precedent, and ensures that the Fourth Amendment will continue to lose its identity.

CONCLUSION

In validating Nevada's "stop and identify" statute, a sharply divided Supreme Court decided that relinquishing one's name on police demand is a minor indignity, if officers have reasonable suspicion to stop that person in the first place.[223] And in the vast majority of situations, this is probably true. However, when the Court curtails Fourth Amendment protections,

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218. Ohio v. Robinette, 519 U.S. 33, 39 (1996). Chief Justice Rehnquist suggests that avoiding the creation of bright line rules is well-established in Fourth Amendment case law. *See id.* (citing Florida v. Bostick, 501 U.S. 429 (1991); Michigan v. Chesternut, 486 U.S. 567 (1988); Florida v. Royer, 460 U.S. 491 (1983); Schneckloth v. Bustamonte, 412 U.S. 218 (1973)).

219. *Id.* at 39.

220. *See, e.g.*, Salzburg, *supra* note 11, at 134 (articulating two problems with bright line rules: first, that because they are "divorced from the rationale for action," they do not provide as clear guidance as the rationale itself; and second, "that the Fourth Amendment's place in the Bill of Rights strongly suggests that, if bright line rules are to be adopted, they should protect the constitutional rights of citizens rather than promote police efficiency"); Kathryn R. Urbonya, *Rhetorically Reasonable Police Practices: Viewing the Supreme Court's Multiple Discourse Paths*, 40 AM. CRIM. L. REV. 1387, 1390 (2003) (noting that the court has created conflicting precedent regarding bright line rules, sometimes stating that reasonableness requires a case-by-case analysis, and other times concluding that a bright line rule is necessary to aid law enforcement).

221. *See supra* Part III.C (discussing government actions taken since 9/11 in an attempt to prevent another terrorist attack).

222. *See supra* text accompanying notes 65-75 (discussing various computer databases that state and local police can access, and the information that each provides with the input of a suspect's name).

223. Hiibel v. Sixth Judicial Dist. Court of Nev., 542 U.S. 117, 124 S. Ct. 2451, 2451 (2004).

even a little, it walks the proverbial slippery slope[224] toward whittling away individual privacy rights, as Justice Breyer alluded to in his *Hiibel* dissent.[225] Although the Court left open the possibility of future as-applied challenges to compelled identification under the Fifth Amendment, such challenges are unlikely to succeed.[226]

Moreover, history has suggested that when the Court diminishes privacy rights, it is often poor and minority populations who suffer the most.[227] For those who treasure the integrity of the justice system, trends that infringe on privacy rights, even if only for a small number of people, must be viewed with trepidation.

224. *See* Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 361-62 (1985) (defining "slippery slope" as an argumentative claim that "a particular act, seemingly innocuous when taken in isolation, may yet lead to a future host of similar but increasingly pernicious events").

225. *Hiibel*, 542 U.S. at __, 124 S. Ct. at 2464-66 (Breyer, J., dissenting).

226. *See id.* at __, 124 S. Ct. at 2461; *see also Leading Cases: Fourth and Fifth Amendments—Stop and Identify Statutes*, 118 HARV. L. REV. 286, 292-96 (2004) (noting "it is hard to imagine any plausible circumstance where" an as-applied challenge to state "stop and identify" statutes would succeed, and describing several scenarios that demonstrate why this is so).

227. Saltzburg, *supra* note 11, at 158; *see* Babcock, *supra* note 136 (suggesting that with the holdings of *Hiibel* and *Illinois v. Wardlow*, 528 U.S. 119 (2000), if police see a dark-skinned man looking around furtively, who turns and walks away, they can stop him and, without necessarily suspecting him of anything in particular, demand his identity and arrest him if he refuses to provide it); Stuntz, *supra* note 17, at 2161 (opining that anti-terrorism law enforcement efforts will inevitably target young men of Middle Eastern origin in light of September 11).