Building a Better Terry Stop: the Case for *Hiibel*

*By Charles Hobson**

Hiibel v. *Sixth Judicial District Court*,[1] decided by the Supreme Court in June, is an easy case to misunderstand. Too often, public perceptions about this case frame the debate as a choice between civil liberties and an authoritarian state ordering individuals to present their papers or risk imprisonment.[2] The *Hiibel* decision does not go that far. While important, the Supreme Court decision only grants a limited authority to police officers in states with appropriately narrow stop and identify laws. People are at no greater risk of arbitrary arrest than they were before the decision. What has happened is that the "stop and frisk" sanctioned by *Terry* v. *Ohio*,[3] has become an even more effective public safety tool at little additional cost to civil liberty.

Hiibel affirmed the constitutionality of a Nevada stop and identify statute. If an officer stopped a person under a reasonable suspicion that the person had committed or was about to commit a crime, then the stopped individual is required to comply with a request for identification from the officer. Failure to comply is a misdemeanor.[4] These laws are found in many states.[5]

The Supreme Court properly rejected the Fourth and Fifth Amendment attacks on the Nevada law. The Fourth Amendment is not an absolute guarantee of privacy from searches and seizures, but instead prohibits only "unreasonable searches and seizures . . . ."[6] Therefore, the Fourth Amendment only protects expectations of privacy that society deems reasonable.[7] The Fourth Amendment attack on stop and identify laws fails because of the minimal privacy interest in one's identity. We constantly identify ourselves to the government and each other. Proof of identity is necessary to work, to drive, to have a bank account, and for other modern necessities.[8] Since many government agencies already know our identities, there is little, if any, loss of privacy in complying with a stop and identify law. [9] Given the needs of modern society, there is no reasonable expectation of privacy in one's identity in the context of a *Terry* stop.

Fourth Amendment challenges to searches or seizures are resolved by balancing the reasonable expectation of privacy against the legitimate government interests served by the intrusion.[10] The *Hiibel* Court correctly recognized that identifying the suspect at a *Terry* stop serves important and legitimate interests. Prompt identification allows the officer to determine highly relevant information, such as if the suspect is wanted for a crime or has a record of violence or mental disorder.[11] Also, identification can help quicken the release of an innocent suspect in some circumstances.[12] Since identity is a public matter for almost everybody, the balance of interests strongly favors allowing the state to require identification at *Terry* stops.

Critics of stop and identify statutes also claim that these laws allow police to circumvent the probable cause requirement for arrest. The claim is that stop and identify laws allow police to arrest people for merely being suspicious, and this encourages arbitrary police action.[13] The Supreme Court properly rejected this argument. Stop and identify laws only apply if the person is validly stopped under *Terry*'s reasonable suspicion standard. Supreme Court precedent prevents police from stopping people without suspicion and demanding identification,[14] and the *Hiibel* decision does not change this rule.[15]

Hiibel was not arrested because the officer had reasonable suspicion to make a *Terry* stop, but because the officer had probable cause to believe that Hiibel did not comply with Nevada's stop and identify law.[16] This demonstrates that fears of a repressive stop and identify regime are overblown. Any valid stop and identify law, like Nevada's, contains an important limit on officer discretion and the authority of the state. The Nevada law only required the detained person to answer the officer's request for a name.[17] A more stringent identification requirement would raise substantial constitutional questions. For example, California's stop and identify law, which required the detainee to provide "credible and reliable" identification, was struck down for being unconstitutionally vague in *Kolender* v. *Lawson*.[18] Just as vague, difficult to satisfy identification requirements give too much discretion to the officer,[19] the narrower, more easily satisfied requirement upheld in *Hiibel* effectively limits the discretion of the officer in the field. Since the detainee can avoid arrest by merely stating his or her name, *Hiibel* does not give officers the authority to make arbitrary arrests. While it is possible that a more stringent identification requirement would survive judicial review, the specter of *Kolender* counsels a more cautious approach.

It is true that an officer could overcome this limit by lying about the suspect's response, but this is a constitutional strawman. No constitutional standard can consistently defeat a sufficiently corrupt officer. Manufactured consent to a search can overcome the warrant requirement for searches, and planted evidence can overcome probable cause or even proof beyond a reasonable doubt. The overwhelming majority of police officers are honest and conscientious. Defense counsel, citizen oversight, and a vigilant press are much more effective at dealing with those few who are willing to perjure themselves to harass individuals than a punitively stringent constitutional criminal procedure. Fourth Amendment doctrine is predicated on the assumption that most officers are honest, and *Hiibel* is no different.

Fifth Amendment attacks on stop and identify laws are similarly unpersuasive. As the Supreme Court properly held, producing one's name to an officer carries "no reasonable danger of incrimination."[20] While providing one's identity may lead to arrest if there is an outstanding warrant, the mere fact of identity will not be used to convict the person at trial. While identity is unique, to each of us it is also a universal characteristic.[21] An arrestee must provide his or her identity, as does a witness who is about to invoke the self-incrimination privilege.[22] Also, if the state can readily establish a fact without compelling it from the individual, then testimony regarding that fact's existence is much less likely to be incriminating.[23] Every April we provide the federal government with our identities in our tax returns, yet this does not raise any genuine Fifth Amendment problem.[24] Barring highly unusual circumstances, identity is not incriminating, and stop and identify statutes do not violate the Fifth Amendment.[25]

Hiibel represents the triumph of common sense over hyperbole. Police can now make *Terry* stops even more effective tools for public safety than they were before. The decision allows states to fashion laws which will entitle police to non-incriminating but highly useful information that we give out to the public every day. There will be no random stops with demands for one's papers after *Hiibel*. However, there will be less crime and more apprehended criminals.

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Footnotes

[1] 542 U. S. __, 124 S. Ct. 2451 (2004).

[2] *See*, *e.g.*, A. Coughlin, Simple Question, Big Implication, Washington Post, March 28, 2004, p. B5 ("Defenders of Larry Hiibel argue that identification laws such as Nevada's dramatically and unnecessarily expand the power of police to intrude on our liberties—indeed that such laws authorize the police to arrest innocent people whose only transgression was to ask an officer to leave them alone.").

[3] 392 U. S. 1 (1968).

[4] *See Hiibel*, *supra* note 1, 124 S. Ct., at 2455-56.

[5] *See id*., at 2456.

[6] U. S. Const. Amend. IV.

[7] California v. Greenwood, 486 U. S. 35, 39-40 (1988).

[8] *See* California v. Byers, 402 U. S. 424, 427-428 (1971) (plurality opinion).

[9] *See id*., at 39-40.

[10] *See* Delaware v. Prouse, 440 U. S. 648, 654 (1979).

[11] *See Hiibel*, *supra* note 1, 124 S. Ct., at 2458.

[12] *See ibid*.

[13] *See id*., at 2459.

[14] *See* Brown v. Texas, 443 U. S. 47, 51-52 (1979).

[15] *See Hiibel*, *supra* note 1, 124 S. Ct., at 2459.

[16] *See ibid*.

[17] *See ibid*.

[18] *See* 461 U. S. 352, 358 (1983).

[19] *See ibid*.

[20] *Hiibel*, *supra* note 1, 124 S. Ct., at 2460.

[21] *See id*., at 2461.

[22] *See ibid*.

[23] *See* Baltimore City Dept. of Social Servs. v. Bouknight, 493 U. S. 549, 555 (1990).

[24] *See* United States v. Sullivan, 274 U. S. 259, 263-264 (1927) (bootlegger during Prohibition does not have a Fifth Amendment privilege against identifying himself on an income tax return).

[25] *See Hiibel*, *supra* note 1, 124 S. Ct., at 2461.