What activists don't know can hurt them:

May police now arrest people for refusing to identify themselves?

Jennifer Van Bergen
21 July 2004

The following article was contributed to the WSWS by Jennifer Van Bergen, the author of the upcoming book, The Twilight of Democracy: The Bush Plan for America*. She has been an adjunct faculty member of the New School for Social Research in NYC since 1993 and lectures on the antiterrorism laws and the Constitution.*

Several days ago, three persons stood on a street corner in a suburban area of the United States, exercising their rights to assemble and express themselves in their opposition to the American invasion, occupation, and corporatization of Iraq. The group has been holding protests since early last year and has often demonstrated in public areas, including the one they were in this time, in front of the County Courthouse.

But this time was not the same as the other times. This time was a little different. A police officer came over and asked them what they were doing. Three people standing there with signs and clearly marked t-shirts showing their anti-war views. One of the three pointed to her t-shirt, which said the name of the peace group to which she belonged.

The officer asked for identification. Only one of the three had I.D., and the police officer asked that person to come with him. The remaining two immediately objected that they did not want to be separated from each other. The officer insisted, and one of the protesters said, "Officer, there is a First Amendment: we have a First Amendment right to stand here and protest!" to which the officer replied, "There is also such a thing as police business!" and he took the third person with I.D. away to question her.

The story has a relatively happy ending. The officer questioned the person with I.D. and left the protesters alone thereafter, perhaps because that person was an attorney who showed the officer her bar card. But the protesters felt harassed. This had never happened before. The group regularly protested, and the police knew them by now. This event seemed to signal trouble for peaceful protesters. They wondered whether surveillance and harassment of activist groups were on the rise.

Particularly since the November 2003 Miami FTAA demonstrations, such concerns are hardly idle ones. Hundreds of peaceful protesters were arrested without having violated any law and were treated with brutality and indifference to their behavior, their rights and even their health. A few protesters received permanent physical injuries because of unprovoked police brutality. The police declared the "Miami Model" the new blueprint for homeland security.

Some local peace groups have reason to believe they have been infiltrated and monitored by the FBI or have had undercover agents in the audience at their forums or town meetings. With activists around the country being subpoenaed and/or indicted by grand juries, with a well-known environmental group, Greenpeace, which carries out peaceful protest activities, having been indicted (albeit subsequently the case was dismissed), with an activist defense attorney having been charged with supporting terrorism (the initial charges were thrown out, she was re-indicted, and her trial is occurring as I write), with the FBI admitting that it is monitoring even places of religious worship, peaceful activists and protesters have good reason to be concerned.

What the three anti-war demonstrators on that street corner didn't know was that the Supreme Court just issued a decision that could have a monumental effect on the rights and freedoms of activists and dissenters. This decision appears to have been the basis for the officer asking the protesters to provide identification.

Under previous Supreme Court law, individuals did *not* need to identify themselves to police. The ACLU has a brochure called "Know Your Rights," in which it informs readers that "you do not need to answer any questions if you are detained or arrested" on the street. The National Lawyers Guild (NLG) also has a "Know Your Rights" brochure. It states: "**The Right to Remain Silent.** The Fifth Amendment to the U.S. Constitution gives every person the right not to answer questions asked by a police officer or government agent."

The NLG adds: "CONSTITUTIONAL RIGHTS CANNOT BE SUSPENDED—EVEN DURING A STATE OF EMERGENCY OR WARTIME—AND THEY HAVE NOT BEEN SUSPENDED BY THE 'USA PATRIOT ACT' OR OTHER RECENT LEGISLATION!"

Apparently, the Supreme Court just changed all this. The way the Court did this was pretty sneaky, because it merely upheld a Nevada state law that authorizes police to request that a person identify himself when the officer has a "reasonable suspicion" that a person may be involved in criminal activity, and that if the person refuses to identify himself, the officer may arrest him. So, it was only under these very specific factual circumstances that the Court ruled. However, the decision is like a piece of moss clinging to a crevice in a rock on the side of a sheer cliff. It gets into that crevice and it works its roots in, making the crack gradually bigger and bigger as it grows. This ruling finds a tiny little crevice in the Fifth Amendment and capitalizes on it, ultimately potentially leading to the complete evisceration of the right to remain silent, not to mention the Fourth Amendment right to be free of unreasonable searches and seizures.

Let's unpack this a bit. The Court's decision applies to a specific fact situation: where (1) there was a state law that authorized police to stop a person, when (2) there was "reasonable suspicion" that that person might be involved in criminal activity, and (3) demand he show identification, and (4) if he refused, the police could arrest him. In the case, *Hiibel v. Sixth Judicial District Court of Nevada, Humboldt County, et al.*, No. 03-5554 (June 21, 2004), someone had called the police and reported a man in a red and silver GMC truck assaulting a woman. Thus, there was reasonable suspicion of criminal activity.

The Nevada law allows the officer to "detain any person whom [he] encounters under circumstances which reasonably indicate that the person has committed, is committing, or is about to commit a crime" but "only to

ascertain his identity and the suspicious circumstances surrounding his presence abroad." The statute concludes: "Any person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer."[1] Thus, there was a law that authorized the demand for identification.

The arrestee, Mr. Hiibel, was charged with "willfully resist[ing], delay[ing], or obstruct[ing] a public officer in discharging or attempting to discharge any legal duty of his office."[2] The legal duty, of course, was the officer's investigation of the report, which authorized him to demand identification.

Now, in the case of the three protesters in the suburban area, the police officer who accosted them—let's call him Officer Smith—apparently had heard the news about the Supreme Court decision, or he was briefed about it, and apparently he concluded that because of the Court's decision, police now have broader latitude to stop and question activists and protesters, and demand they reveal their identities, *even in the absence of statutory language that authorizes it.*

Remember that the *Hiibel* case decided *only* that a Nevada law was *constitutionally permissible*. The Court was careful to say that it did not decide that the Fourth Amendment requires a suspect to answer questions. It stated that "the source of the legal obligation arises from Nevada state law, not the Fourth Amendment."

But, what is the difference? The Court is still saying the officer can demand the suspect provide his identity. What does this mean for free speech? What does it mean for the three anti-war protesters? Despite the Court's nimble sidestepping of the Fourth Amendment pretext, this is an open question, and none of the possible answers are good for individual rights.

According to a local police officer in Officer Smith's state, Florida, there is no "stop and identify" law there. Technically, the officer is correct. However, the Supreme Court in the *Hiibel* case cited a long list of similar state statutes. Among them was a law in Florida against *loitering*. It states:

It is unlawful for any person to loiter or prowl in a place, at a time or in a manner not usual for law-abiding individuals, under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity. Among the circumstances which may be considered in determining whether such alarm or immediate concern is warranted is the fact that the person...refused to identify himself...a law enforcement officer shall, prior to any arrest for an offense under this section, afford the person an opportunity to dispel any alarm or immediate concern which would otherwise be warranted by requesting the person to identify himself...and explain his...presence and conduct. No person shall be convicted of an offense under this section if the law enforcement officer did not comply with this procedure or if it appears at trial that the explanation given by the person is true and, if believed by the officer at the time, would have dispelled the alarm or immediate concern.[3]

It is disingenuous for the Supreme Court to have considered this law in parallel with the Nevada law.

What do you think? Is the Florida loitering statute constitutional? Is it upheld by the *Hiibel* case? The Court says: "An officer may not arrest a suspect for failure to identify himself if the request for identification is not reasonably related to the circumstances justifying the stop." The "circumstances justifying the stop" must create a reasonable suspicion of criminal activity. Notice the Florida statute does not include this language. It does not say there must be reasonable suspicion of criminal activity. It says there must be "justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity."

Presumably, police discretion allowed Officer Smith to decide that three people standing in anti-war t-shirts, with anti-war signs in broad daylight were "loitering" or "prowling" "at a time or in a manner not usual for law-abiding individuals" and "under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity."

This is not quite the same as reasonable suspicion of criminal activity, which is articulated under the Nevada statute and more closely follows earlier Supreme Court standards for investigative stops, known as "Terry stops" after *Terry v. Ohio*, 392 U.S. 1 (1968). The *Terry* case decided what was constitutionally permissible under the Fourth Amendment. The Nevada law obviously attempts to follow *Terry* law. The Florida statute does not.

But the Supreme Court cites to the Florida statute, and although the Court doesn't say that this or the other statutes that require persons to identify themselves are constitutionally permissible, it appears to endorse them by including them in its list.

The *Hiibel* decision is sneaky. It's like a "bait-and-switch" con: offering (or, in this case, offering to protect) with one hand what it is really taking away with the other. Or rather, on a quick reading, it looks bad. Then, on a closer reading, it looks okay. But, on further analysis, the decision is worse than it first looks. Why? Because the Court has opened the door to police doing just what Officer Smith did. It is very easy to construe this case as permitting police to demand identification from anyone they please at any time for any reason, without any reasonable suspicion of criminal activity, and to arrest him or her for refusing to comply.

It is worth taking a solid look at the dissenting opinion of Justice Stevens in *Hiibel*. He writes at length about the faulty reasoning of the Court:

In my judgment, the broad constitutional right to remain silent, which derives from the Fifth Amendment's guarantee that "[n]o person...shall be compelled in any criminal case to be a witness against himself," is not as circumscribed as the Court suggests, and does not admit even of the narrow exception defined by the Nevada statute.

Discussing the Court's assertion that disclosure of one's identity is not constitutionally prohibited where it is not in itself an incriminating fact, Stevens notes that:

The Court reasons that we should not assume that the disclosure of petitioner's name would be used to incriminate him or that it would furnish a link in a chain of evidence needed to prosecute him. But why else would an officer ask for it? And why else would the Nevada legislature require its disclosure only when circumstances "reasonably indicate that the person has committed, is committing or is about to commit a crime"?—If the Court is correct, then petitioner's refusal to cooperate did not impede the police investigation. Indeed, if we accept the predicate of the Court's holding, the statute requires nothing more than a useless invasion of privacy. I think that, on the contrary, the Nevada Legislature intended to provide its police officers with a useful law enforcement tool, and that the very existence of the statute demonstrates the value of the information it demands.

Stevens concludes:

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."...As the target of [an] investigation, [Mr. Hiibel], in my view, acted well within his rights when he opted to stand mute.

This case is another blow by this Court to the individual rights of Americans.

Notes:

1) Nev. Rev. Stat. §171.123.

2) Nev. Rev. Stat. §199.280 (2003).

3) Fla. Stat. §856.021 (2003).