Buffalo Public Interest Law Journal

Volume 27 Article 2

9-1-2008

National Security, Policing, and the Fourth Amendment: A New Perspective on *Hiibel*

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NATIONAL SECURITY, POLICING, AND THE FOURTH AMENDMENT: A NEW PERSPECTIVE ON *HIIBEL*

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I. INTRODUCTION

In *Hiibel v. Sixth Judicial Dist. Ct.*, the U.S. Supreme Court held Nevada's stop-and-identify statute constitutional in a 5-4 decision.[1] Unlike the decision itself, the scholarly response to *Hiibel* has been entirely one-sided and entirely critical of the majority.[2] Commentators, both on and off the Court's bench, have argued that permitting a police officer to arrest an individual for failing to provide his name during a *Terry* stop dilutes Fourth Amendment protections vital to preserving Americans' civil liberties.[3] They contend that it resurrects the sort of problems the Court's void-for-vagueness decisions previously dispensed with, all for the sake of law enforcement convenience in catching and prosecuting terrorists.[4] However, these criticisms rely on a faulty conception of Fourth Amendment rights and reflect outdated

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[1] Hiibel v. Sixth Judicial Dist. Ct. 542 U.S. 177 (2004).

[2] *See, e.g.*, E. Martin Estrada, *Criminalizing Silence: Hiibel and the Continuing Expansion of the Terry Doctrine*, 49 ST. LOUIS U. L.J. 279 (2005); Arnold H. Loewy, *The Cowboy and the Cop: The Saga of Dudley Hiibel, 9/11, and the Vanishing Fourth Amendment*, 109 PENN ST. L. REV. 929 (2005); Shelli Calland, Recent Development, *Hiibel v. Sixth Judicial District Court: Stop and Identify Statutes Do Not Violate the Fourth or Fifth Amendments*, 40 HARV. C.R.-C.L. L. REV. 251 (2005); James Ryan Kelly, Note, *Is Silence Golden? Not After Hiibel v. Sixth Judicial District Court of Nevada*, 25 ST. LOUIS U. PUB. L. REV. 155 (2006); William R. Snyder, Jr., Case Comment, *Slipping Down The Slope Of Probable Cause: An Unreasonable Exception To What Was Once A Reasonable Rule*, 57 FLA. L. REV. 445 (2005); Jamie L. Stulin, Comment, *Does Hiibel Redefine Terry? The Latest Expansion of the Terry Doctrine and the Silent Impact of Terrorism on the Supreme Court's Decision to Compel Identification*, 54 AM. U. L. REV. 1449, 1478 (2005).

[3] *See supra* note 2.

[4] *See supra* note 2.

notions about the nature of policing. Far from a blind step down the totalitarian path, *Hiibel* represents an appropriate balance of individual privacy and government interests. It reflects an accurate conception of Fourth Amendment rights, as well as, the realities of modern policing.

This article will discuss how the *Hiibel* decision demonstrates the true nature of Constitutional protections in criminal procedure. Part II states *Hiibel*'s facts and the Court's justification for its holding. Part III discusses the flexible nature of Fourth Amendment protections, the proper balance of individual and government interests struck in *Hiibel*, and precedent supporting this balance. It also discusses the post-September 11 transformation in the Court's conception of law-enforcement interests that now prevents the Court from distinguishing situations involving terrorism from the rest of its criminal procedure jurisprudence. Part IV discusses the legal reforms, changes in police practices, and modern racial dynamics that mitigate concerns of arbitrary and discriminatory enforcement of laws like the stop-and-identify statute at issue in *Hiibel*. Part V proposes additional future safeguards. Part VI concludes.

II. THE HIIBEL DECISION

The facts of the *Hiibel* case are unremarkable. Police in Humboldt County, Nevada, received an afternoon telephone call reporting an assault, and dispatched Deputy Sheriff Lee Dove to the scene.[5] When he arrived, he found a red and silver GMC truck parked by the side of the road, with a man standing beside it and a young woman sitting in it.[6] Dove approached the man, who appeared to be intoxicated, and explained that he was investigating a fight.[7] Dove asked the man if he had any identification on him.[8] The man refused this request and asked Dove why he wanted

[5] *Hiibel*, 542 U.S. at 180.
[6] *Id.*
[7] *Id.* at 180-81.
[8] *Id.* at 181.

identification.[9] Dove explained that he was conducting an investigation and needed to know who the man was and what he was doing there.[10] The man refused again, became agitated, and began to taunt Dove.[11] Officer Dove repeated his request for identification eleven times and was refused each time.[12] After warning the man that he would be arrested for failing to comply, Dove finally arrested him.[13] The man, Dudley Hiibel, was tried in the Justice Court of Union Township, convicted of violating Nevada's "stop and identify" statute,[14] and fined $250.[15] The Sixth Judicial District Court affirmed, as did the Supreme Court of Nevada, in a divided opinion.[16] Hiibel's petition for rehearing was denied without opinion.[17]

In a 5-4 decision, the U.S. Supreme Court affirmed Hiibel's conviction.[18] With respect to the Fourth Amendment claims Hiibel raised on appeal, the Court held that the Nevada statute's provision granting officers the discretion to arrest a *Terry* stop suspect for refusing to identify himself did not violate the Fourth Amendment

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[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] NEV. REV. STAT. ANN. § 171.123 (West 2008) provides, in relevant part, that:

> 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.
> 4. A person must not be detained longer than is reasonably necessary to effect the purposes of this section, and in no event longer than 60 minutes. The detention must not extend beyond the place or the immediate vicinity of the place where the detention was first effected, unless the person is arrested.

[15] *Hiibel*, 542 U.S. at 182.
[16] Hiibel v. Sixth Judicial Dist. Ct., 59 P.3d 1201 (Nev. 2002).
[17] *Id.*
[18] *Hiibel*, 542 U.S. 177.

prohibition on unreasonable searches and seizures.[19] In so holding, the Court concluded that the statute constitutionally balanced the intrusion on an individual's privacy against legitimate government interests.[20] The Court found that dangers commonplace to statutes authorizing officer discretion would not materialize here, since the *Terry* stop must be "justified at its inception, and . . . reasonably related in scope to the circumstances which justified the interference in the first place."[21] Additionally, the Court noted that an officer's discretion to arrest ensures that the authority to make such a "commonsense inquiry"[22] does not become a "legal nullity."[23]

III. THE ROLE OF TERRORISM

It seems clear that the events of September 11, 2001 informed the *Hiibel* Court's reasoning. On its face, *Hiibel*, a case decided in the context of a domestic assault investigation, seems far removed from national security issues. Although the U.S. Supreme Court does not mention terrorism in its *Hiibel* opinion, the Nevada Supreme Court opinion brings the issue to the fore.[24] The federal government picked up on the case's national security implications, and filed an *amicus curiae* brief pointing out the necessity of stop-and-identify authority in identifying individuals on terrorist watch lists and thereby preventing or deterring imminent crime.[25] Virtually all scholars who have addressed the subject agree that terrorism informed the Court's reasoning.[26]

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[19] *Id.* at 185, 188.
[20] *Id.* at 188 (citing Delaware v. Prouse, 440 U.S. 648, 654 (1979)).
[21] *Id.* at 185 (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)).
[22] *Id.* at 189.
[23] *Id.* at 188.
[24] *See* Hiibel v. Sixth Judicial Dist. Ct., 59 P.3d 1206 (Nev. 2002).
[25] *See* Brief for the United States as Amicus Curiae Supporting Respondent at 14-15, Hiibel v. Sixth Judicial Dist. Ct., 542 U.S. 177 (2004) (No. 03-5554), 2004 WL 121587.
[26] *See, e.g.*, Arnold H. Loewy, *The Cowboy and the Cop: The Saga of Dudley Hiibel, 9/11, and the Vanishing Fourth Amendment*, 109 PENN ST. L. REV. 929,

A. Sacrificing Freedom for Security?

Hiibel's critics argue that the Court failed to recognize the Fourth Amendment's content and purpose and, instead, blindly diluted vital constitutional safeguards when Americans needed them the most. Thus, they fear that *Hiibel* represents the Court's submission to the "powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand."[27] Such concerns coincide with the widely held view that the Fourth Amendment should perform a countermajoritarian function, and that courts should enforce the Bill of Rights in such a way as to safeguard minority rights against encroachment by majority actors.[28]

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943 (2005) ("[T]o the extent that 9/11 did give us Hiibel, it seems trite but fair to say: 'Chalk up one more win for the terrorists.'"); Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 YALE L.J. 1801, 1842 (classifying Hiibel as one of the cases in which "judges are beginning to come to grips with the emergency measures adopted by the government in the wake of September 11, 2001"); Shelli Calland, Recent Development, *Hiibel v. Sixth Judicial District Court: Stop and Identify Statutes Do Not Violate the Fourth or Fifth Amendments*, 40 HARV. C.R.-C.L. L. REV. 251, 262 (2005) ("[N]o doubt the Court's decisions in *Hiibel* can be attributed at least in part to recent events that have awakened our country to new and frightening enemies."); Jamie L. Stulin, Comment, *Does Hiibel Redefine Terry? The Latest Expansion of the Terry Doctrine and the Silent Impact of Terrorism on the Supreme Court's Decision to Compel Identification*, 54 AM. U. L. REV. 1449, 1478 (2005) (stating "the terrorism threat against America likely played a key role in the Court's decision"); *see also* Warren Richey, *If Police Ask Who You Are, Do You Have to Say?*, CHRISTIAN SCI. MONITOR, Mar. 22, 2004, *available at* 2004 WLNR 1644756 (noting "heightened concern about possible terrorist activities within the U.S.").

[27] Terry v. Ohio, 392 U.S. 1, 39 (1968) (Douglas, J., dissenting).

[28] Susan Herman, for example, cites Justice Stone's famous Carolene Products footnote four as support for the proposition that the political process cannot be trusted to protect "discrete and insular minorities," and, therefore, that courts should declare unconstitutional legislation prejudicing such groups. Susan N. Herman, *The USA PATRIOT Act and the Submajoritarian Fourth Amendment* 41 HARV. C.R.-C.L. L. REV. 67, 70 (2006) (referencing United States v.

Adherents to this view would agree with Judge Agosti's dissent from the Nevada Supreme Court decision in which she argued that "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."[29] Furthermore, critics argue that the citizenry's need for concrete Fourth Amendment protections is at its zenith in times of crisis, when the government most demands power susceptible to abuse at the expense of minority rights.[30]

Carolene Products Co., 304 U.S. 144, 153 n.4 (1938) (stating that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry")); *see also* JOHN HARTELY, DEMOCRACY AND DISTRUST 97 (1980) (calling the Fourth Amendment a "harbinger of the Equal Protection Clause" and emphasizing the "tremendous potential for the arbitrary or invidious infliction of 'unusually' severe punishments on persons of various classes other than 'our own"'); Tracey Maclin, *When the Cure for the Fourth Amendment is Worse than the Disease*, 68 S. CAL. L. REV. 1, 41-42 (1994) (noting that "Fourth Amendment rights are personal, they are not subject to majority rule"); William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2143 (2002) (noting that "most constitutional argument assumes that there is a normatively right answer to the question what the scope of [Fourth and Fifth Amendment] rights should be, and that the answer is basically fixed").

[29] Hiibel v. Sixth Judicial Dist. Ct., 59 P.3d 1201, 1209 (Nev. 2002) (Agosti, J., dissenting). In lamenting how the Court had lapsed in its countermajoritarian duty, Susan Herman cited the U.S. Supreme Court's Hiibel decision as evidence that "[t]he Court is unlikely to upset decisions made by legislative bodies or policymakers about what searches and seizures are reasonable." Herman, *supra* note 28, at 105.

[30] *Hiibel* at 1209 (Agosti, J., dissenting) (stating that "[n]ow is precisely the time when our duty to vigilantly guard the rights enumerated in the Constitution becomes most important"); Calland, *supra* note 2, at 263 (warning "[i]n these dangerous times, the truest emergency involves our Constitution, and we must never sacrifice any part of that Constitution upon the altar of security"); Christopher Metzler, *Providing Material Support to Violate the Constitution: The USA PATRIOT Act and Its Assault on the 4th Amendment*, 29 N.C. CENT. L.J. 35, 64 (2006) (noting "[t]his is not the time to give law enforcement officials greater leeway; rather, it is time to reinforce the original purpose of the Fourth Amendment, limiting government action").

Consequently, *Hiibel*'s critics allege that the events of September 11 improperly influenced the Court's balancing of individual and government interests. They argue that individuals harbor a reasonable expectation of privacy in their names,[31] which the Court here undervalued against the government desire for law enforcement convenience.[32] Although they concede that "probable cause can be bent to protect heightened government interests," commentators argue that the standard "cannot be broken for the sole purpose of enabling greater law enforcement efficacy and authority."[33] They alleged that such a breach happened in this case,[34] citing precedent they claim contradicts *Hiibel*'s holding.[35]

Additionally, scholars take issue with the fact that the police authority sanctioned in *Hiibel* is not limited to seeking out and arresting terrorists. Rather, police may use these expanded powers in all of their law-enforcement duties.[36] Some

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[31] Stulin, *supra* note 2.

[32] Hiibel v. Sixth Judicial Dist. Ct., 542 U.S. 177, 196 (2004) (Stevens, J., dissenting) (pointing out that police databases allow a name to provide police with information "tremendously useful in a criminal prosecution"); Estrada, *supra* note 2, at 306; *see also Hiibel*, 59 P.3d, at 1209 (Agosti, J., dissenting) (arguing that the Nevada majority "does not provide any evidence that an officer, by knowing a person's identity, is better protected from potential violence").

[33] Snyder, *supra* note 2, at 449-50; *see also* Metzler, *supra* note 30, at 50 (noting that in times of war, "citizens have the opportunity to see the true nature of their government as its interests subsume their own").

[34] *Hiibel*, 542 U.S. at 196 (2004) (Stevens, J., dissenting) (stating that "the Nevada Legislature intended to provide its police officers with a useful law enforcement tool").

[35] *See, e.g.*, Snyder, *supra* note 2, at 449 (arguing that the Court previously declined "to uphold a diminished standard of suspicion simply to ensure greater police efficacy" (referencing Papachristou v. City of Jacksonville, 405 U.S. 156, 171 (1972) and Hayes v. Fla., 470 U.S. 811, 814 (1985))).

[36] *See* Stuntz, *supra* note 28, at 2162; Tribe & Gudridge, *supra* note 26, at 1826. A Nevada Supreme Court *Hiibel* concurrence noted as much, stating, "I write separately to note that the majority has not somehow overreacted to the dangers presented by the war against domestic and international terrorism. Our decision today is truly related to the ability of police to properly and safely deal with persons reasonably suspected of criminal misconduct, here, domestic violence

commentators argue that such an unwarranted expansion of power weakens vital Fourth Amendment protections and justifies public outrage.[37] Others even suggest that *Hiibel* will result in a permanent loss of civil liberties.[38] Justice Breyer expressed such fears in his *Hiibel* dissent, in which he asked, "Can a State, in addition to requiring a stopped individual to answer 'What's your name?' also require an answer to 'What's your license number?' or 'Where do you live?'"[39] Moreover, because police will not voluntarily abdicate broadened powers, some objectors even suggest that these decisions foretell the United States' devolution into a police state.[40]

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and driving under the influence of alcohol." Hiibel v. Sixth Judicial Dist. Ct., 59 P.3d 1201, 1207 (Nev. 2002) (Maupin, J., concurring).

[37] *See* Stulin, *supra* note 2, at 1484 (claiming that "to apply this tactic to ordinary police encounters, where learning a suspect's name has nothing to do with investigating the crime at hand, unnecessarily infringes on privacy rights, upends precedent, and ensures that the Fourth Amendment will continue to lose its identity").

[38] *See* Estrada, *supra* note 2, at 302, 317 ("By unbridling the *Terry* doctrine from its earlier restrictions, the Hiibel Court has thrust open the door to the *Terry* doctrine's further expansion into new Fourth Amendment frontiers" and causing the author to fear that the decision steepened "the slippery slope of eroding individual rights."); M. Christine Klein, *A Bird Called Hiibel: The Criminalization of Silence*, 2004 CATO SUP. CT. REV. 357, 393 (2004) (calling it "only a matter of time before [the Court] has the opportunity to decide . . . whether its rollback of Fourth Amendment protections will be limited to a search for mere identity, or whether the state will be empowered to arrest its citizens for rebuffing a wide variety of intrusive inquiries . . . "); Loewy, *supra* note 2, at 940 (claiming that "[u]ncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government" (citing Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting))). As Philip M. McVey pointed out, "Bridges and buildings damaged by [terrorist] campaigns can be quickly repaired, but the restoration of a society's human rights is often an arduous and multigenerational task." PHILIP M. MCVEY, TERRORISM AND LOCAL LAW ENFORCEMENT: A MULTIDIMENSIONAL CHALLENGE FOR THE TWENTY-FIRST CENTURY 109 (1997).

[39] *Hiibel*, 542 U.S. at 198 (Breyer, J., dissenting).

[40] *See* Hiibel v. Sixth Judicial Dist. Ct., 59 P.3d 1201, 1210 (Nev. 2002) (Agosti, J., dissenting) ("History bears testimony that by such disregard are the rights of liberty extinguished, heedlessly at first, then stealthily, and brazenly in the end."

B. Contemporary Terrorism and the Fourth Amendment

However, *Hiibel*'s critics fail to recognize the dynamic nature of Fourth Amendment protections and the preventative need to fight terrorism, which ultimately explain the U.S. Supreme Court's holding.

1. Fluctuating Fourth Amendment Protections

Far from a strict countermajoritarian bulwark, Fourth Amendment rights are constantly evolving.[41] As Justice Cardozo stated, "Bills of rights give assurance to the individual of the preservation of his liberty. They do not define the liberty they promise."[42] Rather than some stricture in its text, the Fourth

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(quoting Barrios-Lomeli v. State, 961 P.2d 750, 752 (Nev. 1998) (quoting Davis v. United States, 328 U.S. 582, 597 (1946) (Frankfurter, J., dissenting)))); *see also* Terry v. Ohio, 392 U.S. 1, 38 (1968) (Douglas, J., dissenting) ("To give the police greater power than a magistrate is to take a long step down the totalitarian path."); Metzler, *supra* note 30, at 49 ("The conclusion in Hiibel allowing a state to require a suspect to disclose his name during the course of a *Terry* stop has instigated a barrage of articles which claim that a slippery slope to the total erosion of Fourth Amendment rights has begun."); *see also* Philip B. Heymann, *Civil Liberties and Human Rights in the Aftermath of September 11*, 25 HARV J. L. PUB. POL'Y 441, 441-42 (2002) ("The issues of discretion involve matters of life or death, torture, detention without trial, trial without juries, and basic freedoms to dissent."); Tribe & Gudridge, *supra* note 26, at 1829.

[41] *See generally Hiibel*, 542 U.S. at 197 (Breyer, J., dissenting).

[42] Benjamin N. Cardozo, THE PARADOXES OF LEGAL SCIENCE 97 (1928); *see also* Hudson Water Co. v. McCarter, 209 U.S. 349, 355 (1908):

> All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached.

Amendment's "mandate and touchstone" is reasonableness.[43] The standard that a police officer must meet in order to justify his conduct is equally amorphous, since probable cause "is not a thing; it is a probability measure, a burden of persuasion in other words."[44] In judging whether certain conduct complies with the Fourth Amendment, a court asks whether it is reasonable under the "totality of the circumstances."[45] This totality includes both the particular facts of a case as well as the broader social context.[46] Indeed, the Fourth Amendment's vague text "positively invites constructions that change with changing circumstances."[47] As a result, Fourth Amendment protections can and should change in relation to both case-specific facts and broader social trends.[48] In

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[43] Akhil Reed Amar, *Terry and Fourth Amendment First Principles*, 72 ST. JOHN'S L. REV. 1097, 1098 (1998); *see Hiibel*, 542 U.S. at 187-88 ("The reasonableness of a seizure under the Fourth Amendment is determined by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests." (quoting Delaware v. Prouse, 440 U.S. 648, 654 (1979))).

[44] Ronald J. Allen & Ross M. Rosenberg, *The Fourth Amendment and the Limits of Theory: Local Versus General Theoretical Knowledge*, 72 ST. JOHN'S L. REV. 1149, 1160 (1998); *see also* Metzler, *supra* note 30, at 37 ("As recently as 2003, the Court described probable cause as "a fluid concept . . . 'not readily, or even usefully, reduced to a neat set of legal rules.'" (citing Maryland v. Pringle, 540 U.S. 366, 371 (2003) (quoting Illinois v. Gates, 462 U.S. 213, 232 (1983))).

[45] *Gates*, 462 U.S. at 232.

[46] *See* United States v. Leon, 468 U.S. 897, 928 (1984) (Blackmun, J., concurring):

> If a single principle may be drawn from this Court's exclusionary rule decisions, from Weeks [v. United States] through Mapp v. Ohio . . . to the decisions handed down today, it is that the scope of the exclusionary rule is subject to change in light of changing judicial understanding about the effects of the rule outside the confines of the courtroom.

[47] Carol Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 824 (1994).

[48] Stuntz, *supra* note 28, at 2144 ("The scope of these rights is, has been, and will be responsive to changes in context."); *see also* Estrada, *supra* note 2, at 305 (noting that "the Court has recognized that notions of what constitute acceptable privacy interests can evolve over time, mirroring changes in societal norms" (referencing Kyllo v. U.S., 533 U.S. 27, 33-34 (2001))); Dan M. Kahan

order to avoid charges of judicial activism, however, the Court couches its contextual reasoning in a contextual principle.[49]

2. The Totality of Today's Circumstances

Against this amorphous standard of reasonableness under a totality of the circumstances, the Court in *Hiibel* properly upheld Nevada's balancing of relevant individual and government interests. In his article, *Local Policing After the Terror*, William Stuntz states:

> [E]ither because we usually think of rights as constants, or because we think that some kinds of rights should never vary in response to public outcry, the tendency is to think that rights like those contained in the Fourth and Fifth Amendments should not change in response to events like those of September 11, 2001. That tendency is wrong. It is also futile. . . .[50]

& Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1184 (1998) (noting that as "conditions change, the enlightened doctrinal innovations of one generation can become barriers to social progress in the next"); Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801 (2004) (discussing technology's effect on privacy rights under the Constitution).

[49] Stuntz, *supra* note 28, at 2143 n.10 ("Social context matters, but stays under the table; opinions must be couched in terms of a contextual principle."). *See generally* Allen & Rosenberg, *supra* note 44. *See also* Kahan & Meares, *supra* note 48, at 1157-58:

> [T]he Court's leading race-equality cases, including Brown v. Board of Education and Baker v. Carr, provoked intense political controversy. Confronted with a sustained attack on its own legitimacy, the Court changed its tactics. Rather than meet racism head on, the Court began to fight it indirectly through general constitutional standards that did not explicitly address race but that there were nonetheless calculated to constrain racially motivated policies.

[50] Stuntz, *supra* note 28, at 2144.

Instead, "Constitutional doctrines have life cycles. They are born of practical need, flourish in an atmosphere of general utility, and decline as changing conditions drain them of their vitality."[51] As the Nevada Supreme Court noted, the attacks of September 11 changed American conditions by increasing the government's interest in allowing police to identify individuals. [52] Conversely, it seems that individuals today have little interest in keeping their names private. The great value to police of information individuals routinely disclose strongly suggests that the Nevada statute does not represent such an unjustifiable infringement on individual privacy as to be labeled unconstitutional.

a. Intrusion on Individual Privacy

In America today, providing one's name to a police officer can hardly be deemed an intrusion on individual privacy. The act itself is simple, requiring an individual to communicate only a handful of words. Additionally, experience suggests that most individuals do not harbor a subjective expectation of privacy in their identities, but rather willingly and unknowingly provide their names to complete strangers routinely. Many people publicize their identities by permitting their names to be listed in the phonebook and many label their mailboxes with their names, all for others' convenience. Furthermore, people purchase items with checks and credit cards requiring identification or listing their names. Identity disclosure is especially prevalent on the internet, as internet access requires broadcasting one's IP address, from which one's name, location, and other information can be determined.[53]

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[51] Kahan & Meares, *supra* note 48, at 1153.

[52] *See* Hiibel v. Sixth Judicial Dist. Ct., 59 P.3d 1201, 1206 (Nev. 2002) (stating that the war on terror is "a different kind of war that requires a different type of approach and a different type of mentality" (quoting President George W. Bush, Address During a News Conference (Oct. 11, 2001))).

[53] This says nothing of recently popular social networking sites such as Facebook and MySpace, which require the publication of one's name and often disclose much more to complete strangers.

Moreover, considering that the Court regularly declines to recognize an objectively reasonable expectation of privacy in areas indisputably more sensitive and personal than one's identity, any subjective expectation of privacy in one's name cannot be justified as objectively reasonable.[54] The Court has upheld the principle that individuals, who knowingly communicate with others, even in private conversation, have no reasonable expectation of privacy in the information communicated.[55] In *California v. Greenwood*, the Court held that individuals void any reasonable expectation of privacy in the contents of opaque, plastic garbage bags when they place such bags on the street for collection.[56] And in *Florida v. Riley*, the Court found no reasonable expectation of privacy in greenhouses that can be seen into from hovering helicopters.[57] *Hiibel*'s holding seems completely consistent with such precedent.[58]

b. The Government Interest in Identification

In light of the legitimate government interests that *Hiibel*'s stop-and-identify statute serves, the Court properly found the law constitutional. Preventing police officers from arresting individuals who refuse to identify themselves would inhibit law enforcement's ability to fight terrorism and it would actually necessitate more local police intrusion on individual privacy during *Terry* stops. As Justice Stevens noted in his *Hiibel* dissent, police databases allow officers to access a variety of criminal information from the street,[59] which allows officers to particularize their interactions

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[54] *E.g.*, U.S. v. White, 401 U.S. 745 (1971); California v. Greenwood, 486 U.S. 35 (1988); Florida v. Riley, 488 U.S. 445 (1989).
[55] *See White*, 401 U.S. at 751-52.
[56] 486 U.S. at 40-41.
[57] 488 U.S. at 450-51.
[58] Hiibel v. Sixth Judicial Dist. Ct., 542 U.S. 177 (2004).
[59] *Hiibel*, 542 U.S. at 196 (2004) (Stevens, J., dissenting); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, LOCAL POLICE DEPARTMENTS, 2003 at 33 (2006) ("In more than a third of local police departments, at least some officers

with individuals based on what they learn. Such particularization benefits both society and police in several ways. First, it notifies the officer if the individual is wanted for questioning or if there is a warrant out for his arrest, which would provide probable cause for an arrest. Second, it alerts the officer if the individual is a suspected terrorist or suffers from a mental disorder, thus advising the officer of specific dangers and enabling him to take protective measures.[60] Third, it provides the officer a context in which to evaluate the suspect's story, based on his reputation in the community, which in some situations dispels the officer's concerns and reduces his incentive to conduct a more intrusive investigation.[61]

3. Precedent Distinguishes Potential Terrorism

An examination of earlier Court decisions reveals that the Court has always indicated a willingness to defer to the executive in cases implicating national security.

The Court's *Katz v. United States* decision marked the constitutionalization of criminal procedure.[62] In that case, the majority held that the Fourth Amendment protects persons, not places, from unreasonable searches and seizures.[63] Additionally,

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in the field could use computers to access vehicle records, driving records, and warrants during 2003. This included a majority of the departments serving a population of 10,000 or more residents.").

[60] Despite some critics' comments policing remains a very dangerous job. From 1997 to 2006, 562 police officers were feloniously killed in the line of duty, and in 2006 alone, 58,634 officers were assaulted while performing their duties, with 26.8% of these officers suffering injuries as a result. FEDERAL BUREAU OF INVESTIGATIONS, U.S. DEP'T OF JUSTICE, LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED, 2006 (2007); *see, e.g.*, Klein, *supra* note 38, at 379 (calling the officer safety rationale "not convincing").

[61] This particularization may "reduce[] the potential for capricious exercises of police discretion to a significant degree." Debra Livingston, *Gang Loitering, the Court, and Some Realism about Police Patrol*, 1999 SUP. CT. REV. 141, 188.

[62] 389 U.S. 347 (1967).

[63] *Id.* at 353.

Justice Harlan enunciated a two-part test for determining whether or not a search is reasonable, and, therefore, whether or not Fourth Amendment protections are triggered.[64] But, even here, the majority left open the question of "[w]hether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security . . . ."[65] In his concurrence, Justice White answered this question in the affirmative, arguing for deference to the executive under such circumstances.[66]

In its 1972 decision, *United States v. United States District Court*,[67] the Court addressed this issue directly, balancing individual privacy interests against the government's interest in preventing terrorism.[68] In that case, the government's request for a complete exemption from Fourth Amendment requirements in conducting surveillance to catch terrorists was denied.[69] However, the Court did note that Fourth Amendment requirements "may vary according to the governmental interest to be enforced and the nature of citizen rights deserving protection."[70]

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[64] *Id.* at 361 (Harlan, J., concurring).
[65] *Id.* at 358 n.23.
[66] *Id.* at 363-64 (White, J., concurring).
[67] 407 U.S. 297 (1972).
[68] One of the defendants in the original case was charged with conspiracy to damage Government property and with the dynamite bombing of a Central Intelligence Agency office in Ann Arbor, Michigan. *Id.* at 299.
[69] *Id.* at 321.
[70] *Id.* at 323 (citing Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523, 534-35 (1967)). The Court also noted that "the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the Government's preparedness for some possible future crisis or emergency. Thus, the focus of domestic surveillance may be less precise than that directed against more conventional types of crime." 407 U.S. at 322. This seems to suggest that "[t]he prevention of substantial . . . harm to the nation justifies dispensing with the Fourth Amendment's mandate that ' . . . no Warrants shall issue, but upon probable cause, . . . particularly describing the place to be searched, and the persons or things to be seized.'" RONALD JAY ALLEN ET AL., COMPREHENSIVE CRIMINAL PROCEDURE 1027 n.2 (2nd ed. 2005) (citations omitted).

In 2000, the Court in *Florida v. J.L.*[71] held that an unverified anonymous tip reporting an individual carrying a handgun bore insufficient indicia of reliability to justify a search.[72] However, writing for a unanimous court, Justice Ginsberg suggested that the government's compelling interest in preventing terrorism would justify permitting such a search, stating, "We do not say, for example, that a report of a person carrying a bomb need bear the indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk."[73]

Similarly, in its Fifth Amendment jurisprudence, the Court formally adopted the public safety exception to *Miranda* warning requirements in *New York v. Quarles*.[74] The Court held that the substantial threat an unholstered handgun concealed in a supermarket posed to public safety justified a police officer's failure to provide a *Miranda* warning,[75] regardless of whether the officer's subjective motivation was public safety or obtaining evidence for trial.[76]

Since September 11, the Court has further indicated that the Fourth Amendment's requirements relax when the concern is terrorism. In 2005, the Court in *Illinois v. Caballes*[77] sanctioned drug-dog sniffs of automobiles stopped for reasons unrelated to drug interdiction.[78] Even the dissenters in that case, Justices Souter and Ginsberg, suggested that they would have voted differently if dog sniffs were more likely to turn up evidence of terrorism.[79] Justice Souter stated:

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[71] 529 U.S. 266 (2000).
[72] *Id.* at 274.
[73] *Id.* at 273-74.
[74] 467 U.S. 649, 659 (1984).
[75] *Id.* at 657-58.
[76] *Id.* at 656.
[77] 543 U.S. 405.
[78] *Id.* at 409.
[79] *See id.* at 410-25.

> I should take care myself to reserve judgment about a possible case significantly unlike this one. All of us are concerned not to prejudge a claim of authority to detect explosives and dangerous chemical or biological weapons that might be carried by a terrorist who prompts no individualized suspicion . . . . Unreasonable sniff searches for marijuana are not necessarily unreasonable sniff searches for destructive or deadly material if suicide bombs are a societal risk.[80]

Justice Ginsberg also distinguished the considerable danger presented by terrorism, stating that "[a] dog sniff for explosives, involving security interests not presented here, would be an entirely different matter."[81] Furthermore, the Court in *In re Sealed Case*[82] noted that the Foreign Intelligence Surveillance Court of Review cited several U.S. Supreme Court decisions authorizing warrantless searches when facing a pressing government need, and that "it is hard to imagine greater emergencies facing Americans" than "terrorists and espionage threats directed by foreign powers."[83]

These cases indicate that the Court has long responded to changing national threats. Both before and since September 11, the Court noted the propriety of granting discretion to the government in cases directly addressing terrorism or those otherwise likely to implicate national security concerns.[84] The Court thus responds to

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[80] *Id.* at 417 n.7 (Souter, J., dissenting) (citation omitted).

[81] *Id.* at 423 (Ginsberg, J., dissenting). Ginsberg also mentioned that an "immediate, present danger of explosives would likely justify a bomb sniff under the special needs doctrine." *Id.* at 425 (citing Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)).

[82] In re Sealed Case, 310 F.3d 717 (For. Intel. Surv. Rev. 2002).

[83] *Id.* at 746.

[84] Christopher L. Eisgruber & Lawrence G. Sager, *Civil Liberties in the Dragons' Domain: Negotiating the Blurred Boundary Between Domestic Law and Foreign Affairs After 9/11*, *in* SEPTEMBER 11 IN HISTORY: A WATERSHED MOMENT? 163, 163-64, 166-67 (Mary L. Dudziak ed., 2003) ("Doubtful of their competence and fearful that their errors might jeopardize national interests,

terrorist crime waves the same way it responds to other crime waves: by granting police officers additional authority to prevent crime.[85] Even in *Terry v. Ohio*, the Court approved Officer McFadden's preventative policing tactics in the context of a national crime wave.[86] Therefore, in context, it seems natural that "[s]ince September 11, the Supreme Court has decided thirteen of the fourteen Fourth Amendment cases it has heard[,]" including *Hiibel*, "in favor of the government . . . ."[87]

4. Potential Terrorism Realized

The preventative nature of fighting terrorism could explain why the Court did not seek to limit its decision to terrorism investigations.[88] As noted previously, before September 11, the Court was able to draw a distinction between cases concerning terrorism and those not concerning terrorism, which it did in cases such as *Katz* and *Caballes*.[89] However, the *Hiibel* Court recognizes that things are different today.[90] Terrorism is now a concern, and antiterrorism work is preventative in nature.[91] A police officer will likely only suspect an individual of plotting terrorism upon learning his identity and, thus, the Court can no longer permit certain procedures when investigating terrorism and forbid those procedures in less serious cases.[92] The circumstances of *any* given

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judges have traditionally granted Congress and the president almost complete discretion over questions about immigration, the military, espionage, and many other aspects of foreign affairs. To American judges, foreign policy is an unordered wilderness, the domain of realpolitik rather than reason.").

[85] See Stuntz, *supra* note 28, at 2138 ("Crime waves always carry with them calls for more law enforcement authority.").

[86] 392 U.S. 1, 23-24 n.21 (1968).

[87] Herman, *supra* note 28, at 131.

[88] *See* Brief for the United States as Amicus Curiae Supporting Respondent, *supra* note 25, at 4.

[89] The events at issue in Caballes took place in 1998, before terrorism was a salient concern for American law enforcement officers.

[90] *See* Hiibel v. Sixth Judicial Dist. Ct., 542 U.S. 177, 186-88 (2004).

[91] *See* Stulin, *supra* note 2, at 1476-78.

[92] *See* Calland, *supra* note 2, at 253 n.22.

Terry stop may suggest terrorism, so if *any* officer conducting a *Terry* stop is to have authority commensurate with such an investigation, *all* officers must. Since it would not have been possible to limit *Hiibel*'s stop-and-identify authority to terrorism investigations, the Court did not need to mention terrorism in its opinion.

Additionally, since the same Constitutional criminal procedure applies to federal law enforcement agencies and local police departments,[93] restricting local police authority would have the effect of tying federal agencies' hands as well. Such restrictions would raise the cost of federal law enforcement efforts, including personnel demands.[94] It is possible that such considerations further informed the Court's reasoning.[95]

IV. POLICE INCENTIVES

A. Vagueness Concerns Resurrected?

Commentators have suggested that *Hiibel* sanctions a preventative law enforcement agenda,[96] which will revive the very practices the Court previously sought to eliminate in its "void for

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[93] *See* Stuntz, *supra* note 28, at 2162 ("[T]he pressure on the law comes from terrorism, but the relevant power extends to local police investigating local crimes.").

[94] See Stuntz, *supra* note 28, at 2145 ("Restrictions on police authority act as a tax; they make criminal investigation more expensive than it otherwise might be."). Decreased police efficiency necessitates increasing the number of police employed to maintain a constant level of crime deterrence. *Id.*

[95] *See Hiibel*, 542 U.S. at 186.

[96] Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 26-27 (2005) ("[W]hereas in the past the priority with respect to terrorism was to prosecute suspected terrorists in a traditional manner . . . the overriding priority of the Department since 9/11 is to prevent attacks before they occur using all available tools.") (citations omitted); *see also* Calland, *supra* note 2, at 26; Eric S. Janus, *The Preventive State, Terrorists and Sexual Predators: Countering the Threat of a New Outsider Jurisprudence*, 40 CRIM. L. BULL 576 (2004) (noting that "radical prevention operates by substantially curtailing people's liberty").

vagueness" decisions.[97]

Traditional vagueness doctrine recognizes that an imprecise law, or one that criminalizes common conduct, grants law enforcement excessive discretion in determining whom to arrest and prosecute.[98] The underlying fear is that unscrupulous police officers will use this discretion to harass and persecute members of minority groups. To avoid this, courts should invalidate laws that vest the police with broad discretion.[99] The Court has done this frequently since the 1960s.[100]

Several scholars see such vagueness concerns arising from the Nevada stop-and-identify statute at issue in *Hiibel*.[101] Critics argue that the authority to arrest sanctioned in *Hiibel* is susceptible to arbitrary and discriminatory enforcement[102] by officers "engaged in the often competitive enterprise of ferreting out crime,"[103] and that such officers will use their authority to conduct

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[97] *See, e.g.*, Lawson v. Kolender, 461 U.S. 352 (1983); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Davis v. Mississippi, 394 U.S. 721 (1969).

[98] *See* David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. REV. 1333, 1365 (2005); John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 215 (1985).

[99] *See* Jeffries, *supra* note 98, at 214 ("[I]nhibiting racial discrimination in law enforcement is very much a part of what the rule of law is all about.").

[100] Herman, *supra* note 28, at 119; *see, e.g.*, City of Chicago v. Morales, 527 U.S. 41 (1999); *Kolender*, 461 U.S. 352; *Papachristou*, 405 U.S. 156; *Davis*, 394 U.S. 721.

[101] This assertion is easy to make, since even the *Hiibel* majority pointed out that "[s]top and identify statutes often combine elements of traditional vagrancy laws with provisions intended to regulate police behavior in the course of investigatory stops." Hiibel v. Sixth Judicial Dist. Ct., 542 U.S. 177, 183 (2004).

[102] *See, e.g.*, Snyder, *supra* note 2, at 452-53 (claiming that the *Hiibel* decision "may have heralded a return to the days of unchecked police discretion exemplified by the Jacksonville ordinance at issue in Papachristou").

[103] Johnson v. United States 333 U.S. 10, 14 (1948); *see also* United States v. United States Dist. Ct. 407 U.S. 297, 316 (1972) (noting the need of the Fourth Amendment "to check 'well-intentioned but mistakenly over-zealous executive officers' who are a part of any system of law enforcement" (quoting Coolidge v. New Hampshire, 403 U.S. 443, 481 (1971))).

broad-ranging searches[104] in violation of minorities' civil rights.[105] Judge Agosti suggested as much in her Nevada Supreme Court dissent, in which she argued that that court failed to keep up its "struggles against arbitrary power,"[106] stating that "[t]he majority, by its decision today, has allowed the first layer of our civil liberties to be whittled away. The holding weakens the democratic principles upon which this great nation was founded."[107] These arguments Justice Douglas made in his *Terry* dissent. Justice Douglas advised against permitting stops based on reasonable suspicion alone for fear that, a lack of the probable cause requirement would "leave law-abiding citizens at the mercy of the officers' whim or caprice."[108]

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[104] *See* Livingston, *supra* note 61, at 186-87 ("An officer may elect to make a 'public order' arrest, for instance, without attempting to negotiate an end to troublesome conduct. This is because his real motivation is not order maintenance at all. Instead, the officer wants to arrest so that he can conduct a search incident to arrest in the hope that this search will reveal evidence of more serious crime.").

[105] *See, e.g.*, Stulin, *supra* note 2, at 1485 ("[H]istory has suggested that when the Court diminishes privacy rights, it is often poor and minority populations who suffer the most."); *see also* Herman, *supra* note 28, at 119 ("Even if a majority of Americans were willing to sacrifice the privacy of Arab and Muslim men, the presumed targets of much of the government's attention, that does not make a discriminatory search policy reasonable."); Tribe & Gudridge, *supra* note 26, at 1841 (arguing that the government's response to September 11 invites "discrimination on the basis of race, nationality, or religion," and that "minorities, old and new, are in the soup" (quoting Christopher Edley, Jr., *The New American Dilemma: Racial Profiling Post-9/11*, in THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM 170, 192 (Richard C. Leone & Greg Anrig, Jr. eds., Public Affairs (2003))).

[106] Metzler, *supra* note 30, at 37 (citing Boyd v. United States, 116 U.S. 616, 630 (1886)).

[107] Hiibel v. Sixth Judicial Dist. Ct., 59 P.3d 1201, 1210 (Nev. 2002) (Agosti, J., dissenting). *Hiibel*'s Supreme Court petitioner also made this argument, claiming that the statute "creates a risk of arbitrary police conduct that the Fourth Amendment does not permit." Hiibel v. Sixth Judicial Dist. Ct., 542 U.S. 177, 188 (2004).

[108] Terry v. Ohio, 392 U.S. 1, 36 n.3 (1968) (Douglas, J., dissenting).

Thus, commentators frame *Hiibel* as an unjustified departure from precedent. Several critics equate the *Hiibel* stop-and-identify statute with the stop-and-identify statute deemed unconstitutionally vague in *Lawson v. Kolender*.[109] Critics cite to Justice Brennan's *Kolender* concurrence,[110] in which he rejected the argument that entrusting an officer with broad arrest power would serve important law enforcement interests, stating that "the balance struck by the Fourth Amendment between the public interest in effective law enforcement and the equally public interest in safeguarding individual freedom and privacy from arbitrary governmental interference forbids such expansion."[111] Some scholars claim *Hiibel* unduly departs from other holdings as well.[112] In his *Terry* concurrence, Justice White stated that the police might question a person detained in *Terry* stop, but that he is "not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest."[113] The Court repeated this dictum in *Berkemer v. McCarty* in 1984.[114] Additionally, in *Hayes v. Florida*,[115] the Court held that an officer might not arrest a suspect for failing to identify himself if the identification request is not reasonably related to the circumstances justifying the stop.[116] In his *Hiibel* dissent, Justice Breyer cited this precedent and

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[109] *See generally Kolender*, 461 U.S. 352.

[110] *See, e.g.*, Estrada, *supra* note 2, at 291; Klein, *supra* note 38, at 374; Loewy, *supra* note 2, at 938; Calland, *supra* note 2, at 256; Stulin, *supra* note 2, at 1465.

[111] *Kolender*, 461 U.S. at 365 (Brennan, J., concurring).

[112] *See, e.g.*, Estrada, *supra* note 2, at 302; Stulin, *supra* note 2, at 1466; Calland, *supra* note 2, at 262.

[113] Terry v. Ohio, 392 U.S. 1, 34 (1968) (White, J., concurring). Note that just six months earlier in *Katz v. United States* 389 U.S. 347, 363-64 (1967), Justice White distinguished terrorism, arguing for deference to the executive in cases of national security.

[114] 468 U.S. 420, 439 (1984).

[115] 470 U.S. 811, 817 (1985).

[116] The Court found such circumstances in *Brown v. Texas*, 443 U.S. 47 (1979), and held that police lacked "any reasonable suspicion" to detain the particular petitioner and require him to identify himself. *Id.* at 53.

claimed that the majority had not "presented any … convincing justification for change."[117]

B. Modern Incentives on Police

However, changes to the law, revised police protocols, and changes in societal racial dynamics since the 1960s, provide incentives to police officers not to enforce stop-and-identify statutes arbitrarily and discriminatorily. While these incentives cannot completely prevent arbitrary and discriminatory enforcement of criminal laws, they should be considered in evaluating a law's potential for prejudiced application.

The Supreme Court has long considered such factors. In *United States v. Leon*, the Court noted the importance of weighing the costs and benefits of the exclusionary rule rather than applying it indiscriminately.[118] The Court clarified this position in *Pennsylvania Board of Probation and Parole v. Scott*, stating that the rule "applies only where its deterrence benefits outweigh the substantial social costs."[119] In *Hudson v. Michigan*,[120] the Court balanced such interests and declined to apply the exclusionary rule in that case.[121] As Justice Scalia wrote, "[w]e cannot assume that

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[117] 542 U.S. 177, 199 (2004) (Breyer, J., dissenting) (citation omitted).

[118] 468 U.S. 897, 908 (1984); *see also id.* at 926 (denying applying the exclusionary rule in this case, because "the rule's purposes will only rarely be served by applying it in such circumstances").

[119] 524 U.S. 357, 357 (1998).

[120] 547 U.S. 586 (2006).

[121] The Court cited civil suits, "the increasing professionalism of police forces, including new emphasis on internal police discipline . . . wide-ranging reforms in the education, training, and supervision of police officers" as sufficiently powerful incentives on modern police to justify keeping evidence resulting from a police violation of the knock and announce rule as sufficiently powerful incentives on modern police to justify not excluding evidence resulting from a police violation of the knock-and-announce rule in this case. *Id.* at 596-99 (citing SAMUEL WALKER, TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE 1950-1990 51 (1993)); Empirical data on police recruitment supports these assertions of police professionalism. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, LOCAL POLICE DEPARTMENTS,

exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago. That would be forcing the public today to pay for the sins and inadequacies of a legal regime that existed almost half a century ago."[122]

These decisions illustrate the modern Court's trend of deferring more authority to law enforcement when officers have other incentives to comply with the Fourth Amendment's reasonableness requirement. Modern legal remedies, policing practices, and minority enfranchisement impose such incentives on police, encouraging them to act reasonably even when granted more authority, as they were in *Hiibel*.[123] Such considerations likely influenced the Court's decision to hold the *Hiibel* statute constitutional.

1. Legal Remedies

Numerous modern legal mechanisms provide redress for abusive police conduct, regardless of whether the victim is arrested or prosecuted. Indeed, today's law "forbids discriminatory practices that it once required."[124] Civil suits for excessive use of force under federal[125] and state law are available to remedy police

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2003 at 21 (2006) (explaining that "[i]n an effort to hire officers more suited to community policing, 27% percent of local police departments, employing 32% of all officers, assessed new recruits' analytical and problem-solving abilities as part of the selection process. Fourteen percent of departments, employing 23% of officers, assessed recruits' understanding of culturally diverse populations. Ten percent of departments, employing 12% of officers, assessed mediation skills and ability to manage interpersonal conflicts;"); *see also id.* at 9 (noting that the number of departments with some sort of college education requirement more than tripled between 1990 and 2000).

[122] *Hudson* 547 U.S. at 597.

[123] *See generally* Hiibel v. Sixth Judicial Dist. Ct., 542 U.S. 177 (2004).

[124] William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 815 (2006).

[125] 42 U.S.C.A. §§ 1981, 1983, 1985 (West 2008).

abuses.[126] As scholar Carl Klockars discusses, civil suits deter police who fear "the charge of brutality and the scandal such a charge may inspire."[127] Additionally, the Police Pattern or Practice provision (known as § 14141) in the Crime Control Act of 1994 makes it illegal for "any governmental authority . . . to engage in a pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States."[128] Such suits, which can be brought against police officer and department alike, pressure individual officers to act reasonably and encourage police departments to monitor their officers.

2. New Policing Strategies

Police practices have undergone two radical transformations since the 1960s. After constitutionalizing criminal procedure in *Katz*,[129] the Court invalidated vague laws and limited police discretion in an effort to prevent racial discrimination by the police.[130] As a result, police in urban areas in the 1970s and 1980s retreated from the street.[131] The consequent lack of deterrence led to a dramatic increase in drug use and crime in many cities,[132] as

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[126] Carl B. Klockars, *A Theory of Excessive Force and Its Control*, *in* POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE 1, 4 (William A. Geller & Hans Toch eds., 1996).

[127] *Id.* at 7.

[128] 42 U.S.C.A. § 14141(a) (West 2008).

[129] *Katz*, 389 U.S. 347; *see* Kerr, *supra* note 48, at 860 ("[I]t is difficult to contest the fact that over the last forty years the Court has constitutionalized the law governing criminal investigations. Today, the law of criminal procedure is mostly constitutional law.").

[130] *See* Kahan & Meares, *supra* note 48, at 1153 ("[T]he Court, beginning in the 1960's and continuing well into the 1970's, erected a dense network of rules to delimit the permissible bounds of discretionary law-enforcement authority.").

[131] David Alan Sklansky, *Not Your Father's Police Department: Making Sense of the New Demographics of Law Enforcement*, 96 J. CRIM. L. & CRIMINOLOGY 1209, 1213 (2006) ("[B]y the end of the 1960s . . . police felt themselves increasingly under siege.").

[132] *See* Stuntz, *Political Constitution*, *supra* note 124, at 781-82 ("The

well as to "white flight" from urban centers.[133] Political pressure to address urban crime and police legitimacy scandals of the 1990s drove police departments to change continually their methods in recognition of the fact that infrequent, often-confrontational police-citizen interactions foster a police-community relationship antithetical to preventing crime. [134] New strategies, collectively referred to as "community policing," assign officers to particular areas[135] and instruct them to conduct foot and bicycle patrols[136] in an effort to produce frequent police-citizen interactions and foster

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constitutional proceduralism of the 1960s and after helped to create the harsh justice of the 1970s and after. Overcriminalization, excessive punishment, racially skewed drug enforcement, overfunding of prisons and underfunding of everything else – these familiar political problems are as much the consequences of constitutional regulation as the reasons for it.").

[133] *See generally* DAVID J. ARMOR, FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW 117-53 (1995); KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES (1985); DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993); GREGORY R. WEIHER, THE FRACTURED METROPOLIS: POLITICAL FRAGMENTATION AND METROPOLITAN SEGREGATION (1991). The 1981 film ESCAPE FROM NEW YORK (AVCO Embassy Pictures), presents a perfect snapshot of the public's fear of rising urban crime at the time. A summary of the film's plot notes, "In 1988, the U.S. turned Manhattan, New York into a maximum security prison where the most brutal criminals are residing for life, due to the 400% rise in crime rates." The Internet Movie Database, Escape From New York (1981) – Plot summary, http://www.imdb.com/title/tt0082340/plotsummary (last visited Apr. 25, 2008).

[134] *See* David Thacher, *The Local Role in Homeland Security*, 39 LAW & SOC'Y REV. 635, 668 (2005).

[135] In the 12-month period ending June 30, 2000, 90% of police agencies serving cities with populations over 250,000 "[g]ave patrol officers responsibility for specific geographic areas." BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, POLICE DEPARTMENTS IN LARGE CITIES, 1990-2000, 6 (2002).

[136] In cities with populations over 250,000, police bicycle use jumped dramatically in the 1990s. Ninety-eight percent of departments serving such communities used them in 2000, compared to 39% in 1990. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, POLICE DEPARTMENTS IN LARGE CITIES, 1990-2000 at 8 (2002). By 2003, use had dropped slightly, to around 75%. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, LOCAL POLICE DEPARTMENTS, 2003 at 13 (2006).

a cooperative, reciprocal police-community relationship[137] that enables officers to remain informed about goings-on in the community.[138] Several scholars have noted that "when properly implemented, [community policing has] been credited with controlling crime[,]"[139] and with improving the overall "quality of life" in urban areas.[140]

These new strategies provide incentives to police officers to employ their legal authority in a manner reasonable to the community. Modern community policing depends on a cooperative relationship between law enforcement and the community it serves.[141] Regular police-community meetings are a part of this.[142]

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[137] Richard R.W. Brooks, *Fear and Fairness in the City: Criminal Enforcement and Perceptions of Fairness in Minority Communities*, 73 S. CAL. L. REV. 1219, 1225 (2000) (citing Hubert Williams & Antony M. Pate, *Returning to First Principles: Reducing the Fear of Crime in Newark*, 33 CRIME & DELINQ. 53 (1987)) (indicating that "increased quality of contact between citizens and police such as door-to-door police visits in the neighborhood and other non-confrontational interactions with the community members gave the police more opportunities to feel connected to the communities, learn about their desires, and better serve them").

[138] Brooks, *supra* note 137, at 1224; *see also* Livingston, *supra* note 61, at 188 ("[T]o the extent that a police department structures its work to ensure that officers develop significant community-specific knowledge about the problems they are addressing, the exercise of police discretion is likely to be both better informed and more judicious.").

[139] Brooks, *supra* note 137, at 1264 (citing Wesley G. Skogan, DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS 109-24 (1990); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 578-91 (1997)).

[140] Livingston, *supra* note 61, at 141. Ironically, "[o]n the surface, these community policing techniques bear a striking resemblance to the ones that communities used to reinforce the exclusion of minorities from the Nation's political life before the 1960's." Kahan & Meares, *supra* note 48, at 1154.

[141] Sixty percent of departments, including more than 80% of those serving 25,000 or more residents, had problem-solving partnerships, or written agreements with community groups, local agencies, or others during the 12-month period ending June 30, 2003. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, LOCAL POLICE DEPARTMENTS, 2003 at iii (2006).

At such meetings, community members provide feedback to police departments, which directly pressure individual officers and entire departments to conduct activities the community approves of in a manner reasonable to the community.[143] Additionally, political pressure from city leaders, who must answer to the enfranchised public for police conduct at election time, compels the police to self-regulate adequately.[144] Many departments do so through internal affairs divisions, which investigate claims of police misconduct, issue administrative sanctions up to and including termination, and even turn some cases over to prosecutors.[145]

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[142] In the 12-month period ending June 30, 2000, all police agencies serving cities with populations over 250,000 "[m]et at least quarterly with citizen groups to discuss crime-related problems." BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, POLICE DEPARTMENTS IN LARGE CITIES, 1990-2000 at 6 (2002).

[143] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, LOCAL POLICE DEPARTMENTS, 2003 at 21 (2006) (explaining that in 2003, "Fourteen percent of departments, employing 34% of all officers, included participation in collaborative problem-solving projects in the performance evaluation criteria for patrol officers. An estimated 37% of departments . . . collaborated with citizen groups to elicit feedback for developing community-policing strategies. This included more than two-thirds of departments serving a population of 25,000 or more"); *see also* Kahan & Meares, *supra* note 48, at 1174-75 (noting that if a community "is affected in a vital way by the discretionary policing strategy in question, then the approval of that policy by the community's representatives is compelling evidence that that strategy doesn't present the sorts of dangers that the void for vagueness doctrine is meant to avert"); Livingston, *supra* note 61, at 189, 197 (mentioning that "community policing goals of the statute at issue in *Morales* were to derive at least in part from some measure of community consultation and that such public discussion of a public order problem and the police department's proposed response may help ameliorate the problem before enforcement ever takes place").

[144] Kahan & Meares, *supra* note 48, at 1159 ("The primary check against such abuse . . . is the accountability of law enforcers to the community's political representatives.") (citation omitted); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 529 (2001) ("[C]rime is one of those matters about which most voters care a great deal."). Also, note that such political pressure come only from the public, since local police departments do not engage in "rent-seeking." Kerr, *supra* note 48, at 885.

[145] *See, e.g.*, Philadelphia Police Department, Reporting Police Misconduct, http://www.ppdonline.org/hq_misconduct.php (last visited Apr. 25, 2008).

Local accountability thus discourages the sort of active offender-search tactics many communities would find objectionable.[146] Such an approach would endanger police honor, legitimacy, and trust, which "cannot be bought"[147] and which recover slowly from a breach.[148] In his post-September 11 case study of Dearborn, Michigan, David Thacher concluded that these powerful accountability incentives "drove police to emphasize . . . the community protection functions of homeland security and avoid . . . the offender search functions . . . ."[149] Success in some large cities indicates that some order-maintenance police strategies work so police departments are loathe to kill the goose that laid the golden egg and return to the adversarial policing model that proved disastrous in the 1970s and 1980s.[150]

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[146] In contrast to the recommendations of James Q. Wilson and George L. Kelling's famous article, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29, 31-32, which endorses community policing strategies strictly enforcing low-level laws in order to deter more serious crime, many modern community policing advocates argue that such tactics portray the police as an authoritarian adversary rather than the community's ally against crime; thus poisoning the community-police relationship and thwarting community policing's ultimate goals; s*ee*, *e.g.*, Livingston, *supra* note 61, at 142 ("[P]olice initiatives directed at crime and disorder have generated concern, anxiety, and outright anger about police intrusiveness, particularly as directed at minority populations.").

[147] Thacher, *supra* note 134, at 672.

[148] Brooks, *supra* note 137, at 1227 ("Community tension with and distrust of police may rise with more aggressive policing of low-level offenses."); Livingston, *supra* note 61, at 178 (warning that "even when properly employed, aggressive use of stop and frisk can alienate and estrange communities in ways that ultimately detract from, rather than contribute to, the maintenance of a vibrant civil order").

[149] Brooks, *supra* note 137, at 636; Thacher, *supra* note 134, at 636-37. (Thacher chose Dearborn as the subject of his study "[b]ecause it has one of the nation's largest concentrations of Arab Americans and has been a major focus of national attention since 9/11 . . . .").

[150] Dan M. Kahan & Tracey L. Meares, *Meares and Kahan Respond*, BOSTON REV., Apr.-May 1999, at 22, 22 n.1.

Even in their antiterrorism duties, police are unlikely to use the arrest power sanctioned in *Hiibel* to enforce criminal laws.[151] Due to a lack of manpower at the federal level,[152] it is true that state police agencies, including local police departments, will serve as the "first line of defense against terrorism."[153] However, note their specific duties. "They monitor subways, sporting events and even schools,"[154] and "guard public places."[155] Additionally, many local police departments face manpower constraints in the wake of their increased duties since September 11.[156] These constraints further discourage local officers from actively searching for terrorists.[157] Combined with the incentives discussed previously, these factors suggest that local police departments are ill suited to undertake broad, active searches for terrorists.[158]

3. Changed Racial Dynamics

Racial paradigms have changed dramatically since the 1960s, especially in urban areas.[159] The "white flight" of the 1970s and 1980s produced urban communities composed heavily, even

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[151] *See generally* Hiibel v. Sixth Judicial Dist. Ct., 542 U.S. 177 (2004).

[152] *See* Stuntz, *Political Constitution*, *supra* note 124, at 843-44 (noting that "eleven thousand FBI agents will not soon displace 700,000 local police officers").

[153] Metzler, *supra* note 30, at 62.

[154] *Id.* Metzler also mentions that police "conduct searches and investigate potential threats." *Id.*

[155] Stuntz, *supra* note 28, at 2160.

[156] *See id.*

[157] *See id.*

[158] Jeffrey Horvath, *Testimony Before United States Senate Committee on the Judiciary*, (2008) http://judiciary.authoring.senate.gov/hearings/testimony.cfm (stating his view that "hometown security is homeland security"); Thacher, *supra* note 134, at 672 ("If federal officials hope to enlist cooperation from local governments for offender search . . . they should recognize the strong reasons cities have to resist.").

[159] *See* ARMOR, *supra* note 133, JACKSON, *supra* note 133; MASSEY, *supra* note 133; WEIHER, *supra* note 133.

predominantly of minorities.[160] Additionally, the Voting Rights Act of 1965[161] greatly increased minority participation in politics, which has only continued to increase in the decades following its passage.[162] For example, since the 1980s, New York, Los Angeles, Chicago, and San Francisco, have each elected a non-white mayor,[163] and African-American Barack Obama has been inaugurated as President of the United States.[164] Indeed, the political influence minorities wield is enormous. This empowerment extends to modern police forces as well.[165] Today, police forces are more integrated than ever before, and much more so than in the 1960s.[166]

As David Sklansky states, "The altered demographics of American policing do not change everything, but they may well mean that some features of criminal procedure law deserve to be

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[160] *See* ARMOR, *supra* note 133, JACKSON, *supra* note 133; MASSEY, *supra* note 133; WEIHER, *supra* note 133. *But see* Audrey G. McFarlane, *The New Innercity: Class Transformation, Concentrated Affluence and the Obligations of the Police Power*, 8 U. PA. J. CONST. L. 1, 3-5 (2006) (noting an increasingly diverse urban population).

[161] 42 U.S.C. § 1973 (1965).

[162] Kahan & Meares, *supra* note 48, at 1161.

[163] *Id.*

[164] Carl Hulse, *Obama Is Sworn In as the 44th President*, N.Y. TIMES, Jan. 20, 2009.

[165] Sklansky, *supra* note 131, at 1210 ("The virtually all-white, virtually all-male departments of the 1950s and 1960s have given way to departments with large numbers of female and minority officers, often led by female or minority chiefs.").

[166] Kahan & Meares, *supra* note 48, at 1162 ("African-Americans today make up a significant percentage of all urban police departments."). Recent data confirms that minority representation in police departments continues to grow, especially in large cities. In cities with more than 250,000 inhabitants, minorities comprised 38.1% of police forces in 2000, compared to 29.8% in 1990. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, POLICE DEPARTMENTS IN LARGE CITIES, 1990-2000 at 3 (2002). Nationwide, "[r]acial and ethnic minorities comprised 23.6% of full-time sworn personnel in 2003, up from 22.6% in 2000, and 14.6% in 1987." BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, LOCAL POLICE DEPARTMENTS, 2003 at iii (2006).

reconsidered . . . ."[167] Racial integration of the nation's police forces, internal police policy reforms,[168] political empowerment of minorities, and the police's accountability to the community it serves provide incentives on the police vastly different from those in the 1960s.[169] Indeed,

> [T]he modern regime insists on hyper-specific rules based on the assumption that white political establishments can't be relied on to punish – and can in fact be expected to reward – law enforcers who abuse discretion to harass minorities. That anxiety is less well founded now that law enforcers in America's big cities are accountable to political establishments that more fairly represent African-Americans.[170]

Racial integration may protect citizens in three ways. First, minority officers may better understand minority communities, enabling them to more effectively recognize and address community needs with minimal intrusion on individual privacy.[171] Second, minority officers may legitimize the police, thus engendering helpful community support rather than resentment, and further encourage the police to act reasonably to maintain this relationship.[172] Third, integration may broaden all officers' perspectives and reduce officer prejudice.[173] These benefits are not

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[167] Sklansky, *supra* note 131, at 1242.

[168] *See* BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, LOCAL POLICE DEPARTMENTS, 2003 at iv (2006) (showing that in 2003 90% of agencies serving cities with over 250,000 residents had written policies about racial profiling by officers).

[169] *See* Kahan & Meares, *supra* note 48, at 1161.

[170] Kahan & Meares, *supra* note 48, at 1182; s*ee also* Sklansky, *supra* note 131, at 1213 ("[P]olice officers are far less unified today and far less likely to have an 'us-them' view of civilians.").

[171] *See* Sklansky, *supra* note 131, at 1224.

[172] *See id.*

[173] Indeed, "the experience of working together across lines of social division . . . though not untroubled by prejudice and hostility, tends to reduce prejudice and

thought to reduce police effectiveness in fighting crime.[174]

Although modern incentives do not entirely prevent racial discrimination, and therefore do not justify throwing away Fourth Amendment protections entirely, courts can properly consider such factors in determining whether a law permits police unconstitutionally broad authority.[175] Such considerations likely played a role in *Hiibel*.[176]

4. Modern Incentives and Circumstances Accommodated

In other areas of criminal procedure, the Court has recognized these modern incentives, authorizing police discretion of a type previously deemed unconstitutionally susceptible to arbitrary and discriminatory application.[177]

The Court in *Papachristou v. City of Jacksonville*[178] invalidated an ordinance on vagueness grounds because it "made criminal those activities that by modern standards are typically considered innocuous."[179] But the Court, in *United States v. Arvizu*[180] held that a border patrol agent had reasonable suspicion to suspect the defendant of drug smuggling, even though the factors the officer relied upon seemed innocuous when considered individually. During oral arguments, Justice O'Connor noted that "we live in a perhaps more dangerous age today than we did when

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hostility." *Id.* at 1230 (citing CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY 84 (2003)).

[174] Sklansky, *supra* note 131, at 1233.

[175] *Id.* at 1241 ("The most that can be said with confidence is that the dramatic but still incomplete integration of American police departments does not remove the entire foundation of criminal procedure law, but neither can it be entirely ignored.").

[176] *See* Snyder, *supra* note 2, at 446.

[177] *See id.* at 448 (referencing Papachristou v. City of Jacksonville, 405 U.S. 156, 171 (1972)).

[178] 405 U.S. 156, 163 (1972).

[179] Snyder, *supra* note 2, at 449.

[180] 534 U.S. 266, 277 (2002).

this event took place."[181] She further "expressed concern that the Ninth Circuit, in ruling against the government, was applying an excessively rigid form of the 'totality of the circumstances' test, and that this rigidity was more than 'common sense would dictate today.'"[182]

The Problem-Oriented Policing (POP) program, which encourages location-specific preventative policing,[183] provides another example. Such tactics were criticized as discriminatory and deemed unconstitutional before the community policing revolution,[184] but have since been upheld.[185]

Additionally, *Hiibel* can be seen as consistent with the Court's decision in *Berkemer v. McCarty*.[186] The cases' circumstances differ in two important respects. First, *Hiibel* authorizes a much more limited authority to police officers conducting a *Terry* stop investigation.[187] In *Berkemer*, the Court exempted routine traffic stops from *Miranda* requirements; thereby, permitting police to ask such *Terry*-stopped individuals a variety of questions, but denying officers the authority to arrest individuals who refused to answer.[188] In contrast, the Nevada statute permits police to arrest individuals only for refusing to identify themselves, not for refusing to answer any other

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[181] Stulin, *supra* note 2, at 1479 (citations omitted).
[182] *Id.* at 1479-80 (citations omitted).
[183] *See* Center for Problem-Oriented Policing, *The Key Elements of Problem-Oriented Policing*, http://www.popcenter.org/about/?p=elements (last visited Apr. 25, 2008).
[184] Maryland v. Buie, 494 U.S. 325, 334 n.2 (1990) (holding that "[e]ven in high crime areas, where the possibility that any given individual is armed is significant, *Terry* requires reasonable, individualized suspicion before a frisk for weapons can be conducted").
[185] Illinois v. Wardlow, 528 U.S. 119, 124 (2000) (finding a *Terry* stop reasonable when stop was based heavily on the fact that the suspect was in a "high crime area," noting that "officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation").
[186] 468 U.S. 420 (1984).
[187] *See* Hiibel v. Sixth Judicial Dist. Ct., 542 U.S. 177, 185 (2004).
[188] *See Berkemer* 468 U.S. at 439-40.

questions.[189] Second, *Berkemer* was decided in 1984, before modern police incentives materialized. While these changes do not permit just any expansion of police authority, the Court has demonstrated its willingness to weigh external police incentives in considering whether a statute is unconstitutionally permissive, and likely did so in *Hiibel*. The *Hiibel* decision thus grants officers narrower powers than does *Berkemer*, which are less susceptible to abuse on their own, as well as in light of modern incentives, and therefore require the accompaniment of fewer tempering restrictions.[190]

V. ENSURING FUTURE POLICE RESTRAINT

Although existing incentives discourage police misconduct, legitimizing and regulating police conduct effectively and funding local police departments adequately would further ensure police officers employ their authority reasonably.

A. Legitimize and Regulate Police Discretion

Police discretion should be legitimized and its use regulated. In the 1960s and earlier, "the prevalent assumption of both the police and the public was that the police had no discretion – that their job was to function in strict accordance with the law."[191] Despite the vast changes to criminal procedure doctrine since the 1960s, modern criminal procedure doctrine still clings to the fantasy that proper policing requires an objective justification for police actions. Perhaps the most glaring example of this can be

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[189] *E.g.*, INS v. Delgado, 466 U.S. 210, 216 (1984) (holding that an "interrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure").

[190] *See* United States v. Calandra, 414 U.S. 338, 350 (1974) ("[I]t does not follow that the Fourth Amendment requires adoption of every proposal that might deter police misconduct.").

[191] Livingston, *supra* note 61, at 193 (citing HERMAN GOLDSTEIN, POLICING A FREE SOCIETY 105 (1977)).

seen in police officers' written reports and court testimony, in which officers are forced to "gild the lily" – i.e. concocting objective grounds to justify a successful search or seizure.[192] Such testimony does not reflect how officers react to situations as they unfold on the street.[193] Officers act on their hunches, and rightly so.[194] As Craig Lerner notes, "The nub of the problem is that individuals do and will prejudge people according to age, sex, and race, and it is not entirely clear that we want police officers to ignore such data."[195] Resource constraints, in fact, demand that officers discriminate between situations likely and unlikely to require their intervention.[196]

Criminal procedure doctrine should not require officers to perjure themselves to justify good policing; it should "recognize the legitimate function of discretionary policing techniques in combating inner-city crime,"[197] while ensuring adequate procedural safeguards to protect communities from abusive police behavior. *Hiibel* promotes efficient and particularized police-citizen interactions, but until police discretion is frankly

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[192] Craig S. Lerner, *Reasonable Suspicion and Mere Hunches*, 59 VAND. L. REV. 407, 469 (2006) ("Why it pleases some to have police officers parrot back slogans from previous judicial opinions is not entirely clear to me; and those who enthusiastically support the current regime would need to acknowledge its costs . . . which doubtless include the breeding of cynicism among police officers.") (citations omitted).

[193] Livingston, *supra* note 61, at 191 ("Significant sociological research show[s] that patrol officers invoking public order laws in the service of order-maintenance ends do not consider these laws and then apply them to the facts in the manner of a law student taking an exam. Rather, police officers blend legal knowledge, 'common sense,' and various behavioral norms in using such laws to deal with problems they are called upon the handle.").

[194] *See* Lerner, *supra* note 192, at 472 ("Police officers are, or should be, in the business of policing. To do this difficult job well, police officers, just like judges and prosecutors, need a realm of freedom in which to act, and to some degree this means a freedom to act upon their hunches.").

[195] *Id.* at 471.

[196] *See* Livingston, *supra* note 61, at 193 (calling discretion "a necessary consequence of limited resources and the need to prioritize").

[197] Kahan & Meares, *supra* note 48, at 1154 (noting the need for a new criminal procedure doctrine).

recognized, legitimized, and regulated, officers without "explicit authority to deal effectively with the problems they encounter" will continue to be seen as "dirty workers," nevertheless "doing what has to be done through the exercise of their discretion."[198]

B. Fund Community Policing Adequately

Sufficient funding is required to provide police departments the personnel and other resources necessary to conduct community policing activities. A lack of resources may limit police-community meetings and other friendly interactions, thereby inhibiting the development of the essential cooperative police-community relationship. Since the Community Oriented Policing Services (COPS) program was created in 1994,[199] the Department of Justice's COPS office has distributed over $12 billion[200] to "promote police integrity and build greater trust and mutual respect between police and the public."[201] Additionally, the Edward Byrne Memorial Justice Assistance Grant Program provides state and local governments with additional funding for initiatives targeted to "prevent and control crime and to improve the criminal justice system,"[202] including community policing initiatives.[203] In fiscal year (FY) 2006, Congress funded the Judge Advocate General (JAG) program with $1.095 billion dollars.[204]

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[198] GEORGE L. KELLING AND CATHERINE M. COLES, FIXING BROKEN WINDOWS 167 (1996).
[199] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.
[200] COPS Office: Funding Opportunities, U.S. Department of Justice, http://www.cops.usdoj.gov/Default.asp?Item=65 (last visited Apr. 25, 2008).
[201] Carl Peed, Director of the Office of Community Oriented Policing Services, Statement Before the House Appropriations Committee Subcommittee on Commerce, Justice, State and the Judiciary (Mar. 18, 2004).
[202] Programs: Justice Assistance Grant (JAG), Bureau of Justice Assistance, http://www.ojp.usdoj.gov/BJA/grant/jag.html (last visited Apr. 25, 2008).
[203] 42 U.S.C.A. § 3751 (a) (West 2008).
[204] 42 U.S.C.A. § 3758 (West 2008).

However, the Bush Administration has made severe cuts in these federal programs in recent years. In FY 2008, COPS is slated to receive just over $320 million,[205] a severe decrease from the high of $1.490 billion in FY 1998.[206] Additionally, although the U.S. Senate approved FY 2008 JAG funding totaling $660 million, the President's threat to veto the Omnibus Appropriation package forced a reduction of JAG funding to $170 million[207] – 67% less than the $520 million for FY 2007.[208] Furthermore, both programs are slated to receive no funding whatsoever in FY 2009.[209] These cuts have prompted a slew of outcries from law enforcement officials whose community policing initiatives depend on financial support from the federal government.[210] Proposed funding in the COPS Improvements Act of 2007 and in the 2008 supplemental appropriations bill would restore and increase funding for these programs.[211] Passing such legislation would ensure that

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[205] COPS Office: COPS FY 2008 Funding, U.S. Dep't of Justice, http://www.cops.usdoj.gov/Default.asp?Item=2033 (last visited Apr. 25, 2008).

[206] COPS Office: COPS History, U.S. Dep't of Justice, http://www.cops.usdoj.gov/Default.asp?Item=44#2006 (last visited Apr. 25, 2008).

[207] Press Release, Sen. Barack Obama, Obama Statement on Drastic Funding Cuts for Criminal Justice Program in Illinois (Apr. 3, 2008) (on file with author).

[208] Horvath, *supra* note 158.

[209] *Id.*

[210] *E.g.*, Horvath, *supra* note 158 (calling COPS funding cuts "madness"); Letter from National Association of Attorneys General to The Leadership of Congress (Mar. 3, 2008) (on file with author) (stating that "[JAG] funding cuts will devastate state law enforcement efforts . . ."); *PCCD Chairman Warns Federal Funding Cuts Will Impair Public Safety, Criminal Justice Improvements, Services for Juveniles and Victims of Crime*, REUTERS, Jan. 7, 2008, http://www.reuters.com/article/pressRelease/idUS141367+07-Jan2008+PRN20080107 (last visited Apr. 25, 2008) (stating that JAG cuts "will hamper justice improvements and innovations which ultimately help to protect our citizens").

[211] S. 368, 110th Cong. (2007); Supplemental Appropriations Act, 2008, Pub. L. No. 110-252, 122 Stat. 2324.

community-policing incentives continue to restrain the arbitrary exercise of police authority.[212]

VI. CONCLUSION

As an accurate reflection of the realities of modern policing within the bounds of the Fourth Amendment, *Hiibel* deserves to be praised rather than lamented. In light of enormous changes to police procedure specifically and American society generally since the 1960s, the costs of some formerly necessary restrictions on police conduct today outweighs the benefits. By finding Nevada's stop-and-identify statute constitutional, the Court removed one such constraint. In so holding, the Court recognized the fact that distinguishing cases of national security from other criminal procedure cases no longer makes sense. One can only hope that the Court will continue to honor the intent of the Bill of Rights' framers by accounting for social changes in all of its future jurisprudence, not just criminal procedure.

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[212] Department of Justice studies suggest that cuts in COPS funding since 2000 may have already begun to restrict community policing activities, and accompanying incentives. While bicycle use among police departments rose during the 1990s, it dropped from 2000 to 2003. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, LOCAL POLICE DEPARTMENTS, 2003 at 13 (2006). Furthermore, "[i]n all population categories the percentage of local police departments using community policing officers in 2003 was greater than in 1997, but less than in 2000." *Id.* at 20.