Brooklyn Law Review

Volume 71 | Issue 3 Article 7

2006

Where Everybody Knows Your Name: Compulsory Identification and the Fallacy of the *Hiibel* Majority

William H. Weisman

Where Everybody Knows Your Name

COMPULSORY IDENTIFICATION AND THE FALLACY OF THE *HIIBEL* MAJORITY

I. INTRODUCTION

The Fourth Amendment to the United States Constitution protects the individual from unwarranted government intrusion by requiring that a search or seizure be predicated upon a finding of probable cause.[1] However, not every search and seizure necessitates a finding of probable cause. In its landmark 1968 decision in *Terry v. Ohio*,[2] the United States Supreme Court annunciated an exception to the probable cause requirement. The *Terry* Court held that a police officer acting pursuant to the less-stringent standard of "reasonable suspicion" of criminality is permitted to stop a person for a period of brief duration in order to take additional steps to investigate.[3] The Court ruled that this type of investigative stop does not infringe upon a citizen's Fourth Amendment right.[4] Thus, the concept of a "*Terry* stop" was adopted into American jurisprudence.[5] In addition to adopting

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[1] The Fourth Amendment states

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

U.S. CONST. amend. IV.

[2] 392 U.S. 1 (1968).

[3] *Id.* at 30. "Reasonable suspicion" is defined as a "particularized and objective basis, supported by specific and articuable facts, for suspecting a person of criminal activity." BLACK'S LAW DICTIONARY 1487 (Bryan A. Garner ed., 8th ed. 2004). For example, in *Terry*, the Court cited, along with other factors, Officer McFadden's (the investigating officer) three decades of police experience, his meticulous observation of the three suspects, and the fact that the suspects appeared to be behaving in a manner suggestive of a "preface to a 'stick-up,'" as supporting the conclusion that criminal activity was underway. *Terry,* 392 U.S. at 5, 28.

[4] *Terry*, 392 U.S. at 31.

[5] A *Terry* stop is the least intrusive form of constitutional "seizure," requiring only a finding of reasonable suspicion that criminality is afoot. *See id.* at 21. A *Terry* stop occurs when, by means of physical force or by show of authority, a police

the reasonable suspicion standard, the *Terry* Court also annunciated the "stop and frisk" doctrine, which grants an officer, in the course of conducting a valid *Terry* stop, the authority to compel a suspect to submit to a pat-down frisk.[6] However, merely performing a *Terry* stop does not provide law enforcement with a blanket invitation to conduct a compulsory frisk. The *Terry* Court clearly articulated the rule that the police may frisk a suspect only when an officer has a reasonably appreciable fear that the particular suspect may be "an armed and dangerous individual."[7] Thus, in implementing the rules which govern an investigative stop undertaken pursuant to a mere reasonable suspicion of criminality, the Court struck a middle ground of Fourth Amendment jurisprudence, balancing the "intrusion on the individual's Fourth Amendment interests" with the "promotion of legitimate governmental interests."[8] By strictly regulating the duration, scope, and content of the stop, the Court explicitly sought to limit the intrusion occasioned on the individual's Fourth Amendment interests, thereby preserving the protection of individual integrity which lies at the very foundation of the Fourth Amendment. Unfortunately, in its recent decision in *Hiibel v. Sixth Judicial District Court of Nevada*,[9] the Supreme Court disregarded the Fourth Amendment ideals advanced in the *Terry* decision.

In a 5-4 opinion, the *Hiibel* Court upheld the validity of a Nevada statute which requires a suspect, under pain of arrest and monetary fine, to identify himself by name to law enforcement personnel when detained pursuant to the reasonable suspicion standard annunciated in *Terry*.[10] Commonly referred to as stop and identify statutes, compulsory identification laws exist in varying composition in some twenty states.[11] However, as explained throughout the course of this

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officer, acting pursuant to a reasonable suspicion, briefly detains an individual such that "a reasonable person would have believed that he was not free to leave." United States v. Mendenhall*,* 446 U.S. 544, 554 (1980).

[6] *Terry*, 392 U.S. at 27.

[7] *Id*.

[8] Delaware v. Prouse, 440 U.S. 648, 654 (1979).

[9] 542 U.S. 177 (2004).

[10] *Id.* at 179, 181, 188-89.

[11] *See* NEV. REV. STAT. § 171.123(3) (2001); ALA. CODE § 15-5-30 (1995); ARK. CODE ANN. § 5-71-213(a)(1) (1997); COLO. REV. Stat. § 16-3-103(1) (2005); DEL. CODE ANN. tit. 11, §§ 1902, 1321(6) (2003); FLA. STAT. § 856.021(2) (2003); GA. CODE ANN. 16-11-36(b) (2003); 725 ILL. COMP. STAT. 5/107-14 (2000); KAN. STAT. ANN. § 22-2402(1) (1995); LA. CODE CRIM. PROC. ANN., art. 215.1(A) (West 2004); MO. REV. STAT.

Note, Nevada's statute is particularly troublesome in that it requires identification pursuant only to the lessened standard of reasonable suspicion. The intrusion authorized by the Nevada statute is of such a substantial degree that it can not be reconciled with the *Terry* Court's criminal procedure jurisprudence and the protections afforded the individual in the Fourth Amendment.

As implicitly acknowledged by the Supreme Court in *Terry*, providing the individual with protection from unnecessary, overbroad governmental intrusions is an essential component of any truly free society.[12] Illustrating the ideals advanced in *Terry*, author Ayn Rand articulated the need for the individual to be free from unwarranted intrusions, writing "Civilization is the progress toward a society of privacy. The savage's whole existence is public, ruled by the laws of his tribe. Civilization is the process of setting man free from men."[13] In affirming the constitutionality of Nevada's compulsory identification requirement, the *Hiibel* Court implicitly rejected the idea advanced in *Terry* and so eloquently articulated in Rand's prose, concerning the outright necessity of a relatively substantial degree of anonymity in a society which aspires to safeguard the rights and integrity of the individual. In rendering its opinion, the *Hiibel* majority blatantly disregarded the implicit ideals regarding individual integrity and personal freedom embodied in the Fourth Amendment and espoused by the *Terry* Court, which sought to promote the interests of law enforcement without denigrating the rights of the individual.

This Note will demonstrate that a compulsory identification requirement predicated upon a finding of a reasonable suspicion of criminality is incompatible with the ideals set forth in the Fourth Amendment. Part II of this Note sets forth the factual circumstance which gave rise to the dispute at issue in *Hiibel*. Part III explains the legal rationale advanced in the opinion crafted by the *Hiibel* majority. Part IV

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§ 84.710(2) (2003); MONT. CODE ANN. § 46-5-401(2)(a) (2005); NEB. REV. STAT. § 29-829 (1995); N.H. REV. STAT. ANN. §§ 594:2, 644:6 (2001); N.M. STAT. § 30-22-3 (2004); N.Y. CRIM. PROC. LAW § 140.50(1) (Consol. 1996); N.D. CENT. CODE § 29-29-21 (1991); R.I. GEN. LAWS § 12-7-1 (2002); UTAH CODE ANN. § 77-7-15 (2003); VT. STAT. ANN., tit. 24 § 1983 (Supp. 2005); WIS. STAT. § 968.24 (2003).

[12] *See Terry*, 392 U.S. at 19 (quoting Warden v. Hayden, 387 U.S. 294, 310 (1967) (Fortas, J., concurring)) ("The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible.").

[13] AYN RAND, THE FOUNTAINHEAD 715 (25th Anniversary Ed. 1968).

of this Note seeks to demonstrate that the *Hiibel* majority failed to adequately comprehend the nature of the intrusion occasioned by Nevada's compulsory identification requirement. Part V of this Note will demonstrate that Nevada's statute is so overbroad in scope that it cannot be reconciled with the Court's Fourth Amendment jurisprudence. Finally, Part VI of this Note proposes legislative alternatives which aspire to reach a more appropriate middle-ground between the promotion of legitimate, socially beneficial law enforcement interests and the constitutional protections afforded the individual.

II. THE FACTS OF *HIIBEL*

In order to best comprehend the intrusion constituted by compelled identification authorized by a mere reasonable suspicion, it is necessary to understand the specific factual circumstance in which the dispute at issue in *Hiibel* arose. On a clear Nevada afternoon, the sheriff's department of Humboldt County, Nevada, received a telephone call from a caller who reported seeing a man assault a woman in a silver and red G.M.C. truck on Grass Valley Road.[14] Deputy Lee Dove was dispatched to investigate the caller's report. Deputy Dove soon located a truck matching the caller's description parked on the side of Grass Valley Road. The deputy observed skid marks in the gravel immediately behind the vehicle, leading him to conclude that the truck had come to an abrupt stop.[15] A man was standing by the rear of the truck and a young woman was seated in the passenger compartment.[16]

Deputy Dove approached the man, who appeared to be inebriated, and explained that he was investigating a reported fight.[17] The deputy asked the man if he had "any identification on [him]," but the man declined to identify himself and instead inquired why the deputy wanted to see his identification.[18] Deputy Dove responded that he was conducting an investigation and therefore needed to see his identification. The unidentified man grew agitated, vehemently insisting that he had done nothing wrong. Deputy Dove explained that he wanted to find out who the man was and what he was doing on

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[14] *Hiibel,* 542 U.S. 177, 180 (2004).
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id*. at 181.

the side of the road.[19] The man continued to refuse compliance with the identification request and began to taunt the deputy.[20] The man placed his hands behind his back, as if waiting to be handcuffed, and repeatedly told the deputy to take him to jail.[21] For a period of several minutes Deputy Dove continued, eleven times in all, to request identification.[22] Each request was rebuffed by the unidentified man. After repeatedly warning that he would be arrested if he continued to refuse the identification request, the deputy placed the man under arrest.[23]

It was later determined that the unidentified man arrested by Deputy Dove was Larry Dudley Hiibel.[24] The state of Nevada, citing Nevada Revised Statute § 171.123, an ordinance which defines the legal rights and duties of a police officer in the context of an investigative stop (or *Terry* stop), argued that Hiibel had obstructed Deputy Dove from carrying out his duties during an investigative stop.[25] The Justice Court of Union Township held that in refusing to identify himself, as required by Nevada Revised Statute § 171.123, Hiibel "obstructed and delayed [Deputy] Dove as a public officer in attempting to discharge his duty," thereby violating Nevada Revised Statute §199.80.[26] On appeal, Hiibel argued that Nevada Revised Statute § 171.123, which required him to identify himself to the investigating officer, violated the rights granted him by the Fourth and Fifth Amendments to the

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[19] *Id*.

[20] *Hiibel*, 542 U.S. at 181 (2004).

[21] *Id*.

[22] *Id.*

[23] *Id.* To view the confrontation between Deputy Dove and Hiibel in its entirety, as captured by the dashboard video recorder mounted in Dove's patrol car, one can visit http://papersplease.org/hiibel/facts2.html.

[24] *Hiibel,* 542 U.S. at 181.

[25] The statute states,

> 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 . . . . 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.

NEV. REV. STAT. §171.123 (2001).

[26] *Hiibel*, 542 U.S. at 182.

United States Constitution.[27] Unmoved by Hiibel's argument, Nevada's intermediate appellate court affirmed the trial court's ruling.[28] The Supreme Court of Nevada issued a divided opinion rejecting Hiibel's challenge.[29] Subsequently, the United States Supreme Court granted certiorari.[30]

III. THE *HIIBEL* MAJORITY'S RATIONALE

In upholding the Nevada statute as constitutional, the Supreme Court began its analysis by setting forth the general proposition that posing questions to a person suspected of criminality comprises an essential component of police investigatory powers.[31] After retracing fundamental aspects of its *Terry* stop jurisprudence, the *Hiibel* Court concluded that "the principles of *Terry* permit a State to require a suspect to disclose his name in the course of a *Terry* stop."[32] Thus, the Nevada statute, which requires a suspect to identify himself to an investigating officer acting pursuant to a reasonable suspicion of criminality, was deemed constitutional.[33] In justifying its conclusion, the Court stated that the reasonableness of a *Terry* stop seizure is determined "by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests."[34] The *Hiibel* Court concluded that the Nevada statute satisfied this balancing test because the identity request had an "immediate relation to the purpose, rationale, and practical demands of a *Terry* stop."[35] The Court deemed the identification request a mere "commonsense inquiry"[36] which served important government interests, including allowing the officer to gain knowledge regarding a suspect's past criminal activity, propensity for violence, and history of mental disorder. [37] The Court further stated that knowledge of

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[27] *Id.* The sheer number and complexity of the Firth Amendment issues raised in *Hiibel* prevent in-depth discussion of such concerns within the confines of this note.

[28] *Id.* at 182.

[29] Hiibel v. Sixth Jud. Dist. Ct. of Nev., 59 P.3d 1201, 1202, 1207 (Nev. 2002).

[30] Hiibel v. Sixth Jud. Dist. Ct. of Nev., 540 U.S. 965 (2003).

[31] *Hiibel*, 542 U.S. at 185.

[32] *Id.* at 187.

[33] *Id.* at 182-83, 189-91.

[34] *Id.* at 188 (quoting Delaware v. Prouse, 440 U.S. 648, 654 (1979)).

[35] *Id.* at 188.

[36] *Hiibel*, 542 U.S. at 189.

[37] *Id.* at 186.

a suspect's identity "may help clear a suspect and allow the police to concentrate their efforts elsewhere."[38] The threat of arrest and criminal sanction was deemed necessary in order to ensure that the identity request did not become a legal nullity.[39] The *Hiibel* majority concluded that because it did not change the duration or location of the detention, the compulsory name requirement did not alter the fundamental nature of the actual *Terry* stop.[40]

Additionally, the Court went on to dispense with the argument that the compulsory identification requirement allowed law enforcement to perform an end-run around the probable cause requirement,[41] in effect permitting an officer to arrest a person merely for appearing suspicious.[42] The majority stated that the individual is protected from arbitrary police intrusion by the "requirement that a *Terry* stop must be justified at its inception and 'reasonably related in scope to the circumstances which justified' the initial stop."[43] An officer is prevented from placing a suspect under arrest for refusing to identify himself if the request was not sufficiently related to the circumstances justifying the stop.[44] The Court concluded that Deputy Dove's request for identification was reasonably related to the circumstances which justified the stop. The deputy was seeking to further his investigation into an alleged assault and thus was not seeking to obtain an arrest for failure to identify after the *Terry* stop yielded insufficient evidence.[45] Thus, Nevada's compulsory identification requirement, which requires a suspect to disclose his identity when detained by a law enforcement officer conducting an investigative stop pursuant to a finding of reasonable suspicion, was found to be consistent with the Fourth Amendment's prohibition against unreasonable searches and seizures.

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[38] *Id.*

[39] *Id.* at 188.

[40] *Id.*. at 188.

[41] Probable cause exists where the "facts and circumstances within [the officer's] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense had been or is being committed." BLACK'S LAW DICTIONARY 1239 (Bryan A. Garner ed., 8th ed. 2004).

[42] *Hiibel*, 542 U.S. at 188.

[43] *Id.* (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)).

[44] *Id.* at 188.

[45] *Id.* at 189.

IV. THE *HIIBEL* MAJORITY FAILED TO ADEQUATELY CONSIDER THE NATURE OF THE INTRUSION OCCASIONED BY A COMPULSORY IDENTIFICATION REQUIREMENT

A. The Wealth of Information Available to Law Enforcement upon Obtaining Knowledge of an Individual's Identity Constitutes a Substantial Intrusion

The reasonableness of a seizure under the Fourth Amendment is determined "by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests."[46] In *Terry*, the Court explicitly acknowledged that a frisk, when conducted during an investigatory stop initiated pursuant only to a mere reasonable suspicion, was inherently intrusive.[47] Nevertheless, the Court ultimately found that such an intrusion was consistent with the constitutional protections of the Fourth Amendment because the imposition experienced by the individual was both "limited" and "brief".[48] However, Nevada's compulsory name requirement has the potential to be far more invasive than the limited pat-down authorized by *Terry*.

At first glance, the idea that compelled identification constitutes a serious intrusion on the individual, perhaps even more so than the degradation experienced by an individual made to endure the physical touching of a frisk, may seem a somewhat untenable proposition. After all, even a peripheral survey of American jurisprudence reveals the idea that our system of legality has long supported the notion that a person's physical sanctity is of the utmost importance.[49] However, when gauging the intrusion posed by compelled identification, one must remember that the frisk authorized by *Terry* is highly constricted and subject to numerous binding restraints. Since the sole justification for the frisk is protection of law enforcement personnel and nearby citizenry, the pat-down is confined in scope to that which is necessary to determine if the

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[46] *Id.* at 188 (quoting Delaware v. Prouse, 440 U.S. 648, 654 (1979)).

[47] *Terry*, 392 U.S. at 25 (stating that even a limited search of the outer clothing "must surely be an annoying, frightening, and perhaps humiliating experience").

[48] *Id.* at 24-25, 27.

[49] For example, tort law permits recovery, be it nominal, for even the slightest offensive touch or bodily contact sufficient to offend a reasonable sense of personal dignity. *See* AARON D. TWERSKI & JAMES A. HENDERSON, TORTS: CASES AND MATERIALS 21 (2003).

suspect is concealing hidden instruments capable of inflicting harm upon the officer.[50] However, unlike the fleeting, limited, highly regulated frisk authorized by the *Terry* Court, the compulsory name requirement at issue in *Hiibel* authorizes a totally unrestrained intrusion.

Writing during a far simpler time, Shakespeare once rhetorically pondered "What's in a name?"[51] In this unprecedented era of information, knowledge of one's name, particularly in the hands of law enforcement personnel, has far greater significance than at any other time in human history, certainly more so than it did in Elizabethan England. While Shakespeare sought to impress upon his audience that a name can be relatively inconsequential,[52] in the context of a twenty-first century citizen/police encounter, one's identity is of the utmost significance. Today's technological society allows for instant access to seemingly endless quantities of highly personal information. A name is no longer just a verbal construct used merely for identification purposes, but instead provides the password for an innumerable array of both public and private cross-referenced databases, each capable of exposing the most intimate details of an individual's life.[53]

For instance, Massachusetts State Troopers, recently equipped with mobile Black-Berry devices, can instantaneously link to databases containing information on an estimated ninety-eight percent of adults residing in the United States.[54]

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[50] Terry v. Ohio, 392 U.S. 1, 29 (1968) ("The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.").

[51] WILLIAM SHAKESPEARE, ROMEO AND JULIET act 2, sc. 2, line 43 (G. Blakemore Evans ed., Cambridge University Press) (2003).

[52] Shakespeare's Juliet further states "That which we call a rose, by any other word would smell as sweet." *Id.* The contention is that in this passage Juliet seeks to imply that a name is an artificial and meaningless convention. *See William Shakespeare*, *Romeo and Juliet, Famous Quotes*, http://www.enotes.com/romeo/276 (last visited Nov. 17, 2005).

[53] Brief of Amici Curiae Electronic Privacy Information Center (EPIC) et al. at 3, Hiibel v. Sixth Jud. Dist. of Nev., 542 U.S. 177 (2004) (No. 03-5554). Certainly, concerns about the degree of information accessible to officers when supplied with a suspect's name were central to Justice Steven's dissenting opinion, in which he wrote "A name can provide the key to a broad array of information about [a] person, particularly in the hands of a police officer with access to a range of law enforcement databases." *Hiibel*, 542 U.S. at 196 (Stevens, J., dissenting).

[54] Keith Reed, *Logan Troopers To Get Roving Database Access*, BOSTON GLOBE, June 22, 2004, at F1. In the article, Reed quotes Jon Latorella, chief executive of LocatePlus, a company that collects records about individuals and rents access to this information to various law enforcement agencies, as stating "A name, that's all [a

Provided only with a person's name, the troopers access a wealth of personal information, ranging anywhere from Social Security numbers to unlisted telephone numbers to names on a lease.[55] As information linked to identification has increasingly become part of daily life in America, it is now apparent that there is seemingly no limit to the information available to properly equipped officers of the law.[56] With terrorism prevention occupying a prominent place of concern for the collective law enforcement community, it would seem likely that funding will only become more readily available for municipalities wishing to upgrade their intelligence gathering and information sharing capabilities.[57] Such technological proliferation has eroded many of the traditional barriers that once inhibited efficient information sharing amongst various members of the law enforcement community. For example, both New York and Vermont recently announced participation in a new multi-jurisdictional law enforcement program which provides field officers with the capability to relay information about a suspect to a command outpost, which can then instantaneously cross-reference such information across numerous databases and law enforcement information repositories.[58] To be certain, information sharing is not a new phenomenon. An informal national network of identification systems has long been in development, spurred by the intricate intermingling of government databases and identification requirements which accompanied several federal legislative initiatives that combined demands for identification with

police officer] needs. . . . [The officer] can find out who you lived with, where you lived, anything about you." *Id.*

[55] *Id*.

[56] *See* Daniel J. Steinbock, *National Identity Cards: Fourth and Fifth Amendment Issues*, 56 Fla. L. Rev. 697, 706 (2004) (discussing, in the context of the potential for a national identification card requirement, the degree to which information gathering by both public and private entities has become common-place in American society).

[57] *See* Brendan Lyons, *Albany Initiative Aims to Break Down Barriers to Sharing Anti-Terror Reports*, TIMES UNION, May 26, 2004, at A1 (reporting that a counter terrorism intelligence initiative aimed at facilitating information sharing and involving collaboration between federal and state authorities, recently instituted in New York and Vermont, might be expanded to other states in the Northeast and across the nation).

[58] *Id*. In Lyon's article Robert Mueller, director of the Federal Bureau of Investigation, promised that the newly instituted information systems installed in New York and Vermont would provide a "'seamless flow of intelligence' to street level cops in 'real time.'" *Id.*

extensive computerized records.[59] The effect of this intermingling of stored data is that the most intimate details of a person's existence, ranging anywhere from travel habits to financial status, are readily accessible to law enforcement agencies. When authorizing a seizure predicated only upon a mere reasonable suspicion of criminality, the *Terry* Court, in all likelihood, never intended that their decision would lay the framework for such a substantial, seemingly limitless intrusion.

Unfettered access to limitless sources of information cannot coexist with the ideals of restraint and individual autonomy embodied in the Fourth Amendment and advanced in the *Terry* decision. For illustrative purposes, consider the specific facts of *Terry*. Having observed Terry and his cohorts behaving in what appeared to be the preparatory stage of an armed robbery, it was deemed a perfectly logical and appropriate exercise of his law enforcement duties for the investigating officer to question the men about their purpose for being on the street and their particular interest in the jewelry shop's storefront. The *Terry* Court concluded that inquiries made during an investigative stop were to be "reasonably related in scope to the circumstances which justified" the initial stop.[60] Thus, the *Terry* Court advanced the proposition that investigative detention predicated upon a mere finding of reasonable suspicion was to be limited to that necessary to confirm or dispel suspicion.[61] However, in seeming total disregard for the guidelines advanced in *Terry*, there exists no limit whatsoever to the information available when a suspect is compelled to reveal his identity. Thus, the practical result of the *Hiibel* decision is that, rather than limit law enforcement inquiry to that necessary to dispel suspicion, police are now empowered to gain access to highly personal information totally unrelated to the circumstances of the stop. Such information might include: where the suspect used to live,

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[59] Richard Sobel, *The Demeaning of Identity and Personhood in National Identification Systems*, 15 HARV. J.L. & TECH. 319, 323 (2002) (identifying legislation contributing to the formation of a de facto national information and identification system as including the Immigration Reform and Control Act of 1986, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, the Health Insurance Portability and Accountability Act of 1996, and the Transportation Security Administration's ID requirement and Computer Assisted Passenger Pre-Screening System).

[60] Terry v. Ohio, 392 U.S. 1, 20 (1968).

[61] *Id.* at 30.

where he currently resides, with whom he resides, his phone number, his license plate, his financial history, and even his travel habits.[62] Indeed, this seemingly extensive list constitutes merely a sampling of the potential information available to law enforcement upon production of one's identity.[63]

Respect for personal autonomy, an idea which inherently encompasses the ability to remain as a relatively anonymous individual absent a truly worthy government interest which might justify a limited intrusion, is an essential component of the protection of personal integrity at the very heart of the Fourth Amendment. *Terry* sought to ensure that persons detained pursuant to a mere reasonable suspicion of criminality would not be made to relinquish their entitlement of substantial protection from invasions of their individual integrity. Certainly, rational persons concerned with crime prevention would agree that access to information is an important and necessary component of effective policing. We all are fortunate to live in an age where law enforcement has at their disposal numerous technological tools with which they can combat societal ills. However, the sheer wizardry of today's technological age is such that providing a name to law enforcement has a fundamentally different connotation than it did even a mere 20 years ago. Due to the special significance associated with a name in the hands of law enforcement in this era of unprecedented information, compelled identification pursuant to a mere reasonable suspicion is fundamentally incompatible with the protection of personal integrity embodied in the Fourth Amendment and advanced in the *Terry* decision.

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[62] *See, e.g.,* Keith Reed, *Logan Troopers To Get Roving Database Access*, BOSTON GLOBE, June 22, 2004, at F1. *See also* Brief of Amici Curiae Electronic Privacy Information Center (EPIC) et al. at 5, Hiibel v. Sixth Jud. Dist. of Nev., 542 U.S. 177 (2004) (No. 03-5554) (commenting that "[p]olice officers today have access to an extraordinary range of detailed personal information" and detailing, with specific examples, the extensive information available to law enforcement).

[63] *See* Brief of Amici Curiae Electronic Privacy Information Center (EPIC) et al. at 3,5, Hiibel v. Sixth Jud. Dist. of Nev., 542 U.S. 177 (2004) (No. 03-5554). The amicus brief submitted by the Electronic Privacy Information Center documents the vast array of personal information available to law enforcement upon accessing various databases. *Id.*

B. Compelled Identification Leads to a Permanent Record of the Citizen/Police Interaction, Thereby Heightening the Intrusion Occasioned by Compelled Identification Such That It Is Unreasonable

Furthering the intrusion constituted by the compulsory identification requirement at issue in *Hiibel* is the fact that compelled identification leads to a permanent, everlasting record of the citizen/police encounter. There is no disputing that all *Terry* stops, irrespective of the circumstances, constitute an intrusion upon the individual.[64] However, prior to *Hiibel*, when the limited investigation that accompanied the stop failed to create circumstances amounting to probable cause which would justify further, heightened police/citizen interaction, the individual was free to go on his way. Notwithstanding the brief intrusion, and the psychic harm which inevitably accompanies the situation where an individual is confronted by adversarial law enforcement personnel,[65] the individual emerged from the encounter relatively unscathed. Barring voluntary identification, there was frequently no record of the stop which would forever link the individual with his detainment at the hands of police. However, following the ruling in *Hiibel*, an individual detained pursuant to reasonable suspicion will no longer possess the ability to carry on after the stop as a relatively anonymous individual.

When an investigative stop pursuant to reasonable suspicion is accompanied by a compulsory identification requirement, every such detention will result in a permanent record of the encounter. According to Mary Hoffman, a staff attorney with the Electronic Privacy Information Center, the reality of a compulsory identification requirement like that at issue in *Hiibel* is that every *Terry* stop will be recorded and added to information gathering systems.[66] Therefore, stop and

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[64] Chief Justice Warren opinioned that a *Terry* stop, particularly when accompanied by a frisk, is a "severe, though brief, intrusion upon cherished personal security." *Terry,* 392 U.S. at 24-25. Justice Warren further stated "it must surely be an annoying, frightening, and perhaps humiliating experience." *Id.* at 25.

[65] *See* Steinbock, *supra* note 56 at 740 ("Identification checkpoints, it may be argued, have an additional subjective effect on a grand scale: the psychic harm to free people of having to 'show your papers'. . . .").

[66] Ms. Hofman stated "Every little time something like this happens, the police question you and want to know who you are, it's an incident that gets put into a database. And there will be a record of it thereafter, regardless of whether you did anything wrong." Gabriel Syme, *Fighting For Right Not to Show ID*, White Rose

identify statutes not only provide law enforcement with an opportunity to check existing databases, they also generate new data by continuously inputting additional, increasingly detailed information about the detained individual.[67] Every subsequent *Terry* stop would present a new opportunity for law enforcement to input additional information into database receptacles, thereby facilitating increased government surveillance of a person's behavior.[68] Such intrusive data compilation resulting from an investigatory stop greatly increases the imposition experienced by the individual subjected to the encounter.[69]

Feelings of a loss of personal anonymity are especially heightened when the investigative detainment fails to escalate to a degree warranting arrest. The individual, having already endured the harrowing experience of detention by adversarial authorities, is further intruded upon in that they compile a documented police record, even though his behavior proved entirely insufficient to warrant an arrest, let alone an indictment or conviction.[70] While it recognized that an investigatory stop pursuant to a mere reasonable suspicion was an "annoying, frightening, and perhaps humiliating experience,"[71] the *Terry* Court nevertheless authorized detainment pursuant to a reasonable suspicion of criminality because it deemed the intrusion upon the individual to be both "brief" and "limited."[72] However, contrary to *Terry*, compelled identification pursuant only to a mere reasonable suspicion of criminality has the practical effect of turning a highly restrained intrusion into an everlasting, ceaseless intrusion in the form of a permanent police record which will forever follow

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Privacy Archives, *available at* http://whiterose.samizdata.net/archives/005632.html (last visited Jan. 3, 2005).

[67] Steinbock, *supra* note 56, at 744-58 (discussing, in the context of the potential for a national identification card requirement, the various ways in which data is generated, collected, and retained).

[68] *Id.* at 709 ("Each identification encounter would be an occasion to add information to the central database, facilitating government surveillance of movement and activity.").

[69] *Id.* at 755 ("There is no question that retaining data from a stop adds to its intrusiveness when that data is linked to a particular person.").

[70] *Id.* at 755 (Commenting that feelings of intrusion become especially palpable when an "investigative stop does not lead to arrest; an individual could acquire a police 'record' for activities that were not criminal enough to produce an arrest, much less a conviction.").

[71] Terry v. Ohio, 392 U.S. 1, 25 (1968).

[72] *Id.* at 25-26.

the individual.[73] Such an effect is entirely contrary to the implicit principles of government restraint and protection from over-intrusive, unreasonable invasions of individual autonomy which lie at the very heart of the *Terry* Court's Fourth Amendment jurisprudence.

C. The Hiibel *Majority Failed to Consider the Degree to Which the Intrusion Occasioned by a Compulsory Identification Requirement Will Disproportionately Affect Minority Citizenry*

The intrusiveness of a statute authorizing compelled identification pursuant to reasonable suspicion, especially in light of the potential for unfettered, highly invasive data collection, will disproportionately affect the minority citizenry. The Warren Court, which decided *Terry*, presided during one of the most trying periods in American history[74] and thus was greatly influenced by the social landscape of the time. The Court's criminal procedure jurisprudence, in particular its decision in *Terry*, was swayed by the civil rights movement which had come to dominate the headlines throughout the 1950's and 1960's.[75] A prominent concern in the struggle for racial equality was the widespread, pervasive mistreatment of African-Americans perpetrated by police departments across the nation.[76] The abuses perpetrated on African-Americans by

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[73] Steinbock, *supra* note 56, at 755 ("[D]ata collection and retention clearly adds to the imposition of a *Terry* stop. Now, instead of the 'brief intrusion' described by the Court in *Terry*, the individual has a 'brief intrusion' plus an endless record, not only of having been in a particular place at a particular time but also perhaps of having generated reasonable suspicion of criminal activity. Because *Terry* was decided by balancing the governmental need for investigative stops against their degree of individual intrusion, this additional imposition threatens to upset *Terry*'s balance.").

[74] David A. Harris, *Frisking Every Suspect: The Withering of Terry*, 28 U.C. DAVIS L. REV. 1, 7 (1994) (commenting that when *Terry* reached the Supreme Court, "American society seemed to be fraying at the edges. A palpable climate of unrest had settled over the nation.").

[75] *Id.* at 43 ("[T]he civil rights struggles of the 1950's and 1960's were part of the reason (if not the reason) for the Warren Court's concern with criminal procedure in general and with stop and frisks in particular."); A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 256 (1969) ("The Court's concern with criminal procedure can be understood only in the context of the struggle for civil rights.").

[76] Harris, *supra* note 74, at 8 (discussing the mistreatment of African-Americans by police as a backdrop for the *Terry* decision); Pye, supre note 75, at 256 ("If the Court's espousal of equality before the law was to be credible, it required not only that the poor [African-American] be permitted to vote and to attend school with whites, but also that he and other disadvantaged individuals be able to exercise, as well as posses, the same rights as the affluent white when suspected of crime.").

law enforcement authorities, particularly through the rampant use of over-aggressive, unregulated stop and frisks, had come to dominate the collective American consciousness. The President's Commission on Law Enforcement and Administration of Justice directly acknowledged the proliferation of such ill-treatment inflicted upon minorities by police conducting investigatory stops, stating: "Misuse of field interrogations . . . is causing serious friction with minority groups in many localities. This is becoming particularly true as more police departments adopt 'aggressive patrols' in which officers are encouraged to routinely stop and question persons on the street . . . ."[77] Through the annunciation of clear constitutional guidelines regulating investigatory stops, the *Terry* Court sought to revitalize the deteriorating relationship between African-Americans and the law enforcement community.[78] However, a compulsory identification requirement such as that which exists in Nevada is inconsistent with the inherent ideals of *Terry* in that such statutes will only heighten tensions between minorities and the police, thereby directly escalating the very problem the *Terry* Court intended to combat.

Unfortunately, racism in the criminal justice system, especially in the context of contemporary stop and frisk law, is an intractable, highly corrosive social ill. Numerous studies have demonstrated that in practice, police frequently utilize race as a proxy for criminality when deciding whether to stop a potential suspect.[79] Further escalating the perception of an apparent racial bias in the methodology of criminal law enforcement, contemporary criminal procedure jurisprudence has begun to whittle away at the *Terr*y Court's attempt to improve minority/police relations through the establishment of

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[77] TASK FORCE ON THE POLICE, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 184 (1967).

[78] *See* Pye, *supra* note 75, at 256 (commenting that the Warren Court could not "ignore the clear evidence that members of disadvantaged groups generally bore the brunt of most unlawful police activity").

[79] Harris, *supra* note 74, at 4. *See also* MICHAEL K. BROWN ET AL., WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY, 149-50 (2003) (reporting, in the context of a discussion concerning the findings of various studies documenting the disproportionate representation of racial minorities in the American criminal justice system, that "blacks and those otherwise fitting the delinquent stereotype were more likely to be stopped and interrogated 'often even in the absence of evidence that an offense has been committed'"); Sheri L. Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 214 (1983) ("Police still view race as an important factor in the decision to detain a suspect.").

strict guidelines regulating investigatory stops not predicated upon a finding of probable cause.[80] A prime example of such activity can be seen in the fact that courts dispersed throughout the nation have upheld *Terry* stops based merely on an individual's presence in a high-crime locale, coupled with an observation of the individual exhibiting evasive behavior towards the police.[81] The result of this judicial acquiescence, of what, at best, might be termed questionable justification for an investigative stop is that a vastly inordinate number of *Terry* stops now occur in predominately minority neighborhoods, which in urban settings tend to have a higher crime rate.[82] Authorizing the "location plus evasion matrix" as a justification for the finding of a reasonable suspicion ignores the well documented fact that many persons of color residing in the United States, for historic reasons, entertain an entirely reasonable fear of police authority.[83] Thus, such persons are behaving rationally when they seek to employ evasive measures designed to avoid unnecessary, unwarranted police

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[80] David A. Harris, *Factors For Reasonable Suspicion*, *When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 660 (1994) (explaining that in the twenty five years that followed the decision in *Terry*, case law gradually began to exceedingly require less evidence to justify a investigative stop).

[81] *Id.* at 680 (1994). *See also* United States v. Alexander, 907 F.2d 269 (2d Cir. 1990) (discussing how under federal law principles, the "location plus evasion matrix" is sufficient to justify police intrusion). Alexander's car was double-parked in a neighborhood known for the sale of illicit narcotics. Upon emerging from a residence, Alexander got in his car and proceeded to drive while frequently looking in the rear view mirror, allegedly indicating a fear of law enforcement surveillance, thereby providing sufficient justification for the resultant *Terry* stop conducted by federal agents under the authority of the Drug Enforcement Agency. *Id.* New York courts have been rather progressive on this issue in that the state judiciary has recognized the damaging effect of upholding such a basis for reasonable suspicion and accordingly have exercised resistance to the theory that location plus evasion is sufficient to justify an investigatory stop. *See* People v. Howard, 542 N.Y.S.2d 536, 540 (1989) (cautioning against placing excessive weight on an individual's location in finding reasonable suspicion and stating that location "cannot serve as the justification for untoward or excessive police behavior against those of our citizens who happen to live, work, or travel in what are characterized as 'high crime areas.'"); People v. Powell, 667 N.Y.S.2d 725, 728 (1998) (finding insufficient grounds for a determination of reasonable suspicion where stop was based on defendant's alleged evasive answers to police questioning along with an observation of defendant walking swiftly with stiff arm movements in a high crime area); In re James, 559 N.E.2d 1273, 1274, 560 N.Y.S.2d 114, 115 (1990) (stop of defendant was not justified where defendant was carrying a heavy bag in an area prone to drug crime and weapons activity and defendant's companions fled upon the appearance of police officers).

[82] Harris, *supra* note 80, at 660 (stating that minorities are more likely to live in "so-called high crime areas").

[83] *Id.* at 681 (Noting that blacks and Hispanics have "become caught in a vicious cycle . . . . Feeling understandably harassed, they wish to avoid the police and act accordingly. This evasive behavior in (their own) high crime neighborhoods gives the police that much more power to stop and frisk.").

interaction. Use of police tactics which dictate that a subclass of citizens will be stopped more often merely because of their race or ethnicity forces the minority populace to pay a far higher price, in terms of sacrifice of individual integrity and loss of autonomy, than their white counterparts.[84] The *Hiibel* ruling will only exacerbate this unfair disposition.

As acknowledged by the *Terry* Court, but nevertheless inexplicably disregarded by the majority in *Hiibel*, feelings of unwarranted harassment heighten tensions between minority citizens and police.[85] Such unrest, already heightened by contemporary *Terry* stop procedures which disproportionately target persons of color, will be substantially escalated due to the *Hiibel* ruling. Minority citizens will now have to endure not only the denigration associated with repeated, unwarranted investigatory stops, but will also be forced to tolerate the additional degradation of compelled identification. When confronted with persistent police harassment, much of the psychological armor which protects one's self-dignity is comprised of the ability to remain anonymous. The Supreme Court implicitly seemed to agree with such a rationale, when, prior to its decision in *Hiibel*, the Court stated that *Terry* stops have a "non-threatening" character, in part because the detained suspect "is not obliged to respond."[86] Indeed, even the individual willing to accept subjection to a *Terry* stop as a necessary intrusion in a society which seeks to promote obedience of the law surely takes great solace in the knowledge that when the detainment is over, he can, at the very least, go on his way in a state of relative anonymity. *Hiibel* has the effect of stripping away this last remaining refuge for minority citizens.

It seems an entirely logical conclusion that, especially in blighted neighborhoods, a beat officer's knowledge of a person's identity is a powerful law enforcement tool, so much so that it

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[84] *See* Harris, *supra* note 74, at 43-44.

[85] Terry v. Ohio, 392 U.S. 1, 14 (1968) (stating that African-Americans have been subjected to "wholesale harassment by certain elements of the police community").

[86] Berkemer v. McCarty, 468 U.S. 420, 439-40 (1984) (explaining why *Terry* stops do not require the investigating officer to issue Miranda warnings). The *Hiibel* majority held that *Berkemer* was not controlling because the cited statement merely indicated that the Fourth Amendment itself cannot compel a suspect to answer questions. The source of the legal obligation at issue in *Hiibel* arose not from the Fourth Amendment, but from a state statute. Hiibel v. Sixth Jud. Dist. of Nev., 542 U.S. 177, 187 (2004).

can lead to misuse and outright abuse.[87] Investigative reporting performed by the *Los Angeles Times* in the wake of erupting racial tensions in the city's minority communities revealed a commonly employed police tactic described by local black residents as "The Routine."[88] Young black males were made to kneel with their fingers laced behind their head while officers performed a pat-down frisk and conducted an investigation.[89] Even where such interaction may fail to result in arrest, it would seem that use of such tactics present police officers with the opportunity to incrementally increase their knowledge of suspected criminals and the activities in which they engage. Certainly, it is of prominent importance that police officers have the ability to collect information which will aid in combating crime.[90] However, such a mindset produces an inevitable paradox in that the "the more intrusive data collection and retention, the greater its effectiveness is likely to be."[91] Thus, even the most well-meaning members of the law enforcement community will inevitably feel the need to collect and retain ever increasing amounts of information about an individual suspect. This is quite troubling in that it disregards the fact that the actual number of criminals dispersed in the minority populace is undoubtedly relatively small, and furthermore, the number likely to be successfully apprehended by a *Terry* stop accompanied by compelled identification is even smaller.[92] The likelihood for mistaken stops that nevertheless result in the loss of anonymity and the input of information regarding an entirely innocent individual, an individual stopped, at least in part, because of ethnicity and the socio-

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[87] *See* Anne M. Coughlin, *Simple Question, Big Implications*, WASH. POST, March 28, 2004, at B5 (speculating that police seeking to combat crime might unnecessarily compel identification in a broad array of instances, including those where the grounds for suspicion rests primarily upon the suspect's race).

[88] Harris, *supra* note 74, at 3.

[89] *Id.* at 3-4.

[90] In theory, the greater the amount of information available to law enforcement, the more likely it is that police will be able to anticipate and prevent crime. *See* Steinbock, *supra* note 56, at 736 (discussing, in the context of national identity cards, collection of data in an effort to create a terrorist profile in order to foil terrorist activity).

[91] *Id.*

[92] *Cf. id.* at 735-36 (commenting, within the context of a national identification requirement as a means of terrorism prevention, that identification requirements would have a relatively miniscule success rate because the number of terrorists dispersed amongst the populace is small, and the number of those likely to be apprehended by an identification requirement is even smaller).

economic status of their community, is sure to be a far too frequent occurrence.[93]

Minorities in the United States, particularly African-Americans, have endured a long, tragic legacy of police abuse and ill-treatment. The *Terry* Court sought to combat such unfair police practices when it enacted strict guidelines to regulate police investigatory stops predicated upon a mere suspicion of criminality. *Hiibel*, in authorizing a practice that will inevitably worsen police/minority relations through the disproportionate infliction of an unquantifiable, but nevertheless harmful intrusion upon minority citizens, represents a movement toward the very worst of pre-*Terry* police/citizen interaction.

D. Compelled Identification Inhibits Individual Spontaneity, Thereby Greatly Amplifying the Intrusion

The noxious effect of a statute like that at issue in *Hiibel*, while disproportionately effecting people of color, will not be limited to predominately minority communities. The pervasive feelings of intrusiveness that accompany a compulsory identification requirement are far-reaching and are likely to have the effect of curbing the spontaneity of existence and the spirit of unencumbered individuality which has long been an essential characteristic of life in the United States. Freedom of existence, the ability to live, associate, and move about free from over-bearing government intrusion is a key component of the American existence.[94] In accordance with this

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[93] *See id.* (discussing how even with all the data available through terrorist profiling software like CAPPS, a threat-detection passenger screening system employed by commercial airlines operating in the United States, the occurrence of "false positives" is frequent).

[94] Americans have long cherished the ability to move freely, anonymously, and unfettered throughout the vast confines of the nation's territories. Since the earliest days of our country Americans have possessed an explorative, free-spirited nature. Lewis and Clark's historic trek across the continent is forever engrained in American lore. *See, e.g.,* STEPHEN E. AMBROSE, UNDAUNTED COURAGE: MERIWETHER LEWIS, THOMAS JEFFERSON, AND THE OPENING OF THE AMERICAN WEST (1996). Famed American author Jack Kerouac documented a generation of free-spirited beatniks who journeyed across the continent in search of adventure and self-enlightenment, thereby continuing the American tradition of spontaneity of existence. *See, e.g.,* JACK KEROUAC, ON THE ROAD (1957). The proliferation of the automobile, an invention which would eventually take its place as a staple of American life, coupled with the boost in interstate highway construction undertaken by the Eisenhower administration, spurred countless individuals to take to "Route 66" and travel the nation unfettered. *See, e.g.*, TOM LEWIS, DIVIDED HIGHWAYS: BUILDING THE

deeply cherished tradition, the judiciary has consistently acknowledged the fundamental role that freedom of movement and spontaneity of existence has long occupied in our society.[95] However, compulsory identification requirements threaten to stifle the unbridled existence which comprises an essential component of American life. The compulsory identification requirement at issue in *Hiibel* has the adverse effect of substantially constricting freedom of movement and suppressing spontaneity of existence, thereby heightening the intrusion imposed upon the individual to a level entirely inconsistent with the ideals espoused in the Fourth Amendment and advanced in *Terry*.

Stop and identify statutes, and their close relative, anti-loitering statutes, have their roots in centuries old English laws specifically formulated to limit the behavior and stifle the movement of society's least fortunate.[96] Thus, the history of

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INTERSTATE HIGHWAYS, TRANSFORMING AMERICAN LIFE 86-91 (1997); MICHAEL WALLIS, ROUTE 66: THE MOTHER ROAD 2 (1990).

[95] *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (establishing that the right to travel is a fundamental right in holding unconstitutional a California statutory provision which denied welfare assistance to residents who have not resided within the given jurisdiction for at least one year). The *Shapiro* court stated:

> This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.

Id. at 629. *See also* Katzenbach v. Morgan, 379 U.S. 294 (1964) (citing the burden and restriction on interstate travel occasioned by racial discrimination in restaurants in finding that eateries which refused to serve African-American patrons were in violation of the Title II of the Civil Rights Act of 1964). *See also* Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972):

> Persons "wandering or strolling" from place to place have been extolled by Walt Whitman and Vachel Lindsay….[T]hese activities are historically part of the amenities of life as we have known them. They are not mentioned in the Constitution or in the Bill of Rights. These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness. They have encouraged lives of high spirits rather than hushed, suffocated silence. They are embedded in Walt Whitman's writings, especially in his "Song of the Open Road." They are reflected, too, in the spirit of Vachel Lindsay's "I Want to Go Wandering", and by Henry David Thoreau.

[96] Jocelyn L. Santo, *Down on the Corner: An Analysis of Gang-Related Antiloitering Laws,* 22 CARDOZO L. REV. 269, 270-71 (2000) (discussing how the demise of feudal Europe created a population of impoverished vagrants who wandered the streets in search of work, prompting the ruling class to enact laws targeting this perceived "menace to society").

compelled identification statutes reveals that they were first promulgated with the explicit intention of limiting the movement and activities of individuals deemed undesirable. Today, compulsory identification requirements remain an effective way to confine the populace and restrict the individual's existence. Requests for identification inflict substantial, be it unquantifiable, "psychic harm" on the individual in that such requests inevitably damage one's sense of personal freedom.[97] The idea that compelled identification has become an omnipresent component of the societal landscape inevitably reduces one's invaluable feeling of general liberty.[98] Even individuals entirely innocent of wrongdoing, but nevertheless unfortunate enough to elicit a reasonable suspicion of criminality in well-intentioned law enforcement officers, will inevitably experience considerable trepidation at the prospect of having to identify oneself.[99] The perception that the government might have cause to document one's movements and activities has the potential to dramatically alter behavioral patterns, "not for fear of being caught doing something illegal but because [individuals are] reluctant to contribute to a permanent, government-held record of their actions."[100] The unavoidable effect is suppression of one's inquisitive nature and the gradual reduction of individual vitality and spontaneity. This imposition on the conscience inevitably leads society down the path of a more Orwellian existence. Such a lifestyle not only stands juxtaposed with the implicit ideals contained in the Fourth Amendment as

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[97] Steinbock, *supra* note 56, at 740 ("Identification checkpoints, it may be argued, have an additional subjective effect on a grand scale: the psychic harm to free people of having to 'show your papers.'"). While the cited portion of Steinbock's commentary focuses on the potential effects of law enforcement checkpoints established to combat crime and primarily deals with demands for the production of tangible identity documents (a demand outside the context of *Hiibel*), I submit that the effects on the individual consciousness and sense of freedom detailed by Steinbock are highly relevant to the overall discussion of compulsory identification requirements.

[98] *See* Andrew E. Taslitz, *The Fourth Amendment in the Twenty-First Century: Technology, Privacy, and Human Emotions*, 65 LAW & CONTEMP. PROBS. 125, 131 (2002) (concluding that an appropriate definition of privacy must account for a person's emotional and psychological response to surveillance).

[99] *See* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 451 (discussing the inevitable subjective feelings of intrusion that arise in an innocent motorist compelled to stop at a sobriety checkpoint).

[100] *See* Steinbock, *supra* note 56, at 745. *See also*, Christopher Slobogin, *Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity,* 72 MISS. L.J. 213, 251 (2002) (discussing how persons fearful of the potential for government surveillance tend to develop a reduced sense of individualism which can inhibit their conduct, associations, and activities).

espoused in *Terry*, but also is entirely incompatible with the fundamental nature of the American existence.

A free society which purports to value the sanctity of the individual must protect the ability to move and associate in relative anonymity without the fear of unreasonable government intrusion. Indeed, some of the worst regimes mankind has ever known utilized identification requirements to maintain tabs on the citizenry, thereby limiting the ability to associate freely and restricting all movement and activity deemed undesirable.[101] To be certain, the compulsory identification requirement at issue in *Hiibel* is a far cry from the oppression associated with authoritative regimes like that which presided in the former Soviet Union and the satellite states of the Eastern European communist bloc. Nevertheless, even a peripheral study of world history reveals that freedom of movement, and the invaluable spontaneity of existence which inherently accompanies such freedom, is inevitably stifled when there exists a persistent fear of having to identify oneself to state authorities. The *Hiibel* majority failed to adequately consider the ramifications of Nevada's compulsory identification requirement on a person's subjective feelings of constriction, and the degree to which this emotional response will manifest itself by inhibiting the extemporaneousness movement which has long constituted an essential component of American life. Such imposition upon the individual weighs heavily in upsetting the delicate balance between legitimate state interest and intrusion upon personal sanctity which the *Terry* Court sought to strike when it authorized a brief and substantially restrained intrusion pursuant to a mere reasonable suspicion.

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[101] Perhaps one of the most enduring impressions of a restricted populace is that of the infamous Berlin Wall, and numerous other images of the oppression associated with the satellite states of the former Soviet Union. However, demands for identification also played a role in limiting the movement of blacks in segregated South Africa and were utilized by the Nazis to prevent the flight of Holocaust victims. *See* Sobel, *supra* note 59, at 344-47.

V. THE COMPULSORY IDENTIFICATION STATUTE AT ISSUE IN *HIIBEL* IS FAR TOO BROAD IN SCOPE

A. The Ideals of the Fourth Amendment As Advanced in Terry *Demand That a Compulsory Identification Statute Require Additional Justification Beyond That Which Occasioned the Initial Investigative Stop*

The compelled identification requirement at issue in *Hiibel* requires identification from a detained suspect without any individualized justification and therefore is incompatible with the *Terry* Court's Fourth Amendment jurisprudence. The *Terry* Court explicitly declined to empower police with an automatic right to frisk during every investigatory stop.[102] Rather, in a carefully formulated opinion, the Court clearly outlined the limited circumstances in which officers were permitted to perform a frisk pursuant to a finding of reasonable suspicion.[103] While an officer's finding of reasonable suspicion was deemed a sufficient predicate for performing the initial stop, if the officer wished to heighten the intrusive nature of the investigation by performing a frisk, additional justification beyond that which occasioned the stop was required.[104] Nevertheless, in blatant disregard for the *Terry* Court's requirement of heightened justification when an investigative stop escalates in intrusiveness, the Nevada statute authorizes the automatic right to demand identification during every investigative stop without any additional justification. Thus, the blanket identification requirement at issue in *Hiibel* is contrary to the Fourth Amendment principles advanced by *Terry* because it authorizes an automatic identification requirement without requiring any additional justification from the investigating officer.

The *Terry* Court intentionally stopped far short of authorizing an automatic right to frisk, instead holding that a frisk was constitutionally permissible only if the "officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and

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[102] Terry v. Ohio, 392 U.S. 1, 30 (1968).

[103] *Id.* (limiting the right to frisk to instances where the police officer concludes that "the persons with whom he is dealing with may be armed and presently dangerous" and "where nothing in the initial stages of the encounter serves to dispel [the] reasonable fear for [the officer's] safety or others' safety").

[104] *Id.*

presently dangerous to the officer or to others."[105] The requirement of a reasonable fear for officer safety as a precondition for a frisk is not a mere formality. An officer's "street sense," no matter how well honed, when standing alone, is insufficient to justify a frisk.[106] Thus, the officer must be able to articulate his basis for believing that crime is afoot and is additionally required to articulate his basis for believing that a frisk of the suspect was warranted.[107] This requirement of a reasonable, articulable basis for conducting a frisk, beyond that which provoked the initial investigatory stop, has the effect of preventing overbroad, unnecessary, and unwarranted intrusions. The *Terry* Court stated that the "demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence."[108] By failing to require an additional individualized justification for the compelled identification requirement, the *Hiibel* Court disregarded the *Terry* Court's explicit decree requiring police to sufficiently justify actions which encroach on Fourth Amendment guarantees.

Echoing concerns identical to those raised by the authors of *Terry*, officer safety was an issue of great prominence for the drafters of the *Hiibel* opinion. Writing on behalf of the majority, Justice Kennedy concluded:

> Obtaining a suspect's name . . . serves important government interests. Knowledge of identity may inform an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder . . . . Officers called to investigate domestic disputes need to know whom they are dealing with in order to assess . . . the threat to their own safety . . . .[109]

Justice Kennedy is indeed correct in that the more information possessed by investigating officers, the more likely it is that an investigation can be conducted safely. However, even if compelling identification might increase officer safety incrementally in certain instances, the desire to protect and promote law enforcement safety does not permit circumvention of the Fourth Amendment. The *Terry* Court mandated that police action undertaken during an investigatory stop

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105 *Id.* at 24.

106 *See* Harris, *supra* note 80, at 13.

107 *Terry*, 392 U.S. at 32-33.

108 *Id*. at 21 n.18.

109 *Hiibel,* 542 U.S. at 186.

conducted pursuant to a mere reasonable suspicion requires explicit justification.[110] However, the Nevada statute fails to require any such justification,[111] instead compelling identification from all detained suspects on the mere hunch that knowledge of identity might possibly reveal that a certain individual poses a danger. Such encroachment on the individual, requiring no reasonable justification whatsoever, can not be aligned with the standards of the Fourth Amendment as advanced in *Terry*.

All suspects are not equally dangerous, and therefore all suspects cannot be treated as such. In *Delaware v. Prouse* the Supreme Court stated that stopping an automobile and detaining the driver in order to verify license and registration is unreasonable under the Fourth Amendment if there exists no articulable, reasonable suspicion that the particular motorist is unlicensed or that the automobile is unregistered.[112] The holding in *Prouse* was dictated, at least in great part, by the fact that the police action at issue was not based upon "an appropriate factual basis for suspicion directed at a particular automobile," thereby inviting "intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches."[113] The *Prouse* Court went on to state that the police had chosen to rely on the flawed hypothesis that "stopping apparently safe drivers is necessary only because the danger presented by some drivers is not observable at the time of the stop."[114] The automatic identification requirement in *Hiibel* has the effect of doing exactly that which the Court so vehemently proscribed in *Prouse*. Admittedly, the statute in *Hiibel* is tailored to a finding of reasonable suspicion, while the officer who conducted the stop in *Prouse* was not acting pursuant to any suspicion of criminal activity. However, the logic advanced in the *Prouse* opinion is intuitively quite analogous to the issues presented by *Hiibel*. Demanding identification from all suspects stopped during a *Terry* stop, absent a finding of some factual basis which confirms the necessity for such a demand, is equivalent to stopping motorists on the bare hunch that they may be unlicensed or

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[110] *See Terry,* 392 U.S. at 30 (describing the necessary justification for a stop and detailing the instances in which police may perform a frisk).

[111] *See* NEV. REV. STAT. § 171.123 (2001).

[112] 440 U.S. 648 (1979).

[113] *Id.* at 661.

[114] *Id.*

otherwise unfit to operate a vehicle. Such a policy, in which all are made to endure an intrusion on the bare chance that an officer might learn of an individual posing a threat, relies on the very same "inarticulate hunches" that the Supreme Court explicitly characterized as an insufficient justification for police intrusion.

It is an unfortunate reality that present societal conditions are such that police officers routinely expose themselves to countless risks while pursuing their daily law enforcement duties. For such service and sacrifice, society should be eternally grateful. Nevertheless, the idea that a blanket, automatic compulsory identification requirement may, in certain instances, lessen the risks confronting an officer performing an investigatory stop is insufficient to supercede the mandates of the Fourth Amendment. When the *Terry* Court rendered its decision requiring additional justification before a suspect could be compelled to undergo a frisk, the Court acknowledged that it was well aware of the numerous dangers confronting the brave men and women of law enforcement.[115] However, even when confronted with the rampant infliction of violence on the nation's police officers, the *Terry* Court refused to articulate a rule authorizing an officer conducting an investigatory stop the automatic right to frisk. Instead, the *Terry* Court sought to remain faithful to the Fourth Amendment's prohibition against unreasonable intrusions while appeasing the competing interests which arise from an investigative stop.[116] In authorizing compelled identification without requiring any additional justification, the *Hiibel* majority disregarded the Fourth Amendment ideals espoused in *Terry* regarding the need for additional justification when police seek to undertake action during an investigative stop which will heighten the intrusion experienced by the individual.

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[115] *Terry*, 392 U.S. at 23-24 ("American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded. Virtually all of these deaths and a substantial portion of the injuries are inflicted with guns and knives."). The Court acknowledged that in the first half of the 1960's alone, some several hundred police officers were killed while performing their law enforcement duties. *Id.* at 24 n.21.

[116] The Court stated that the dual interests of consequence in *Terry* were "the neutralization of danger to the policeman in the investigative circumstance and the sanctity of the individual." *Id.* at 26.

B. The Statute at Issue in Hiibel is Insufficiently Tailored in That It Compels Identification Even When Entirely Unwarranted

The Nevada statute at issue in *Hiibel* is far too broad in scope because it requires identification from all suspects detained pursuant to a reasonable suspicion, irrespective of the circumstances surrounding the stop. The blanket application of the compelled identification statute disregards the fact that many times an officer confronting a suspect will have his suspicion quickly dispelled, at which time compelled identification can no longer be said to be consistent with the Fourth Amendment's reasonableness requirement. For instance, suppose upon being detained by the investigating officer, Terry stated that he was simply having a great deal of trouble selecting an engagement ring from the impressive selection in the store's display window. Assuming the investigating officer found Terry's explanation for his behavior entirely credible and therefore no longer suspected Terry of "casing" the storefront in preparation for a robbery, the officer would be without the authority to continue the investigative detention. The reasonable suspicion which justified the initial stop having dissipated, continued detainment would be unreasonable.

A similar situation can easily be hypothesized in the factual circumstances of *Hiibel*. As previously discussed, Deputy Dove approached Larry Hiibel in order to investigate an alleged assault of the female passenger in the truck.[117] For illustrative purposes, consider the following hypothetical which slightly alters the facts of the investigative stop at issue in *Hiibel*. Suppose that rather than being entirely uncooperative, Hiibel instead vehemently insisted to Deputy Dove that an assault had not taken place. His daughter's screams were not cries of pain or alarm, but merely joyous exaltations that could have easily been misinterpreted by a concerned, but uninformed, member of the public. Assume further that Hiibel's explanation is corroborated in full by his daughter. Notwithstanding the inherent difficulty associated with gauging the creditability of statements made by the possible victim of a violent domestic dispute, assuming that Deputy Dove's experience as an officer led him to conclude that Hiibel's

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[117] Hiibel v. Sixth Jud. Dist. Ct. of Nev., 542 U.S. 177, 180 (2004).

explanation was entirely truthful, there would no longer be any reasonable suspicion of criminality afoot. When suspicion of criminality dissipates, there is no authority to continue an investigative detainment, let alone compel identification.

It is a settled principle of Fourth Amendment jurisprudence that police officers are not permitted to rely upon a citizen's refusal to cooperate to furnish the minimal level of objective justification required to authorize detention or seizure.[118] However, the statute at issue in *Hiibel* authorizes exactly that. Even if the officer's suspicion quickly dissipates upon undertaking an investigation, identification can still nevertheless be compelled. A person who has alleviated the officer's suspicions of possible criminal behavior can nevertheless be made to provide identification or face arrest and criminal sanction.[119]

Such an occurrence will not be confined to classroom hypotheticals. Officers frequently stop persons who upon detainment are found to have been engaging in entirely lawful behavior. For example, in *Martiszus v. Washington County,* an officer patrolling in a police cruiser in the early morning hours observed an automobile stopped on the shoulder of the road with what appeared to be a leg emerging from the open driver-side door.[120] The officer believed that the vehicle's occupant might be drunk or perhaps involved in an assault. However, when the officer instituted an investigation, the suspect immediately explained that he was merely performing repairs on his automobile, an explanation clearly corroborated by the circumstances of the encounter (suspect was holding tools, appeared to be in the process of making repairs, etc.). [121] Nevertheless, apparently perturbed by the motorist's abrasive tone and dismissive demeanor, the officer continued with the *Terry* stop even after the suspect had promptly alleviated any suspicion of criminality. While the officer's initial suspicion of criminal activity was quite reasonable, his fears were quickly dispelled and no additional facts arose during the encounter to support a revitalized reasonable belief of criminality.[122]

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[118] Florida v. Bostick, 501 U.S. 429, 437 (1991).

[119] *See* NEV. REV. STAT. § 171.123 (2001) (the statutory language contains no provision which allows for circumvention of the name requirement in a situation where the officer's initial suspicion has dissipated).

[120] 325 F. Supp. 2d 1160, 1163 (D. Or. 2004).

[121] *Id.* at 1171.

[122] *Id.*

Therefore, the court in *Martiszus* concluded that the intrusion was unreasonable in so far as it lasted beyond the vitality of the officer's initial finding of reasonable suspicion.[123] As stated in *Martiszus*, "Though an officer's detention may have been justified at its inception, the detention exceeds *Terry* boundaries when it continues unreasonably despite dissipation of the officer's initial suspicion."[124] Therefore, the statute at issue in *Hiibel* is unreasonable. Nevada's stop and identify statute impermissibly requires identification from all those detained pursuant to a reasonable suspicion of criminality, even in the far from uncommon instance where the reasonable suspicion which served as the predicate for the stop has been alleviated. The paradigm of the Fourth Amendment is entirely inconsistent with such an intrusive requirement.

VI. LEGISLATIVE ALTERNATIVES

If the ideals embodied in the Fourth Amendment are to be respected, compelled identification pursuant to a mere reasonable suspicion of criminality must be deemed unreasonable. However, short of an outright ban on compelled identification, there exist methods of narrowly tailoring a compulsory identification requirement so as to lessen the intrusion upon the rights of the individual. The flexibility of our federalist system of governance grants the individual states the freedom to pursue their own legislative initiatives. Admittedly, a "hundred flowers" approach[125] to a hot-button issue like crime prevention and officer safety, especially in today's charged political climate, may seem an especially combustible issue for elected officials wary of appearing weak on crime.[126] However, if the guarantees of the Fourth

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[123] *Id.*

[124] *Id.* at 1169.

[125] During a brief two-year period in the mid nineteen fifties, Mao Zedong encouraged Chinese intellectuals to openly discuss the nation's problems and formulate alternative problem-solving approaches in order to strengthen Chinese society. Mao's brief flirtation with intellectual freedom and a democratic approach to governance was inspired by a poetic passage which read, "Let a hundred flowers bloom: let a hundred schools of thought contend." *Hundred Flowers Campaign*, Nation Master Encyclopedia, *available at* http://www.nationmaster.com/encyclopedia/Hundred-Flowers-Campaign (last visited Jan. 3, 2005).

[126] Consider that polling conducted by the New York Times in conjunction with CBS News in the wake of the terrorist attacks of September 11, 2001 found that seventy percent of Americans were willing to surrender personal freedoms in order to make the nation safer. YALE KASMIR ET AL., MODERN CRIMINAL PROCEDURE 374 (10th

Amendment are to remain viable, it is imperative that legislation be structured so as to best protect the respect for the integrity of the individual which exists as the bedrock principle of the American institution of governance.

The least constitutionally offensive method of formulating a compelled identification statute is to tailor the requirement to allow the suspect the initial opportunity to dispel the officer's suspicions before a demand for identification becomes compulsory. Using this legislative archetype, it is only after the officer's investigation and the initial interaction with the suspect has failed to adequately alleviate suspicion that a request for identification must be obeyed. Such a statute would prevent a citizen who has engaged in entirely lawful conduct, mistakenly misinterpreted as criminal, from being compelled to needlessly endure the substantial intrusion constituted by involuntary revelation of identity. Offering the citizenry an initial opportunity to dispel the officer's suspicion would go a long way in curing the overreaching that plagues the statute at issue in *Hiibel*. Before subjecting a person to the harrowing experience of custodial arrest,[127] legislatures would be better served if they drafted legislation whereby compelled identification, followed by arrest for noncompliance, was a tactic of last resort to be utilized only when traditional investigative methods fail to dispel suspicion. Consider *Welsh v. Wisconsin*, where the Supreme Court held that the legislature's decision not to impose incarceration for a statutory infraction is the best indicator of the state's level of interest in taking custody of individuals who commit a violation.[128] Thus, the fact that Nevada merely imposes a monetary fine upon obtaining a conviction for failure to identify is further evidence of the appropriateness of compelling identification only after granting the suspect an opportunity to dispel suspicion. Since arrest for failure to identify would not seem to be a pressing state interest, legislatures should afford a detained suspect the

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ed. 2002). *See also,* Harris, *supra* note 80, at 39 ("[I]t is hardly surprising to find that most people would support crime-fighting efforts of questionable constitutionality.").

[127] Arrest is highly intrusive in that it grants the right to use force to affect the arrest, to transport the person to the police station, and to handcuff, book, and fingerprint the person. Arrest also authorizes police to detain the arrestee for a prolonged period prior to presentation before a magistrate. Brief of Amici Curiae American Civil Liberties Union et al. in Support of Petitioners, at 21, Atwater v. City of Lago Vista, 532 U.S. 318 (2001) (No. 99-1408).

[128] Welsh v. Wisconsin, 466 U.S. 740 (1986).

opportunity to dispel suspicion before an identification demand becomes compulsory.

Admittedly, the legislative proposal detailed above may appear somewhat inadequate in that it fails to sufficiently protect the officer conducting the investigative stop. However, municipalities attempting to better ensure officer safety should not adopt measures which require suspects to identify themselves to law enforcement as a preliminary matter during each and every investigative stop. Such a blanket, automatic identification requirement is far too invasive. Rather, states should adopt legislation that incorporates the ideals encompassed in the automatic frisk doctrine in order to better balance individual integrity with the legitimate needs of law enforcement.

As previously discussed, the *Terry* court specifically authorized the frisking of a suspect detained pursuant to a reasonable suspicion of criminality only when there exists a reasonable fear for officer safety.[129] In *Sibron v. New York* the Court opined that officers have an automatic right to frisk a suspect in one of two situations; either the suspect exhibits some outward sign of being armed or the suspected crime, by its very nature, is one of violence.[130] Over time, case law has begun to expand the circumstances in which automatic frisk is permissible. In addition to the situation where the crime suspected is an inherently violent offense, when the offense suspected is one that involves the mere possibility of armed violence, a search in the form of a frisk is permissible.[131] Additionally, persons suspected of a drug crime, even be it a minor offense, may be frisked immediately upon detention

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[129] Terry v. Ohio, 392 U.S. 1, 28 (1968). In *Terry*, the Court concluded that since the suspects had been observed in what appeared to be preparation for a robbery, an offense "likely to involve the use of weapons," the investigating officer acted properly in conducting a frisk. *Id.*

[130] Sibron v. New York, 392 U.S. 40, 64 (1968) ("In the case of a self-protective search for weapons, [a police officer] must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous."); *Id.* at 74 (Harlan, J., concurring) ("[T]he right to frisk is automatic when an officer lawfully stops a person suspected of a crime whose nature creates a substantial likelihood that he is armed. . . ."). *See also* Harris *supra* note 74, at 4, 5 ("[T]he Supreme Court has always maintained that police could perform frisks – pat down searches of the outer clothing of suspects – only if the officer suspected a violent crime was afoot, or if the individual suspect showed some sign of being armed and dangerous.").

[131] Adams v. Williams, 407 U.S. 143, 144-45 (1972). In *Adams*, an informant apprised police officers that a person seated in a nearby automobile was carrying a handgun, prompting the officers to approach the individual. When the suspect ignored instructions to exit the vehicle, the officer removed a gun from the suspect's waistband. *Id.*

regardless of whether they exhibit any tell-tale signs of danger to the investigating officer.[132] The propensity for burglars to carry instruments capable of inflicting harm has resulted in burglary also being treated as an offense authorizing automatic frisk.[133] Furthermore, numerous cases hold that law enforcement personnel may frisk persons "based not on the crime or outward signs that the suspect may be armed, but because the situation presents the police with circumstances detrimental to their safety."[134]

Adoption of compelled identification legislation which embodies the ideals of the automatic frisk doctrine is far more compatible with Fourth Amendment jurisprudence than the intrusive statute at issue in *Hiibel*. A prominent justification put forth by the *Hiibel* majority in upholding the Nevada statute was the idea that compelled identification increases officer safety.[135] Thus, aligning the rationale of the *Hiibel* majority with the extensive body of automatic frisk cases, an officer performing an investigative stop pursuant to a reasonable suspicion would be permitted to issue a compulsory demand for identification only when the suspected offense is one which carries a propensity for violence or the specific factual circumstances of the stop are such that there exists a reasonable fear for officer safety. The wide array of offenses which have been viewed by various courts as sufficient to authorize an automatic frisk provide a sufficient framework for instances when compelled identification should be deemed permissible.

Of course, adoption of the proposal set forth above would dictate that Larry Hiibel, a suspect in an alleged assault,

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[132] *See* Harris, *supra* note 80, at 24 (describing weapons as tools of the trade for narcotics trafficking, thus justifying frisk of suspected drug offenders upon detainment). *See also, e.g.*, United States v. Brown, 913 F.2d 570, 572 (8th Cir. 1990) ("Since weapons and violence are frequently associated with drug transactions, the officers reasonably believed that the individuals with whom they were dealing were armed and dangerous.").

[133] *See, e.g.,* Gutierres v. State, 793 P.2d 1078, 1081 (1990) ("While burglary is not *per se* a crime of violence, it is a serious crime and . . . someone suspected of burglary would carry a weapon and resort to violence."). *See also,* Harris, *supra* note 80 at 26-27 ("Courts frequently allow automatic frisks of burglary suspects . . . . As with narcotics cases, the reasoning is that those involved *might* have weapons.").

[134] Harris, *supra* note 80, at 31. Factors highlighted as authorizing frisk in such circumstances include presence in a high crime locale, a larger number of suspects than officers, darkness, etc. *Id.*

[135] Hiibel v. Sixth Jud. Dist. Ct. of Nev., 542 U.S. 177, 186 (2004) (Police "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.").

would still be required to identify himself to the investigating deputy. However, such an approach is far more desirable than the automatic identification requirement upheld in *Hiibel*. Persons not suspected of a crime likely to pose a threat to the officer would not be needlessly compelled to reveal their identity. Just as an automatic frisk is not authorized in accordance with every *Terry* stop, offenses which do not present a reasonable fear for officer safety should not grant an automatic right to compel identification. For instance, persons suspected of loitering, littering, or a host of other similarly trivial offenses do not inherently pose danger to the investigating officer. Therefore, compelling identification in such instances cannot be said to appreciably increase officer safety to the point where the intrusion upon the individual is justified. As with a frisk, if the offense which serves as a predicate for the *Terry* stop is insufficient to create a reasonable fear for officer safety, but the circumstances of the stop (i.e. suspect's demeanor and behavior as the investigative stop unfolds) reasonably creates such fear, compelled identification could then be required.[136]

One need not worry that limiting the instances in which compelled identification is allowable and requiring officers to justify their decisions to compel identification will substantially expose police officers to harm. In a hearing to adjudicate an allegation that a suspect was illegally searched during the course of a *Terry* stop, testimony given by police officers is entitled substantial deference.[137] While the police officer may be called upon to explain what made the situation appear sufficiently dangerous to warrant a frisk, law enforcement is rarely, if ever, required to submit statistics in support of its assumption that a particular class of suspect poses a threat.[138] Indeed, the Supreme Court explicitly instructed lower courts to defer to the testimony by police, holding that evidence "must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law

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[136] *See* Sibron v. New York, 392 U.S. 40, 74 (1968) (Harlan, J., concurring) ("If the nature of the suspected offense creates no reasonable apprehension for the officer's safety, I would not permit him to frisk unless other circumstances did so.").

[137] United States v. Cortez, 449 U.S. 411, 418 (1981).

[138] Harris, *supra* note 80, at 33 ("Seldom, if ever, do police supply any data substantiating their assumptions that the suspect was armed and dangerous; rather, it is simply assumed.").

enforcement."[139] Thus, if similar deference is afforded the testimony given by officers called upon to explain their rationale for compelling identification, police will retain the ability to respond to the threats which confront them in the field, and the integrity of the individual subjected to the detention will not be unnecessarily trampled.

Irrespective of the particulars of the stop and identify statute adopted by a particular jurisdiction, no record of the citizen-police encounter should be made if the investigative stop ultimately proves unfounded or fruitless. As previously discussed, the feeling that the authorities are consciously documenting an individual's activities has a dramatic adverse effect on the mental well-being of the populace. In order to lessen the psychic trauma of the encounter, when an investigative stop fails to produce justification for continued detainment, no permanent record should be made of the encounter. Inevitably, adoption of such a policy would mean that a certain number of criminally inclined individuals, either clever enough to dispel an officer's well-founded suspicions or fortunate enough to have encountered the officer in a situation where continued detainment is legally impermissible, might perhaps benefit from the opportunity to avoid documentation. While such an occurrence is truly unfortunate, this is an unavoidable burden that society must shoulder in order to live in an environment sufficiently respectful of individual integrity and freedom.[140]

Furthermore, an officer who remained suspicious of an individual detained during a *Terry* stop is not without recourse. Even if the suspect's identity were to go undocumented at the conclusion of the fruitless *Terry* stop, a record of the encounter could still be gleaned by other means. Should an officer feel that such action is warranted, there has never existed any principle of Fourth Amendment jurisprudence which would prevent an officer remaining suspicious of an individual detained during a *Terry* stop from continuing to observe the

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[139] *Cortez*, 449 U.S. at 418. Further evidencing the degree of deference deemed appropriate, the Court in *Cortez* advanced the rationale that judgments made by officers in the field are not to be viewed in isolation with the benefit of hindsight analysis. Instead, the Court stated that "the totality of the circumstances – the whole picture – must be taken into account." *Id.* at 417-18.

[140] English legal scholar Sir William Blackstone, a champion of egalitarian justice, famously opined that "it is better that ten guilty persons escape, than that one innocent suffer." WILLIAM BLACKSTONE, 4 COMMENTARIES *358 (GARLAND PUBL'G 1978).

suspect even after the investigative detention has concluded.[141] Practically speaking, such continued observation will frequently result in the documentation of a license plate number or street address from which the officer could accurately record his interaction with the suspect without having to rely on information gained through compulsion. Legislation of this sort, in which the identity of the individual is not recorded when the *Terry* stop proves fruitless, is far more desirable than that adopted in Nevada because it better respects individual integrity by seeking to lessen the psychological harm occasioned by compelled revelation of identity.

VII. CONCLUSION

Since the very earliest days of the Union, our nation has rested on a foundation grounded in the bedrock of personal freedom and respect for the individual. While on its face the Fourth Amendment outlines proscriptions against oppressive government action, at its very core, the prohibition against unreasonable search and seizure seeks to protect personal integrity and individual sanctity. At a very fundamental level, the compulsory identification statute at issue in *Hiibel v. Sixth Judicial District of Nevada* is an assault on individual integrity. In upholding the Nevada statute at issue in *Hiibel*, the Supreme Court not only upset the delicate balance struck by the *Terry* Court between the legitimate needs of law enforcement and the integrity of the individual citizen, but also blatantly disregarded the implicit ideals set forth by the founders in adopting the provisions of the Fourth Amendment. However, while the Supreme Court's ratification of the Nevada statute may seem a damaging blow to the personal freedoms espoused in the Bill of Rights, diligence on the part of the citizenry in demanding that our elected representatives remain faithful to the most basic principles of our nation can lessen the impact of the Court's mistake. President Dwight Eisenhower once stated "There is nothing wrong with America that the faith, love of freedom, intelligence and energy of her citizens

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[141] *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 5 (1968) (describing an officer's procedure of observing persons he should encounter as "routine").

cannot cure."[142] Through insistence upon stop and identify statutes more consistent with the Constitution's ideals, the citizenry has an opportunity to prove Eisenhower's inspiring commentary entirely accurate.

William H. Weisman[†]

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[142] Quote of President Dwight D. Eisenhower, unattributed, *available at* http://www.quotationspage.com/search.php3?homesearch=freedom&page=6 (last visited Jan. 3, 2005).

[†] Candidate for Juris Doctor, expected June 2006, graduate of the University of Maryland, College Park, 2003. I would like to thank the faculty at Brooklyn Law School and the dedicated staff of the *Brooklyn Law Review*, for without the tireless support of both this Note never would have been possible. For my family.