

# The Supreme Courts: Did September 11th Accelerate Their Sanctioning the Constitutionality of Criminalizing Suspicion?

DANNYE HOLLEY\*

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## I. INTRODUCTION

## A. Background

In 1972, in *Papachristou v. City of Jacksonville*,<sup>1</sup> the U.S. Supreme Court proclaimed: “A direction by the legislature to the police to arrest all ‘suspicious’ persons would not pass constitutional muster.” The Court in effect prohibited 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 whether that ruling, after September 11, 2001, can still be fairly characterized as the law of the land. Criminalization of status and innocuous omissions or conduct is criminalization based on subjective suspicion, and the U.S. Supreme Court has held multiple times that such criminalization violates the national Constitution.<sup>2</sup>

The U.S. Supreme Court has repeatedly held that criminalization of one’s status as a gangster, gang member, ex-felon, or addict violates the Constitution.<sup>3</sup> Criminalizing reasonable suspicion that societal-harmful conduct has occurred, is occurring, or is about to occur—even when a crime’s definition also includes innocuous omissions, possession, or conduct—is the criminalization of suspicion. The U.S. 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*<sup>4</sup> that the Constitution bars the government from criminalizing an American citizen’s failure to answer identification questions or 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, was committing, or was about to commit some unspecified crime. But in 2004, the Supreme Court decided in *Hiibel v. Sixth Judicial*

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\* Professor of Law, Texas Southern University; LL.M., University of California, Berkeley (1971); J.D., State University of New York—Buffalo (1970); B.A., State University of New York—Buffalo (1967).

1. 405 U.S. 156, 169 (1972). A year earlier, Justice Stewart asserted that the government lacks power to criminalize based solely on circumstances that provided a basis for concluding that the accused was a suspicious person. *Palmer v. City of Euclid*, 402 U.S. 544, 546 (1971) (Stewart, J., concurring).

2. See *infra* notes 21–22 and accompanying text.

3. See *infra* notes 30–32 and accompanying text.

4. 461 U.S. 352, 359 n.9 (1983) (concluding the privilege against self-incrimination is implicated when persons are compelled to answer such questions). The Court characterizes this freedom-protecting rule as “settled.” *Id.*

*District Court*<sup>5</sup> that the national Constitution permits a state to criminalize an American citizen's mere refusal to respond to a government agent's demand for identification where, at the time of the request, the agent reasonably suspects that the citizen had committed, was committing, or was about to commit any crime.<sup>6</sup>

In between these two decisions, September 11th happened.

This article evaluates whether the nation's highest appellate courts have, on balance, been more willing to acquiesce to criminalization based on suspicion since the attacks on the World Trade Center seven years ago.<sup>7</sup> The article seeks to accomplish this evaluation by comparing decisions of the United States and state supreme courts in the six years prior to September 2001 with decisions in the six years following the terrorist attack—have the courts with the greatest authority to sanction the criminalization of suspicion been more willing to do just that? Such a post-September 11th trend would be significant because, despite the attacks, neither the national nor state governments have abolished or amended pertinent federal and state constitutional protections of individual rights.<sup>8</sup>

This article first defines criminalization, suspicion, and reasonable suspicion, based on policy and precedents from these supreme courts. This article next combines these definitions to define what it means to “criminalize suspicion.”

The second section of the article begins with a comparative analysis of the opinion of the U.S. Supreme Court in *Hiibel* with the most pertinent of the Court's prior precedents.<sup>9</sup> The section continues with surveys of reactions to *Hiibel* by the U.S. Supreme Court, commentators, and the states' legislatures and supreme courts.<sup>10</sup>

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 September 11, 2001. This principal section of the article examines decisions of the state supreme courts that can be fairly character-

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5. 542 U.S. 177 (2004).

6. *Id.* at 184–85, 190–91.

7. For an article viewing the *Hiibel* decision as a diminution of individual rights possibly attributable to the September 11th terrorist attack, see Arnold H. Loewy, *The Cowboy and the Cop: The Saga of Dudley Hiibel, 9/11, and the Vanishing Fourth Amendment*, 109 PENN ST. L. REV. 929, 942–43 (2005).

8. One legislative caveat is the enactment of the USA PATRIOT Act, Pub. L. 107-56, 115 Stat. 272 (2001), which has been criticized as seriously undermining the liberty interests of the American people. See, e.g., Timothy Walczak, *We Can Be Both Safe and Free: How the PATRIOT Act Threatens Civil Liberties*, 76 PA. B. ASS'N Q. 21, 22 (2005) (“Key Provisions of the USA PATRIOT Act threaten fundamental American civil liberties.”); Jeremy C. Smith, Comment, *The USA PATRIOT Act: Violating Reasonable Expectations of Privacy Provided by the Fourth Amendment Without Advancing National Security*, 62 N.C. L. REV. 412, 453–54 (2003).

9. See *infra* Part II.A.

10. See *infra* Parts II.B–E.

rized as implicating the constitutionality of criminalizing suspicion. Criminalization of suspicion is implicated in prosecutions involving a variety of crimes and concepts: obstruction of justice, stop-and-identify statutes, loitering, disorderly conduct, anti-car-cruising, and the status of the suspect. Criminalization based on the status of a suspect occurs through sex offender registration requirements, juvenile curfews, and the prosecution of gang members and suspected terrorists. The great irony of these decisions—and one of the key findings of this article—is that in the vast majority of these decisions over the last dozen years, and even the decades preceding the study period, neither these courts nor the parties litigating these cases expressly recognized that criminalizing suspicion was implicated.<sup>11</sup> The article concludes by summarizing its key findings, recommending reforms to the most pertinent constitutional doctrines to curtail the criminalization of suspicion, and offering perspectives on those findings and reforms and their future implications.

### B. Definitions

In this article, “criminalization” means: (1) a decision of a legislature which expressly declares that the subject of the enactment is a crime, or (2) a decision of a legislature to proscribe conduct, omissions, or possession, backed by at least the threat of the deprivation of liberty following a prosecution that results in a conviction.<sup>12</sup>

In this article, “suspicion” means a subjective belief (and therefore no evidence that a government interest is actually at stake), by either the executive or legislative branch of the federal or state governments, that a specific or even unspecified crime has occurred, is occurring, or is immi-

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11. Since 1980, only three state supreme court opinions—and no U.S. Supreme Court decisions—have made reference to “criminalizing” and “suspicion” in the same paragraph. See *Commonwealth v. Dellamano*, 469 N.E.2d 1254, 1257 (Mass. 1984); *State v. Daniel*, 12 S.W.3d 420, 429–30 (Tenn. 2000) (Byers, Special J., concurring and dissenting); *State v. Worrell*, 761 P.2d 56, 61 (Wash. 1984) (Utter, J., concurring).

12. In approximately ten decisions over the past several decades, the U.S. Supreme Court adopted a strong presumption for the first definition of criminalization—as a strategy to subordinate 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” proceedings or prosecutions), to the decisionmaking of the national Congress and any and every state and local legislature. The Court has interpreted the reference to “criminal” to be a qualifying reference. See, e.g., *Smith v. Doe*, 538 U.S. 84, 92 (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, 257–58 (Alaska 2004), in which failure to obey a juvenile curfew ordinance had been declared a crime. For other commentators’ definitions of criminalization, see Stuart Green, *Why It’s a Crime to Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1542–43 (1997).

ment, thus affording a reason to at least “encounter” one or more persons.<sup>13</sup> An “encounter” is an attempt—which may be pursued even if the suspect takes public flight—by the government to consensually engage a person in a public space, or at that person’s home or place of business, to confirm or disprove the subjective suspicion that prompted the government to attempt to initiate the interaction.<sup>14</sup>

In this article, “reasonable suspicion” means a 2 to 15 percent likelihood, based on some evidence possessed by either the executive or legislative branch of the federal or state governments, that the person or persons “stopped” has committed, is committing, or will imminently commit a specific or even unspecified crime, therefore providing a reason to seize-stop or possibly to search-frisk a suspect, and, if thereafter justified—or if the government at least believes it is justified—to further seize and/or search, or possibly prosecute and convict a suspect.<sup>15</sup>

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13. The U.S. Supreme Court, in approximately ten decisions, piggybacked this “encounter” regime on top of the “reasonable suspicion” regime. *United States v. Drayton*, 536 U.S. 194, 203–04 (2002) (finding no seizure, only an encounter); *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) (finding no seizure); *Florida v. Bostick*, 501 U.S. 429 (1991) (finding no seizure, only an encounter); *California v. Hodari D.*, 499 U.S. 621, 629 (1991) (finding no seizure, only an encounter); *Brower v. County of Inyo*, 489 U.S. 593, 598–99 (1989) (finding seizure); *Michigan v. Chesternut*, 486 U.S. 567, 574 (1988) (finding no seizure, only an encounter); *INS v. Delgado*, 466 U.S. 210, 218 (1984) (finding no seizure, only an encounter); *United States v. Mendenhall*, 446 U.S. 544, 559–60 (1980) (finding no seizure, only an encounter); *Brown v. Texas*, 443 U.S. 47, 50 (1979) (finding seizure); *Delaware v. Prouse*, 440 U.S. 648, 659 (1979) (finding seizure, but no encounter since it is not possible to “encounter” a single moving vehicle); *United States v. Brignoni-Ponce*, 422 U.S. 873, 876 (1975) (finding seizure, but no encounter since it is not possible to “encounter” a single moving vehicle in the interior of the U.S.). Over the last dozen years, state supreme courts have decided over five hundred cases which implicated the West Key Number—Arrest, Key 68—which purports to identify decisions implicating what is and is not a seizure. See also Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 155–56 (2002) (criticizing the premise of the entire “encounter” regime by pointing out that empirical evidence casts grave doubt on the hypothesis that people feel free to leave a public discourse with a government agent initiated by that agent).

14. See generally Margaret Raymond, *The Right to Refuse and the Obligation to Comply: Challenging the Gamesmanship Model of Criminal Procedure*, 54 BUFF. L. REV. 1483, 1484–85 (2007) (focusing her theses on appropriate constitutional analysis of “encounters,” although needlessly qualifying “encounter” with the word “consensual”); Fern L. Kletter, Annotation, *Construction and Application of Rule Permitting Knock and Talk Visits Under Fourth Amendment and State Constitutions*, 15 A.L.R.6TH 515 (2007) (discussing attempts to encounter persons in their homes).

15. Twelve U.S. Supreme Court decisions are listed in the West Key Number System as having directly engaged in defining reasonable suspicion over the last four decades in the context of a seizure. *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 189 (2004) (finding reasonable suspicion); *United States v. Arvizu*, 534 U.S. 266, 277 (2002) (finding reasonable suspicion); *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) (finding no reasonable suspicion); *Florida v. J.L.*, 529 U.S. 266, 271 (2000) (finding no reasonable suspicion); *Illinois v. Wardlow*, 528 U.S. 119, 124–25 (2000) (finding reasonable suspicion); *Ornelas v. United States*, 517 U.S. 690 (1996) (holding that determination of reasonable suspicion should be made de novo); *Alabama v. White*, 496 U.S. 325, 331 (1990) (finding reasonable suspicion); *United States v. Sokolow*, 490 U.S. 1, 7, 9 (1989) (finding reasonable suspicion and defining it as some minimal level of objective suspicion); *United States v. Hensley*, 469 U.S. 221, 234 (1985) (finding reasonable suspicion); *Brown*, 443 U.S. at 51–52 (finding no reasonable suspi-

The major thesis of this article is that, given these definitions, there are two independent strains of criminalization based on suspicion. First, legislatures define certain crimes—for example, loitering—to directly criminalize suspicion as defined in this article, and the inquiry of this article is whether supreme courts since 2001 have increasingly sanctioned the constitutionality of such legislation. Hence criminalizing suspicion as defined herein has mirror-image connotations. The government perceives then reflects in the penal code that under certain or generic circumstances, certain conduct, omissions, or citizens' statuses are sufficiently suspicious to warrant government intervention and ultimately the possibility that the identified citizen will be convicted. Second, 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 investigative techniques. These courts, for example, have increasingly sanctioned the criminalization of lies 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.<sup>16</sup> Preliminary support for 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.<sup>17</sup> Such judicial sanctioning of the cri-

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cion); *Brignoni-Ponce*, 422 U.S. at 883 (finding no reasonable suspicion); *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (finding reasonable suspicion).

In the last decade, twenty-two state supreme court decisions were listed as having engaged in analyzing reasonable suspicion. Among the listed decisions, six of them actually address, directly and in detail, the definition of reasonable suspicion. See, e.g., *State v. Ramirez*, 100 P.3d 94, 98 (Kan. 2004) (finding one or two factors sufficient to constitute "reasonable suspicion"). For recognition by other commentators of the ephemeral nature of "reasonable suspicion" as a proof standard, see also 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), where the author noted, in stating the thesis 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. *Id.* at 104–08. She concluded that courts were reluctant to state the 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 5 to 40 percent probability that a 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, 1572 (9th Cir. 1988) (holding that a 2.5 percent likelihood that suspect could be found in any one of forty hotel rooms constituted reasonable suspicion).

16. See *infra* note 83 and accompanying text.

17. *Terry*, 392 U.S. at 35–36, 38–39 (1968) (Douglas, J., dissenting).

minalization of suspicion is a totally unacceptable interests-reconciliation in today's democracy, and is unconstitutional under express provisions of both the federal Constitution and most state constitutions.<sup>18</sup>

## II. *HIIBEL* VERSUS PRE-*HIIBEL*: U.S. SUPREME COURT PRECEDENT ON THE CONSTITUTIONALITY OF CRIMINALIZING SUSPICION & POST-*HIIBEL* REACTION TO THAT DECISION BY THE SUPREME COURTS, STATE LEGISLATURES, AND COMMENTATORS

### A. *Comparison of Hiibel with Pre-Hiibel U.S. Supreme Court Precedent on the Constitutionality of Criminalizing Suspicion*

In 1944, less than three years after what some may consider the twentieth century's most notorious terrorist attack against the United States, the U.S. Supreme Court sanctioned for the first time criminalization based on subjective suspicion.<sup>19</sup> While the anxiety and fear caused by that attack explains the 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.<sup>20</sup> It is not surprising that Justice Kennedy's majority opinion in *Hiibel* did not cite the *Korematsu* decision as supporting precedent.

Approximately three decades after *Korematsu*, a unanimous Supreme Court effectively held that it was unconstitutional to criminalize based on, first, objectively reasonable suspicion of government agents and even legislatures, and later, the subjective suspicion of a government agent.<sup>21</sup> The Court, however, in its 1979 decision, did not cite to its 1972 decision, failing to recognize the scope and significance of that decision's implications—including the fact that its 1972 decision subsumed the principle

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18. Martin Estrada, *Criminalizing Silence: Hiibel and the Continuing Expansion of the Terry Doctrine*, 49 ST. LOUIS U. L.J. 279, 286 (2005).

19. *Korematsu v. United States*, 323 U.S. 214, 223–24 (1944).

20. See *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886); Eric K. Yamamoto, *Racial Reparations: Japanese Americans Redress & African-American Claims*, 19 B.C. THIRD WORLD L.J. 477, 489–90 (1998).

21. See, e.g., *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); *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).

adopted in the second case, and therefore made an express statement in conflict with those implications.<sup>22</sup>

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.<sup>23</sup> The Court therefore did not perceive or seize either opportunity to overrule that pernicious decision.

Thirty-two years later, the majority opinion in *Hiibel* cited both of these 1970s decisions.<sup>24</sup> Justice Kennedy, however, made no reference to the *Papachristou* principle prohibiting criminalization based on suspicion. Instead, the *Hiibel* Court referenced *Papachristou* for the proposition that it held unconstitutional a traditional vagrancy statute for overbreadth and vagueness, because its words of criminalization were too imprecise to provide citizens adequate notice, and because it gave police, judges, and juries too much discretion in determining which conduct to criminalize.<sup>25</sup> Justice Kennedy failed to precisely restate the specific standards he believed the

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22. *Papachristou*, 405 U.S. at 169; *Brown*, 443 U.S. at 52. In *Brown*, 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 unspecified criminal activity. 443 U.S. at 53 n.3. Remarkably, the Court decided to reserve decision on this issue despite the fact it was squarely presented in the case and acknowledged by the trial judge. *Id.* 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 spectacle of empowering the government to criminalize the refusal of a detainee to identify himself when the government had only reasonable suspicion to stop him. *Id.* at 53. The 1972 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*, 392 U.S. at 30. 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—made a disapproving reference to statistics proving large scale arrest on the bases of vagrancy and suspicion of some crime, and immediately followed that reference by approvingly citing the assertion that constitutional convictions should start with the government having—at the time of the initial seizure—probable cause of at least an attempt regarding a specific crime by the accused. *Papachristou*, 405 U.S. at 168–69. Of course, this would mean that only if the government amassed sufficient evidence to prove beyond reasonable doubt non-compliance with a permissible government investigatory technique at the time of that probable cause could it secure a conviction. *Id.* at 169–70.

23. The Court in *Brown* did, however, cite to an even earlier precedent involving criminalization of suspicion: *Lanzetta v. New Jersey*, 306 U.S. 451 (1939). *Brown*, 443 U.S. at 51. 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. *Id.* 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 37–38 and accompanying text.

24. *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 184 (2004).

25. *Id.*



Court employed in 1972 to conclude that the crime's definition was too vague. Instead, he merely restated that conclusion.

Focusing the Constitutional defect on imprecise language restored the possibility—which later became a reality—that legislatures 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.<sup>26</sup> Justice Kennedy characterized *Brown* as only prohibiting a government agent from conducting a stop and demanding that a citizen identify himself when he lacks reasonable suspicion that the person has committed, is committing, or is about to commit a crime.<sup>27</sup> 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 *Hiibel* did not prevent the Court from departing from its 1979 holding by blurring—to the point of obliterating—the difference between criminalizing on the basis of subjective rather than reasonable suspicion. The *Hiibel* decision asserted, without reference to any evidence and contrary to the weight of evidence available to the Court, that the government agent had reasonable suspicion prior to demanding that Hiibel identify himself.<sup>28</sup> Justice Kennedy failed to discuss or apply the Court's precedent defining reasonable suspicion or discuss the fact that the government agent failed to try to determine the reality of the alleged assault—perhaps by asking the only possible alleged victim, who, unknown to the agent, was Hiibel's daughter, whether Hiibel actually struck her, or trying to determine the extent to which a viewing of the alleged victim would confirm the alleged assault. Even more telling was the failure of Justice Kennedy to refer in the record or comment upon whether Hiibel was ever arrested, prosecuted or convicted for the alleged assault or any other crime besides the obstruction of an officer for refusing to identify himself. In fact, Hiibel was arrested for only one other charge, domestic violence, and that charge was abandoned by the state prior to trial.<sup>29</sup> Therefore, precisely sixty years after its *Korematsu* decision, the Court perhaps 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.

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26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 180–82.

*Hiibel* reverted to *Korematsu*'s extremely liberal authorization of criminalization, despite the fact that the Court had in five decisions over a span of sixty years, 1939 to 1999, based 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.<sup>30</sup> 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.<sup>31</sup> In the 1999 decision, just two years before September 11, 2001, and only five years before *Hiibel*, the Court held that the criminalization of the refusal to obey a government agent's order for a public gathering to disperse infringed protected liberty interests, because the order was based solely on the agent's reasonable suspicion that at least one of the loiterers was a member of a street gang.<sup>32</sup>

The *Hiibel* majority opinion made express reference to only one of these decisions, the crucial and heretofore mentioned 1983 decision in *Ko-*

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30. *City of Chicago v. Morales*, 527 U.S. 41, 64 (1999) (plurality opinion) (involving a gang member and persons standing in public with a gang member); *Kolender v. Lawson*, 461 U.S. 352, 361 (1983) (involving a stroller); *Robinson v. California*, 370 U.S. 660, 667 (1962) (involving addicts); *Lambert v. California*, 355 U.S. 225, 229–30 (1957) (involving ex-felons); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939) (involving gangsters).

31. *Morales*, 527 U.S. at 51 n.15 (discussing how the Illinois Supreme Court characterized the City of Chicago's intent to criminalize intolerable street gang members); *Kolender*, 461 U.S. at 358; *Robinson*, 370 U.S. at 667 (discussing how the state failed to offer any medical evidence to prove that the accused was addicted, but government enforcement agents suspected he was addicted); *Lambert*, 355 U.S. at 229; *Lanzetta*, 306 U.S. at 458 (expressly recognizing that the "gangster" crime definition did not include within its definition either a conduct or a substitute omission element). In *Lambert*, the accused was arrested of suspicion of some unspecified crime, but prosecuted for only the failure to register as an ex-felon. 355 U.S. at 226. The Court suggested that the purpose of the registration crime was but a convenience for law enforcement to keep track of ex-felons. *Id.* at 229. The inference is that this tracking facilitated the ability to locate ex-felons as potential suspects.

32. *Morales*, 527 U.S. at 64. Tens of thousands of American citizens were arrested and prosecuted for this crime based only on reasonable suspicion in just a few years during the 1990s. *Id.* at 49. Despite this reality, the U.S. Supreme Court expressed no specific alarm about the specter of a police state. See generally *id.* at 45–64. 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 diminution of constitutional protections, nor the latter's broad condemnation of criminalization based on suspicion, were repeated by the Court. In fact, at the end of his opinion, in dicta, Justice Stevens suggested that it might be constitutional to criminalize based solely on reasonable suspicion of the status of street gang member, if all such persons standing in public had such status. *Id.* at 62.

lender.<sup>33</sup> Justice O'Connor'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's refusal to answer questions about his identity or the suspect's failure to adequately respond to a demand for identification based on a standardless evaluation of the adequacy of the suspect's response undertaken by government agents and ultimately the trier of fact.<sup>34</sup>

The *Kolender* majority opinion did not cite to *Korematsu*, *Lambert*, or *Robinson*, but did cite to *Lanzetta*, *Papachristou*, and *Brown v. Texas*.<sup>35</sup> It cited to *Lanzetta* twice.<sup>36</sup> 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.<sup>37</sup> Second, and more significantly for the primary thesis of this article, *Lanzetta* was the sole precedent cited as support for the principle that 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.<sup>38</sup>

The majority opinion in *Kolender* also cited to *Papachristou* twice. In each instance, *Papachristou* was cited as one among a string of its own precedents which established both key concerns of the vagueness doctrine.<sup>39</sup> First, the definition of a crime must provide potential defendants with reasonable notice of the conduct and/or circumstances that provide the basis for the criminalization decision.<sup>40</sup> Second, the Court raised the concern that 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.<sup>41</sup> For some inexplicable reason, *Kolender*, *Hiibel*, and all of the Supreme Court precedent articulating the vagueness doctrine continue

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33. See *supra* note 4 and accompanying text.

34. *Kolender*, 461 U.S. at 360 n.9. The first part of the assertion, of course, is in direct conflict with the Court's holding in *Hiibel*, but is nevertheless accurate. Justice O'Connor asserted that criminalizing the refusal to answer *Terry* stop questions implicates the Fifth Amendment. *Id.* She then expressly endorsed as a settled principle that while police officers have the right to ask citizens to voluntarily answer questions concerning unsolved crimes, they have no right to compel them to answer. *Id.*

35. *Id.* at 357, 358 n.5.

36. *Id.* at 356 n.8, 361.

37. *Id.* at 356 n.8.

38. *Id.* at 361.

39. *Id.* at 357.

40. *Id.*

41. *Id.* at 358.

to 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.<sup>42</sup> Justice O'Connor'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.<sup>43</sup>

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.<sup>44</sup> 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.

In *Hiibel*, Justice Kennedy cited to *Kolender* for the proposition that the constitutional limits on criminalization identified in that decision were similar to those of the *Papachristou* decision.<sup>45</sup> His majority opinion abruptly distinguished the *Kolender* holding from the *Hiibel* case by characterizing its sole constitutional concern as vagueness of the criminalization language that risked citizen bewilderment as to what was prohibited, and also the danger that government agents had unfettered discretion to determine who to arrest, prosecute, and convict.<sup>46</sup> Justice Kennedy made no reference to the California Penal Code provision that was the basis for the *Kolender* prosecution, which by its own terms only criminalized a person's refusal to identify herself and account for her presence when the government had reasonable suspicion of criminal activity.<sup>47</sup> Crucially, neither he nor the majority opinion in *Kolender* recognized that the judicial expansion of the California crime was just that—an alternative basis for criminalization focusing on an assessment by a government agent regarding the quality of the response by a suspect who chose to attempt to respond to a demand for identification by a government agent acting with reasonable suspicion. Nor did the *Hiibel* majority acknowledge that the Court in *Kolender* did not know the facts of the fifteen situations in which Mr. Lawson was stopped, or whether there was a basis for concluding in any of those situations whether the government agents had reasonable suspicion before they

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42. See *infra* notes 176–87 and accompanying text.

43. *Kolender*, 461 U.S. at 358.

44. *Id.* at 357.

45. *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 188 (2004).

46. *Id.*

47. CAL. PENAL CODE § 647 (West 1983). The law was found unconstitutionally vague by the Court, and later amended. *Kolender*, 461 U.S. at 361–62.

encountered or stopped Mr. Lawson.<sup>48</sup> This admission of ignorance concerning the actual details of the facts of what happened during these stops also encompassed what Mr. Lawson did in response to the government agent's demand for identification and whether Mr. Lawson simply refused to identify himself.<sup>49</sup> Most significantly, the majority opinion in *Hiibel* failed to acknowledge that the majority opinion in *Kolender* had 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.<sup>50</sup> 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 *Hiibel* because she was also in the majority in *Hiibel*, and her vote was necessary to *Hiibel*'s repudiation of that constitutional protection against the criminalization of suspicion. Instead, the *Hiibel* majority thought it was decisive, with respect to *Kolender*'s protection, that *Hiibel* on appeal did not even claim that the Nevada Penal Code's criminalization was unconstitutionally vague, despite the fact that the Nevada crime definition was almost identical to the California statute.<sup>51</sup> Hence *Hiibel* 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 *Hiibel* ignored the core principle stated in *Papachristou*: no matter how clearly the government articulates its intent, it is unconstitutional to criminalize based solely on suspicion of another crime—especially an unspecified crime—when the conduct that gave rise to the suspicion falls far short of constituting even an attempt of that other crime. Justice Kennedy was also unfaithful to the Court's own precedent, discussed in the proceeding paragraphs, that barred criminalization based on suspicion or 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

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48. *Kolender*, 461 U.S. at 354 n.2.

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

50. *Id.* at 359 n.9.

51. *Id.* Compare NEV. REV. STAT. § 199.280 (2003), with CAL. PENAL CODE § 647 (West 1983).

corollary.<sup>52</sup> He then falsely characterized that language, however, as mere dicta.<sup>53</sup> The U.S. Supreme Court has therefore waffled in only two decisions, both of which followed within a few years of catastrophic terrorist attacks, regarding whether criminalization based on suspicion—which in turn was based upon no, few, or a small quantum of facts—violates the national constitution.

#### B. Reaction to *Hiibel*: The U.S. Supreme Court, 2004–2007

The U.S. Supreme Court has cited *Hiibel* twice in the first three years after the decision.<sup>54</sup> Neither citation, however, could be characterized as reconfirming the constitutionality of criminalizing suspicion.

#### C. Reaction to *Hiibel*: Commentators

Commentators on the *Hiibel* decision have almost universally condemned the constitutional analysis of the majority opinion.<sup>55</sup> Some of them have speculated that September 11th may have influenced the majority's decision to depart from its own precedents and principles.<sup>56</sup>

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52. *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 187 (2004) (citing *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984)) (stating that with reasonable suspicion a government agent may ask the suspect a moderate number of questions the purpose of which is to dispel that suspicion, but indicating that the accused is not obligated to respond).

53. *Id.* at 187. In fact, the assertion was integral to Justice Marshall's policy-interests reconciliation in *Berkemer*. 468 U.S. at 438–40. Justice Marshall reasoned that *Miranda* warnings need not be given at the outset of a reasonable-suspicion-based seizure because of a variety of factors, including the suspect's right not to respond to questions. *Id.* at 440. Justice Kennedy acknowledged as much just before making his second "dicta" characterization in reference to *Berkemer*. *Hiibel*, 542 U.S. at 187. Unfortunately for the intellectual integrity of Justice Kennedy and those who signed on to his opinion, his second "dicta" characterization seems based upon his earlier, completely unrelated characterization that *Berkemer* cited to *Brown* in dicta. *See id.*

54. *Davis v. Washington*, 547 U.S. 813, 827 (2006); *Illinois v. Caballes*, 543 U.S. 405, 419 (2005) (Ginsburg, J., dissenting).

55. Joseph R. Ashby, Note, *Declining to State a Name: In Consideration of the Fifth Amendment's Self-Incrimination Clause and Law Enforcement Databases After Hiibel*, 104 MICH. L. REV. 779 (2006); Estrada, *supra* note 18, at 286; Trevor A. Hickey, Note and Comment, *Expanding Terry: Compulsory Identification in Hiibel v. Sixth Judicial District Court, Humboldt County*, 19 BYU J. PUB. L. 387 (2005); James Ryan Kelly, Note, *Is Silence Golden? Not After Hiibel v. Sixth Judicial District Court of Nevada*, 25 ST. LOUIS U. PUB. L. REV. 155 (2006) (discussing how the Supreme Court's decision jeopardizes basic liberties protected by the fourth and fifth amendments, and is based on logical contradictions which created a rule with problematic applications); Loewy, *supra* note 7, at 937; Michael D. Treacy, Comment, *Hiibel v. The Sixth Judicial Court of Nevada: Is a Suspect's Refusal to Identify Himself Protected by the Fifth Amendment?*, 40 NEW ENG. L. REV. 897 (2006). *But see* Robert A. Hull, *What Hath Hiibel Wrought?: The Constitutionality of Compelled Self-Identification*, 33 PEPP. L. REV. 185, 224 (2005) (arguing that *Hiibel* does not unjustifiably or seriously threaten civil liberties).

56. Hickey, *supra* note 55, at 407, 411; Loewy, *supra* note 7, at 935.

#### D. Reaction to *Hiibel*: State Legislatures

Of the twenty state stop-and-frisk statutes cited in *Hiibel*, only two of the annotations to those statutes made reference to *Hiibel* by late 2007.<sup>57</sup> One of the two citations was for the purpose of using *Hiibel* as support for authorizing only an arrest, but the other more accurately cited it as authority to support a conviction based only on a person's refusal to give identification to a law enforcement officer during an investigatory stop.<sup>58</sup>

#### E. Reaction to *Hiibel*: State Supreme Courts

Twelve state supreme courts, in fifteen decisions, have cited to *Hiibel* in the years since that decision was announced by the U.S. Supreme Court.<sup>59</sup> Three of these state supreme courts have cited *Hiibel* with apparent approval, or at least acceptance, of what they interpret as *Hiibel*'s endorsement of the right of the government to initiate encounters with citizens and demand identification without a scintilla of evidence to support that demand, and even without having to reciprocate by offering identification as a government agent—hence potentially sanctioning criminalization based on subjective suspicion.<sup>60</sup> One of these state high courts reasoned that a citizen's right to walk or run away from an attempted illegal stop by

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57. LA. CODE CRIM. PROC. ANN. art. 215.1(A) (2007); WIS. STAT. ANN. § 968.24 (West 2007); *Hiibel*, 542 U.S. at 182.

58. LA. CODE CRIM. PROC. ANN. art. 215.1(A) (conviction); WIS. STAT. ANN. § 968.24 (arrest).

59. *State v. Baez*, 894 So. 2d 115, 125 (Fla. 2004) (Pariente, C.J., dissenting); *Hardister v. State*, 849 N.E.2d 563, 570 (Ind. 2006); *State v. Reinders*, 690 N.W.2d 78, 82 (Iowa 2004); *State v. Smith*, 683 N.W.2d 542, 548 n.5 (Iowa 2004); *In re Ariel G.*, 858 A.2d 1007, 1013–14 (Md. 2004); *People v. Jenkins*, 691 N.W.2d 759, 764 (Mich. 2005); *Nev. Comm'n on Ethics v. Ballard*, 102 P.3d 544, 548 n.22 (Nev. 2004); *State v. Crawley*, 901 A.2d 924, 936 n.9 (N.J. 2006); *State v. Pineiro*, 853 A.2d 887, 891 (N.J. 2004); *State v. Mathre*, 683 N.W.2d 918, 924 (N.D. 2004); *Commonwealth v. Ickes*, 873 A.2d 698, 701 (Pa. 2005); *State v. Markland*, 112 P.3d 507, 513 (Utah 2005); *State v. Mechling*, 633 S.E.2d 311, 322 (W. Va. 2006); *State v. Young*, 717 N.W.2d 729, 749 n.20 (Wis. 2006); *In re Mark*, 718 N.W.2d 90, 96 (Wis. 2006).

60. *Reinders*, 690 N.W.2d at 82 (finding that no seizure occurred and therefore no Fourth Amendment protections were implicated); *Jenkins*, 691 N.W.2d at 764; *Crawley*, 901 A.2d at 933–34 (citing *Hiibel* for other propositions, the state supreme court nevertheless 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); *Pineiro*, 853 A.2d at 891. First the court in *Pineiro* 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 to go on his way without answering any question. *Id.* It immediately followed recitation of this principle with a “*cf.*” reference to *Hiibel*. *Id.* This reference was followed by the court's characterization of the *Hiibel* holding: that it was constitutional for a government agent to initiate such an encounter and “request” identification anytime there were suspicious circumstances. *Id.* The New Jersey Supreme Court at this point in its restatement of *Hiibel* appeared to deliberately omit that *Hiibel* 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. See *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 188–89 (2004).

government agents—a seizure which should require 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.<sup>61</sup> This, of course, means that after September 11th, state courts of last resort have interpreted *Hiibel* as establishing a national standard that sanctions ignoring completely the motives of particular government agents for encounters and the ensuing requests for identification. This suggests that the agent's motive can be racist, sexist, or simply a result of the particular agent's bad night or dislike of the looks, smell, or speech of the targeted citizen. A person may retain the right to walk, but not run, from such encounters, as flight by itself is a basis for criminalization.

Three other state supreme courts have cited *Hiibel* 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.<sup>62</sup> Two of these courts, and one of the courts sanctioning seizures based on subjective suspicion, have cited with approval *Hiibel*'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.<sup>63</sup>

Two other state supreme courts have cited *Hiibel* with apparent approval, or at least acceptance, of its interpretation of the privilege against self-incrimination, which requires a person asserting the privilege to prove he qualifies for the privilege, in part by showing that the statement was likely to be incriminating.<sup>64</sup> These courts have therefore agreed with the *Hiibel* decision's interpretation of the privilege against self-incrimination that requires—because of the bald assertion that compliance is not likely to be incriminating—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.<sup>65</sup>

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61. *Crawley*, 901 A.2d at 933–34.

62. *Hardister*, 849 N.E.2d at 570; *Markland*, 112 P.3d at 512; *Mechling*, 633 S.E.2d at 322.

63. *Jenkins*, 691 N.W.2d at 764; *Markland*, 112 P.3d at 512 n.2; *Mechling*, 633 S.E.2d at 322.

64. *In re Ariel G.*, 858 A.2d 1007, 1013 (Md. 2004); *Ballard*, 102 P.3d at 548 n.22; see also *In re Mark*, 718 N.W.2d at 96 (erroneously characterizing *Hiibel* as focusing its holding on the qualification for the privilege that the statement must be “compelled” by the government).

65. *In re Ariel G.*, 858 A.2d at 1013.



Only one state supreme court has sought to distinguish *Hiibel* by asserting that the government has no interests to justify criminalizing the failure to comply with a demand for identification based on subjective suspicion; but this court nevertheless found that the state's important interests justify such criminalization where based on objectively reasonable suspicion.<sup>66</sup> The New Jersey Supreme 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 the subjective suspicion that the person has committed some crime.<sup>67</sup> The New Jersey Supreme Court failed to explain the threat to these interests where the government agent has only evidence of a small probability, as opposed to a good faith belief, that the accused may have committed some unspecified crime at the time the agent asks for the identification.

### III. HAVE STATE SUPREME COURTS BEEN MORE WILLING TO SANCTION THE CRIMINALIZATION OF SUSPICION POST-SEPTEMBER 11TH? COMPARING THE SIX YEARS PRE- & POST-SEPTEMBER 11TH

#### A. State Supreme Courts: Pre-September 11th

In the six years prior to September 11, 2001, the high courts in seven states—Arkansas, Georgia, Illinois, Louisiana, Michigan, Tennessee, and Washington—prohibited potential or actual attempts by the government to criminalize subjective suspicion by a government agent or the legislature.<sup>68</sup> In 2001, prior to September 11th, the Michigan high 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 relevant to that suspicion, use that lie as the basis to arrest, prosecute, and convict that person for obstruction of justice.<sup>69</sup> Even more significantly, the Louisiana court, just three years prior to September 11th, in a decision directly in conflict with the subsequent *Hiibel* decision, declared unconstitutional as violative of both the vagueness and overbreadth doctrines a legislative attempt to criminalize reasonable suspi-

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66. *State v. Crawley*, 901 A.2d 924, 936 n.9 (N.J. 2006).

67. *Id.* (discussing how if a suspect runs when the government only has subjective, but good faith, suspicion, the government has interests adequate to uphold criminalizing that flight).

68. See generally *Johnson v. State*, 37 S.W.3d 191 (Ark. 2001) (Brown, J., concurring); *Johnson v. Athens-Clarke County*, 529 S.E.2d 613 (Ga. 2000); *City of Chicago v. Morales*, 687 N.E.2d 53 (Ill. 1997); *State v. Muschkat*, 706 So. 2d 429 (La. 1998); *People v. Vasquez*, 631 N.W.2d 711 (Mich. 2001); *State v. Daniel*, 12 S.W.3d 420 (Tenn. 2000); *State v. Mendez*, 970 P.2d 722 (Wash. 2000).

69. *Vasquez*, 631 N.W.2d at 718.

cion.<sup>70</sup> The court expressly recognized that part of the loitering statute in question was designed to criminalize status and constitutionally protected conduct.<sup>71</sup> The crucial criminalization element of the statute was not based on the conduct of any person prosecuted under the statute, but on unspecified “circumstances” deemed to do that which they could not possibly do: prove the suspect’s involvement in drug-related criminal activity.<sup>72</sup> The Louisiana court also reviewed the decisions of three other state supreme courts, which between 1980 and 1993 had split on the constitutionality of criminalizing suspicion of drug-related loitering.<sup>73</sup> In 2000, the Georgia high court reached an almost identical conclusion about an almost identical crime in its loitering statute.<sup>74</sup>

During the same six-year period immediately preceding September 11th, however, ten state supreme courts—California, Connecticut, Indiana, Mississippi, Ohio, Pennsylvania, Rhode Island, Washington, West Virginia, and Wisconsin—in twelve decisions, sanctioned expressly or by implication the constitutionality of criminalizing on the basis of reasonable suspicion, and in some cases, subjective suspicion.<sup>75</sup> The Wisconsin Supreme Court, ignoring the pernicious racist implications of the facts of the case, held that lying to government agents acting only on their subjective suspicion could be criminalized.<sup>76</sup> The Washington 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, following a stop of the accused based on a government agent’s reasonable suspicion or safety concerns, may be a basis for criminalization under a provision in the state’s obstruction of justice statute.<sup>77</sup>

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70. *Muschkat*, 706 So. 2d at 435–36 (striking down a drug crime loitering statute that provided for punishment of up to six months in jail).

71. *Id.*

72. *Id.*

73. *Id.* at 433–34 (discussing how two of the three courts acting in 1980 and 1993 sanctioned the power of the government to criminalize suspicion of public drug-related activity in the form of a loitering crime).

74. *Johnson v. Athens-Clarke County*, 529 S.E.2d 613, 613 (Ga. 2000).

75. See generally *People v. Garcia*, 23 P.3d 590 (Cal. 2001) (subjective suspicion); *Wright v. Superior Court*, 936 P.2d 101 (Cal. 1997) (subjective suspicion); *Ramos v. Town of Vernon*, 761 A.2d 705 (Conn. 2000) (reasonable suspicion); *State v. Klein*, 698 N.E.2d 296 (Ind. 1998); *Smith v. City of Picayune*, 701 So. 2d 1101 (Miss. 1997) (subjective suspicion); *State v. Cook*, 700 N.E.2d 570 (Ohio 1998); *Commonwealth v. Killinger*, 888 A.2d 592 (Pa. 2005) (implicit subjective suspicion); *State v. Milette*, 727 A.2d 1236 (R.I. 1999) (reasonable suspicion); *State v. Mendez*, 970 P.2d 722, 729 (Wash. 2000); *Sale v. City of Charleston*, 539 S.E.2d 446 (W. Va. 2000); *In re A.S.*, 626 N.W.2d 712 (Wis. 2001) (reasonable suspicion); *State v. Griffith*, 613 N.W.2d 72 (Wis. 2000).

76. See *Griffith*, 613 N.W.2d at 84 (Bradley, J., dissenting) (discussing a police officer who without any basis asked a black male backseat passenger for identification).

77. *Mendez*, 970 P.2d at 729–30.

### B. State Supreme Courts: Post-September 11th

Since September 11, 2001, eleven 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 on suspicion.<sup>78</sup> In California, Maryland, and New Hampshire, the courts even sanctioned expressly or by implication the right of criminalization based on subjective suspicion.<sup>79</sup>

On the other hand, five state supreme courts—Massachusetts, Nevada, Washington, and two courts which also sanctioned suspicion-based criminalization during the same period, Florida and Maryland—in five decisions, expressly or by implication prohibited the government from criminalizing even reasonable suspicion.<sup>80</sup> The Maryland court held that the government cannot constitutionally search a person or his effects based on reasonable suspicion, and therefore is also prohibited from criminalizing what it finds as a result of a search based on that suspicion.<sup>81</sup>

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78. *See generally* Treacy v. Municipality of Anchorage, 91 P.3d 252 (Alaska 2004); People v. Sorden, 113 P.3d 565 (Cal. 2005); People v. Barker, 96 P.3d 507 (Cal. 2004) (finding no violation of due process to criminalize failure to re-register as a sex offender); Carter v. State, 814 A.2d 443 (Del. 2002); State v. Baez, 894 So. 2d 115 (Fla. 2005); State v. Barros, 48 P.3d 584 (Haw. 2002); Byndloss v. State, 893 A.2d 1119 (Md. 2006); State v. Wardell, 122 P.3d 443 (Mont. 2005); State v. Bear, 106 822 A.2d 562 (N.H. 2003); State v. Bryant, 614 S.E.2d 479 (N.C. 2005); *Killinger*, 888 A.2d at 594; Commonwealth v. Ickes, 873 A.2d 698 (Pa. 2005).

79. *See, e.g.,* Barker, 96 P.3d at 507; Byndloss, 893 A.2d at 1121 (stating that government agents, after stopping a vehicle for a possible traffic violation, can continue to seize all of the occupants of that vehicle, even if 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, license, and warrant checks—which means, of course, that a refusal to comply with any of these sanctioned government investigative techniques could be criminalized by the Maryland state legislature); State v. Porelle, 822 A.2d 562, 566 (N.H. 2003) (finding no violation of due process vagueness doctrine in criminalizing merely following another person in violation of a protective order).

80. *See generally* State v. J.P., 907 So. 2d 1101 (Fla. 2005) (criminalizing statuses of juvenile and or parent/guardian if the juvenile left home even with parents permission after the curfew hour); Swift v. State, 899 A.2d 867 (Md. 2006) (requiring reasonable suspicion after finding that the original encounter which precipitated the events that led to the arrest was a stop where an officer had only subjective suspicion at the time he began the encounter, and eventually arrested the accused for an unidentified crime, subsequently finding contraband drugs and an illegal gun after a result of a search incident to the illegal arrest); Commonwealth 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); Silvar v. Eighth Judicial Dist. Court, 129 P.3d 682, 684 (Nev. 2006) (finding prohibition of loitering for purpose of prostitution unconstitutionally vague and overbroad); 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, which would apply even more if criminal sanctions were imposed by ordinance).

81. *Swift*, 899 A.2d at 873.

*C. Crimes based on Lying to Government Agents*

When the government or its agent “encounters” a person based only on subjective suspicion that the person has 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 the truth or risk the loss of liberty. In 2001, the Michigan court held that a lie in such circumstances could not be criminalized as obstruction of justice.<sup>82</sup> A year earlier, the Georgia court likewise held that vagrancy and loitering crimes violate due process when they are employed to 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.<sup>83</sup>

*D. Stop-and-Identify Crimes*

As documented in Part II, almost all stop-and-identify statutes open the door to criminalization based on suspicion because they seek to justify a government seizure and permit government investigatory techniques that piggyback on that seizure—based solely on, at most, reasonable suspicion—and almost all criminalize the refusal of a citizen to provide identification.<sup>84</sup> Less than nineteen months before September 11, 2001, the Tennessee Supreme Court prohibited the executive branch from relying solely on an agent’s subjective suspicion to seize a person and then criminalize the person based on what was thereafter discovered by investigative techniques.<sup>85</sup> Additionally, that same court analyzed a large array of judicial precedents, from both state and federal courts, to support its contention that state and federal constitutional search and seizure protections prohibit the government from obtaining the identification of citizens to pursue investigations based only on the subjective suspicion of its agents.<sup>86</sup> The Tennessee and Wisconsin courts, however, impliedly 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

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82. *People v. Vasquez*, 631 N.W.2d 711, 718 (Mich. 2001). *But see* 18 U.S.C. § 1001 (2006) (providing criminal penalties for “mak[ing] any materially false, fictitious, or fraudulent statement or representation” while “within the jurisdiction of the executive, legislative, or judicial branch of the Government”).

83. *See Johnson v. Athens-Clarke County*, 529 S.E.2d 613, 616 (Ga. 2000).

84. *See supra* Part II.E and accompanying notes.

85. *State v. Daniel*, 12 S.W.3d 420, 428 (Tenn. 2000).

86. *Id.* at 427–28.

place, even in a seized motor vehicle, and request that the citizen identify himself or provide identification documents.<sup>87</sup> While these courts did not claim that a consensus of appellate courts had sanctioned the grant of this power to government agents, they did suggest that standards developed to evaluate the constitutionality of employing such investigative techniques during an encounter gave little or no significance to the fact that the government had no interests at risk.<sup>88</sup>

Since September 11th, the supreme courts of Florida, Iowa, Michigan, Nevada, and Pennsylvania have held expressly or implicitly that the government, acting without reasonable suspicion, can request in a public place that any citizen provide identification.<sup>89</sup> The Pennsylvania court, however, expressly held that it violates federal and arguably state constitutional standards for the government to criminalize a person's refusal to comply with such a request.<sup>90</sup> These courts have held that 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 an identification document and its use to run a warrant check. Thereafter, the Florida, Iowa, and Michigan courts held that the government may arrest, prosecute, and convict the citizen based on information provided by the citizen, failure of the citizen to provide information sought, information learned during that encounter, or from a warrant check.<sup>91</sup> In Iowa, the court reasoned that a government agent's request for a citizen's official government identification, and a check with 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 simply asking the citizen to answer a question during such a public encounter.<sup>92</sup> The court did not address the crucial interests-reconciliation issue of whether the citizen remained free to demand return of his identification upon learning or simply believing that the agent intended to use it to run a warrant check. On the other hand, the Michigan court held that if a citizen seeks to leave while the warrant check is being conducted, there is significant evidence to

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87. See *id.* at 426–27; *Griffith*, 613 N.W.2d at 84.

88. *Daniel*, 12 S.W.3d at 426 (listing several factors all focusing on the attitude, behavior, and communications of government agents once the agent begins the encounter); *State v. Griffith*, 613 N.W.2d 72, 84 (Wis. 2000).

89. See *State v. Baez*, 894 So. 2d 115, 115 (Fla. 2004) (discussing the 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); *Hiibel v. Sixth Judicial Dist. Court*, 59 P.3d 1201 (Nev. 2002); *Ickes*, 873 A.2d at 701.

90. *Ickes*, 873 A.2d at 701–02 (stating that the right to refuse request is expressly characterized as a right and therefore non-criminal behavior).

91. See *Baez*, 894 So. 2d at 115 (discussing the court's restatement of its 1983 holding in the *Lightbourne* case); *Smith*, 683 N.W.2d at 548; *Jenkins*, 691 N.W.2d at 764.

92. *Smith*, 683 N.W.2d at 547–48.

justify a conclusion that there is reasonable suspicion that the citizen must be guilty of some unspecified crime at some unspecified time, thereby helping to justify the government's subsequent seizure of that citizen.<sup>93</sup> In Pennsylvania, citing *Hiibel*, the court held that not only does it not violate the U.S. 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 an unspecified crime may have been committed.<sup>94</sup>

#### E. "Status" Crimes

##### 1. Sex-Offender Registration and Crimes based on Refusal to Register

One of the most significant trends in the last dozen years involving the state supreme courts' sanctioning the criminalization of suspicion is their upholding the legality of sex-offender-registration status crimes.<sup>95</sup> This trend is arguably inconsistent with the U.S. Supreme Court's decision in *Lambert v. California*.<sup>96</sup> Statutes which criminalize the status of an "ex-felony-sex-offender," coupled with the innocuous omission of failing to register or re-register that status, criminalize based on a legislature's purportedly reasonable but in reality subjective suspicion. Hence, a person's liberty can be taken absent a scintilla of individualized proof that he is likely to have committed or is in the process of committing the same crime again.

In the six years prior to September 11th, the California and Ohio courts 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 a failure to register or re-register that status.<sup>97</sup> Since September 11th, the

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93. *Jenkins*, 691 N.W.2d at 764.

94. *Ickes*, 873 A.2d at 701.

95. See generally *People v. Barker*, 96 P.3d 507 (Cal. 2004) (felony crime); *Wright v. Superior Court*, 936 P.2d 101 (Cal. 1997); *State v. Bryant*, 614 S.E.2d 479 (N.C. 2005); *Commonwealth v. Killinger*, 888 A.2d 592, 595 (Pa. 2005) (accusing convicted person of a remedial measure treated as a felony despite the fact that 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) (involving 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).

96. 355 U.S. 225, 229–30 (1958) (holding that registration provisions violated due process when applied to a person who had no actual knowledge of her duty to register); see also *supra* notes 30–31 and accompanying text.

97. *People v. Garcia*, 23 P.3d 590, 590 (Cal. 2001); *Wright*, 936 P.2d at 102; *State v. Cook*, 700 N.E.2d 570, 575 (Ohio 1998).

California, Montana, North Carolina, North Dakota, and Pennsylvania courts, in seven decisions, did the same.<sup>98</sup>

In North Carolina, the court's sanctioning of the constitutionality of criminalizing an ex-sex-offender's failure to register or re-register that status, has endorsed enhancing the government's interests justifying such crimes, despite the fact that the basis for such enhancement was data subject to unilateral manipulation by the government.<sup>99</sup> The data demonstrated a higher frequency of re-arrest for ex-sex-offenders in comparison to those convicted of other crimes; but the registration regime, imposed nationally, significantly heightens the likelihood of such re-arrest. The re-arrests are, in this cycle of circular reasoning, the primary empirical justification for the registration regime.<sup>100</sup>

The California and North Carolina supreme courts, in sanctioning the criminalization of an ex-sex-offender's willful failure to register or re-register that status, also implicitly further empowered the government by permitting an accused to be convicted based on strict liability for that failure.<sup>101</sup> 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—their inadvertent failure register or re-register. This is true even if multiple government agencies know of the ex-sexual-offender's residence at that point in time, and even if the ultimate sentence could be substantially enhanced because the new status conviction makes the accused a recidivist felon.<sup>102</sup> Criminalizing on the basis of inherently suspicious status

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98. *People v. Sorden*, 113 P.3d 565, 568 (Cal. 2005); *Barker*, 96 P.3d at 507; *State v. Wardell*, 122 P.3d 443, 443 (Mont. 2005); *Bryant*, 614 S.E.2d at 479; *Knowles*, 643 N.W.2d at 22; *Killinger*, 888 A.2d at 594.

99. *Bryant*, 614 S.E.2d at 479.

100. *Id.* at 482 (citing 42 U.S.C. §§ 14071–72 (2000) (codifying the policy of conditioning funding to states for law enforcement on passage of sex offender registration laws)).

101. See *Sorden*, 113 P.3d at 568–69 (finding that the accused knew of his duty to re-register, and the government did not have to prove any level of culpability of the accused at the times he failed in his duty); *Barker*, 96 P.3d at 515; *Bryant*, 614 S.E.2d at 484 (The court made a 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. The court also failed to counter long policy history by the supreme court of limiting strict liability to offenses which penalized without any possible jail time or only a short possible period of jail time.). But see *State v. Tippet*, 624 N.W.2d 176, 178 (Iowa 2001) (stating that 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); *Knowles*, 643 N.W.2d at 24 (employing statutory interpretation analysis to conclude that failure to register or re-register crime was not a strict liability offense).

102. See *Barker*, 96 P.3d at 515; *Garcia*, 23 P.3d at 598 (upholding application of California's "three strike" sentencing enhancement scheme based solely on the failure to register as a sex offender); *Wardell*, 122 P.3d at 447 (recognizing that such statutes criminalize status and sanctioning that the failure-

means criminalizing everyone who has that status, even if the basis for it occurred a quarter of a century ago.<sup>103</sup> The California Supreme Court has unwittingly admitted that the government has no real interests at risk to justify such criminalization, by acknowledging that a prior sex offender can constitutionally be convicted of a felony for not registering or re-registering—even where that the government at all times knew of his local residence, the accused had registered and re-registered for over a decade, and the failure to register or re-register was *de minimis*.<sup>104</sup>

Most of these state supreme court decisions sanctioning the criminalizing of sex offenders' failure to register or re-register have balanced the interest assessment described above by holding that these crimes are constitutional only if read to be an exception to the principle that ignorance of the law is no excuse.<sup>105</sup> Accordingly, for the government to convict, it 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.<sup>106</sup> The California court relied on the U.S. Constitution's due process protection as the basis for requiring the accused to have known or have had reason to know of his duty to register.<sup>107</sup> Also, the court has interpreted the holding of the U.S. Supreme Court in *Lambert* as imposing this national standard.<sup>108</sup> Since September 11th, however, the North Carolina court has sought to skirt the *Lambert* limitation or question its continuing viability in the context of sex-offender-registration crimes.<sup>109</sup>

Even more disturbing was the incredible conceptual confusion in a recent holding of the Pennsylvania Supreme Court, which sanctioned the constitutionality of restoring a criminal prosecution for failure to register by apparently approving the constitutionality of a subsequent conviction factually decided by a judge and based on a standard of review that was less than proof beyond reasonable doubt.<sup>110</sup> This court's recent history of

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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).

103. *Barker*, 96 P.3d at 515.

104. *Sorden*, 113 P.3d at 567–69 (sanctioning the constitutionality of prosecution and conviction for failure to re-register where the accused was required to re-register within five days of his birthday, voluntarily came into register sixteen days after his birthday, and the state knew of his current address at all times).

105. *Garcia*, 23 P.3d at 596.

106. *Id.* at 595.

107. *Sorden*, 113 P.3d at 568.

108. *Id.*; *Garcia*, 23 P.3d at 595.

109. See *State v. Bryant*, 614 S.E.2d 479, 487–88 (N.C. 2005) (offering an unconvincing recitation of authority to justify that the subsequent limiting of the *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 his move into the new county was an out-of-state move (to North Carolina), as well as notify the county in South Carolina where he previously lived).

110. *Commonwealth v. Killinger*, 888 A.2d 592, 600–01 (Pa. 2005).



sanctioning the constitutionality of criminalizing the refusal of sex offenders to register or re-register demonstrates an ultimate danger in a maturing democracy of criminalization based on the subjective suspicion of the legislature. Interest 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 fails 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, further subjecting a violator to another term of imprisonment upon failure to comply. Either of these policies provides complete public protection without resort to creating a new crime based on subjective suspicion of future crimes. When the accused has engaged in no anti-social behavior, further piling on strict liability or treating the “new” offense as a separate felony can trigger dire sentencing consequences.

## 2. *Gang Crimes*

Criminalization of “criminal gangs” or members of such gangs are attempts to criminalize suspicion. In Illinois, the court has justified this decision on the government’s subjective suspicion that such persons are always likely to have committed, be committing, or be about to commit some future crime.<sup>111</sup> In Pennsylvania, the court sanctioned use as a significant factor to justify, not just reasonable suspicion, but probable cause to search a vehicle, identifying an individual as a member of a dangerous gang.<sup>112</sup> Implications of dangerous gang membership justified a search of a vehicle for illegal weapons.<sup>113</sup> Once the state supreme court sanctions the constitutionality of such a search, justified primarily by subjective suspicion of gang status, the legislature can criminalize any failure to cooperate with the search procedure.

## 3. *Terrorist Crimes*

In the six years prior to September 11th, there were no state supreme courts which decided the constitutionality of criminalizing the status of “terrorist.” Since September 11th, the Massachusetts court has prohibited the government from criminalization based on subjective suspicion, even

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111. *City of Chicago v. Morales*, 687 N.E.2d 53, 58 (Ill. 1997).

112. *Killinger*, 888 A.2d at 600–01.

113. *Id.*

when there was a direct reference by the state to terrorism and terrorist as a primary justification for a seizure executed without an evidentiary basis.<sup>114</sup>

#### 4. *Juvenile Curfew Crimes*

Juvenile curfew crimes are among the most widespread current examples of criminalization based upon the subjective suspicion of a legislature. These crimes criminalize subjective suspicion because they criminalize an innocuous status, age, and circumstance, such as leaving one's home after a certain time when the person has not reached a certain age. Legislatures that enact such crimes are only criminalizing their subjective suspicion that the location of juveniles in public in the late evening hours creates a risk that some unspecified other crime might be committed by or upon such juveniles.<sup>115</sup> Anecdotal evidence, statistics, and heuristics are often cited as the basis for this suspicion.<sup>116</sup> Many of these juvenile curfew crimes also criminalize the status of the parent or guardian of these juveniles, such as a parent's acquiescence or failure to prevent his child from leaving home after the curfew begins.<sup>117</sup> These youth curfew crimes, however, omit as an element any specific conduct, circumstances, or result that would serve as relevant evidence that the commission of any crime is imminent.

Prior to September 11th, courts in Connecticut and West Virginia held it was constitutional for local legislatures to enact, enforce, and eventually criminalize a juvenile curfew.<sup>118</sup> Since September 11th, the supreme courts of Alaska and Florida have addressed the constitutionality of such curfew crimes under the federal as well as state constitutions. In Alaska, the court sanctioned the constitutionality of the legislature's criminalization of age

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114. *Commonwealth v. Carkhuff*, 804 N.E.2d 317, 323 (Mass. 2004) (finding that a seizure without evidence of individual suspicion may be justified, providing there is adequate administrative authorization and guidelines which limit the intrusion on the liberty interests of many law abiding citizens).

115. *See City of Sumner v. Walsh*, 61 P.3d 1111, 1116–17 (Wash. 2003) (stating that the practical effect of a juvenile curfew ordinance was to sanction any juvenile who is found in public for any reason, leaving it to police to determine the 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. *Id.*

116. *See generally Sale v. City of Charleston*, 539 S.E.2d 446, 456 (W. Va. 2000) (relying on trial evidence provided by the city tending to show that the crime rate dropped when juvenile curfews were enacted by other cities). Crime rates would necessarily drop for all public place crimes if all citizens were ordered to stay in after a certain hour.

117. *Id.* at 450 (punishing parents with a maximum sentence of thirty days in jail, but subjecting the youth only to juvenile authority).

118. *Ramos v. Town of Vernon*, 761 A.2d 705, 710 (Conn. 2000); *Sale*, 539 S.E.2d at 446.

status based on subjective suspicion. In Florida, however, the court prohibited criminalization based on such legislative subjective suspicion.<sup>119</sup>

The courts relied on anecdotal evidence, arrest as opposed to conviction statistics, conclusory findings of fact, presumptions, or merely conjured an array of state interests.<sup>120</sup> The Alaska Supreme Court sanctioned the constitutionality of the juvenile curfew crime despite the fact that at the moment of every actual arrest or subsequent conviction which is based solely on that crime, the government has no interests threatened or injured by an innocent status combined with innocent conduct. This lack of government interests is the reality every time a government seeks to criminalize based solely on subjective suspicion.<sup>121</sup> Turning a blind eye to this reality, both of the state supreme courts reviewing the constitutionality of juvenile curfew crimes after September 11th have concluded that the government not only has an interest in criminalizing, it has a “compelling” interest.<sup>122</sup>

The Florida court also acknowledged that these curfew crimes injure such fundamental federal or state constitutional rights as the right to movement and privacy.<sup>123</sup> The Florida court reconciled these competing important interests, first by partially recognizing the principle asserted at the beginning of this subsection that these juvenile curfew crimes criminalize innocent status and conduct.<sup>124</sup> 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.<sup>125</sup> The court expressly recognized that potentially criminalizing any juvenile who merely appears in public after the curfew hour is “antithetical” to the curfew’s purported 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.<sup>126</sup>

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119. See *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 265 (Alaska 2004) (finding the government’s interests in criminalizing juveniles “compelling”); *State v. J.P.*, 907 So. 2d 1101, 1101 (Fla. 2005); see also *City of Sumner v. Walsh*, 61 P.3d at 1117 (holding unconstitutional a juvenile curfew statute that imposed only civil sanctions).

120. See *Treacy*, 91 P.3d at 265; *J.P.*, 907 So. 2d at 1116–17.

121. See *Treacy*, 91 P.3d at 265; *J.P.*, 907 So. 2d at 1116–17.

122. *Treacy*, 91 P.3d at 269; *J.P.*, 907 So. 2d at 1117.

123. *J.P.*, 907 So. 2d at 1115–16.

124. *Id.* at 1118.

125. *Id.* at 1118–19 (pointing out, regarding two city ordinances under review, that both juveniles and parents can be jailed for violating the curfew crime a second time, even though the model curfew act, adopted by the Florida legislature, is civil and authorizes no imprisonment).

126. *Id.* at 1119 (reviewing prior cases sanctioning the constitutionality of juvenile curfew laws involving civil rather than criminal sanctions).

The decisions of three of these four courts which upheld the constitutionality of the legislatures' decisions to criminalize this innocent status and circumstance were made despite the fact that in at least four decisions, the U.S. Supreme Court has held expressly or by implication that criminalization based solely on status, or status coupled with otherwise completely innocuous conduct, violates the federal constitution.<sup>127</sup> Curfew criminalization based on subjective suspicion, like the stop-and-identify crime charged in *Hiibel*, highlights a legislative drafting lesson that the vagueness constitutional challenge can be combated through broader criminalization based on reasonable suspicion of some crime while ensuring that a crime's definition clearly identifies an innocuous status or conduct.<sup>128</sup>

### 5. *Loitering Crimes*

Criminalization of loitering is the criminalization of lingering in public, which by itself is a completely harmless course of conduct, and one protected against criminalization by the U.S. Constitution.<sup>129</sup> Therefore, the criminalization of loitering by itself is an unconstitutional deprivation of liberty. Accordingly, almost all current loitering statutes combine public lingering with what the government perceives to be a sinister motive, suspicious status, or sinister circumstance as the basis for the crime.<sup>130</sup> All three combinations, however, merely involve a constitutionally impermissible deprivation of liberty coupled with subjective suspicion based upon a person's thoughts, status, or unspecified circumstance. These combinations, therefore, all violate both the U.S. Constitution's due process and cruel and unusual punishment protections.<sup>131</sup> 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. For example, post-September 11th, a Delaware court inferentially sanctioned criminalization based on such a govern-

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127. See *supra* notes 30–32 and accompanying text.

128. See *infra* notes 203–08 and accompanying text.

129. See *City of Chicago v. Morales*, 687 N.E.2d 53, 60 (Ill. 1997) (stating that a person may know the meaning of “loiter,” but may not understand based on that definition why his loitering was the basis for criminalization); see also *supra* notes 30–32 and accompanying text.

130. See 91 C.J.S. *Vagrancy and Related Offenses* § 32 (2008).

131. See generally *Morales*, 687 N.E.2d at 58 (discussing groups lingering in public, and finding that one group is also a member of a criminal street gang); *Silvar v. Eighth Judicial Dist. Court*, 129 P.3d 682, 687 (Nev. 2006); see also *supra* notes 30–32 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 77 AM. JUR. 2D *Vagrancy and Related Offenses* § 3 (2008).

ment's self-aggrandizing power ploy.<sup>132</sup> In reality, all three combinations seek criminalization based on legislative subjective suspicion.<sup>133</sup> Commentators recognize that loitering crimes often sanction skirting the constitutionally mandated proof standard of probable cause to arrest, but often fail to recognize the much more egregious constitutional violation.<sup>134</sup> Such loitering statutes authorize not just arrest but conviction based on mere suspicion of an unspecified other crime.

Prior to September 11th, the Illinois, Georgia, and Louisiana supreme courts prohibited their state legislatures from criminalizing loitering or 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 at least one such person was about to engage or had just engaged in drug-related activity.<sup>135</sup> Post-September 11th, the Nevada high court also prohibited the state legislature from criminalizing loitering or lingering in public because the legislature's primary rationale of the criminalization was based on the subjective suspicion of a crime.<sup>136</sup> On the other hand, the Delaware high court decided, by implication, that even without reasonable suspicion the government can define a loitering crime to include the criminalization of a refusal to comply with a command that the citizen move on from a public street.<sup>137</sup>

Loitering and vagrancy crimes are among the most enduring examples of American governments criminalizing based on suspicion.<sup>138</sup> Ironically, even the Model Penal Code—the icon of criminal law reform—adopted a

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132. *Carter v. State*, 814 A.2d 443, 445 (Del. 2002) (expressly acknowledging 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. *Id.* Therefore there was no basis for proving even a reasonable suspicion of a crime; yet the court assumed officers had authority to order the accused to move from the area, and if he failed to do so—in this case he did comply with this first command—this would have given the agents probable cause to arrest, and seemingly prosecute and convict on that provision of the loitering statute. *Id.* This was so, in spite of the fact that the crime definition required that the government agent's order to move must be lawful, but the state supreme court made no reference to this circumstantial element which limited the scope of the crime. *Id.*

133. *Morales*, 687 N.E.2d at 58 (discussing how the City Council claimed that gang membership and loitering created a justifiable fear); *Silvar*, 129 P.3d at 687; see also 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 the potential of the idle poor to commit crimes).

134. See Berns, *supra* note 133, at 724, 733–34.

135. See generally *Morales*, 687 N.E.2d at 58 (criminal street gang member); *Johnson v. Athens Clarke County*, 529 S.E.2d 613 (Ga. 2000) (drug related activity); *State v. Muschkat*, 706 So. 2d 429 (La. 1998) (drug related activity).

136. *Silvar*, 129 P.3d at 689.

137. *Carter*, 814 A.2d at 445 (stating that since the police only thought the accused might be street drug dealer, but did not observe any transactions, there was no basis for proving even a reasonable suspicion of a crime).

138. See Berns, *supra* note 133, at 718.

loitering crime that sanctioned criminalization based on suspicion.<sup>139</sup> Consequently, several states have adopted revised penal codes with loitering crimes mimicking the Model Penal Code, which authorize criminalization based only on suspicion.<sup>140</sup>

The precedents of the last dozen years, however, provide some indication that current state supreme courts—in contrast to an earlier U.S. Supreme Court, commentators, and state supreme courts adopting the U.S. Supreme Court’s reasoning—are more likely to reject the constitutionality of these loitering crimes. In addition, these current courts are also more likely to reject the principle that the insertion of a *mens rea* element, particularly the inherently ambiguous old common law concept of “specific intent” or even “purpose” as defined in modern codes, is a significant factor boosting the constitutionality of such loitering crimes.<sup>141</sup> 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 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.<sup>142</sup>

#### 6. *Disorderly Conduct Statutes*

Disorderly conduct crimes sometimes include provisions which, as interpreted by state supreme courts, sanction criminalization based on the subjective suspicion of a government agent or the legislature that a crime might take place.<sup>143</sup> For example, one state supreme court recently held that disorderly conduct can be constitutionally criminalized based on only a police officer’s subjective belief that the accused is suspicious where, after an encounter was initiated, the suspect cursed at the officer and inquired why he was being harassed.<sup>144</sup> Of course, if a person who was not a government agent acted on the same subjective suspicion, his action would be characterized not as an encounter, but as a confrontation, and the person confronted would be justified in cursing and inquiring about the reason for the confrontation. When encounters based solely on subjective suspicion

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139. See, e.g., MODEL PENAL CODE § 250.6 (1985).

140. See Berns, *supra* note 133, at 727–30.

141. See Berns, *supra* note 133, at 730–35; *supra* note 132 and accompanying text.

142. See *supra* notes 72, 130–31, and accompanying text.

143. Johnson v. State, 37 S.W.3d 191, 194 (Ark. 2001) (involving a government agent’s subjective suspicion); Smith v. City of Picayune, 701 So. 2d 1101 (Miss. 1997) (dealing with a government agent’s subjective suspicion); *In re A.S.*, 626 N.W.2d 712, 717 (Wis. 2001) (involving the state legislature’s subjective suspicion).

144. Johnson, 37 S.W.3d at 192–93.

were first sanctioned by the U.S. 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 conversation in the same public space—but such an agent runs the same risk as any other person, in that the individual being confronted might tell him to “get lost” in no uncertain terms.<sup>145</sup>

Three state supreme courts, in the six years prior to September 11th, sanctioned the constitutionality of criminalizing legislative subjective suspicion found in definitions of the crime of disorderly conduct.<sup>146</sup> In sanctioning the power of the government to criminalize suspicion via a definition of disorderly conduct, two state supreme courts shortly before September 11th were willing to subordinate an express constitutional right—speech—to the power of the government, in the criminalization of a verbal threat of multiple homicides to be committed at some unspecified time in the future, without requiring that the elements of the crime, as interpreted, include the circumstance that the accused at least have the present ability to execute the threat.<sup>147</sup>

#### IV. SUMMARY OF FINDINGS & REFORM PROPOSALS: PERSPECTIVES & CONCLUSION

##### A. *The U.S. Supreme Court's Position Over Time Regarding the Constitutionality of Criminalizing Suspicion*

The *Hiibel* decision was a substantial departure from the U.S. Supreme Court's precedents that had rejected the constitutionality of criminalizing suspicion.<sup>148</sup> 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.<sup>149</sup> The first time—the infamous and yet to be expressly repudiated *Korematsu* decision—was also made in the wake of a major “terrorist” attack.<sup>150</sup> In addition, the Nevada Supreme Court, in reaching the same decision in *Hiibel* as the U.S. Supreme Court,

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145. See cases cited *supra* note 13. The author's principal conceptual thesis 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. See Raymond, *supra* note 15.

146. *Johnson*, 37 S.W.3d at 191; *Smith v. City of Picayune*, 701 So. 2d 1101, 1101 (Miss. 1997); *In re A.S.*, 626 N.W.2d at 712.

147. *Johnson*, 37 S.W.3d at 194–95; *In re A.S.*, 626 N.W.2d at 720.

148. See *supra* Part II.A.

149. See *supra* notes 28–30 and accompanying text.

150. See *supra* notes 19–20, 23 and accompanying text.

justified its decision in part by reliance upon the September 11th attack.<sup>151</sup> In combination, these two facts are circumstantial evidence that the attack might well have influenced the majority of the U.S. Supreme Court in the *Hiibel* decision. Since that 2004 decision, the Court has not revisited the merits of the constitutional analysis in *Hiibel*, but has cited to the case twice.<sup>152</sup>

*B. Summarizing Outcomes of State Supreme Court Decisions on the Constitutionality of Criminalizing Suspicion Pre- & Post-September 11th, & Perspectives Including Core Null Hypotheses*

In the six years immediately preceding September 11, 2001, a majority of state supreme courts which had considered the matter (ten of seventeen), in a majority of decisions (twelve of nineteen), sanctioned the constitutionality of criminalizing suspicion.<sup>153</sup> In the six years immediately following September 11, 2001, a majority of state supreme courts (eleven of sixteen), in a majority of decisions (fourteen of nineteen), sanctioned the constitutionality of criminalizing suspicion.<sup>154</sup> In addition, thirteen state supreme courts have cited the Supreme Court's *Hiibel* decision.<sup>155</sup> Seven of these courts cited *Hiibel* favorably, and only one seemed, by implication, to disagree with the Court's assessment of the government's interest at stake when a person refuses to identify himself upon demand of a suspicious government agent.<sup>156</sup>

This means that in the last dozen years, almost half of the state supreme courts (twenty-three), and over two-thirds of the state supreme courts this article identified as faced with the choice, sanctioned the criminalization of suspicion—although five supreme courts sanctioned in one or more cases, and prohibited in one or more cases. Hence, this article's primary inquiry—whether the nation's highest appellate courts were, on balance, more willing to acquiesce in criminalization based on suspicion in the six years following the attacks on the World Trade Center and the Pentagon—must be answered, tentatively, “no” for the state supreme courts. Based on the *Hiibel* decision, however, the tentative answer is “yes.”

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151. *Hiibel v. Sixth Judicial Dist. Court*, 59 P.3d 1201, 1206 (Nev. 2002).

152. See *supra* note 54 and accompanying text.

153. See *supra* notes 68, 75, and accompanying text.

154. See *supra* notes 78, 80, and accompanying text.

155. See *supra* note 59 and accompanying text.

156. See *supra* notes 60–67 and accompanying text.



*C. 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 U.S. Supreme Court, but also on state constitutions as interpreted by state supreme courts. State supreme courts have the power to hold that rights guaranteed by their respective constitutions provide greater protection to individual rights than that provided by the federal Constitution.<sup>157</sup> Hence, the question becomes, how willing are state supreme courts to interpret their respective constitutions to further limit criminalization based on suspicion? The scorecard follows.

In six cases, five state supreme courts during the period of this study, 1995 through 2007, held that their constitutions provide no more protection of an express constitutional right than that provided by the federal Constitution when these rights were asserted to challenge the direct or implied criminalization of suspicion.<sup>158</sup> The Connecticut Supreme Court, for example, held that while its state constitution could provide more protection than the federal 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 a reasonable doubt.<sup>159</sup> Similarly, the Maryland, Tennessee, and Wisconsin supreme courts construed their constitutions' search and seizure provisions to be identical in intent and purpose with the Fourth Amendment, therefore providing no more protection from government searches and seizures than that provided by the Fourth Amendment of the U.S. Constitution as interpreted by the U.S. Supreme Court.<sup>160</sup> These courts fail to recognize that, taken

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157. Neil Colman McCabe, *State Constitutions and Substantive Criminal Law*, 71 TEMP. L. REV. 521, 526, 535–36 (1998) (referring to other authorities identifying state constitutional restrictions on criminalization and noting a longstanding tendency of state courts to place more limits than the federal courts on the power of the government to criminalize).

158. *Byndloss v. State*, 893 A.2d 1119, 1121 (Md. 2006); *State v. Bryant*, 614 S.E.2d 479, 485 (N.C. 2005) (stating that unless expressly invoked by the accused, the court will apply the due process standards of the federal Constitution, although it reconfirmed the possibility that the state constitution's "Law of the Land" could be interpreted to provide more due process protection); *Stave v. Daniel*, 12 S.W.3d 420, 424 (Tenn. 2000); *City of Sumner v. Walsh*, 61 P.3d 1111, 1114 n.5 (Wash. 2003) (stating that unless expressly briefed, the court will assume that the person making several constitutional challenges to a juvenile curfew statute with civil sanctions was relying on the federal Constitution); *In re A.S.*, 626 N.W.2d 712, 719 (Wis. 2001) (showing the Wisconsin constitution's protection of speech was no greater than that provided by First Amendment of the federal Constitution); *State v. Griffith*, 613 N.W.2d 72, 77 n.10 (Wis. 2000).

159. *Ramos v. Town of Vernon*, 761 A.2d 705, 710, 717 (Conn. 2000) (holding that under this standard, the defendant failed multiple times to convince the court that several state constitutional protections were violated by a juvenile curfew crime).

160. *Byndloss*, 893 A.2d at 1121; *Daniel*, 12 S.W.3d at 424; *Griffith*, 613 N.W.2d at 77 n.10; *see also State v. Klein*, 698 N.E.2d 296, 299 (Ind. 1998) (stating that a failure to specifically make separate

literally, this assertion would negate the need for their comparable state provisions, unless the U.S. 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 of an express or implied criminalization of suspicion first, in part because the state constitution could provide more protection than the U.S. Constitution's corresponding provision.<sup>161</sup>

1. *Curbing & Shrinking the Constitutionality of Criminalization of Suspicion: Identifying why the Supreme Courts Sanction the Constitutionality of Criminalizing Suspicion, Reforming the Reasonable Suspicion Doctrine by Connecting it to Appropriate Standards of Substantive Criminal Law, & General Perspectives*

In the forty years since its invention by the U.S. Supreme Court, the reasonable suspicion proof standard has been drastically altered for the worse, altering the relationship between the liberty interests of American citizens and their governments.<sup>162</sup> Most pertinent to this article's inquiry, is that the doctrine has played a major role in expanding the government's ability to criminalize based only on suspicion.<sup>163</sup> Governments are empowered by the Supreme Court, despite the absence of any specific constitutional language or historical justifications, to seize citizens based on an ephemeral proof standard. A standard which Justice Douglas, the lone dissenter in *Terry*, vehemently argued should only have been created and

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argument and precedent references results in waiver of the accused independent state constitutional claim that the criminalization was void for vagueness).

161. See *State v. J.P.*, 907 So. 2d 1101, 1112 (Fla. 2005) (asserting that the state constitution's right of privacy "embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution" (citing *In re T.W.*, 551 So. 2d 1186, 1192 (Fla. 1989)); *State v. Wardell*, 122 P.3d 443, 446 (Mont. 2005); *State v. Porelle*, 822 A.2d 562, 565 (N.H. 2003) (regarding due process void for vagueness claim); *State v. Mendez*, 970 P.2d 722, 726 (Wash. 2000) (examining preeminence of the right of privacy under the state constitutional provision comparable to the Fourth Amendment); *Sale v. Goldman*, 539 S.E.2d 446, 458 (W. Va. 2000) (referencing—without discussing the minimum standards of the federal Constitution—only its own precedent establishing and articulating both its equal protection doctrine and due process void for vagueness doctrine).

162. Estrada, *supra* note 18, at 287; see also Scott Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383, 402 (1988).

163. See *supra* notes 15–16, 26, 62–63, 75, 78, 93–94 and accompanying text. But see cases cited *supra* notes 30–32, 80–81, 135 and accompanying text.

sanctioned by an express constitutional amendment.<sup>164</sup> 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 a citizen with any plausibly permissible investigatory technique employed by the government during this temporary seizure.<sup>165</sup> 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 generic criminality.<sup>166</sup>

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

Only evidence that provides at least a 25 percent probability that a specific person or his cohorts has committed, is in the process of committing, or imminently will be committing a specific crime (or traffic violation if the stop is of a motorist) should constitute a basis for finding reasonable suspicion to justify the government seizing-by-stopping an individual.<sup>167</sup> Without this reform, the reality is that in today's penal codes there are hundreds of crimes, and in addition local legislatures have enacted ordinances with scores of additional crimes. The government practically has carte blanche after a seizure to construct a plausible reasonable suspicion claim based on a generic reference to criminality, or to one or more of the hundreds of crimes located in current state and local penal codes.<sup>168</sup> But if a specific crime can be the only 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

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164. *Terry v. Ohio*, 392 U.S. 1, 38 (1968) (Douglas, J., dissenting). Justice Douglas pointed out that the arrest and searches practiced by the English based only on suspicion were the very evils the Fourth Amendment and the probable cause standard were meant to prevent. *Id.* at 37; *see also supra* notes 15, 75, 78.

163. *See supra* notes 26, 62–63, 84, 93–94 and accompanying text. *But see* cases cited *supra* notes 66–67, 70–71.

166. David A. Harris, *Factors For Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659 (1994); Tracey Maclin, *Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1278 (1998); Tracey Maclin, *Race And the Fourth Amendment*, 51 VAND. L. REV. 333 (1998) (reporting and commenting upon empirical studies proving government agents used the reasonable suspicion standard for racist purposes to disproportionately seize African-American motorist).

167. *See supra* note 15 and accompanying text.

168. Dannye Holley, *Culpability Evaluations in the State Supreme Courts from 1977 to 1999: A "Model" Assessment*, 34 AKRON L. REV. 401, 425 n.7 (2001) (reporting on a national survey of state legislative drafting councils). One of the principal inquiries of this survey was to determine the number of crimes currently contained in the states' penal codes. *See also* Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409 (2001) (examining the role of municipalities in legislating against crime).

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 has committed, or is in the process of committing, a specific crime is that it would constitutionally ban criminalizing reasonable suspicion of some future commission of even a serious crime.<sup>169</sup>

The reform of the reasonable suspicion standard would also signal the death knell for the current prevalent criminalization of the refusal of sex offenders to comply with sex-offender-registration statutes.<sup>170</sup> As documented earlier in this article, such crimes are based on mere legislative subjective suspicion that the entire universe of sex offenders is likely to commit another such crime.<sup>171</sup> As also documented earlier, the Supreme Court has consistently barred criminalization based on the subjective suspicion of the government through 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.<sup>172</sup> Furthermore, constitutional crimes cannot be created solely to vindicate subjective suspicion even in combination with the moral values of the current majority, especially where they take the form of a crime that targets a distinct group for engaging in or failing to perform certain conduct.<sup>173</sup>

The proposed specific definition of reasonable suspicion would also cast doubt on the policy wisdom of one commentator’s recommendation to focus a finding of reasonable suspicion on a generic, circumstantial element subject to post hoc reconstruction: abnormal behavior in the specific neighborhood, when that neighborhood is characterized by executive branch government agents or agencies as “high crime.”<sup>174</sup> Such a position is tantamount to telling the government to assert, after the fact and based on any source or even no source at all, that the accused’s 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 of

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169. See, e.g., *In re A.S.*, 626 N.W.2d 712, 721 (Wis. 2001) (sanctioning criminalization of reasonable suspicion of the future commission of homicide).

170. See *supra* notes 97–100 and accompanying text.

171. See *supra* notes 103–104 and accompanying text.

172. See *supra* notes 21–22 and accompanying text.

173. *Lawrence v. Texas*, 539 U.S. 558, 581–84 (2003) (O’Connor, J., concurring) (expressly pointing out that the Texas sodomy statute, struck down on substantive due process grounds, was more appropriately declared unconstitutional as a violation of equal protection, and also noting that those convicted of that crime would be required to register as sex offenders in four states).

174. Raymond, *supra* note 15, at 126–27.

any crime from among the hundreds of crimes defined in state and local penal codes.<sup>175</sup>

2. *Curbing the Constitutionality of Criminalizing Suspicion—Identifying why Most Supreme Courts Sanction the Constitutionality of Criminalizing Suspicion & Reforming the Void-for-Vagueness Doctrine by Centering it on Ex Post Facto Policy & Current Substantive Criminal Law Principles*

The void-for-vagueness doctrine, as it has evolved in the opinions of the U.S. Supreme Court and state supreme courts, has always been conceptually flawed.<sup>176</sup> 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 focusing 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 regarding the minimal content of a constitutional crime definition.<sup>177</sup> 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 federal and state constitutions' ex post facto prohibitions.<sup>178</sup> *No conduct should be criminalized after the fact, and a legislature cannot delegate authority it does not have to criminalize after the fact, either on purpose or through poor draftsmanship.* Hence, government agents, the trial trier of fact, and appellate courts cannot be delegated the authority to criminalize after the fact.<sup>179</sup> The two-pronged inquiry is there-

175. *But see supra* notes 167–169 and accompanying text (regarding the qualifying discussion).

176. Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 358–59 (2005); Ted Sampsell-Jones, *Reviving Saucier: Prospective Interpretations of Criminal Laws*, 14 GEO. MASON L. REV. 725, 735–36 (2007).

177. *See, e.g.,* Silvar v. Eighth Judicial Dist. Court, 129 P.3d 682, 685 (Nev. 2006) (following *Kolender v. Lawson*, 461 U.S. 352 (1983), and asserting that the second pillar 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*, 100 N.Y.2d 412, 420–21 (2003) (recognizing that the two standards are “closely related”).

178. U.S. CONST. art. I, § 9, cl. 3 (prohibiting Bills of Attainder and ex-post facto laws); *id.* § 10, cl. 1 (imposing the same prohibitions on the states); *see also* MODEL PENAL CODE § 1.05(1) (Official Draft 1985) (“No conduct constitutes an offense unless it is a crime or violation under this Code or another statute of this State.”).

179. *Kolender v. Lawson*, 461 U.S. 352, 357–58 (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 the trier of fact—the latter is more important.

fore unnecessary, as conclusively proven by the fact that supreme courts almost always find that either both or neither are violated.<sup>180</sup>

Even when reduced to a single inquiry, however, there is an even more fundamental flaw in the current conception of the void for vagueness doctrine. It is quintessentially a doctrine that is highly susceptible to post hoc reasoning by the supreme courts, which by definition empowers them, but makes the constitutional protection highly ephemeral.<sup>181</sup> The opportunity is provided for these supreme courts to eyeball the words—the clarity of which are under scrutiny—in the definition of the crime, make reference to the dictionary definition of those words, and proclaim them plain, clear, and understandable, therefore denying the claim that the vagueness doctrine was violated.<sup>182</sup> 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, violates the doctrine.<sup>183</sup> Hence the real risk—the risk of unconstitutional legislative delegation of ex post facto criminalization authority—is seldom mentioned, and the task of standardizing an appropriate policy-based protocol for evaluating that risk is almost never undertaken.<sup>184</sup> This leaves the right embodied in the prohibition against ex post facto criminalization vulnerable to the first definition

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180. See, e.g., *id.* at 358 (both violated); *Silvar*, 129 P.3d at 685–86 (both violated). But see *Porelle*, 822 A.2d at 566 (neither violated). Even when a state supreme court focuses its analysis on only one of the two standards, the facts and outcome of the case graphically illustrate that the finding of a violation also demonstrates that the other standard was also violated. *Palmer v. City of Euclid*, 402 U.S. 544, 545 (1971) (per curiam) (holding that the “Suspicious Person” city ordinance 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 *Palmer* 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. *Id.* at 544–45.

181. *Silvar*, 129 P.3d at 686; *Porelle*, 822 A.2d at 567; *In re A.S.*, 626 N.W.2d 712, 717–18 (Wis. 2001) (showing that a disorderly conduct crime is constitutional even if it prohibits conduct intertwined with specific constitutional protections, as long as it is consistent with the legislature’s purpose in enacting the crime); see also Robinson, *supra* note 176, at 357–58 (asserting that arguably the void for the vagueness doctrine itself is an indefinite concept). The conclusory nature of doctrine’s use by state supreme courts can be compounded: in *Porelle*, the New Hampshire Supreme Court determined that an anti-stalking crime was not too vague, and then conclusionally dismissed arguably pertinent U.S. Supreme Court precedent that supported the defendant’s constitutional challenge. 822 A.2d at 567.

182. See, e.g., *Porelle*, 822 A.2d at 565–66.

183. See, e.g., *Silvar*, 129 P.3d at 684; *Porelle*, 822 A.2d at 565.

184. See Robinson, *supra* note 176, at 357, 359. Twice Professor Robinson 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 to the courts. *Id.* at 357. Later, he cites to a U.S. Supreme Court decision that suggests to him that the vagueness doctrine serves to prevent common law criminalization. *Id.* at 360. 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.

of criminalization of suspicion identified in this article—enactment of crimes which have as their express or implied purpose the criminalization of suspicion.<sup>185</sup> 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.<sup>186</sup> To determine if a crime's definition violates this right, there is a sequential set of core inquiries—fully supported by current U.S. Supreme Court precedent—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 in public, or First Amendment-protected speech and conduct, or a combination thereof.<sup>187</sup> Therefore, a constitutional crime definition cannot be based only on the government's suspicion that the accused has committed, is committing, or will imminently commit some generic or even specific crime. Nor can it consist of only an express reference to suspicion and the status of the accused, or the refusal of an accused to obey a government agent's demand that the accused cease thinking, sitting, standing, loitering in public, or otherwise engaging in conduct protected by the Constitution.<sup>188</sup> This is true because such definitions of crimes do not even hint at conduct that can constitutionally be criminalized, thereby leaving the criminalization decision to be made *ex post facto* by government agents, the trier of fact, and ultimately, appellate courts.

There is a large body of precedent that erroneously sanctions the constitutionality of criminalizing suspicion by allowing legislatures to draft a definition of a crime that 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 suspicion of criminality.<sup>189</sup> Such crime definitions create the grave risk of *ex post facto* criminalization based on the collective creative skills of government agents to conjure and morph suspicion from these constitutionally protected sources. Similarly, defining a crime to include only status or innocuous, pervasive behavior as a basis to assert suspicion of criminality, creates the grave risk of legislative delegation of *ex post facto* criminalization authority.

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185. See *supra* notes 16, 135–37 and accompanying text.

186. See *supra* notes 176, 181–82 and accompanying text.

187. See *supra* notes 30–31, 69–74, 113, 123–126, 135–36 and accompanying text; see also 91 C.J.S. *Vagrancy and Related Offenses* § 23.

188. See, e.g., *Smith v. City of Picayune*, 701 So. 2d 1101, 1103 (Miss. 1997) (sanctioning the criminalization as disorderly conduct regarding the refusal of a business owner to obey a police order to return inside his business building because he was standing on his business property with a baseball bat when other people were causing a disturbance on that property).

189. See *supra* notes 130–31 and accompanying text.

Even if the conduct element of such crimes were not constitutionally protected, each conduct category identified in the preceding paragraph fails as a logical basis for inferring the conscious intent to commit some unspecified, or more appropriately specific, other crime. Hence, these legislative crime definitions open the door to sanctioning criminalization that is based upon only the executive branch's suspicion, never articulated before the seizure, and which therefore can be created and crafted after the fact.<sup>190</sup> 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 government agents to construct, after the fact, the necessary specifics of such circumstances.<sup>191</sup> These "suspicious circumstances" crimes almost invariably fail to include in their definitions conduct of the accused that makes the accused somehow responsible for those circumstances.

A constitutional crime definition must include specific, non-constitutionally protected conduct, a possession or omission element, or alternatively a generic reference to conduct coupled with a specific result element.<sup>192</sup> This minimum content requirement is clear and any legislative draftsman should be able to comply with this principle. A failure to

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190. See, e.g., *City of Chicago v. Morales*, 687 N.E.2d 53, 60 (Ill. 1997) (examining a statute that expressly defers to police judgment). 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.

191. See *supra* notes 30–32 and accompanying text (regarding the federal Constitution's ban on criminalizing suspicion by focusing solely or primarily on status); see also *Morales*, 687 N.E.2d at 61 (making reference to several pre-1996 state supreme court decisions in which the courts sanctioned the constitutionality of loitering statutes based on generic references to "under circumstances or in a manner"); *Silvar v. Eighth Judicial Dist. Court*, 129 P.3d 682, 686 (Nev. 2006) (relying on an Alaska Supreme Court decision stating that the vagueness doctrine was violated when the crime criminalized a known prostitute for standing around in public); *In re A.S.*, 626 N.W.2d 712, 716 (Wis. 2001) (finding 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 re A.S.*, 626 N.W.2d at 721–22. 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.

192. Dannye Holley, *The Influence of the Model Penal Code's Culpability Provisions on State Legislatures: A Study of Lost Opportunities, Including Abolishing the Mistake of Fact Doctrine*, 27 SW. L.J. 229, 230 n.3 (1997).



comply signals an attempt by the legislature to delegate ex post facto criminalization authority—an authority the legislature does not possess.<sup>193</sup> 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 violates this core constitutional principle.<sup>194</sup> This core principle and these two corollaries are all the constitutional scrutiny courts should give the work of a legislature in defining the elements of a crime, and together are 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 definitional hurdles, it could still be challenged on other constitutional grounds such as substantive due process or equal protection.<sup>195</sup>

The federal and state constitutions' ex post facto protections also prohibit increasing criminal punishments after the fact.<sup>196</sup> Despite this specific protection, state supreme courts during the period of this study (1995 through 2007), rejected claims that legislative criminalization based on suspicion violated ex post facto constitutional protection.<sup>197</sup> The California Supreme Court did so in the context of sanctioning a legislative decision which twice violated the purpose of ex post facto protection: first, in the

193. *People v. Stuart*, 100 N.Y.2d 412, 421–22 (2003) (citing the U.S. Supreme Court decision in *Coates v. City of Cincinnati*, 402 U.S. 611 (1971), 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 bifurcating vagueness challenges on its facts 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 societal-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.

194. *Stuart*, 100 N.Y.2d at 416–418 (discussing the New York legislature's 1999 criminalization of stalking). The law defines stalking as: "intentionally . . . engaging in a course of conduct" (no specific conduct is specified, and almost all conduct in culpability concept terms is purposeful or knowing) "for no legitimate purpose" (a mish mash of pseudo culpability and a circumstantial element not related to the specific circumstances surrounding the crime event—this element is highly susceptible to post hoc determination) and "directed at" (not further defined) "a specific person" if that conduct was likely to "cause reasonable fear of material" (not further defined) "harm" (possible emotional state of the victim, but not a required result) to the victim. N.Y. PENAL LAW § 120.45 (McKinney 1999). Alternatively, the crime required proof both of a specific conduct and a specific result. *Id.* 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. *Stuart*, 100 N.Y.2d at 428–29.

195. *Lawrence v. Texas*, 539 U.S. 558, 564 (2003) (holding that criminalization of consensual, private sex between adults of the same sex violated substantive due process); *Yick Wo v. Hopkins*, 118 U.S. 356, 367–68 (1886) (holding that crime enforced against only one race violated equal protection).

196. U.S. CONST. art. I, §§ 9, cl. 3, 10, cl.1; *see also* *Wright v. Superior Court*, 936 P.2d 101, 109–10 (Cal. 1997) (Mosk, J., dissenting) (stating that the ex post facto clause when applied to states should be analyzed "under the analytical framework set forth" in *Collins v. Youngblood*, 497 U.S. 37 (1990)).

197. *See, e.g., Wright*, 936 P.2d at 102.

criminalizing of subjective suspicion by making it a misdemeanor to refuse to register or re-register as a sex offender, and second, by letting the misdemeanor conviction serve as the basis for a recidivist conviction—thereby changing the crime’s punishment grade to a felony.<sup>198</sup> 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.<sup>199</sup> The court relied entirely on its court-created “continuing crime” doctrine, and failed to cite, analyze, or adequately consider the superior authority of the federal or California state constitution.<sup>200</sup> The California Supreme Court’s reliance on its own doctrine—articulated 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 significantly enhance the punishment for a crime after the fact.<sup>201</sup> In addition, the court also failed to adequately consider that it had interpreted this status offense to be a strict liability offense.<sup>202</sup> Hence, the court’s holding was tantamount to finding that, after the accused’s omission, it had the power to declare a felony which doubled the significance of doing nothing. Further, the state was not required to prove that the accused was aware of the risk that he had violated, or was currently violating, his duty, thus obliterating any meaningful protection of that component of the ex post facto right that prohibits after-the-fact 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 recurring.

3. *The Hiibel Constitutional Quandary: Criminalizing Specific Acts or Omissions that Constitute Failure to Cooperate with a Government Agent Acting with Arguably Reasonable Suspicion—Substantive Due Process Scrutiny of the Minimal Rationality of such Criminalization*

Notwithstanding this article’s proposal for a reformed, more precise, and more stringent reasonable suspicion standard, and the reformed vagueness doctrine outlined above, a legislature could still constitutionally criminalize specific refusals to obey permissible government investigation tactics that are employed after the government has developed reasonable

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198. *Id.* at 107.

199. *Id.* at 108.

200. *Id.* at 105.

201. *Id.*

202. *See supra* note 101 and accompanying text.

suspicion that a person has committed, is in the process of committing, or will imminently commit a specific crime. For example, crimes could result from a refusal to comply with a government agent's investigatory demands, or from the suspicion that sex offenders are always imminently threatening to repeat the same or a similar offense.<sup>203</sup> A legislature making this decision can enhance the likelihood of a supreme court sanctioning the criminalization decision by including, as an exception, the otherwise totally superfluous language that the crime does not encompass innocent conduct specifically protected by the federal and/or state constitutions.<sup>204</sup>

Criminalizing the refusal to comply with government demands for cooperation when the government has, at most, only reasonable suspicion should not be constitutional in a mature democracy given the myriad of investigatory techniques the government can employ based on such suspicion. This is most obviously true when the specific uncooperative conduct or omissions have no rational or logical value as proof of the specific crime that was originally suspected. Yet most state supreme courts in the six years before and after September 11th have agreed with the U.S. Supreme Court that it is constitutional to criminalize such lack of cooperation with a government agent acting on such suspicion, even if, as previously stated, the specific uncooperative conduct or omissions have no rational or logical nexus to the specific crime that was originally suspected.<sup>205</sup>

In 2008 and beyond, 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 the suspicion.<sup>206</sup> Criminalization based on reasonable suspicion, like all criminali-

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203. See *supra* notes 85–105.

204. *Sale v. City of Charleston*, 539 S.E.2d 458–59 (W. Va. 2000) (finding the constitutionality of a juvenile curfew crime was shielded in part against a void for vagueness attack by the fact that the crime has exceptions for First Amendment-protected conduct). Of course, even if the exception was omitted, constitutionally protected conduct could not be criminalized.

205. See cases cited *supra* notes 60–65, 96–98 and accompanying text; see also *State v. Porelle*, 822 A.2d 562, 566 (N.H. 2003).

206. See *supra* notes 31, 38, 43 and accompanying text; see also *Lawrence v. Texas*, 539 U.S. 558, 565 (2003) (stating that 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, 253–75 (2005); Andrew J. Liese, Note, *We Can Do Better: Anti-Homeless Ordinances as Violations of State Substantive Due Process Law*, 59 *VAND. L. REV.* 1413, 1436 n.143 (2006) (asserting that the U.S. Constitution substantive due process standard is deferential to legislative judgments in the development and employment of the rational basis test, and also that the test has two sequential prongs: the first, 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, 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 the liberty interests of people. See Liese, *supra* at 1437–43.

zation decisions, implicates the most basic of substantive due process principles. It does substantial, and in most instances, irreparable, injury to the liberty interests of the accused.<sup>207</sup> This principle unearths another fatal flaw of the majority opinion in *Hiibel*.<sup>208</sup> The Court's holding was a stark admission that the request for identification was neither rationally related to the investigation nor proof of probable cause of the alleged assault. If it were, it could plausibly have been incriminating, and the accused therefore would have been entitled to invoke his privilege against self-incrimination. No person should be criminalized and thereby deprived of his liberty based on the current standard parameter of only a 2 percent, or even a 25 percent, probability that he has committed some other crime, simply because the person refuses to cooperate with a government investigatory technique that has no rational or logical relationship to proving guilt of the specific crime for which he is suspected.

## V. CONCLUSION

Fear fuels the sanctioning of the criminalization of suspicion.<sup>209</sup> The more people fear, the more they tolerate government encroachments on liberty, including the very serious encroachment that was the focus of this study—the criminalization of suspicion.<sup>210</sup> 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 only on suspicion.<sup>211</sup> This article has demonstrated the reality of those precepts with an added dimension. Every time the legislature enacts a crime that criminalizes based solely or predominantly on suspicion, or on 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 deri-

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207. See Beschle, *supra* note 206, at 255 (suggesting criminal statutes threaten liberty interests protected by substantive as well as procedural due process).

208. See *supra* notes 23–33, 45–51, and accompanying text.

209. See *Hiibel v. Sixth Judicial Dist. Court*, 59 P.3d 1201, 1210 (Nev. 2002) (Agosti, J., dissenting) (expressly characterizing the majority opinion seeking to sanction the criminalization of *Hiibel* as one based on fear).

210. As Justice Brandeis noted in his concurring opinion in *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), the framers knew that fear breeds repression.

211. *Korematsu v. United States*, 323 U.S. 214, 235–36 (1944) (Murphy, J., dissenting) (denouncing the majority opinion, stating that even real fear cannot justify criminalization or internment based on only suspicion which was in turn based only on racial guilt).

vatively the executive branches of government. This empowerment of all three branches of the government, based only on suspicion, comes at the direct expense of the obvious liberty interests 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, that 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 doctrinal scheme, in order to sanction the constitutionality of the criminalization of suspicion.<sup>212</sup> Another state supreme court subordinated another express constitutional right—free speech—by distorting a U.S. 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.<sup>213</sup> In effect, the court gave itself the power to skirt the constitutional ex post facto prohibition barring legislative criminalization after the actor's conduct.<sup>214</sup>

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 the government wields such power today, and that reality is what all of us should really fear.

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212. *State v. Cook*, 700 N.E.2d 570, 576–77 (Ohio 1998). In *Cook*, the Ohio Constitution had an express provision which denied its legislature the power to enact retroactive statutes. *Id.* at 576. 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. *Id.* at 577. Yet the court resorted to its own doctrines on retroactivity to conclude that by its doctrines the crime was not a retroactive statute. *Id.* at 577.

213. *In re A.S.*, 626 N.W.2d 712, 720 (Wis. 2001) (converting the threshold constitutional requirement to criminalize pure speech to the sole requirement).

214. *Id.*