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THE SUPREME COURTS: DID 9/11/2001 ACCERLERATE THEIR SANCTIONING THE CONSTITUTIONALITY OF CRIMINALIZING SUSPICION?

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THE SUPREME COURTS: DID 9/11/2001 ACCELERATE THEIR SANCTIONING THE CONSTITUTIONALITY OF CRIMINALIZING SUSPICION?

ARTICLE ABSTRACT

This article evaluates if in the 6.5 years since the bombing of the World Trade Towers and the Pentagon, the nation's highest appellate courts were, on balance, more willing to acquiesce in criminalization based on suspicion. The article seeks to accomplish this evaluation by comparing decisions of the United States and the States’ Supreme Courts in the six years before September 2001, and the six years since the terrorist attack to determine if these courts with the greatest authority to sanction the criminalization of suspicion in fact have been more willing to do just that. Such a post 9/11/2001 trend would be even more significant because despite the attacks, neither the national or state governments have abolished or amended pertinent federal and state constitutional protections of individual right. It begins by providing definitions of criminalization, suspicion, and reasonable suspicion, based on policy and prior precedent from these supreme courts. Based on the composite of these definitions it next provides a definition of what this article means by criminalizing suspicion. The second section of the article begins with a comparative analysis of the opinion of the United States Supreme Court in Hibbel with the most pertinent of the court’s precedent that preceded that decision. The section continues with surveys of reactions to Hibbel by the U.S. Supreme Court, commentators, and the states’ legislatures and supreme courts.

The third section of the article is its core - a comparative examination of the decisions of the states’ supreme courts in the six-year periods before and after 9/11/2001. This principal section of the article examines decisions of the state supreme courts that substantively are fairly characterized as implicating the issue of whether to sanction the constitutionality of criminalizing suspicion. The study includes state supreme court decisions fairly characterized as involving the issue of the criminalization of suspicion by identifying and study of cases involving such crimes as obstruction of justice, stop and identify, status generally, status-sex offender registration, status-terrorist, status-"gang", status-juvenile curfew, loitering, disorderly conduct, and anti-car cruising. The article therefore has a significant empirical element.

The article concludes with a final section devoted to first to summarizing its key findings. The key finding is that the majority of supreme courts both before and after 9/11 were willing to sanction criminalization based on only suspicion. To curb this highly undesirable result, the final section of the article proposes major reforms, based on current substantive criminal law principles. The major reforms are to three doctrines which have played a significant role in the supreme courts’ willingness to sanction the constitutionality of criminalization based on suspicion --- the reasonable suspicion doctrine, the void for vagueness doctrine, and substantive due process analysis as applied to the suspicion based crimes identified and evaluated in this article. The article concludes with perspectives, including exploring future implications, of its key findings and reforms.
In 1972, in Papachristou v. City of Jacksonville the United States Supreme Court expressly proclaimed that: “Direction by the legislature to the police to arrest all suspicious persons would not pass constitutional muster.” The court was in effect prohibiting the federal and state governments from arresting, prosecuting, and most importantly convicting persons based solely on a status alone or in combination with innocuous conduct that for historical or other reasons conjures government suspicion of possible crime. The purpose of this article is to evaluate if that ruling, after 9/11/2001, can still be fairly characterized as the law of the land. Criminalization of status such as gangsters, gang members, ex-felons, or addicts is the criminalization of suspicion and the United States Supreme Court has already held multiple times that such criminalization violates the national constitution. Criminalization of status and innocuous omissions or conduct is criminalization based on subjective suspicion, and the United States Supreme Court has held multiple times that such criminalization violates the national constitution.

Criminalizing reasonable suspicion that societal harmful conduct has occurred, is occurring, or is about to occur, even when the crime’s definition also includes innocuous omissions, possession, or conduct is the criminalization of suspicion. The United States Supreme Court has waffled on whether the criminalization of reasonable suspicion in this context violates the national constitution. In 1983, the Court held in Kolender v. Lawson that the national constitution...
constitution barred the government from criminalizing an American citizen's failure to answer identification questions and the failure to satisfy a government agent's subjective criteria for an adequate identification when that agent had only a reasonable suspicion that the citizen had committed or was committing or was about to commit some unspecified crime. But in 2004, the United States Supreme Court decided in Hibbel v. Sixth Judicial District Court of Nevada that the national constitution sanctioned states criminalizing an American citizen's mere refusal to respond to the government's demand for identification, coupled with the fact that at the time of the request the agent reasonably suspected that the citizen had committed or was committing or was about to commit any crime.

In between these two decisions, 9/11/2001 happened.

This article evaluates if in the 6.5 years since the bombing of the World Trade Towers and the Pentagon, the nation's highest appellate courts were, on balance, more willing to acquiesce in criminalization based on suspicion. The article seeks to accomplish this evaluation by comparing decisions of the United States and the States’ Supreme Courts in the six years before September 2001, and the six years since the terrorist attack to determine if these courts with the greatest authority to sanction the criminalization of suspicion in fact have been more willing to do just that. Such a post 9/11/2001 trend would be even more significant because despite the attacks, neither the national or state governments have abolished or amended pertinent federal and state constitutional protections of individual rights.

established


6. Id. at 185. and 190-191.


It begins by providing definitions of criminalization, suspicion, and reasonable suspicion, based on policy and prior precedent from these supreme courts. Based on the composite of these definitions it next provides a definition of what this article means by criminalizing suspicion. The second section of the article begins with a comparative analysis of the opinion of the United States Supreme Court in Hibbel with the most pertinent of the court’s precedent that preceded that decision. The section continues with surveys of reactions to Hibbel by the U.S. Supreme Court, commentators, and the states’ legislatures and supreme courts.

The third section of the article is its core - a comparative examination of the decisions of the states’ supreme courts in the six-year periods before and after 9/11/2001. This principal section of the article examines decisions of the state supreme courts that substantively are fairly characterized as implicating the issue of whether to sanction the constitutionality of criminalizing suspicion. The study includes state supreme court decisions fairly characterized as involving the issue of the criminalization of suspicion identified by research of such crimes as obstruction of justice, stop and identify, status generally, status-sex offender registration, status-terrorist, status-"gang", status-juvenile curfew, loitering, disorderly conduct, and anti-car cruising. The great irony of these decisions, and one of the key findings of this article, is that in only a very few decisions over the last dozen years, and even for the decades that proceeded the study period, neither these courts or the parties litigating these cases, expressly recognized that criminalizing suspicion was implicated. The article concludes with a final section devoted to summarizing its key findings, recommending reforms to the most pertinent constitutional doctrines as the best option for curtailing the criminalization of suspicion, and providing perspectives, including exploring future implications, of those findings and reforms.

Section 1 - Defining Criminalization Suspicion, Reasonable Suspicion, and The Criminalization of Suspicion

In this article, “criminalization” means a decision of a legislature which expressly declares that the enactment is a crime, or a decision of a legislature to proscribe conduct, omissions, or possession, which is sanctioned by at least the threat of the deprivation of liberty, 9

9. See infra notes S2.1, =19-51, and accompanying text.

10. See infra notes Ss2.1.1 -2.4=52-66, and accompanying text.

11. Since 1980 only three state supreme court decisions, and no United States Supreme Court decisions have made reference to criminalization and suspicion in the same paragraph: Com. v. Dellamano, 469 N.E.2d 1254, 1257(Mass., 1984); Stave v. Daniel, 12 SW3d 420,429(Ten. 2000)(appeared in an opinion concurring and dissenting); State v. Worrell, 761 P.2d 56,61(Wash., 1984)(appeared in concurring opinion)
following a prosecution that results in a conviction.\textsuperscript{12}

In this article, “suspicion” means, based on almost four decades of United States and States Supreme Courts’ decisions, a subjective belief (and therefore no evidence that government interests is actually at stake) by either the executive or legislative branch of the federal or state governments that a specific or even unspecified crime had occurred, was occurring, or was imminent and there is reason therefore to at least “encounter” one or more persons.\textsuperscript{13} An “encounter” is an attempt (an attempt that may be pursued even if the suspect takes public flight) by the government to consensually engage a person in a public space discourse, or even at that

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\item[12.] The United States Supreme Court in approximately ten decisions over the last several decades had adopted as a strong presumption only the first definition of criminalization apparently as a conscious or unconscious strategy to subordinate to the decision making of the moment of the national congress and any and every state and local legislature, certain national constitutional rights such as the privilege against self-incrimination, double jeopardy, ex-post facto, and the right to a jury trial, all of which make some reference in their text to “criminal” proceeding or prosecution. The Court interpreted the reference to be a qualifying reference see e.g. Smith v. Doe, 538 U.S. 84(2003). For an example of the first definition of criminalization by a state supreme court see Treacy v. Municipality of Anchorage, 91 P.3d 252,258(Alaska, 2004)(Anchorage City Council expressly declared a failure to obey its juvenile curfew ordinance to be a criminal violation, which also provided for alternative adjudication as a civil violation. For other commentators definitions of criminalization see; Stuart Green, Why It’s A Crime to Tear The Tag Off A Mattress: Over criminalization And The Moral Content of Regulatory Offenses, 46 Emory L.J. 1533,1542(1997) )

\end{enumerate}
person’s home or place of business, designed to confirm or disprove the subjective suspicion that prompted the government to attempt to initiate the inter-action.\(^{14}\)

In this article, “reasonable suspicion” means, based on almost four decades of United States and States Supreme Courts’ decisions, a two to fifteen percent likelihood based on some evidence possessed by either the executive or legislative branch of the federal or state governments that a specific or even unspecified crime had occurred, was occurring, or is imminent by the person or persons “stopped”, and there is reason therefore to seize-stop and possibly to search-frisk a suspect, and if thereafter justified or the government at least believes it is justified, to further seize and/or search, or possibly prosecute and convict a suspect.\(^{15}\)

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15. Twelve United States Supreme Court decisions are listed in the West Key Number System as directly engaging in defining reasonable suspicion over the last four decades in the context of a seizure: Hibbel(2004)(reasonable suspicion); U.S. v. Arvizu, 534 U.S. 266(2002)reasonable suspicion); City of Indianapolis v. Edmond, 531 U.S. 32(2000)(reasonable suspicion); Florida v. J.L., 529 U.S.266(2000)(no reasonable suspicion); Illinois v. Wardlaw, 528 U.S. 119(2000)(reasonable suspicion); Omelas v. U.S. 517 U.S. 690(1996)(reasonable suspcion); Alabama v. White, 496 U.S. 325(1990)(reasonable suspicion); U.S. v. Sokolow, 490 U.S. 1(1989)(reasonable suspicion)(reasonable suspicion is some minimal level of objective suspicion); U.S. v. Hensley, 469 U.S. 221(1985)(reasonable suspicion); Brown v. Tx., 443 U.S. 47(1979)(no reasonable suspicion); U.S. v. Brignoni-Ponce, 422 U.S. 473(1975); and Terry v. Ohio, 392 U.S. 1(1968). In the last decade, twenty-two state supreme court decisions were listed as directly engaging in defining reasonable suspicion in the same context. Among the listed decisions six of them actually addressed directly and in detail the definition of reasonable suspicion: see e.g., State v. Ramirez, 100 P.3d 94(Kan., 2004)(one or two factors sufficient to constitute “reasonable suspicion”) See also recognition by other commentators of the ephemeral nature of “reasonable suspicion” as a proof standard; Margaret Raymond, Down On The Corner, Out In The Street: Considering The Character Of The Neighborhood In Evaluating Reasonable Suspicion, 60 Ohio St. L.J. 99, 100(1999)noting in stating the theses of her article that observations of little significance in proving commission of a crime are held sufficient to constitute reasonable suspicion once courts credit neighborhood character as a factor supporting a finding of reasonable suspicion). Later, id. at 104-108, Professor Raymond directly discusses the text assertion accompanying this note. She concluded that courts were reluctant to state a percentage of probability of crime commission necessary to justify a conclusion of reasonable suspicion, but noted a 1981 article in which a scholar estimated that it was a five to forty percent probability that a
The major theses of this article is that given these definitions there are two independent definitions of criminalization based on suspicion. First, legislatures define certain crimes, for example loitering, to frequently directly criminalize suspicion as defined in this article, and the inquiry of this article is whether the supreme courts since 2001 have increasingly sanctioned the constitutionality of such legislation. Second, that increasingly the executive branch of governments relying on the supreme courts creation and sanctioning of “consensual encounters” and “reasonable suspicion” as a basis to seize, have employed investigative techniques justified solely by suspicion as defined in this article, and the supreme courts in turn since 2001 have increasingly sanctioned criminalizing any refusal of a suspect to obey these investigatory techniques. These courts for example have increasingly sanctioned the criminalization of lies when told to a government agent during an encounter or a stop despite the fact that the agent either had no evidence of the commission of any crime or only evidence arguably implicating unspecified “criminal activity.” Preliminary proof of the significance of the independence of these definitions, is that Justice Douglas in his solo dissent in the seminal Terry case, condemned the reasonable suspicion doctrine’s creation, but would have sanctioned criminalization of suspicion by the legislature so defining loitering. Such judicial sanctioning of the criminalization of suspicion is a totally unacceptable interests reconciliation today in this democracy, and unconstitutional under express provisions of both the federal and most state constitutions.

Section 2: Hibbel Versus Pre-Hibbel U.S. Supreme Court Pertinent Precedent on the Constitutionality of Criminalizing Suspicion & Post-Hibbel Reaction
To that decision by the Supreme Courts, State Legislatures, and Commentators

crime was committed, was in the process of being committed, or was imminent—See Neil Ackerman, Considering the Two-Tier Model of The Fourth Amendment, 31 Am. U. L. Rev. 85, 112(1981). See also United States v. Winsor, 846 F.2d 1569(9th Cir., 1988)(expressly holding that 2.5 percent likelihood that suspect could be found in any one of forty hotel rooms constituted reasonable suspicion)

16 See infra note 81 and accompanying text.

17. Terry v. Ohio, 392 U.S. 1,35-36, 38-39(1968)(constitution requires at least probable cause and therefore reasonable suspicion is an unconstitutional proof standard. Yet if government has prosecuted the accused for loitering rather then gun possession there would have been probable cause to arrest, and therefore to search, prosecute, and convict)

2.1 Comparison of Hibbel & Pre-Hibbel U.S. Supreme Court Pertinent Precedent on The Constitutionality of Criminalizing Suspicion

In 1944, less than three years after the major terrorist attack against the United States in the twentieth century, the United States Supreme Court knowingly sanctioned for the first and only time criminalization based on subjective suspicion.\(^1\) While the anxiety and fear caused by that attack explains that decision, it surely did not justify the court’s acquiescence in the suspension of constitutional protections prohibiting such criminalization, particularly when the suspicion was founded solely upon status - the prohibited equal protection category of race.\(^2\) It is not surprising that Justice Kennedy’s majority opinion in Hibbel did not cite the Korematsu decision as supporting precedent.

Approximately three decades later, an unanimous supreme court twice held in effect that it was unconstitutional to criminalize based on first, objective-reasonable suspicion of government agents and even legislatures, and later subjective suspicion of a government agent.\(^3\) The court, however, in its 1979 decision did not cite to its 1972, decision, failed to recognize the scope and significance of that decision’s implications, including the fact that its 1972 decision subsumed the principle adopted in the second case, and therefore made an express statement in conflict with those implications.\(^4\)

\(^{19}\) Korematsu v. United States, 323 US 214(1944)


\(^{21}\) Papachristou v. City of Jacksonville, 405 U.S. 156, 169(1972); Brown v. Texas, 443 U.S. 47, 52(1979)(prohibiting criminalization of the refusal to cooperate with a government agent's investigation which the agent instigated based only upon his subjective suspicion).

\(^{22}\) Papachristou v. City of Jacksonville, 405 U.S. 156, 169(1972)(prohibiting the government from criminalizing based solely on status or innocuous conduct that for historical or other reasons had conjured government suspicion of possible crime); Brown v. Texas, 443 U.S. 47, 52(1979)(The court expressly reserved determining if non-cooperation with the government could be criminalized when the government had at least reasonable suspicion of some perhaps even unspecified criminal activity, ld. at 53(n.3). Remarkably, the court decided to reserve decision on this issue despite the fact it was squarely presented in this case, as the court expressly acknowledged the trial judge in the case expressly and impressively recognized. Chief Justice Burger included as an appendix an excerpt from the trial transcript which he characterized as demonstrating that the trial judge was troubled by the spectacled of empowering the government to criminalize the refusal of a detainee to identify himself when the government has only reasonable suspicion to stop him) The 1972
These opinions of the court made no reference to Korematsu, and therefore failed to recognize the conflict between that decision’s sanctioning criminalization based on subjective suspicion of an entire American minority racial group, and the court’s current opinions. The Court therefore did not perceive or seize either opportunity to overrule that pernicious decision.

Thirty-two years later, the majority opinion in Hibbel expressly cited both of these 1970's decisions. Justice Kennedy, however, made no reference to the Papachristou principle prohibiting criminalization based on suspicion. Instead, the Hibbel Court's reference to Papachristou was for the proposition that it held unconstitutional a traditional vagrancy statute because it was too broad and its criminalization words were too imprecise so as to fail to provide citizen’s adequate notice and gave

proclamation of the court was made in a context which seemingly meant that the court was at that point in time prohibiting the federal and state governments from arresting, much less prosecuting and then convicting persons based merely on suspicion. The court’s proclamation came just five years after it first authorized the government to seize persons short of arresting them by stopping them based on its invention of a proof standard less than probable cause which it characterized as “reasonable suspicion”; Terry v. Ohio, 392 U.S. 1(1968). While not expressly citing to the Terry decision, the court's proclamation in Papachristou must be taken to encompass prohibiting arrest, prosecution, and conviction based on such reasonable suspicion because the Court expressly in support of the blanket statement prohibiting criminalization based on suspicion which began this article, the court made a disapproving reference to the statistics proving large scale arrest in the country on the bases of vagrancy and suspicion of some crime, and followed that reference immediately by approvingly citing the assertion that constitutional convictions should start with the government having at the time of the initial seizure proof of probable cause of at least an attempt of a specific crime by the accused. Of course this would mean that only if the government amassed sufficient evidence to prove that attempt beyond reasonable doubt could it secure a conviction; Id. at 169-70).

23. The court in Brown, Id. at 51 did, however, cite to an even earlier pertinent criminalization of suspicion precedent, Lanzetta v. New Jersey, 306 U.S. 451(1939). Chief Justice Burger cited Lanzetta as additional authority for the proposition that in order for a government agent to seize an individual legally, the government must have objective facts to support that seizure. He failed to note that Lanzetta was a case not focused on a temporary seizure but conviction based on a subjectively suspicious status. See infra notes 37-39, and accompanying text placing Lanzetta in context and discussing its significance)

police, judges, and juries too much discretion in determining which conduct to criminalize.\textsuperscript{25} Justice Kennedy failed to precisely restate the specific standards he believed the court employed in 1972 to conclude that the crime definition was too vague. Instead, he merely restated that conclusion.

Focusing the constitutional defect on imprecise language restored the possibility that then became reality in the court’s holding that the legislature could criminalize reasonable suspicion by using it as a basis to authorize government investigatory techniques which if the citizen refused to comply, could be criminalized, even if that conduct was doing and saying nothing.\textsuperscript{26} Justice Kennedy characterized Brown as only prohibiting the government from conducting a stop and the investigatory technique during a stop of demanding a citizen to identify himself when the government lacks reasonable suspicion that the person has, is, or is about to commit a crime.\textsuperscript{27} He failed to make reference to the fact that the Brown decision prohibited criminalization based on refusal to cooperate with this investigatory technique.

The citation to Brown in the majority opinion in Hibbel did not prevent it from departing from the court’s 1979 holding, by blurring to the point of obliterating the difference between criminalizing on the basis of subjective rather than reasonable suspicion. The Hibbel decision simply boldly asserted without reference to any evidence and contra to the weight of evidence available to the court, that the government agent had reasonable suspicion prior to demanding Hibbel identify himself.\textsuperscript{28} Justice Kennedy’s failed to discuss or apply the court’s precedent defining reasonable suspicion, nor did his opinion discuss the fact that the government agent failed even to try to determine the reality of the alleged assault, by simply asking the only possible alleged victim, who unknown to the agent was Hibbel’s infant daughter, had Hibbel actually struck her, or to try to determine the extent to which a view of the alleged victim would confirm the alleged assault. Even more telling was the failure of Justice Kennedy for the Court to refer in the record or comment upon whether Hibbel was ever arrested, prosecuted and convicted for the alleged assault or any other crime except the obstruction of the officer by refusing to identify himself. In fact, Hibbel was arrested for only one other charge, domestic violence, and that charge was abandoned by the state prior to trial. Therefore, precisely sixty years after its Korematsu decision, the Court again reacted to a major terrorist attack by opening the door to upholding the power of the federal and state governments to criminalize based only on subjective suspicion, albeit this time a sanctioning de-facto rather than de-jure.

Hibbel reverted to the Korematsu’s extremely liberal authorization of criminalization standard, despite the fact that the Court had in five decisions also over a span of sixty years, 1939-1999, based

\begin{itemize}
  \item \textsuperscript{25} Id.
  \item \textsuperscript{26} Id.
  \item \textsuperscript{27} Id.
  \item \textsuperscript{28} Id.  \textit{See text documentation that follows immediately after this text assertion.}
\end{itemize}
on a number of constitutional rights, barred the federal and state governments from criminalizing suspicion, including reasonable suspicion, when that suspicion was based solely or primarily on a status that signaled crime or crime potential to a legislature or at least one government agent. The Court had held that mere public place association with gang members, a persistent evening stroller, addicts, ex-felons, and gangsters, could not be convicted of a crime based on each of those statuses, or the suspicion emanating from each status in the collective or individual minds of the government.

A constitutional policy theme present in all of these decisions was the Court’s concern that the criminalization of status alone or even when a suspicious status is combined with innocuous omissions or conduct is criminalization based only on suspicion. In the 1999 decision, just two years before 9/11/2001 and only five years before Hibbel, the Court barred criminalization of the refusal to obey a government agent’s order to a public gathering of at least two people to disperse based solely on the agent’s reasonable suspicion of gang status of at least one person loitering-standing in public, because such an order itself infringed constitutionally protected liberty.


30. City of Chicago v. Morales, 527 U.S. 41, 51 (1999) (Illinois Supreme Court characterizes City of Chicago intent to criminalize intolerable street gang members); Kolender v. Lawson, 461 US 352, 358 (1983); Robinson v. Calif., 370 US 660, 667 (1962) (state failed to offer any medical evidence to prove that the accused was addicted, but government enforcement agents suspected he was addicted); Lambert v. Calif., 355 US 225, 226 and 229 (1958) (accused arrested of suspicion of some unspecified crime, but prosecuted for only the failure to register as an ex-felon crime. Purpose of registration crime but a convenience to law enforcement to keep track of ex-felons. Inference is that this tracking facilitated ability to locate ex-felons as potential suspects); and Lanzetta v. N.J., 306 US 451, 458 (1939) (expressly recognizing that the “gangster” crime definition did not include within its definition either a conduct or a substitute omission element.)

31. City of Chicago v. Morales, 527 U.S. 41, 58 (1999) (tens of thousands of American citizens arrested and prosecuted for this crime based only on reasonable suspicion in just a few years during the 1990’s; Id. at 49. Despite this reality the United States Supreme Court’s Justices expressed no specific alarm about this spector of a police state. Further, despite citing and relying on Kolender and Papachristou, neither the former’s rejection of the idea that escalation of crime and threat to society does not justify dimunition of constitutional protections, or the latter’s broad condemning of criminalization based on suspicion, were repeated by the court. In fact, at the end of his opinion, in dicta, Justice Steven’s suggested that it might be constitutional to criminalize solely on reasonable suspicion of the status of street gang member, if all such persons standing in public had such status; Id. at 61)
The Hibbel majority opinion made express reference to only one of these decisions, the crucial and heretofore mentioned 1983 decision of the court in Kolender. Justice O’Conner’s majority opinion in Kolender held that reasonable suspicion of a crime and a government agent’s demand for identification from the suspect, could not constitutionally justify the criminalization of the accused refusal to answer questions about his identity, or the suspect’s failure to adequately respond to a demand for identification, when the evaluation undertaken by government agents and ultimately the Trier of fact at trial of the adequacy of the suspect’s response, is standardless.

The Kolender majority opinion did not cite to Korematsu, Lambert, or Robinson, but did cite to Lanzetta, Papachristou, and Brown v. Texas. It cited to Lanzetta twice. First, Lanzetta was among a string of its own precedent which established the principle that the standard the legislature must meet in adequately drafting the definition of any crime is more stringent than that for civil statutes, and therefore a crime may fail to satisfy that standard even if the definition could be construed to satisfy the standard of minimal clarity as applied to some course of conduct. Second, and more significantly for the primary theses of this article. Lanzetta was the sole precedent cited to as support for the principle that established constitutional restraints on criminalization cannot be subordinated to government claims that the times demand less liberty in order to respond to outbreaks of lawlessness that threaten society.

The majority opinion in Kolender also cited to Papachristou twice. In each instance, as one

32. See supra note 4 and accompanying text.

33. Kolender v. Lawson, 461 US 352, 365(1983)(The first part of the text assertion of course is in direct conflict with the Court’s holding in Hibbel, but it is nevertheless accurate. Justice O’Connor expressly asserted, in the course of evaluating the balancing of interests required by Terry and its progeny, that the “suspect must be free to leave after a short time and to decline to answer the questions put to him”. Justice O’Connor’s endorsement of this principle was made even clearer when she next favorably cited J. White’s concurring opinion in Terry which expressly asserted three closely related principles. First, during a Terry stop, the suspect is not required to answer any questions put to him, answers cannot be compelled, and the failure to answer questions furnishes no basis for arrest(much less conviction)

34. Id. at 358(n.5)

35. Id. at 356(n.8), and 361

36. Id. At 356(n.8)]

37. Id. at 361
among a string of its own precedents which established both key concerns of the vagueness doctrine. 38 First, the definition of crimes must provide potential defendants with reasonable notice of the conduct and/or result and/or circumstances that were the basis for the criminalization decision. 39 Second, those enforcing as well as those evaluating guilt or innocence of the crime as Trier of fact will be left to their own predilections, including discrimination against particular groups as to what the legislature intends to criminalize. 40 For some inexplicable reason, Kolender, Hibbel, and all of the Supreme Court precedent articulating the vagueness doctrine, continue to rote recite these two elements, despite the fact that it is obvious that conceptually they are identical and require the same analytical steps to fairly evaluate and resolve. 41 Justice O’Conner’s opinion, however, did not make reference to the Papachristou court’s statement expressly and broadly condemning criminalization based on suspicion, despite the fact that her majority opinion did expressly recognize that substantive as well as procedural due process restrained criminalization decisions. 42

The majority opinion in Kolender cited to Brown, as support for the proposition that not even a stop, and hence certainly not a conviction, could be based on subjective suspicion, without implicating fourth amendment concerns. 43 As a logical matter, this meant the court would prohibit any attempt to criminalize a refusal to cooperate with any government agent’s investigatory techniques employed during an encounter or illegal seizure.

Justice Kennedy in Hibbel cited to Kolender for the proposition that the constitutional limits on criminalization of that decision was similar to those of the Papachristou decision. 44 His majority opinion abruptly distinguished the Kolender holding from the Hibbel case by characterizing its sole constitutional concern as vagueness of the criminalization language that risked citizen bewilderment as to what was prohibited, and also risked the danger that government agents had unfettered discretion to determine who to arrest, prosecute, and convict. 45 Justice Kennedy made no reference to the California Penal Code provision that was the basis for the Lawson prosecution, which by its own terms only criminalized a person’s refusal to identify herself and account for her presence when

38. Id. at 357 and 358
39. Id. at 357
40. Id. At 358
41. See discussion infra notes 176 - 185, and accompanying text.
42. Id.
43. Id. at 357
45. Id.
the government had reasonable suspicion of criminal activity. Crucially, neither he nor the majority opinion in Kolender, recognized that the judicial expansion of the California crime was just that, an alternative second basis for criminalization that focused on an assessment by a government agent of the quality of the response by a suspect who chose to attempt to respond to the demand for identification by the government acting with reasonable suspicion. Nor did the Hibbel majority acknowledge that the Kolender decision admitted it did not know the facts of the fifteen situations in which Mr. Lawson was encountered or stopped, or whether there was a basis for concluding in any of those situations whether the government agents had reasonable suspicion before they encountered or stopped Mr. Lawson. 46 This admission of ignorance of the actual details of the facts of what happened during these encounters or stops, also encompassed most significantly, what Mr. Lawson did in response to the government agent’s demand for identification, including whether Mr. Lawson simply refused to identify himself. 47 Most significantly, the majority opinion in Hibbel, failed to expressly acknowledge that the majority opinion in Kolender, expressly asserted that the Fifth Amendment’s privilege against self-incrimination bars states and the federal government from criminalizing the refusal of a suspect to comply with a demand for identification by the government based only on reasonable suspicion. 48 Ironically, Justice O’Connor who wrote the majority opinion in Kolender, must have changed her mind about this constitutional protection in the intervening two decades between Kolender and Hibbel, because she was also in the majority in Hibbel, and her vote was necessary to Hibbel’s crucial repudiation of that constitutional protection against the criminalization of suspicion. Instead, the Hibbel majority apparently thought it was decisive with respect to Kolender’s protection, that Hibbel on appeal did not even claim the Nevada Penal Code’s criminalization was unconstitutionally vague, despite the fact that the Nevada crime definition was almost identical to the California statute. 49 Hence Hibbel signaled the court’s exceedingly fine line drawing – if the government has reasonable suspicion a flat refusal to respond to a demand for identification could be criminalized, but not an attempt to respond that did not meet an unspecified standard of clarity.

Obviously the majority’s position in Hibbel ignored the core principle stated in Papapchristou, that it did not make any difference how clearly the government articulates its intent, it is unconstitutional to criminalize based solely on suspicion of another, even another unspecified crime when the conduct that gave rise to the suspicion falls far short of constituting even an attempt of that


47  Id. Justice Kennedy failed to acknowledge that for possibly these reasons, the district court holding in favor of Mr. Lawson, had reached and squarely decided in direct conflict with the holding in Hibbel, that it was unconstitutional to criminalize a refusal to identify in response to a government demand based only upon reasonable suspicion; Id.

48.  Id. at 359(n.9)

49  Id.
other crime. Justice Kennedy also failed to acknowledge the court’s own precedent discussed in the proceeding paragraphs that barred criminalization based on suspicion as well as the failure of a person to cooperate with the government’s demand that the citizen dispel that suspicion. He was forced to acknowledge that another decision of the court, outside the context of criminalization of suspicion, included language expressly stating this latter corollary principle. He falsely characterized that language, however, as mere dicta. The United States Supreme Court has therefore waffled only in two decisions, both of which followed within a few years, catastrophic terrorist attacks, on whether criminalization based on suspicion which in turn was based upon no, few, or a small quantum of facts violates the national constitution.

2.1.1 Reaction to Hibbel: The United States Supreme Court – 2004-2007

Note: Vanishing precedent treatment ala Korematsu?

The United States Supreme Court has cited Hibbel twice in this the first three years after that decision. Neither citation, however, could be characterized as reconfirming the constitutionality of criminalizing suspicion.

2.2 Reaction to Hibbel - Commentators

Commentators who focused their articles on the Hibbel decision, have almost universally condemned the constitutional analysis of the majority opinion. Some of them

50. Hibbel v. Montana, 542 U.S. 177,187(2004)(court cited to Berkemer v. McCarty, 468 U.S. 420, at 439, with reasonable suspicion a government agent may ask the suspect a moderate number of questions whose purpose is to dispel that suspicion, but the accused is not obligated to respond)

51. Id. In fact, the assertion was integral to Justice Marshall policy-interests reconciliation in Berkemer. Miranda warnings need not be given at the outset of a reasonable suspicion based seizure-a stop, because of a variety of factors, including the suspect’s right not to respond to questions, a stop is not as police dominated as a full blown arrest and questions asked while the suspect is in such custody. Justice Kennedy acknowledged as much just before making his second “dicta” characterization in reference to Berkemer. Unfortunately, for the intellectual integrteity of Justice Kennedy and those who signed on to his opinion, his second “dicta” characterization seems based upon his earlier completed unrelated characterization that Berkemer cited to “Brown v. Texas” in dicta.


speculated that 9/11/2001 may have influenced the majority to depart from its own contra multiple statements of principles that conflicted with the holding in Hibbel. 54

2.3. Reaction to Hibbel - State Legislatures

Of the twenty state stop and frisk criminalization authorization statutes cited in Hibbel, only two of the annotations to those statutes made reference to Hibbel by late 2007.55 One of the two state annotations were for the purpose of use of Hibbel as support for authorizing only an arrest, but the other more accurately cited it as authority for a conviction if a person refuses to give identification to a law enforcement officer acting during an investigatory stop.56

2.4 Reaction to Hibbel - State Supreme Court Cases

Twelve state supreme courts in fifteen decisions have cited to Hibbel in the three plus years since that decisions was announced by the United States Supreme Court.57 Three of these state...
supreme courts have cited Hibbel with apparent approval or at least acceptance of what these courts interpret as its endorsement of the right of the government to initiate encounters with citizens during which it is permissible for the government to request the citizen provide identification without a scintilla of evidence to support that request, or even without having to reciprocate by at some point in the discussion showing identification as a government agent- hence potentially sanctioning criminalization based on subjective suspicion.\(^58\) One of these courts reasoned that a citizen’s right to walk or run away from an attempted illegal stop by government agents, a seizure which requires minimal evidence to justify it, can be criminalized, because the government agents are likely to continue their illegal conduct, and perhaps even resort to deadly force to effectuate the illegal seizure of the citizen.\(^59\) This of course means that after 9/11/2001 state courts of last resort have interpreted Hibbel as establishing a national standard that sanctions ignoring completely the motive of particular government agent’s for the encounter and ensuing request for identification. This means that the agent’s motive can be racist, sexist, or simply because the particular agent had a bad night or did not like the looks, smell, or speech of this particular citizen.

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\(^{58}\) State v. Reinders, 690 S.E.2d 78,82(Iowa, 2004)( no seizure has occurred and therefore no fourth amendment protections are implicated); People v. Jenkins, 691 N.W.2d 759,764(Mich., 2005); State v. Crawley, 901 A.2d 924,933-934(N.J., 2006)( while citing Hibbel for other propositions, state supreme court expressly authorized criminalization of flight from government agents when those agents have not reasonable suspicion, but a good faith belief in reasonable suspicion of some unspecified crime).\(^{59}\) State v. Pinero, 853 A.3d 887,891(N.J., 2004)(first the court cited with apparent approval the constitutional limiting principle that when the government attempts to engage a citizen in such an encounter, the citizen may decline the invitation, and is free not to answer any question and to go his way. It immediately followed recitation of this principle with a Cf.(compare) reference to Hibbel. This reference was followed by its characterization that the Hibbel holding was that it was constitutional for a government agent to initiate such an encounter and “request” identification anytime there were suspicious circumstances. The New Jersey Supreme Court at this point in its restatement of Hibbel appeared to deliberately omit that Hibbel required that the circumstances must provide a reasonable basis for the government agent to believe criminal activity of some sort had occurred, was occurring, or was about to occur.

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\(^{59}\) State v. Crawley, 901 A.2d 924,933-934(N.J., 2006)
Two other state supreme courts have cited Hibbel with apparent approval or at least acceptance of its authorization of the government to demand that citizens produce identification when the government has at least reasonable suspicion that the person has committed, is committing, or is about to commit a specific or even an unspecified crime, any crime, any and all crimes.\textsuperscript{60} These two courts, and one of the courts sanctioning seizures based on subjective suspicion, have cited with approval Hibbel’s policy evaluation that the government has important interests at stake in initiating such encounters or seizures which justify sanctioning its authority to demand identification of those they reasonably suspect have committed, are committing, or are about to commit a crime.\textsuperscript{61}

Two other state supreme courts cited Hibbel with apparent approval or at least accepting of its interpretations of the privilege against self-incrimination that requires a person claiming the privilege must prove he qualifies for the privilege by satisfying multiple qualifying hurdles, including that the statement was likely to be incriminating.\textsuperscript{62} These courts therefore have agreed with the Hibbel decision’s privilege against self-incrimination interpretation that requiring citizens to yield to the government’s demand for identification documents in situations where the citizen is a suspect in a criminal investigation which has proceeded to the point that the government has seized the citizen because of the bald assertion that compliance is not likely to be incriminating.\textsuperscript{63}

Only one of the state supreme courts cited Hibbel with apparent disapproval of its holding sanctioning the constitutionality of criminalizing suspicion, or disapproving or disagreeing with its policy assessment that the government has an important interest that justify authorizing it to demand identification of those they reasonably suspect have committed, are committing, or are about to commit a crime.\textsuperscript{64} The court concluded that there was no danger to the public or the police when a person merely refused to identify himself to government agents acting on reasonable suspicion that the person has committed some crime.\textsuperscript{65}

\textsuperscript{60} Hardister v. State, 849 N.E.2d 563,570(Ind., 2006); State v. Markland, 112 P.3d 507,512(Utah, 2005)

\textsuperscript{61} People v. Jenkins, 691 N.W.2d 759,764(Mich., 2005); State v. Markland, 112 P.3d 507,512(Utah, 2005); State v. Mechling, 633 S.E.2d 311,322(W. Virg., 2006)

\textsuperscript{62} In re Ariel G., 858 A.2d 1007,1013(Mry., 2004); Nev. Com. Of Ethics v. Boyd, et. al., 102 P3d 844, 848(n.22)(Nev., 2004). See also In re Commitment of Mark, 718 N.W.2d 90,96(Wis., 2006) characterizing Hibbel erroneously as focusing its holding on the qualification for the privilege that the statement must be “compelled” by the government.

\textsuperscript{63} In re Ariel G., 858 A.2d 1007,1013(Mry., 2004)

\textsuperscript{64} State v. Crawley, 901 A.2d 924,936(n.9)(N.J., 2006)

\textsuperscript{65} Id. at 936(n.9)(N.J., 2006)
Have State Supreme Courts Post 9/11/2001 Been More Willing to Sanction
THE CRIMINALIZATION OF SUSPICION?

3.0
3.0.1 State Supreme Court Decisions Relevant to Assessing State Supreme Courts Willingness
to Sanction Constitutionality of Criminalization Based Upon SUSPICION & REASONABLE
SUSPICION - September 11, 1996 - September 10, 2001 OVERVIEW of OUTCOMES

3.0.2 State Supreme Court Decisions Relevant to Assessing State Supreme Courts Willingness
to Sanction Constitutionality of Criminalization Based Upon SUSPICION & REASONABLE
SUSPICION - September 12, 2001 - September 11, 2006 OVERVIEW of OUTCOMES

In the six years prior to 9/11/2001, seven state supreme courts in seven decisions prohibited
potential or actual attempts by the government to criminalize based on the subjective suspicion of a
government agent or even the legislature.\footnote{Johnson v. State, 37 S.W. 3d 191(Ark., 2001); Johnson v. Athens Clark c County, 529 S.E.2d 613(Ga., 2000); City of Chicago v. Morales, 687 N.E.2d 53,59(Ill., 1997); State v. Muschkat, 706 So.2d 429(La., 1998); People v. Vasquez, 631 N.W. 2D 711(Mich., 2001); Stave v. Daniel, 12 SW3d 420,428(Ten. 2000); State v. Mendez, 970 P.2d 722,730(Wash., 2000)} In 2001, but before September 11\textsuperscript{th} for example, the
Michigan Supreme Court held that a government agent could not, based on his subjective suspicion,
initiate an encounter with a citizen and if the citizen lied during that encounter with regard to a
matter that is relevant to confirm or eliminate that suspicion, use that lie as the basis to arrest,
prosecute, and convict that person under an obstruction statute.\footnote{People v. Vasquez, 631 N.W. 2D 711, 718(Mich., 2001)} Even more significantly because
directly in conflict with the subsequent Hibbel decision, just three years before 9/11/2001, a state
supreme court declared unconstitutional as violative of both the vagueness and overbreadth due
process doctrines, a legislative attempt to criminalize reasonable suspicion.\footnote{State v. Muschkat, 706 So.2d 429,435-436(La., 1998) (striking down drug crime
loitering statute that provided for punishment of up to six months in jail.)} The court expressly
recognized that part of the loitering statute was designed to criminalize status and primarily
correspondingly protected conduct.\footnote{Id.} The crucial criminalization element of the statute was not the
conduct of any person prosecuted under the statute, but unspecified “circumstances” projected to do
that which they could not possibly do — manifest the purpose of the suspect to be involved in drug
related criminal activity.\footnote{Id.} That court also reviewed three other state supreme courts, which between
1980-1993 had split on the constitutionality of criminalizing suspicion of drug crime related
loitering. The Georgia Supreme Court in 2000 reached almost the identical conclusion about an almost identical crime in its loitering statute.

But during this same six year period, proceeding 9/11/2001, 10 state supreme courts, in twelve decisions, including the California, Connecticut, Indiana, Mississippi, Ohio, Pennsylvania, Rhode Island, Washington, West Virginia, and Wisconsin Supreme Courts, sanctioned expressly or by implication the constitutionality of criminalizing on the basis of reasonable suspicion, and in some cases even on the basis of subjective suspicion. The Wisconsin Supreme Court, ignoring the even more pernicious racist implications of the facts of the case, held that lying to government agents

71. Id. at 433-432(two of the three courts acting in 1980 and 1983 sanctioned the power of the government to criminalize suspicion of public drug related activity in the form of a loitering crime.

72. Johnson v. Athens Clark e County, 529 S.E.2d 613(Ga., 2000)

73. People v. Garcia, 23 P.3d 590(Cal., 2001)(sanctioning the constitutionality of criminalizing based on legislative subjective suspicion); Wright v. Superior Court, 936 P.2d 101, 102(Cal., 1997)(sanctioning the constitutionality of criminalizing based on legislative subjective suspicion); Ramos v. Town of Vernon, 761 A.2d 705,720(Con., 2000)(legislature's subjective suspicion, but court construed statute to require reasonable suspicion solely because officer must have basis for suspecting accused was juvenile in public during prohibited time period. Court expressly held that criminalization could be based on this suspicion. Court treated ordinance as if it was a criminal statute, despite fact it made reference only to penalty provisions that provided fines); State v. Klein, 698 N.E.2d 296,299(Ind., 1998); Smith v. City of Picayune, 701 So.2d 1101(Miss., 1997)(state supreme court sanctioned criminalization based on the subjective suspicion of two executive branch government agents); State v. Cook, 700 N.E.2d 570,575(Ohio, 1998 )(no violation to state's specific constitutional ban on retroactive legislation, and no violation of national constitution's ex post facto provision for sex offender registration refusal crime to apply to offenders who had already committed the predicate element crime); Com. v. Killinger, 888 A.2d 592(Pa., 2005)(implicitly sanctioning the criminalization of legislative subjective suspicion based primarily on the status of the accused); State v. Milette, 727 A2d 1236, 1238(R.I., 1999)(badly skewing evidential basis for finding reasonable suspicion. On facts, police had only circumstantial evidence of skinhead gang membership as basis for searching car stopped for speeding for weapons.); State v. Mendez, 970 P.2d 722,729(Wash., 2000); Sales, et. al. v. City of Charleston, 539 S.E.2d 446(W. Virg.,2000); In the Interest of A.S., 626 N.W.2d 712(Wis., 2001)(criminalizing reasonable suspicion of a teen's verbalization of an aspiration of committing future homicides at some unspecified time in the future); State v. Griffith, 613 N. W.2d 72,84(Wis, 2000)
acting only on their subjective suspicion could be criminalized.\textsuperscript{74} The Washington Supreme Court asserted that a passenger’s refusal to obey an order to get out of or stay in a motor vehicle or stop walking away from the vehicle when a government agent has reasonable suspicion to stop the accused for some unspecified crime or even for agent safety concerns may be a basis for criminalization — under a provision in the state’s obstruction of justice statute.\textsuperscript{75}

3.0.2 Overview of Outcome Summary Post 9/11/2001 State Supreme Court Cases

Since 9/11/2001, eleven State Supreme Courts; Alaska, California, Delaware, Florida, Hawaii, Maryland, Montana, Nevada, New Hampshire, North Carolina, and Pennsylvania, in fourteen decisions, have expressly or by implication sanctioned the constitutionality of criminalization based only on suspicion.\textsuperscript{76} Some of these state supreme courts even sanctioned expressly or by implication

\textsuperscript{74} State v. Griffith, 613 N. W.2d 72, 84(Wis, 2000)(police officer without any basis “asked” black male back seat passenger for identification)

\textsuperscript{75} State v. Mendez, 970 P.2d 722, 729(Wash., 2000).

\textsuperscript{76} Treacy v. Municipality of Anchorage, 91 P.3d 252(Alas, 2004); People v. Sorden, 113 P. 3d 565(Cal., 2005); People v. Barker, 96 P.3d 507(Cal., 2004)(no violation of due process to criminalize failure to re-register as a sex offender); Carter v. State, 814 A.2d 443, 445(Del., 2002); State v. Baez, 894 So.2d 115(Fla. 2005); State v. Barros, 48 P.3d 584(Haw., 2002)(officer acting on his subjective suspicion, made a pretextual stop for jaywalking - a non-criminal traffic violation. Court sanctioned right of government agent to demand identification and even run an arrest warrant check of the suspect based solely on the jaywalking, which meant that legislature could criminalize refusal to honor that demand); Byndloss v. State, 893 A,2d 1119, 1121(Mry. 2006); State v. Wardell, 122 P.3d 443(Mont., 2005)(no denial of double jeopardy or cruel and unusual punishment constitutional protections, to first criminalize as a felony failure to register as a sex offender, and then use that conviction in combination with the same prior conviction to sentence the accused to prison for several more years as a persistent felony offender); State v. Bear, 106 P.3d 516,517(Mont., 2005)(no violation of due process to criminalize based on status - dangerous offender and omission - failure to register or re-register); Hibbel v. The Sixth Judicial District Court, 59 P3d 1201(2002)(stop and identify statute which sanctioned criminalization of refusal to identify based on only reasonable suspicion of a crime sanctioned as constitutional. Court made express reference to events of 9/11/2001 as part of its justification of this decision, Id. at 1206; State v. Porelle, 822 A.2d 562,566(N.H., 2003)(no violation of due process-vagueness doctrine in criminalizing merely following another person once a protective order is issued); State v. Bryant, 614 S.E.2d 479(N.C., 2005); Com. v. Killinger, 888 A.2d 592,594(Pa., 2005); Com. v. Ickes, 873 A.2d 698,701(Pa., 2005)(sanctioning criminalization based on reasonable suspicion)
the right of the government to criminalize based on subjective suspicion.\textsuperscript{77}

On the other hand, five State supreme courts in five decisions since 9/11/2001, including Nevada and two courts which also sanctioned suspicion based criminalization during the same period, expressly or by implication prohibited the government from criminalizing solely on the basis of even reasonable suspicion.\textsuperscript{78} One of these courts relied on the principle that since the government cannot search a person or his effects based on reasonable suspicion, the government cannot criminalize based on what it finds as a result of a search based on that suspicion.\textsuperscript{79}

\textsuperscript{77}. \textit{People v. Barker, 96 P.3d 507(Cal., 2004)}; \textit{Byndloss v. State, 893 A.2d 1119, 1121(Mry. 2006)}(government agents can after stopping a vehicle for a possible traffic violation, can continue to seize all of the occupants of that vehicle after the only reason for the stop was resolved, for an additional twenty minutes based solely on the agent’s subjective suspicion, and can demand that all occupants provide identification, and run registration and license checks and warrant checks. This means of course that a refusal to comply with any of these sanctioned government investigative techniques could be criminalized by the Maryland state legislature); \textit{State v. Porelle, 822 A.2d 562,566(N.H., 2003)}(no violation of due process-vagueness doctrine in criminalizing merely following another person once a protective order is issued)

\textsuperscript{78}. \textit{State v. J.P., 907 So.2d 1101,1107-08(Fla., 2005)}(criminalizing [six month jail sentence for parents for second and subsequent violations] statuses of juvenile and or parent/guardian if the juvenile left home even with parents permission after the curfew hour); \textit{Swift v. State, 899 A.2d 867(Mry., 2006)}(officer only had his subjective suspicion at time he began encounter and eventually arrested the accused for an unidentified crime. Contraband drugs and an illegal gun were found as a result of a search incident to the illegal arrest. Court held that the original encounter which precipitated the events that led to the arrest was a stop and therefore required reasonable suspicion); \textit{Com. v. Carkhuff, 804 N.E.2d 317,323(Mass.,2004)}(prohibiting criminalization based on sanctioning the government investigatory technique of stopping all cars without individualized suspicion); \textit{Silvar v. Eigth Judicial Dist. Court ex rel County of Clark, 129 P.3d 682, 684(Nev. 2006)}(loitering for purpose of prostitution held unconstitutionally vague and overbroad); \textit{City of Sumner v. Walsh, 61 P.3d 1111(Wash., 2003)}(prohibiting criminalization of legislative subjective suspicion of “juveniles” and their parents, even though ordinance only provided for “civil" sanctions. Reasoning of the majority justices of the court would apply even more if criminal sanctions were imposed by ordinance)]

\textsuperscript{79}. \textit{Swift v. State, 899 A.2d 867(Mry., 2006)
3.1 CRIMINALIZATION OF SUSPICION EXPRESS REFERENCE CASES & LYING TO GOVERNMENT CRIMES/CASES

3.1.0 CRIMINALIZATION OF SUSPICION EXPRESS REFERENCE CASES & LYING TO GOVERNMENT CRIMES/CASES - WHY LYING TO GOVERNMENT CRIMES ARE EXAMPLE OF CRIMINALIZING SUSPICION

When the government or its agents “encounters” a person based only on subjective suspicion, that the person committed, is committing, or is about to commit a crime, any decision by the legislature to criminalize any lie the person tells in response to the government’s questions is the criminalization of suspicion. A democratic government with no interests at stake except its own self-aggrandizement has no justification for demanding that a person so encountered tell it only the truth or risk loss of liberty. A state supreme court during the study period held that a lie in such circumstances could not be construed to constitute a violation of the state’s obstruction of justice standard. 80 The Georgia Supreme Court, without citing expressly to the Papachristou decision of the United States Supreme Court, recognized that vagrancy and loitering crimes violate due process, and cannot therefore serve their historical purpose of allowing government agents to round up those they suspect of some other crime, even if those suspected are uncooperative and untruthful with the government agent.81

3.2 STOP & IDENTIFY CASES CRIMES – Why They Are PROPERLY CHARACTERIZED as THE CRIMINALIZATION OF SUSPICION & EVALUATING Pre & Post 9/11/2001 State Supreme Court Decisions Pertinent to the Issue of CONSTITUTIONALITY OF CRIMINALIZATION OF SUBJECTIVE & REASONABLE SUSPICION IN A STOP & IDENTIFY CRIME – CASE OUTCOMES & ANALYSIS

As documented in Part 2, Stop and Identify statutes almost all open the door to criminalizing based only on suspicion because they seek to justify a government seizure and permissible government investigatory techniques piggybacking on that seizure based solely on at most reasonable suspicion, and almost all criminalize the refusal of a citizen to provide such identification. 82 Less than nineteen months before 9/11/2001, a state supreme court prohibited the executive branch of government from relying solely on its agent's subjective suspicion to seize a person, and then to criminalize what was thereafter discovered by investigative techniques which sequentially included retention of a requested identification document, an arrest warrant search based on the information in


81. Johnson v. Athens Clark e County, 529 S.E.2d 613,616(Ga., 2000)]

82. See supra notes 57-65, and accompanying text.
that identification document, and a search following arrest based on a current arrest warrant discovered as a result of the warrant check.\textsuperscript{83} The Tennessee Supreme Court gathered and described a large array of national precedent, from both state and federal courts, to support its contention that federal and states’ constitutions’ search and seizure protections, prohibited the government from retaining the identification of citizens to pursue investigations based only on the subjective suspicion of its agents.\textsuperscript{84} The Tennessee Supreme Court as well as the Wisconsin Supreme Court, however, held that a polite but racist, sexist, or just plain sadistic government agent could pursue his prejudices or merely subjective suspicions to “encounter” any citizen in any public place or even in a seized motor vehicle, and request that the citizen identify himself, or provide identification documents.\textsuperscript{85} While these courts did not claim a consensus of appellate courts had sanctioned the grant of this power to government agents, they did suggest that standards developed by courts to the date of their decision in 2000 to evaluate the constitutionality of such an investigation technique, found the fact that in these situations no government interests were at risk was insignificant.\textsuperscript{86}

Since 9/11/2001 all five state supreme courts whose review authority encompassed deciding, have decided expressly or by implication, that even without reasonable suspicion the government can request that any citizen its agent(s) may choose, and for any reason the agent might have, to provide that government agent the citizen’s identification documents when that agent “encounters” the citizen in a public place.\textsuperscript{87} One of these courts, however, expressly held that it violates the national and arguably state constitutional standards, for the government to criminalize a person’s decision to refuse to comply with such a government request.\textsuperscript{88} These courts have held that the subjective suspicion, despite the fact that it per se means that no governmental interests are at risk, is enough to justify the government agent’s retention of that identification document, and its use to run a timely warrant check based on the voluntarily proffered identification. Thereafter three of these state supreme courts held that the government may arrest, prosecute, and convict the citizen based on information provided by the citizen, or the failure of the citizen to provide information sought, and/or

\begin{itemize}
\item \textsuperscript{83} Stave v. Daniel, 12 SW3d 420,428(Ten. 2000)
\item \textsuperscript{84} Id., at 427-428
\item \textsuperscript{85} Id. at 426-427; \textbf{State v. Griffith, 613 N. W.2d 72,84(Wis, 2000)}
\item \textsuperscript{86} \textbf{Id. at 426}(listing several factors all focusing on the attitude, behavior, and communications of government agents once the agent begins the encounter; and Id. at 84.
\item \textsuperscript{87} \textbf{State v. Baez, 894 So.2d 115(Fla. 2005}(court’s restatement of its 1983 holding in the Lightbourne case); \textbf{State v. Smith, 683 N. W. 2d 542, 548(Iowa,2004); People v. Jenkins, 691 N.W.2d 759,764(Mich., 2005); Hibbel v. The Sixth Judicial District Court, 59 P3d 1201(2002);Com. v. Ickes, 873 A.2d 698,701(Pa., 2005)
\item \textsuperscript{88} \textbf{Com. v. Ickes, 873 A.2d 698,701-702(Pa., 2005)}(right to refuse request is expressly characterized as a right and therefore non-criminal behavior)
\end{itemize}
information learned during that encounter, and/or from that warrant check.\textsuperscript{89} The majority justices on one of these courts reasoned that a government agent’s uncommunicated decision to retain a citizen’s official government identification document, and call other government agents to determine if the citizen had an outstanding arrest warrant, was not a seizure because this investigatory technique was no more intrusive than asking the citizen to answer a question during such a public encounter.\textsuperscript{90} The court did not address the crucial interests reconciliation issue of whether the citizen remained free to demand return of his identification document upon learning or simply believing that the agent intended to use it to run a warrant check. At least one of these courts held that if the citizen seeks to leave while the warrant check is being conducted, that this is significant evidence to justify a conclusion that there is reasonable suspicion that the citizen must be guilty of some unspecified crime at some unspecified time, and thereby helps to justify the government’s subsequent seizure of that citizen.\textsuperscript{91} A state supreme court, citing Hibbel, held that not only doesn’t it violate the national constitution, it also does not apparently violate its state constitution to criminalize the refusal of a citizen to provide identification, if the demanding government agent has reasonable suspicion that any unspecified crime was committed or was in the process of commission.\textsuperscript{92}

3.3 CRIMINALIZATION OF SUSPICION VIA “STATUS” CASES

3.3.1 CRIMINALIZATION OF STATUS CRIMES -
STATE SUPREME COURT CASES SEXUAL OFFENDER REGISTRATION/REFUSAL TO REGISTER CRIMINALIZED CASES -
Why They Are PROPERLY CHARACTERIZED as THE CRIMINALIZATION OF SUSPICION & EVALUATING Pre & Post 9/11/2001 State Supreme Court Decisions Pertinent to the Issue of CONSTITUTIONALITY OF CRIMINALIZATION OF SUBJECTIVE & REASONABLE SUSPICION IN A SEXUAL OFFENDER REGISTRATION/REFUSAL STATUS CRIMES – CASE OUTCOMES & ANALYSIS

In last ten years, one distinctive trend sanctioning the criminalization of status is the sanctioning by state supreme courts of crimes based upon sex offender registration statutes and express or implied sanctioning of criminalization of the refusal to so register: This trend of course is arguably

\begin{itemize}
\item \textsuperscript{89} State v. Baez, 894 So.2d 115(Fla. 2005(\textit{court’s} restatement of its 1983 holding in the Lightbourne case); State v. Smith, 683 N.W. 2d 542, 548(Iowa,2004); People v. Jenkins, 691 N.W.2d 759,764(Mich., 2005)
\item \textsuperscript{90} State v. Smith, 683 N.W. 2d 542, 547-548(Iowa,2004)
\item \textsuperscript{91} People v. Jenkins, 691 N.W.2d 759,764(Mich., 2005)
\item \textsuperscript{92} Com. v. Ickes, 873 A.2d 698,701(Pa., 2005)
\end{itemize}
inconsistent with the United States Supreme Court’s decision in Lambert v. California. Statutes which criminalize the status of “ex-felony sex offender” coupled with the innocuous omission of failing to register or re-register that status, criminalize a legislature’s subjective suspicion because such persons liberty is taken absent a scintilla of individualized proof that that they are likely to have committed or are in the process of committing the same crime again.

Two state supreme courts, after 9/12/1996 but prior to 9/11/2001, sanctioned the constitutionality of criminalizing legislative subjective suspicion by upholding the right of the government to make it a crime and even a felony to have the status of an ex-sex crime felon, coupled with an omission - failure to register or re-register that status. Four state supreme courts, since 9/11/2001, in six decisions, sanctioned the constitutionality of criminalizing legislative subjective suspicion by upholding the right of the government to make it a crime and even a felony to have the status of an ex-sex offender felon, coupled with an omission - failure to register or re-register that status.

Some of these state Supreme Courts sanctioning the constitutionality of criminalizing an ex-sex offenders failure to register or re-register that status, have endorsed enhancing the government’s interests warranting such crimes, despite the fact that the basis for the enhancement was data subject completely to unilateral manipulation by the government. The basis - data demonstrating a higher frequency of re-arrest of ex-sex offenders in comparison to those convicted of other crimes, is in the total control of government executive branch agents, and the very registration regime, imposed nationally, significantly heightens the likelihood of such re-arrest, and the re-arrest are, in this cycle


94. People v. Barker, 96 P.3d 507,( Cal., 2004)(felony crime); Wright v. Superior Court, 936 P.2d 101, 104(Cal., 1997); State v. Bryant, 614 S.E.2d 479,484(N.C., 2005); Com. v. Killinger, 888 A.2d 592,595(Pa., 2005)(accused convicted of a "remedial measure" "treated" as a felony despite fact he merely lived in the city in which he had already registered for less than two months before reporting moving to another address in the same city); State v. Knowles, 643 N.W.2d 20, 22(N.D., 2002) (failure to register or re-register a class A misdemeanor, and imposing a non-waivable mandatory minimum of ninety days imprisonment on all those convicted except juveniles)

95. People v. Garcia, 23 P.3d 590(Cal., 2001); Wright v. Superior Court, 936 P.2d 101, 102(Cal., 1997); State v. Cook, 700 N.E.2d 570,575(Ohio, 1998 )

96. People v. Sorden, 113 P. 3d 565,569(Cal., 2005); People v. Barker, 96 P.3d 507(Cal., 2004); State v. Wardell, 122 P.3d 443(Mont., 2005); State v. Bear, 106 P.3d 516,517(Mont., 2005)(dangerous offender status); State v. Knowles, 643 N.W.2d 20, 22(N.D., 2002); Com. v. Killinger, 888 A.2d 592,594(Pa., 2005)

97. State v. Bryant, 614 S.E.2d 479(N.C., 2005)
of circular reasoning, the primary empirical justification for the registration regime. 98

Some of these state Supreme Courts sanctioning criminalizing of an ex-sex offender’s failure to register or re-register that status, have also implicitly further empowered the government, by permitting an accused to be convicted based on strict liability for the failure to register or re-register. 99 Since such ex-felons have a status that makes them inherently suspect in the collective subjective belief of the legislature, the government is empowered to keep track of them at all times, and criminalize, even as a felony, even their inadvertent failure to cooperate by failing to register or re-register, even if multiple government agencies in fact know of their residence at that point in time, even if it could be compounded by a finding that the accused was now a multiple felony offender and therefore could be imprisoned for years or even for life. 100 Criminalizing on the basis of inherently suspicious status means criminalizing everyone who has that status, even if the basis for the status


99. People v. Sorden, 113 P. 3d 565,568 and 569(Cal., 2005)(accused knew of his duty to re-register, and this knowledge of his duty was all government had to prove. Hence government did not have to prove any level of culpability of the accused at the times he failed in his duty to register); People v. Barker, 96 P.3d 507(Cal., 2004); State v. Bryant, 614 S.E.2d 479,484(N.C., 2005)(court makes gross conceptual error of excusing the decision of the legislature to eliminate any level of culpability by characterizing the registration regime as regulatory, but completely ignoring that the regime culminated with a criminal prosecution for a felony, and failing to identify any other regulatory regime in North Carolina which included a strict liability felony. Court also failed to counter long policy history by supreme courts of limiting strict liability to offenses which penalized without any possible jail time or only a short possible period of jail time). Compare, however, State v. Tippett, 634 N.W. 176,178(Iowa, 2001)(criminal convictions for failure to register or re-register can only be based on proof of a voluntary and intentional failure to perform a known legal duty), and State v. Knowles, 643 N.W.2d 20, 24(N.D., 2002)(statutory interpretation analysis employed to conclude that failure to register or re-register crime was not a strict liability offense) ]

100. People v. Barker, 96 P.3d 507,Cal., 2004; People v. Garcia, 23 P.3d 590,598(Cal., 2001)(upholding application of California’s “thee strike” sentencing enhancement scheme based solely on the failure to register as a sex offender felony, and the underlying felony that was the basis for the duty to register); State v. Wardell, 122 P.3d 443,447(Mont., 2005)(recognizing that such statutes criminalize status and sanctioning that the failure to register felony crime can then be recycled as the sole basis for triggering additional years of imprisonment under the state’s persistent felony offender scheme)
occurred a quarter of a century ago. 101 State Supreme Courts unwittingly admit that the government has no real interests at risk to justify such criminalization when they acknowledge that a previous sex offender can constitutionally be convicted of a felony of not registering or re-registering despite the fact that the government at all times knew of his local and residence, the accused had registered and re-registered for over a decade, and the failure to register or re-register was de-minimis. 102

Most of these state supreme courts sanctioning criminalizing of ex-sex offenders’ failure to register or re-register that status, have balanced the interest assessment described above by holding that these crimes were only constitutional, if read to be an exception to the principle that ignorance of the law is no excuse.103 Hence the government to convict must prove that the accused actually knew of his duty to register or re-register, or there was a basis for concluding the accused was probably aware of that legal duty. 104 Most of these state supreme courts relied on the national constitution’s due process protection as the basis for requiring that the accused must have known or have reason to know of his duty to register. 105 Most of these courts have interpreted the holding of the United States Supreme Court in Lambert, as imposing this national standard. 106 Since 9/11/2001, however, at least one state supreme court has sought to skirt the Lambert limit or question its continuing viability in the context of the sex offender registration crimes. 107

Even more disturbing, was the incredible conceptual confusion in the recent holding of the

101. People v. Barker, 96 P.3d 507, Cal., 2004

102. People v. Sorden, 113 P. 3d 565,567 and 569(Cal., 2005)(accused required to re-register within five days of his birthday, voluntarily came into register sixteen days after his birthday. State knew of current address at all times. Nevertheless, state supreme court sanctioned constitutionality of prosecution and conviction for failure to re-register.

103. People v. Garcia, 23 P.3d 590,596(Cal., 2001)

104. People v. Garcia, 23 P.3d 590,595(Cal., 2001)

105. People v. Sorden, 113 P. 3d 565,568(Cal., 2005)

106. People v. Sorden, 113 P. 3d 565,568(Cal., 2005); People v. Garcia, 23 P.3d 590,595(Cal., 2001)

107. State v. Bryant, 614 S.E.2d 479,487-488(N.C., 2005)(court's totally unconvincing recitation of authority to justify subsequent limiting of Lambert assertion was unnecessary in light of the fact that the accused had apparently received actual written notice by South Carolina of the need to re-register if he should move out of state in the new county, as well as notify the county in South Carolina where he previously lived, see Id. at 481.
Pennsylvania Supreme Court, which apparently sanctioned the constitutionality of restoring a
criminal prosecution for failure to register, by apparently sanctioning the constitutionality of a
subsequent conviction factually decided by a judge and based on less than proof beyond reasonable
doubt. This recent state supreme courts history sanctioning the constitutionality of criminalizing
the refusal of ex-sex offenders to register or re-register demonstrate an ultimate danger in a maturing
democracy of criminalizing based on even the subjective suspicion of the legislature. Interests
identification, evaluation, and reconciliation are skewed to the point of tyranny. The government
could sentence such offenders to long original terms of imprisonment, but in these cases failed to
“protect” the public by employment of this unassailable policy decision. It could subject each
offender upon release to a continuing period of supervision, and make the failure to register or re-
register an express term of release or the granting of probation, and subject a violator to a further
term of imprisonment upon failure to comply. Either or both of these policies provide complete
public protection, without resort to creating a new crime based on this decision on the government’s
subjective suspicion that such persons are always likely to have committed, are committing, or are about to commit some other
unspecified crime. A state supreme court sanctioned use as a significant factor to justify, not just
reasonable suspicion but probable cause to search a vehicle, eyeballing an individual as a member of
a dangerous gang. Implications of dangerous gang membership justified a search of a vehicle for
illegal weapons. Once the state supreme court sanctioned the constitutionality of such a search,
justified primarily by subjective suspicion of gang status, the legislature could criminalize any failure
to cooperate with the search procedure.

3.3.2 CRIMINALIZATION OF STATUS CRIMES - “Gangs”
Why They Are PROPERLY CHARACTERIZED as THE CRIMINALIZATION
OF SUSPICION & EVALUATING Pre & Post 9/11/2001 State Supreme Court
Decisions Pertinent to the Issue of CONSTITUTIONALITY OF
CRIMINALIZATION OF SUBJECTIVE & REASONABLE SUSPICION
IN A “GANG” STATUS CRIMES – CASE OUTCOMES & ANALYSIS

Crimes criminalizing “criminal gangs” or members of such gangs are attempts to criminalize
suspicion because they justify this decision on the government’s subjective suspicion that such
persons are always likely to have committed, are committing, or are about to commit some other
unspecified crime. A state supreme court sanctioned use as a significant factor to justify, not just
reasonable suspicion but probable cause to search a vehicle, eyeballing an individual as a member of
a dangerous gang. Implications of dangerous gang membership justified a search of a vehicle for
illegal weapons. Once the state supreme court sanctioned the constitutionality of such a search,
justified primarily by subjective suspicion of gang status, the legislature could criminalize any failure
to cooperate with the search procedure.

111. Id.
3.3.3 “TERRORIST STATUS CRIMES – State Supreme Court Cases

In the six years prior to 9/11/2001, there were no states supreme courts’ decisions which decided the constitutionality of criminalization solely or predominantly on the status of an accused as a terrorist. Since 9/11/2001, a state supreme court prohibited the government from criminalizing based on subjective suspicion even when there was a direct reference by the state to terrorism and terrorist as a primary justification for the seizure executed without an evidential basis.\(^{112}\)

3.3.4 JUVENILE CURFEW STATUS CRIMES – STATE SUPREME COURT CASES"

Why They Are PROPERLY CHARACERIZED as THE CRIMINALIZATION OF SUSPICION & EVALUATING Pre & Post 9/11/2001 State Supreme Court Decisions Pertinent to the Issue of CONSTITUTIONALITY OF CRIMINALIZATION OF SUBJECTIVE & REASONABLE SUSPICION IN A JUVENILE CURFEW STATUS CRIMES – CASE OUTCOMES & ANALYSIS

Juvenile curfew crimes are among the most widespread current examples of criminalization based upon the subjective suspicion of a legislature. Juvenile curfew crimes criminalize subjective suspicion because they criminalize an innocuous status, age, coupled with an innocuous circumstance -leaving one's home after 10 or 11 p.m. when the person has not reached a certain age - usually eighteen. Legislatures which enact such crimes are criminalizing their subjective suspicion that in combination the status and conduct create a risk that some unspecified other crime might be committed by or upon such juveniles.\(^{113}\) Often antidote, statistics, and heuristics are cited as the basis for this suspicion.\(^{114}\) Many of these juvenile curfew crimes also criminalized the status of parent/guardian of these juveniles, when the parents acquiescence or fail to prevent their child from

\(^{112}\) Com. v. Carkhuff, 804 N.E.2d 317,323(Mass., 2004)(a seizure without evidence of individual suspicion may be justified however provided there is adequate administrative authorization and guidelines which limit the intrusion on the liberty interests of many law abiding citizens)

\(^{113}\) See City of Sumner v. Walsh, 61 P.3d 1111,1116 and 1117(Wash., 2003)("practical effect"of juvenile curfew ordinance was to sanction any juvenile who is found in public for any reason, and leave it to police to determine narrow range of situations when in fact an arrest and prosecution is justified. The court went further by then expressly asserting that it was constitutional for the government to seize persons they suspected of this subjective suspicion status crime.

\(^{114}\) Sales, et. al. v. City of Charleston, 539 S.E.2d 446,456(W. Virg.,2000)(Court relied on trial evidence by city that crime rate dropped when juvenile curfews were enacted by other cities. But of course, crime rates would drop for all public place crime, if all citizens were ordered to stay in after a certain hour)
leaving home after the curfew begins. These youth curfew crimes, however, omit as an element any event specific conduct, circumstance, or result that would serve as relevant evidence that the commission of any crime is imminent.

Two state supreme courts prior to September 11, 2001, but after 9/12/1995, held it was constitutional for one of its local legislatures to enact, enforce, and eventually criminalize based upon a juvenile curfew crime. Since, September 11, 2001, 2 state supreme court have addressed the constitutionality of such a curfew crime under the national as well as their state constitutions. One state supreme court sanctioned the constitutionality of the legislature's criminalizing age status based on subjective suspicion, but the other court prohibited criminalization based on such legislative subjective suspicion.

These state supreme courts relied on antidote, and/or arrest as opposed to conviction statistics, and/or conclusory findings of fact, and/or presumptions, or merely conjured an array of state interests. This consensus existed despite the fact that at the moment of every actual arrest–subsequent conviction which is based solely on the juvenile curfew crime, the government has no interests threatened or injured by an innocent status combined with innocent conduct. This lack of government interest truism is the reality every time a government seeks to criminalize based solely on subjective suspicion. Turning a blind eye to this reality, all of the state supreme courts reviewing the constitutionality of juvenile curfew crimes after 9/11/2001, have concluded that the

115. Id. at 450(W. Virg.,2000)(parents punishable by a maximum sentence of thirty days in jail, but youth only subject to juvenile authority)


117. Treacy v. Municipality of Anchorage,91 P.3d 252,265(Alaska, 2004)(government's interests in criminalizing juveniles found by court to be compelling); State v. J.P., 907 So.2d 1101(Fla., 2005). See also City of Sumner v. Walsh, 61 P.3d 1111,1117(Wash., 2003)(holding unconstitutional a juvenile curfew statute that imposed only civil sanctions]


government not only has an interest in criminalizing, it has a “compelling” interests.120

These courts also all acknowledged that these curfew crimes injure such fundamental federal or state constitutional rights as the right to movement, privacy, and/or travel.121 One of the state supreme courts reconciled these competing important interests, first by partially recognizing the principle asserted at the beginning of this sub-section — these juvenile curfew crimes criminalize innocent status coupled with innocent conduct.122 Second, the court gave great significance to the principle that these interests are fairly reconciled by eliminating the power of the government to enact juvenile curfew laws to criminalize as that term is defined in this article.123 The court expressly recognized that potentially criminalizing any juvenile who merely appears in public after the curfew hour is “antithetical” to curfew goal of protecting juveniles, and even noted that one of the cities was willing to concede that the criminalization provision of its ordinance was unconstitutional.124

The decisions of three of these four courts who upheld the constitutionality of these legislatures' decisions to declare sufficiently suspicious to criminalize this innocent status and innocent circumstance were made despite the fact that in at least four decisions the United States Supreme Court had held expressly or by implication that criminalization based solely on status or status coupled with otherwise completely innocuous conduct, violated the National constitution.125 Curfew criminalization based on subjective suspicion, like the stop and identify crimes such as in Hibbel, identify the legislative drafting lesson - a vagueness constitutional challenge can be combated by more broadly criminalizing based on at most reasonable suspicion of some crime, but including in the definition of the crime clear identification of an  innocuous status and or conduct.126


121. State v. J.P., 907 So.2d 1101,1115-1116(Fla., 2005)

122. State v. J.P., 907 So.2d 1101,1118(Fla., 2005)

123. State v. J.P., 907 So.2d 1101,1118(Fla., 2005)(under two city ordinances under review court points out that both juveniles and parents can be jailed for violating the curfew crime a second time, while the model curfew act, adopted by the Florida legislature, is civil, i.e. no imprisonment is authorized)

124. State v. J.P., 907 So.2d 1101,1119(Fla., 2005)(court reviewed prior cases sanctioning the constitutionality of juvenile curfew laws involved ‘civil” rather than “criminal” sanctions)

125. See supra notes 29-31 and accompanying text.

126. See discussion infra. notes 201-205, and accompanying text.
3.4 CRIMINALIZATION OF SUBJECTIVE & REASONABLE SUSPICION VIA LOITERING CASES
Why They Are PROPERLY CHARACTERIZED as THE CRIMINALIZATION OF SUSPICION & EVALUATING Pre & Post 9/11/2001 State Supreme Court Decisions Pertinent to the Issue of CONSTITUTIONALITY OF CRIMINALIZATION OF SUBJECTIVE & REASONABLE SUSPICION IN A LOITERING CRIME – CASE OUTCOMES & ANALYSIS

Criminalization of loitering is the criminalization of lingering in public, by itself, a completely harmless course of conduct, and one protected against criminalization by the national constitution.\(^{127}\) Hence the criminalization of loitering alone is an unconstitutional deprivation of liberty, and therefore almost all current loitering statutes combine the public lingering with what the government perceives to be a sinister ambition, and/or suspicious status, and/or sinister circumstances as the basis for the crime.\(^{128}\) All three combinations, however, merely combine a constitutionally impermissible deprivation of liberty with a person’s thoughts, status, or unspecified conditions which exist at the time of unspecified conduct of the accused. These combinations therefore all violate a combination of the national constitution's due process and cruel and unusual punishment protections.\(^{129}\) These unconstitutional combinations cannot be saved by the government posting a sign or assigning an agent to assert that loitering is forbidden, and then criminalizing the refusal to obey the sign or agent, despite the fact that after 9/11/2001 a state supreme court inferentially sanctioned criminalization based on such a government self-aggrandizing power ploy.\(^{130}\)

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127. City of Chicago v. Morales, 687 N.E.2d 53, 58(Ill., 1997)(a person may know the meaning of “loiter”, but not based on that definition, why his loitering was the basis for criminalization). See discussion supra notes 29-31, and accompanying text)

128. See for confirmation if not express recognition of the constitutional infirmities, Simmons, Kimberly, Statutes and Ordinances Prohibiting “Loitering and Prowling”, 91 C.J.S. S32(2007)

129. City of Chicago v. Morales, 687 N.E.2d 53, 58(Ill., 1997)(group public lingering and one of group is also a member of a criminal street gang); Silvar v. Eighth Judicial Dist. Court ex rel County of Clark, 129 P.3d 682,687(Nev. 2006). See also supra notes 29-31 and accompanying text. The constitution prohibits criminalizing a person's thoughts of committing a crime when unaccompanied by any conduct that is even mildly corroborative of that criminal purpose. But see contra, Kerry M. Diggin, Vagrancy and Related Offenses, 77 Am.Jur. 2d S1, n.5(2007)

130. Carter v. State, 814 A.2d 443, 445(Del., 2002)(state supreme court expressly acknowledged that at no time did the government have probable cause to arrest the accused for any crime. Police thought accused might be street drug dealer, but did not observe any transactions. Therefore there was no basis for proving even a reasonable suspicion of a crime. Yet the court assumed officers had authority to
In reality, all three combinations seek to criminalize based only on legislative subjective suspicion. Commentators recognize that loitering crimes often sanction skirting constitutionally mandated proof standard of probable cause to arrest, but often fail to recognize the much more egregious constitutional violation. Such loitering statutes authorize not just arrest but conviction based on mere suspicion of some unspecified other crime.

Three State supreme courts in the six years prior to 9/11/2001, prohibited the state legislature from criminalizing loitering-lingering in public, when the rationale of the criminalization decisions was reasonable suspicion that at least one person participating in the lingering has a per se suspicious status, or that at least one such person was about to engage or had just engaged in drug related activity. A state supreme court in the six years after 9/11/2001, also prohibited the state legislature from criminalizing loitering-lingering in public, when the primary rationale of the criminalization decisions was subjective suspicion that the defendant’s purpose was the commission of a misdemeanor or violation. On the other hand, a state supreme court decided by implication, that even without reasonable suspicion the government can define a loitering crime to include the order accused to move from the area, and if he failed to do so (he did comply with this first command), this would have given the agents probable cause to arrest, and seemingly prosecute and convict of that provision of the loitering statute. This was so, in spite of the fact that the crime definition required that the government agent’s order to move must be “lawful”. State supreme court made no reference to this circumstantial element which limited the scope of the crime.

131. City of Chicago v. Morales, 687 N.E.2d 53, 58 (Ill., 1997) (City Council expressly claimed that gang membership and loitering created a justifiable fear); Silvar v. Eigth Judith Dist. Court ex rel County of Clark, 129 P.3d 682, 687 (Nev. 2006) See, Jordan Berns, Is There Something Suspicious About the Constitutionality Of Loitering Laws?, 50 Ohio St. L. J.717, 718 (1989) (asserting that as originally adopted in the United States, loitering crimes were enacted to thwart potential of the idle poor to commit crimes)

132. See Berns, supra note 131 at 724, 733, and 734.

133. City of Chicago v. Morales, 687 N.E.2d 53, 58 (Ill., 1997) (criminal street gang member); Johnson v. Athens Clark e County, 529 S.E.2d 613 (Ga., 2000) (drug related activity); State v. Muschkat, 706 So.2d 429, 43 (La., 1998) (drug related activity)

criminalization of a refusal to comply with a “command” that the citizen “move on” from a public street. 135

Loitering and Vagrancy crimes are among the most enduring examples of American governments felt need to criminalize based only on suspicion. 136 Ironically, even the Model Penal Code, the icon of criminal law reform, adopted a loitering crime that sanctioned criminalization based on suspicion. 137 Consequently, even several revised penal code states have adopted loitering crimes mimicking the MPC, which authorize criminalization based only on suspicion. 138

The rather meager precedent of the last dozen years, however, is some indicator that current state supreme courts, in contrasts, to earlier United States Supreme Court and some commentators and State Supreme Courts adopting that court’s reasoning, are more likely to reject the constitutionality of these crimes, as well as the principle that the insertion of a mens rea element, particularly, the old common law inherently ambiguous concept of “specific intent” or even “purpose” as defined in modern codes, is a significant factor boosting the constitutionality of such loitering crimes. 139 These current courts thereby recognize the reality that a person’s purpose cannot be determined by his lingering in public, nor can a person’s objective, if any, be discerned by the time of the day at which the lingering takes place, and inserting in the crime’s definition words such as “suspicious circumstances” does nothing to logically link the actor’s lingering with an intent to commit any specific crime. 140

3.5 CRIMINALIZATION OF SUSPICION VIA DISORDERLY CONDUCT STATUTES
Why They Are PROPERLY CHARACTERIZED as THE CRIMINALIZATION OF SUSPICION & EVALUATING Pre & Post 9/11/2001 State Supreme Court Decisions Pertinent to the Issue of CONSTITUTIONALITY OF CRIMINALIZATION OF SUBJECTIVE & REASONABLE SUSPICION IN A DISORDERLY CONDUCT CRIME – CASE OUTCOMES & ANALYSIS

Disorderly conduct crimes sometimes include provisions which as interpreted by state supreme courts sanction criminalizing based on the subjective suspicion of a government agent or the

135. Carter v. State, 814 A.2d 443, 445(Del., 2002)(police thought accused might be street drug dealer, but did not observe any transactions. Therefore there was no basis for proving even a reasonable suspicion of a crime)

136. See Berns, supra note 131, at 718

137. Model Penal Code, S 250.6(1985)

138. See Berns supra note 131, at 727-30

139. See supra note 130 and accompanying text; Berns supra note 131 at 730-35.

140. See supra notes 70, 128-129, and accompanying text.
legislature that a crime might take place, or that perhaps a more serious crime is likely to occur some time in the future.  For example, a state supreme court has recently held that disorderly conduct can be constitutionally criminalized based only on a police officer’s subjective belief that the accused is suspicious, which prompts the officer to initiate an encounter with the accused, and the person’s reaction by cursing the officer, and inquiring why the officer was harassing him. Of course, if a person who was not a government agent acted on the same subjective suspicion his action would be characterized as not an encounter but a confrontation, and the person confronted would be authorized to curse and inquire about the reason for the confrontation. When encounters based solely on subjective suspicion were first sanctioned by the United States Supreme Court, its primary if not only rationale was that a government agent like any other person should be allowed to attempt to engage another person in the same public space in a conversation, but such an agent ran the same risk ran by any other person that the person asked to respond might tell him/her to “get lost” in no uncertain terms.

Three state supreme courts in the six years prior to 9/11/2001, sanctioned the constitutionality of criminalizing legislative subjective suspicion found in definitions of the crime of disorderly conduct. While in the six years after 9/11/2001, there were two dozen state supreme court decisions interpreting the elements and the constitutionality of the elements of the crime of disorderly conduct, none of these courts interpreted and construed the crime to substantively focus on the criminalization of suspicion or its constitutionality.

In sanctioning the power of the government to criminalize suspicion via a definition of disorderly conduct, two state supreme courts, shortly before 9/11/2001, were willing to subordinate an express constitutional right – speech, to the power of the government to criminalize a verbal threat of multiple homicides to be committed at some unspecified time in the future, and without requiring

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141. Johnson v. State, 37 S.W. 3d 191, 194(Ark., 2001)(government agent subjective suspicion); Smith v. City of Picayune, 701 So.2d 1101(Miss., 1997); In the Interest of A.S., 626 N.W.2d 712, 717(Wis., 2001)(state legislature subjective suspicion)


143. See supra note 13 and accompanying text. See also discussion in Raymond, supra note 15, at 126-27. Author’s principal conceptual theses and evaluation is that a circumstance, the character of a neighborhood, when asserted by the government to be one high in the incidence of crime, while relevant arguably to a determination of reasonable suspicion, should not be a factor upon which to significantly base a finding of reasonable suspicion absent specific evidence based on the behavior of the particular suspect.

144. Johnson v. State, 37 S.W. 3d 191, (Ark., 2001); Smith v. City of Picayune, 701 So.2d 1101(Miss., 1997); In the Interest of A.S., 626 N.W.2d 712, 717(Wis., 2001).
that the elements of the crime as interpreted, include the circumstance that the accused at least have the present ability to execute the threat.\textsuperscript{145}

Section 4 – Summary of Findings – Reform Proposals - Perspectives & Conclusion

4.1 U.S Supreme Courts position over time - Constitutionality of Criminalizing Suspicion

The Hibbel decision was a substantial departure from most of the court’s pertinent precedent which had rejected the constitutionality of criminalizing suspicion\textsuperscript{146} In fact, the decision marks only the second time in the court’s history when it signaled its willingness to sanction criminalization based on only subjective suspicion.\textsuperscript{147} The first time, the infamous and yet to be expressly repudiated Korematsu decision, was also made in the wake of a major “terrorist” attack.\textsuperscript{148} In addition, the Nevada Supreme Court in reaching the same decision in the same case as the Court, expressly justified its decision in part by express reliance upon the 9/11 attack.\textsuperscript{149} In combination, these two facts are circumstantial evidence that the attack might well have influenced the majority of the United States Supreme Court in Hibbel. Since that 2004 decision, the court has not revisited the merits of the constitutional analysis in Hibbel, but has cited to the case favorably three times.\textsuperscript{150}

4.2 State Supreme Courts overall position re Constitutionality of Criminalizing Suspicion

Prior in the six years immediately proceeding 9/11/2001, a majority of state supreme courts(10 of 17) in a majority of decisions(12 of 19) sanctioned the constitutionality of criminalizing

\textsuperscript{145}.  Johnson v. State, 37 S.W. 3d 191, 194-195(Ark., 2001); In the Interest of A.S., 626 N.W.2d 712, 720(Wis., 2001).

\textsuperscript{146}.  See supra notes 19-49, and accompanying text.

\textsuperscript{147}.  See supra note 28 and text accompanying and following that note.

\textsuperscript{148}.  See supra notes 19-20, and 23 and accompanying text

\textsuperscript{149}.  See supra note 76.

\textsuperscript{150}.  See supra note 52 and accompanying and following text.
suspicion. After (in the six years immediately following 9/11/2001, a majority of state supreme courts (11 of 16) in a majority of decisions (14 of 19) sanctioned the constitutionality of criminalizing suspicion. In addition, thirteen state supreme courts have cited the Supreme Court’s Hibbel decision. Seven of these courts cited Hibbel favorably, and only one disagreed with its decision sanctioning the constitutionality of criminalizing suspicion.

This means that in the last dozen years, almost half of the states (23), and over two thirds of the state supreme courts this article identified as faced with this decision, sanctioned (although five supreme courts sanctioned in one or more case, and prohibited in one or more cases) the criminalization of suspicion. Hence this article’s primary research question of whether in the six years since the bombing of the World Trade Towers and the Pentagon, the nation's highest appellate courts were, on balance, more willing to acquiesce in criminalization based on suspicion must be answered tentatively No! for the state supreme courts, but based on the Hibbel decision, tentatively Yes! for the United States Supreme Court.

4.4 FEDERALISM FINDINGS & THEIR IMPACT on the CONSTITUTIONALITY OF CRIMINALIZING SUSPICION

Whether it is currently constitutional in America to criminalize based on subjective or objective suspicion depends not only upon the federal constitution and its interpretation by the United States Supreme Court, but on state constitutions as interpreted by state supreme courts. State Supreme Courts have the power to hold that rights guaranteed by their respective state constitutions provide greater protection to individual rights than that provided by the national constitution. Hence the question becomes how willing were state supreme courts to interpret their respective constitutions to further limit criminalization based on suspicion. The scorecard follows.

In five cases, five State Supreme Courts during the period of this study, 1995-2007, held that their constitution provides no more protection of an express constitutional right than that provided by the national constitution when these rights were asserted to challenge the direct or implied criminalization of suspicion. The Connecticut Supreme Court, for example, held that while its

151. See supra notes 66 and 73, and accompanying text.

152. See supra notes 76 and 78, and accompanying text.

153. See supra note 57, and accompanying text.

154. See supra notes 58-65, and accompanying text.

155. Neil Colman McCabe, State Constitutions and Substantive Criminal Law, 71 Temp. L. Rev. 521, 526, and 535-536(1998)(making reference to other authorities identifying state constitutional restrictions on criminalization, and noting longstanding tendency of state courts to more strictly that the federal courts limit criminalization)
state constitution could provide more protection than the national constitution, a Connecticut citizen claiming independent violation of a state constitutional right, must prove that violation by satisfying the ultimate burden of persuasion standard—beyond reasonable doubt.\textsuperscript{157} Similarly, the Maryland, Tennessee, and Wisconsin Supreme Courts construed their constitutions’ search and seizure provision to be identical in intent and purpose with the fourth amendment, and therefore providing no more protection from government searches and seizures than that provided by the fourth amendment of the United States Constitution as interpreted by the United States Supreme Court.\textsuperscript{158} These courts failed to recognize that taken literally this assertion would negate the need for their comparable state provisions, unless the national constitution’s fourth amendment was somehow repealed or substantively amended to narrow its protection. Most significantly for the focus of this article, these state supreme courts eliminated the search and seizure provisions of their constitutions as a source to provide more protection against government criminalization of suspicion.

On the other hand, five other state supreme courts during this most recent dozen years applied or presumed that their state constitution should be applied to a constitutional challenge to an express or implied criminalization of suspicion first, because the state constitution provided more protection than the comparable national constitution provision.\textsuperscript{159}

\textsuperscript{156} Byndloss v. State, 893 A.2d 1119, 1121 (Mly. 2006); State v. Bryant, 614 S.E.2d 479, 485 (N.C., 2005) (unless expressly invoked by the accused, court will apply the due process standards of the national constitution, although it reconfirmed possibility that the state constitution’s “Law of the Land” could be interpreted to provide more due process protection); Stave v. Daniel, 12 SW3d 420, 424 (Ten. 2000); City of Sumner v. Walsh, 61 P.3d 1111, 1117 (Wash., 2003) (unless expressly briefed, court assumed that person making several constitutional challenges to a juvenile curfew statute with civil sanctions, was relying on the national constitution); In the Interest of A.S., 626 N.W.2d 712, 719 (Wis., 2001) (Wisconsin constitution’s protection of speech no greater than that provided by first amendment of national constitution); State v. Griffith, 613 N.W.2d 72, 77 (n.10) (Wis. 2000)

\textsuperscript{157} Ramos v. Town of Vernon, 761 A.2d 701, 710 and 717 (Con., 2000) (Under this standard, defendant failed multiple times to convince the court that several state constitutional protections were violated by the Juvenile Curfew crime)

\textsuperscript{158} Byndloss v. State, 893 A.2d 1119, 1121 (Mly. 2006); Stave v. Daniel, 12 SW3d 420, 424 (Ten. 2000); State v. Griffith, 613 N. W.2d 72, 77 (n.10) (Wis. 2000). See also State v. Klein, 698 N.E.2d 296, 299 (Ind., 1998) (failure to specifically make separate argument and precedent reference results in waiver of the accused independent state constitutional claim that the criminalization was void for vagueness)

\textsuperscript{159} State v. J.P., 907 So.2d 1101, 1112 (Fla., 2005) (court expressly asserted that the state constitution’s right of privacy provides more protection to such interests as that provided by the federal constitution); State v. Wardell, 122 P.3d 443, 446 (Mont., 2005); State v. Porelle, 822 A.2d 562, 565 (N.H., 2003) (with regard to due process, void
4.5.0 Curbing/Shrinking Criminalization of Suspicion—
Identifying Why the Supreme Courts Sanction The
Constitutionality of Criminalizing Suspicion - Reforming
the Reasonable Suspicion Doctrine – Via Connecting to
Appropriate Standards of Substantive Criminal Law –
& General Overview Perspectives

In the forty years since its invention by the United States Supreme Court, the reasonable
suspicion proof standard has drastically altered for the worse the relationship between the liberty
interests of American citizens and their governments.\textsuperscript{160} Most pertinent to the inquiry in this article,
the doctrine has played a major role in expanding the government’s ability to criminalize based only
on suspicion.\textsuperscript{161} Governments are empowered by the Supreme Courts, despite the absence of any
specific constitutional language or historical justifications, to seize citizens based on an ephemeral
proof standard, which as Justice Douglas, the lone dissenter in Terry vehemently argued, should only
have been created and sanctioned by express constitutional amendment.\textsuperscript{162} Once sanctioned,
legislatures are free to criminalize any innocuous conduct or even innocuous omissions that can be
fairly characterized as a lack of cooperation by any citizen with any plausibly permissible
 investigatory technique employed by the government during this temporary seizure.\textsuperscript{163}

Most egregiously racial minorities and the underclass appear to have borne a disproportionate
likelihood of being stopped, and eventually criminalized on the basis of only reasonable suspicion of

\begin{itemize}
\item \textit{for vagueness claim); State v. Mendez, 970 P.2d 722, 726(Wash., 2000)(preeminent
and more protection of the right of privacy under the state constitutional provision comparable to federal fourth amendment); Sales, et. al. v. City of Charleston, 539 S.E.2d 446,458(W. Virg.,2000)(state supreme court, without reference to the minimum standards of the national constitution, makes reference only to its own precedent establishing and articulating both its equal protection doctrine, or due process void for vagueness doctrine)]
\end{itemize}

\textsuperscript{160.} Estrada, supra note 18 at 287; Scott Sundby, A Return To Fourth Amendment Basics:
Undoing The Mischief of Camera And Terry, 72 Minn. L. Rev. 383(1988)

\textsuperscript{161.} See supra notes 15-16, 26, 60-61, 73, 76, and 91-92, and accompanying text. But see contra
cases discussed notes 29-31, 78-79, and 133, and accompanying text.

\textsuperscript{162.} Supra notes 15, 73, and 76; Terry v. Ohio, 392 U.S. 1,38-39(1968)(Justice Douglas
pointed out that arrest and searches by the English based only on suspicion, were
the very evils that the fourth amendment, and the probable cause standard were
meant to prevent, Id. at 37).

\textsuperscript{163.} See supra notes 26, 60-61, 82, and 91-92, and accompanying text. But see contra cases
discussed notes 64-64, and 68.
generic criminality.  

Abolition is appropriate, reform is necessary, and current sound substantive criminal law principles are the sources recommended for such reform. A proposal follows.

Only evidence that provides at least a twenty-five percent probability that a specific person or his cohorts committed or are in the process of committing or imminently committing a specific crime (or specific traffic violation if the stop is of a motorist) should constitute a basis for finding reasonable suspicion to justify the government seizing by stopping such an individual. Without this reform, the reality is that given the fact that in the penal codes of 2007 there are hundreds of crimes, and in addition local legislatures have enacted ordinances with scores of additional crimes, the government has carte blanch to continue to pursue the options of reconstructing after the seizure a plausible reasonable suspicion claim based on generic reference to criminality, or to one or more of the hundreds of crimes located in current state and locale penal codes. But if only a specific crime can be the basis of the reasonable suspicion, element identification and evaluation is determinative of the probability that there was evidence to justify a one in four chance that such a crime had been or was in the process of being committed. This identification and evaluation is based on principles sufficiently complex that it should have the effect of substantially reducing the ability of the government to easily reconstruct post hoc “reasonable suspicion”. Another consequence of redefining reasonable suspicion to focus on a specific minimum probability that a specific person or his cohorts committed or are in the process of committing a specific crime is that it would constitutionally ban criminalizing reasonable suspicion of some future (days/weeks/years) in time commission of even a serious crime.


165. See supra note 15, and accompanying text.

166. Dannye Holley, Culpability Evaluations in The State Supreme, Courts, 34 Akron L. Rev. 401(2001)(reporting on a national survey of state legislative drafting councils. One of the principal inquiries of the survey was to determine the number of crimes currently contained in its states’ penal code); Wayne A. Logan, The Shadow Criminal Law of Municipal Governance, 62 Ohio St. L. J. 1409(2001)

167. See, e.g., In the Interest of A.S., 626 N.W.2d 712, 716(sanctioning criminalization of reasonable suspicion of the future commission of homicide)
The reform of the reasonable suspicion standard would also signal the death knell for the current prevalent criminalization of the refusal of sex offender to comply with the universal enactment of sex offender registration statutes. As documented earlier in this article, such crimes are based only on legislative subjective suspicion that the entire universe of sex offenders is likely to commit another such crime. As also documented earlier, the Supreme Court has consistently barred criminalization based on the subjective suspicion of the government(executive) branch agents, including when that suspicion is based upon a lack of cooperation of the citizen with the government’s attempt to investigate and interact with the suspect. Furthermore, constitutional crimes cannot be created solely to vindicate subjective suspicion even in combination with the moral values of the current majority, especially if that moral value takes the form of a crime which criminalizes a distinct group for engaging in or failing to perform the same conduct as other similarly situated groups or persons do or omit.

The proposed specific definition of reasonable suspicion would also cast doubt on the policy wisdom of a commentator’s recommendation to focus a finding of reasonable suspicion on a generic, subject to Post hoc reconstruction, circumstantial element, abnormal behavior in the specific neighborhood when that neighborhood is characterized by executive branch government agents/agencies as “high crime”. Such a position is tantamount to telling the government to assert, after the fact, based on any source or even no source that the accused behavior was atypical for the neighborhood. The appropriate focus is not on atypical neighborhood behavior, but on a factual basis to suspect that the accused has engaged in or is engaging in the “conduct” specified as an element(s) of any crime from among the hundreds of specific crimes in state and local penal codes.

4.5.1 Curbing/Shrinking The Criminalization of Suspicion – Identifying Why the Constitutionality of Criminalizing Suspicion is Sanctioned - REFORM of The

168. See supra notes 93, and accompanying text.

169. See supra note 94, and accompanying text.

170. See supra notes 21-22, and accompanying text.

171. Lawrence v. Texas 539 U.S. 558, 581-584(2003)(J. O’Connor concurring, and authority cited therein)(Justice O’Connor expressly pointed out that the Texas Sodomy statue struck down on substantive due process grounds, was more appropriately declared unconstitutional as a violation of equal protection, and noting that those convicted of that crime would be required to register as sex offenders in four states, Id. at 581)

172. See Raymond supra note 15, at 126.

173. But see qualifying discussion supra notes 165-167, and accompanying text.
Void for Vagueness Doctrine - By Substituting a Constitutional Component of Current Substantive Criminal Law Element Analysis/Criminalizing Element Model—Crimes Must Include Conduct or Omission & Crimes Cannot Criminalize Status or Status & Innocuous Conduct or Omissions

The void for vagueness doctrine as it has evolved in the opinions of the U.S. Supreme and State Supreme Courts has always been conceptually flawed.¹⁷⁴ Most obviously, its two policy pillars, one focusing on the inability of an accused to discern, prior to engaging in conduct, what is criminalized, and the other, on the empowerment of law enforcement agents and ultimately the Trier of fact to arbitrarily, after the fact, determine what should be criminalized, are substantively identical with respect to what they suggest should be the nature of the appropriate evaluation of the minimal constitutional adequacy of a crime's definition.¹⁷⁵ The appropriate evaluation should embody the principle that converts the vagueness doctrine to a means to fully explicate the protection that should be provided by the national and state constitutions Ex-Post Facto Prohibitions.¹⁷⁶ NO ONE SHOULD BE CRIMINALIZED AFTER THE FACT, AND A LEGISLATURE ON PURPOSE OR BY POOR DRAFTMANSHIP CANNOT DELEGATE AUTHORITY IT DOES NOT HAVE TO CRIMINALIZE AFTER THE FACT. Hence government agents, the trial Trier of fact, and appellate courts cannot be delegated or assert the authority to criminalize after the fact.¹⁷⁷ Both inquiries are therefore unnecessary, as conclusively proven by the fact that the supreme courts almost always find that either both or neither are violated.¹⁷⁸


¹⁷⁵. See e.g., Silvar v. Eigth Judicial Dist. Court ex rel County of Clark, 129 P.3d 682,685(Nev. 2006)(following United States Supreme Court decision in Kolender v. Lawson, 461 US 352(1983) by asserting that the second concern is somehow different and of more significance than the first inquiry); State v. Porelle, 822 A.2d 562,565(N.H., 2003; People v. Stuart, 787 N.E. 2d 28,34(N.Y. 2003)(recognizing that two standards are “highly related”) -

¹⁷⁶. U.S. Const. art. 1 S 9; and art. 1 S 10(prohibiting Bills of Attainder and Ex-Post Facto Legislation by both the federal and state legislatures)

¹⁷⁷. Kolender v. Lawson, 461 US 352,(1983)(This conceptual view perhaps explains why Justice O'Connor would assert that of the two policy concerns underlying the vagueness doctrines, notice to potential accused and authorizing post-hoc criminalization by government agents and trial Trier of fact, the more important is the latter.

Even when reduced to a single inquiry, however, there is an even more fundamental flaw with the current conception of the void for vagueness doctrine. It is quintessentially a doctrine that is highly susceptible to post-hoc conclusory reasoning by the supreme courts, which by definition empowers them, but makes the constitutional protection highly ephemeral. The opportunity is provided these supreme courts to eyeball the words in the definition of the crime whose clarity is under scrutiny, make reference to the dictionary definition of those words, proclaim them “plain”, clear, and understandable, and therefore deny the claim that the vagueness doctrine was violated.

This is especially true because almost universally supreme courts place a heavy burden of persuasion on the accused who invokes the doctrine to prove that the crime as defined and as these courts have interpreted that definition violate the doctrine. Hence the real risk - the risk of unconstitutional legislative delegation of Ex-Post Criminalization authority is seldom mentioned and the task of standardizing an appropriate policy based protocol for evaluating that risk is almost never undertaken. This leaves the right embodied in the prohibition against Ex-Post Facto

Supreme Court focuses its analysis on only one of the two standards, the facts and outcome of the case graphically illustrate that the finding that the standard was violated also demonstrated that the other standard was also violated, Palmer v. City of Euclid, Ohio, 402 U.S. 544,546(1971)(per curium)Court held that “Suspicious Person” City Ordinance criminalization, was unconstitutionally vague because it failed to give persons prosecuted under it fair notice of what was “without visible or lawful business”. The procedural history of the case also indicated that a jury found the accused guilty of the offense, he was sentenced by a judge to a jail term, an intermediate court upheld the conviction, and the Ohio Supreme Court declined discretionary review because no substantial constitutional question was presented.

179. Silvar v. Eighth Judicial Dist. Court ex rel County of Clark, 129 P.3d 682,685-686(Nev. 2006); State v. Porelle, 822 A.2d 562,567(N.H., 2003)(Conclusionary nature of doctrine’s use by state supreme courts can be compounded. In this case, state supreme court conclusionarily determined that anti-stalking crime was not too vague, and then conclusionarily dismissed arguably pertinent United States Supreme Court precedent that supported the defendant’s constitutional challenge); In the Interest of A.S., 626 N.W.2d 712,717-718(Wis., 2001)(disorderly conduct crime is constitutional even if it prohibits conduct intertwined with specific constitutional protections as long as consistent with the legislature’s purpose in enacting the crime. See also Robinson, supra note 174, at 357(asserting that arguably the void for vagueness doctrine itself is an indefinite concept)


182. See Robinson, supra note 174, at 357 and 360. Twice Professor Robinson
criminalization vulnerable to the first definition of criminalization of suspicion identified in this article—enactment of crimes which have as their express or implied purpose the criminalization of suspicion.\textsuperscript{183} Reform is needed and proposed in the following paragraph.

First, for the reasons just discussed, all substantive and procedural components of the current void for vagueness doctrine, including the name, should be jettisoned.\textsuperscript{184} The current two inquiries are appropriately only components of the policy concern that implicates the express national and state constitutional right prohibiting per se any legislative attempt to delegate authority, it does not possess, to criminalize Ex-Post Facto.

To determine if a crime definition violates this right there are a sequential set of core inquiries, fully supported by current supreme courts authority, that all legislatures, courts, and lawyers should make. This article has reviewed specific precedent that establishes that the government cannot define a crime to criminalize solely thoughts, status, standing and lollygaging in public, or first amendment protected speech and conduct, or a combination thereof.\textsuperscript{185} Therefore a constitutional crime definition cannot consists of only these things or a refusal of an accused to obey a government agent's demand that the accused cease thinking, the status, sitting, standing, or loitering in public, or otherwise engaging in conduct expressly protected by the national constitution, based only on the government’s suspicion that the accused has committed, is committing, or will imminently commit some generic or even specific other crime.\textsuperscript{186} This is true because such definitions of crimes do not comes close to agreeing, at least by implication, with this principle. First he asserted that the purpose of the void for vagueness doctrine was to prevent legislative delegation of the power to criminalize. Later, he cites to a state court decision which suggest to him that the vagueness doctrine serves to prevent common law criminalization. The decision, however, struck down a statute which sought to authorize criminalization based on common law recognition, but of crimes which were not already legislatively defined as crimes. Hence a clear-cut example of an attempt to delegate Ex-Post Facto criminalization authority to courts.

\textsuperscript{183} See supra text proceeding note 16, and notes 133-135 and accompanying text.

\textsuperscript{184} See commentator critiques supra note 166.

\textsuperscript{185} See supra notes 29-30, ---, and accompanying text. See also Simmons, supra note 128, section 23, n.76(2007)

\textsuperscript{186} See for example Smith v. City of Picayune, 701 So.2d 1101(Miss., 1997)(sanctioning the criminalization as disorderly conduct of a refusal of a business owner to obey a police order to return inside his business building from standing on his business property with a baseball bat when other people were causing a disturbance on that property)
even hint at conduct that can constitutionally be criminalized, thereby leaving the criminalization decision to be made Ex-Post Facto by executive branch government agents, the Trier of fact, and ultimately appellate courts.

There is a large body of supreme courts precedents that currently erroneously sanction the constitutionality of criminalizing suspicion by allowing legislatures to draft a definition of a crime which only combines bad thoughts in the form of a culpability level such as “specific intent” with status and/or loitering in public as a basis to assert they signal suspicion of criminality. Such crime definitions create the grave risk of Ex-Post Facto criminalization based on the collective creative skills of government executive branch agents to conjure and morph suspicion from these constitutionally protected bases. Similarly, defining a crime to include only status, and/or innocuous, pervasive behavior as a basis to assert they signal suspicion of criminality also create the same grave risk of legislative delegation of Ex-Post Facto criminalization authority.

Even if the conduct element of such crimes were not constitutionally protected, each conduct category identified in the proceeding paragraph, fail as a logical basis to infer the conscious objective to commit some unspecified or more appropriately a specific other crime. Hence these legislative crime definitions open the door to sanction criminalization which is based only upon the executive branch of the government’s suspicion that was never articulated before the seizure, and therefore can be created and crafted after the fact. Similarly, a substantial risk of delegating Ex Post Facto criminalization authority is also present when the legislature defines a crime to include only references to thoughts, status, or constitutionally protected conduct, including loitering, coupled with a generic reference to “under circumstances” or similar language. Combining words referencing that which cannot be criminalized, with language making reference not to what the accused has done or not done but to generic “externalities” is a relatively obvious attempt to authorize criminalizing suspicion by providing the opportunity for executive branch government agents to construct after the fact the necessary specifics of such circumstances.

187. See discussion supra notes 128-129, and accompanying text.

188. See for example discussion in City of Chicago v. Morales, 687 N.E.2d 53, 60(III., 1997)(courts err in sanctioning constitutionality of loitering with intent to beg, but this basic drafting protection could be honored if instead criminalization was based upon the actual conduct of begging in public.)

189. See discussion supra notes 29-31, and accompanying text of the national constitution’s ban on criminalizing suspicion by focusing solely or primarily on status. See also: City of Chicago v. Morales, 687 N.E.2d 53, 60(III., 1997)(making reference to several pre 1996 state supreme court decisions in which the courts sanctioned the constitutionality of loitering statues based on generic references to “under circumstances or in a manner”); Silvar v. Eigth Judicial Dist. Court ex rel County of Clark, 129 P.3d 682,686(Nev. 2006)(relying on an Alaska Supreme Court decision that the vagueness doctrine was violated when the crime criminalized a known prostitute from standing around in public); In the Interest of A.S., 626 N.W.2d
A constitutional crime definition must include specific, non-constitutionally protected, conduct, possession, or an omission element, or alternatively a generic reference to conduct coupled with a specific result element. This minimum content requirement is clear and any legislative draftsperson should be able to comply with this principle. A failure to comply signals an attempt by the legislature to delegate Ex-Post Facto criminalization authority, an authority the legislature does not possess. However, a crime which is defined by generically making reference to any act or course of conduct and which fails to identify a specific result element would also be unconstitutional because it also violates this proposed core constitutional principle. This core principle and these

712, 716 (Wis., 2001) (a person could be convicted of disorderly conduct if he engaged in unreasonably loud speech in a public or private place, “under circumstances” that tend to cause a disturbance). The Wisconsin Supreme Court sanctioned the constitutionality of this obvious attempt to criminalize based only on suspicion of the risk that some disturbance undefined both with respect to magnitude or temporal relation to the speech of the accused, might take place. In so doing, the court failed to recognize that a generic reference to circumstances is to externalities outside the control of the accused, which could include fears and biases of other persons. The statute did not require that the state prove that the accused was aware of or in some way responsible for these unspecified circumstances.


191 People v. Stuart, 787 N.E. 2d 28, 34 (N.Y. 2003) (citing the U.S. Supreme Court decision in Coates v. Cincinnati, as authority to support its assertion that when a crime definition fails to include a conduct element it is “void” for all purposes. This acknowledgment also signals the lack of necessity of bi-furcating vagueness challenges as on its fact or as applied. A crime definition found flawed under the revised standard is so defective that it cannot be fairly applied to any case, because even if the accused arguably engaged in societally harmful conduct with some minimum culpability it was not within the definition of this offense prior to his conduct, and whether it was appropriate to criminalize his behavior was in fact only determined after the fact by a court and/or the Trier of fact)

192 People v. Stuart, 787 N.E. 2d 28, 29 (N.Y. 2003) (1999 New York legislature’s criminalization of “stalking” defined as any intentional course of conduct (no specific conduct specified, and almost all conduct in culpability concept terms is purposeful or knowing), with no legitimate purpose (a mish mash of pseudo culpability and/or circumstantial element not related to the specific circumstances surrounding the
two corollaries are all the appropriate constitutional scrutiny courts should give the criminalization work of a legislature in defining the elements of a crime, and it is sufficient to prevent gross abuse and curtail the most blatant attempts to criminalize based only on suspicion. Of course, once a crime clears these fundamental definition hurdles, it could still be challenged on other constitutional grounds such as substantive due process or equal protection.193

4.5.2 Curbing/Shrinking The Criminalization of Suspicion –
Identifying Why the Constitutionality of Criminalizing Suspicion is Sanctioned - REFORM of The Ex-Post Facto Right to Appropriately Use it to Prohibit Criminalizing Suspicion Via Status + Innocuous Omission Crimes – Lessons of 3.3. > 3.3.1 Cases

As just discussed, the Vagueness doctrine is best understood as a necessary corollary of the constitutional protection against Ex-Post Facto legislation. The Ex-Post Facto right itself, however, fails to protect against state and federal legislation which is designed to directly criminalize subjective suspicion based on a status given to the accused by the government, coupled with the failure of the accused to register that status with the government that bestowed and has actual pre-knowledge of that status. The only comprehensive constitutional protection against such legislation is found in the reform of the ‘reasonable suspicion’ protection proposed earlier in this summary and reforms section.

The federal and state constitutions, however, not only prohibit legislative enactment of Ex-Post Facto crimes, but also Ex-Post Facto criminal punishments.194 State Supreme Courts during the crime event, and highly susceptible to post hoc determination) and targeting(undefind) a particular person, if that conduct was likely to have placed a reasonable accused on notice that a reasonable victim might be placed in fear of material(undefind)harm(possible emotional state of the victim, but not a required result). Alternatively, the crime required proof both of a specific conduct and a specific result. Hence the first but not the second basis for committing stalking violates the corollary principle articulated in the text, and creates a grave risk of delegation of Ex-Post Facto criminalization authority. Yet, the New York Court of Appeals purporting to apply the amorphous current void for vagueness doctrine sanctioned the constitutionality of this crime, including the defective definition of the crime)]


194. U.S. Const. art. 1 S 9; and art. 1 S 10; Wright v. Superior Court, 936 P.2d 101, 109-110(Cal., 1997)(dissent cited to Collins v. Youngblood, 497 U.S. 37, 43(U.S. 1990) (cited for this proposition). See also law review articles including ALR re state Ex-Post Facto constitutional provisions.
period of this study, 1995-2007, rejected claims that legislative criminalization based on suspicion violated Ex-Post Facto constitutional protection. Some of these courts did so in the context of sanctioning a legislative decision which twice violated the purpose of Ex-Post Facto protection, first by criminalizing subjective suspicion by making it a misdemeanor to refuse to register or re-register as a sex offender, and second, by then letting the misdemeanor conviction serve as the basis for a recidivist conviction – thereby changing the crime’s punishment grade to a felony. The court reasoned that because the failure to register continued after the effective date of the change in the crime to a felony, the accused could be prosecuted based on his post enactment continuing failure. The court relied entirely on its court created inferior authority “continuing crime” doctrine, and failed to cite, analyze or adequately consider the superior authority of the national or state constitution. The California Supreme Court’s reliance on its own doctrine, well after the conduct of the accused, as the sole basis to sanction the imposition of the additional punishment, violated the principle that no entity has the authority to Ex-Post Facto significantly enhance the punishment for a crime. In addition, the court also failed to adequately consider that it had interpreted this status offense to be a strict liability offense. Hence the court’s holding was tantamount to finding that after the accused acted it had the power to declare a felony that consisted of doubling the significance of doing nothing, and that the state need not prove that the accused ever was aware of even the risk that he had violated or was currently violating his duty, thereby obliterating any meaningful protection of that component of the ex-post facto right that prohibits after the fact crime penalty enhancements. In a maturing constitutional democracy, our minimal sense of fair play and reason requires that the constitutional Ex Post Facto protection should be held to prevent this result from ever reoccurring.

4.5.3 The Hibbel Constitutional Quandary – Criminalizing Specific Acts or Omissions that Constitute Failure to Cooperate with A Government Agent Acting with Reasonable Suspicion - Substantive Due Process Scrutiny of Minimal Rationality of such Criminalization

Notwithstanding this article’s proposed reformed more precise and more stringent reasonable

195.  Wright v. Superior Court, 936 P.2d 101, 102(Cal., 1997)
197.  Id. at 108.
198.  Id.
199.  Id.
200.  See supra notes 99-102, and accompanying text.
suspicion standard, and the reformed vagueness doctrine outlined above, a legislature can still constitutionally criminalize specific conduct or omissions (including refusal to comply with a government agent’s sanctioned investigatory command) that occur when the government has reasonable suspicion that the suspect has committed, is in the process of committing, or will imminently commit a specific crime. A legislature making this decision can even earn good to go points from a supreme court reviewing the constitutionality of the crime, by including as an exception, the totally superfluous language that the crime does not encompass innocent conduct specifically protected by the national and/or state constitutions.\(^\text{201}\)

Criminalizing the refusal to provide identification when the government only has such suspicion is the quintessential example of such crimes. Most state supreme courts after 9/11/2001 have agreed with the United States Supreme Court that it is constitutional to criminalize clearly such lack of cooperation with a government agent acting on such suspicion, even if the uncooperative conduct or omissions have no rational/logical nexus as proof of the specific crime that was originally suspected.\(^\text{202}\)

In 2008, the national and state substantive due process right should bar criminalization of reasonable suspicion when coupled with only a failure to cooperate with government attempts to resolve that suspicion which has no rational/logical nexus as proof of the specific crime that was originally suspected.\(^\text{203}\) Criminalization based on reasonable suspicion, like all criminalization

\(^\text{201}\) Sales, et. al. v. City of Charleston, 539 S.E.2d 446,458-459(W. Virg.,2000)(constitutionality of juvenile curfew crime shielded in part against void for vagueness attack by fact that crime has exceptions for first amendment protected conduct. Of course, even if the exception was omitted, constitutionally protected conduct could not be criminalized)

\(^\text{202}\) See supra notes 60-63, and accompanying text. See also State v. Porelle, 822 A.2d 562,566(N.H., 2003)

\(^\text{203}\) See supra notes 30, 37, and 42, and accompanying text. Lawrence v. Texas 539 U.S. 558, 565(2003)(protection of liberty under the fourteenth amendment has a substantive dimension of fundamental significance in defining the rights of the person); Donald L. Beschle, Lawrence Beyond Gay Rights: Taking The Rationality Requirement For Justifying Criminal Statutes Seriously, 53 Drake L. Rev. 231,253-275(2005); Note, Andrew J. Liese, We Can Do Better: Homeless Ordinances As Violations of State Substantive Due Process, 59 Vand. L. Rev. 1413, 1436(2006)(n. 143, asserting that national constitution substantive due process standard is deferential to legislative judgments in the development and employment of the rational basis test. Further asserting that the tests has two sequential prongs. The first prong evaluating whether the legislation seeks to achieve a legitimate government interests, and second, whether the method embodied in the statute is rationally related to that interest. Thereafter, Id. at 1437-33 identifying case authority supporting theses that state substantive due process constitutional doctrines provide potentially more protection against criminalization of status and some other implied criminalization of suspicion that on balance unjustly injures liberty interests of people)
decisions, implicates the most basic of substantive due process principles, because it does substantial and in most instances irreparable injury to the liberty interests of the accused. 204 This principle unearths another fatal flaw of the majority opinion in Hibbel. 205 The court’s holding was a stark admission that the request for identification was not rationally related to the investigation and proof even of probable cause of the alleged assault, because if it were, it would have been plausibly incriminating, and the accused therefore would have been entitled to invoke his privilege against self-incrimination. No person should be criminalized and thereby be deprived of or have their liberty threatened on only a two percent (current standard parameter) or even a twenty-five percent probability that he has committed some other crime, simply because the person refuses to cooperate with a government investigatory technique which has no rational/logical relationship to proving guilt of the specific crime for which he is suspected.

4.6. Conclusion

Fear fuels sanctioning the criminalization of suspicion. 206 The more people fear the more they tolerate government encroachments on liberty, including the very serious encroachment which was the focus of this study, the criminalization of suspicion. 207 The more the people who represent the government fear, the more they ask the people to tolerate their authority to address their fear in part by criminalizing based on only suspicion. 208 This article has demonstrated the

204. See Beschle, supra note 202, at 255 (criminal statutes threaten liberty interests protected by substantive as well as procedural due process) But see Atwater v. City of Lago Vista, 532 U.S. 318 (2001), holding that any one for whom there is probable cause of any crime (in our discussion, probable cause of reasonable suspicion) can be arrested if arrest is authorized by state law, and hence in the overwhelming majority of criminal prosecutions the accused loses his personal liberty and some of his property temporarily prior to trial, and risks further loss of property and his personal liberty if convicted of the substantial majority of crimes. Currently, the United States Supreme Court has accepted cert to decide that a state can without violating the national constitution arrest and search a person incident to that arrest, even if state law did not authorize arrest for the specific crime.

205. See discussion supra notes 23-32, and 44-49, and accompanying text.

206. See the dissenting opinion in the Nevada Supreme Court decision in Hibbel, Hibbel v. The Sixth Judicial District Court, 59 P3d 1201, (2002) (expressly characterizing the majority opinion seeking to sanction the criminalization of Hibbel, as one based on fear).

207. As Justice Brandeis noted in his concurring opinion in Whitney v. California, 274 U.S. 357, 375 (1927), The Framers knew that fear breeds repression.

208. Korematsu v. United States, 323 US 214, 236 (1944) (as Justice Murphy
reality of those precepts with an added dimension. Every time the legislature enacts a crime that criminalizes based solely or predominantly on suspicion or the refusal to obey a government investigatory technique authorized only by suspicion it empowers the executive branch of government. Every time a supreme court sanctions the constitutionality of legislation criminalizing based solely or predominantly on suspicion or sanctions the constitutionality of criminalizing a refusal to obey a government investigatory technique authorized only by suspicion, it empowers itself, the legislature, and derivatively the executive branches of government. This empowerment of all three branches of the government based only on suspicion is at the direct expense of the obvious liberty interest of the people not to be seized, prosecuted, stigmatized, and possibly imprisoned. Even more alarming are those state supreme court decisions during the dozen year period of this study which empowered primarily only the court making the decision by turning the authority world on its head. One of these courts subordinated both a specific constitutional right and related legislative intent to the court's manipulation of its doctrine scheme to sanction the constitutionality of the criminalization of suspicion. 209 Another state supreme court subordinated another express constitutional right - free speech by distorting an United States Supreme Court doctrine protecting that right, and empowering itself to criminalize suspicion by deciding to employ a "totality of the circumstances approach" which lent itself to case specific and post hoc criminalization of a verbal threat of future criminality by the court. 210 In effect, the court gave itself the power to skirt the constitutional Ex-Post Facto prohibition barring legislative criminalization after the actor’s conduct. 211

One basic precept of our constitutional democracy should remain as a bedrock principle no matter how perilous the times. The government should never be empowered to criminalize on the basis of suspicion. This article has proven that this is not the case today, and that reality is what all of us should really fear.

asserted in denouncing the majority opinion, that even rreal fear cannot justify criminalization/internment based on only suspicion which was in turned based only on racial guilt.

209. State v. Cook, 700 N.E.2d 570, 576-577(Ohio, 1998)(Ohio constitution had an express provision which denied its legislature the power to enact retroactive statutes. The court concluded that the intent of the legislature in enacting a sex offender registration crime and applying it to offenders already convicted was to create a retroactive crime despite the constitutional ban. Yet the court resorted to its own doctrines on retroactivity to conclude that by its doctrines the crime was not a retroactive statute)

210. In the Interest of A.S., 626 N.W.2d 712, 720(Wis., 2001)(threshold constitutional requirement to criminalize pure speech converted by court to sole requirement)

211. In the Interest of A.S., 626 N.W.2d 712, 720(Wis., 2001)