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**DUDLEY DO WRONG: AN ANALYSIS OF A “STOP AND IDENTIFY” STATUTE IN *HIIBEL V. SIXTH JUDICIAL DISTRICT COURT OF NEVADA*<sup>1</sup>**

I. INTRODUCTION

Dudley Hiibel was standing outside of his vehicle when Humboldt County Sheriff’s Deputy Lee Dove stopped behind him and demanded identification.<sup>2</sup> Hiibel refused to identify himself, as required by a Nevada “stop and identify” statute, resulting in a conviction that every reviewing court affirmed.<sup>3</sup>

A “stop and identify” statute requires an individual detained at a traffic or *Terry* stop<sup>4</sup> to identify himself, and provides penalties for a failure to do so.<sup>5</sup> Various appellate courts have overturned convictions under such statutes based on constitutional challenges.<sup>6</sup> Until now, the United States Supreme Court has not had a case involving both a question of reasonable suspicion for the stop and a violation of a “stop and identify” statute which has survived a vagueness challenge.<sup>7</sup> The Supreme Court’s decision in *Hiibel v. Sixth Judicial District of Nevada*

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1. *Hiibel v. Sixth Jud. Ct. of Nev.*, 542 U.S. 177 (2004).

2. *See infra* notes 111-20 and accompanying text (discussing the facts surrounding the Hiibel stop).

3. *See infra* notes 121-46 and accompanying text (reviewing the procedural history of the *Hiibel* case).

4. *See infra* notes 67-73 and accompanying text (describing the *Terry* stop).

5. *See, e.g.*, COLO. REV. STAT. § 16-3-103 (2005) (providing that a law enforcement officer may ask for identification, but any detention is not an arrest); DEL. CODE ANN. tit. 11, § 1902 (2005) (stating that a person who fails to provide identification to the satisfaction of the officer may be detained for a maximum of two hours and then arrested if a crime was committed); NEB. REV. STAT. § 29-829 (2004) (authorizing a peace officer to demand identification); NEV. REV. STAT. 171.123 (2003) (allowing a detention for a maximum of sixty minutes); N.H. REV. STAT. ANN. § 594:2 (2004) (stipulating only that the police officer may perform a stop and request identification); R.I. GEN. LAWS § 12-7-1 (2005) (providing for a detention of two hours, which is not classified as an arrest); UTAH CODE ANN. § 77-7-15 (2005) (authorizing a police officer only to stop and question a suspect).

6. *See infra* notes 57-66 and accompanying text (tracing various courts’ decisions on “stop and identify” statutes).

7. *See Hiibel*, 542 U.S. at 184. The Court explained that the *Hiibel* case was a continuation of the analysis of “stop and identify” statutes begun by its previous decisions. *Id.* *See infra* notes 98-104 and accompanying text (discussing the Court’s decision in *Kolender v. Lawson*).

threatens to erode the protections of the Fourth Amendment by allowing arrests on reasonable suspicion alone, thereby subverting the probable cause requirement.<sup>8</sup> Additionally, by requiring that a suspect give his name, perhaps leading to incriminating evidence, the Court has reduced the privileges guaranteed by the Fifth Amendment.<sup>9</sup> In all, the *Hiibel* decision reduces the depth of constitutional rights that citizens previously enjoyed.<sup>10</sup>

Part II of this note traces the development of “stop and identify” statutes, including its origins in historical vagrancy and loitering statutes, courts’ treatment of such laws, and the progression of the specific Nevada statute at issue.<sup>11</sup> Part III examines the appellate and Supreme Court decisions in the *Hiibel* case.<sup>12</sup> Part IV analyzes the Court’s decision in *Hiibel* under the void for vagueness doctrine and the Fourth and Fifth Amendments, and highlights the recent enactment of a “stop and identify” statute in Arizona.<sup>13</sup> Finally, Part V concludes that the Nevada “stop and identify” statute allows too great of an intrusion for too minimal of a benefit.<sup>14</sup>

## II. BACKGROUND

In *Hiibel*,<sup>15</sup> the Supreme Court considered whether a conviction for violating of a Nevada “stop and identify” statute during a traffic stop was constitutional under the Fourth and Fifth Amendments.<sup>16</sup> A discussion of the development of the “stop and identify” statutes<sup>17</sup> and

8. See *infra* notes 172-94 and accompanying text (analyzing the Fourth Amendment implications of the *Hiibel* decision).

9. See *infra* notes 195-210 and accompanying text (examining the Court’s rationale from *Hiibel* in the context of the Fifth Amendment).

10. See *infra* notes 211-23 and accompanying text (discussing the impact of the Court’s decision on individual rights).

11. See *infra* notes 15-111 and accompanying text.

12. See *infra* notes 111-46 and accompanying text.

13. See *infra* notes 147-233 and accompanying text.

14. See *infra* notes 234-38 and accompanying text.

15. *Hiibel v. Sixth Jud. Ct. of Nev.*, 542 U.S. 177 (2004).

16. See *Hiibel*, 542 U.S. at 182; U.S. CONST. amend. IV (prohibiting unreasonable searches and seizures); U.S. CONST. amend. V (requiring due process of law).

17. See *infra* notes 21-66 and accompanying text (tracing the development of various versions of “stop and identify” statutes). See also George E. Dix, *Nonarrest Investigatory Detentions in Search and Seizure Law*, 1985 DUKE L.J. 849, 912-19 (1985) (discussing statutes based upon the Uniform Arrest Act and the further need for enabling legislation); James J. Fyfe, *Enforcement Workshop: Arrests on Reasonable Suspicion*, 19 CRIM. L. BULL. 470, 472 (1983) (examining the problems with allowing arrests on less than probable cause); Alan D. Hallock, Note, *Stop-and-Identify Statutes After Kolender v. Lawson: Exploring the Fourth and Fifth Amendment Issues*, 69 IOWA L. REV. 1057, 58 (1984) (analyzing “stop and identify” statutes and proposing a constitutional

the United States Supreme Court's treatment of the issues involved,<sup>18</sup> including any applicability of the Fourth and Fifth Amendments,<sup>19</sup> is necessary to understand the Court's rationale and ruling.<sup>20</sup>

### A. Development of "Stop and Identify" Statutes

#### 1. Precursors to Modern "Stop and Identify" Statutes

The modern "stop and identify" statutes originated in the historical laws of vagrancy and loitering.<sup>21</sup> The demise of many broad vagrancy

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alternative); Nicholas C. Harbist, Note, *Stop and Identify Statutes: A New Form of an Inadequate Solution to an Old Problem*, 12 RUTGERS L.J. 585, 585-89 (1981) (identifying the constitutional infirmities with the then current "stop and identify" statutes and proposing a constitutional alternative); Lois M. Keenan, Note, *California Penal Code Section 647(e): A Constitutional Analysis of the Law of Vagrancy*, 32 HASTINGS L.J. 285, 286 (1980) (deconstructing an identification requirement in a California statute); John Mark Sullivan, Note, "Your Papers, Please." - *Is an Identification Requirement Constitutional?*, 37 WASH. & LEE L. REV. 253, 254-65 (1980) (analyzing "stop and identify" statutes in the context of United States Supreme Court decisions).

18. See *infra* notes 67-104 (discussing the United States Supreme Court's treatment of an identification requirement).

19. See *infra* notes 67-79 and accompanying text (analyzing the Court's application of the Fourth and Fifth Amendments to "stop and identify" statutes). See also 21A AM. JUR. 2D *Criminal Law* § 1138 (West 2005) (stating the scope and extent of the Fifth Amendment privilege against self-incrimination); 68 AM. JUR. 2D *Searches and Seizures* § 88 (West 2005) (describing general stop and frisk procedure); 81 AM. JUR. 2D *Witnesses* § 91 (West 2005) (observing that anyone making a self-incrimination claim under the Fifth Amendment must be confronted by incrimination); 4 WAYNE R. LAFAVE, *SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 9.2 (4th Ed. 2004) (outlining the aspects of a lawful traffic stop); Aaron H. Mendelsohn, *Supreme Court Review: The Fourth Amendment and Traffic Stops: Bright-Line Rules in Conjunction with the Totality of the Circumstances Test*, 88 J. CRIM. L. & CRIMINOLOGY 930, 934-40 (1998) (examining the Fourth Amendment in the context of traffic stops); Genevieve McManus, Note, *State v. Matison: Validity of Traffic Stop and Standing Under Fourth Amendment Seizure Analysis*, 21 J. CONTEMP. L. 56, 59-61 (1995) (discussing the constitutionality of a traffic stop); Note, *Custodial Engineering: Cleaning Up The Scope of Miranda Custody During Coercive Terry Stops*, 108 HARV. L. REV. 665, 667-77 (1995) (delineating the scope of *Miranda* warnings in the context of a traffic stop).

20. See *Hiibel*, 542 U.S. at 183-91.

21. *Id.* at 183. See also MODEL PENAL CODE § 250.6, Comment (Official Draft and Revised Comments, 1962). The Court in *Hiibel* stated the "English vagrancy laws . . . required suspected vagrants to face arrest unless they gave 'a good Account of themselves.'" *Hiibel*, 542 U.S. at 183 (quoting 15 Geo. 2, ch. 5, § 2 (1744)). Vagrancy laws had a long history beginning in England, but experienced a shift in objective from controlling serfs in the feudal system to serving law enforcement as a means of crime prevention. T. Leigh Anenson, Comment, *Another Casualty of the War . . . Vagrancy Laws Target the Fourth Amendment*, 26 AKRON L. REV. 493, 494-95 (1993). As the vagrancy laws developed, various methods of abuse did as well. *Id.* at 495. The early English laws of vagrancy developed for economic reasons. Jordan Berns, Comment, *Is There Something Suspicious About the Constitutionality of Loitering Laws?*, 50 OHIO ST. L.J. 717, 717 (1989) (discussing the development of vagrancy laws as an introduction to an analysis of loitering laws

and loitering statutes came through challenges under the Due Process Clause.<sup>22</sup> After the United States Supreme Court's decision in *Terry v. Ohio*,<sup>23</sup> and with the end of vagrancy laws, many legislatures sought an inchoate offense<sup>24</sup> under which to detain a suspicious individual through a legal, custodial arrest.<sup>25</sup>

Some jurisdictions adopted statutes similar to the one proposed in initial draft of the Model Penal Code.<sup>26</sup> However, the drafters of the Model Penal Code expressed reservations over this provision's

under the United States Constitution). The Americanization of these laws included using them as a basis to prevent criminal activity. *Id.* at 718.

22. Harbist, *supra* note 17, at 589. Signaling the end for vagrancy statutes, the United States Supreme Court overruled a Jacksonville vagrancy ordinance in a unanimous decision. *See Papachristou v. City of Jacksonville*, 405 U.S. 156, 171 (1972). The Court held the statute at issue was void for vagueness because it did not provide fair notice and encouraged arbitrary police enforcement. *Id.* at 162. The Court observed that the purpose of these statutes was to empower police officers. *See id.* at 165.

23. *Terry v. Ohio*, 392 U.S. 1 (1968). In this landmark decision, a Cleveland police officer observed Terry and another man standing on a street corner outside of a downtown department store. *Id.* at 5. The officer believed that the two men were preparing to rob the store. *Id.* He approached the two men to investigate after they had conferred with a third man. *Id.* at 6-7. A subsequent "patdown" search of the three men revealed that two of them, including Terry, possessed handguns. *Id.* at 7. The United States Supreme Court heard the case to consider whether the Fourth Amendment prohibited the introduction of the weapons into evidence. *Id.* at 8. The Court affirmed the conviction, essentially making "stop and frisk" procedures part of the common law. *See id.* at 8-10. The Court reasoned that police officers require a framework that allows them to investigate and act on a level of suspicion less than the probable cause standard mandated by the Fourth Amendment. *See id.* at 10.

24. An inchoate offense is "[a] step toward the commission of another crime, the step in itself being serious enough to merit punishment." BLACK'S LAW DICTIONARY 1111 (8th ed. 2004). Examples of inchoate offenses are attempt and conspiracy. *Id.*

25. Harbist, *supra* note 17, at 589. The majority of these jurisdictions turned to either the Model Penal Code or the Uniform Arrest Act. *Hiibel*, 542 U.S. at 183. *See Dix*, *supra* note 17, at 913; Harbist, *supra* note 17, at 589.

26. Harbist, *supra* note 17, at 589 n.27 (citing *Powell v. Stone*, 507 F.2d 93, 95 (9th Cir. 1974) (quoting a Henderson City Ordinance), *rev'd on other grounds*, 428 U.S. 465 (1976)); *People v. Berck*, 32 N.Y.2d 567, 574 (1973) (recognizing that N.Y. PENAL LAW § 240.35(6) (McKinney Supp. 1967), was "very like" the draft of the Model Penal Code), *cert. denied*, 414 U.S. 1093 (1973); *Salt Lake City v. Savage*, 541 P.2d 1035, 1036 (Utah 1975) (quoting a Salt Lake City Ordinance), *cert. denied*, 425 U.S. 915 (1976). *See also People v. Solomon*, 33 Cal. App. 3d 429 (1973) (quoting CAL. PENAL CODE § 647(e)(West 1970)), *cert. denied*, 415 U.S. 951 (1974). This section of the Model Penal Code draft states:

A person who loiters or wanders without apparent reason or business in a place or manner not usual for law-abiding individuals and under circumstances which justify suspicion that he may be engaged or about to engage in crime commits a violation if he refuses the request of a peace officer that he identify himself and give a reasonably credible account of the lawfulness of his conduct and purposes.

MODEL PENAL CODE § 250.12 (Tent. Draft No. 13, 1961). The drafters of the Model Penal Code referred to this section being the last remnant of the laws of "vagrancy." MODEL PENAL CODE § 250.12, Comments (Tent. Draft No. 13, 1961).

constitutionality.<sup>27</sup> To address that issue, the authors drafted a revised version, which contained elements calling for a more objective analysis of an individual's allegedly suspicious conduct.<sup>28</sup> Both drafts of the Model Penal Code retained elements of loitering laws.<sup>29</sup> As with historical vagrancy statutes,<sup>30</sup> courts adjudicated statutes based on these two versions of the Model Penal Code on due process grounds.<sup>31</sup> Some legislatures based modern statutes on the Uniform Arrest Act.<sup>32</sup> These

27. MODEL PENAL CODE § 250.12, Comments (Tent. Draft No. 13, 1961). This section states:

The reasons for doubt on that score are that a statute which makes it a penal offense for a person to fail to identify himself and give an exculpatory account of his presence is in effect an extension of the law of arrest, and trenches on the privilege against self-incrimination.

*Id.* The authors referenced a disorderly conduct case, intending it as a comparison between disorderly conduct statutes and vagrancy statutes. *Id.* (discussing *People v. Craig*, 152 Cal. 42 (1907)). They commented, "If the disorderly conduct statutes are troublesome because they require so little in the way of misbehavior, the vagrancy statutes offer the astounding spectacle of criminality with no misbehavior at all!" *Id.*

28. MODEL PENAL CODE § 250.6 (Official Draft and Revised Comments, 1962). This revised section states:

A person commits a violation if he loiters or prowls in a place, at a time, or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity. Among the circumstances which may be considered in determining whether such alarm is warranted is the fact that the actor takes flight upon appearance of a peace officer, refuses to identify himself, or manifestly endeavors to conceal himself or any object. Unless flight by the actor or other circumstance makes it impracticable, a peace officer shall prior to any arrest for an offense under this section afford the actor an opportunity to dispel any alarm which would otherwise be warranted, by requesting him to identify himself and explain his presence and conduct. No person shall be convicted of an offense under this Section if the peace officer did not comply with the preceding sentence, or if it appears at trial that the explanation given by the actor was true and, if believed by the peace officer at the time, would have dispelled the alarm.

*Id.* This section of the Model Penal Code addressed the situation where activity rose to the level where it required a police officer inquiry. MODEL PENAL CODE § 250.6, Comment (Official Draft and Revised Comments, 1962). If this criterion was met, "[f]ailure to explain oneself satisfactorily would constitute an offense." *Id.* The circumstances involved in this section, which required some "alarm for the safety of persons or property in the vicinity," changed from the tentative draft, which required justifiable suspicion that the actor had committed or was about to commit a crime. *Id.*

29. See *supra* notes 26, 28 and accompanying text (stating the text of the drafts of the Model Penal Code loitering provisions). As with the modern "stop and identify" statutes, the legislatures designed loitering statutes to permit the arrest of an individual who had committed or was about to commit a crime. MODEL PENAL CODE § 250.6, Comment (Official Draft and Revised Comments, 1962).

30. See *supra* note 21 and accompanying text (discussing some of the history of vagrancy laws).

31. See *infra* notes 35-56 and accompanying text (describing courts' treatment of "stop and identify" statutes on due process grounds).

32. *Dix*, *supra* note 17, at 913. The Uniform Arrest Act provides in pertinent part: Questioning and Detaining Suspects.

statutes “authorized further police action if an ‘objectively suspicious’ subject ‘fails to identify himself or explain his actions to the satisfaction of the officer.’”<sup>33</sup> Under these statutes, refusing a police officer’s request for identification merely resulted in further detention.<sup>34</sup>

The New York Court of Appeals examined a statute similar to the initial draft of the Model Penal Code,<sup>35</sup> which also contained an identification requirement and declared it unconstitutional.<sup>36</sup> The court noted that its paramount concern was vagueness,<sup>37</sup> but also recognized additional constitutional difficulties with the statute under the Fourth, Fifth, and Fourteenth Amendments.<sup>38</sup> Contrary to the New York Court

(1) A peace officer may stop any person abroad who he has reasonable ground to suspect is committing, has committed or is about to commit a crime, and may demand of him his name, address, business abroad and whither he is going.

(2) Any person so questioned who fails to identify himself or explain his actions to the satisfaction of the officer may be detained and further questioned and investigated.

UNIFORM ARREST ACT § 2(1)-(2) (1939), *reprinted in* Sam B. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 320-21 (1942). This section encompassed more activity than current law at this time. Warner, *supra*, at 321 (describing how the Uniform Arrest Act enlarged the scope of detentions to include acts taking place at night and during the day). Four states adopted a “stop and identify” provision based on the Uniform Arrest Act. Sullivan, *supra* note 17, at 253 n.1 (citing DEL. CODE ANN. tit. 11, § 1902 (1979); MO. ANN. STAT. § 84.710 (Supp. 1979); N.H. REV. STAT. ANN. § 594.2 (1974); R.I. GEN. LAWS § 12-7.1 (1969)).

33. Dix, *supra* note 17, at 913.

34. Dix, *supra* note 17, at 913 (stating if the result of the refusal was at most a brief period of detention, this constituted a less significant intrusion upon privacy interests than a potential conviction); Sullivan, *supra* note 17, at 253 n.1 (stating the Uniform Arrest Act did not criminalize a failure to comply with an identification requirement, not even to the point of being a misdemeanor). See Warner, *supra* note 32, at 322 (describing the ramifications of refusal to identify oneself under the Uniform Arrest Act).

35. MODEL PENAL CODE § 250.12 (Tent. Draft No. 13, 1961).

36. *People v. Berck*, 32 N.Y.2d 567, 574 (1973), *cert. denied*, 414 U.S. 1093 (1973) (holding that a loitering statute was unconstitutional as it impermissibly extended the discretion of law enforcement officers). The statute in *Berck* provided for a loitering conviction if the defendant:

Loiters, remains or wanders in or about a place without apparent reason and under circumstances which justify suspicion that he may be engaged or about to engage in crime, and, upon inquiry by a peace officer, refuses to identify himself or fails to give a reasonably credible account of his conduct and purposes.

N.Y. PENAL LAW § 240.35(6) (McKinney Supp. 1967). Compare N.Y. PENAL LAW § 240.35(6) (McKinney Supp. 1967) with MODEL PENAL CODE § 250.12 (Tent. Draft No. 13, 1961). The Court of Appeals of New York found the statute to be unconstitutional as it did not afford the potential defendant adequate notice of the prohibited conduct and placed sufficient discretion with police officers as to encourage arbitrary enforcement. *Berck*, 32 N.Y. 2d at 571.

37. *Berck*, 32 N.Y.2d at 574.

38. *Id.* at 573-74. The court noted that “prohibiting such harmless conduct serves no reasonable State interest consistent with the Fourth or Fifth Amendment.” *Id.* at 574. Furthermore, the statute violated the Fourteenth Amendment’s “privileges and immunities” clause through its restrictions on the travel of individuals throughout New York. *Id.* (citing *Edwards v. California*, 314 U.S. 160, 178 (1941); *Twining v. New Jersey*, 211 U.S. 78, 97 (1908)). The ordinance was unconstitutional under the Fifth Amendment, largely because of its identification requirement. *Id.*

of Appeals, the Utah Supreme Court upheld a statute based on the early draft of Model Penal Code in *Salt Lake City v. Savage*.<sup>39</sup> The Utah court viewed the statute as adequately clear for an ordinary citizen, while at the same time discouraging overbearing conduct by police officers.<sup>40</sup> Agreeing with the Utah Supreme Court, the California Court of Appeals rejected a vagueness challenge to a similar statute.<sup>41</sup> Taking into account the then recent United States Supreme Court decisions,<sup>42</sup> the

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Finally, the court concluded, “While an officer may have a right to inquire into suspicious circumstances, a suspect’s silence may not be used as a predicate for a separate offense such as loitering.” *Id.* (quoting *Davis v. Mississippi*, 394 U.S. 721, 727 n.6 (1969) (“While the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer.”)).

39. *Salt Lake City v. Savage*, 541 P.2d 1035, 38 (Utah 1975) (holding that the statute was not ambiguous and therefore valid under the Due Process Clause), *cert. denied*, 425 U.S. 915 (1976). The court noted the language of the statute as follows:

A person is guilty of loitering when he:

- (5) Loiters, remains or wanders in or about a building, lot, street, sidewalk, or any other public or private place without apparent reason and under circumstances which justify suspicion that he may be engaged in or about to engage in a crime, and
  - (a) upon inquiry by a peace officer, refuses to identify himself by name and address; or
  - (b) after having given his name and address by inquiry of a police officer refuses or fails to give a reasonably credible account of his conduct and purpose.

*Id.* at 1036.

40. *Id.* at 1038. Under the majority’s reading of the statute, a potential defendant understood the criminality associated with his conduct. *Id.* Furthermore, the court did not envision a set of circumstances where an innocent individual would arouse the reasonable suspicion of a police officer. *Id.* The statute was empowering, a positive enactment, that allowed law enforcement to act in the face of pending criminal activity. *Id.* However, Justice Tuckett wrote a separate opinion that raised an important point. *Id.* (Tuckett, J., concurring). A portion of his concurrence stated, “[I]f the ordinance were so construed as to mean that the lawfulness of a person’s action depends on the opinion of a policeman, it would be unconstitutional.” *Id.*

41. *People v. Solomon*, 33 Cal. App. 3d 429, 432 (1973), *cert. denied*, 415 U.S. 951 (1974). The statute at issue made a refusal to present identification a criminal offense:

Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:

...

- (e) Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.

CAL. PENAL CODE § 647(e) (West 1970). Here, a California municipal court dismissed the case. *Solomon*, 33 Cal. App. 3d at 431. The appellate court heard the case in order to reconsider its past decision concerning the constitutionality of § 647(e). *See People v. Weger*, 251 Cal. App. 2d 584, 588 (1967) (finding § 647(e) to be constitutional), *cert. denied*, 389 U.S. 1047 (1968).

42. *See Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (finding a vagrancy ordinance unconstitutionally vague); *California v. Byers*, 402 U.S. 424, 425 (1971) (plurality opinion) (upholding a California requirement that individuals involved in automobile accidents divulge certain information); *Marchetti v. United States*, 390 U.S. 39, 42 (1968) (holding a requirement that gamblers register for an occupational tax violated the privilege against self-



California court held the statute was constitutional.<sup>43</sup>

Possibly due to the constitutional infirmities associated with the early draft of the Model Penal Code, a number of jurisdictions adopted ordinances similar to the revised draft.<sup>44</sup> Two city legislatures modeled ordinances directly after this draft, and courts invalidated each of them under the Due Process Clause of the Fourteenth Amendment.<sup>45</sup> In *City of Bellevue v. Miller*,<sup>46</sup> the City charged the defendant with violating a city vagrancy ordinance.<sup>47</sup> The district court convicted Miller, and he appealed to the superior court.<sup>48</sup> The superior court granted the defendant's motion to dismiss on the ground that the statute was unconstitutionally vague.<sup>49</sup> The Supreme Court of Washington affirmed.<sup>50</sup> The second ordinance came to the Court of Appeals of

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incrimination); *Terry v. Ohio*, 392 U.S. 1, 10 (1968) (outlining the principles of preventive detentions short of traditional arrest).

43. *Solomon*, 33 Cal. App. 3d at 436-39. With a foundation based on the reasonable suspicion standard of *Terry*, the statute withstood a vagueness challenge. *Id.* at 435. The court rejected the claim that the identification requirement violated the privilege against self-incrimination. *Id.* at 436. The court reasoned that the state's interest in regulating motor vehicles, coupled with strong interests in public safety and crime prevention, overcame any individual's interest in anonymity. *Id.* at 436-37. Finally, the statute was not arbitrarily enforced, as it required an objective basis for the detention. *Id.* at 438.

44. *See, e.g.*, *United States v. Rias*, 524 F.2d 118, 121 n.3 (5th Cir. 1975) (quoting MIAMI, FLA., CITY CODE § 38-26); *City of Bellevue v. Miller*, 85 Wash. 2d 539, 542-43 (1975) (en banc) (quoting BELLEVUE, WASH., CITY CODE § 7.40.080); *State v. Ecker*, 311 So. 2d 104, 106 (Fla. 1975), *cert. denied*, 423 U.S. 1019 (1975) (quoting FLA. STAT. § 856.021 (1972)); *City of Portland v. White*, 9 Or. App. 239, 240 (1972) (quoting PORTLAND, OR., CODE § 14.92.045) (cited in Harbist, *supra* note 17, at 589-92).

45. Harbist, *supra* note 17, at 591.

46. 85 Wash. 2d 539 (1975) (en banc).

47. *Id.* at 540. Originally, the City charged Miller with suspicion of burglary. *Id.* After the City released him without filing charges, it notified Miller one month later that he violated the vagrancy ordinance. *Id.* That ordinance read in part:

Any person who wanders or prowls in a place, at a time, or in a manner, and under circumstances, which manifest an unlawful purpose or which warrant alarm for the safety of persons or property in the vicinity is hereby declared to be a vagrant, and is guilty of a misdemeanor.

Among circumstances which may be considered as manifesting an unlawful purpose or warranting alarm for the safety of persons or property, for purposes of this section, is flight by a person upon the appearance of a police officer, the refusal of a person to identify himself to a police officer, or an attempt by a person to conceal himself or any object from a police officer.

BELLEVUE, WASH., CITY CODE § 7.40.080. Compare BELLEVUE, WASH., CITY CODE § 7.40.080 with MODEL PENAL CODE § 250.6 (Official Draft and Revised Comments, 1962), *supra* note 26. The Supreme Court of Washington noted that the Bellevue statute was patterned after the final version of the Model Penal Code. *Miller*, 85 Wash. 2d at 543.

48. *Miller*, 85 Wash. 2d at 540.

49. *Id.*

50. *Id.* at 547. The Washington Supreme Court ruled that the statute was *per se* invalid. *Id.*

Oregon under similar circumstances in *City of Portland v. White*.<sup>51</sup> The court of appeals affirmed the rulings of the lower courts, holding that the statute at issue was unconstitutionally vague.<sup>52</sup> Going against the rationale of the Washington and Oregon courts, the Florida Supreme Court rejected a vagueness challenge to a loitering ordinance.<sup>53</sup> The court reasoned that considerations of public safety and law enforcement were of vital importance in construing the Florida statute.<sup>54</sup> Additionally, the Florida Supreme Court did not find any potential Fourth Amendment<sup>55</sup> or Fifth Amendment implications.<sup>56</sup>

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The court stated, “In requiring one to speculate as to what conduct is proscribed and in providing that criminal prosecution can proceed upon the highly arbitrary and inherently subjective opinion of the arresting officer, the ordinance is unconstitutionally vague.” *Id.* The court noted that the statute must be defined conclusively, thereby discouraging arbitrary law enforcement. *Id.* at 543. The court ultimately ruled that the ordinance’s scope was too broad. *Id.* at 544.

51. *City of Portland v. White*, 9 Or. App. 239, 239-40 (1972). The language of PORTLAND, OR. CODE § 14.92.045 is the same as BELLEVUE, WASH. CITY CODE § 7.40.080 and MODEL PENAL CODE § 250.6 (Official Draft and Revised Comments, 1962). *See id.* at 239. *Compare* PORTLAND, OR. CODE § 14.92.045 *with* BELLEVUE, WASH. CITY CODE § 7.40.080, *supra* note 31, *and* MODEL PENAL CODE § 250.6 (Official Draft and Revised Comments, 1962), *supra* note 28. In *White*, both the municipal and circuit courts held the statute to be unconstitutional. *Id.* at 239-40.

52. *White*, 9 Or. App. at 243. The court here concentrated on a similar concern of the provision encouraging arbitrary police enforcement. *See id.* at 242-43. The court also referred to the fact that the majority of modern courts held these types of loitering statutes to be unconstitutional. *Id.* at 241. *See* *Papachristou v. Jacksonville*, 405 U.S. 152, 171 (1972).

53. *State v. Ecker*, 311 So. 2d 104, 106 (Fla. 1975), *cert. denied*, 423 U.S. 1019 (1975). The Florida loitering statute at issue in this case was quite similar to the one in *City of Bellevue v. Miller*, 85 Wash. 2d 539 (1975), and stated in part:

(1) It is unlawful for any person to loiter or prowl in a place, at a time or in a manner not usual for law-abiding individuals, under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity.

(2) Among the circumstances which may be considered in determining whether such alarm or immediate concern is warranted is the fact that the person takes flight upon appearance of a law enforcement officer, refuses to identify himself, or manifestly endeavors to conceal himself or any object.

FLA. STAT. § 856.021 (1972).

54. *Ecker*, 311 So. 2d at 109-10. The Florida Supreme Court distinguished its case from previous cases in which the statute was ruled to be unconstitutionally vague. *Id.* at 109. As with its current case, the court observed that in cases where statutes were upheld, a concern for public safety was involved. *Id.* Finally, the court noted that the entire purpose of the statute was to provide an effective tool for law enforcement to combat criminal activity. *See id.* at 110.

55. *See id.* The court found that the statute’s foundation on a reasonable suspicion standard was satisfactory to discourage arbitrary enforcement. *Id.*

56. *See id.* at 109-10. “Under circumstances where the public safety is threatened, we find no constitutional violation in requiring credible and reliable identification.” *Id.* at 109 (citing *California v. Byers*, 402 U.S. 424 (1971)). The Florida Supreme Court viewed *Byers* as holding that the “possibility of incrimination is insufficient,” especially given the disclosure of identity to be a “neutral act.” *Id.* However, the court viewed additional disclosure requirements beyond identity to be impermissible. *Id.* at 110.

## 2. Modern “Stop and Identify” Statutes

The previously discussed decisions illustrate the difficulty courts had in analyzing the precursors of modern “stop and identify” statutes, which contained elements of old vagrancy laws.<sup>57</sup> The vagrancy statutes, which were too encompassing in scope, needed revisions in order to survive a vagueness attack under the Due Process Clause.<sup>58</sup> As a result, some jurisdictions revised their laws, creating a new type of statute that predicated arrest on an affirmative, objective act.<sup>59</sup>

In one of the first cases that addressed this new type of statute, the Michigan Court of Appeals held an ordinance void for vagueness.<sup>60</sup> In that case, police responded to a report of suspicious activity.<sup>61</sup> The defendant, Gary DeFillippo, answered evasively when the police officers requested identification.<sup>62</sup> Officers arrested DeFillippo for failure to produce identification in accordance with a Detroit city ordinance.<sup>63</sup> A search, subsequent to the arrest, revealed illegal narcotics, and the City charged the defendant with drug possession.<sup>64</sup> DeFillippo challenged the constitutionality of the ordinance and requested that the evidence be

57. Harbist, *supra* note 17, at 594.

58. *Id.*

59. *See, e.g.*, 38 ILL. COMP. STAT. ANN. 107-14 (Smith-Hurd 1980); TEX. PENAL CODE ANN. § 38.02 (Vernon 1974) (cited in Harbist, *supra* note 17, at 594 n.60). These jurisdictions generally revised their statutes by removing references to loitering laws, but still maintaining a requirement of identification in the context of a lawful investigative stop. Harbist, *supra* note 17, at 594. Legislatures essentially made a failure to identify oneself a substantive offense. *Id.*

60. Harbist, *supra* note 17, at 594. The Michigan case was *People v. DeFillippo*, 80 Mich. App. 197, 201 (1977), *rev'd on other grounds*, 443 U.S. 31 (1979).

61. *DeFillippo*, 80 Mich. App. at 199. Police received a call about drunken and disorderly conduct in an alley. *Id.* The officers arrived on scene and found DeFillippo with a woman, who was intoxicated. *Id.* The officers arrested the woman and requested identification from DeFillippo. *Id.*

62. *Id.* DeFillippo informed the officers that he was “Sergeant Mash.” *Id.* When the officers tried to confirm this, DeFillippo “replied that he was working for Sergeant Mash.” *Id.*

63. *Id.* The ordinance at issue provided:

When a police officer has reasonable cause to believe that the behavior of an individual warrants further investigation for criminal activity, the officer may stop and question such person. It shall be unlawful for any person stopped pursuant to this section to refuse to identify himself, and to produce verifiable documents or other evidence of such identification. In the event that such person is unable to provide reasonable evidence of his true identity the police officer may transport him to the nearest precinct in order to ascertain his identity.

DETROIT, MICH., MUN. CODE § 39-1-52.3 (1976) (quoted in *DeFillippo*, 80 Mich. App. at 200-01).

64. *DeFillippo*, 80 Mich. App. at 199. It was not entirely clear whether a failure to produce identification was a crime at the time of DeFillippo’s arrest. *Id.* at 201 n.1. A later amendment to the statute, DETROIT ORDINANCE NO. 158-H (October 19, 1976), concretely decided that this failure was indeed criminal activity. *Id.*

suppressed. The Michigan Court of Appeals agreed.<sup>65</sup> The Michigan court reasoned that the statute overly infringed on individual rights and concluded that DeFillippo's conviction was unconstitutional.<sup>66</sup>

### *B. United States Supreme Court Treatment of an Identification Requirement*

#### 1. The Traffic Stop

The United States Supreme Court decision in *Terry v. Ohio*<sup>67</sup> and its successors<sup>68</sup> govern the "stop" portion of the "stop and identify" statute.<sup>69</sup> *Terry* set forth a two prong standard: first, inquiring whether the police officer's action was justified at the stop's inception and, second, examining whether the search or seizure was reasonably related in scope to the circumstances that initially justified the stop.<sup>70</sup> An officer fulfills the first requirement, which defines the parameters of a lawful stop, if he or she witnesses a traffic violation directly or possesses reasonable suspicion of criminal activity.<sup>71</sup> Once a police officer establishes the presence of reasonable suspicion, he or she may then conduct a limited frisk of the individual in the interest of safety or detain

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65. See *id.* at 200-03. The court held that the ordinance was unconstitutional on the grounds of vagueness. *Id.* at 201.

66. See *id.* at 202-03. The court offered several reasons for its holding, starting with the statute's lack of fair notice to persons of ordinary intelligence. *Id.* at 201 (citing *United States v. Harris*, 347 U.S. 612, 617 (1954)). Additionally, the ordinance had the potential of criminalizing conduct that was not ordinarily criminal. *Id.* Perhaps most importantly, the court noted the ordinance's effect on individuals' constitutional rights. See *id.* at 201-02. Finally, by authorizing arrest on less than probable cause, in this case reasonable suspicion, the statute was invalid under the Fourth Amendment. See *id.* at 202.

67. *Terry v. Ohio*, 392 U.S. 1 (1968). The impetus behind the United States Supreme Court's decision in *Terry* was to define the standards for forcible police encounters in the absence of both probable cause and a warrant. See Stephen A. Saltzburg, *Terry and the Fourth Amendment: Marvel or Mischief? Terry v. Ohio: A Practically Perfect Doctrine*, 72 ST. JOHN'S L. REV. 911, 912-29 (1998) (discussing the history of the *Terry* decision).

68. See *United States v. Brignoni-Ponce*, 422 U.S. 873, 884-85 (1975) (holding that the principles first outlined in *Terry* apply to investigative stops of vehicles); *Adams v. Williams*, 407 U.S. 143, 146 (1972) (clarifying *Terry* through holding it permissible for police officers to detain suspicious individuals for a brief period).

69. See Mark A. Godsey, *When Terry Met Miranda: Two Constitutional Doctrines Collide*, 63 FORDHAM L. REV. 715, 723 (1994) (defining a stop under the *Terry* doctrine). A stop under *Terry* is analogous to a brief detention for investigative purposes. *Id.* A police officer may effectuate a stop when he possesses reasonable suspicion of criminal activity. *Id.*

70. See *Terry*, 392 U.S. at 19-20.

71. McManus, *supra* note 19, at 60.

the person in order to conduct an investigation.<sup>72</sup> These principles have even greater application in *Hiibel*, where the Nevada Supreme Court found that Section 171.123 of the Nevada Revised Statutes represented a codification of the *Terry* standard.<sup>73</sup>

## 2. The Identification Requirement

The Supreme Court has recognized that a law enforcement officer may ask questions of a detained motorist during a traffic stop.<sup>74</sup> Also, the Court has decided that *Miranda* warnings<sup>75</sup> are not applicable in the case of a traffic stop.<sup>76</sup> Several Supreme Court decisions contain discussions relevant to the constitutionality of requiring a detained citizen to disclose his identity.<sup>77</sup> In the creation of the *Terry* doctrine,

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72. *Terry*, 392 U.S. at 30. *Terry* was the decision in which the Court articulated the standard for the “stop and frisk” encounter between police officers and detained citizens. *Id.* The “frisk” portion of the *Terry* standard is analogous to the identification requirement in the Nevada Statute. See NEV. REV. STAT. § 171.123(3) (2004). See also LAFAVE, *supra* note 19, § 9.2; Kathryn R. Urbonya, *Rhetorically Reasonable Police Practices: Viewing the Supreme Court’s Multiple Discourse Paths*, 40 AM. CRIM. L. REV. 1387, 1392 (2003) (citing *Terry*, 392 U.S. at 16-20).

73. *State v. Lisenbee*, 13 P.3d 947, 950 (Nev. 2000). The Nevada Supreme Court observed that § 171.123(1) outlined the justification for the stop, and § 171.123(4) provided the limitations on the subsequent encounter. See *id.*

74. See *Berkemer v. McCarty*, 468 U.S. 420, 439-40 (1984) (holding that detained motorists at a traffic stop are not subjected to a custodial interrogation and thus may be asked questions without being informed of their constitutional rights). Generally, the Court noted that the Constitution was not implicated when a police officer asked a citizen questions, even in the absence of reasonable suspicion. Cf. *Florida v. Bostick*, 501 U.S. 429, 439-40 (1991). The Supreme Court has yet to address the exact scope or nature of police questioning subsequent to a traffic stop. See, e.g., Bill Lawrence, Note, *The Scope of Police Questioning During a Routine Traffic Stop: Do Questions Outside the Scope of the Original Justification for the Stop Create Impermissible Seizures If They Do Not Prolong the Stop?*, 30 FORDHAM URB. L.J. 1919, 1920 (2003) (noting that the Court had not addressed the permissible inquiries subsequent to a traffic stop), Amy L. Vazquez, Comment, *“Do You Have Any Drugs, Weapons, or Dead Bodies in Your Car?” What Questions Can a Police Officer Ask During a Traffic Stop?*, 76 TUL. L. REV. 211, 225 (2001) (observing that the best solution to this issue would be United States Supreme Court review).

75. *Miranda v. Arizona*, 384 U.S. 436 (1966). *Miranda* warnings protect against self-incrimination, and consist of informing an individual that he has the right to remain silent, that any statement made may be used against him, and that he has the right to any attorney. See *id.* at 444. *Miranda* warnings apply in the case of a custodial interrogation. *Berkemer*, 468 U.S. at 434. The Court in *Miranda* defined custodial interrogation as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” *Miranda*, 384 U.S. at 444.

76. See *Berkemer*, 468 U.S. at 440-42 (concluding that the initial police questioning of a motorist at a routine traffic stop does not constitute custodial interrogation for the purposes of the *Miranda* rule). *Hiibel* did not argue that the officer should have given him *Miranda* warnings before asking for his identification. Brief for the Petitioner at 15, *Hiibel v. Sixth Jud. Ct. of Nev.*, 542 U.S. 177 (2004) (No. 03-5554).

77. *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000) (recognizing that allowing an officer to question a fleeing suspect must be in accord with the “individual’s right to go about his business or

Justice White stated in his concurring opinion, “[O]f course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation.”<sup>78</sup> A majority of the Court reiterated the sentiments of Justice White without establishing the principle that a citizen need not respond to law enforcement questions as law.<sup>79</sup>

### 3. Cases Involving Statutes with Identification Requirements

The United States Supreme Court had not addressed the constitutionality of a “stop and identify” statute, compelling the disclosure of a person’s identity, until its decision in *Hiibel*.<sup>80</sup> However, the Court had previously decided a case involving a statute that contained an identification requirement.<sup>81</sup> *California v. Byers* dealt with the constitutionality of a state vehicular statute.<sup>82</sup> Though not agreeing on a majority opinion, the Court concurred on the holding that the statute did not implicate the Fifth Amendment privilege against self-incrimination.<sup>83</sup>

The Court had analyzed disputes involving “stop and identify” statutes, though not expressly ruling on the constitutionality of an identification requirement in such a law.<sup>84</sup> The cases of *Michigan v.*

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to stay put and remain silent in the face of police questioning”); *Berkemer*, 468 U.S. at 439 (stating that a “detainee is not obliged to respond”); *Kolender v. Lawson*, 461 U.S. 352, 365 (1983) (Brennan, J., concurring) (observing that a suspect is free to refuse to answer questions); *Michigan v. DeFillippo*, 443 U.S. 31, 44 (1979) (Brennan, J., dissenting) (stating that a detained motorist may refuse to answer questions, and this refusal cannot furnish a basis for arrest); *Davis v. Mississippi*, 394 U.S. 721, 727 n.6 (1969) (discussing the principle that police officers cannot compel answers to questions); *Terry*, 392 U.S. at 34 (White, J., concurring) (noting that citizens detained under the principles of *Terry* should not be required to answer the police officer’s questions); *Terry*, 392 U.S. at 33 (Harlan, J., concurring) (observing that a citizen has the “right to ignore his interrogator and walk away”).

78. *Terry*, 392 U.S. at 34 (White, J., concurring).

79. See *Berkemer*, 468 U.S. at 439; *Davis*, 394 U.S. at 727 n.6.

80. See *Hiibel v. Sixth Jud. Ct. of Nev.*, 542 U.S. 177, 184 (2004). The Court explained the *Hiibel* case continued the progression that is began in its previous decisions. *Id.*

81. *California v. Byers*, 402 U.S. 424 (1971) (plurality opinion).

82. *Id.* at 427. The statute provided that an individual involved in traffic accident had to identify himself to the other party and the state. See CAL. VEH. CODE § 20002 (Deering 1971). *Byers* was involved in an accident and charged with two misdemeanors, one for failure to maintain a safe distance and the other for violating the identification requirement. *Byers*, 402 U.S. at 425-26.

83. See *Byers*, 402 U.S. at 427-34; *Id.* at 435-36 (Harlan, J., concurring). Because the statute at issue was essentially regulatory in nature, the danger of incrimination from identity disclosure was low. See *id.* at 427-31. Even operating under the assumption that such a statement would be incriminating, it was not testimonial. See *id.* at 431-34.

84. *Kolender*, 461 U.S. at 352 (addressing the constitutionality of California “stop and

*DeFillippo*<sup>85</sup> and *Brown v. Texas*<sup>86</sup> presented the Court with its first opportunities to deconstruct “stop and identify” statutes and decide whether an identification requirement violated any constitutional rights.<sup>87</sup> However, the Court did not address the applicable statutes’ constitutionality in these cases, but instead based its holdings on other grounds.<sup>88</sup>

In *DeFillippo*, police officers arrested the defendant for violating a Detroit city ordinance after he provided suspicious answers to a request for identification.<sup>89</sup> The Court scrutinized the decision of the Michigan Court of Appeals, which found that the statute at issue was unconstitutional.<sup>90</sup> However, the Court did not rule on the “stop and identify” statute’s constitutionality.<sup>91</sup>

The Court also failed to address the legitimacy of a “stop and identify” statute in *Brown*.<sup>92</sup> In that case, two police officers stopped Brown under circumstances that their experience indicated Brown was engaged in criminal activity.<sup>93</sup> Subsequent to the stop, Brown declined to identify himself.<sup>94</sup> The Court analyzed Brown’s arrest by considering

identify” statute); *Brown v. Texas*, 443 U.S. 47, 53 (1979) (analyzing a conviction under a Texas “stop and identify” statute on Fourth Amendment grounds); *Michigan v. DeFillippo*, 443 U.S. 31, 35 (1979) (deciding a case involving a Detroit city ordinance, though not discussing the statute’s validity under the Constitution).

85. 443 U.S. 31 (1979).

86. 443 U.S. 47 (1979).

87. Sullivan, *supra* note 17, at 255.

88. See *infra* notes 89-97 and accompanying text (discussing the Supreme Court’s holdings in the *DeFillippo* and *Brown* cases).

89. *DeFillippo*, 443 U.S. at 33-34. See *supra* notes 61-64 and accompanying text (providing the facts of the *DeFillippo* case).

90. See *DeFillippo*, 443 U.S. at 34-35. See *supra* notes 65-66 and accompanying text (analyzing the Michigan court’s holding in *DeFillippo*).

91. See *DeFillippo*, 443 U.S. at 35-40. Instead, the Court held that an officer’s good faith reliance on the statute, even if it was later declared unconstitutional, was sufficient to validate the arrest. See *id.* at 40. The extent of the discussion of the statute’s constitutionality was merely recognizing that the Michigan Court of Appeals had held it unconstitutional. Keenan, *supra* note 17, at 290. However, it is possible to decide that the reason for the brevity of this discussion was an implied approval of the lower court’s decision. *Id.* at 290-91.

92. See *Brown*, 443 U.S. at 53 n.3.

93. *Id.* at 48. The two officers saw Brown walking away from another man in a high crime area of the City. *Id.* at 48-49. The men were actually seen apart, but testimony from one of the officers demonstrated the officers believed the two men were together until the police arrived at the location. *Id.* at 48.

94. *Id.* at 49. Brown was arrested for violating the Texas “stop and identify” statute, which provided, “A person commits an offense if he intentionally refuses to report or gives a false report of his name and residence address to a peace officer who has lawfully stopped him and requested the information.” TEX. PENAL CODE ANN. § 38.02(a) (Vernon 1974).

the reasonableness of his detention.<sup>95</sup> The Court reasoned that no evidence pointed to the presence of articulable suspicion,<sup>96</sup> making the initial detention unreasonable and leading to a reversal of Brown's conviction.<sup>97</sup>

The United States Supreme Court also examined the constitutionality of a "stop and identify" statute in *Kolender v. Lawson*.<sup>98</sup> Law enforcement officers detained Edward Lawson on fifteen separate occasions over a period of almost two years under a California "stop and identify" law.<sup>99</sup> Lawson brought suit in California state court alleging that the statute was unconstitutional.<sup>100</sup> The state district court agreed.<sup>101</sup> The United States Supreme Court analyzed the statute under the void-for-vagueness standard,<sup>102</sup> finding that it failed to provide adequate enforcement guidelines to law enforcement.<sup>103</sup> Thus, given the dangers to individual liberties that this situation caused, the Court held the statute to be unconstitutional.<sup>104</sup>

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95. See *Brown*, 443 U.S. at 50-52. The Court held that Brown had been seized, and determined the reasonableness of that seizure by balancing the relevant interests involved. See *id.* at 50-51.

96. *Id.* at 51-52. Furthermore, "the officers did not claim to suspect appellant of any specific misconduct, nor did they have any reason to believe that he was armed." *Id.* at 49.

97. *Id.* at 53. The lack of reasonable suspicion caused the application of the "stop and identify" statute, as a basis for arrest, to violate the Fourth Amendment. *Id.*

98. *Kolender v. Lawson*, 461 U.S. 352, 353 (1983). Lawson presented a direct challenge to the constitutionality of the statute, forcing the Court to examine the constitutionality of the "stop and identify" law. See *id.*

99. *Id.* at 354. The California statute criminalized a failure to respond to a request for identification making it a misdemeanor. See *supra* note 41 and accompanying text (providing the text of the California statute). Of his fifteen detentions, Lawson was prosecuted twice and convicted once. *Kolender*, 461 U.S. at 354.

100. See *Kolender*, 461 U.S. at 354. Lawson sought a declaratory judgment stating the statute was unconstitutional. *Id.* He also prayed for an injunction restricting enforcement of the statute, as well as money damages. *Id.*

101. *Id.* The state district court found the statute to be too broad, and thus unconstitutional, because it allowed arrest on less than probable cause. See *id.* The court granted the injunction, but did not award money damages. *Id.*

102. See *id.* at 357-60. "[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness so ordinary people can understand what conduct is prohibited, in addition, it must be written in a manner that does not encourage arbitrary and discriminatory enforcement." *Id.* at 357 (citing *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982); *Smith v. Goguen*, 415 U.S. 566 (1974); *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Connally v. Gen. Constr. Co.*, 269 U.S. 385 (1926)).

103. *Id.* at 358. Without the presence of standards or guiding principles, enforcement of the statute was completely in the discretion of police officers. See *id.*

104. See *id.* at 358-61. The Court noted that in the absence of any standards governing enforcement, there is potential for arbitrary police conduct. See *id.* at 361. Additionally, conduct which is relatively innocent to one police officer may be suspicious, and result in arrest, to another.



*C. Prior History of the “Stop and Identify” Statute in Nevada*

The Nevada legislature adopted the predecessor to Section 171.123 of the Nevada Revised Statutes in 1969, basing it on language from the Uniform Arrest Act.<sup>105</sup> The applicable portions of Section 171.123 provide:

1. Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime.

...

3. The officer may detain the person pursuant to this section only to ascertain his identity and the suspicious circumstances surrounding his presence abroad. Any person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer.

4. A person must not be detained longer than is reasonably necessary to effect the purposes of this section, and in no event longer than 60 minutes. The detention must not extend beyond the place or the immediate vicinity of the place where the detention was first effected, unless the person is arrested.<sup>106</sup>

The United States Court of Appeals for the Ninth Circuit has offered a different construction of the statute than the Nevada Supreme Court did in *Hiibel*.<sup>107</sup> In *Carey v. Nevada Gaming Control Board*, the only prior case examining the identification requirement in Section 171.123, the Ninth Circuit faced a pattern of facts similar to *Hiibel*.<sup>108</sup>

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*See id.* at 360.

105. Dix, *supra* note 17, at 862.

106. NEV. REV. STAT. § 171.123 (2004). Of special note, the original version of the statute stipulated any detention could not last longer than fifteen minutes. NEV. REV. STAT. § 171.123 (1969). A subsequent amendment changed the applicable duration to thirty minutes. NEV. REV. STAT. § 171.123 (1975). Other than these changes and the addition of current subsection 2 (thereby necessitating a re-ordering of the subsections within the statute), the current statute is the same as the one enacted in 1969. Compare NEV. REV. STAT. § 171.123 (2004) with NEV. REV. STAT. § 171.123 (1969).

107. Compare *Carey v. Nev. Gaming Control Bd.*, 279 F.3d 873, 881-82 (9th Cir. 2002) (holding the Nevada “stop and identify” statute violated the Fourth Amendment), with *Hiibel v. Sixth Jud. Ct. of Nev.*, 59 P.3d 1201, 1202 (Nev. 2002) (holding the Nevada statute did not violate the Fourth Amendment), *aff’d*, 542 U.S. 177 (2004).

108. See *Carey*, 279 F.3d at 876-77; *Hiibel*, 59 P.3d at 1203. The casino suspected Carey and a friend of criminal activity, namely cheating. *Carey*, 279 F.3d at 876. After leaving and then returning to the casino, Agent Spendlove of the Nevada Gaming Control Board detained Carey. *Id.* The agent informed Carey of his *Miranda* rights and then searched him for contraband. *Id.* Next,

However, the Ninth Circuit's reasoning was contrary to that of the Nevada Supreme Court; the circuit court held that the "stop and identify" statute violated protections guaranteed by the Fourth Amendment.<sup>109</sup> The conflict over these different interpretations of Section 171.123 further exemplifies the difficulty that courts and police officers have in interpreting "stop and identify" statutes.<sup>110</sup>

### III. STATEMENT OF THE CASE

#### A. *Statement of the Facts*

On May 21, 2000, Humboldt County Sheriff's Deputy Lee Dove responded to a report of an assault.<sup>111</sup> Dove located the vehicle described in the report and proceeded to investigate.<sup>112</sup> He found Dudley Hiibel standing outside the vehicle and his daughter seated inside of it.<sup>113</sup> As Deputy Dove approached the vehicle, he saw indications that, in his estimation, Hiibel was intoxicated.<sup>114</sup>

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Agent Spendlove asked Carey to identify himself, and he refused. *Id.* The agent determined that there was a lack of probable cause under which to arrest Carey for a violation of gaming laws, but did arrest him for the failure to produce identification. *Id.*

109. *Carey*, 279 F.3d at 880-81. The Ninth Circuit based its decision on its previous holdings in *Martinelli v. City of Beaumont*, 820 F.2d 1491, 1492 (9th Cir. 1987) (holding that a California statute violated the Fourth Amendment protection against unreasonable searches and seizures), and *Lawson v. Kolender*, 658 F.2d 1362, 1366 (9th Cir. 1981) (holding a California statute void for vagueness, and not addressing a Fifth Amendment self-incrimination claim), *aff'd*, 461 U.S. 352 (1983). *Id.* at 800. A primary concern for the circuit court, which it reiterated in *Carey*, was permitting arrests on less than probable cause. *See id.*

110. Brief for the Petitioner at 11, *Hiibel v. Sixth Jud. Ct. of Nev.*, 542 U.S. 177 (2004) (No. 03-5554).

111. *County of Humboldt v. Hiibel*, No. XX-69056, slip op. at 1 (J. Ct. of Union Twp., Nev., Feb. 21, 2001) (unpublished decision from Justice Court of Union Township). A citizen allegedly witnessed two people, a male and a female, involved in a domestic altercation on Grass Valley Road. *Id.* Hiibel provided some insight on the dispute on his personal website. *See* Hiibel's home page, Facts page, <http://www.papersplease.org/hiibel/facts.html> (last visited March 21, 2005). Hiibel stated that the incident began as an altercation between himself and his daughter, Mimi, over her current relationship. *Id.* The argument escalated, and "Mimi got mad at her dad and punched him in the shoulder." *Id.* "They continued shouting at one another . . . and Mimi eventually pulled over the truck after [Hiibel] said he wanted out." *Id.* The citizen identified the vehicle involved as a silver and red GMC truck. *Hiibel*, No. XX-69056 at 1.

112. *Hiibel*, No. XX-69056 at 1-2. Deputy Dove assumed it was the vehicle in the report from dispatch. *Id.* at 2. He had also received further reports from a witness identifying the vehicle. *Id.* His assumption became more concrete when he observed the location of the vehicle. *Id.* Deputy Dove believed the truck had pulled off the road hastily, evidenced by skid marks and the truck being parked in an awkward position. *Id.*

113. Brief for the Petitioner at 4, *Hiibel*, 542 U.S. 177 (No. 03-5554).

114. *Hiibel*, No. XX-69056 at 2. Dove based his belief that Hiibel was intoxicated on Hiibel's appearance and actions. Brief for the Petitioner at 4, *Hiibel*, 542 U.S. 177 (No. 03-5554). However,

Rather than question Hiibel regarding the report of domestic battery or his perceived intoxication, Dove first requested Hiibel's identification.<sup>115</sup> Maintaining his innocence, Hiibel refused this initial request.<sup>116</sup> Dove continued to make demands for identification.<sup>117</sup> At one point during the exchange, Hiibel placed his hands behind his back, challenged Dove's authority and requested that the deputy arrest him.<sup>118</sup> Dove asked Hiibel to cooperate, but Hiibel declined and Dove arrested him.<sup>119</sup> In all, Hiibel refused to produce identification a total of eleven times.<sup>120</sup>

### B. Procedural History

The County of Humboldt charged Dudley Hiibel with obstructing an officer investigating a crime,<sup>121</sup> a violation of the Nevada "stop and identify" statute,<sup>122</sup> and domestic violence.<sup>123</sup> The Justice Court of

Dove did not arrest Hiibel for driving under the influence or any alcohol-related crime. *See Hiibel*, No. XX-69056 at 2.

115. *Hiibel*, No. XX-69056 at 2. Dove made a quick reference to the "fight" before repeatedly requesting identification from Hiibel. Videotape: Hiibel Arrest (<http://www.papersplease.org/hiibel/video.html> (last visited March 21, 2005)). Dove derived his authority to request Hiibel's identity from NEV. REV. STAT. § 171.123(3). Brief for Respondent at 1, *Hiibel*, 542 U.S. 177 (No. 03-5554).

116. *Hiibel*, No. XX-69056 at 2. In response to this initial request, Hiibel informed Dove that he would cooperate. Brief for the Petitioner at 4, *Hiibel*, 542 U.S. 177 (No. 03-5554). However, Hiibel professed his innocence, stating that he would not produce identification for this reason. *Id.*

117. *Hiibel*, No. XX-69056 at 2. Hiibel continued to refuse the requests of Dove. *Id.* At one point, Hiibel asked for the purpose of the requests. *Id.* For the first time, Dove informed Hiibel about the report of a domestic battery. *Id.*

118. Brief for the Petitioner at 4, *Hiibel*, 542 U.S. 177 (No. 03-5554).

119. *Hiibel*, No. XX-69056 at 2. The Nevada Supreme Court opinion quoted Dove's statements that he thought Hiibel was becoming aggressive. *Hiibel v. Sixth Jud. Ct. of Nev.*, 59 P.3d 1201, 1203 (Nev. 2002), *aff'd*, 542 U.S. 177 (June 21, 2004). Dove arrested Hiibel, placed him in handcuffs, and escorted him to his police vehicle. *Id.* Dove based the arrest on the refusal to produce identification, the inability to carry on his investigation, Hiibel's perceived intoxication, and concern for Dove's own safety. *Id.*

120. *Hiibel*, No. XX-69056 at 2. Dove finally informed Hiibel that continuing to refuse to produce identification would result in his arrest for obstructing an officer. *Id.*

121. NEV. REV. STAT. § 199.280 (2004) ("A person who, in any case or under any circumstances not otherwise specially provided for, willfully resists, delays or obstructs a public officer in discharging or attempting to discharge any legal duty of his office shall be punished.")

122. NEV. REV. STAT. § 171.123 (2004). *See supra* note 106 and accompanying text (stating the text of the Nevada "stop and identify" statute). Other states have enacted similar "stop and identify" statutes to Nevada. *See, e.g.*, FLA. STAT. § 856.021(2) (2003); N.Y. CRIM. PROC. LAW § 140.50(1) (2004). The Supreme Court discussed the various "stop and identify" statutes, stating:

The statutes vary from State to State, but all permit an officer to ask or require a suspect to disclose his identity . . . . In some States, a suspect's refusal to identify himself is a misdemeanor offense or civil violation; in others, it is a factor to be considered in whether the suspect has violated loitering laws. In other States, a suspect may decline to

Union Township convicted Hiibel on the charge of delaying an officer<sup>124</sup> and dismissed the domestic battery charge, which had prompted Dove's initial investigation.<sup>125</sup> Hiibel appealed his conviction to the Sixth Judicial District Court of Nevada, arguing that his conviction violated the Fourth and Fifth Amendments.<sup>126</sup> The court rejected Hiibel's arguments and affirmed his conviction.<sup>127</sup>

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identify himself without penalty.

*Hiibel*, 542 U.S. at 183.

123. NEV. REV. STAT. § 33.018 (2004).

124. *Hiibel*, No. XX-69056 at 3. The following is a description of the Justice Court of Union Township:

Union Justice Court is a court of limited jurisdiction which strives to uphold the public's trust and confidence, while retaining its independence and accountability by dealing with each matter in an equitable and timely manner . . . . [T]he Court issues search warrants and arrest warrants, holds arraignments and trials for misdemeanor cases, and handles felony and gross misdemeanor cases from the initial arrest through the preliminary hearing stage, including bail setting and probable cause determination.

Union Justice Court home page, [http://www.hcnv.us/justice/justice\\_home.htm](http://www.hcnv.us/justice/justice_home.htm) (last visited March 21, 2005). The Justice of the Peace, Gene Wambolt, based his ruling, at least in part, on the potential for injury in a domestic battery situation, and Dove's initial observations of the scene. *Hiibel*, No. XX-69056 at 2. Furthermore, Justice Wambolt reasoned that Deputy Dove's conduct was not "overbearing or harassing." *Id.* Justice Wambolt ultimately found two arguments compelling, one based on the text of the statute, and the other on Supreme Court precedent. *Id.* The text of the statute was particularly important, as Justice Wambolt stated that the "person so identified shall identify himself." *Id.* (quoting NEV. REV. STAT. § 171.123(3) (2003) (emphasis in original)). The final argument, based on precedent, relied heavily on the magnitude of the governmental interests of crime prevention and detection. *Id.* at 3 (quoting *Terry v. Ohio*, 392 U.S. 1 (1968)).

125. *Hiibel*, No. XX-69056 (motion to dismiss). The prosecution filed the motion to dismiss on September 29, 2000, based on an inability to locate the eyewitness. *Id.* The court granted the motion that same day. *Id.* (order of dismissal).

126. Brief for Petitioner at 3, *Hiibel v. State*, No. CR 01-4463 (6th Jud. Dist. Ct., Nev., May 4, 2001). Hiibel contended that his conviction violated the Fourth Amendment through the obligations it placed on him during the investigatory stop. *Id.* He argued that the United States Supreme Court had previously held that someone in his position was not obligated to respond to any police officer inquiries. *Id.* (quoting *Berkemer v. McCarty*, 468 U.S. 420 (1984)). As for his Fifth Amendment challenge, Hiibel argued that Dove imposed a necessity on him to disclose his identity when the deputy asked him if he would "cooperate and identify himself." *Id.* This obligation violated Hiibel's privilege against self-incrimination. *See id.*; U.S. CONST. amend. V.

127. *Hiibel v. State*, No. CR 01-4463, slip op. at 7 (6th Jud. Dist. Ct., Nev., June 25, 2004). The Sixth Judicial District Court, Judge Richard Wagner presiding, noted that this case presented a novel question in the State of Nevada, as the law was unsettled by both the Nevada Supreme Court and United States Supreme Court. *Id.* at 1. Judge Wagner stated that a citizen must only answer a question concerning identification if the police officer had reasonable suspicion. *Id.* at 2. Judge Wagner observed that there was articulable suspicion for drunk driving at a minimum. *Id.* at 6. However, the district judge did not rule on the constitutionality of the statute, instead finding "that there was sufficient evidence under the totality of the circumstances of this case that the justice court could and did correctly conclude that Appellant [Larry Hiibel] resisted or delayed officer Lee Dove." *Id.* at 3-4. Finally, the court conducted a balancing test, weighing the protection of societal interests against Hiibel's Fifth Amendment right to remain silent. *Id.* at 7. In the interests of both

On further review, the Supreme Court of Nevada affirmed the judgment of the Sixth Judicial District Court in a divided opinion.<sup>128</sup> The majority rejected Hiibel's Fourth Amendment challenge.<sup>129</sup> The court also examined Hiibel's petition for rehearing, seeking explicit resolution of his Fifth Amendment claim, but denied it without opinion.<sup>130</sup> The Supreme Court granted certiorari on October 20, 2003.<sup>131</sup>

### C. United States Supreme Court Opinion

In a 5-4 decision, the United States Supreme Court affirmed the Nevada Supreme Court.<sup>132</sup> The Court addressed both of Hiibel's

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police officers and victim protection, sufficiently serious in a case of domestic battery, the district court ruled that a citizen must identify himself. *Id.* at 7-8.

128. *Hiibel v. Sixth Jud. Ct. of Nev.*, 59 P.3d 1201, 1203 (Nev. 2002), *aff'd*, 542 U.S. 177 (2004) (affirming judgment of Sixth Judicial District Court and denying a petition for writ of certiorari). The en banc hearing of the Nevada Supreme Court ended in a 4-3 decision with Justice Agosti, joined by two other justices, dissenting. *Id.* at 1207-10 (Agosti, J., dissenting). Justice Agosti expressed concerns over a denial of the right to privacy, based on constitutional protections afforded by the Fourth Amendment. *Id.* at 1207-08. The dissent viewed United States Supreme Court precedent as holding that police officers may ask detained citizens any question, but the detainee is not required to answer. *Id.* at 1208. Justice Agosti referenced the Ninth Circuit Court of Appeals decision in *Carey v. Nev. Gaming Control Bd.*, 279 F.3d 873, 880-81 (9th Cir. 2002) (applying United States Supreme Court precedent to NEV. REV. STAT. § 171.123(3)). *Id.* In *Carey*, the Ninth Circuit held that § 171.123(3) violated the Fourth Amendment and the Supreme Court's recognition that an individual has a right not to answer a police officer's questions. *Carey*, 279 F.3d at 881-82 (citing *Dunaway v. New York*, 442 U.S. 200, 211 (1979) (citing *Terry v. Ohio*, 392 U.S. 1, 34 (1968))). Justice Agosti performed the same balancing test as the majority, weighing governmental law enforcement justifications against individual privacy interests. *Hiibel*, 59 P.3d at 1207-08 (Agosti, J., dissenting). However, he viewed anonymity as being a civil liberty deserving of protection under the Fourth Amendment. *Id.* at 1208. Justice Agosti expressed reservations about the justifications given by the majority for its holding. *Id.* at 1209. He wrote, "[T]he majority relies upon FBI statistics about police fatalities and assaults to support its argument. However, it does not provide any evidence that an officer, by knowing a person's identity, is better protected from potential violence." *Id.* An officer already has the right to perform a limited pat-down search of a detainee in the interests of officer safety, and adding a requirement of disclosing one's identity to a police officer is too much of a deprivation of Fourth Amendment rights. *Id.*

129. *Hiibel*, 59 P.3d at 1202. The majority reasoned there was no Fourth Amendment violation, basing its decision on a proper balance between individual privacy interests and the need to protect police officers and the public. *Id.* The court referenced a split in the federal circuit courts of appeal, but found the Ninth Circuit's reasoning in *Carey* to be "unpersuasive." *Id.* at 1204. The majority performed its own constitutional analysis, even recognizing the importance of privacy rights and discussing freedom from being compelled to divulge one's identity. *Id.* at 1205. The court ultimately held the invasion of privacy by requiring one to identify himself was reasonable, especially given the governmental interests in a new society filled with greater terrorism concerns. *See id.* at 1205-06.

130. *Hiibel v. Sixth Jud. Ct. of Nev.*, 542 U.S. 177, 182 (2004).

131. *Hiibel v. Sixth Jud. Ct. of Nev.*, 540 U.S. 965 (2003) (granting writ of certiorari).

132. *Hiibel*, 542 U.S. 177 (affirming the judgment of the Nevada Supreme Court).

constitutional challenges to his conviction,<sup>133</sup> holding that Hiibel's conviction did not violate his Fourth Amendment<sup>134</sup> or Fifth Amendment rights.<sup>135</sup> The majority discussed previous cases in which the Court applied constitutional limitations to "stop and identify" statutes,<sup>136</sup> but found enough characteristics to distinguish those cases from the present case.<sup>137</sup>

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133. *Id.* at 178-79. The majority of the Nevada Supreme Court only addressed Hiibel's Fourth Amendment challenge. *See supra* notes 128-30 and accompanying text (examining the holding of the Nevada Supreme Court).

134. *See Hiibel*, 542 U.S. 177 at 185-89. The Fourth Amendment addresses "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. The majority viewed the ability to ask questions as an essential portion of a police investigation. *Hiibel*, 542 U.S. at 185. "[A] police officer is free to ask a person for identification without implicating the Fourth Amendment." *Id.* The Court referenced many past decisions where it stated that questioning is a routine portion of any traffic stop. *Id.* (quoting *United States v. Hensley*, 469 U.S. 221, 229 (1985); *Hayes v. Florida*, 470 U.S. 811, 816 (1985); *Adams v. Williams*, 407 U.S. 143, 146 (1972)). The majority discussed the important governmental interests served by a "stop and identify" statute, including helping the officer to decide if the citizen had an outstanding warrant. *Id.* The Court noted that these interests become even more pressing in the case of a domestic disturbance, stating, "[O]fficers called to investigate domestic disputes need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim." *Id.* These concerns, combined with the reasonable basis of the Nevada statute, guarded against any potential Fourth Amendment violation. *See id.* at 188-89.

135. *Hiibel*, 542 U.S. at 189-91. The Fifth Amendment states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. Instead of deciding the case on the basis of statements being non-testimonial, the Court held that the disclosure of Hiibel's identity would not have been incriminating. *Hiibel*, 542 U.S. at 189. The majority defined an incriminating statement as one that the witness reasonably believes would result in criminal prosecution or evidence that would lead to prosecution. *Id.* "In this case, petitioner's refusal to disclose his name was not based on any articulated real and appreciable fear that his name would be used to incriminate him." *Id.* at 190. The majority could not discern the exact reason for Hiibel's failure to disclose his name. *Id.* Hiibel described himself on his personal website as "his own man." Hiibel's home page, <http://www.papersplease.org/hiibel/index2.html> (last visited March 21, 2005). He also implied his challenge to his conviction was based on "his belief in the U.S. Constitution." *Id.* Ultimately, absent any reasonable proof of an incriminating statement, the Court held that there was no reason to override the Nevada legislature on Fifth Amendment grounds. *Hiibel*, 542 U.S. at 190-91. The majority reserved judgment in the case that providing one's name at a traffic stop would provide the police officer with evidence necessary to convict the detainee of a separate offense. *Id.*

136. *Hiibel*, 542 U.S. at 184. *See Kolender v. Lawson*, 461 U.S. 352, 360-62 (1983) (holding that requiring a detained citizen to provide "credible and reliable" identification gives too much discretion to police officers without an identifiable standard, making it unconstitutionally vague); *Brown v. Texas*, 443 U.S. 47, 51-52 (1979) (overturning a conviction based on a Texas "stop and identify" statute because the police officer did not have reasonable suspicion to conduct the traffic stop initially).

137. *See Hiibel*, 542 U.S. at 184-95. Though not providing rationale as to how it arrived at its conclusion, the majority found there to be reasonable suspicion that Hiibel had committed a crime. *See id.* at 184. (differentiating the present case from *Brown*). The Court in *Brown* found the defendant's activity sufficed to establish reasonable suspicion. *See Brown*, 443 U.S. at 51-52. Presence in an alley alone, even though the alley is allegedly frequented by drug users, is too close

Justice Stevens submitted a dissent addressing potential Fifth Amendment concerns with “stop and identify” statutes.<sup>138</sup> He viewed the privilege against self-incrimination as preempting the exception authored by the Nevada legislature.<sup>139</sup> He reasoned that previous cases extended the privilege to encounters outside of criminal court proceedings, and that the privilege should apply to situations like the present case.<sup>140</sup> Justice Stevens addressed the State of Nevada’s argument<sup>141</sup> that the statement was not testimonial.<sup>142</sup> Finally, Justice Stevens disagreed with the majority, reasoning that the Court’s precedent viewed the word “incriminating” much more broadly than the majority.<sup>143</sup>

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to the activity exhibited by innocent pedestrians. *Id.* at 52. Also, the Court stated that there was no challenge that the Nevada statute was unconstitutionally vague, as its terms were more narrow and precise than the statute in *Kolender*. See *Hübel*, 542 U.S. at 184. The statute in *Kolender* required the suspect to present “credible and reliable” identification. *Kolender*, 461 U.S. at 357 (quoting CAL. PENAL CODE § 647(e) (West 1970)).

138. *Hübel*, 542 U.S. at 191-92 (Stevens, J., dissenting).

139. *Id.* at 192. Justice Stevens hypothesized that the Nevada legislature required only a detainee’s name because it realized that any additional questions would implicate the Fifth Amendment. *Id.*

140. *Id.* “[T]here can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves.” *Id.* (quoting *Miranda v. Arizona*, 384 U.S. 436, 467 (1966)). Justice Stevens referenced three particular situations in which the United State Supreme Court extended a privilege against self-incrimination. *Hübel*, 542 U.S. at 193 (Stevens, J., dissenting). In *Carter v. Kentucky*, the Court extended the right to the indicted defendant, who may not be punished for invoking that right. *Id.*; see also *Carter v. Kentucky*, 450 U.S. 288, 299-300 (1981). An individual, even if unindicted and merely the subject of a grand jury investigation, possesses this same right. *Hübel*, 542 at 193; see also *Chavez v. Martinez*, 538 U.S. 760, 767-68 (2003). Finally, the Court extended the right to “an arrested suspect during custodial interrogation in a police station.” *Hübel*, 542 at 193 (quoting *Miranda*, 384 U.S. at 467). Justice Stevens observed that there is no reason that a person investigated on mere police suspicion, rather than these higher standards, should not have protection against self-incrimination. *Hübel*, 542 U.S. at 193 (Stevens, J., dissenting).

141. *Hübel*, 542 U.S. at 193 (Stevens, J., dissenting) (referencing a claim made by the State of Nevada that the Fifth Amendment challenge could be decided on the ground that the communication was nontestimonial).

142. *Id.* at 193-94. Justice Stevens reasoned that although certain actions fall outside the scope of the privilege, “[i]n all instances, we have afforded Fifth Amendment protection if the disclosure in question was being admitted because of its content rather than some other aspect of the communication.” *Id.* at 194. The Court stated the overwhelming majority of verbal statements convey information or relate facts. *Id.*; *Doe v. United States*, 487 U.S. 201, 213 (1988). Thus, most verbal statements are testimonial and, for that reason, fall under the Fifth Amendment privilege against self incrimination. *Id.* at 213-14. Additionally, Justice Stevens recognized the importance of the communication coming at the bequest of a police officer. *Hübel*, 542 U.S. at 194-95 (Stevens, J., dissenting). In the context of a Sixth Amendment challenge, the Court recently explained that statements given to police officers during an interrogation are testimonial. *Id.*; *Crawford v. Washington*, 541 U.S. 36, 51 (2004).

143. *Hübel*, 542 U.S. at 195 (Stevens, J., dissenting). The majority gave a much narrower

Justice Breyer authored a dissent in which Justices Souter and Ginsburg joined.<sup>144</sup> He discussed Supreme Court precedent as requiring police officers to conduct traffic stops within specific limitations.<sup>145</sup> Justice Breyer reasoned that the Court should have relied upon this precedent and not changed a traditional traffic stop condition that does not require answers to a police officer's questions.<sup>146</sup>

#### IV. ANALYSIS

##### A. Application of the Void for Vagueness Doctrine

An effective introduction to a challenge of “stop and identify” statutes is the same procedure used in the past to invalidate vagrancy and loitering laws – the void-for-vagueness or vagueness doctrine.<sup>147</sup> The

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view of what constitutes an incriminating statement. *See supra* note 135 and accompanying text. Justice Stevens reiterated the fact that the statement itself does not have to be incriminating, as long as it leads to evidence that could be used against the individual in a criminal proceeding. *See Hiibel*, 542 U.S. at 195 (Stevens, J., dissenting). Justice Stevens reasoned if an officer was not going to use an individual's identity to incriminate him or her, or to locate further evidence, there would be no reason to ask for it. *Id.* at 195-96. Justice Stevens stated, “[T]he Nevada Legislature intended to provide its police officers with a useful law enforcement tool, and the very existence of the statute demonstrates the value of the information it demands.” *Id.* Justice Stevens viewed identity as incriminating, even if a name is not, as a person's identity leads to a wealth of information for law enforcement. *Id.* All of this information, reasoned Justice Stevens, has the possibility for subsequent use in a criminal prosecution. *Id.*

144. *Hiibel*, 542 U.S. at 197 (Breyer, J., dissenting).

145. *See id.* The United States Supreme Court first outlined the standard for interaction between police officers and motorists in *Terry v. Ohio*. 392 U.S. 1, 30-31 (1968). *See supra* notes 68-74 and accompanying text (describing the *Terry* stop). Justice Breyer viewed a limit the Court imposed in *Terry* as invalidating any statute that requires a response to police questioning. *Hiibel*, 542 U.S. at 197 (Breyer, J., dissenting).

146. *See Hiibel*, 542 U.S. at 198-99 (Breyer, J., dissenting). Justice Breyer further observed the majority's reasoning was contrary to previous Court statements. *See, e.g., Berkemer v. McCarty*, 468 U.S. 420, 439 (1984); *Terry*, 392 U.S. at 34 (White, J., concurring). Justices in both cases supported the proposition that police officers could ask any question of individuals, but such individuals did not have to answer. *See Berkemer*, 468 U.S. at 439; *Terry*, 392 U.S. at 34. Justice Breyer observed this long line of statements has been viewed by the legal system as law, remaining unchanged for twenty years. *Hiibel*, 542 U.S. at 198 (Breyer, J., dissenting). Justice Breyer viewed the majority's reasoning as suspect, as there was no finding that a refusal to provide identification had interfered with law enforcement. *Id.* at 199. Instead, discarding these rules could result in further encroachment on an individual's privacy rights. *See id.* at 198.

147. Berns, *supra* note 21, at 718. Courts utilize the void-for-vagueness doctrine to discern whether a given statute will survive a facial challenge on vagueness grounds. Michael C. Steel, Note, *Constitutional Law - The Vagueness Doctrine: Two-Part Test, or Two Conflicting Tests?* *City of Chicago v. Morales*, 35 LAND & WATER L. REV. 255, 257 (2000) (observing the vagueness doctrine presents one avenue to challenge a statute on its face). Several state courts have invalidated vagrancy or loitering statutes using this doctrine. *See, e.g., City of Bellevue v. Miller*, 85 Wash. 2d 539, 540, (1975); *People v. Berck*, 32 N.Y.2d 567, 574, (1973), *cert. denied*, 414 U.S.



rationale for this doctrine originates in the constitutional safeguards of the Fifth and Fourteenth Amendments.<sup>148</sup> The void-for-vagueness doctrine requires a criminal statute to provide: (1) sufficient clarity of the offense so as to discourage arbitrary enforcement of its provisions; and (2) fair notice of the criminal activity to citizens of average intelligence.<sup>149</sup>

### 1. Components of the Void-for-Vagueness Doctrine

The Supreme Court identifies the prohibition against arbitrary or discriminatory police action as the more important of the two void-for-vagueness elements.<sup>150</sup> A statute is unconstitutional under the Due

1093 (1973); *City of Portland v. White*, 9 Or. App. 239, 243, (1972). *But see* *State v. Ecker*, 311 So. 2d 104, 106 (Fla. 1975), *cert. denied*, 423 U.S. 1019 (1975). *See generally* John C. Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 197-201 (1985) (discussing the vagueness doctrine as it related to penal laws); Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 85-114 (1960) (analyzing the development of the vagueness doctrine); Mark A. Richard, Comment, *The Void-for-Vagueness Doctrine in Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.: Revision or Misapplication?*, 34 HASTINGS L.J. 1273, 1279-91 (1983) (examining the vagueness doctrine in the context of a United States Supreme Court decision).

148. 16B AM. JUR. 2D *Constitutional Law* § 920 (West 2005) (recognizing that the void-for-vagueness doctrine finds its origins in the Fifth and Fourteenth Amendments); Rene M. LaForte, Comment, *The Constitutional Implications of Anti-Drug Loitering Ordinances in Ohio*, 18 U. DAYTON L. REV. 423, 430 (1993) (analyzing an Ohio anti-drug loitering ordinance in part by using the void-for-vagueness doctrine). *See* U.S. CONST. amend. V, cl. 4; U.S. CONST. amend. XIV, § 1, cl. 3. The Fifth Amendment provides the federal government shall not deprive a person “of life, liberty, or property, without due process of law.” U.S. CONST. amend. V, cl. 4. The Fourteenth Amendment extend the same constitutional protection, guarding against interference by state governments. U.S. CONST. amend. XIV, § 1, cl. 3. The void-for-vagueness doctrine represents a fundamental requirement placed upon criminal statutes by federal and state constitutions. 21 AM. JUR. 2D *Criminal Law* § 15 (West 2005) (discussing the basic constitutional premise of the void-for-vagueness doctrine). *See also* *Wright v. Georgia*, 373 U.S. 284, 288-90 (1963); *Connally v. General Constr. Co.*, 269 U.S. 385, 391-94 (1926).

149. *See, e.g.*, *Hill v. Colorado*, 530 U.S. 703, 732 (2000); *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999); *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972); *Connally*, 269 U.S. at 391). The vagueness doctrine does not require absolute certainty in statutory provisions. 21 AM. JUR. 2D *Criminal Law* § 16 (West 2005) (discussing the certainty required for the vagueness doctrine). A statute may be upheld, even if the Court decides that the statute could be more explicit or precise. *Rose v. Locke*, 423 U.S. 48, 49 (1975) (recognizing even those statutes which the legislature could write with greater precision are not necessarily invalid under the Due Process Clause); *United States v. Overstreet*, 106 F.3d 1354, 1358 (7th Cir. 1997) (holding even if the terms of the statute could be more explicit, it is not necessarily unconstitutional), *cert. denied*, *Warren v. United States*, 521 U.S. 1109 (1997). The Court does not require impossible standards of definiteness. *See* *United States v. Powell*, 423 U.S. 87, 95 (1975). Furthermore, a statute is constitutional, even though its provisions are “stringent and harsh.” *Barsky v. Bd. of Regents of the Univ. of the State of New York*, 347 U.S. 442, 448 (1954).

150. *Hallock*, *supra* note 17, at 1060 (citing *Smith v. Goguen*, 415 U.S. 566, 574 (1974)).

Process Clause of the Fourteenth Amendment if it is imprecise and indefinite, thereby encouraging subjective, and possibly discriminatory enforcement.<sup>151</sup> Additionally, a statute is unconstitutional if it is overbroad and thereby impinges upon constitutionally protected rights.<sup>152</sup> The legislature must explicitly define an appropriate standard of conduct.<sup>153</sup>

The fair notice component requires that a criminal statute provide a person of ordinary intelligence with forewarning that certain conduct would be illegal.<sup>154</sup> The Supreme Court has stated, “No one may be required under peril of life, liberty or property to speculate as to the

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“Where inherently vague statutory language permits . . . selective law enforcement, there is a denial of due process.” *Smith*, 415 U.S. at 576. The Supreme Court has analyzed numerous loitering and vagrancy statutes under the vagueness doctrine. See John P. Ludington, Annotation, *Supreme Court’s Views Regarding Validity of Criminal Disorderly Conduct Statutes Under Void-for-Vagueness Doctrine*, 75 L. Ed. 2d 1049 (2004).

151. See, e.g., *Morales*, 527 U.S. at 60; *Smith v. Goguen*, 415 U.S. 566, 572-73 (1974); *Papachristou*, 405 U.S. at 165; *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940); *Herndon v. Lowry*, 301 U.S. 242, 259 (1937). A statute cannot subsist on indefinite terms, hoping to encompass all offenders. See *Keenan*, *supra* note 17, at 294. These types of statutes leave enforcement of law to the complete discretion of law enforcement officials, and therefore, cannot survive due process analysis. See *id.*

152. See, e.g., *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003); *Ashcroft v. ACLU*, 535 U.S. 564, 584 (2002); *L.A. Police Dep’t v. United Reporting Publ’g Corp.*, 528 U.S. 32, 38 (1999); *City of Houston v. Hill*, 482 U.S. 451, 458-59 (1987); *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 296 (1961); *Schwartz v. Bd. of Bar Exam’rs*, 353 U.S. 232, 239 (1957); *Martin v. City of Struthers*, 319 U.S. 141, 146-49 (1943); *Cantwell v. Connecticut*, 310 U.S. 296, 304-07 (1940). To some extent, flexibility in the law is permissible if it does not reach too broadly. See 21 AM. JUR. 2D *Criminal Law* § 16. However, the concern for minimal guidelines finds its origins as far back as the 19th century. See *United States v. Reese*, 92 U.S. 214, 221 (1876). These problems are aggravated when the statute at issue inhibits freedoms and rights guaranteed under the Constitution. *Colautti v. Franklin*, 439 U.S. 379, 391 (1979).

153. *Hallock*, *supra* note 17, at 1060. If the legislature does not adequately perform the task of defining the penal conduct, it risks creating an environment which encourages discriminatory police conduct. *Id.* Laws without proper standards provide the ability for a police officer and other officials to confront a particular individual, based upon his or her own displeasure, with some characteristic unique to that individual. *Berns*, *supra* note 21, at 719. The freedom, or lack thereof, for the suspect in these cases depends almost completely upon the individual motivations of the officer involved. *Id.*

154. See, e.g., *United States v. Batchelder*, 442 U.S. 114, 123 (1979); *Colautti*, 439 U.S. at 390; *Papachristou*, 405 U.S. at 162; *United States v. Harriss*, 347 U.S. 612, 617 (1954); 21 AM. JUR. 2D *Criminal Law* § 15 (West 2005). The phrasing of the intelligence requirement is different in varying jurisdictions, but the basic premise is the same. See *United States v. Makowski*, 120 F.3d 1078, 1080 (9th Cir. 1997) (stating due process requires that individuals of “common intelligence” should not question the statute’s meaning), *cert. denied*, 522 U.S. 1019 (1997); *United States v. Amer*, 110 F.3d 873, 878 (2d Cir. 1997) (requiring “ordinary people” be able to identify the prohibited conduct), *cert. denied*, 522 U.S. 904 (1997); *State v. Hart*, 687 So. 2d 94, 95 (La. 1997) (stating individuals of “reasonable intelligence” must be able to understand the statute). To decipher whether or not the warning is adequate, the court will measure it against “common understanding or practice.” See 73 AM. JUR. 2D *Statutes* § 243 (West 2005).

meaning of penal statutes.”<sup>155</sup> The rationale behind this provision is simple: no person should be found guilty of conduct which he or she could not reasonably understand was criminal.<sup>156</sup>

## 2. Application of the Vagueness Doctrine to “Stop and Identify” Statutes

Previous cases construing “stop and identify” statutes reveal that these laws are assailable under the void for vagueness doctrine on three fronts.<sup>157</sup> First, the statute is vulnerable to a challenge for failure to provide a standard by which to evaluate the suspect’s response to the identification request.<sup>158</sup> Second, the state courts are clear that additional reliance on language from loitering or vagrancy laws will suffice for a vagueness challenge.<sup>159</sup> Finally, any provision requiring that an individual “account for his presence” to the satisfaction of the police is impermissible, as the statute gives too much discretion to police officers in its enforcement.<sup>160</sup>

The analysis of Section 171.123 of the Nevada Revised Statutes, must begin with a comparison to a statute that meets the three requirements just set forth.<sup>161</sup> A “stop and identify” statute that survives

155. *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). Suspects are entitled to have an understanding of the conduct a state seeks to criminalize. *See Papachristou*, 405 U.S. at 162.

156. *Harriss*, 347 U.S. at 617.

157. *Hallock*, *supra* note 17, at 1061. Presumably, the Nevada ordinance in *Hiibel* is not unconstitutionally vague. *Hiibel v. Sixth Jud. Ct. of Nev.*, 542 U.S. 177, 184 (2004). However, the Court did not affirmatively decide this issue, as *Hiibel* failed to raise this claim. *Id.* The Court did view the Nevada statute as “narrower and more precise” than the “stop and identify” statute the Court previously invalidated in *Kolender v. Lawson*, 461 U.S. 352 (1983). *Id.*

158. *Hallock*, *supra* note 17, at 1061. In *Kolender*, vagueness was the primary challenge to the California statute. *Kolender*, 461 U.S. at 358. The California state courts construed the statute as requiring “credible and reliable” identification, for which it provided no standard. *Id.* The police officer made the ultimate determination as to when the identification is satisfactory. *See id.*

159. *Hallock*, *supra* note 17, at 1061. *See supra* note 133 and accompanying text; *see also Powell v. Stone*, 507 F.2d 93, 95 (9th Cir. 1974) (holding Nevada vagrancy ordinance addressing loitering unconstitutional under the void for vagueness doctrine), *rev’d on other grounds*, 428 U.S. 465 (1976). Loitering statutes can fail a vagueness challenge through a failure to provide fair notice, *see Powell*, 507 F.2d at 95, as well as by encouraging arbitrary police enforcement. *Papachristou*, 405 U.S. at 162. *Papachristou* essentially signaled the end for the vagrancy statute. *See Papachristou*, 405 U.S. at 171.

160. *Hallock*, *supra* note 17, at 1061-62. Both the initial draft and the revised version of the Model Penal Code contained this language. *See supra* notes 26, 28 and accompanying text (stating the text of these early drafts of the Model Penal Code).

161. *See supra* notes 157-60 and accompanying text (providing three challenges to “stop and identify” statutes under the vagueness doctrine). The statute that supposedly fulfills the three possible challenges to a “stop and identify” statute provides:

(1) A person commits a misdemeanor if, when stopped by a peace officer having a

a vagueness challenge is consistent with the Nevada provision in some facets, most notably the stopping of individuals.<sup>162</sup> However, the two statutes differ on one provision that is pertinent to an examination under the void-for-vagueness doctrine.<sup>163</sup> The non-vague “stop and identify” statute provides a clear basis upon which an officer can evaluate the suspect’s response to the identification request.<sup>164</sup> To the contrary, Section 171.123 provides no standard under which to assess a reply.<sup>165</sup>

By ignoring history and tradition,<sup>166</sup> the Nevada “stop and identify”

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reasonable suspicion based on articulable facts, and the reasonable inferences drawn therefrom in light of the officer’s experience, that the person was about to commit, is committing, or had committed a crime, he

(a) refuses to state his name and address or provide documentation of his name and address, such as, but not limited to, a driver’s license, credit card, or social security card, after being requested by a peace officer to produce identification; or  
(b) falsely reports his name or address to a peace officer.

(2) A peace officer who stops a person under this statute may detain the person at the situs of the stop for a reasonable period of time not to exceed twenty minutes for the purpose of verifying the name and address disclosed by the person through sources such as a telephone book, a city directory, or law enforcement records.

Hallock, *supra* note 17, at 1062. Compare NEV. REV. STAT. § 171.123 (2004) with *supra* note 106.

162. See *supra* notes 106, 161, and accompanying text (stating the text of the Nevada “stop and identify” statute and the “stop and identify” statute which survives a vagueness challenge). Both statutes have a foundation in the *Terry* standard. See *id.* The non-vague statute contains a reference to “reasonable suspicion based on articulable facts,” Hallock, *supra* note 17, at 1062, which is quite similar to the language used in *Terry*. *Terry v. Ohio*, 392 U.S. 1, 21 (1968). The Nevada statute requires a similar basis for police to begin an encounter with an individual under suspicion of criminal activity. See NEV. REV. STAT. § 171.123(1) (2004). Also, both statutes provide some limit as to the timeframe of the detention, either 20 or 60 minutes. Hallock, *supra* note 17, at 1062; NEV. REV. STAT. § 171.123(4) (2004).

163. Compare NEV. REV. STAT. § 171.123 (2004) with Hallock, *supra* note 17, at 1062. The difference in the statutes unequivocally makes the Nevada statute susceptible to a vagueness challenge, both for not providing fair notice and also for encouraging arbitrary enforcement. See *supra* notes 150-56 (describing the two components of the void-for-vagueness doctrine).

164. Hallock, *supra* note 17, at 1062. This statute is clear in requiring verification through “a book, a city directory, or law enforcement records.” *Id.*

165. See NEV. REV. STAT. § 171.123(3) (2004). The statute fails to provide any further information, other than requiring identification. *Id.* It is ambiguous as to what the Nevada legislature means by the phrase “identify himself.” *Id.* The Nevada Supreme Court tried to clarify the statute by stating a suspect must disclose his name. See *Hiibel v. Sixth Jud. Ct. of Nev.*, 59 P.3d 1201, 1206 (Nev. 2002), *aff’d*, 542 U.S. 177 (2004) (examining the limits of the identification requirement in the Nevada statute). However, the Nevada Supreme Court differed in how it discussed the requirement, going from stating the suspect must “produce identification” to acknowledging the suspect must “identify himself.” See *id.* Thus, despite the U.S. Supreme Court’s assertion that the Nevada statute did not “require a suspect to give the officer a driver’s license or any other document,” *Hiibel v. Sixth Jud. Ct. of Nev.*, 542 U.S. 177, 185 (2004), the Nevada Supreme Court was, at a minimum, ambiguous in describing the form of a lawful response. See *Hiibel*, 59 P.3d at 1206.

166. *Hiibel*, 542 U.S. at 197 (Breyer, J., dissenting). See *supra* note 77 (providing several Supreme Court decisions that hold that an individual does not have to answer a police officer’s

statute and the line of cases seeking to construe it introduce ambiguity and confusion for an ordinary citizen confronted with an identification request from a law enforcement officer.<sup>167</sup> Citizens will be unsure as to what constitutes a lawful response,<sup>168</sup> with the police officer making the final determination.<sup>169</sup> Giving police officers autonomy to make these determinations certainly increases their discretion, thereby increasing the chances of arbitrary enforcement of the statute with the result being an

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questions). Justice Breyer traced the history of compelling identification in the context of a *Terry* stop. *Hiibel*, 542 U.S. 197 (Breyer, J., dissenting). In announcing the *Terry* standard, Justice White concurred in the judgment, but cautioned that further conditions were necessary. *See Terry v. Ohio*, 392 U.S. 1, 34 (1968) (White, J., concurring) (stating “[o]f course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation”). Justice Breyer continued by discussing the Court’s decision in *Brown v. Texas*. *Hiibel*, 542 U.S. at 197 (Breyer, J., dissenting). In an appendix to the opinion of the Court, the Court made special note of the trial court’s concern regarding the state’s interest in compelling identification. *Brown v. Texas*, 443 U.S. 47, 54 (1979) (noting the trial court asked, “I’m sure [officers conducting a *Terry* stop] should ask everything they possibly could find out. *What I’m asking is what’s the State’s interest in putting a man in jail because he doesn’t want to answer . . .*”). Justice Breyer made special reference to a Court majority statement in *Berkemer v. McCarty*, where the Court noted there was no obligation to respond to police questioning at a traffic stop. *Hiibel*, 542 U.S. at 198 (Breyer, J., dissenting) (quoting *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984)). Justice Breyer concluded:

This lengthy history—of concurring opinions, of references, and of clear explicit statements—means that the Court’s statement in *Berkemer*, while technically dicta, is the kind of strong dicta that the legal community typically takes as a statement of the law. And that law has remained undisturbed for more than 20 years.

*Id.*

167. Brief of Amicus Curiae Privacyactivism et al. at 15, *Hiibel*, 542 U.S. 177 (No. 03-5554). Today, many citizens equate identification with “a credential such as a driver’s license, ID card, or passport, rather than just a verbal act.” *Id.* Indeed, the police officer in this case made a request, not for *Hiibel* to identify himself, but a request to see his identification. Videotape: *Hiibel* Arrest, <http://www.papersplease.org/hiibel/video.html> (last visited March 21, 2005). This present-sense impression is contrary to the construction of the Nevada statute offered by the United States Supreme Court. *Hiibel*, 542 U.S. at 184-85 (majority opinion). The enforcement of the statute was different than that stated by the Court, as the deputy went further than merely requesting a name. *Id.* at 185. These differing ideas surely will not help to reduce confusion at a traffic stop. *See* Brief of Amicus Curiae Privacyactivism et al. at 16, *Hiibel* (No. 03-5554).

168. *See* Brief of Amicus Curiae Privacyactivism et al. at 16, *Hiibel*, 542 U.S. 177 (No. 03-5554). “[T]he concept of identity is itself vague.” *Id.* The amicus brief raises the question of what would be an acceptable response to a request for identity. *Id.* There are numerous possible responses to such a question. *Id.* A person could respond with only a first name, a nickname, initials, perhaps even a single name, if appropriate for the culture. *Id.* at 16-17.

169. *Id.* at 17. The police officer’s satisfaction, or lack thereof, may eventually lead to other concerns. *Id.* The suspect may have to respond to further inquiries about identity, or provide proof of the identity the individual already gave to the officer. *Id.* The suspect’s response may also lead to additional intrusions at the discretion of the officer. *Id.* Justice Breyer noted these same concerns, observing a question about one’s identity could logically continue into further questioning. *See Hiibel*, 542 U.S. at 198 (Breyer, J., dissenting) (asking, “Can a State, in addition to requiring a stopped individual to answer ‘What’s your name?’ also require an answer to ‘What’s your license number?’ or ‘Where do you live?’”).

arrest.<sup>170</sup> In summary, the Nevada statute “does not explain how a pedestrian shall effect this identification, nor does it enumerate identification methods that are unacceptable, nor does it provide a procedure to follow should an officer be dissatisfied with an identification attempt.”<sup>171</sup>

### *B. The Nevada Statute Violates the Probable Cause Requirement for Arrests*

The Supreme Court unanimously held, “A direction by a legislature to the police to arrest all ‘suspicious’ persons would not pass constitutional muster. A vagrancy prosecution may be merely the cloak for a conviction which could not be obtained on the real but undisclosed grounds for the arrest.”<sup>172</sup>

#### 1. Construction of the Probable Cause Requirement

Allowing an arrest for a failure to identify oneself, where the identification request is made without probable cause to believe that the suspect committed a crime, is a violation of the Fourth Amendment.<sup>173</sup>

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170. Tracy Maclin, *What Can the Fourth Amendment Learn from Vagueness Doctrine?*, 3 U. PA. J. CONST. L. 398, 415 (2001) (observing that “controlling police discretion is an important feature of the vagueness doctrine”). The law should not curtail individuals’ freedom to engage in lawful activities by subjecting them to the personal ideals of a police officer, detaining them or not “only at the whim of any police officer.” *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90 (1965) (reasoning a Birmingham ordinance is too vague because of the danger of arbitrary police enforcement). While discussing the stopping of an individual, Professor LaFave noted several court decisions “have conferred upon the police virtual *carte blanche* to stop people because of the color of their skin or for any other arbitrary reason.” 1 WAYNE R. LAFAVE, *SEARCH & SEIZURE* § 1.4 (3d Ed. 1996) (expressing concern over recent court decisions and their effect on arbitrary police enforcement). In the context of loitering laws, discretion afforded to law enforcement officials “lends itself to abuse.” Berns, *supra* note 21, at 718.

171. Brief of Amicus Curiae Privacyactivism et al. at 20, *Hiibel*, 542 U.S. 177 (No. 03-5554).

172. *Papachristou v. Jacksonville*, 405 U.S. 156, 169-70 (1972) (holding a vagrancy statute to be unconstitutionally vague). How is the statement of a court applicable to facts of a case? Was it the facts that were similar? The statement by the Court in *Papachristou* seems similar to the facts in the *Hiibel* case. *Hiibel* 542 U.S. at 180-82. The police officer stopped Dudley Hiibel on a report of a domestic battery. *Id.* at 180. The officer did not get to the point of investigating the battery, instead arresting Dudley on an obstruction charge. NEV. REV. STAT. § 199.280 (2004). With the evidence arguably insufficient to support the domestic battery charge, *see* *County of Humboldt v. Hiibel*, No. XX-69056 (J. Ct. of Union Twp., Nev., Feb. 21, 2001) (motion to dismiss), the only remaining grounds for avoiding a possible false arrest charge would be for a failure to identify and the corresponding obstruction charge, for which the prosecution obtained a conviction. *Hiibel*, 542 U.S. at 182.

173. *Kolender v. Lawson*, 461 U.S. 352, 361 n.10 (1983). Edward Lawson raised this argument to the Supreme Court. *Id.* However, the Supreme Court did not address the issue because it found the California statute unconstitutional under the void-for-vagueness doctrine. *Id.* at 361.

The Fourth Amendment recognizes “[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, and no warrants shall issue, but upon probable cause. . . .”<sup>174</sup> The arrest of Dudley Hiibel is undoubtedly a seizure, thus affording him the protections of the Fourth Amendment.<sup>175</sup>

The Supreme Court has interpreted the Warrant Clause of the Fourth Amendment to require that law enforcement officers should make arrests based on probable cause<sup>176</sup> and under the authority of a warrant.<sup>177</sup> To provide police officers with some tools in crime

174. U.S. CONST. amend. IV. The Fourth Amendment’s guarantee against unreasonable searches and seizures is made applicable to the states through the Fourteenth Amendment’s Due Process Clause. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). By construing the language of the Fourth Amendment, one can conclude the Framers of the Constitution sought to limit the circumstances under which an individual could be arrested. Richard A. Williamson, *The Dimensions of Seizure: The Concepts of “Stop” and “Arrest.”*, 43 OHIO ST. L.J. 771 (1982) (discussing the limitations the Framers wished to place on the ability to take a citizen into custody).

175. See *Terry v. Ohio*, 392 U.S. 1, 10 (1968); Robert R. Rigg, *The Objective Mind and “Search Incident to Citation”*, 8 B.U. PUB. INT. L.J. 281, 290 (1999) (observing “the process of being arrested involves the greatest intrusion into a citizen’s privacy in the continuum of invasiveness”). Any time there is an arrest, there is a seizure of the person. See *Terry*, 392 U.S. at 10. “[A] person is ‘seized’ only when, by means of physical force or a show of authority, his freedom of movement is restrained.” *United States v. Mendenhall*, 446 U.S. 544, 553 (1980).

176. See *Wong Sun v. United States*, 371 U.S. 471, 479 (1963). Probable cause equates to some amount of belief more than mere suspicion. *Id.* The amount of evidence necessary to constitute probable cause is that which would “warrant a man of reasonable caution in the belief that a felony has been committed.” *Id.* (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)). The Court ultimately expanded on this definition, stating “‘probable cause’ to justify an arrest means facts and circumstances within the officer’s knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in circumstances shown, that the suspect has committed, is committing, or is about to commit an offense.” *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979) (citations omitted).

177. See Jeffrey Haningan Kuras et al., *Thirty-First Annual Review of Criminal Procedure: Warrantless Searches and Seizures*, 90 GEO. L.J. 1130, 1130 (2002) (discussing the warrant requirement of the Fourth Amendment). See also Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 488-89 (1995) (analyzing the historical abuses that the Fourth Amendment was enacted to prevent); Nathan Vaughan, Note, *Overgeneralization of the Hot Pursuit Doctrine Provides Another Blow to the Fourth Amendment in Middletown v. Flinchum*, 37 AKRON L. REV. 509, 512-14 (2004) (discussing the history of the warrant requirement). The Supreme Court stated:

The arrest warrant procedure serves to insure that the deliberate, impartial judgment of a judicial officer will be interposed between the citizen and the police, to assess the weight and credibility of the information which the complaining officer adduces as probable cause. To hold that an officer may act in his own, unchecked discretion upon information too vague and from too untested a source to permit a judicial officer to accept it as probable cause for an arrest warrant, would subvert this fundamental policy.

*Wong Sun*, 371 U.S. at 481-82. While discussing searches, the Court recognized those made outside of the warrant process are “per se unreasonable,” subject only to some limited exceptions. *Katz v. United States*, 389 U.S. 347, 357 (1967). Cf. *County of Riverside v. McLaughlin*, 500 U.S. 44, 54

prevention, various exceptions to the warrant requirement emerged.<sup>178</sup> However, the Court still requires that in the case of an exception to the warrant requirement as in the *Hiibel* case a warrantless arrest,<sup>179</sup> probable cause must be present before it is “reasonable” under the Fourth Amendment.<sup>180</sup> The Court recognized the potential problem, stating, “We allow our police to make arrests only on ‘probable cause’. . . . Arresting a person on suspicion, like arresting a person for investigation, is foreign to our system.”<sup>181</sup>

## 2. The Text of the Nevada “Stop and Identify” Statute

The text of Section 171.123 of the Nevada Revised Statutes provides a solution to the constitutional problem implicated by an arrest for violating identification requirements in “stop and identify” statutes.<sup>182</sup> Section 171.123 only grants a police officer the authority to

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(1991). The Court established the ability to arrest a suspect without a properly-secured warrant. *Gerstein v. Pugh*, 402 U.S. 103, 113-14 (1975). However, the Court emphasized in the case of a warrantless arrest police must take the suspect before a magistrate for a probable cause determination. *Id.* at 114. The Court held “the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest.” *Id.*

178. Kuras, *supra* note 177, at 1130.

There are . . . many exceptions to the probable cause and warrant requirements, including investigatory detentions, warrantless arrests, searches incident to a valid arrest, seizure of items in plain view, exigent circumstances, consent searches, vehicle searches, container searches, inventory searches, border searches, searches at sea, administrative searches, and searches in which the special needs of law enforcement make the probable cause and warrant requirements impracticable.

*Id.* One of the most well known exceptions is one applicable to the *Hiibel* case, the “stop and frisk” doctrine, delineated in *Terry*, 392 U.S. at 25-27. See *supra* notes 67-73 and accompanying text (discussing the *Terry* case). Though a probable cause determination by a magistrate prior to each arrest would be ideal, the handicap to law enforcement would be too great. *Gerstein*, 420 U.S. at 113. Thus, the Court “has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant.” *Id.*

179. See Kuras, *supra* note 177, at 1144-47.

180. William D. Anderson, Jr., *Investigation and Police Practices: Overview of the Fourth Amendment*, 82 GEO. L.J. 597, 597 (1994) (providing an overview of searches and seizures governed by the Fourth Amendment). Once a law enforcement officer does not act under the Warrant Clause, the Fourth Amendment requires searches and seizures be “reasonable.” See U.S. CONST. amend. IV. In this situation, the Court required that the seizure be based upon probable cause. *Carroll v. US*, 267 U.S. 132, 155-56 (1925). Even with the *Terry* case creating an exception to the probable cause requirement by allowing a “stop” based on reasonable suspicion, the Supreme Court has been careful to limit its application. *Dunaway v. New York*, 442 U.S. 200, 210 (1979). See also *DeFillippo*, 443 U.S. at 44 (Brennan, J., dissenting) (observing law enforcement authority to detain suspects on the basis of reasonable suspicion is “narrowly drawn”) (quoting *Terry*, 392 U.S. at 27).

181. *Papachristou v. Jacksonville*, 405 U.S. 156, 169 (1972).

182. See *supra* note 106 (stating the text of the Nevada “stop and identify” statute). A logical place to begin any legal analysis is with the text of statute. See Wilson R. Huhn, *Teaching Legal*



*detain* individuals who fail to offer identification in response to an officer's request.<sup>183</sup> The Nevada statutes contemplate a progression from reasonable suspicion under Section 171.123 to arrest under Section 171.1231 "if probable cause for an arrest appears."<sup>184</sup> This process appears to be analogous to the one that the Supreme Court proffered in *Terry*.<sup>185</sup> The Nevada prosecutor's office surely must have gleaned as much from the text of the statute, as it eventually charged Dudley Hiibel not for a failure to identify himself, but for delaying an officer.<sup>186</sup>

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*Analysis Using a Pluralistic Model of Law*, 36 GONZ. L. REV. 433, 440-42 (2001) (discussing the applicability of textual analysis in solving legal problems).

183. NEV. REV. STAT. § 171.123 (2004). The first two words of the statute are "temporary detention." *Id.* By failing to identify himself, Subsection 3 became directly applicable to Hiibel. NEV. REV. STAT. § 171.123(3) (2004). Under this provision, the police officer "may detain" the suspect, but "only to ascertain his identity." *Id.* This section of the code is simply void of any allowance of arrest for a failure to identify oneself. *See id.* The Court in *Hiibel* references numerous state "stop and identify" statutes. *Hiibel v. Sixth Jud. Ct. of Nev.*, 542 U.S. 177, 182-83 (2004). Of these, several agree with the Nevada legislature and allow only for a brief detention. *See, e.g.*, ALA. CODE § 15-5-30 (2005) (stipulating that an officer "may stop" an individual); COLO. REV. STAT. ANN. § 16-3-103(1) (West 2003) (stating that a "stopping shall not constitute an arrest"); DEL. CODE ANN. tit. 11, § 1902(b) (2003) (allowing a suspect "who fails to give identification. . . [to] be detained and further questioned and investigated); 725 ILL. COMP. STAT. 5/107-14 (2003) (referring to temporary questioning without arrest); KAN. STAT. ANN. § 22-2402(1) (2004) (providing the officer's actions occur "without making an arrest"). *But see* DEL. CODE ANN. tit. 11, § 1321(6) (2003) (incorporating an identification requirement into a loitering statute); FLA. STAT. ANN. § 856.021(2) (West 2002) (considering the failure to present identification and "dispel[ling] alarm" are part of a process prior to arrest); GA. CODE ANN. § 16-11-36(b) (2005) (stating the failure to present identification is a factor which a police officer can consider for a loitering offense, a misdemeanor). The Supreme Court commented on the brief nature of traffic stops:

State laws governing when a motorist detained pursuant to a traffic stop may or must be issued a citation instead of taken into custody vary significantly . . . but no State requires that a detained motorist be arrested unless he is accused of a specified serious crime, refuses to promise to appear in court, or demands to be taken before a magistrate.

*Berkemer v. McCarty*, 468 U.S. 420, 437 n.26 (1984).

184. NEV. REV. STAT. § 171.1231 (2004). The heading of this section is even more informative, providing for "[a]rrest if probable cause appears." *Id.* The full text of the statute reads, "At any time after the onset of the detention pursuant to NRS 171.123, the person so detained shall be arrested if probable cause for an arrest appears. If, after inquiry into the circumstances which prompted the detention, no probable cause for arrest appears, such person shall be released." *Id.*

185. *Terry v. Ohio*, 392 U.S. 1, 10 (1968). The majority in *Terry* discussed a set of "flexible responses," allowing the police officer to alter his actions based upon the facts and circumstances available. *Id.* The Court takes care to note the distinction between a "stop" based upon reasonable suspicion, and an "arrest." *Id.* The majority stated, "If the 'stop' and the 'frisk' give rise to *probable cause* to believe that the suspect has committed a crime, *then* the police should be empowered to make a formal 'arrest,' and a full incident 'search' of the person." *Id.* (emphasis added).

186. *County of Humboldt v. Hiibel*, No. XX-69056, slip op. at 2 (J. Ct. of Union Twp., Nev., Feb. 21, 2001); NEV. REV. STAT. § 199.280 (2004). The domestic battery charge was later dismissed. *Hiibel*, No. XX-69056 (motion to dismiss). It is certainly possible that Hiibel was not

### 3. Application to the Facts at Issue

Hiibel did not contest the presence of reasonable suspicion in this case.<sup>187</sup> With a lawful basis for a detention, the officer, Deputy Dove, was well within his rights to conduct an investigation.<sup>188</sup> All that was necessary for an arrest was probable cause.<sup>189</sup> Dove lacked probable cause in this case, as he completed little investigation prior to arresting Hiibel.<sup>190</sup> With no real investigation performed prior to arrest, there could be no graduation to probable cause concerning any actual basis for the traffic stop,<sup>191</sup> resulting in a violation of Hiibel's Fourth Amendment rights.<sup>192</sup> By refusing to identify himself, Hiibel merely asserted his

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charged under the Nevada "stop and identify" statute because it does not contain an arrest provision. See NEV. REV. STAT. § 171.123 (2004). Even after discussing the identification requirement, the Justice Court still found it necessary to convict Hiibel on the obstruction charge. *Hiibel*, No. XX-69056, at 2-3.

187. Petition for a Writ of Certiorari at 8, *Hiibel v. Sixth Jud. Ct. of Nev.*, 59 P.3d 1201 (Nev. 2002) (No. 38876). Indeed, Hiibel conceded there was articulable suspicion that both a battery had taken place as well as a possible offense for driving under the influence. *Id.* Hiibel agreed the officer was entitled to conduct an investigation. *Id.* The reasonable suspicion spawned from an anonymous tip phoned into the sheriff's department. *Hiibel*, 542 U.S. at 180. With reasonable suspicion being a much less demanding standard than probable cause, the Supreme Court held an anonymous tip served as a basis of reasonable suspicion. See *Alabama v. White*, 496 U.S. 325, 330-31 (1990) (analyzing whether a sufficiently corroborated tip can suffice to form reasonable suspicion). Once the tip is corroborated, as Deputy Dove did in the present case, the Court held the officer has reasonable suspicion with which to conduct an investigation. *Id.* at 331.

188. See, e.g., Terrence C. Gill, Note, *Regulating the Police in Investigatory Stops: A Practical Alternative to Bright Line Rules*, 59 S. CAL. L. REV. 183, 185-86 (1985) (analyzing a police officer's conduct after a lawful *Terry* stop); Saltzburg, *supra* note 67, at 952 (stating "[a] *Terry* stop enables the police to ascertain whether what looks like criminal activity, actually is"). Cf. *Terry*, 392 U.S. at 24 (discussing an officer's ability to conduct a protective search in the presence of a reasonable belief that the suspect has a weapon). The ability to investigate suspicious conduct is certainly in line with a police officer's beliefs as to his or her authority. James J. Fyfe, *Terry "On The Job": Terry: An Ex-Cop's View*, 72 ST. JOHN'S L. REV. 1231, 1231 (1998) (analyzing the *Terry* decision from the perspective of a former New York City police officer). See also John F. Wagner, Jr., Annotation, *Law Enforcement Officer's Authority, Under Federal Constitution's Fourth Amendment, To Stop and Briefly Detain, and To Conduct Limited Protective Search Of or "Frisk," For Investigative Purposes, Persons Suspected of Criminal Activity – Supreme Court Cases*, 104 L. ED. 2D 1046 (2005).

189. See *supra* notes 172-85 and accompanying text (adhering to the view that probable cause is necessary for an arrest subsequent to a traffic stop under both Supreme Court precedent and the Nevada "stop and identify" statute at issue in this case).

190. Videotape: Hiibel Arrest, (<http://www.papersplease.org/hiibel/video.html> (last visited March 21, 2005)). Deputy Dove referenced the battery or "fight" only once before trying to obtain identification from Hiibel. *Id.*

191. With the lack of investigation performed at the point of arrest, taking Hiibel into custody for delaying an officer seems questionable. NEV. REV. STAT. § 199.280 (2004). Justice Stevens remarked that given the majority's view of the facts, Hiibel's "refusal to cooperate did not impede the police investigation." *Hiibel*, 542 U.S. at 196 (Stevens, J., dissenting).

192. See U.S. CONST. amend. IV; *supra* notes 172-85. The Ninth Circuit described the

privileges and rights as others had done in similar situations.<sup>193</sup> While analyzing a “stop and identify” statute under the vagueness doctrine, the Michigan Court of Appeals authored a poignant statement on exceeding the boundaries of the Fourth Amendment by allowing activities on less than probable cause:

[T]he ordinance undercuts the probable cause standard of the Fourth Amendment. A police officer may make only a limited search of a person he has stopped on suspicion, and then only if he has reason to believe the person is armed and dangerous. The Detroit ordinance sanctions full searches on suspicion, without regard for dangerousness, of those persons whose activities fall within the vague parameters of the ordinance.

. . . [T]he ordinance is void, the search incident to arrest for violation of the ordinance was unlawful.<sup>194</sup>

### *C. An Identification Requirement Infringes Upon Fifth Amendment Rights*

The Supreme Court has definitively recognized the Fifth

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situation involved with the Nevada statutes. *Carey v. Nev. Gaming Control Bd.*, 279 F.3d 873, 880 (9th Cir. 2002). Carey was charged with obstructing a police officer, NEV. REV. STAT. § 197.190 (2004), after he violated the Nevada “stop and identify” statute. NEV. REV. STAT. § 171.123 (2004). The court discussed bootstrapping the authority to arrest on less than probable cause. *Carey*, 279 F.3d at 880. The agent in *Carey* was able to make an arrest even though he had no probable cause to believe any of the laws at issue had been violated. *Id.* The court concluded this circumstance was “unreasonable.” *Id.* at 881.

193. *See, e.g.*, *See v. City of Seattle*, 387 U.S. 541, 541 (1967); *Miller v. United States*, 230 F.2d 486, 487 (5th Cir. 1956); *District of Columbia v. Little*, 178 F.2d 13, 14 (D.C. Cir. 1949), *aff’d* 339 U.S. 1 (1950). Mr. See refused to allow city fire officials to enter his warehouse without a warrant and without probable cause. *See*, 387 U.S. at 541. His conviction was reversed. *Id.* at 546. Miller was charged with obstruction after refusing to allow a United States Marshal to enter her home without a search warrant. *Miller*, 230 F.2d at 487. Her conviction was also reversed. *Id.* at 490. Little was prosecuted for hindering a health official in performing his duty when she refused to allow him to enter her home without a warrant. *Little*, 178 F.2d at 14. A lower court reversed her conviction, and that decision was affirmed. *Id.* at 21. The Supreme Court overturned convictions based on seizures or other intrusive detentions performed by police officers on reasonable suspicion alone. *See, e.g.*, *United States v. Place*, 462 U.S. 696, 703 (1983) (stating only “when the nature and extent of the detention are minimally intrusive of the individual’s Fourth Amendment interests, the opposing law enforcement interests can support a seizure based on less than probable cause”); *Florida v. Royer*, 460 U.S. 491, 496 (1983) (taking Royer into a room for interrogation was too intrusive, and could only be performed on the basis of probable cause); *People v. DeFillippo*, 80 Mich. App. 197, 202 (1977) (reversing defendant’s conviction based upon the impermissible scope of a search), *rev’d on other grounds*, 443 U.S. 31 (1979).

194. *DeFillippo*, 80 Mich. App. at 202-03.

Amendment right to remain silent.<sup>195</sup> Defendants, suspects, witnesses, and others have asserted this right in a variety of contexts.<sup>196</sup> Given the breadth of the right to remain silent and the fact that numerous Supreme Court justices have argued that citizens should not be compelled to answer a police officer's questions,<sup>197</sup> it comes as no surprise that Hiibel chose to withhold his identity.<sup>198</sup> However, the Fifth Amendment privileges only apply to those compelled statements which are both

195. *Malloy v. Hogan*, 378 U.S. 1, 8 (1964) (recognizing a right to remain silent in a custodial situation is grounded in the Fourteenth Amendment). *Cf.* *United States v. Drayton*, 536 U.S. 194, 197 (2002) (reviewing the case as an analysis of a citizen's right not to cooperate); Michael R. Patrick, Note, *Toward the Constitutional Protection of a Non-Testifying Defendant's Prearrest Silence*, 63 *BROOK. L. REV.* 897, 930 (1997) (noting the privilege against self-incrimination applies before an official arrest). The right to remain silent is derived from the Fifth Amendment's provision that "no person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. Concerning the right to remain silent, Justice Robert Jackson once stated, "[A]ny lawyer worth his salt will tell suspects in no uncertain terms to make no statement to police under any circumstances." *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in part and dissenting in part).

196. *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) (observing privileges guaranteed by the Fifth Amendment are available in all settings where coercion may force self-incrimination); Michael Avery, *Confronting Issues in Criminal Justice: Law Enforcement and Criminal Offenders: You Have a Right to Remain Silent*, 30 *FORDHAM URB. L.J.* 571, 575 (2003) (noting that privilege against self-incrimination is available outside criminal proceedings). In any criminal trial, the defendant has the right to refuse to testify. *See Carter v. Kentucky*, 450 U.S. 288, 299-300 (1981). The target of a grand jury investigation enjoys this same right. *See Chavez v. Martinez*, 538 U.S. 760, 767-68 (2003). Finally, *Miranda* itself dealt with an arrested suspect enjoying this right even though he was merely the subject of custodial interrogation at the police station. *Miranda*, 384 U.S. at 467. Indeed, the Supreme Court said of the Fifth Amendment privilege:

The Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.

*Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). This casenote does not endeavor to raise the argument that *Miranda* warnings apply to traffic or *Terry* stops. *See Berkemer v. McCarty*, 468 U.S. 420, 440 (1984) (stating, "The comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that *Terry* stops are subject to the dictates of *Miranda*"); Richard A. Williamson, *The Virtues (And Limits) of Shared Values: The Fourth Amendment and Miranda's Concept of Custody*, 1993 *U. ILL. L. REV.* 379, 380-81 (1993) (noting the Court's decision in *Berkemer* held *Miranda* warnings inapplicable in the context of a traffic stop); Note, *supra* note 19, at 667-68 (noting the Fourth Amendment provides safeguards for a *Terry* stop, whereas the Court intended *Miranda* to protect individuals subject to a custodial interrogation).

197. *See supra* notes 77-79 and accompanying text (discussing the Supreme Court's statements surrounding compelling an individual to answer a police officer's questions). Furthermore, the Court also stated, "We have consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure." *Florida v. Bostick*, 501 U.S. 429, 437 (1991). Justice Breyer viewed this long line of cases as establishing a right to refuse to answer questions, a principle to which Hiibel adhered. *See Hiibel v. Sixth Jud. Ct. of Nev.*, 542 U.S. 177, 197-99 (2004) (Breyer, J., dissenting). Justice Breyer regarded this "strong dicta . . . as a statement of the law." *Id.* at 198.

198. *Hiibel*, 542 U.S. at 193 (Stevens, J., dissenting).

testimonial and incriminating in nature.<sup>199</sup>

### 1. Testimonial Communication

In examining the testimonial communication element, the Supreme Court observed, “In order to be testimonial, an accused’s communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a ‘witness’ against himself.”<sup>200</sup> Any response by *Hiibel* to an identification request would clearly relay a factual assertion.<sup>201</sup> Traditionally, the Court has viewed such verbal acts as meeting this testimonial requirement.<sup>202</sup> Thus, Justice Stevens correctly asserted that identifying oneself under the circumstances of this case would be a testimonial communication.<sup>203</sup>

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199. *Doe v. United States*, 487 U.S. 201, 207 (1988) (citing *Fisher v. United States*, 425 U.S. 391, 409 (1976)). See also *Williamson*, *supra* note 196, at 388. Furthermore, the Fifth Amendment in no way inhibits law enforcement officials from asking questions. *United States v. Monia*, 317 U.S. 424, 433 (1943).

200. *Pennsylvania v. Muniz*, 496 U.S. 582, 589 (1990) (quoting *Doe*, 487 U.S. at 210). See also *United States v. Hubbell*, 530 U.S. 27, 35 (2000). The majority in *Hiibel* did not address whether identifying oneself in the context of a traffic stop would be testimonial. *Hiibel*, 542 U.S. at 189 (stating that though the State of Nevada urged the Court to hold an identification requirement is nontestimonial, “[w]e decline to resolve the case on that basis”). However, the Court does go on to recognize, “Stating one’s name may qualify as an assertion of fact relating to identity. Production of identity documents might meet the definition as well.” *Id.*

201. *Muniz*, 496 U.S. at 589. Disclosing one’s identity does not fall within an exception to the testimonial element, such as the disclosure of real or physical evidence. *Schmerber v. California*, 384 U.S. 757, 764 (1966). The Court has found certain acts and the production of physical evidence are not testimonial, falling outside the protection of the Fifth Amendment. *E.g.*, *United States v. Dionisio*, 410 U.S. 1, 7 (1973) (ruling a voice recording was not testimonial); *Gilbert v. California*, 388 U.S. 263, 266 (1967) (holding taking handwriting exemplars did not violate the protections of the Fifth Amendment); *United States v. Wade*, 388 U.S. 218, 222 (1967) (stating a requirement that an individual participate in a lineup is not a testimonial act); *Schmerber*, 384 U.S. at 765 (holding the act of providing a blood sample was not testimonial or communicative); *Holt v. United States*, 218 U.S. 245, 252-53 (1910) (ruling having a prisoner wear a particular piece of clothing was admissible under the Fifth Amendment).

202. *Doe*, 487 U.S. at 213-14 (stating expressly, “There are very few instances in which a verbal statement, either oral or written, will not convey information or assert facts. The vast majority of verbal statements thus will be testimonial and, to that extent at least, will fall within the privilege.”). See also *Patrick*, *supra* note 195, at 931. In *Muniz*, the Court discussed the distinction between the production of physical evidence and a verbal response to a question. *Muniz*, 496 U.S. at 593. The Court noted providing a blood sample, thereby disclosing physical evidence, was nontestimonial. *Id.* However, the Court contrasted this to a verbal act, stating “had the police instead asked the suspect directly whether his blood contained a high concentration of alcohol, his affirmative response would have been testimonial even though it would have been used to draw the same inference concerning his physiology.” *Id.*

203. *Hiibel*, 542 U.S. at 194 (Stevens, J., dissenting). See generally Charles Gardner Geyh, *The Testimonial Component of the Right Against Self-Incrimination*, 36 CATH. U.L. REV. 611, 628-41 (1987) (discussing inconsistencies with Supreme Court decisions on the testimonial component and offering a more precise definition). The majority also seemed to agree with Justice Stevens, as

## 2. The Nevada Statute Imposes the Danger of Self-Incrimination

The Fifth Amendment privilege against self-incrimination extends not only to statements that in and of themselves are incriminating, but also to those which by association lead to the discovery of incriminating evidence.<sup>204</sup> The majority in *Hiibel* chose to resolve the Fifth Amendment challenge on the ground that disclosing a person's name is not incriminating.<sup>205</sup>

The majority appears too ready to disregard all possibilities that disclosing his name would incriminate Hiibel.<sup>206</sup> One commentator noted that “[i]t is not necessary, in order to assert the Fifth Amendment privilege against self-incrimination, that the testimony will, with certainty, lead to criminal conviction of the witness . . .”<sup>207</sup> This scenario, a criminal conviction or at the least detention, was possible for Hiibel under Nevada law by the mere disclosure of his name.<sup>208</sup> Indeed,

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Justice Kennedy wrote, “Stating one’s name may qualify as an assertion of fact relating to identity. Production of identity documents might meet the definition as well.” *Hiibel*, 542 U.S. at 189.

204. *Ohio v. Reiner*, 532 U.S. 17, 20 (2001) (quoting *Hoffman v. United States*, 341 U.S. 479, 486 (1951)); 21A AM. JUR. 2D *Criminal Law* § 1138 (West 2005) (defining what statements are incriminating). The Fifth Amendment guards against those “disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.” *Kastigar v. United States*, 406 U.S. 441, 445 (1972). In *Mason v. United States*, 244 U.S. 362 (1917), Chief Justice John Marshall stated:

When a question is propounded, it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it may incriminate himself, then he must be the sole judge what his answer would be.

*Id.* at 364-65 (citations omitted).

205. *Hiibel*, 542 U.S. at 189. The Court maintains the police officer in this case could not have used Hiibel’s name in any way to incriminate Hiibel. *See id.* at 190. However, while making the conclusion that a name is not incriminating, the majority takes care to note “a case may arise where there is a substantial allegation that furnishing identity at the time of a stop would have given the police a link in the chain of evidence needed to convict the individual . . .” *Id.* at 191.

206. *See Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). In *Innis*, the Court noted the Fifth Amendment privilege against self-incrimination does not “distinguish degrees of incrimination.” *Id.* at 301 n.5.

207. 81 AM. JUR. 2D *Witnesses* § 91 (West 2005).

208. *See NEV. REV. STAT. § 33.018* (2004). The police officer was investigating a report of an assault. *Hiibel*, 542 U.S. at 180. The assault involved Hiibel and his daughter. Hiibel’s home page, Facts page, <http://www.papersplease.org/hiibel/facts.html> (last visited March 21, 2005). Thus, through simple police work upon discovering everyone’s identity, the officer would have discovered the two involved in the assault were related. *Id.* As a result, Hiibel could have been subjected to a charge of domestic violence. NEV. REV. STAT. § 33.018(1)(b) (providing that a person is guilty of domestic violence when he commits an assault upon any person to whom he is related by blood). Once the officer established that a domestic battery occurred, an arrest would be required under Nevada law. NEV. REV. STAT. § 171.137(1) (2004). Two examples are illustrative of the potential implications stemming from an identification requirement. *See Kirby v. Illinois*, 406 U.S. 682, 684

a person's name provides access to a wide range of information which may be used to his detriment.<sup>209</sup> Individuals similarly situated to *Hiibel* have a plethora of different rationales for refusing to respond to police officers' inquiries.<sup>210</sup>

(1972); *United States v. Purry*, 545 F.2d 217, 219 (D.C. Cir. 1976). In *Kirby*, the police officers requested identification from the suspect at a *Terry* stop, and he subsequently produced the identification of a robbery victim. *Kirby*, 406 U.S. at 684. An identification requirement thus, ultimately, led to the suspect's arrest. *Id.* A similar situation happened in *Purry*, where an identification request ultimately led to the connection of the suspect with an armed robbery. *Purry*, 545 F.2d at 219.

209. Brief of Amicus Curiae Electronic Privacy Information Center et al. at 3, *Hiibel*, 542 U.S. 177 (No. 03-5554). Databases and systems accessible by police include the National Crime Information Center ("NCIC"), the Multi-State Anti-Terrorism Information Exchange ("MATRIX"), the United States Visitor and Immigrant Status Indicator Technology System ("US-VISIT"), the Driver and Vehicle Information Database ("DAVID"), and the Transportation Workers Identification Credential ("TWIC"). *Id.* The amicus brief goes on to state:

Police officers today have access to an extraordinary range of detailed personal information in government databases that could easily give rise to further investigations unrelated to the reasons for the initial detention. Moreover, much of the information contained in these databases is often inaccurate and unreliable. Some of the information is obtained from private record systems and was never intended to be used for law enforcement purposes.

*Id.* at 5. Justice Stevens asks the question, if a name is not incriminating or useful to a police officer in the course of an investigation, "why else would an officer ask for it?" *Hiibel*, 542 U.S. at 195-96 (Stevens, J., dissenting). To reiterate, the majority in *Hiibel* viewed an individual's name or identity as neutral, not incriminating. *See id.* at 191 (majority opinion). This idea is in accord with a previous statement from the Court concerning a similar type of statute. *See California v. Byers*, 402 U.S. 424, 429 (1971) (plurality opinion); *Hallock*, *supra* note 17, at 1076 (referencing the *Byers* decision as requiring a substantial danger of self-incrimination before Fifth Amendment privileges would be violated). However, it is possible to distinguish the statute in *Byers* and the "stop and identify" statute in *Hiibel*, in that, the former was mainly regulatory in nature. *Hallock*, *supra* note 17, at 1077. *Compare* CAL. VEH. CODE § 20002 (Deering 1971) and NEV. REV. STAT. § 171.123 (2004).

210. *See* Sara Ciarelli, Comment, *Pre-Arrest Silence: Minding That Gap Between Fourth Amendment Stops and Fifth Amendment Custody*, 93 J. CRIM. L. & CRIMINOLOGY 651, 673-75 (2003) (reviewing various reasons a person may refuse to respond to a police officer's questions). Though analyzing silence from the perspective of using such silence as evidence of guilt, the reasoning offered for refusing to answer is applicable in the case of a "stop and identify" statute:

A person may refuse to speak to police simply out of fear and intimidation. A person may refuse to respond to questioning because she may be involved in unrelated transactions, criminal or non-criminal, that she may not want to reveal to the police. A suspect may refuse to respond to questioning because an accomplice or other third-party has intimidated him with threats if he talks to the police. A suspect may refuse to respond in order to protect a friend or family member. Furthermore, the right to silence is a right upon which many would rely; because of the repetition of 'you have the right to remain silent' in the media, silence may appear to provide the only safe harbor from criminal prosecution and conviction.

Thus, the reasons for silence are varied and many of these reasons have nothing to do with guilt associated with committing the specific crime. Nevertheless, a person accused of a crime may invoke her Fifth Amendment rights through silence because she is in an intimidating situation - a police officer may pat down her body searching for weapons, or

*D. Individual and Governmental Interests Involved in the Hiibel Decision*

The final method for analyzing the *Hiibel* decision is to examine the reasonableness of the intrusion to the individual, a rationale the Supreme Court first proposed in the *Terry* case.<sup>211</sup> The Court wrote in *Terry* that there is a “central inquiry under the Fourth Amendment—the reasonableness in all the circumstances of the particular governmental invasion of a citizen’s personal security.”<sup>212</sup> This inquiry should consist of balancing an individual’s interests against the governmental interests furthered by an identification requirement.<sup>213</sup>

1. Individual Interests

Hiibel argued that his First, Fourth and Fifth Amendment liberty interests were at stake.<sup>214</sup> At least one Justice characterized the individual’s interests involved in compelled identification as “safeguarding individual freedom and privacy from arbitrary governmental interference.”<sup>215</sup> Hiibel certainly has a privacy interest

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badger her with questions in a setting that is removed from the public.

*Id.* at 673-74 (citations omitted). Commentaries on the use of pre-arrest silence against the accused at a subsequent trial are helpful in understanding the depth to which the Court has protected against the use of silence as evidence of guilt. See generally Jane Elinor Notz, Comment, *Prearrest Silence as Evidence of Guilt: What You Don’t Say Shouldn’t Be Used Against You*, 64 U. CHI. L. REV. 1009, 1011 (1997) (arguing that pre-arrest silence is not admissible as evidence of guilt). But see Barbara Rook Snyder, *A Due Process Analysis of the Impeachment Use of Silence in Criminal Trials*, 29 WM. & MARY L. REV. 285, 297-301 (1988) (maintaining the position that in certain situations the use of pre-arrest silence should be admissible as probative of a suspect’s guilt).

211. *Terry v. Ohio*, 392 U.S. 1, 19 (1968).

212. *Id.* See also *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979) (observing one purpose of the Fourth Amendment is to impose a standard of reasonableness); *United States v. Chadwick*, 433 U.S. 1, 9 (1977) (holding a fundamental inquiry in Fourth Amendment analysis is whether the seizure is reasonable).

213. *United States v. Place*, 462 U.S. 696, 703 (1983) (stating the reasonableness of a Fourth Amendment seizure is determined by a “balancing of the competing interests”); *County of Riverside v. McLaughlin*, 500 U.S. 44, 53 (1991) (noting the Court established a balance between individuals interests and those of law enforcement). See Jason M. Katz, Note, *Atwater v. City of Lago Vista: Buckle-Up or Get Locked-Up: Warrantless Arrests for Fine-Only Misdemeanors Under the Fourth Amendment*, 36 AKRON L. REV. 491, 525-27 (2003) (describing how the Court should have proceeded in *Atwater* to a balancing of the interests involved).

214. Brief for the Petitioner at 33, 2003 WL 23144815, *Hiibel*, 542 U.S. 177 (No. 03-5554). Hiibel argued his interests in security, privacy, and mobility outweighed any possible governmental interests involved. *Id.*

215. *Hallock*, *supra* note 17, at 1070 (quoting *Kolender v. Lawson*, 461 U.S. 352, 365 (1983) (Brennan, J., concurring)). Without the ability to refuse to answer an officer’s request for identification, an individual has no means of safeguarding personal privacy and security rights. *Id.*



that the police officer encroached upon,<sup>216</sup> and that interest can easily justify withholding his name.<sup>217</sup> Furthermore, with the ability to arrest a person for a refusal to identify himself, the police officers have a legitimate ability to impinge upon one's right of locomotion, or the freedom to move or travel.<sup>218</sup> The Court in *Kolender* discussed this very issue, observing that the compelled identification scheme in that case implicated the right of locomotion.<sup>219</sup> Finally, the Court has dealt with the effect of an identification requirement on other First Amendment rights, though in a different context.<sup>220</sup>

The "stop and identify" statute gives too much authority to police

216. *Schmerber v. California*, 384 U.S. 757, 767 (1966) (stating "[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted State intrusion). The Court in *Terry* stated:

Moreover, it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a "petty indignity." It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.

*Terry*, 392 U.S. at 16-17. A privacy interest exists when an individual has a subjective interest of privacy which society objectively deems is reasonable. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Without a reasonable expectation of privacy, the adverse government activity fulfills the reasonableness requirement of the Fourth Amendment. *See, e.g., California v. Greenwood*, 486 U.S. 35, 39-40 (1988) (holding there was no expectation of privacy in one's garbage at the curb, and the subsequent search was constitutional).

217. Reply Brief for the Petitioner at 9, *Hiibel*, 542 U.S. 177 (2004) (No. 03-5554). *Hiibel* argued he had a privacy interest in his name. *Id.* *Hiibel* firmly held the belief that he had a privacy interest in his name, evidenced by the fact that he repeatedly refused to disclose it. *Hiibel*, 542 U.S. at 181. Additionally, society would likely recognize a privacy interest in a person's name, as most people will not readily disclose their names to strangers. Reply Brief for the Petitioner at 10, *Hiibel*, 542 U.S. 177 (No. 03-5554). Additionally, most individuals keep their names secret given the wide range of databases available to a police officer. *See supra* note 209 and accompanying text (examining the databases police officers can access with an individual's name).

218. *E.g. Dunn v. Blumstein*, 405 U.S. 330, 338 (1972) (stating the "freedom to travel throughout the United States has long been recognized as a basic right under the Constitution"); *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) (recognizing that all individuals should be free to travel), *overruled in part on other grounds, Edelman v. Jordan*, 415 U.S. 651 (1974). *See generally* Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1264-83 (1990) (providing an in-depth analysis of the right of locomotion). In discussing the right of locomotion, Professor Maclin argues "substantial discretion given to police officers in their confrontations with citizens has severely restricted that right." *Id.* at 1260.

219. *Kolender*, 461 U.S. at 358 (stating the statute "implicates consideration of the constitutional right to freedom of movement").

220. *See Talley v. California*, 362 U.S. 60 (1960). In *Talley*, a Los Angeles city ordinance did not allow the distribution of pamphlets omitting the author's and manufacturer's names. *Id.* at 60-61. *Talley* distributed pamphlets calling for the boycott of certain merchants, and the police arrested him. *Id.* at 61. In ruling the ordinance was facially invalid, the Court stated "an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression." *Id.* at 64. The Court further remarked, "[T]here are times and circumstances when States may not compel members of groups engaged in the dissemination of ideas to be publicly identified." *Id.* at 65.

officers who are all too ready to investigate.<sup>221</sup> The effect of this is a constraint on the rights of innocent citizens.<sup>222</sup> The result is even more burdensome if the individual involved is a member of a minority group.<sup>223</sup>

## 2. Governmental Interests

The Nevada courts delineated various governmental interests furthered by an identification requirement, including crime prevention, crime detection, police officer safety, public safety, and even terrorism.<sup>224</sup> These principles are important and deserve protection by the courts.<sup>225</sup> However, the Nevada statute does not protect and advance

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221. See Fyfe, *supra* note 17, at 470. Professor Fyfe even comments about those police officers becoming less trusting in dealing with individuals, which could lead to more suspicion and then arrests under the auspices of a “stop and identify” statute. See *id.* More certainly, these laws make the jobs of police officers much easier. *Id.* at 471.

222. See Charles A. Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L.J. 1161, 1161-72 (1966) (discussing the effect of police confrontations on the life of an individual engaged in no wrongdoing); Timothy P. O’Neill, *Beyond Privacy, Beyond Probable Cause, Beyond the Fourth Amendment: New Strategies for Fighting Pretext Arrests*, 69 U. COLO. L. REV. 693, 693 (1998) (noting traffic laws provide the opportunity for police to stop individuals for numerous minor violations). Police stopped a Yale law professor on numerous occasions while walking, in Maryland, California, Massachusetts, Connecticut and New York. Reich, *supra*, at 1161. Police officers also detained him without reason several times while he was driving. *Id.* at 1161-62. Dealing with laws very similar to “stop and identify” statutes, the professor expressed concern over the “virtually unlimited sanction [which] lurks behind the policeman’s questions.” *Id.* at 1166.

223. See *Kolender*, 461 U.S. at 354. Lawson, a black man, was stopped fifteen times over a two year period. Fyfe, *supra* note 17, at 472. Lawson was only prosecuted twice, and convicted once. *Kolender*, 461 U.S. at 354. The Supreme Court upheld a vagueness challenge to the California statute. Fyfe, *supra* note 17, at 472. With a statute similar to the one in *Hiibel*, stops involving minorities like Edward Lawson could turn into arrests. See *Hiibel v. Sixth Jud. Ct. of Nev.*, 542 U.S. 177, 191 (2004) (affirming the decision of the Nevada Supreme Court). Also, the police are more likely to stop minorities, such as African-Americans. Reich, *supra* note 222, at 1164. This situation becomes even more disconcerting when one takes into account the Supreme Court’s holding that police officer’s subjective reasons for performing a *Terry* stop are irrelevant in the context of the Fourth Amendment. *Whren v. United States*, 517 U.S. 806, 812 (1996).

224. *County of Humboldt v. Hiibel*, No. XX-69056, slip op. at 2 (J. Ct. of Union Twp., Nev., Feb. 21, 2001); *Hiibel v. State*, No. CR 01-4463, slip op. at 8 (6th Jud. Dist. Ct., Nev., June 25, 2004); *Hiibel v. Sixth Jud. Ct. of Nev.*, 59 P.3d 1201, 1205-06 (Nev. 2002), *aff’d*, 542 U.S. 177 (2004). The Justice Court of Union Township based its decision on both crime prevention and crime detection. *Hiibel*, No. XX-69056 at 2. The Nevada District Court examined the interests of officers and public safety. *Hiibel*, No. CR 01-4463, at 8. The Nevada Supreme Court did the most extensive analysis of governmental interests, recognizing the importance of officer safety, crime prevention and terrorism. *Hiibel*, 59 P.3d at 1205-06.

225. *E.g.*, *Michigan v. Summers*, 452 U.S. 692, 698 (1981) (recognizing public interests of crime prevention, crime detection, and officer safety can make a seizure reasonable under the Fourth Amendment); *Brown v. Texas*, 443 U.S. 47, 52 (1979) (observing crime prevention is an important social interest); *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975) (weighing the importance of public safety and crime prevention); *Terry v. Ohio*, 392 U.S. 1, 22 (1968) (noting a

these interests, especially in a situation with an innocent, unarmed person like *Hiibel* which is a probable occurrence.<sup>226</sup> Without any real basis for suspecting misconduct on the part of an individual, the balancing of interests involved should favor protection of the individual's rights and privileges.<sup>227</sup>

#### *E. Recent Legislative Developments*

The Arizona legislature recently enacted a "stop and identify" statute that the governor signed into law.<sup>228</sup> The new Arizona statute is different from the Nevada law applied in *Hiibel* in several respects.<sup>229</sup> First, the Arizona ordinance calls for a law enforcement officer to provide notice that a failure to give one's name is a crime, thus resolving anyone's preconceived notion about being able to withhold this information during a *Terry* stop.<sup>230</sup> Additionally, the Arizona law deals

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general interest in crime prevention and detection). The Nevada Supreme Court considered the public interests involved to be "overwhelming." *Hiibel*, 59 P.3d at 1205.

226. See NEV. REV. STAT. § 171.123 (2004). With the crime already completed, the interests in crime prevention are lower. See *United States v. Hensley*, 469 U.S. 221, 228 (1985). Additionally, *Terry* already provides the ability to perform a patdown search in the interests of police officer safety. *Terry*, 392 U.S. at 24. It is uncertain how asking the individual's name would increase safety beyond that of a patdown search, which is already considered a "significant intrusion" upon an individual's rights. *Id.* at 24-25. The Court in *Terry* stressed the importance of disarming a suspect as a central concern or interest allowing a patdown search with less than probable cause. *Id.* at 29. As *Hiibel* was not armed, the interests of police officers or public safety are not advanced. See *Hiibel*, 542 U.S. at 181. Concerning terrorism, the Eleventh Circuit recently dealt with a large-scale search conducted at least partly due to a Department of Homeland Security threat assessment. *Bourgeois v. Peters*, 387 F.3d 1303, 1307 (11th Cir. 2004). The circuit court ruled that a search based upon this interest, even if combined with others such as public safety, violates the Fourth Amendment. *Id.* at 1316. The court stated, "While the threat of terrorism is omnipresent, we cannot use it as the basis for restricting the scope of the Fourth Amendment's protections . . ." *Id.* at 1311.

227. *Brown*, 443 U.S. at 52. To reiterate, the only charge left against *Hiibel* was for the failure to identify himself, a "delaying an officer" violation. *Hiibel*, No. XX-69056 at 3. The court dismissed the charge of domestic battery. *Id.* (motion to dismiss).

228. ARIZ. REV. STAT. ANN. § 13-2412 (2005). The text of the statute provides:

Refusing To Provide Truthful Name When Lawfully Detained; Violation; Classification

A. It is unlawful for a person, after being advised that the person's refusal to answer is unlawful, to fail or refuse to state the person's true full name on request of a peace officer who has lawfully detained the person based on reasonable suspicion that the person has committed, is committing or is about to commit a crime. A person detained under this section shall state the person's true full name, but shall not be compelled to answer any other inquiry of a peace officer.

B. A person who violates this section is guilty of a Class 2 misdemeanor.

*Id.*

229. Compare ARIZ. REV. STAT. ANN. § 13-2412 (2005) with NEV. REV. STAT. § 171.123 (2004).

230. ARIZ. REV. STAT. ANN. § 13-2412 (2005). The Arizona law requires a law enforcement

with problems under the vagueness doctrine by providing both the form and content of a lawful response.<sup>231</sup> However, though the Arizona statute makes improvements in some areas, it still allows for arrests based upon a finding of reasonable suspicion alone.<sup>232</sup> Finally, the law fails to address the danger of self-incrimination inherent in any identification requirement.<sup>233</sup>

## V. CONCLUSION

When discussing a case overturning a “stop and identify” statute, one commentator wrote, “[T]he official closest to [the case] welcomed the Court’s decision on the grounds that [the statute] was a ‘stupid’ law that invited abuse, damaged police relations with minorities and others . . . and rarely resulted in the detection of offenders.”<sup>234</sup> While the Nevada statute at issue is not a “stupid” law on its face, the Court’s interpretation allows law enforcement officers to go beyond its mandates, which may be unwise.<sup>235</sup> The Nevada statute also does little to advance the governmental interests that courts assert that it serves.<sup>236</sup> In light of these issues, the Supreme Court has extinguished constitutional rights by allowing one of the most significant intrusions, arrest, in the absence of probable cause.<sup>237</sup> A viable alternative would be

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official to advise that a failure to respond is unlawful. *Id.* As a result, the officer quickly and accurately provides the law, dispelling any thoughts that a person has on the lawfulness of withholding identification. *See supra* notes 77-79, 195-98, and accompanying text.

231. *See* ARIZ. REV. STAT. ANN. § 13-2412 (2005). The statute requires only that a suspect “state [his or her] true full name.” *Id.* There is little confusion as to what constitutes a lawful response to a request for identification. *See supra* note 167 and accompanying text. Further, by clearly delineating a lawful response, the law also reduces the amount of discretion that normal “stop and identify” statutes afford to law enforcement officers. *See supra* note 170 and accompanying text.

232. *See* ARIZ. REV. STAT. ANN. § 13-2412 (2005). The Arizona law provides a person who does not state his or her true full name is guilty of a misdemeanor. *Id.* By allowing for arrest without graduation to probable cause, the statute contradicts the mandates of the Fourth Amendment. *See supra* notes 173-81 and accompanying text.

233. *See supra* notes 204-10 and accompanying text.

234. Fyfe, *supra* note 17, at 474.

235. *See supra* notes 182-86 and accompanying text (discussing how the Nevada statute only provides for detention rather than arrest).

236. *See supra* note 224-27 and accompanying text (analyzing the governmental interests implicated by a “stop and identify” statute).

237. *See supra* notes 172-94 and accompanying text (examining the Nevada statute’s impact on the Fourth Amendment’s probable cause requirement); U.S. CONST. amend. I; U.S. CONST. amend. IV; U.S. CONST. amend. V. Furthermore, this authority goes beyond that contemplated by the Framers, who did not view even probable cause as justifying a warrantless arrest. *See* Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 WAKE FOREST L. REV.

to adhere to the words of the statute and allow police officers to go no further than a brief detention and investigation for a failure to provide identification.<sup>238</sup>

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239, 246-47 (2002) (discussing the Framers intent surrounding probable cause and arrests).

238. See NEV. REV. STAT. § 171.123 (2004).