

STEVENS, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 03–5554

LARRY D. HIIBEL, PETITIONER *v.* SIXTH JUDICIAL
DISTRICT COURT OF NEVADA, HUMBOLDT
COUNTY, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
NEVADA

[June 21, 2004]

JUSTICE STEVENS, dissenting.

The Nevada law at issue in this case imposes a narrow duty to speak upon a specific class of individuals. The class includes only those persons detained by a police officer “under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime”¹—persons who are, in other words, targets of a criminal investigation. The statute therefore is directed not “at the public at large,” but rather “at a highly selective group inherently suspect of criminal activities.” *Albertson v. Subversive Activities Control Bd.*, 382 U. S. 70, 79 (1965).

Under the Nevada law, a member of the targeted class “may not be compelled to answer” any inquiry except a command that he “identify himself.”² Refusal to identify oneself upon request is punishable as a crime.³ Presuma-

¹Nev. Rev. Stat. §171.123(1) (2003).

²§171.123(3).

³In this case, petitioner was charged with violating §199.280, which makes it a crime to “willfully resis[t], dela[y] or obstruc[t] a public officer in discharging or attempting to discharge any legal duty of his office.” A violation of that provision is a misdemeanor unless a dangerous weapon is involved.

bly the statute does not require the detainee to answer any other question because the Nevada Legislature realized that the Fifth Amendment prohibits compelling the target of a criminal investigation to make any other statement. 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," U. S. Const., Amdt. 5,⁴ is not as circumscribed as the Court suggests, and does not admit even of the narrow exception defined by the Nevada statute.

"[T]here can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." *Miranda v. Arizona*, 384 U. S. 436, 467 (1966). It is a "settled principle" that "the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes," but "they have no right to compel them to answer." *Davis v. Mississippi*, 394 U. S. 721, 727, n. 6 (1969). The protections of the Fifth Amendment are directed squarely toward those who are the focus of the government's investigative and prosecutorial powers. In a criminal trial, the indicted defendant has an unqualified right to refuse to testify and may not be punished for invoking that right. See *Carter v. Kentucky*, 450 U. S. 288, 299–300 (1981). The unindicted target of a grand jury investigation enjoys the same constitutional protection even if he has been served with a subpoena. See *Chavez v. Martinez*, 538 U. S. 760, 767–768 (2003). So does an arrested suspect during custo-

⁴The Fifth Amendment's protection against compelled self-incrimination applies to the States through the Fourteenth Amendment's Due Process Clause. See *Malloy v. Hogan*, 378 U. S. 1, 6 (1964).

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dial interrogation in a police station. *Miranda*, 384 U. S., at 467.

There is no reason why the subject of police interrogation based on mere suspicion, rather than probable cause, should have any lesser protection. Indeed, we have said that the Fifth Amendment's protections apply with equal force in the context of *Terry* stops, see *Terry v. Ohio*, 392 U. S. 1 (1968), where an officer's inquiry "must be 'reasonably related in scope to the justification for [the stop's] initiation.'" *Berkemer v. McCarty*, 468 U. S. 420, 439 (1984) (some internal quotation marks omitted). "Typically, this means that the officer may ask the 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." *Ibid.* See also *Terry*, 392 U. S., at 34 (White, J., concurring) ("Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for arrest, although it may alert the officer to the need for continued observation"). Given our statements to the effect that citizens are not required to respond to police officers' questions during a *Terry* stop, it is no surprise that petitioner assumed, as have we, that he had a right not to disclose his identity.

The Court correctly observes that a communication does not enjoy the Fifth Amendment privilege unless it is testimonial. Although the Court declines to resolve this question, *ante*, at 10–11, I think it clear that this case concerns a testimonial communication. Recognizing that whether a communication is testimonial is sometimes a "difficult question," *Doe v. United States*, 487 U. S. 201, 214–215 (1988), we have stated generally that "[i]t is the 'extortion of information from the accused,' the attempt to force him 'to disclose the contents of his own mind,' that implicates the Self-Incrimination Clause," *id.*, at 211 (citations omitted). While "[t]he vast majority of verbal state-

ments thus will be testimonial and, to that extent at least, will fall within the privilege,” *id.*, at 213–214, certain acts and physical evidence fall outside the privilege.⁵ In all instances, we have afforded Fifth Amendment protection if the disclosure in question was being admitted because of its content rather than some other aspect of the communication.⁶

Considered in light of these precedents, the compelled statement at issue in this case is clearly testimonial. It is significant that the communication must be made in response to a question posed by a police officer. As we recently explained, albeit in the different context of the Sixth Amendment’s Confrontation Clause, “[w]hatever else the term [‘testimonial’] covers, it applies at a minimum . . . to police interrogations.” *Crawford v. Washington*, 541 U. S. ___, ___ (2004) (slip op., at 33). Surely police questioning during a *Terry* stop qualifies as an interrogation, and it follows that responses to such questions are

⁵A suspect may be made, for example, to provide a blood sample, *Schmerber v. California*, 384 U. S. 757, 765 (1966), a voice exemplar, *United States v. Dionisio*, 410 U. S. 1, 7 (1973), or a handwriting sample, *Gilbert v. California*, 388 U. S. 263, 266–267 (1967).

⁶See *Pennsylvania v. Muniz*, 496 U. S. 582, 598–599 (1990) (respondent’s answer to the “birthday question” was protected because the “content of his truthful answer supported an inference that his mental faculties were impaired”); *Doe v. United States*, 487 U. S. 201, 211, n. 10 (1988) (“The content itself must have testimonial significance”); *Fisher v. United States*, 425 U. S. 391, 410–411 (1976) (“[H]owever incriminating the contents of the accountant’s workpapers might be, the act of producing them—the only thing which the taxpayer is compelled to do—would not itself involve testimonial self-incrimination”); *Gilbert*, 388 U. S., at 266–267 (“A mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying characteristic outside its protection”); *United States v. Wade*, 388 U. S. 218, 223 (1967) (“[I]t deserves emphasis that this case presents no question of the admissibility in evidence of anything Wade said or did at the lineup which implicates his privilege”).

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testimonial in nature.

Rather than determining whether the communication at issue is testimonial, the Court instead concludes that the State can compel the disclosure of one's identity because it is not "incriminating." *Ante*, at 11. But our cases have afforded Fifth Amendment protection to statements that are "incriminating" in a much broader sense than the Court suggests. It has "long been settled that [the Fifth Amendment's] protection encompasses compelled statements that lead to the discovery of incriminating evidence even though the statements themselves are not incriminating and are not introduced into evidence." *United States v. Hubbell*, 530 U. S. 27, 37 (2000). By "incriminating" we have meant disclosures that "could be used in a criminal prosecution or could lead to other evidence that might be so used," *Kastigar v. United States*, 406 U. S. 441, 445 (1972)—communications, in other words, that "would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime," *Hoffman v. United States*, 341 U. S. 479, 486 (1951). Thus, "[c]ompelled testimony that communicates information that may 'lead to incriminating evidence' is privileged even if the information itself is not inculpatory." *Hubbell*, 530 U. S., at 38 (citing *Doe*, 487 U. S., at 208, n. 6).

Given a proper understanding of the category of "incriminating" communications that fall within the Fifth Amendment privilege, it is clear that the disclosure of petitioner's identity is protected. 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. *Ante*, at 12–13. 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”?⁷ If the Court is correct, then petitioner’s refusal to cooperate did not impede the police investigation. Indeed, if we accept the predicate for 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.

A person’s identity obviously bears informational and incriminating worth, “even if the [name] itself is not incriminatory.” *Hubbell*, 530 U. S., at 38. 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.” *Ante*, at 12.

The officer in this case told petitioner, in the Court’s words, that “he was conducting an investigation and needed to see some identification.” *Ante*, at 2. As the target of that investigation, petitioner, in my view, acted well within his rights when he opted to stand mute. Accordingly, I respectfully dissent.

⁷Nev. Rev. Stat. §171.123(1) (2003). The Court suggests that furnishing identification also allows the investigating officer to assess the threat to himself and others. See *ante*, at 8. But to the extent that officer or public safety is immediately at issue, that concern is sufficiently alleviated by the officer’s ability to perform a limited patdown search for weapons. See *Terry v. Ohio*, 392 U. S. 1, 25–26 (1968).