

Ex Post Facto *Laws*

Scope of the Provision.—This clause, like the cognate restriction imposed on the Federal Government by § 9, relates only to penal and criminal legislation and not to civil laws that affect private rights adversely.¹⁹¹²

Distinguishing between civil and penal laws was at the heart of the Court’s decision in *Smith v. Doe*¹³ upholding application of Alaska’s “Megan’s Law” to sex offenders who were convicted before the law’s enactment. The Alaska law requires released sex offenders to register with local police and also provides for public notification via the Internet. The Court accords “considerable deference” to legislative intent; if the legislature’s purpose was to enact a civil regulatory scheme, then the law can be *ex post facto* only if there is “the clearest proof” of punitive effect.¹⁴ Here, the Court determined, the legislative intent was civil and non-punitive—to promote public safety by “protecting the public from sex offenders.” The Court then identified several “useful guideposts” to aid analysis of whether a law intended to be non-punitive nonetheless has punitive effect. Registration and public notification of sex offenders are of recent origin, and are not viewed as a “traditional means of punishment.”¹⁵ The Act does not subject the registrants to an “affirmative disability or restraint”; there is no physical restraint or occupational disbarment, and there is no restraint or supervision of living conditions, as there can be under conditions of probation. The fact that the law might deter future crimes does not make it punitive. All that is required, the Court explained, is a rational connection to a non-punitive purpose, and the statute need not be narrowly tailored to that end.¹⁶ Nor is the act “excessive” in relation to its regulatory purpose.¹⁷ Rather, “the means chosen are ‘reasonable’ in light of the [state’s] non-punitive objective” of promoting public safety by giving its citizens information about former sex offenders, who, as a group, have an alarmingly high rate of recidivism.¹⁸

There are three categories of *ex post facto* laws: those “which punish[] as a crime an act previously committed, which was innocent when done; which make[] more burdensome the punishment for a crime, after its commission; or which deprive[] one charged with crime of any defense available according to law at the time when the act was committed.”¹⁹¹³ The bar is directed only against legislative action and does not touch erroneous or inconsistent decisions by the courts.¹⁹¹⁴

¹⁹¹² *Calder v. Bull*, [3 U.S. \(3 Dall.\) 386, 390](#) (1798); *Watson v. Mercer*, [33 U.S. \(8 Pet.\) 88, 110](#) (1834); *Baltimore and Susquehanna R.R. v. Nesbit*, [51 U.S. \(10 How.\) 395, 401](#) (1850); *Carpenter v. Pennsylvania*, [58 U.S. \(17 How.\) 456, 463](#) (1855); *Loche v. New Orleans*, [71 U.S. \(4](#)

[Wall.](#)) [172](#) (1867); *Orr v. Gilman*, [183 U.S. 278, 285](#) (1902); *Kentucky Union Co. v. Kentucky*, [219 U.S. 140](#) (1911). In *Eastern Enterprises v. Apfel*, [524 U.S. 498, 538](#) (1998) (concurring), Justice Thomas indicated a willingness to reconsider *Calder* to determine whether the clause should apply to civil legislation.

¹³ [538 U.S. 84](#) (2003).

¹⁴ 538 U.S. at 92.

¹⁵ The law’s requirements do not closely resemble punishments of public disgrace imposed in colonial times; the stigma of Megan’s Law results not from public shaming but from the dissemination of information about a criminal record, most of which is already public. 538 U.S. at 98.

¹⁶ 538 U.S. at 102.

¹⁷ Excessiveness was alleged to stem both from the law’s duration (15 years of notification by those convicted of less serious offenses; lifetime registration by serious offenders) and in terms of the widespread (Internet) distribution of the information.

¹⁸ 538 U.S. at 105. Unlike involuntary civil commitment, where the “magnitude of restraint [makes] individual assessment appropriate,” the state may make “reasonable categorical judgments,” and need not provide individualized determinations of dangerousness. *Id.* at 103.

¹⁹¹³ *Collins v. Youngblood*, [497 U.S. 37, 42](#) (1990) (quoting *Bezell v. Ohio*, [269 U.S. 167, 169–170](#) (1925)). Alternatively, the Court described the reach of the clause as extending to laws that “alter the definition of crimes or increase the punishment for criminal acts.” *Id.* at 43. Justice Chase’s oft-cited formulation has a fourth category: “every law that aggravates a crime, or makes it greater than it was, when committed.” *Calder v. Bull*, [3 U.S. \(3 Dall.\) 386, 390](#) (1798), *cited in, e.g., Carmell v. Texas*, [529 U.S. 513, 522](#) (2000).

¹⁹¹⁴ *Frank v. Mangum*, [237 U.S. 309, 344](#) (1915); *Ross v. Oregon*, [227 U.S. 150, 161](#) (1913). However, an unforeseeable judicial enlargement of a criminal statute so as to encompass conduct not covered on the face of the statute operates like an *ex post facto* law if it is applied retroactively and violates due process in that event. *Bouie v. City of Columbia*, [378 U.S. 347](#) (1964). *See Marks v. United States*, [430 U.S. 188](#) (1977) (applying *Bouie* in context of § 9, cl. 3). *But see Splawn v. California*, [431 U.S. 595](#) (1977) (rejecting application of *Bouie*). The Court

itself has not always adhered to this standard. *See* Ginzburg v. United States, [383 U.S. 463](#) (1966).

The fact that a law is *ex post facto* and invalid as to crimes committed prior to its enactment does not affect its validity as to subsequent offenses.¹⁹¹⁵ A statute that mitigates the rigor of the law in force at the time the crime was committed,¹⁹¹⁶ or merely penalizes the continuance of conduct lawfully begun before its passage, is not *ex post facto*. Thus, measures penalizing the failure of a railroad to cut drains through existing embankments¹⁹¹⁷ or making illegal the continued possession of intoxicating liquors which were lawfully acquired¹⁹¹⁸ have been held valid.

Denial of Future Privileges to Past Offenders.—The right to practice a profession may be denied to one who was convicted of an offense before the statute was enacted if the offense reasonably may be regarded as a continuing disqualification for the profession. Without offending the Constitution, statutes barring a person from practicing medicine after conviction of a felony¹⁹¹⁹ or excluding convicted felons from waterfront union offices unless pardoned or in receipt of a parole board’s good conduct certificate,¹⁹²⁰ may be enforced against a person convicted before the measures were passed. But the test oath prescribed after the Civil War, whereby office holders, teachers, or preachers were required to swear that they had not participated in the Rebellion, was held invalid on the ground that it had no reasonable relation to fitness to perform official or professional duties, but rather was a punishment for past offenses.¹⁹²¹ A similar oath required of suitors in the courts also was held void.¹⁹²²

Changes in Punishment. Justice Chase in *Calder v. Bull* gave an alternative description of the four categories of *ex post facto* laws, two of which related to punishment. One such category was laws that inflict punishment “where the party was not, by law, liable to any punishment”; the other was laws that inflict greater punishment than was authorized when the crime was committed.¹⁹

Illustrative of the first of these punishment categories is “a law enacted after expiration of a previously applicable statute of limitations period [as] applied to revive a previously time-barred prosecution.” Such a law, the Court ruled in *Stogner v. California*,²⁰ is prohibited as *ex post facto*. Courts that had upheld extension of *unexpired* statutes of limitation had been careful to distinguish situations in which the limitations periods have expired. The Court viewed revival of criminal liability after the law had granted a person “effective amnesty” as being “unfair” in the sense addressed by the Ex Post Facto Clause.

Illustrative of the second punishment category are statutes that changed an indeterminate sentence law to require a judge to impose the maximum sentence,²¹ that required solitary confinement for prisoners previously sentenced to death,²² and that allowed a warden to fix, within limits of one week, and keep secret the time of execution.²³ Because it made more onerous the punishment for crimes committed before its enactment, a law, a law that altered sentencing guidelines to make it more likely the sentencing authority would impose on a defendant a more severe sentence than was previously likely and making it impossible for the defendant to challenge the sentence was *ex post facto* as to one who had committed the offense prior to the change.¹⁹²⁶ But laws providing heavier penalties for new crimes thereafter committed by habitual criminals,¹⁹²⁷ changing the punishment from hanging to electrocution, fixing the place therefore in the penitentiary, and permitting the presence of a greater number of invited witnesses,¹⁹²⁸ or providing for close confinement of six to nine months in the penitentiary, in lieu of three to six months in jail prior to execution, and substituting the warden for the sheriff as hangman, have been sustained.¹⁹²⁹

¹⁹¹⁵ *Jaehne v. New York*, [128 U.S. 189](#), [194](#) (1888).

¹⁹¹⁶ *Rooney v. North Dakota*, [196 U.S. 319](#), [325](#) (1905).

¹⁹¹⁷ *Chicago & Alton R.R. v. Tranbarger*, [238 U.S. 67](#) (1915).

¹⁹¹⁸ *Samuels v. McCurdy*, [267 U.S. 188](#) (1925).

¹⁹¹⁹ *Hawker v. New York*, [170 U.S. 189](#), [190](#) (1898). *See also* *Reetz v. Michigan*, [188 U.S. 505](#), [509](#) (1903); *Lehmann v. State Board of Public Accountancy*, [263 U.S. 394](#) (1923).

¹⁹²⁰ *De Veau v. Braisted*, [363 U.S. 144](#), [160](#) (1960).

¹⁹²¹ *Cummings v. Missouri*, [71 U.S. \(4 Wall.\) 277](#), [316](#) (1867).

¹⁹²² *Pierce v. Carskadon*, [83 U.S. \(16 Wall.\) 234](#) (1873).

¹⁹ [3 U.S. \(3 Dall.\) 386](#), [389](#) (1798).

²⁰ [539 U.S. 607](#), [632](#)–33 (2003) (invalidating application of California’s law to revive child abuse charges 22 years after the limitations period had run for the alleged crimes).

²¹ *Lindsey v. Washington*, [301 U.S. 397](#) (1937). But note the limitation of *Lindsey* in *Dobbert v. Florida*, [432 U.S. 282](#), [298](#)–301 (1977).

²² Holden v. Minnesota, [137 U.S. 483](#), [491](#) (1890).

²³ Medley, Petitioner, [134 U.S. 160](#), [171](#) (1890).

¹⁹²⁶ Miller v. Florida, [482 U.S. 423](#) (1987). *But see* California Dep't of Corrections v. Morales, [514 U.S. 499](#) (1995) (a law amending parole procedures to decrease frequency of parole-suitability hearings is not *ex post facto* as applied to prisoners who committed offenses before enactment). The opinion modifies previous opinions that had held impermissible some laws because they operated to the disadvantage of covered offenders. Henceforth, "the focus of *ex post facto* inquiry is . . . whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable." *Id.* at 506 n.3. *Accord*, Garner v. Jones, [529 U.S. 244](#) (2000) (evidence insufficient to determine whether change in frequency of parole hearings significantly increases the likelihood of prolonging incarceration). *But see* Lynce v. Mathis, [519 U.S. 433](#) (1997) (cancellation of release credits already earned and used, resulting in reincarceration, violates the Clause).

¹⁹²⁷ Gryger v. Burke, [334 U.S. 728](#) (1948); McDonald v. Massachusetts, [180 U.S. 311](#) (1901); Graham v. West Virginia, [224 U.S. 616](#) (1912).

¹⁹²⁸ Malloy v. South Carolina, [237 U.S. 180](#) (1915).

¹⁹²⁹ Rooney v. North Dakota, [196 U.S. 319](#), [324](#) (1905).

In *Dobbert v. Florida*,¹⁹³⁰ the Court may have formulated a new test for determining when a criminal statute *vis-a-vis* punishment is *ex post facto*. Defendant murdered two of his children; at the time of the commission of the offenses, Florida law provided the death penalty upon conviction for certain takings of life. Subsequent to the commission of the capital offenses, the Supreme Court held capital sentencing laws similar to Florida's unconstitutional, although convictions obtained under the statutes were not to be overturned,¹⁹³¹ and the Florida Supreme Court voided its death penalty statutes on the authority of the High Court decision. The Florida legislature then enacted a new capital punishment law, which was sustained. Dobbert was convicted and sentenced to death under the new law, which was enacted after the commission of his offenses. The Court rejected the *ex post facto* challenge to the sentence on the basis that whether the old statute was constitutional or not, "it clearly indicated Florida's view of the severity of murder and of the degree of punishment which the legislature wished to impose upon murderers. The statute was intended to provide maximum deterrence, and its existence on the statute books provided fair warning as to the degree of culpability which the State ascribed to the act of murder."¹⁹³² Whether the "fair warning" standard is to have any prominent place in *ex post*

facto jurisprudence may be an interesting question, but it is problematical whether the fact situation will occur often enough to make the principle applicable in very many cases.

¹⁹³⁰ [432 U.S. 282, 297–98](#) (1977). Justices Stevens, Brennan, and Marshall dissented. *Id.* at 304.

¹⁹³¹ *Furman v. Georgia*, [408 U.S. 238](#) (1972). The new law was sustained in *Proffitt v. Florida*, [428 U.S. 242](#) (1976).

¹⁹³² 432 U.S. at 297.

Changes in Procedure.—An accused person does not have a right to be tried in all respects in accordance with the law in force when the crime charged was committed.¹⁹³³ Laws shifting the place of trial from one county to another,¹⁹³⁴ increasing the number of appellate judges and dividing the appellate court into divisions,¹⁹³⁵ granting a right of appeal to the State,¹⁹³⁶ changing the method of selecting and summoning jurors,¹⁹³⁷ making separate trials for persons jointly indicted a matter of discretion for the trial court rather than a matter of right,¹⁹³⁸ and allowing a comparison of handwriting experts¹⁹³⁹ have been sustained over the objection that they were *ex post facto*. It was said or suggested in a number of these cases, and two decisions were rendered precisely on the basis, that the mode of procedure might be changed only so long as the substantial rights of the accused were not curtailed.¹⁹⁴⁰ The Court has now disavowed this position.¹⁹⁴¹ All that the language of most of these cases meant was that a legislature might not evade the *ex post facto* clause by labeling changes as alteration of “procedure.” If a change labeled “procedural” effects a substantive change in the definition of a crime or increases punishment or denies a defense, the clause is invoked; however, if a law changes the procedures by which a criminal case is adjudicated, the clause is not implicated, regardless of the increase in the burden on a defendant.¹⁹⁴²

¹⁹³³ *Gibson v. Mississippi*, [162 U.S. 565, 590](#) (1896).

¹⁹³⁴ *Gut v. Minnesota*, [76 U.S. \(9 Wall.\) 35, 37](#) (1870).

¹⁹³⁵ *Duncan v. Missouri*, [152 U.S. 377](#) (1894).

¹⁹³⁶ *Mallett v. North Carolina*, [181 U.S. 589, 593](#) (1901).

¹⁹³⁷ *Gibson v. Mississippi*, [162 U.S. 565, 588](#) (1896).

¹⁹³⁸ *Bezell v. Ohio*, [269 U.S. 167](#) (1925).

¹⁹³⁹ Thompson v. Missouri, [171 U.S. 380](#), [381](#) (1898).

¹⁹⁴⁰ *E.g.*, Duncan v. Missouri, [152 U.S. 377](#), [382–383](#) (1894); Malloy v. South Carolina, [237 U.S. 180](#), [183](#) (1915); Beazell v. Ohio, [269 U.S. 167](#), [171](#) (1925). The two cases decided on the basis of the distinction were Thompson v. Utah, [170 U.S. 343](#) (1898) (application to felony trial for offense committed before enactment of change from 12–person jury to an eight-person jury void under clause), and Kring v. Missouri, [107 U.S. 221](#) (1883) (as applied to a case arising before change, a law abolishing a rule under which a guilty plea functioned as a acquittal of a more serious offense, so that defendant could be tried on the more serious charge, a violation of the clause).

¹⁹⁴¹ Collins v. Youngblood, [497 U.S. 37](#), [44–52](#) (1990). In so doing, the Court overruled Kring and Thompson v. Utah.

¹⁹⁴² 497 U.S. at 44, 52. *Youngblood* upheld a Texas statute, as applied to a person committing an offense and tried before passage of the law, that authorized criminal courts to reform an improper verdict assessing a punishment not authorized by law, which had the effect of denying defendant a new trial to which he would have been previously entitled.

Changes in evidentiary rules that allow conviction on less evidence than was required at the time the crime was committed can also run afoul of the *ex post facto* clause. This principle was applied in the Court’s invalidation of retroactive application of a Texas law that eliminated the requirement that the testimony of a sexual assault victim age 14 or older must be corroborated by two other witnesses, and allowed conviction on the victim’s testimony alone.¹⁹⁴³