

**HIIBEL V. SIXTH JUDICIAL DISTRICT COURT  
OF NEVADA:  
IDENTIFICATION AND ANONYMITY POST-9/11**

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Since the September 11, 2001 terrorist attacks, government demands for identification have become an increasingly common proposal to ensure public safety. This idea is based on the theory that knowing as much as possible about a person decreases the likelihood that he will do harm, or perhaps put society on notice that he could be dangerous and allows law enforcement to react accordingly. However, routine identification may affect an individual's right to be free from unreasonable searches, as well as the rights to engage in free speech, movement and association. Compelled identification also impinges upon a person's ability to enjoy these rights anonymously.

In an age of digital networks, a name does not serve merely to identify a person. It can provide access to a vast, cross-referenced system of public and private databases that contain many intimate details of a person's life. If anyone can be forced by the state to give his name — a key to these databases — to the police, then constitutional protections guaranteeing certain freedoms become illusory.

Perhaps the most significant test concerning anonymity the United States Supreme Court has faced since 9/11 is *Hiibel v. Sixth Judicial District Court of Nevada*.<sup>1</sup> This case arose when a Humboldt County, Nevada sheriff's deputy responded to a bystander's phone call reporting that a man had struck a female passenger inside a truck during an argument. The deputy arrived on the scene and found Larry Dudley Hiibel, who was standing next

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<sup>1</sup> 124 S. Ct. 2451 (U.S. 2004).

to a parked truck with his daughter inside. The deputy demanded to see Hiibel's identification, which Hiibel refused eleven times to show because he did not believe he had done anything wrong.<sup>2</sup>

Hiibel was subsequently arrested under a Nevada state law that allows a law enforcement officer to hold a person to "ascertain his identity" when there are circumstances that "reasonably indicate that the person has committed, is committing or is about to commit a crime." The law requires that anyone so held "shall identify himself, but may not be compelled to answer any other inquiry of any peace officer."<sup>3</sup> It is important to note that a law enforcement officer's suspicion that a person has committed a crime does not rise to the level of "probable cause," the standard required before an officer may arrest a person. In effect, the Nevada state law makes it possible for an officer to combine refusal to provide identification with suspicion of criminal involvement to equal probable cause to arrest.

Hiibel was charged with and convicted of resisting a public officer in violation of Nevada state law, and he appealed the conviction. At the heart of the case was the question of whether Nevada's "stop and identify" law authorizes unconstitutional police behavior, or whether situations arising under the law fall within the realm of a "Terry stop." During a Terry stop, an officer may briefly detain a person and investigate further when the officer reasonably suspects — but does not have probable cause to believe — the person may be involved in criminal activity.<sup>4</sup> The Terry stop is an exception to the procedures police must ordinarily observe to ensure their searches are not unreasonable.

The Nevada District Court found it was reasonable and necessary for the deputy to ask for Hiibel's identification, and held that the public interest in requiring Hiibel to identify

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<sup>2</sup> A video of the arrest and transcript of the conversation between Hiibel and the sheriff's deputy are available at <http://www.papersplease.org/hiibel/video.html> (last accessed March 29, 2005).

<sup>3</sup> Nevada Revised Statute § 171.123(3), available at <http://www.leg.state.nv.us/NRS/NRS-171.html> (last accessed March 29, 2005).

<sup>4</sup> *Terry v. Ohio*, 392 U.S. 1 (U.S. 1968).

himself outweighed his right to remain silent. Hiibel asked the Supreme Court of Nevada to review the case, challenging the constitutionality of the stop-and-identify law.

The Nevada Supreme Court recognized the interest at stake in *Hiibel* implicated anonymity. The court noted that it is “[f]undamental to a democratic society [that we have] the ability to wander freely and anonymously, if we so choose, without being compelled to divulge information to the government about who we are or what we are doing.”<sup>5</sup> However, noting that a government invasion of privacy does not violate constitutional guarantees as long as it is reasonable, the court decided that any intrusion on privacy under the stop-and-identify law is reasonable when weighed against the benefits to law enforcement and public safety. “Knowing the identity of a suspect allows officers to more accurately evaluate and predict potential dangers that may arise during an investigative stop,” the court explained. The threat of terrorism was a particularly compelling justification for requiring identification. The court found:<sup>6</sup>

[W]e are at war against enemies who operate with concealed identities and the dangers we face as a nation are unparalleled. Terrorism is changing the way we live and the way we act and the way we think . . . . To deny officers the ability to request identification from suspicious persons creates a situation where an officer could approach a wanted terrorist or sniper by being unable to identify him or her if the person’s behavior does not rise to the level or probable cause necessary for arrest.<sup>7</sup>

The court asserted the disclosure of a name is a minor intrusion: “[t]o hold that a name, which is neutral and non-incriminating information, is somehow an invasion of privacy is untenable . . . . Requiring identification is far less intrusive than conducting a pat down search of one’s physical person,” which is permitted during *Terry* stops.<sup>8</sup> The court also found the stop-and-identify law to be narrowly written and applicable only in situations

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<sup>5</sup> *Hiibel v. Sixth Judicial District Court of Nev.*, 59 P.3d 1201, 1204 (Nev. 2002), available at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=nv&vol=118NevAdvOpNo88&invol=2> (last accessed March 29, 2005).

<sup>6</sup> *Id.* at 1205.

<sup>7</sup> *Id.* at 1206 (internal quotation marks omitted).

<sup>8</sup> *Id.*

where an officer has an articulable suspicion that a person is involved in criminal activity, and thus is constitutional.<sup>9</sup>

Of the seven Nevada Supreme Court justices hearing the case, three did not agree that requiring identification under the stop-and-identify law was reasonable. In a strongly worded dissenting opinion, they first urged that anonymity is part of the right to privacy, which in turn is protected during *Terry* stop frisks performed by officers: “[a]nonymity is encompassed within the expectation of privacy, a civil liberty that is protected during a *Terry* stop. The majority now carves away at that individual liberty by saying that a detainee must surrender his or her identity to the police.”<sup>10</sup> In such situations, the dissent argued,

The majority avoids the fact that knowing a suspect’s identity does not alleviate any threat of immediate danger by arguing that a reasonable person cannot expect to withhold his identity from police officers, as we reveal our names to different people everyday. What the majority fails to recognize, however, is that when we give our names to new acquaintances, business associates and shop owners, we do so voluntarily, out of friendship or to complete a transaction . . . In contrast, being forced to identify oneself to a police officer or else face arrest is government coercion — precisely the type of governmental intrusion that the Fourth Amendment was designed to prevent.<sup>11</sup>

The dissenting judges also criticized the majority for “reflexively reasoning that the public interest in police safety outweighs Hiibel’s interest in refusing to identify himself,” noting that no evidence exists that an officer is safer for knowing a person’s identity.<sup>12</sup> “What the majority fails to recognize,” the opinion continued, “is that it is the observable conduct, not the identity, of a person, upon which an officer must legally rely when investigating crimes and enforcing the law.”<sup>13</sup>

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<sup>9</sup> *Id.* at 1207.

<sup>10</sup> *Id.* at 1208 (Agnosti, J., dissenting).

<sup>11</sup> *Id.* at 1209 (Agnosti, J., dissenting).

<sup>12</sup> *Id.* (Agnosti, J., dissenting).

<sup>13</sup> *Id.* (Agnosti, J., dissenting).

Hiibel appealed his case to the United States Supreme Court, which examined the constitutionality of the stop-and-identify law without discussing the right to anonymity. The sharply divided court concluded in its majority opinion that the law did not violate constitutional protections against unreasonable search and seizure or self-incrimination. Justice Kennedy, writing for a narrow majority, said the demand for identification under the stop-and-identify law:

has an immediate relation to the purpose, rationale, and practical demand of a *Terry* stop. The threat of criminal sanction helps ensure that the request for identity does not become a legal nullity. On the other hand, the Nevada statute does not alter the nature of the stop itself: it does not change its duration, or its location. A state law requiring a suspect to disclose his name in the course of a valid *Terry* stop is consistent with [constitutional] prohibitions against unreasonable searches and seizures.<sup>14</sup>

The majority also concluded that the stop-and-identify statute does not violate a person's constitutional protection against self-incrimination — at least, in the absence of any indication that his identity actually could be used against him in court. The majority noted, “[o]ne’s identity is, by definition, unique; yet it is, in another sense, a universal characteristic. Answering a request to disclose a name is likely to be so insignificant in the scheme of things as to be incriminating only in unusual circumstances.”<sup>15</sup>

Despite upholding the stop-and-identify law, the majority limited the scope of its decision strongly by stating:

[a]s we understand it, the statute does not require a suspect to give the officer a driver's license or any other document. Provided that the suspect either states his name or communicates it to the office by other means — a choice, we assume, that the suspect may make — the statute is satisfied and no violation occurs.<sup>16</sup>

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<sup>14</sup> 124 S. Ct. at 2459 (internal citations omitted).

<sup>15</sup> *Id.* at 2461.

<sup>16</sup> *Id.* at 2457.

This qualification is particularly interesting in light of the fact that during Hiibel's encounter with the Humboldt County sheriff's deputy, the officer specifically asked that Hiibel *show* identification. It is uncertain whether the officer would have accepted a spoken name in lieu of a driver's license or other documentation. If the stop-and-identify statute expressly required suspicious individuals to show identification documents to avoid arrest, it is unclear whether the majority would have reached the same conclusion.

Four of the nine Supreme Court justices dissented from the majority's opinion. In one dissent, Justice Stevens argued that an individual's identity falls within constitutional protections against self-incrimination:

A name can provide the key to a broad array of information about the person, particularly in the hands of a police officer with access to a range of law enforcement databases. And that information, in turn, can be tremendously useful in a criminal prosecution. It is therefore quite wrong to suggest that a person's identity provides a link in the chain to incriminating evidence only in unusual circumstances.<sup>17</sup>

Justice Stevens also noted that the logic of the court's opinion did not make sense. If disclosure of a person's name would not be incriminating, then it could not be of value to the police and the stop-and-identify law "requires nothing more than a useless invasion of privacy."<sup>18</sup> If a person's name is incriminating, however, disclosure of his identity would clearly be constitutionally protected.<sup>19</sup>

Three other justices argued in a second dissenting opinion that the stop-and-identify law violated constitutional protections against unreasonable search and seizure, and noted the slippery slope created by the majority's holding. "Can a State, in addition to requiring a stopped individual to answer 'What's your name?' also require an answer to 'What's

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<sup>17</sup> *Id.* at 2464 (Stevens, J., dissenting.).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

your license number?’ or ‘Where do you live?’ . . . After all, answers to any of these questions may, or may not, incriminate, depending upon the circumstances.”<sup>20</sup>

It is clear that the *Hiibel* decision affects the ability of a person to maintain anonymity in the face of a law enforcement request for identification. However, the Supreme Court deliberately chose not to address the question of whether a person can refuse to provide identification documents to a police officer, and did not explain what an adequate showing of identification is. The court’s analysis leaves open questions about a policeman’s authority to stop a person and ask for identification.

- Is speaking a name aloud enough to satisfy the law enforcement interest in knowing a person’s identity? Suppose a police officer feels he needs additional personal information, *e.g.*, home address, date of birth, Social Security number, or citizenship, before feeling confident someone is who he claims to be? And how can an individual or an officer in the midst of a *Terry* stop know how much information the individual is obligated to give to establish his identity?
- If an officer remains suspicious about a person’s behavior after he identifies himself verbally, but still lacks probable cause to arrest, how much further does his investigative authority extend? Would he be justified in “frisking” for identifying documents, just as an officer may frisk for dangerous weapons during a *Terry* stop?
- Does the holding in *Hiibel* create situations in which a person would be within his constitutional rights to refuse to identify himself, such as when providing his name would reveal that he is wanted for an outstanding warrant? Could he assert this constitutionally protected right during a *Terry* stop without being arrested?

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<sup>20</sup> *Id.* at 2465-66 (Breyer, J., dissenting).

Before *Hiibel*, the U.S. Supreme Court affirmed a right of anonymity in several settings, including boycotts, handbills, political petitions, and door-to-door solicitation.<sup>21</sup>

It remains to be seen how courts will treat anonymity in the years after 9/11. *Hiibel* suggests that the Supreme Court is not willing to make such substantial concessions to law enforcement as to defeat the individual's right to be left alone by the state.

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<sup>21</sup> *Talley v. California*, 362 U.S. 60 (U.S. 1960), *McIntyre v. Ohio*, 514 U.S. 334 (U.S. 1995), *Buckley v. American Constitutional Law Found.*, 525 U.S. 182 (U.S. 1999), *Watchtower Bible v. City of Stratton*, 536 U.S. 150 (U.S. 2002).