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Further Down the Road with *Hiibel*: Pedestrians to Passengers*

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On May 21, 2000, Dudley Hiibel was arrested for allegedly violating Nevada's "stop and identify" statute, a law which requires persons detained under reasonable suspicion to identify themselves. Before he was arrested, Mr. Hiibel was questioned by a police officer responding to a report of a fight inside a moving vehicle. Police found Mr. Hiibel standing outside the passenger door of a truck parked on the side of the road; he declined to answer the officer's command that he identify himself. Other than violating the law by not identifying himself, the police had no basis to arrest Mr. Hiibel. Indeed, without the stop and identify statute, the police only had reasonable suspicion to detain Mr. Hiibel and ask him questions which he could refuse to answer.

The reasonable suspicion standard occupies an uneasy position between no cause and probable cause. Because of the low threshold necessary for seizures on the basis of reasonable suspicion, *Terry v. Ohio* only allowed police to briefly detain suspects. 392 U.S. 1 (1968). To protect the suspect's Fourth Amendment rights, searches predicated on reasonable suspicion were limited to a pat down for weapons to assure the officer's safety during the detention. Furthermore, to preserve the suspect's Fifth Amendment right against self incrimination, strong dicta from *Terry* and other decisions allowed the suspect to remain silent when questioned.

In *Hiibel v. Sixth Judicial District of Nevada, Humboldt County*, the Supreme Court eviscerated these Fourth and Fifth Amendment protections from *Terry*.. 542 U.S. 177 (2004). Now police can, on the basis of only reasonable suspicion, require a suspect to give his name or be subject to arrest. Besides giving a result contrary to Court precedent, this decision directly contradicts the very nature of our limited, constitutional form of government.

This article argues that *Hiibel* has transgressed the Supreme Court's Fourth and Fifth Amendment jurisprudence after *Terry*. But *Hiibel* has done more than just contravene previous decisions. Because our constitutional government is one of limited powers that rules with the consent of the governed, *Hiibel* inverts the proper relationship between the people and the state. Finally, through the lens of motor vehicle stops, we show that an apparent anomaly in the law could allow courts to rule that police have the power to order passengers to supply a name *without* reasonable suspicion. To

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prevent this absurd conclusion, we contend that the brightline rule that existed before *Hiibel* would dissolve this anomaly and acknowledge the importance of a name to its bearer.

Terry stops before *Hiibel*

Nevada's "stop and identify" statute provides in pertinent part:

> 1. Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime.
>
> .....
>
> 3. The officer may detain the person pursuant to this section only to ascertain his identity and the suspicious circumstances surrounding his presence abroad. Any person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer.

Nev. Rev. Rev. Stat. § 171.123 (2003).

In discussing Mr. Hiibel's arrest, the Supreme Court stated that he refused to answer a police officer's question "which we understand as a request to produce a driver's license or some other form of written identification." By not abiding by this command, Mr. Hiibel allegedly obstructed the officer in executing his duties, a misdemeanor, Nev. Rev. Stat. § 199.280 (2003). He was arrested and convicted of this offense. He challenged the decision to the Supreme Court, ultimately losing his appeal.

Mr. Hiibel's challenge had support from *Terry* as well as later decisions and strong dicta that set limits on police action. *Terry* itself allowed for "swift action predicated upon on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subject to the warrant procedure." According to the Court, if an officer observes someone engaged in activity that the officer suspects is criminal, the officer can briefly detain the suspect to ascertain if criminal activity is afoot. In detaining the suspect, the officer is entitled to conduct a cursory frisk for weapons should the officer have an articulable reason, e.g., a visible bulge in a pant pocket that could be a knife or gun, warranting reasonable suspicion to believe that the suspect is armed: "[T]here must be a *narrowly drawn* authority to permit a reasonable search for weapons for the protection of the police officer." (Emphasis added.) Justice White's concurring opinion supports the belief that *Terry* did not allow for states to legally compel suspects to answer police questions on the threat of arrest: "[A] person detained in an investigative stop can be questioned but is 'not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest.'"

...Hiibel inverts the proper relationship between the people and the state.

Furthermore, dicta and other Court rulings after *Terry* supported the contention that a suspect can remain silent and not risk arrest. *Berkemer v. McCarty*, 468 U.S. 420 (1984), provided direct support for the appeal, although the brightline articulated there was dicta, albeit "the kind of strong dicta that the legal community typically takes as a statement of the law." *Hiibel*, 542 U.S. 198 (2004) (J. Breyer, dissent.) In *Berkemer*, a unanimous Court denied that a suspect can be compelled to answer an officer's questions: An "officer may ask the [*Terry*] detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to respond."

Other decisions directly address the suspect's right to remain silent in the face of police questioning: *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000) (stopping a fleeing suspect "is quite consistent with the individual's right to go about his business or to stay put and remain silent in the face of police questioning."); *Kolender v. Lawson*, 461 U.S. 352, 365 (1983) (stating that a Terry suspect "must be free to leave after a short time and to decline to answer the questions put to him.") (J. Brennan, concurring); *Terry* 393 US 1, 34 (1968) (J. White, concurring) ("...of course, the person stopped is not obliged to answer...and refusal to answer furnishes no basis for an arrest..."). In short, the brightline rule before *Hiibel* held that the officer may ask; the suspect may remain silent.

Moreover, the Court had previously articulated its concern to prevent the expansion of the searches allowed under Terry. Though allowing so-called "plain-feel" searches in *Minnesota v. Dickerson* within the limitations of *Terry*, the Court took pains to analogize them to "plain-view" searches, contending that police should not have to turn a blind eye to contraband they recognize but were not intending to find when the search began. 508 U.S. 366 (1993). Nevertheless, the Court retained strict limitations on the search, forbidding the police to intrude more than they could under *Terry*, nor ostensively search for anything but weapons: "Here, the officer's continued exploration of respondent's pocket after having concluded that it con-

tained no weapon was unrelated to '[t]he sole justification of the search [under *Terry*] ... the protection of the police officer and others nearby.'"

Thus, prior to *Hiibel*, the Court only allowed searches for safety under *Terry*, not general investigations. Therefore, under what would appear to be the erstwhile jurisprudence before his arrest, Mr. Hiibel could not break the law by refusing to give his name on the basis of reasonable suspicion. The status of the law with respect to the Fourth Amendment prior to Mr. Hiibel's arrest was nicely summarized in *Dunaway v. New York*:

> Thus, *Terry* departed from traditional Fourth Amendment analysis in two respects. First, it defined a special category of Fourth Amendment 'seizures' so substantially less intrusive than arrests that the general rule requiring probable cause to make Fourth Amendment 'seizures' reasonable could be replaced by a balancing test. Second, the application of this balancing test led the Court to approve this narrowly defined less intrusive seizure on grounds less rigorous than probable cause, but only for the purpose of a pat-down for weapons.

442 U.S. 200, 209-10 (1979).

Finally, the Court had previously rejected a California law requiring that suspects produce "credible and reliable" identification because the law "encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute." *Kolender*, 461 U.S. at 361. Since the majority in *Hiibel* identified at the outset that they understood the offer's command under the Nevada law "as a request to produce a driver's license or some other form of written identification," it appeared that the Court had previously considered the very case presented in *Hiibel* and rejected the law in *Kolender*. Clearly Mr. Hiibel had good reason to believe he was standing on firm ground when challenging the identification demand as well as his arrest and conviction.

Court's decision in *Hiibel*

In deciding whether Nevada's "stop and identify" statute is constitutional, the Court's first act was to follow the Nevada Supreme court's decision in declaring that the law merely compelled the suspect to relay a name, not produce identification. Thus the Supreme Court majority swiftly dispensed with its own interpretation of what the officer asked Mr. Hiibel to produce, "a request to produce a driver's license or some other form of written identification." Unencumbered with the *Kolender* problem of credible and reliable identification, the Court addressed the Fourth and Fifth Amendment concerns that appeared to block the route the Court would follow.

To show that the question presented in *Hiibel* was not foreclosed, the Court referred to a footnote in *Brown v. Texas*: "We need not decide whether an individual may be punished for refusing to identify himself in the context of a lawful investigatory stop which satisfies Fourth Amendment requirements." 443 U.S 47, 53 n. 3 (1979). In reaching this question the Court rejected dicta and concurring opinions stating an officer could not demand a name on the threat of arrest. This is particularly notable since the Court had previously affirmed Justice White's concurrence articulating the limitation in *Davis v. Mississippi*, 394 U.S. 721, 729 n. 6 (1969) (noting what is referred to as the "settled principle" that police officers may not compel answers to questions about unsolved crimes), *Royer* 460 U.S. 491, 497-8 (1983) (affirming Justice White's contention in *Terry* that a suspect need not answer questions), and a unanimous *Berkemer* Court.

Legal realists will contend that the Court simply chose one of two equally viable seedlings in its previous decisions to ensure the request for a name is not a "legal nullity." *See Hiibel*, 542 U.S. at 188 (showing the Court's concern that the suspect supply a name). However, two of these decisions, including the unanimous *Berkemer* decision, occurred after the *Brown* footnote. Nevertheless, the Court would not let the limitation stand because knowing the suspect's "identity may inform an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder." According to the Court, the requirement that a suspect supply a name, when reasonably related to the circumstances that give rise to the officer's suspicions, is a legitimate search under *Terry*.

Terry did not allow officers to frisk suspects for safety *unless* there was a concern *beyond* the reasons for the detention for the officer to think that the suspect was dangerous. Asking for the name first and then determining that the suspect has a history of violence means officers may be investigating the safety concern before there is justification for that search. But since the threshold for reasonable suspicion is so low, an officer may easily reach the minimal amount of evidence necessary to issue the demand for a name. However, the Court does not go about its analysis in this manner. Instead, the Court

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identifies safety as part of the equation, but allows the primary reason to be determining if the suspect is wanted for another offense.

Allowing non-safety reasons to motivate the demand for a name places *Hiibel* in direct conflict with *Minnesota v. Dickerson*. That decision only allowed for contraband to be seized if found as the result of a legitimate pat down for safety. Furthermore, the contraband had to be recognized *as contraband* by feel alone, a rationale analogous to that justifying a plainview search. The purpose of the search could not be an investigation for any purpose other than safety, and certainly not the "scope and concern" that motivated the officer for stopping the suspect in the first place. A *Terry* stop can be instigated for any reason that gives an officer an objective basis to think that a crime is occurring or about to occur. *Hiibel* has extended the pat down to provide for officer safety to an investigation that compels the production of a name, thus allowing police to match the name of the suspect to any information or misinformation available in law enforcement databases.

Practically, there is little reason to think that an officer will stop the investigation before it transgresses the still existing *Kolender* limitation. Police will not be satisfied with the names some suspects will offer. For those lacking previous brushes with the law, a commonly used nickname might not satisfy the officer; nor would a name like "John Doe." To expect a citizen with a name like "John Doe" to assert his right under *Kolender* against the compelled production of "credible and reliable" identification under the threat of arrest is to substitute Panglossian optimism for policy. Moreover, any suspect with a real interest in perpetrating a crime or knowing that a long criminal history resides in a law enforcement databank will give a false name.

...Fifth Amendment protections have been eviscerated to facilitate government investigations.

Instead of allowing for mission-creep, the Court should have retained the brightline rule of its past decisions to guard against violations of the Fifth Amendment: "the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest." *Terry*, 392 U.S. at 34 (J. White, concurring). Before *Hiibel*, officers could not arrest for silence. Under *Terry*, the Fifth Amendment was deemed to be operative. *Berkemer*, 468 U.S. at 440 (explaining that the non-threatening nature of the *Terry* stops—no principal threat of arrest for not responding to the officer's questions—is the reasoning behind not worrying about Fifth Amendment protections during these on the street investigations). Now Fifth Amendment protections have been eviscerated to facilitate government investigations. The expanding nature of government at the expense of constitutional protections raises essential threats to privacy rights and appropriate relationship of citizens to the states.

Importance of privacy

Hiibel allows states to pass laws requiring people to give their names or be arrested. In so ruling, the Court has excluded a name from those things covered by the right to privacy. Before *Terry*, the probable cause requirement of the Fourth Amendment was the level of justification necessary for the state to seize and search someone. After *Terry*, brief seizures on the basis of reasonable suspicion were allowed, but arrest still required probable cause, which could not arise out of silence. Moreover, the state could not require citizens to answer any question. Now, instead of needing probable cause for arrest, the state can arrest a silent person on reasonable suspicion—a standard that is notoriously thin and easy to satisfy. *See* Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets* 75 COR. L. REV. 1258, 1332-1333 (1999) (contending that there is "no way to meaningfully articulate a standard between probable cause and arbitrariness."). A citizen can mind her own business and not break the law, yet the state can arrest if, after asking for a name, the suspects continues minding her own business. This further intrusion undermines the very premise upon which our country was founded as stated in the Preamble to the Constitution—to "secure the blessings of liberty to ourselves and our posterity"—the burden must stay on the state to justify intrusions on citizens' privacy.

The legal landscape of search and seizure law is strikingly different after *Hiibel*. Instead of being able to remain silent until booking, citizens can now be questioned by police and arrested for not giving information. Without probable cause, the state can arrest citizens who do not provide what it desires. Citizens can no longer live free from unwanted government interference by minding their own business. Simply not giving the state what it wants—something the state has not proved it needs to the standards of the Fourth Amendment for an arrest—can lead to an arrest. To stay out of jail, persons must *do* what the state wants, reversing the relationship between the government and the people that the founders conceived.

The *Hiibel* has effectively legitimated identity checks because the police are entitled to compel a suspect to disclose her identity when the state has not made a showing that identity is relevant to the reason for detention and lacks evidence to support a finding of probable cause. As argued Louis Brandies and Samuel Warren in the *locus classicus* of privacy law, the right to privacy is "the right to be let alone." *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Thus the state, under *Hiibel*, has the power to intrude on the right to be let alone in the most dramatic fashion—arrest.

This inverted relationship becomes apparent in the context of the right to travel. "The word 'travel' is not found in the text of the Constitution. Yet the 'constitutional right to travel from one State to another' is firmly embedded in our jurisprudence." *Saenz v. Roe*, 526 U.S. 489, 499 (1999). "Like the

right of association, *NAACP v. Alabama*, [travel] is a virtually unconditional personal right, guaranteed by the Constitution to us all." *Shapiro v. Thompson*, 394 U.S. 618, 643 (1969) (citations omitted). Identity checkpoints restrict this "virtually unconditional personal right" because citizens are required to disclose their identity to travel when they have not broken the law, yet do not want their identity known. Travel links up with the right privacy, showing how the ways in which the decision in *Hiibel* transgresses more than just its search and seizure jurisprudence after *Terry*.

Skeptics of unenumerated rights contend that the only rights the Constitution protects are those named in the text. However, the history of the Supreme Court since John Marshall shows that unenumerated rights have been indispensable in protecting the liberties actually enumerated. As discussed below, the First Amendment right to freedom of speech is limited if unpopular opinions cannot be expressed anonymously. In short, the right to speak anonymously is essential for exercising the enumerated right to free speech.

Finding additional rights under the First Amendment than those enumerated captures the conceptual import of the ideas the framers identified instead of limiting the meaning of the words to the actual understanding of those who wrote them. The history of the Supreme Court shows how this view has been operative in the Court's jurisprudence. Justice Douglas employed this conceptual analysis in finding the right to contraception—a topic few imagine the framers had in mind when amending the Bill of Rights to the Constitution—protected under the right to privacy. Douglas wrote that "the First Amendment has a penumbra where privacy is protected from government intrusion." *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965). In *Schware v. Board of Examiners*, the Court recognized that the First Amendment also protects the right to freedom of association even though the text of the First Amendment list no such right. 353 U.S. 232 (1957). In *NAACP v. Alabama*, Justice Harlan's unanimous opinion linked association and privacy for political purposes: "This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. ...Inviolability of privacy in group associations may in many circumstances be indispensable to freedom of association, particularly where a group espoused dissident beliefs." 357 U.S. 449, 462 (1958).

NAACP v. Alabama is particularly apropos for understanding the importance of travel unfettered by name disclosure because the state of Alabama was trying to acquire NAACP membership roles. By transgressing the privacy protecting and enabling association, the Court ruled that Alabama was hampering the expression of the constitutional right of freedom of association. This right to be free from having to disclose membership roles constitutes what Justice Douglas later called a "zone" of privacy in his penumbra analysis: "Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen." *Griswold*, 381 U.S. at 484.

A zone of privacy analysis of *Hiibel* would begin by recognizing the importance of privacy in undergirding additional rights in previous decisions. The *Terry* Court affirmed the freedom from unwarranted interference in the strongest of terms:

> this Court has always recognized, "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."

With the freedom from unwarranted interference as a starting point, the next step would be to analyze whether the compelled disclosure of a name falls into a zone of privacy. Finding a zone of privacy for a name is particularly important for *Hiibel* because Justice Kennedy was concerned that Mr. Hiibel give a reason for not disclosing his name. One need look no further than the founding of the country to discover the importance of privacy for names.

As the Court recognized in *McIntyre v. Ohio Elections Comm'n*, the "tradition [of anonymity in support of political causes] is famously embodied in the Federalist Papers, authored by James Madison, Alexander Hamilton, and John Jay, but signed by 'Publius.'" 514 U.S. 334, 343, n. 6 (1995). Moreover, during "the first twenty years of American constitutional government, six men who would later be presidents wrote under pen names." John W. Johnson, *Griswold v. Connecticut: Birth Control and the Constitutional Right of Privacy* (2005) at 55. Furthermore, the tradition of the secret ballot is enshrined in our history. *McIntyre*, 514 U.S. at 343 ("This tradition [of anonymity in support of political causes] is perhaps best exemplified by the secret ballot, the hard-won right to vote one's conscience without fear of retaliation."). Finally, the Court has recognized that anonymity is essential so that despised groups can express their point of view:

> Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all.

Talley v. California, 362 U.S. 60, 64 (1960).

If those with power can link the speech they despise with the individuals who speak, the powerful know whom to silence. A person walking down the street detained by police after obviously taking part in an unpopular political demonstration faces similar harassment in protected First Amendment activities. A stop on the street where the decision is to get arrested and have the authorities find out the name at booking or give the name to avoid the arrest and possible prosecution while giving up privacy gives no choice.

Hiibel makes manifest that the burden has shifted to the citizen on the street who must now give a name on evidence that cannot support an arrest. Requiring a citizen to state her name under threat of arrest—an arrest the state could not otherwise make—creates a new duty for citizens that tramples

privacy and contradicts other aspects of criminal law. Returning home from a controversial event, citizens would have to fear any action that could give rise to reasonable suspicion, for with reasonable suspicion the police are entitled to conduct an investigation that has the consequence of linking identity with unpopular views. The chilling effect that such laws have on First Amendment rights runs counter to the Court's jurisprudence. As such, we know why identity checkpoints disturb us; they are the trappings of a police state, a regime that we have to justify ourselves to, not a state that must justify itself to its citizens. (Similar concerns apply in *Crawford v. Marion County Election Board* (07-725, 2008) where Indiana citizens must justify themselves to the state, absent even reasonable suspicion, by providing photo ID or be denied the right to vote and possibly be accused of voter impersonation fraud.)

Yet Justice Kennedy voices his dissatisfaction that Mr. Hiibel did not tell the police or the Court why he did not want to give his name: "Even today, petitioner does not explain how the disclosure of his name was none of the officer's business." This is exactly the showing Mr. Hiibel does not need to make if his privacy is to be respected. Justice Kennedy's insistence for a reason shows that he does not perceive the burden shifting his opinion imposes. In shifting the burden of justification Kennedy has faulted Mr. Hiibel for the same unconstitutional shortcoming of vagrancy statutes, i.e., not "give a good account of himself." But Mr. Hiibel does not need to give a justification for not giving his name since respecting his privacy means not requiring a reason or a name with under threat of arrest unless there is probable cause.

Furthermore, there is an additional privacy principle that does not require this historical analysis of political speech, association, and travel. Instead, this reason lies behind one of the most basic constitutional protections we have—the right to not give evidence against oneself. A name was, in the very case presented to the Court, incriminating.

Many states have laws like Nev. Rev. Stat. § 171.137 (1):

> ... whether or not a warrant has been issued, a peace officer shall, unless mitigating circumstances exist, arrest a person when he has probable cause to believe that the person to be arrested has, within the preceding 24 hours, committed a battery upon his spouse, former spouse, any other person to whom he is related by blood or marriage, a person with whom he is or was actually residing, a person with whom he has had or is having a dating relationship, a person with whom he has a child in common, the minor child of any of those persons or his minor child.

Thus, if police had probable cause to believe Mr. Hiibel had committed battery on his daughter—the other occupant of the truck sitting in the driver's seat of the truck parked off the side of the road where Mr. Hiibel stood—then once the police got his daughter's name, one of them was likely to be arrested. In Nevada and many other states, domestic assault and battery is a separate crime with restrictions on bail requiring detention after arrest for twelve hours. *See* Nev. Rev. Stat. § 178.484(7). In short, this is the exact case Justice Kennedy proposed and dismissed:

> Still, a case may arise where there is a substantial allegation that furnishing identity at the time of a stop would have given the police a link in the chain of evidence needed to convict the individual of a separate offense. In that case, the court can then consider whether the privilege applies, and, if the Fifth Amendment has been violated, what remedy must follow. We need not resolve those questions here.

Recalling that the police began their investigation because of a report of a fight, suppose Mr. Hiibel decided to give his name. Then the police questioned Mr. Hiibel's daughter for her name. Knowing both names would enable the police to determine that there is a relationship requiring arrest unless there are mitigating circumstances. Here the Supreme Court simply slipped. Another challenge to the stop and identify law in which providing a name leads to incriminating evidence for arrest could return the Fifth Amendment case to the Court for reconsideration.

Restoring consent of the governed

Our government depends for its authority on the consent of the governed. Yet stop and identify statutes place citizens in untenable situations. If they do not want to identify themselves, then they break the law. If they do identify themselves because of the government threat, they respond to coercion, not with consent. This inversion of the relationship between citizens and the state contradicts the founders' republican conception.

Not only does *Hiibel* transgress Fourth Amendment Court precedent; in the actual case argued for the Court, Mr. Hiibel was compelled to give evidence against himself or break the law, violating the Fifth Amendment. In short, *Hiibel* subverts the consent of the governed by threatening citizens with arrest unless they disclose their name—undermining the privacy rights the Court has recognized as essential for political freedom.

To restore the balance in favor of the governed, the Court should return to the brightline rule that existed before *Hiibel*: The officer may ask; the suspect may remain silent.

What can lawyers as officers of the court do to facilitate restoring the old rule? Besides the self-incrimination trap that the Court might decide to hear in the future, there is an anomaly in motor vehicle stops that is likely to rise to the Court's attention. As elaborated below, the Court already allows passengers to be delayed while their criminal histories are searched. In these cases the passengers agreed to give their names, but they did not agree to be delayed while their names are searched in criminal history databanks. Nevertheless, the Court allows the detentions because it claims the intrusion is minimal and promotes officer safety. Additionally, officers in motor vehicle stops are allowed to order passengers out of the car even though there is no reasonable suspicion that the passenger is committing a crime or is armed. However, passengers are considered to be legally seized in traffic stops. Considering all of the mechanisms that that courts have already allowed police to use to control passengers allegedly for officer safety without reasonable suspicion, it might seem

anomalous to allow passengers to refuse to give a name (or walk away), but the principles neglected in *Hiibel* suggest those directions.

...the Court should return to the brightline rule that existed before Hiibel: The officer may ask; the suspect may remain silent.

Criminal defense lawyers routinely encounter the following situation: The police think a vehicle is transporting narcotics, so they follow it until there is a traffic infraction. The vehicle is pulled over on the basis of the infraction, and the police conduct a plainview search while interrogating the driver and passengers, hoping to find more evidence to support their hunch. *See O'Boyle v. State*, 117 P.3d 401 ¶ 78 (Wyo. 2005) ("Any credible law enforcement officer will admit that the interrogation of motorists and their passengers has absolutely nothing whatever to do with the speeding violation or other reason for the 'traffic' stop. ... [T]he interrogation is to ... ... justify a search of the vehicle for controlled substances ... ."). The officer will ask the driver for a license and the car's registration, revealing that the driver is not the owner of the car. Determined to find out why the driver has the car, the police will issue an exit order and ask the driver questions out of earshot of the passengers. After obtaining a story from the driver, the police will then question the passengers to elicit discrepancies, hoping to find probable cause to search the car. In the course of questioning the passengers the police will ask for (but may not require) their names. Passengers will typically comply with the request. However, if the passenger declines to supply a name or only does so because of the threat of arrest, the restriction in *Hiibel* makes the demand illegal.

The nature of traffic stops create conditions making it likely to transgress the *Hiibel* prohibition against demanding identification absent reasonable suspicion. First, the Court has allowed passengers to be ordered from a vehicle stopped for a traffic violation even though there is no evidence of an illegality on the part of the passenger. The reason proffered for allowing this is officer's safety. According to the Court, there is likely to be more danger in a traffic stop when passengers are present. *Maryland v. Wilson*, 519 U.S. 408, 414-15 (1997). Second, the Court has also found that ordering a passenger out of a stopped vehicle was only a minimal intrusion on liberty. *Id.* Furthermore, passengers are legally seized in traffic stops even though they may have done nothing to contribute to the infraction. *Brendlin v. California*, 127 S. Ct. 2400 (2007). Therefore, the Court has ruled that police have more authority with regard to passengers than they do in relation to pedestrians. Considering all of the extra authority police have relative to passengers, what is to stop the Court from taking the extra step of allowing police, without reasonable suspicion, to order passengers to give their names?

The reasons the Court has articulated in *Wilson* for allowin passenger exit orders are identical to the reasons for allowin officers to command a name on threat of arrest in *Hiibel*: (1 officer safety; and (2) the minimal nature of the intrusion. *Hi ibel*, 542 U.S. at 191 ("Answering a request to disclose a nam is likely to be so insignificant in the scheme of things as to b incriminating only in unusual circumstances."). Since the is sues are aligned in *Wilson* and *Hiibel*, the stage is set for court to allow police to demand a name from a passenger withou even reasonable suspicion. This is especially likely to occu when courts like the Fifth Circuit have declared that "deten tion, not questioning, is the evil at which *Terry*'s second pron is aimed." *U.S. v. Shabazz*, 993 F.2d 431, 436 (5th Cir. 1993 (questioning by an officer, even on matters unrelated to pur pose of stop, does not cause the stop to become more intrusiv unless questioning extends duration of stop). With all the con cern about the length of the detention and officer safety, th importance of a name to its bearer in lost in the analysis.

In *U.S. v. Purcell*, the Eleventh Circuit allowed that a ve hicle can be detained to complete a criminal history chec of passengers so long as the delay is of a reasonable dura tion. 236 F.3d 1274, 1277-80 (11th Cir. 2001), *cert. denied* 534 U.S. 830 (2001). Whether the passengers in *Purcel* consented to giving their names was not an issue before th court; however, the passengers did not consent to wait fo their criminal histories to be searched—they simply volun teer their names in response to the officer's request after th officer obtained the driver's name. The officer went back t his cruiser and ran criminal history checks on the driver an passengers before returning to the stopped vehicle, detainin the vehicle for three minutes more than would have been th case had the officer merely checked the driver's history. The court decided that police can detain the driver and passengers in vehicles for traffic violations while their criminal histories are searched even though the passengers had nothing to do with the reasons that gave rise to the traffic stop.

Just one piece of the puzzle is missing to construct a scenario under which passengers can be compelled to provide a name even without reasonable suspicion. The Supreme Court has already held that, without reasonable suspicion, passengers can be removed from a vehicle for officer's safety, calling it a minimal intrusion. The Court has already held that passengers are seized in traffic stops even though they may have done nothing to contribute to the justification for the stop. The Eleventh Circuit has already held that a vehicle can be detained even though the police are searching the criminal history of the passengers, not the driver, as long as the delay is not unreasonable. And the Supreme Court declared in *Hiibel* that the privacy concerns related to a name in an identity request is insignificant. Since the safety concern that motivates the exit order and the continued detention would be undermined if passengers refuse to give their "insignificant" names, it seems likely that a federal appeals court may one day uphold state laws that make it legal for police, without reasonable suspicion, to compel passengers to give their names or break the law.