

2-2004

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# “DEMOCRATIC DESPOTISM” AND CONSTITUTIONAL CONSTRAINT: AN EMPIRICAL ANALYSIS OF EX POST FACTO CLAIMS IN STATE COURTS

Wayne A. Logan\*

*This Article explores the history of the Ex Post Facto Clause, including the Supreme Court’s seminal 1798 decision in Calder v. Bull, and analyzes the results of a survey of ex post facto claims decided in state courts from 1992–2002, the first study to catalog the types of claims generated among the states, and the institutional response of state courts to them. The author provides an overview of the claims resolved in state courts, examining the nature of the laws challenged, how the challenges fared, and the rationales used by courts in their dispositions. Discussion focuses on two abiding sources of confusion in ex post facto jurisprudence: the interpretation of the categories of laws the Calder decision prescribed as being ex post facto, and the ongoing uncertainty over the definition and treatment of laws deemed procedural (as opposed to substantive) in nature. These areas of uncertainty, it is argued, not only inspire confusion among the courts, but also serve to undermine the crucial structural role of the Ex Post Facto Clause itself—intended by the Framers to guard against the potent political forces motivating state legislatures to adopt criminal laws with retroactive effect.*

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## INTRODUCTION

During the last week of its October 2002 term, the Supreme Court issued a number of long-awaited decisions, addressing such politically charged issues as affirmative action in higher education,<sup>1</sup> the criminalization of same-sex consensual

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<sup>1</sup> Gratz v. Bollinger, 123 S. Ct. 2411 (2003) (invalidating affirmative action admissions program employed by the University of Michigan Office of Undergraduate Admissions on equal protection grounds); Grutter v. Bollinger, 123 S. Ct. 2325 (2003) (upholding affirmative action admissions program employed by the University of Michigan Law School against equal protection challenge).

sodomy,<sup>2</sup> and the First Amendment rights of public library patrons to access the Internet without governmental interference.<sup>3</sup> Taken together, the decisions fully warranted media assessments of a “momentous” term,<sup>4</sup> and the outcomes will surely fuel related cultural wars for years to come. That same week the Court issued another decision, which, although largely overshadowed by its high-profile companions, is also well deserving of attention. In *Stogner v. California*, the Court held that the Ex Post Facto Clause precluded California from prosecuting individuals suspected of sexually abusing children, after the limitations period for such prosecutions had expired.<sup>5</sup> The five-to-four vote accrued to the immediate benefit of hundreds of convicted and suspected sex offenders, including members of the clergy who were only recently held accountable for decades-old child sexual predations,<sup>6</sup> and cast into doubt other recent efforts to revive expired prosecutions, including those of Congress regarding aged allegations of terrorism.<sup>7</sup>

In reaching its controversial result, the Court gave effect to its structural role contemplated by the Framers: exerting a brake on the “sudden and strong passions” that provoke state legislatures to enact criminal laws with retroactive application.<sup>8</sup> As it had three years before in *Carmell v. Texas*, when it invalidated a Texas law retroactively easing the evidentiary burden of government in prosecuting sex

<sup>2</sup> *Lawrence v. Texas*, 123 S. Ct. 2472 (2003) (invalidating Texas law criminalizing “deviate sexual intercourse” on substantive due process grounds).

<sup>3</sup> *United States v. Am. Library Ass’n*, 123 S. Ct. 2297 (2003) (upholding the Children’s Internet Protection Act, which conditions the receipt of federal funds on a requirement that public libraries install software that blocks obscene and child pornographic materials).

<sup>4</sup> Linda Greenhouse, *In a Momentous Term, Justices Remake the Law, and the Court*, N.Y. TIMES, July 1, 2003, at A1.

<sup>5</sup> 123 S. Ct. 2446 (2003).

<sup>6</sup> John M. Broder, *Victims Angered and Upset by Ruling Freeing Molesters*, N.Y. TIMES, July 13, 2003, at A12 (discussing release of convicted Roman Catholic priests as a result of *Stogner*).

<sup>7</sup> Linda Greenhouse, *Justices Hear Debate on Extending a Statute of Limitations*, N.Y. TIMES, Apr. 1, 2003, at A14 (discussing law passed by Congress allowing terrorism prosecutions beyond the expired statute of limitations).

<sup>8</sup> *See Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 137–38 (1810):

Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves . . . from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment. . . .

*See also Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 322 (1866) (noting that “[i]t was against the excited action of the States . . . that the framers of the Federal Constitution intended to guard”).

offenders,<sup>9</sup> the Court invoked the Ex Post Facto Clause in order to second-guess a decision by a popularly elected state legislature, to the benefit of a notably unpopular segment of the populace.<sup>10</sup> Much as it did in the wake of the Civil War when states targeted Confederate sympathizers for retroactive punishment,<sup>11</sup> the Court in *Stogner* and *Carmell* voided laws enacted in impassioned, retributive times — in this instance the 1990s<sup>12</sup> — an era in which sex offenders were singled out for particular disdain and enjoyed paramount catalytic political value.<sup>13</sup>

The decisions, to be sure, should not be taken to signal any new special fondness for criminal defendants, or sex offenders in particular, who otherwise boast a notably dismal recent track record before the Court.<sup>14</sup> Rather, optimistically, the decisions can be taken to manifest a willingness to breathe life into ex post facto constraints, twice enshrined in Article I of the Constitution,<sup>15</sup> to limit the capacity of Congress and state legislatures to enact retroactive criminal laws.<sup>16</sup> In both cases,

<sup>9</sup> 529 U.S. 513 (2000).

<sup>10</sup> See ADAM SAMPSON, *ACTS OF ABUSE: SEX OFFENDERS AND THE CRIMINAL JUSTICE SYSTEM* 124 (1994) (observing that the "vehemence of the hatred for sex offenders is unmatched by attitudes to any other offenders").

<sup>11</sup> See *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866); *Cummings*, 71 U.S. (4 Wall.) 277.

<sup>12</sup> Michael Tonry, *Rethinking Unthinkable Punishment Policies in America*, 46 UCLA L. REV. 1751, 1752 (1999) (observing that "[w]e live in a repressive era when punishment policies that would be unthinkable in other times and places are not only commonplace but also are enthusiastically supported by public officials, policy intellectuals, and much of the general public").

<sup>13</sup> See generally Wayne A. Logan, *Federal Habeas in the Information Age*, 85 MINN. L. REV. 147, 161–67 (2000) (discussing rapid enactment of state and federal laws targeting sex offenders, including those allowing for involuntary confinement and registration and community notification); Jonathan Simon, *Megan's Law: Crime and Democracy in Late Modern America*, 25 LAW & SOC. INQUIRY 1111, 1139–42 (2000) (describing political and social forces inspiring registration and community notification laws).

<sup>14</sup> Recent unsuccessful claims have included those challenging the post-imprisonment, involuntary civil confinement of sex offenders; see *Kansas v. Crane*, 534 U.S. 407 (2002); *Seling v. Young*, 531 U.S. 250 (2001); *Kansas v. Hendricks*, 521 U.S. 346 (1997); registration and community notification; see *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1 (2003); *Smith v. Doe*, 538 U.S. 84 (2003); and the refusal of prison authorities to extend the Fifth Amendment right against compelled self-incrimination to inmates engaged in sex-offender treatment; see *McKune v. Lile*, 536 U.S. 24 (2002).

<sup>15</sup> See U.S. CONST. art. I, § 10, cl. 1 (providing that "[n]o State shall . . . pass any . . . ex post facto Law"); U.S. CONST. art. I, § 9, cl. 3 (providing that "[n]o . . . ex post facto Law shall be passed" by Congress).

<sup>16</sup> See *Weaver v. Graham*, 450 U.S. 24, 29 n.8 (1981) ("So much importance did the [Convention] attach to [the ex post facto prohibition], that it is found twice in the Constitution."). Because the discussion here focuses on the prohibition regarding the states, the ex post facto bar is used in a singular sense.

the conservative Rehnquist Court's avowed deference to majoritarianism and state prerogative in formulating criminal justice policy took a back seat.<sup>17</sup> Almost as important, the reasoning supporting the Court's decisions in both cases highlights an important shift in emphasis — focusing less on the reliance and notice interests of individual offenders that are jeopardized when criminal laws are retroactively altered, and more on the arbitrariness of such governmental action.<sup>18</sup> It was this same concern that prompted Justice Black to insist that “the Government should turn square corners in dealing with the people”<sup>19</sup> — no matter how detestable their acts.

While the 1990s, without question, marked a particularly active period of aggressive legislative action on criminal justice-related matters, the proclivity for and motives animating such laws were by no means new. The Court itself acknowledged this political reality early on, in its seminal *ex post facto* decision *Calder v. Bull*.<sup>20</sup> Upon surveying the variety of *ex post facto* laws known to the Framers, it observed that:

The ground for the exercise of such *legislative* power was this, that the *safety* of the kingdom depended on the death, or other punishment, of the offender: as if traitors, when *discovered*, could be so formidable, or the government so insecure! With very few exceptions, the advocates of such laws were stimulated by ambition, or personal resentment, and vindictive malice.<sup>21</sup>

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<sup>17</sup> See, e.g., *Ewing v. California*, 123 S. Ct. 1179, 1187 (2003) (acknowledging the Court's “traditional deference to legislative policy choices” of states in criminal justice matters); see generally CHRISTOPHER E. SMITH, *THE REHNQUIST COURT AND CRIMINAL PUNISHMENT* (1997) (discussing changes to the criminal justice system as a result of the Rehnquist Court); Stephen F. Smith, *The Rehnquist Court and Criminal Procedure*, 73 U. COLO. L. REV. 1337 (2002) (discussing success of the Rehnquist Court in limiting, or reversing, various holdings of the liberal Warren Court).

<sup>18</sup> As noted by the *Carmell* Court, all *ex post facto* laws have one thing in common: “In each instance, the government refuses, after the fact, to play by its own rules, altering them in a way that is advantageous only to the state. . . .” *Carmell v. Texas*, 529 U.S. 513, 533 (2000). For discussion of the Court's recent decisions in the area of retroactive civil legislation, which can similarly be conceived as being based in governmental restraint, not notice and reliance, see Debra Lyn Bassett, *In the Wake of Schooner Peggy: Deconstructing Legislative Retroactivity Analysis*, 69 U. CIN. L. REV. 453 (2001).

<sup>19</sup> *St. Regis Paper Co. v. United States*, 368 U.S. 208, 229 (1961) (Black, J., dissenting).

<sup>20</sup> 3 U.S. (3 Dall.) 386 (1798).

<sup>21</sup> *Id.* at 389; cf. *Landsgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994) (acknowledging that a legislature's “responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals”).

With the dust now settling from a decade in which U.S. prison populations grew to unprecedented proportions,<sup>22</sup> and legislators attached particular value to being perceived as tough on crime,<sup>23</sup> concern over the "democratic despotism"<sup>24</sup> feared by the Framers remains as warranted as ever.

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<sup>22</sup> By year-end 2002, the number of persons incarcerated in the U.S. exceeded 2.1 million, an all-time high. PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, PRISONERS IN 2002, at 1 (2003). The rate of incarceration for persons in prison or jail per 100,000 residents stood at 701, up from 458 in 1990. *Id.* The total number of persons under some form of correctional supervision, whether incarcerated or under community supervision pursuant to probation or parole, grew to nearly 6.6 million. LAUREN E. GLAZE, U.S. DEP'T OF JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES—2001, BUREAU OF JUSTICE STATISTICS BULLETIN, at 1 (2002). In monetary terms, expenditures for correctional activities nationwide grew at an equally alarming rate, almost doubling between 1990 and 1999. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—2001, at 12, tbl. 1.8 (Ann L. Pastore & Kathleen Maguire eds., 2002). Translated into more human terms, during the 1990s, U.S. prisons and jails dispensed almost 16 million "person-years" of incarceration, roughly 4.5 million more years than if confinement rates would have remained unchanged after 1990. *See* HENRY RUTH & KEVIN R. REITZ, THE CHALLENGE OF CRIME: RETHINKING OUR RESPONSE 21 (2003). For an insightful examination of the factors contributing to this aggressive resort to punitive severity, see David Cole, *As Freedom Advances: The Paradox of Severity in American Criminal Justice*, 3 U. PA. J. CONST. L. 455 (2001).

<sup>23</sup> As Katherine Beckett has written, "crime and punishment have taken a front-row seat in the theater of American political discourse." Katherine Beckett, *Political Preoccupation with Crime Leads, Not Follows, Public Opinion*, in PENAL REFORM IN OVERCROWDED TIMES 40 (Michael Tonry ed., 2001). For more on the especially potent political ramifications of criminal justice issues today, see KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS (1997); DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2001); JONATHAN SIMON, GOVERNING THROUGH CRIME: CRIMINAL LAW AND THE RESHAPING OF AMERICAN GOVERNMENT 1965–2000 (forthcoming 2004); LORD WINDELSHAM, POLITICS, PUNISHMENT AND POPULISM (1998); Harry A. Chernoff et al., *The Politics of Crime*, 33 HARV. J. ON LEGIS. 527 (1996); Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829 (2000).

<sup>24</sup> *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 403–07 (1969). For more on this period of retroactive criminal law excesses, and the concerns raised by early state laws in particular, see William Winslow Crosskey, *The True Meaning of the Constitutional Prohibition of Ex-Post-Facto Laws*, 14 U. CHI. L. REV. 539, 540–44 (1947); Robert W. Scheef, "Public Citizens" and the Constitution: Bridging the Gap Between Popular Sovereignty and Original Intent, 69 FORDHAM L. REV. 2201, 2216–17 (2001); James Westfall Thompson, *Anti-loyalist Legislation During the American Revolution*, 3 U. ILL. L. REV. 81 (1908).

This Article addresses the important judicial work that remains to be done if the Ex Post Facto Clause is to fully regain its rightful place, in James Madison's words, as a "constitutional bulwark in favor of personal security and private rights."<sup>25</sup> In particular, the Article reviews the results of a survey of the over 1,000 ex post facto claims decided in state courts from 1992–2002, the first study to catalog the types of claims generated among the states, and the institutional response of state courts to them.

Part I surveys the historic underpinnings of the Ex Post Facto Clause and the major decisions issued from *Calder* onward. As will be apparent, despite the unequivocal clarity of the command that "[n]o State shall . . . pass any . . . ex post facto Law,"<sup>26</sup> the Court has charted a quixotic and uncertain course in its ex post facto jurisprudence. More importantly, over time, it has erected numerous obstacles to the grant of relief on ex post facto grounds — obstacles at odds with the profound suspicions prompting the Framers to include the prohibition in Article I of the Constitution itself, a place otherwise mainly dedicated to specifying the architecture and workings of government. Part II provides an overview of the claims resolved in state courts during the study period, examining the nature of the laws challenged, how the challenges fared, and the rationales used by courts in their dispositions. In Part III, the discussion focuses on two abiding sources of confusion in ex post facto jurisprudence: the interpretation of the categories of laws the *Calder* decision prescribed as being ex post facto, and the ongoing uncertainty over the definition and treatment of laws deemed procedural (as opposed to substantive) in nature. These areas of uncertainty, it will be argued, not only inspire confusion among the courts, but also serve to undermine the crucial structural role of the Ex Post Facto Clause itself — intended by the Framers to guard against the potent political forces motivating state legislatures to adopt criminal laws with retroactive effect.

## I. EX POST FACTO CLAUSE ORIGINS AND CASE LAW

Although bias against retroactive laws is evidenced in thirteenth-century English common law,<sup>27</sup> and Greek and Roman law before that,<sup>28</sup> in America such concern was manifested in the early state constitutional<sup>29</sup> and then the federal

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<sup>25</sup> THE FEDERALIST NO. 44, at 282 (James Madison) (Clinton Rossiter ed., 1961); see also THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (referring to the Clause as a "specified exception[] to the legislative authority" that the courts must enforce).

<sup>26</sup> U.S. CONST. art. I, § 10, cl. 1.

<sup>27</sup> Elmer E. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775, 775–77 (1936).

<sup>28</sup> *Id.* at 775–76.

<sup>29</sup> See Robert G. Natelson, *Statutory Retroactivity: The Founders' View*, 39 IDAHO L. REV. 489, 504 (2003) (noting and discussing instances).



constitutional debates.<sup>30</sup> Despite pleas by such notables as George Mason of Virginia, James Wilson of Pennsylvania, and Oliver Ellsworth of Connecticut, predicated on the practical need of government on occasion to legislate retroactively,<sup>31</sup> abuses by the Crown and state governments alike galvanized efforts to ban such laws.<sup>32</sup> The concerns took shape in Sections 9 and 10 of Article I of the Constitution, prohibiting, respectively, Congress and state legislatures from enacting retroactive laws.<sup>33</sup>

The prohibitions received their first judicial interpretation just over a decade later in *Calder v. Bull*,<sup>34</sup> a decision that governs ex post facto interpretation to this day. In *Calder*, the Connecticut Legislature set aside a probate decree issued by a local court and granted a new hearing on the construction of a will, after the ordinary right to appeal had passed.<sup>35</sup> Writing for the Court, Justice Chase concluded that the decision by the probate court did not create a vested right on behalf of Calder and his wife, and that the legislature, therefore, did not retroactively disturb any recognized legal expectancy.<sup>36</sup> Having concluded that the laws of civil justice were not violated by Connecticut's action, Justice Chase nonetheless went on to state that the Ex Post Facto Clause did not "prohibit . . . depriving a citizen even of a *vested right to property*" because it solely prohibited retroactive application of criminal laws in particular.<sup>37</sup> Writing separately, Justices Paterson<sup>38</sup> and Iredell<sup>39</sup> agreed that the ban extended only to criminal cases. To Justice Iredell, "[i]t is only in criminal cases, indeed, in which the danger to be

<sup>30</sup> See *infra* notes 31–32 and accompanying text.

<sup>31</sup> See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 375–76, 435, 439–40, 640 (Max Farrand ed., 1937) [hereinafter CONVENTION RECORDS].

<sup>32</sup> According to one Convention attendee, "experience overruled all other calculations." CONVENTION RECORDS, *supra* note 31, at 376 (remarks of Daniel Carrol, Maryland). Federalists advanced the ex post facto provisions as a main argument in favor of ratification, in the absence of a Bill of Rights. See THE FEDERALIST NO. 84, at 511 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The establishment of the writ of habeas corpus, the prohibition of ex post facto laws, and Titles of Nobility . . . are perhaps greater securities to liberty and republicanism than any [the Constitution] contains."). For a discussion of the several constitutional provisions evincing the Framers' strong bias against retroactive legislation more generally, with the Ex Post Facto Clause figuring chiefly, see Natelson, *supra* note 29, at 515–27; Smead, *supra* note 27, at 789–93.

<sup>33</sup> See *supra* notes 15–16 and accompanying text.

<sup>34</sup> 3 U.S. (3 Dall.) 386 (1798).

<sup>35</sup> *Id.* at 386.

<sup>36</sup> *Id.* at 392.

<sup>37</sup> *Id.* at 394.

<sup>38</sup> *Id.* at 395 (opinion of Paterson, J.).

<sup>39</sup> *Id.* at 398 (opinion of Iredell, J.). Justice Cushing also wrote separately but expressed no opinion on the question. See *id.* at 400–01 (opinion of Cushing, J.).

guarded against, is greatly to be apprehended.”<sup>40</sup> Despite resolving that the Ex Post Facto Clause was not applicable to the claim before the Court, three of the four sitting Justices spoke at length, five years before *Marbury v. Madison*,<sup>41</sup> on the purpose and reach of the Ex Post Facto Clause in the regulation of state criminal law making.<sup>42</sup> Justice Chase surveyed “[a] few instances” of legislative activity

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<sup>40</sup> *Id.* at 399 (opinion of Iredell, J.). For his part, Justice Paterson observed that if the Ex Post Facto Clause reached all retroactive laws, then the Contracts Clause would be superfluous. *See id.* at 397 (opinion of Paterson, J.).

For commentary in support of the contrary view that the Ex Post Facto Clause was widely, if not uniformly, understood at the time of framing as applying to civil and criminal laws alike see WILLIAM WINSLOW CROSSKEY, 1 POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 325–29 (1953); Jane Harris Aiken, *Ex Post Facto in the Civil Context: Unbridled Punishment*, 81 KY. L.J. 323 (1992); Crosskey, *supra* note 24; Oliver Field, *Ex Post Facto in the Constitution*, 20 MICH. L. REV. 315 (1921); Breck P. McAllister, *Ex Post Facto Laws in the Supreme Court of the United States*, 15 CAL. L. REV. 269 (1927). *But see* Natelson, *supra* note 29, at 522 (noting ongoing negotiations among Federalist and anti-Federalist camps and concluding that there existed “a public quasi-consensus . . . that the Ex Post Facto Clauses banned only criminal retroactivity”).

According to Leonard Levy, *Calder’s* limitation of the Ex Post Facto Clause to criminal cases “was more innovative than it was an accurate reflection of the opinions of the Framers and ratifiers. . . . The Court in that case reinvented the law on the subject.” LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMER’S CONSTITUTION 74 (1988). One commentator attributes the confusion to the fact that records of the Convention did not start becoming available in published form until 1819, twenty-one years after *Calder*. McAllister, *supra*, at 270. Another notes that “only one” member of the *Calder* Court (Paterson) attended the Convention, but the author fails to elaborate on why this would not suffice to illuminate other members of the Court on such a central matter of constitutional interpretation. Field, *supra*, at 316.

<sup>41</sup> For more on the seminal place of *Marbury* in the pantheon of judicial review, see PAUL W. KAHN, THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA (1997); Dean Alfange, Jr., *Marbury v. Madison and Original Understandings of Judicial Review: In Defense of Traditional Wisdom*, 1993 SUP. CT. REV. 329 (1993); *Marbury v. Madison: A Bicentennial Symposium*, 89 VA. L. REV. 1105 (2003). For a discussion of the place of the Ex Post Facto Clause in attesting to the Framers’ intended authorization of judicial review more generally, see Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 947–51 (2003); *see also* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888, at 41–49 (1992) (discussing the central place of *Calder* in the Court’s early history).

<sup>42</sup> According to Justice Chase, “[t]he prohibition . . . necessarily requires some explanation; for, naked and without explanation, it is unintelligible, and means nothing. Literally, it is only, that a law shall not be passed concerning, and after the fact, or thing done, or action committed.” *Calder*, 3 U.S. (3 Dall.) at 390.

exemplifying ex post facto abuses, and proceeded to set forth a menu of laws coming within the prohibition:

1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates a crime*, or makes it *greater* than it was, when committed. 3rd. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal rules of evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*.<sup>43</sup>

According to Justice Chase, "[a]ll these, and similar laws, are manifestly *unjust and oppressive*."<sup>44</sup>

In its next major ex post facto decision, *Cummings v. Missouri*,<sup>45</sup> the Court addressed a provision of the Missouri Constitution approved in the wake of the Civil War, which contained a "test oath" designed to ensure Union loyalty.<sup>46</sup> Each affiant was compelled to deny *inter alia* "that he ha[d] ever 'been in armed hostility to the United States, or to the lawful authorities thereof,'" or "that he ha[d] ever, 'by act or word,' manifested his adherence to the cause of the enemies of the United States, foreign or domestic."<sup>47</sup> The Missouri provision further provided that any individual who refused to take the oath would be barred from "any office of honor, trust, or profit."<sup>48</sup> Cummings, a Roman Catholic priest, was convicted of teaching and preaching without first taking the oath and challenged the provision on ex post facto grounds.<sup>49</sup>

<sup>43</sup> *Id.* at 388, 390.

<sup>44</sup> *Id.* at 391; *see also id.* at 396 (opinion of Paterson, J.) ("The historic page abundantly evinces, that the power of passing such laws should be withheld from legislators; as it is a dangerous instrument in the hands of bold, unprincipled, aspiring, and party men, and has been two [sic] often used to effect [sic] the most detestable purposes."); *id.* at 399–400 (opinion of Iredell, J.) ("The temptation to such abuses of power is unfortunately too alluring for human virtue; and, therefore, the framers of the *American* Constitutions have wisely denied to the respective Legislatures . . . the possession of the power itself . . .").

<sup>45</sup> 71 U.S. (4 Wall.) 277 (1866).

<sup>46</sup> *Id.* at 316.

<sup>47</sup> *Id.* at 316–17.

<sup>48</sup> *Id.* at 317. These offices included "councilman, director, or trustee, or other manager of any corporation, public or private . . . professor or teacher in any educational institution, or in any common or other school." *Id.* The provision also expressly barred such persons from practicing law or acting as clergy. *Id.*

<sup>49</sup> *Id.* at 281–82.

The Court, Justice Field writing for the majority, held that the loyalty oath violated the Ex Post Facto Clause, on the basis of several *Calder* categories.<sup>50</sup> According to Justice Field, the oath violated the prohibition against punishing behaviors not punishable at the time of commission;<sup>51</sup> enhanced the punishment of other behaviors already made criminal at the time of their commission;<sup>52</sup> and subverted the “presumptions of innocence,” and thus altered rules of evidence.<sup>53</sup> While facially targeting professional association, the oath nonetheless raised ex post facto concern:

The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding.<sup>54</sup>

In the late 1800s, the Court addressed a series of trial-related changes in state laws, each prompting ex post facto challenges. In *Kring v. Missouri*,<sup>55</sup> Kring was charged with first-degree murder, ultimately pled guilty to second-degree murder, and later successfully appealed his sentence.<sup>56</sup> On remand, he was convicted of first-degree murder and sentenced to death<sup>57</sup> on the basis of a new law that for the first time allowed defendants to be tried for first-degree murder after entry of any plea to a lesser offense.<sup>58</sup>

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<sup>50</sup> *Id.* at 332.

<sup>51</sup> In particular, “[i]t was no offence against any law to enter or leave the State of Missouri for the purpose of avoiding enrollment or draft in the military service of the United States, however much the evasion of such service might be the subject of moral censure.” *Id.* at 327.

<sup>52</sup> *Id.* at 328. Justice Field’s language on this score is a bit ambiguous stating only that “[s]ome of the acts at which the oath is directed constituted high offences at the time they were committed, to which, upon conviction, fine and imprisonment, or other heavy penalties, were attached.” *Id.*

<sup>53</sup> According to Justice Field, “[t]hey assume that the parties are guilty; they call upon the parties to establish their innocence; and they declare that such innocence can be shown only in one way — by an inquisition, in the form of an expurgatory oath, into the consciences of the parties.” *Id.* at 328.

<sup>54</sup> *Id.* at 325. In the same term, the Court also invalidated, on ex post facto grounds, a loyalty oath enacted by Congress, which served to prohibit a lawyer from practicing law because the statute was “a means for the infliction of punishment.” *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866).

<sup>55</sup> 107 U.S. 221 (1883).

<sup>56</sup> *Id.* at 222.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 223–24.

The Court reversed on *ex post facto* grounds, citing two *Calder* categories.<sup>59</sup> First, the change in Missouri law amounted to a change in a rule of evidence insofar as "what was conclusive evidence of innocence" of first-degree murder — actual conviction of a lower grade of homicide — was nullified by the new law.<sup>60</sup> Second, the new law retroactively altered the quantum of punishment imposed on Kring; when initially convicted, he could not have been prosecuted for first-degree murder (and sentenced to death).<sup>61</sup>

The Court hastened to add that it backed a "liberal construction" of the Ex Post Facto Clause, one "in manifest accord with the purpose of the constitutional convention to protect the individual rights of life and liberty against hostile retrospective legislation."<sup>62</sup> To this end, the Court felt obliged to respond to the assertion that the law was "procedur[al]" in nature and thus outside the ambit of *ex post facto* coverage.<sup>63</sup> The Court first noted that this could not be the case because the term, as popularly defined, encompassed rules of evidence, one of the *Calder* categories.<sup>64</sup> Procedure, according to the majority, was simply too broad a categorical basis to distinguish *ex post facto* laws. The Court asked:

Can the law with regard to bail, to indictments, to grand juries, to the trial jury, all be changed to the disadvantage of the prisoner by state legislation after the offence was committed, and such legislation not be held to be *ex post facto* because it relates to procedure . . . ?

And can any substantial right which the law gave the defendant at the time to which his guilt relates be taken away from him by *ex post facto* legislation, because, in the use of a modern phrase, it is called a law of procedure? We think it cannot.<sup>65</sup>

Quoting from a previous decision, *United States v. Hall*, the Court stated that any retroactive law that "alters the situation of a party to his disadvantage" is *ex post facto*.<sup>66</sup>

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<sup>59</sup> *Id.* at 228.

<sup>60</sup> *Kring*, 107 U.S. at 228.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 229.

<sup>63</sup> *Id.* at 231.

<sup>64</sup> *Id.* at 231–32 (quoting JOEL PRENTISS BISHOP, CRIMINAL PROCEDURE § 2 (3d ed. 1880), to the effect that "[t]he term 'procedure' is so broad in its signification that it is seldom employed in our books as a term of art. It includes in its meaning whatever is embraced by the three technical terms, Pleading, Evidence, and Practice.").

<sup>65</sup> *Id.* at 232.

<sup>66</sup> *Id.* at 235 (quoting *United States v. Hall*, 2 Wash. C.C. 366 (1809)).

*Kring* marked the beginning of the uncertainty that endures to this day over the place of ex post facto protections relative to substantive and procedural legislative changes. Only one year after deciding *Kring*, the Court in *Hopt v. Utah* rejected an ex post facto challenge because, in the Court's view, the retroactive legal change was procedural in nature.<sup>67</sup> Hopt was convicted of first-degree murder, and his conviction was reversed on appeal.<sup>68</sup> He was retried and again convicted of first-degree murder with the prosecution relying on the testimony of a convict then serving time for murder, as permitted by a recent change in state law.<sup>69</sup> On appeal, Hopt challenged the testimony, arguing that, on the date of the offense, Utah law specified that felons were incompetent to testify in criminal trials.<sup>70</sup>

The Court held that application of the new law did not violate the Clause, reasoning that laws relating to witness competency failed to come within the ambit of the *Calder* categories.<sup>71</sup> While the law broadened the permissible range of witnesses, it did not change "the quantity or degree of proof necessary to establish . . . guilt," and did not alter the requisite elements or facts necessary for guilt.<sup>72</sup> The provision, Justice Harlan wrote for the Court, fell within the category "relat[ing] to modes of procedure only, in which no one can be said to have a vested right . . ."<sup>73</sup>

The Court's reasoning in *Hopt* reflected a decidedly more cramped ex post facto jurisprudence. Indeed, the distinction drawn by the *Hopt* Court arguably was at odds with *Calder* itself, where Justice Chase included in his "instances" of ex post facto laws the retroactive removal of the second witness requirement in treason prosecutions and the bars against unsworn and interspousal testimony.<sup>74</sup>

In a pair of decisions decided in 1898, the Court refined its broad notion of procedure and concluded that changes in procedural law could violate the Ex Post Facto Clause under certain circumstances. In *Thompson v. Missouri*,<sup>75</sup> Thompson was convicted of first-degree murder by means of strychnine poisoning.<sup>76</sup> At trial the court admitted into evidence handwritten letters of Thompson so that they could be compared to the allegedly forged strychnine prescription.<sup>77</sup> When the crime occurred such exemplars were inadmissible, but the Missouri legislature later

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<sup>67</sup> 110 U.S. 574 (1884).

<sup>68</sup> *Id.* at 575.

<sup>69</sup> *Id.* at 587.

<sup>70</sup> *Id.*

<sup>71</sup> *See id.* at 589–90.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 590.

<sup>74</sup> *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 389 (1798).

<sup>75</sup> 171 U.S. 380 (1898).

<sup>76</sup> *Id.* at 380–81.

<sup>77</sup> *Id.* at 381.

allowed their consideration.<sup>78</sup> Thompson challenged the admission of the letters on *ex post facto* grounds.<sup>79</sup>

The Court rejected the claim, reasoning that the legal change was procedural in nature, but provided some important elaboration.<sup>80</sup> Again writing for the Court, Justice Harlan concluded that Thompson failed to show that he had "any vested right in the rule of evidence" applicable at the time of his offense, or that the new rule "entrenched upon any of the essential rights belonging to one put on trial for a public offence."<sup>81</sup> A criminal defendant "is not entitled of right to be tried in the exact mode, in all respects, that may be prescribed . . . at the time of the commission of the offence . . . so far as mere modes of procedure are concerned."<sup>82</sup> After discussing *Kring* and *Hopt*, Justice Harlan added, however, that a procedural change could violate the Clause when it "alters the situation of a party to his disadvantage," insofar as it affects a "substantial right."<sup>83</sup>

In *Thompson v. Utah*, Thompson killed a man when applicable law guaranteed a jury of twelve, but he was ultimately tried by a jury of eight, as permitted by a law newly enacted when Utah was admitted to the Union.<sup>84</sup> Justice Harlan, yet again writing for the Court, concluded that the change in jury composition was of the procedural kind condemned in *Kring*.<sup>85</sup> Procedural disadvantage violated the Clause, Justice Harlan reasoned, when it "materially impair[ed] the right of the accused to have the question of his guilt determined according to the law as it was when the offence was committed."<sup>86</sup> At the same time, however, Justice Harlan acknowledged the difficulty of applying the materiality test:

The difficulty is not so much as to the soundness of the general rule that an accused has no vested right in particular modes of procedure, as in determining whether particular statutes by their operation take from an accused any right that was regarded, at the time of the adoption of the Constitution, as vital for the protection of life and liberty, and which he

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 382.

<sup>80</sup> *Id.* at 387–88.

<sup>81</sup> *Id.* at 388. This was because the legal change did not "disturb the fundamental rule that the state, as a condition of its right to take the life of an accused, must overcome the presumption of his innocence and establish his guilt beyond a reasonable doubt." *Id.* at 387.

<sup>82</sup> *Id.* at 386.

<sup>83</sup> *Id.* at 383 (quoting *United States v. Hall*, 2 Wash. C.C. 366, 373 (1809) and *Kring v. Missouri*, 107 U.S. 221 (1883)).

<sup>84</sup> 170 U.S. 343 (1898).

<sup>85</sup> *Id.* at 351–52.

<sup>86</sup> *Id.* at 351.

enjoyed at the time of the commission of the offence charged against him.<sup>87</sup>

The definitional uncertainty continued in the ensuing decades, assuming new forms. In *Bezell v. Ohio*, the Court rejected an ex post facto challenge to a law that retroactively altered the ability of co-defendants to pursue separate trials.<sup>88</sup> The *Bezell* defendants were jointly indicted for embezzlement.<sup>89</sup> At the time of their offense, Ohio law expressly allowed for separate trials, but by the time of trial, the law had changed to permit separate trials only “for good cause shown.”<sup>90</sup> After being tried jointly and convicted, the defendants challenged the law on ex post facto grounds.<sup>91</sup>

The Court rejected the claim, resorting to a novel formulation of the *Calder* categories. Rather than recounting the traditional four categories identified in *Calder*,<sup>92</sup> the *Bezell* Court articulated a tripartite framework, which at once omitted the second and fourth *Calder* categories, and specified a new category — concerning any “defense” retroactively withdrawn by law.<sup>93</sup> According to *Bezell*, an ex post facto law is one “which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed . . . .”<sup>94</sup>

<sup>87</sup> *Id.* at 352.

<sup>88</sup> 269 U.S. 167 (1925).

<sup>89</sup> *Id.* at 168.

<sup>90</sup> *Id.* at 169.

<sup>91</sup> *Id.*

<sup>92</sup> See *supra* note 43 and accompanying text.

<sup>93</sup> *Bezell*, 269 U.S. at 169–70. The genesis of defense as a category appears to date from statements made by the Court in *Kring v. Missouri*, 107 U.S. 221, 229 (1882), and *Thompson v. Missouri*, 171 U.S. 380, 384 (1898). As subsequent cases make clear, to the extent the “defense” category still enjoys recognition, it has been subsumed in *Calder* categories one and two.

<sup>94</sup> *Bezell*, 269 U.S. at 169. In its next sentence, the Court confusingly elaborated on its test, making reference to the second *Calder* category but yet again omitting the fourth:

The constitutional prohibition and the judicial interpretation of [ex post facto] rest upon the notion that laws, whatever their form, which purport to make innocent acts criminal after the event, or to *aggravate an offense*, are harsh and oppressive, and that the criminal quality attributable to an act, either by the legal definition of the offense or by the nature or amount of the punishment imposed for its commission, should not be altered by legislative enactment, after the fact, to the disadvantage of the accused.

*Id.* at 170 (emphasis added).



Applying these criteria, the Court concluded that the change in Ohio law was a procedural one, affecting only how a defendant's trial was to be conducted.<sup>95</sup> The change did not deprive Beazell "of any defense previously available, nor affect the criminal quality of the act charged."<sup>96</sup> Nor did the change alter "the legal definition of the offense or the punishment to be meted out."<sup>97</sup> The law merely "restored a mode of trial deemed appropriate at common law, with discretionary power in the court to direct separate trials."<sup>98</sup> Again, however, the Court acknowledged that some types of procedural changes triggered *ex post facto* concern, but noted the difficulty of distinguishing such claims:

Just what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibition cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree. But the constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation, and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance.<sup>99</sup>

In *Dobbert v. Florida*, the Court again grappled with the substance/ procedure distinction.<sup>100</sup> At the time the defendant committed several killings, Florida law provided that a capital defendant would be sentenced to death unless a majority of the jury recommended life.<sup>101</sup> After the murders, however, the state supreme court invalidated the law, and the Florida legislature adopted a new capital sentencing law.<sup>102</sup> The new regime provided for a separate proceeding, in lieu of the prior approach that consolidated the guilt-sentencing phase, and further authorized the trial court to overrule the jury's refusal to impose a sentence of death.<sup>103</sup> Defendant was sentenced to death under the amended law, after the jury voted ten-to-two to impose life and the trial court overruled the recommendation.<sup>104</sup> Contending that the new law deprived him of a substantial right to have the jury determine whether he was to live or die, defendant challenged the law on *ex post facto* grounds.<sup>105</sup>

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<sup>95</sup> See *Beazell*, 269 U.S. at 170.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 171.

<sup>99</sup> *Id.* (citation omitted).

<sup>100</sup> 432 U.S. 282 (1977).

<sup>101</sup> *Id.* at 288.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 289 n.5.

<sup>104</sup> *Id.* at 287.

<sup>105</sup> *Id.*

The Court concluded that the law was procedural in nature and rejected the claim.<sup>106</sup> The amended law “simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime.”<sup>107</sup> To the *Dobbert* Court, designation of a law as procedural in nature itself was dispositive: “Even though it may work to the disadvantage of a defendant, a procedural change is not *ex post facto*.”<sup>108</sup> Quoting its prior language in *Hopt*,<sup>109</sup> the Court stated that “[t]he crime for which the present defendant was indicted, the punishment prescribed therefor[e], and the quantity or degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute.”<sup>110</sup>

Moreover, the Court reasoned, the claim failed because the amended Florida law did not disadvantage the defendant. This was because it “[could not] be said with assurance” that even under the old sentencing regime the jury would have returned a life sentence.<sup>111</sup> With its added level of review by the trial court, allowance for the presentation of mitigating evidence in a new post-guilt phase and assurance of appellate review, the new law provided defendant “with more, rather than less, judicial protection.”<sup>112</sup>

Finally, the *Dobbert* Court rejected the defendant’s claim that he suffered an *ex post facto* violation because when the killings occurred no “valid” capital law was in effect, given that shortly thereafter the Florida Supreme Court struck down the state’s law on the basis of *Furman v. Georgia*.<sup>113</sup> The majority characterized the argument as “sophistic,” “highly technical,” and “mock[ing] the substance of the *Ex Post Facto* Clause.”<sup>114</sup> Regardless of the constitutional invalidity of the law, its existence in the Florida statutes “served as an ‘operative fact’”<sup>115</sup> that provided

<sup>106</sup> *Id.* at 293.

<sup>107</sup> *Id.* at 293–94.

<sup>108</sup> *Id.* at 293.

<sup>109</sup> 110 U.S. 574 (1884).

<sup>110</sup> *Dobbert*, 432 U.S. at 294 (quoting *Hopt v. Utah*, 110 U.S. 574, 589–90 (1884)).

<sup>111</sup> *Id.* The Court elaborated in a footnote:

For example, the jury’s recommendation may have been affected by the fact that the members of the jury were not the final arbiters of life or death. They may have chosen leniency when they knew that that decision rested ultimately on the shoulders of the trial judge, but might not have followed the same course if their vote were final.

*Id.* at 294 n.7.

<sup>112</sup> *Id.* at 295.

<sup>113</sup> *Id.* at 297–98.

<sup>114</sup> *Id.* at 297.

<sup>115</sup> *Id.* at 298. Notably, the Court made use of a civil case to support this proposition. *See id.* at 297–98 (citing *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374 (1940)).

sufficient warning to potential killers of the penalty Florida would seek upon a finding of culpability.<sup>116</sup>

The Court's 1990 decision in *Collins v. Youngblood*<sup>117</sup> marked its continued proclivity to view the Ex Post Facto Clause in narrow terms. In *Collins*, the defendant was sentenced to a term of imprisonment and to pay a fine, yet the fine was not authorized by law.<sup>118</sup> Under Texas law, the error entitled defendant to a new trial, but while defendant's habeas petition was pending on appeal, the Texas legislature passed a statute expressly allowing appellate courts to reform improper verdicts, obviating any need for remand.<sup>119</sup> The Texas Court of Criminal Appeals modified the verdict and reinstated the defendant's prison term, leading to an ex post facto challenge.<sup>120</sup>

The *Collins* Court rejected the claim, reaching back sixty-five years to its decision in *Beazell* for support, and, yet again, modified *Calder*. Writing for the majority, Chief Justice Rehnquist concluded that "[t]he *Beazell* formulation is faithful to our best knowledge of the original understanding of the Ex Post Facto Clause: Legislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts."<sup>121</sup> In a footnote, the Court acknowledged that *Beazell* had modified *Calder*, in particular omitting reference to changes in evidence as being ex post facto, but inferred that "[a]s cases subsequent to *Calder* make clear, this language was not intended to prohibit the application of new evidentiary rules in trials for crimes committed before the changes."<sup>122</sup>

Applying this test, the Court found no ex post facto violation, reasoning that the new law constituted a procedural change that neither altered the definition of defendant's crime of conviction, nor increased the punishment associated with conviction.<sup>123</sup> Moreover, the Court proceeded to disavow its prior view that changes in procedural law implicate the Ex Post Facto Clause when they affect

<sup>116</sup> See *id.* at 297 ("Whether or not the old statute would, in the future, withstand constitutional attack, 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.").

<sup>117</sup> 497 U.S. 37 (1990).

<sup>118</sup> *Id.* at 39.

<sup>119</sup> *Id.* at 39-40.

<sup>120</sup> *Id.* at 40.

<sup>121</sup> *Id.* at 43.

<sup>122</sup> *Id.* at 43 n.3 (citing *Thompson v. Missouri*, 171 U.S. 380, 386-87 (1898) and *Hopt v. Utah*, 110 U.S. 574, 588-90 (1884)).

<sup>123</sup> *Id.* at 44. To confuse matters all the more, the Court concluded its opinion by invoking the *Beazell* tripartite framework, concluding that the Texas law "does not punish as a crime an act previously committed, which was innocent when done; nor make more burdensome the punishment for a crime, after its commission; nor deprive one charged with crime of any defense available according to law at the time when the act was committed." *Id.* at 52.

“substantial” rights or “matters of substance.”<sup>124</sup> The decades-long effort to distinguish such laws, the Court stated, had “imported confusion” into ex post facto jurisprudence leading to an “undefined enlargement” of the reach of the Clause.<sup>125</sup> Rather than assigning significance to whether a law is procedural, the key issue is whether the challenged law comes within the *Calder* categories, as newly characterized by the Court.<sup>126</sup> Concluding that its prior decisions in *Kring v. Missouri*<sup>127</sup> and *Thompson v. Utah*,<sup>128</sup> with their focus on “substantial protections” and “personal rights,”<sup>129</sup> strayed from this “analytical framework” and “caused confusion,”<sup>130</sup> the Court overruled the decisions.<sup>131</sup>

Later in the 1990s, the Court rendered several important decisions concerning the original third *Calder* category, proscribing retroactive laws increasing the quantum of punishment.<sup>132</sup> In prior decisions, the Court addressed laws altering methods of punishment,<sup>133</sup> and those that functioned to increase sentence lengths.<sup>134</sup>

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<sup>124</sup> *Id.* at 45.

<sup>125</sup> *Id.* at 45–46.

<sup>126</sup> *Id.* at 46.

<sup>127</sup> 107 U.S. 221 (1883).

<sup>128</sup> 170 U.S. 343 (1898).

<sup>129</sup> *Collins*, 497 U.S. at 45.

<sup>130</sup> *Id.* at 47.

<sup>131</sup> *Id.* at 50–52. While embracing its truncated version of the *Calder* categories, drawn from *Beazell*, and overruling *Kring* and *Thompson*, the *Collins* majority seemed untroubled by language in *Beazell* suggesting a broader view. See *Beazell*, 269 U.S. at 171 (asserting that the Ex Post Facto Clause “was intended to secure substantial personal rights against arbitrary and oppressive legislation”).

<sup>132</sup> See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (proscribing “[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed”).

<sup>133</sup> See *Malloy v. South Carolina*, 237 U.S. 180, 185 (1915) (finding no increase in punishment when death penalty statute was amended to require death by electrocution rather than by hanging); *Rooney v. North Dakota*, 196 U.S. 319, 326 (1905) (finding no increase in punishment when capital prisoners were subject to six-to-nine months in “close confinement” before execution, when original law required confinement in county jail for three to six months). But see *In re Medley*, 134 U.S. 160, 171 (1890) (invalidating law mandating solitary confinement for inmates awaiting execution because law imposed “additional punishment of the most important and painful character”).

<sup>134</sup> See *Miller v. Florida*, 482 U.S. 423, 435–36 (1987) (invalidating increase in prison term based on retroactive application of sentencing guidelines); *Lindsey v. Washington*, 301 U.S. 397, 401–02 (1937) (invalidating law that mandated a fifteen-year prison term, in lieu of prior law providing for a fifteen-year maximum, and made parole revocable at will). In *Lindsey*, the Court held that it was irrelevant for ex post facto purposes that the sentence actually received by petitioners was allowable under both the new and old laws:

It is true that petitioners might have been sentenced to fifteen years under the old statute. But the *ex post facto* clause looks to the standard of punishment

In the 1990s, the Court rendered several important decisions regarding retroactive modifications to the ability of prisoners to win early release, in particular.

In *California Department of Corrections v. Morales*,<sup>135</sup> a new law modified the intervals at which certain prisoners could be considered for parole release — from an annual basis to up to three years.<sup>136</sup> Morales claimed that the retroactive change in required frequency of opportunities for parole violated the Ex Post Facto Clause.<sup>137</sup> The Court disagreed, contrasting the legal change to those in prior successful claims, where the challenged law had the “effect of enhancing the range of available prison terms.”<sup>138</sup> The new law merely “‘alter[ed] the method to be followed’ in fixing a parole release date under identical substantive standards.”<sup>139</sup> Moreover, the decreased number of required parole hearings created “only the most speculative and attenuated possibility . . . of increasing the measure of punishment for covered crimes, and such conjectural effects” did not warrant ex post facto protection.<sup>140</sup> For the Clause to apply, the petitioner must show “a sufficient risk of increasing the measure of punishment attached to the covered crimes.”<sup>141</sup> Extending ex post facto coverage to laws having only conceivable effects on

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prescribed by a statute, rather than to the sentence actually imposed. The Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer. It is for this reason that an increase in the possible penalty is *ex post facto*, regardless of the length of the sentence actually imposed, since the measure of punishment prescribed by the later statute is more severe than that of the earlier.

Removal of the possibility of a sentence of less than fifteen years, at the end of which petitioners would be freed from further confinement and the tutelage of a parole revocable at will, operates to their detriment in the sense that the standard of punishment adopted by the new statute is more onerous than that of the old. . . . [Moreover,] [i]t is plainly to the substantial disadvantage of petitioners to be deprived of all opportunity to receive a sentence which would give them freedom from custody and control prior to the expiration of the 15-year term.

*Lindsey*, 301 U.S. at 401–02 (citations omitted).

<sup>135</sup> 514 U.S. 499 (1995).

<sup>136</sup> *Id.* at 503.

<sup>137</sup> *Id.* at 504.

<sup>138</sup> *Id.* at 507.

<sup>139</sup> *Id.* at 508 (quoting *Miller v. Florida*, 482 U.S. 423, 433 (1987)).

<sup>140</sup> *Id.* at 509. In a footnote, citing *Collins*, the Court expressly disavowed the contention that changes in punishment are ex post facto if they produce “some ambiguous sort of ‘disadvantage.’” *Id.* at 506 n.3.

<sup>141</sup> *Id.* at 509. The majority added that the Ex Post Facto Clause “does [not] require that the sentence be carried out under the identical legal regime that previously prevailed.” *Id.* at 510 n.6.

punishment would, in the Court's words, require the judiciary to be charged "with the micromanagement of an endless array of legislative adjustments of parole and sentencing procedures."<sup>142</sup>

Two years later, in *Lynce v. Mathis*,<sup>143</sup> the Court addressed a Florida law permitting the retroactive cancellation of early release credits earned by prisoners, which were awarded when the volume of prisoners in the corrections system exceeded predetermined levels.<sup>144</sup> Lynce benefited from the credits and was released, only to be rearrested when a new law rescinded the prior largesse for certain classes of inmates (including Lynce).<sup>145</sup> In addressing Lynce's ensuing ex post facto challenge, the Court looked to the "objective" effects of the legal change — whether the retroactive cancellation of sentence credit served to lengthen his period of incarceration.<sup>146</sup> The Court had no difficulty finding the test satisfied, given that Lynce was rearrested after having been released.<sup>147</sup> Unlike the mere lost "opportunity" and "merely speculative" lengthening of imprisonment contested in *Morales*, Lynce experienced greater punishment and, therefore, had a meritorious claim.<sup>148</sup>

Finally, in 2000 and 2003, the Court returned to the foundational work of discerning the reach of the Ex Post Facto Clause, first delineated by Justice Chase over two centuries earlier in *Calder*.<sup>149</sup> In *Carmell v. Texas*,<sup>150</sup> the Court was presented with the question of whether a retroactive change in the rules of evidence warranted ex post facto protection.<sup>151</sup> When Carmell sexually abused his fifteen-

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<sup>142</sup> *Id.* at 508.

<sup>143</sup> 519 U.S. 433 (1997).

<sup>144</sup> *Id.* at 435.

<sup>145</sup> *Id.* at 436.

<sup>146</sup> *Id.* at 443.

<sup>147</sup> *Id.* at 447. According to the Court, "retroactive alteration of parole or early release provisions, like the retroactive application of provisions that govern initial sentencing, implicates the *Ex Post Facto* Clause because such credits are 'one determinant of petitioner's prison term . . . and . . . [the petitioner's] effective sentence is altered once this determinant is changed.'" *Id.* at 445 (quoting *Weaver v. Graham*, 450 U.S. 24, 32 (1981)).

<sup>148</sup> *Id.* at 446 n.16, 447. In 2000, the Court refined the *Morales* analytic framework. See *Garner v. Jones*, 529 U.S. 244, 250–52 (2000). In *Garner*, which also involved a retroactive decrease in the frequency of parole reconsideration hearings of inmates, instead of restating the *Morales* standard of requisite "sufficient risk of increasing" punishment, *Morales*, 514 U.S. at 509, the Court required that the new law "in its operation, create[] a significant risk of increased punishment." *Id.* at 257. Denying *Garner*'s claim under this test, the Court emphasized that "[t]he States must have due flexibility in formulating parole procedures and addressing problems associated with confinement and release." *Id.* at 252.

<sup>149</sup> *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798).

<sup>150</sup> 529 U.S. 513 (2000).

<sup>151</sup> *Id.* at 516.

year-old stepdaughter, Texas law specified that a person could not be convicted on the basis of uncorroborated testimony of a victim if the victim was fourteen years of age or older at the time of the offense.<sup>152</sup> Later, Texas amended its law to allow conviction based on the uncorroborated testimony of a victim, so long as the victim was less than eighteen at the time of the offense.<sup>153</sup> The trial court employed the new law, allowing the step-daughter to testify without corroboration.<sup>154</sup> Carmell was convicted and challenged the retroactive application of the new law on *ex post facto* grounds.<sup>155</sup>

The Court concluded that the amended law violated the fourth *Calder* category prohibiting changes in rules of evidence "in order to convict the offender."<sup>156</sup> Writing for a majority of highly unusual liberal/conservative membership,<sup>157</sup> Justice Stevens stated that the new law "changed the quantum of evidence necessary to sustain a conviction; under the new law, petitioner could be (and was) convicted on the victim's testimony alone, without any corroborating evidence."<sup>158</sup> Relying on *Calder*, Justice Stevens reasoned that "[r]equiring only the victim's testimony to convict, rather than the victim's testimony plus other corroborating evidence is surely 'less testimony required to convict' in any straightforward sense of those words."<sup>159</sup>

To reach this outcome, Justice Stevens needed to rehabilitate the fourth *Calder* category, the vitality of which was cast into doubt by language in *Beazell* and *Collins*, which, while professing fealty to *Calder*, substantially altered *Calder's* categories by *inter alia* excluding the fourth category (relating to evidence).<sup>160</sup>

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<sup>152</sup> *Id.* at 517. The statute provided for two exceptions, neither of which was satisfied under the facts:

A conviction . . . is supportable on the uncorroborated testimony of the victim of the sexual offense if the victim informed any person, other than the defendant, of the alleged offense within six months after the date on which the offense is alleged to have occurred. The requirement that the victim inform another person of an alleged offense does not apply if the victim was younger than 14 years of age at the time of the alleged offense.

*Id.* at 517 (quoting TEX. CRIM. PROC. CODE ANN. § 38.07 (Vernon 1983)).

<sup>153</sup> *Id.* at 518.

<sup>154</sup> *Id.* at 516–17.

<sup>155</sup> *Id.* at 518–19.

<sup>156</sup> *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (prohibiting "[e]very law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender").

<sup>157</sup> Justices Stevens, Scalia, Thomas, Souter, and Breyer comprised the majority. *Carmell*, 529 U.S. at 515.

<sup>158</sup> *Id.* at 530.

<sup>159</sup> *Id.* (citing *Calder*, 3 U.S. at 390).

<sup>160</sup> See *supra* notes 121–22 and accompanying text.

Noting the inconsistency in *Collins* between its insistence that the *Calder* categories provide “the ‘exclusive definition’ of *ex post facto* laws,” and its questionable assertion that *Beazell’s* definition was a “faithful” interpretation of the “original understanding” of the Ex Post Facto Clause,<sup>161</sup> Justice Stevens reaffirmed the existence of the fourth category. If *Collins* had intended to discard the fourth category (itself not implicated under the *Collins* facts), Justice Stevens concluded, it would not “have done so in a footnote. . . . [T]his Court does not discard longstanding precedent in this manner.”<sup>162</sup> Thus, “*Collins* held that it was a mistake to stray *beyond Calder’s* four categories, not that the fourth category was itself mistaken.”<sup>163</sup>

To provide added support, Justice Stevens surveyed the historical record leading up to *Calder*, including the 1695 case of Sir John Fenwick, cited by Justice Chase, to exemplify the fourth category.<sup>164</sup> Justice Stevens noted that the fourth category “resonates harmoniously with one of the principal interests that the Ex Post Facto Clause was designed to serve, fundamental justice.”<sup>165</sup> Observing that the Ex Post Facto Clause is also directed at ensuring that laws afford “‘fair warning of their effect and permit individuals to rely on their meaning until explicitly changed,’ and at reinforcing the separation of powers,”<sup>166</sup> Justice Stevens emphasized that the absence of a reliance interest, such as in Fenwick’s case,<sup>167</sup> did not compel any modification in the *Calder* categories.<sup>168</sup> Rather, the fourth

<sup>161</sup> *Carmell*, 529 U.S. at 538.

<sup>162</sup> *Id.* “The better understanding of *Collins*,” Justice Stevens inferred, was “that it eliminated a doctrinal hitch” embodied in cases it overruled — *Kring* and *Thompson* — “which purported to define the scope of the Clause along an axis distinguishing between laws involving ‘substantial protections’ and those that are merely ‘procedural.’” *Id.* at 539.

<sup>163</sup> *Id.*

<sup>164</sup> Fenwick was a Jacobin thought to have conspired with others to overthrow King William III. At the time of the alleged betrayal, English law required two witnesses to support any high treason conviction, which served to bar Fenwick’s prosecution. *Id.* at 526. Fenwick, however, was ultimately tried under a new law that eschewed the two-witness requirement, and was convicted and beheaded. *Id.* at 528–30.

<sup>165</sup> *Id.* at 531.

<sup>166</sup> *Id.* at 531 n.21 (quoting *Miller v. Florida*, 482 U.S. 423, 430 (1987), and citing *Weaver v. Graham*, 450 U.S. 24, 29 n.10 (1981)).

<sup>167</sup> See *Carmell v. Texas*, 529 U.S. 513, 533 (2000) (“Fenwick could claim no credible reliance interest in the two-witness statute, as he could not possibly have known that only two of his fellow conspirators would be able to testify as to his guilt, nor that he would be successful in bribing one of them to leave the country.”).

<sup>168</sup> See *id.* at 531 n.21:

[Notice and reliance] are not [the Clause’s] only aims, and the absence of a reliance interest is not an argument in favor of abandoning the [fourth] category itself. If it were, the same conclusion would follow for *Calder’s* third category (increases in punishment), as there are few, if any, reliance interests in planning future criminal activities based on the expectation of less severe repercussions.



category — and Fenwick's case — comported "precisely" with the Framers' core concern over oppressive and arbitrary behavior by government: "There is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life."<sup>169</sup> The Ex Post Facto Clause, in short, prohibits the government from refusing, "after the fact, to play by its own rules, altering them in a way that is advantageous only to the State, to facilitate an easier conviction."<sup>170</sup> It thus guards against the subversion of "fundamental justice" and the promulgation of "manifestly unjust and oppressive" laws.<sup>171</sup>

Viewed in this context, Justice Stevens concluded that the change in Texas law bore a striking similarity to the evidentiary change condemned in Fenwick's case, raising ex post facto concern.<sup>172</sup> Moreover, unlike *Hopt v. Utah*<sup>173</sup> and *Thompson v. Missouri*,<sup>174</sup> the Texas law did not merely concern "witness competency" — it did not "simply enlarge the class of persons who may be competent to testify" or "remove existing restrictions" on the competency of potential witnesses.<sup>175</sup> Rather, the law concerned the sufficiency of the evidence necessary for the State to meet its burden of proof.<sup>176</sup> *Hopt*, in particular, "expressly distinguished witness

<sup>169</sup> *Id.* at 532–33. According to Justice Stevens, "the pertinent rule altered in Fenwick's case went directly to the general issue of guilt, lowering the minimum quantum of evidence required to obtain a conviction. The Framers, quite clearly, viewed such maneuvers as grossly unfair, and adopted the Ex Post Facto Clause accordingly." *Id.* at 534.

<sup>170</sup> *Id.* at 533. The Court hastened to add that not all changes in evidentiary law implicate the Ex Post Facto Clause:

Ordinary rules of evidence, for example, do not violate the Clause. Rules of that nature are ordinarily evenhanded, in the sense that they may benefit either the State or the defendant in any given case. More crucially, such rules, by simply permitting evidence to be admitted at trial, do not at all subvert the presumption of innocence, because they do not concern whether the admissible evidence is sufficient to overcome the presumption.

*Id.* at 533 n.23 (citation omitted).

<sup>171</sup> *Id.* at 531–32. The Court elaborated in a footnote, however, that "the principle of unfairness . . . is not a doctrine unto itself, invalidating laws under the Ex Post Facto Clause by its own force." *Id.* at 533 n.23.

<sup>172</sup> *Id.* at 530.

<sup>173</sup> 110 U.S. 574 (1884). For discussion of *Hopt*, see *supra* notes 67–74 and accompanying text.

<sup>174</sup> 171 U.S. 380 (1898). For discussion of *Thompson*, see *supra* notes 75–83 and accompanying text.

<sup>175</sup> *Carmell*, 529 U.S. at 544 (quoting *Hopt*, 110 U.S. at 589–90).

<sup>176</sup> *Id.* at 545. According to the Court:

Under the law in effect at the time the acts were committed, the prosecution's case was legally insufficient . . . unless the state could produce both the victim's

competency laws from those laws that ‘alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed.’”<sup>177</sup> Justice Stevens elaborated on the distinction he saw between the two types of rules, again emphasizing the Clause’s core concern over unfairness:

[A] sufficiency of the evidence rule resonates with the interests to which the *Ex Post Facto* Clause is addressed in a way that a witness competency rule does not. In particular, the elements of unfairness and injustice in subverting the presumption of innocence are directly implicated by rules lowering the quantum of evidence required to convict. Such rules will *always* run in the prosecution’s favor, because they always make it easier to convict the accused. This is so even if the accused is not in fact guilty, because the coercive pressure of a more easily obtained conviction may induce a defendant to plead to a lesser crime rather than run the risk of conviction on a greater crime. Witness competency rules, to the contrary, do not necessarily run in the State’s favor. . . .

Nor do such rules necessarily affect, let alone subvert, the presumption of innocence. The issue of the admissibility of evidence is simply different from the question whether the properly admitted evidence is sufficient to convict the defendant. Evidence admissibility rules do not go to the general issue of guilt, nor to whether a conviction, as a matter of law, may be sustained.<sup>178</sup>

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testimony *and* corroborative evidence. The amended law, however, changed the quantum of evidence necessary to sustain a conviction; under the new law, petitioner could be (and was) convicted on the victim’s testimony alone, without any corroborating evidence.

*Id.* at 530.

<sup>177</sup> *Id.* at 545 (quoting *Hopt*, 110 U.S. at 589).

<sup>178</sup> *Id.* at 546. The decision inspired high praise from Professor Laurence Tribe. He stated: *Carmell* is a rather well argued and closely reasoned case that makes one feel proud of the Court. That is, every now and then it looks like these people are not simply there to act on the basis of their impulses in determining whether it’s better to get tough on criminals or better to vindicate some abstract ideal of liberty or of fairness.

Erwin Chemerinsky, *Law Enforcement and Criminal Law Decisions*, 28 PEPP. L. REV. 517, 538 (2001) (quoting Professor Tribe’s response to Professor Chemerinsky’s remarks). Professor Amar welcomed the decision with less relish. See Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 PEPP. L. REV. 601, 613–14 (2001) (stating that *Carmell* “defined the *Ex Post Facto* Clause very broadly, and then applied it quite rigidly,” and that the case “exemplifies modern doctrinalism and illustrates some of its pathologies”).

Most recently, in *Stogner v. California*,<sup>179</sup> the Court addressed a claim brought pursuant to the second *Calder* category, a category never before interpreted by the Court, proscribing "[e]very law that aggravates a crime, or makes it greater than it was when committed,"<sup>180</sup> also seemingly abandoned by the Court in *Beazell* and *Collins*.<sup>181</sup> In 1998, Stogner was indicted for sexually abusing his children between 1955 and 1973.<sup>182</sup> Until 1993, California law contained a three-year statute of limitations, which by 1998 had long since expired with respect to Stogner's alleged wrongdoing.<sup>183</sup> The 1993 amendment allowed such time-barred prosecutions to be brought, so long as they commenced within a year of the victim's first complaint to the police.<sup>184</sup> The question before the Court was whether the Clause was violated by California's effort to revive previously time-barred prosecutions.<sup>185</sup>

The Court, with Justice Breyer writing for the majority, concluded that the amendment ran afoul of *Calder*'s second category, offering three rationales.<sup>186</sup> First, by retroactively permitting prosecutions otherwise not permitted by law:

[The new law in basic terms] threaten[ed] the kind of harm that . . . the Ex Post Facto Clause seeks to avoid. Long ago the Court pointed out that the Clause protects liberty by preventing governments from enacting statutes with "manifestly *unjust and oppressive*" retroactive effects. Judge Learned Hand later wrote that extending a limitation period after the State has assured "a man that he has become safe from its pursuit . . . seems to most of us unfair and dishonest."<sup>187</sup>

In such a situation, as in *Carmell*, "the government has refused 'to play by its own rules.'"<sup>188</sup> Also, inasmuch as the limitations period served as an amnesty, the new law deprived Stogner of "fair warning" because he might have otherwise sought to preserve exculpatory evidence.<sup>189</sup> If legislatures were permitted "to pick

<sup>179</sup> 123 S. Ct. 2446 (2003).

<sup>180</sup> *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798).

<sup>181</sup> See *supra* notes 88–99, 117–31 and accompanying text (discussing *Beazell* and *Collins*).

<sup>182</sup> *Stogner*, 123 S. Ct. at 2449.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* (citing 1993 Cal. Stat. ch. 390, § 1 (codified as amended at CAL. PENAL CODE § 803(g) (West Supp. 2003)).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* (quoting *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 391 (1798), and *Falter v. United States*, 23 F.2d 420, 426 (2d Cir. 1928)).

<sup>188</sup> *Id.* (quoting *Carmell v. Texas*, 529 U.S. 513, 533 (2000)).

<sup>189</sup> *Id.* (quoting *Weaver v. Graham*, 450 U.S. 24, 28 (1981)).

and choose when to act retroactively,” there would be a risk of both “‘arbitrary and potentially vindictive legislation,’ and erosion of the separation of powers.”<sup>190</sup>

Second, Justice Breyer reasoned that the California law fell squarely within the second *Calder* category.<sup>191</sup> To reach this result, Justice Breyer invoked what he called Justice Chase’s “alternative description” of ex post facto laws, set forth elsewhere in Chase’s opinion in *Calder*: “[A]t other times they inflicted punishments, where the party was not, by law, liable to any punishment.”<sup>192</sup> Focusing on this language in tandem with the traditional language of the second category, Justice Breyer concluded that California’s new statute of limitations “aggravated” Stogner’s alleged crime because at the time of the amendment Stogner was not “liable to any punishment.”<sup>193</sup> This understanding of the second category, in turn, clarified its distinctive place in the *Calder* framework:

So to understand the second category (as applying where a new law inflicts a punishment upon a person not then subject to that punishment, to any degree) explains why and how that category differs from both the first category (making criminal noncriminal behavior) and the third category (aggravating the punishment).<sup>194</sup>

Finally, Justice Breyer attached importance to the “well settled” view that the Clause bars laws permitting revival of time-barred prosecutions, citing to Congress’s rejection of such laws as applied to Confederates in the Reconstruction Era, as well as the condemnation of the laws by courts and commentators down the years.<sup>195</sup>

<sup>190</sup> *Stogner*, 123 S. Ct. at 2449 (quoting *Weaver*, 450 U.S. at 29 & n.10).

<sup>191</sup> *See id.*

<sup>192</sup> *Id.* at 2450 (quoting *Calder*, 3 U.S. at 389).

<sup>193</sup> *Id.* at 2451; *see also id.* at 2450–51 (concluding that the law fell within the second category “as long as those words are understood as Justice Chase understood them — *i.e.*, as referring to a statute that ‘inflict[s] punishments, where the party was not, by law, liable to any punishment’”).

<sup>194</sup> *Id.* at 2451. Justice Breyer also emphasized that, while the California law fell “within the literal terms” of the second category, it possibly implicated the fourth category as well, insofar as it diminished “the quantum of evidence required to convict.” *Id.* at 2452 (quoting *Carmell v. Texas*, 529 U.S. 513, 532 (2000)). This was because “a statute of limitations reflects a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict.” *Id.* Allowing resurrection of a prosecution would “permit conviction on a quantum of evidence where that quantum, at the time the new law is enacted, would have been legally insufficient.” *Id.*

<sup>195</sup> *Id.* at 2446, 2452–55.

Justice Breyer concluded by taking on the assertion by the dissent (authored by Justice Kennedy, joined by Chief Justice Rehnquist, and Justices Scalia and Thomas) that it was not "unfair, in any constitutionally relevant sense," for California "to prosecute a man for crimes committed 25 to 42 years earlier when nearly a generation has passed since the law granted him an effective amnesty."<sup>196</sup> The dissent questioned "whether it is warranted to presume that criminals keep calendars,"<sup>197</sup> and asserted that "it is the victim's lasting hurt, not the perpetrator's fictional reliance, that the law should count the higher."<sup>198</sup> To the majority, however, the law was constitutionally unfair because it violated "significant reliance interests" and ignored "a predominating constitutional interest" in governmental fairness, which outweighed the competing governmental interest in prosecuting a decades-old allegation of child sexual abuse.<sup>199</sup>

As the foregoing survey suggests, the Court has charted an uncertain course with respect to its interpretation and application of the Ex Post Facto Clause. Much of the uncertainty stems from the seminal case of *Calder v. Bull* itself, a 1798 decision specifying the types of retroactive laws that violate the Ex Post Facto Clause.<sup>200</sup> Despite the fact that over the years the Court has, with regularity, insisted that the categories are sacrosanct,<sup>201</sup> the contours of their protection have been disputed, resulting in alternate expansion and constriction of the coverage of the Ex Post Facto Clause. Indeed, over two hundred years after *Calder*, the Court in *Carmell* was obliged to resuscitate the proscription against retroactive laws altering rules of evidence, despite its unmistakable presence as the fourth *Calder* category.<sup>202</sup> Similarly, only in 2003 in *Stogner* did the Court acknowledge the viability of the second *Calder* category, which previously had been thought by some

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<sup>196</sup> *Stogner*, 123 S. Ct. at 2455.

<sup>197</sup> *Id.* at 2470 (Kennedy, J., dissenting).

<sup>198</sup> *Id.* at 2471 (Kennedy, J., dissenting). Justice Kennedy elaborated:

The victims whose cause is now before the Court have at last overcome shame and the desire to repress these painful memories. They have reported the crimes so that the violators are brought to justice and harm to others is prevented. The Court now tells the victims that their decision to come forward is in vain.

*Id.*

<sup>199</sup> *Id.* at 2460–61.

<sup>200</sup> *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (stating that the prohibition "necessarily requires some explanation; for, naked and without explanation, it is unintelligible, and means nothing").

<sup>201</sup> See, e.g., *Carmell v. Texas*, 529 U.S. 513, 538–39 (2000); *Collins v. Youngblood*, 497 U.S. 37, 46 (1990); *Miller v. Florida*, 482 U.S. 423, 429 (1987); see also *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 391 (1866) (Miller, J., dissenting) ("[*Calder's*] exposition of the nature of *ex post facto* laws has never been denied . . .").

<sup>202</sup> See *supra* notes 160–71 and accompanying text.

redundant of the third,<sup>203</sup> and otherwise ignored by the Court.<sup>204</sup> In sum, insofar as the *Calder* categories are intended to function, in Richard Fallon's words, as a vehicle to "implement the Constitution"<sup>205</sup> and, in particular, as a provision avowedly designed to ensure governmental certainty and fairness, their erratic application has been disappointing to say the least.<sup>206</sup>

Nevertheless, at this point a few certainties can be stated. As a threshold matter, the Ex Post Facto Clause is intended to reach only legislative enactments.<sup>207</sup> Second, only criminal laws come within its ambit<sup>208</sup> — a domain where, as one eighteenth-century legal scholar observed, "justice wears her sternest aspect."<sup>209</sup> And third, the Ex Post Facto Clause solely concerns laws that are retrospective in their application, those applying "to conduct completed before [their] enactment,"<sup>210</sup> and such laws must "disadvantage" offenders coming within their scope.<sup>211</sup>

## II. THE DATA

In order to assess the place of the Ex Post Facto Clause in contemporary constitutional litigation, the author conducted a Westlaw search of all state court decisions (including those in the District of Columbia), rendered between 1992 and 2002, involving challenges brought pursuant to the Ex Post Facto Clause.<sup>212</sup> State

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<sup>203</sup> See Neil Coleman McCabe & Cynthia Ann Bell, *Ex Post Facto Provisions of State Constitutions*, 4 EMERGING ISSUES IN ST. CONST. L. 133, 134 (1991) (stating that the *Calder* categories "have not stood the test of time. On closer analysis, the second and third categories appear to be the same idea expressed in different ways"); see also WAYNE R. LAFAVE & AUSTIN W. SCOTT, *CRIMINAL LAW* 97 n.3 (2d ed. 1986) (offering the same conclusion that the second and third *Calder* categories are duplicative).

<sup>204</sup> See *supra* notes 186–95 and accompanying text.

<sup>205</sup> Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 57 (1997) (stating that "[i]dentifying the 'meaning' of the Constitution is not the Court's only function. A crucial mission of the Court is to *implement* the Constitution successfully"). For more on Professor Fallon's views in this regard, see RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* (2001).

<sup>206</sup> The uncertainties bred by the *Calder* categories, and the associated concerns raised, are discussed at *infra* notes 395–434 and accompanying text.

<sup>207</sup> See *Marks v. United States*, 430 U.S. 188, 191 (1977).

<sup>208</sup> *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390–93 (1798).

<sup>209</sup> 2 RICHARD WOODDESON, *A SYSTEMATICAL VIEW OF THE LAWS OF ENGLAND* 641 (1792).

<sup>210</sup> *Johnson v. United States*, 529 U.S. 694, 699 (2000).

<sup>211</sup> *Weaver v. Graham*, 450 U.S. 24, 29 (1981).

<sup>212</sup> In addition to the federal Ex Post Facto Clause, reposed in Article I, Section 10, clause 1 of the Constitution, which by its terms applies to and governs the states, the constitutions of all but four states (Delaware, Hawaii, New York and Vermont) contain indigenous ex post

courts, not their federal counterparts, were selected as the focus of analysis because the states are the primary engine of criminal law legislation,<sup>213</sup> allowing for a richer understanding of the role of the Ex Post Facto Clause in regulating criminal justice-related changes during the study period. Querying the "ALLSTATES" database, the search netted a total of 1,026 claims,<sup>214</sup> including published and unpublished work of the state courts.<sup>215</sup>

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facto provisions. *See generally* McCabe & Bell, *supra* note 203. Typically, the text of state provisions tracks that of the federal provision, and state appellate courts, as with other aspects of constitutional interpretation, practice "lockstep interpretation." *See id.* at 144–51; *see also* G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTREDAME L. REV. 1097, 1114–17 (1997) (summarizing research noting limited state court reliance on state constitutions). On occasion, however, state courts expressly give a broader reading to their facially identical, indigenous ex post facto provisions, as of course is permitted. Moreover, at times, the language of state provisions also bars "retroactive" and "retrospective" laws, even of a noncriminal nature. Both varieties of decisions were excluded from the database.

<sup>213</sup> *See* Sara Sun Beale, *Federal Criminal Jurisdiction*, in *ENCYCLOPEDIA OF CRIME AND JUSTICE* 775 (Joshua Dressler ed., 2d ed. 2002) (noting that "[g]eneral police powers and the bulk of criminal jurisdiction were not granted to the federal government, and accordingly were uniformly recognized to be reserved to the states").

<sup>214</sup> The initial search query produced 1,647 cases, based on a Westlaw key number search for "Retrospective and Ex Post Facto Laws" (Westlaw key number 92VIII). The author excluded several categories of decisions from the database. These included the following: (i) decisions based on *Bouie v. City of Columbia*, 378 U.S. 347 (1964), which while also involving challenges to retroactive imposition of criminal sanctions, sound in due process because they concern judicial rulings (not legislative enactments); (ii) decisions interpreting indigenous state ex post facto provisions, as noted in *supra* note 212; (iii) decisions not expressly predicated on the Ex Post Facto Clause but challenging laws with retroactive application; (iv) decisions redundant of one another because they were affirmed or reversed by other cases in the database; (v) decisions addressing laws that were not intended to be applied retroactively; (vi) decisions resolved on procedural grounds (e.g., mootness or waiver); and (vii) decisions of a miscellaneous nature not implicating the Ex Post Facto Clause (e.g., styled as an ex post facto claim but decided on vagueness grounds).

In the rare event that a single decision contained more than one ex post facto challenge, each challenge was counted. Three decisions fell in this category, each involving two distinct ex post facto claims. Also, on three occasions, federal courts granted habeas relief when state courts did not; the federal results, not those of the states, were counted.

<sup>215</sup> This was done in order to obtain the broadest possible understanding of the ex post facto claims filed and the rationales used by courts to resolve them. For general commentary on the propriety of judicial resort to unpublished decisions, and the resulting consequences to the case law, see, for example, Richard B. Cappalli, *The Common Law's Case Against Non-Precedential Opinions*, 76 S. CAL. L. REV. 755 (2003); Johanna S. Schiavoni, Comment, *Who's Afraid of Precedent?: The Debate Over the Precedential Value of Unpublished Opinions*, 49 UCLA L. REV. 1859 (2002).

### A. Types of Claims Brought

Table 1 reflects the number of ex post facto claims resolved by state courts during the study period, arrayed by categories in descending order of frequency. The Table reflects the broad gamut of crime-related legislative activity during the study period, a time when crime control and draconian criminal law measures enjoyed high political salience.<sup>216</sup> The largest category encompasses challenges to laws making more onerous the sentences of convicted offenders, a highly popular legislative pastime.<sup>217</sup> In this category, laws targeting recidivist offenders predominate, a penal strategy with widespread appeal in the early-to-mid 1990s, most vividly evidenced in California with the 1994 enactment of its “three strikes” law.<sup>218</sup> Most often the claims involved enhancements of generalized application, including expanded consideration of prior juvenile adjudications, although with some regularity particular offender groups such as drunk drivers were singled out for enhanced punishment. The category also contains a significant number of claims challenging retroactive increases in “cleansing” or “look back” periods, the temporal windows used by sentencing courts to assess offending history for

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<sup>216</sup> See *supra* notes 22–23 and accompanying text.

<sup>217</sup> To politicians, there is much to gain and little to lose in enacting such laws. As Justice Stevens observed, “[t]here is obviously little legislative hay to be made in cultivating the multiple murderer vote.” *Cal. Dep’t of Corr. v. Morales*, 514 U.S. 499, 522 (1995) (Stevens, J., dissenting). In more practical terms, as Harold Krent has written, “[l]egislators need not fear that enacting most criminal measures will dry up campaign coffers. Throughout history, criminal offenders have been from the poorest strata in society. . . . Nor will legislators necessarily lose votes if they are insensitive to the needs of convicted felons. Felons often cannot vote. . . .” Harold J. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking*, 84 *GEO. L.J.* 2143, 2168–69 (1996). For more on the reasons for this legislative unconcern, see Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don’t Legislatures Give a Damn About the Rights of the Accused?*, 44 *SYRACUSE L. REV.* 1079 (1993).

<sup>218</sup> See Ronald F. Wright, *Three Strikes Legislation and Sentencing Commission Objectives*, 20 *LAW & POL’Y* 429, 430 (1998) (surveying legislative efforts nationwide in the mid-1990s to enact “three strikes laws”). As Professor Wright observes, recidivist-oriented enhancements are far from new, existing in one form or another in the U.S. since the 1790s. *Id.* at 441. The new laws enacted in the mid-1990s were distinctive because they carried much longer enhancements (including life without parole, as in California); imposed more limits on courts to deviate from their imposition; and expanded the list of predicate convictions sufficient to trigger enhancement (to include nonviolent felonies). *Id.* at 442. For discussion of the motivating forces behind the 1990s-genre laws and the controversies surrounding them, see generally Gary LaFree, *Too Much Democracy or Too Much Crime? Lessons From California’s Three-Strikes Law*, 27 *LAW & SOC. INQUIRY* 875 (2002), and Robert Heglin, *A Flurry of Recidivist Legislation Means: “Three Strikes and You’re Out”*, 20 *J. LEGIS.* 213 (1994).



**TABLE 1: Types of Claims by Category (n=1026)**

<b>Sentence Enhancement</b>	<b>232</b>	<b>Monetary Sanctions</b>	<b>61</b>
Recidivist	143	Fine/Reimbursement	23
First-offense	89	Restitution	24
<b>Custody Modification</b>	<b>219</b>	Fee	14
Parole	197	<b>Judicial Administration</b>	<b>55</b>
Probation	7	<b>Evidence*</b>	<b>47</b>
Probation/Parole Violation	15	<b>Death Penalty**</b>	<b>45</b>
<b>Post-Custody Sanction</b>	<b>168</b>	<b>Jury/Trial Rights</b>	<b>30</b>
Registration/Notification	91	<b>Institutional Administration</b>	<b>28</b>
Sex Offender Commitment	39	<b>Juvenile Justice***</b>	<b>17</b>
Collateral Consequences	26	<b>Miscellaneous</b>	<b>8</b>
Expungement Refusal	12		
<b>Substantive Criminal Law</b>	<b>116</b>		
Crime	62		
Statute of Limitations	26		
Felon-in-possession	23		
Defense	5		

\* This category includes claims challenging the use of "victim impact evidence" in capital trials but excludes challenges to evidentiary laws that permit consideration of prior convictions at sentencing for enhancement purposes (categorized as sentence enhancements).

\*\* This category includes claims that would also logically merit placement in other categories (e.g., use of prior juvenile adjudications as a punishment phase aggravator in capital cases; prior killing by defendant as an aggravator).

\*\*\* This category excludes claims that, while concerning juvenile offenders, touch on legal changes of a more particular nature (e.g., laws making changes to the consideration of prior juvenile adjudications for punishment decisions, categorized as recidivist sentence enhancements; laws requiring juveniles to register as sex offenders, categorized as registration/ notification).

purposes of recidivism. The other subcategory, constituting thirty-eight percent of claims in the larger category, challenged laws affecting first-time offenders. Here, statutory increases to maximum or minimum sentences and changes to sentencing guidelines were the primary subjects of challenge. Challenges to new laws requiring that specimens be provided for assessment of DNA and HIV are also categorized here.

The next largest category of claims involves changes to probation and parole eligibility and supervision. Faced with the negative political consequences of prisoners being freed before their terms ended, in the 1990s state legislatures moved to restrict the availability of early release, and their laws attracted the Court's attention in *Morales* (1995) and *Lynce* (1997). The database reflects this activity, containing a broad array of challenges, including laws affecting changes to "good time," "gain time," or early release credits; requiring that some significant portion of a sentence be served before the individual becomes eligible for parole (often 85%); requiring or extending periods of supervised release; and modifying the intervals at which parole review is to occur.

The third largest category of claims involves a variety of sanctions that, while not involving direct penal servitude as such, nonetheless differentially burden those convicted of crimes, doing so after they have served their time. This category contains four subcategories of post-custody sanctions enjoying significant popularity in the 1990s.<sup>219</sup> The subcategory containing the largest number of claims relates to sex offender registration and community notification laws, popularly known as "Megan's Laws" as a result of the 1994 New Jersey law enacted after the sexual assault and murder of seven-year-old Megan Kanka.<sup>220</sup> This subcategory also contains a small number of claims challenging required post-custody registration on the basis of gang affiliation, felon status, and drug conviction. The second subcategory relates to provisions, also directed at sex offenders, known as "sexually violent predator laws," designed to subject offenders to involuntary civil commitment after their release from prison.<sup>221</sup> The

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<sup>219</sup> See generally David G. Savage, *Do More Than Time for Crime*, A.B.A. J., May 2003, at 28 (describing recent initiatives).

<sup>220</sup> See generally Wayne A. Logan, *Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws*, 89 J. CRIM. L. & CRIMINOLOGY 1167, 1172-73 (1999) (discussing genesis of New Jersey law and rapid national proliferation of laws after 1994).

<sup>221</sup> See generally Eric S. Janus & Wayne A. Logan, *Substantive Due Process and the Involuntary Confinement of Sexually Violent Predators*, 35 CONN. L. REV. 319, 320-21 (2003). Although originating in the 1930s, the laws experienced an extended desuetude until Washington State adopted a new approach in 1990, which, in contrast to former laws, uses

third subcategory of sanctions is especially broad, encompassing other burdens collaterally related to criminal conviction.<sup>222</sup> Claims here include post-conviction deprivations of licenses (for example, to practice law or drive a car); forfeitures of property; limitations on receiving state-authorized funds while incarcerated; and prohibitions on holding public office. Lastly, the category contains challenges to laws retroactively limiting the capacity of individuals to have prior criminal convictions expunged from their records, tangible evidence of the increasingly unforgiving tendencies of government.<sup>223</sup>

The fourth largest category concerns arguably the most basic, political aspect of the legislative process: the devise and modification of the substantive criminal law. Substantive criminal lawmaking, of course, emanates from the basic Lockean obligation to ensure maintenance of the social and political order,<sup>224</sup> with the state assuming the role of aggrieved party.<sup>225</sup> However, as recognized by Jerome Hall over sixty years ago, the criminal law inevitably also reflects the corresponding political order of its era of origin.<sup>226</sup> The decisions surveyed here appear to confirm this view, addressing challenges to a variety of new laws bespeaking contemporary American concerns, including identity theft, "pattern"

commitment in addition to, rather than in lieu of, prison terms. For more on this evolution see Eric S. Janus, *Sexual Predators*, in *ENCYCLOPEDIA OF CRIME AND JUSTICE 1475-76* (Joshua Dressler ed., 2d ed. 2002).

<sup>222</sup> See generally A.B.A. CRIMINAL JUSTICE STANDARDS ON COLLATERAL CONSEQUENCES AND DISQUALIFICATION OF CONVICTED PERSONS (draft 3d ed. 2002); Kathleen M. Olivares et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, 60 *FED. PROBATION* 10 (1996).

<sup>223</sup> George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Use of Infamia*, 46 *UCLA L. REV.* 1895, 1907 (1999) (discussing the tendency in late modern penalty for unforgiveness).

<sup>224</sup> JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* ch. 3, para. 13 (Thomas P. Peardon ed., MacMillan Pub. Co. 1952) (1698) (positing that civil government is needed "to restrain the partiality and violence of men"); see also CHARLES DE SECONDAT BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS*, bk. III (Prometheus Books 2002) (1748) (speaking of laws as "necessary relations").

<sup>225</sup> LOCKE, *supra* note 224, at ch. 2, para. 8 & ch. 3, para. 16; see also JEFFRIE G. MURPHY & JULES L. COLEMAN, *PHILOSOPHY OF LAW* 114 (rev. ed. 1990) (observing that "[t]he state is the complaining party in a criminal action and in a sense views itself as the injured party . . .").

<sup>226</sup> Jerome Hall, *The Substantive Law of Crimes, 1887-1936*, 50 *HARV. L. REV.* 616, 616 (1937) (observing that criminal law's "evolution . . . has been in response to deep-seated economic and social wants"). For a recent effort to reinvigorate the once predominant scholarly focus on the link between political governance and criminal law making, with special attention paid to the place of criminal law defenses in reflecting majoritarian norms, see V.F. Nourse, *Reconceptualizing Criminal Law Defenses*, 151 *U. PA. L. REV.* 1691 (2003).

child abuse, membership in a street gang, and stalking. During the period, legislatures also modified the elements and definitions of already existing crimes and burdens of proof. With defenses, the survey unearthed challenges to retroactive changes to the defense of insanity and entrapment, in particular. The statute of limitations subcategory relates to laws broadening limitations periods (enacted both before and after the periods expired), almost always regarding the prosecution of sex offenders, addressed in 2003 by the Court in *Stogner v. California*.<sup>227</sup> As the Table reflects, the study period also contains a significant number of challenges to laws altering the right of convicted felons to possess firearms.<sup>228</sup>

The next category, "Monetary Sanctions," reflects the particular influence of two distinct but related political causes taking hold in the 1990s: the victims' rights movement<sup>229</sup> and the increasing desire to shift the costs of prosecution and custody to criminal defendants.<sup>230</sup> The former is reflected in challenges to laws making changes to the required financial restitution of victims, which swept the nation in revamped form in the 1990s.<sup>231</sup> The latter is reflected in challenges to

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<sup>227</sup> 123 S. Ct. 2446 (2003). For discussion of *Stogner*, see *supra* notes 179–99 and accompanying text.

<sup>228</sup> Two claims in this subcategory, both originating in California, challenged the retroactive application of a new law prohibiting persons convicted of specified *misdemeanors* from carrying firearms.

<sup>229</sup> See generally GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS (1995); NAT'L VICTIM CTR., THE 1996 VICTIMS' RIGHTS SOURCEBOOK: A COMPILATION AND COMPARISON OF VICTIMS' RIGHTS LEGISLATION (1996); Jeffrey Toobin, *Victim Power*, THE NEW YORKER, Mar. 24, 1997, at 40. For commentary on the unique political potency of the movement, see JOEL BEST, RANDOM VIOLENCE: HOW WE TALK ABOUT NEW CRIMES AND NEW VICTIMS 119–41 (1999) (describing appeal of "the victim industry"); Lynne Henderson, *Co-opting Compassion: The Federal Victim's Rights Amendment*, 10 ST. THOMAS L. REV. 579, 591 (1998) (noting that "[i]ndividual victims and victims' groups supporting punitive responses to crime have the public and legislative ear; those that do not are ignored"). One telling piece of evidence of victims' influence during the study period was the frequent effort by states to name tough anticrime measures after particular victims. See Clifford J. Levy, *A Wave of New Bills Bearing Victims' Names*, N.Y. TIMES, Feb. 27, 1999, at B5.

<sup>230</sup> See, e.g., Robert L. Spangenberg & Tessa J. Schwartz, *The Indigent Defense Crisis is Chronic*, 9 CRIM. JUST. 13 (1994) (surveying instances of fee assessments in prosecutions); cf. PRIVATIZING THE UNITED STATES JUSTICE SYSTEM: POLICE, ADJUDICATION, AND CORRECTIONS SERVICES FROM THE PRIVATE SECTOR (Gary W. Bowman et al. eds., 1992) (examining the growing role of private institutions in the criminal justice system).

<sup>231</sup> See MARKUS DIRK DUBBER, VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS' RIGHTS 222–25 (2002).

laws requiring defendants to pay for probation, prison or jail-related costs, to repay the state for the costs of extradition, and "drug offender" surcharges, all popular initiatives during the period. Challenges to fines, comprising just under twenty-five percent of claims in the category, reflect the ongoing tendency of the criminal justice system to expand its reach into "middleground" sanctions.<sup>232</sup>

"Judicial Administration," the next largest category, includes challenges to legislative changes made to the functioning of the justice system, which taken together reflect the system's broader tendency during the study period to toughen the rules attending defendants' rights of recourse. The tendency assumed its most high-profile form during the midpoint of the study period when Congress undertook efforts to sharply limit the availability of federal habeas corpus for state court defendants.<sup>233</sup> Consistent with this trend, the category includes challenges to laws shortening the time for individuals to withdraw pleas and file for appeal or post-conviction relief; expanding requirements for post-conviction relief and appeal; limiting availability of bail; barring the capacity of sex offenders to seal their records; and modifying joinder rules.

As its title implies, the next largest category, "Evidence," concerns challenges to changes in evidentiary laws. Here again, the influence of the victims' rights movement was felt, perhaps most notably, with *Payne v. Tennessee*, where the Court reversed itself and permitted "victim impact" testimony in capital trials, allowing survivors to provide emotional testimony on the losses caused by homicides.<sup>234</sup> Similarly, in 1994, Congress made major changes to the Federal

<sup>232</sup> See Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795 (1992). Speaking to such changes in 1991, one commentator noted that "[w]e are in the midst of fundamentally altering the way we approach criminal justice problems. Law enforcement authorities are no longer content to fight crime with the traditional methods of arrest, prosecution, and jailing." Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1413 (1991).

<sup>233</sup> See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1217 (codified at 28 U.S.C. § 2254 (2000)).

<sup>234</sup> 501 U.S. 808 (1991). For manifestations of this influence, see *id.* at 834 (Scalia, J., concurring) (asserting that the preclusion of such evidence "conflicts with a public sense of justice keen enough that it has found voice in a nationwide 'victims rights' movement"); *id.* at 859 (Stevens, J., dissenting) (stating that the "majority has obviously been moved by an argument that has strong political appeal but no proper place in a reasoned judicial opinion"); *id.* at 867 (Stevens, J., dissenting) (acknowledging "the political strength of the 'victims' rights' movement"). For more on victim impact evidence see Wayne A. Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials*, 41 ARIZ. L. REV. 143 (1999); cf. Wayne A. Logan, *Opining on Death: Witness Sentence*

Rules of Evidence, significantly broadening the admissibility of evidence of prior sexual misconduct in sexual assault and child molestation cases,<sup>235</sup> with imagery of victims figuring prominently in legislative debates.<sup>236</sup> Consistent with these broader national shifts and deference to prosecutorial interests more generally, the survey includes challenges to new laws allowing consideration of particular types of evidence or testimony, including that relating to alleged prior sexual misconduct or other forms of wrongdoing (regardless of whether a conviction resulted); loosening hearsay restrictions; allowing the admission of victim impact testimony; and limiting spousal privilege rules.<sup>237</sup>

Laws relating to capital sentencing, a common focus of legislatures since the Supreme Court entered the constitutional fray in 1972 with its *Furman* decision,<sup>238</sup> were also subject to *ex post facto* challenges during the study period. Challenges were made to laws making changes in the availability of life without parole as a sentencing option; the available methods of inflicting death; the definition and existence of aggravating and mitigating factors; the respective roles of judge and jury in death decision making; and the trial court's authority to resentence upon remand from appellate courts.

"Jury/Trial Rights" categorizes challenges brought during the study period against a broad variety of laws affecting the litigation rights of criminal defendants. These changes included retroactive modifications to laws governing the right to jury trial for particular offenses; the composition of juries; juror removal; the extent of peremptory challenges available; and the joining or bifurcation of different parts of criminal trials.

"Institutional Administration" captures challenges to laws modifying the operation of prison and mental health facilities. Such challenges include those against laws imposing limits on inmate visitation, correspondence, and opportunities for education; modifying the criteria for inmate security

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*Recommendations in Capital Trials*, 41 B.C. L. REV. 517 (2000) (examining the permissibility of survivors' testimony in capital trials on the question of whether the defendant should be sentenced to death).

<sup>235</sup> See FED. R. EVID. 413–15.

<sup>236</sup> See Michael S. Ellis, *The Politics Behind Federal Rules of Evidence 413, 414, and 415*, 38 SANTA CLARA L. REV. 961 (1998); David P. Leonard, *The Federal Rules of Evidence and the Political Process*, 22 FORDHAM URB. L.J. 305 (1995).

<sup>237</sup> The category also contains four claims challenging the Texas "outray" statute invalidated by the Court in *Carmell v. Texas*, 529 U.S. 513 (2000).

<sup>238</sup> *Furman v. Georgia*, 408 U.S. 238 (1972) (holding Georgia's capital sentencing procedure unconstitutional). For a comprehensive examination of legislative and judicial activity during the study period, see AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION (James R. Acker et al. eds., 1998).

classification, custody, and transfer; requiring inmates to undergo treatment; and modifying requirements for transfer within and out of mental health institutions.

"Juvenile Justice," the last specialized category, contains claims almost exclusively challenging jurisdictional changes to the juvenile justice system. These claims involve either expansions of the juvenile court supervision period or statutory changes making it easier to try juveniles as adults.<sup>239</sup> Of the seventeen claims in the category, sixteen concerned jurisdictional changes.

Finally, a handful of challenges did not admit of ready categorization, and thus are relegated to the "Miscellaneous" category. Here, one finds a variety of claims, including challenges to laws instructing juries that parole and good time credits are potentially available to defendants and those easing the government's capacity to obtain implied consent in drunk driving prosecutions.

Taken altogether, Table 1 illuminates the expansive efforts of states during the study period to legislate in the criminal justice arena. On matters as diverse as sex offender registration, sentence enhancements for first-time and recidivist offenders, capital punishment, litigation rights of criminal defendants and inmates, availability of parole or probation, and definition of crimes and defenses, the states acted to toughen their treatment of those accused or convicted of crimes. Overall the greatest number of claims broadly pertained to laws allegedly increasing the quantum of punishment (*Calder* category three), a category that historically has also received the most attention from the Supreme Court.<sup>240</sup> Category three claims are predominantly found in the enhancement, custody modification, monetary sanctions, and post-custody sanction groupings but the category is also implicated in claims contained within many of the remaining groupings as well. A sizeable number of claims, however, related to *Calder* category one, mainly classified here in the substantive criminal law grouping, which suggests a greater concentration of legislative activity in this "core" area of ex post facto concern than previously thought.<sup>241</sup>

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<sup>239</sup> See generally Barry C. Feld, *The Juvenile and Criminal Justice Systems' Responses to Youth Violence*, 24 CRIME & JUSTICE 189 (1998); Eric K. Klein, Note, *Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice*, 35 AM. CRIM. L. REV. 371 (1998).

<sup>240</sup> *Lynce v. Mathis*, 519 U.S. 433, 441 (1997) (noting that the majority of ex post facto challenges before the Court have involved an alleged increase in punishment).

<sup>241</sup> See Krent, *supra* note 217, at 2147 (concluding that "Congress and state legislatures have rarely threatened the core of the Ex Post Facto Clause, which prohibits criminalizing an action that was innocent when done or increasing the severity of a crime's classification").

## B. Rates of Success and Rationales

Table 2 reflects the success rates of the different types of ex post facto claims adjudicated in state courts during the study period. This section provides an overview of the rationales used by courts to resolve the claims, which, as the Table suggests, did not enjoy a high degree of success during the study period.

### I. Monetary Sanctions

Surprisingly, the category enjoying the highest rate of success overall during the study period was that involving challenges to monetary sanctions. Notwithstanding that the Supreme Court has held that monetary penalties in themselves do not warrant designation as punishment for double jeopardy purposes<sup>242</sup> and, by extension, thus do not raise ex post facto concerns,<sup>243</sup> state courts during the study period were receptive to the argument in its particulars. In each of nine instances, California courts invalidated, on ex post facto grounds, a new law imposing a probation or parole "revocation fine," on the rationale that the law retroactively made punishment for a crime more burdensome after its commission (*Calder* category three).<sup>244</sup> Retroactively imposed fines for drunk driving and domestic abuse convictions,<sup>245</sup> and a "restitution fine,"<sup>246</sup> were also invalidated on ex post facto grounds. Courts were far less amenable to invalidating laws that retroactively imposed upon offenders "fees" and reimbursements, reasoning that they were nonpunitive.<sup>247</sup> However, several such cost-shifting laws were struck down, with courts finding that they increased the quantum of punishment above that in effect or scope of restitution owed were largely safe from challenge, as they were found at the time the crime was committed.<sup>248</sup> Laws retroactively increasing the amount

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<sup>242</sup> See *Hudson v. United States*, 522 U.S. 93, 103 (1997).

<sup>243</sup> See *Russell v. Gregoire*, 124 F.3d 1079, 1086 n.6 (9th Cir. 1997), *cert. denied*, 523 U.S. 1007 (1998).

<sup>244</sup> As noted by one court, although the purpose of the revocation fine might not be punitive, "its consequences to the defendant are severe enough that it qualifies as punishment for purposes of the ex post facto clause." *People v. Callejas*, 102 Cal. Rptr. 2d 363, 365 (Cal. Ct. App. 2000).

<sup>245</sup> See *State v. Theriot*, 00-870 (La. App. 5 Cir. 1/30/01), 782 So. 2d 1078, 1086-87 (2001) (drunk driving); *People v. Rayburn*, 630 N.E.2d 533, 538 (Ill. Ct. App. 1994) (domestic abuse).

<sup>246</sup> See *People v. Zito*, 10 Cal. Rptr. 2d 491, 493-94 (Cal. Ct. App. 1992).

<sup>247</sup> See, e.g., *State v. Oliver*, 588 N.W.2d 412, 416 (Iowa 1998) (probation enrollment fee); *State ex rel. Nixon v. Taylor*, 25 S.W.3d 566, 568 (Mo. Ct. App. 2000) (reimbursement for incarceration costs).

<sup>248</sup> See, e.g., *People v. Ellington*, 854 P.2d 223, 224 (Colo. 1993) ("drug offender surcharge"); *People v. Slocum*, 539 N.W.2d 572, 574 (Mich. Ct. App. 1995) (extradition costs).



**TABLE 2: Types of Claims by Category and Rate of Success\***

Overall Rate of Success: 189/1026 (18%)

<b>Monetary Sanctions</b>	<b>25/61 (41%)</b>	<b>Sentence Enhancement</b>	<b>52/232 (22%)</b>
Fine	13/14 (93%)	First-offense	44/89 (49%)
Fee/Reimbursement	8/23 (35%)	Recidivist	8/143 (6%)
Restitution	4/24 (17%)	Death Penalty	9/45 (20%)
<b>Custody Modification**</b>	<b>65/219 (30%)</b>	<b>Evidence****</b>	<b>2/47 (4%)</b>
Probation	6/7 (86%)	Post-Custody Sanction	4/168 (2%)
Probation/Parole Violation	5/15 (33%)	Collateral Consequences	1/26 (4%)
Parole	54/197 (27%)	Registration/Notification	3/91 (3%)
<b>Juvenile Justice</b>	<b>4/17 (24%)</b>	Sex Offender Commitment	0/39 (0%)
<b>Substantive Criminal Law</b>	<b>27/116 (23%)</b>	Expungement Refusal	0/12 (0%)
Defense	5/5 (100%)	Judicial Administration	1/55 (2%)
Crime	18/62 (29%)	Jury/Trial Rights	0/30 (0%)
Felon-in-possession	2/23 (9%)	Institutional Admin.	0/28 (0%)
Statute of Limitations***	2/26 (8%)	Miscellaneous	0/8 (0%)

\* Table 2 reflects the disposition of claims in state courts during the study period (1992–2002), without regard for the possible effects of subsequent U.S. Supreme Court decisions. However, in the event Westlaw indicated subsequent case history involving a reversal and remand from the Court during the study period, such outcomes are reflected in the Table. Also, all percentages reported are rounded up to the nearest whole number.

\*\* During the study period, the U.S. Supreme Court issued several important decisions involving challenges to parole regime changes. Again, consistent with the protocol used here, the claims were coded in accord with their state court outcomes, unless the Court expressly reversed and remanded during the study period. If this occurred, the claim was coded according to the Court's directive.

\*\*\* This category contains claims made against the California statute invalidated by the Supreme Court in *Stogner v. California*, 123 S. Ct. 2446 (2003), as well as similar laws in other states that revived time-expired prosecutions, and claims extending limitations periods for prosecutions not yet time-barred. The category also contains a single claim alleging improper retroactive application of a shortened limitations period denied on the rationale that the pertinent time period in actuality was not altered. The *Stogner*-type claims are coded to reflect their state court outcomes, without regard for the *Stogner* decision, which was rendered after the end of the study period.

\*\*\*\* This category contains challenges to the Texas statute invalidated by the Supreme Court in *Carmell v. Texas*, 529 U.S. 513 (2000). The pre-2000 decisions are coded to reflect their state court outcomes, and decisions rendered between 2000 and 2002 are coded to reflect the impact of *Carmell*, per any subsequent Westlaw case history indicated.

not to increase punishment;<sup>249</sup> four courts concluded otherwise and invalidated restitution on ex post facto grounds as an increase in punishment.<sup>250</sup>

## 2. Custody Modification

Laws affecting modifications to custody, the second largest category of claims overall, warranted ex post facto relief thirty percent of the time. As noted above, legislative activity here was brisk during the study period, and attracted the Supreme Court's attention on several occasions.<sup>251</sup> Denials of relief for parole-related changes were rationalized on several grounds in particular: (1) that limiting parole release did not affect the quantum of incarceration imposed at sentencing,<sup>252</sup> (2) that predicating release on fulfillment of sex offender treatment did not increase punishment;<sup>253</sup> (3) that parole release, and the guidelines often used to reach such decisions, are discretionary and hence changes made to eligibility do not increase punishment;<sup>254</sup> and (4) that laws relating to parole are "procedural," and hence do not warrant ex post facto attention.<sup>255</sup> A number of claims, moreover, met with defeat because courts concluded that the provision limiting parole release, whether a guideline, regulation or rule, despite being authorized by the legislature, was not within the ambit of ex post facto protection because it was not a "law."<sup>256</sup>

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<sup>249</sup> See, e.g., *People v. Stewart*, 926 P.2d 105, 108 (Colo. Ct. App. 1996); *Commonwealth v. Kline*, 695 A.2d 872, 877 (Pa. Super. 1997).

<sup>250</sup> See *Eichelberger v. State*, 916 S.W.2d 109, 110–12 (Ark. 1996); *People v. Saelee*, 40 Cal. Rptr. 2d 790, 792–93 (Cal. Ct. App. 1995); *State v. Corwin*, 616 N.W.2d 600, 602 (Iowa 2000); *State v. McMann*, 541 N.W.2d 418, 422 (Neb. Ct. App. 1995).

<sup>251</sup> See *supra* notes 135–48 and accompanying text.

<sup>252</sup> See, e.g., *Rauso v. Pa. Bd. of Prob. & Parole*, 762 A.2d 774, 775 (Pa. Commw. Ct. 2000), *aff'd* by 770 A.2d 309 (Pa. 2001) (per curiam).

<sup>253</sup> See, e.g., *Hall v. Zavaras*, 916 P.2d 634, 637 (Colo. Ct. App. 1996).

<sup>254</sup> See, e.g., *Graham v. Norris*, 10 S.W.3d 457, 460 (Ark. 2000).

<sup>255</sup> See, e.g., *Gaines v. Fla. Parole Comm'n*, 743 So. 2d 118, 122 (Fla. Ct. App. 1999).

<sup>256</sup> See, e.g., *Austin v. Div. of Parole*, 717 N.Y.S.2d 756, 757 (N.Y. App. Div. 2000); *Bealler v. Ohio Adult Parole Auth.*, 740 N.E.2d 1100, 1101 (Ohio 2001); *Commonwealth v. O'Brian*, 811 A.2d 1068, 1070 (Pa. Super. 2002). It bears mentioning that Justice Scalia recently endorsed just such a view. See *Garner v. Jones*, 529 U.S. 244, 257–58 (2000) (Scalia, J., concurring) (arguing that only a legislative change affecting frequency of parole eligibility hearings, not an administrative one promulgated by a duly authorized parole board, comes within the ambit of the Ex Post Facto Clause).

Notwithstanding that *Calder* itself actually involved a challenge to a "resolution or law" of the Connecticut legislature, *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), courts have insisted that only laws come within the ambit of the Ex Post Facto Clause. It is for this reason that the judiciary can make retroactive changes to the criminal law unfettered by ex post facto constraints. See *Bouie v. City of Columbia*, 378 U.S. 347, 352–54 (1964) (holding that retroactive judicial enlargements of the criminal law are regulated by Fourteenth Amendment

Successful parole-related claims during the study period, to a significant degree, reflected U.S. Supreme Court decisions issued during the period. For instance, challenges to laws requiring the retroactive forfeiture of various types of imprisonment time credits were granted on the basis of the Court's 1997 decision in *Lynce v. Mathis*.<sup>257</sup> So too were challenges to new laws retroactively requiring that inmates serve a set percentage of their sentences before being eligible for parole.<sup>258</sup> Challenges to retroactive changes to the timing and intervals of parole consideration, in keeping with the case-specific test set forth in *California*

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Due Process Clause, rather than by the Ex Post Facto Clause). Nonetheless, the cases examined here make clear that courts apply ex post facto analysis to pattern jury instructions tendered by judges that modify the law, even though such instructions lack legislative imprimatur. *See, e.g., Napier v. State*, 46 S.W.3d 565, 568 (Ark. Ct. App. 2001) (granting claim with regard to instruction making change to definition); *Carinda v. State*, 734 So. 2d 514, 515 (Fla. Ct. App. 1999) (denying claim); *People v. Criss*, 719 N.E.2d 776, 784–85 (Ill. App. Ct. 1999) (denying claim). Constitutional changes over time have also been subject to ex post facto analysis. *See, e.g., Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866); *State v. Kavanaugh*, 258 P. 209 (N.M. 1927). In *Ross v. Oregon*, 227 U.S. 150 (1913), for example, the Court held:

[The Ex Post Facto Clause has been regarded] as reaching every form in which the legislative power of a State is exerted, whether it be a constitution, a constitutional amendment, an enactment of the legislature, a by-law or ordinance of a municipal corporation, or a regulation or order of some other instrumentality of the State exercising delegated legislative authority.

*Id.* at 162–63.

A still unaddressed question is whether voter initiatives and referenda should warrant ex post facto scrutiny. A product of Progressive Era reforms, such initiatives are self-consciously populist attempts to sidestep the legislative process, yet are susceptible to the same inflammatory influences affecting legislatures that the Ex Post Facto Clause is designed to guard against. For discussion of the initiative process more generally, see *CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES* (Shaun Bowler et al. eds., 1998); Philip P. Frickey, *The Communion of Strangers: Representative Government, Direct Democracy, and the Privatization of the Public Sphere*, 34 WILLAMETTE L. REV. 421 (1998); Michael M. O'Hear, *Statutory Interpretation and Direct Democracy: Lessons From the Drug Treatment Initiatives*, 40 HARV. J. ON LEGIS. 281 (2003). Professor Tribe, for one, is inclined to conclude that the Bill of Attainder Clause, in many ways a companion provision, also reposed in Article I, should extend to popular referenda. *See* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 10-4, at n.27 & § 10-6, at 658–59 (2d ed. 1988). For more on the historically close kinship of the Bill of Attainder and the Ex Post Facto Clauses, see *infra* notes 455, 471.

<sup>257</sup> 519 U.S. 433 (1997); *see also McGee v. Snyder*, 760 N.E.2d 982, 990 (Ill. App. Ct. 2001) (applying *Lynce*). For instances of pre-*Lynce* decisions granting relief on this basis, see *Gwong v. Singletary*, 683 So. 2d 109, 114 (Fla. 1996), *cert. denied*, 519 U.S. 1142 (1997); *Barger v. Peters*, 645 N.E.2d 175, 177 (Ill. 1994), *cert. denied*, 514 U.S. 1102 (1995).

<sup>258</sup> *See, e.g., McKnight v. State*, 751 So. 2d 471, 475 (Miss. Ct. App. 1999).

*Department of Corrections v. Morales*,<sup>259</sup> succeeded when courts were convinced that the disadvantage was more than merely “speculative.”<sup>260</sup> Other successful claims, such as those challenging laws newly requiring supervised, as opposed to unsupervised, release or extending the period of supervised release, were also found to violate *Calder* category three’s prohibition of retroactive increases in punishment.<sup>261</sup>

Challenges to changes in the availability or conditions of probation were few in number. Half of the successful claims challenged an amendment to an Oregon law retroactively authorizing “split” probation sentences — incorporating jail terms as a condition — which the courts deemed an increase in punishment.<sup>262</sup> The balance of successful claims, arising in other states, concerned retroactive limits on the availability of deferred or suspended sentences, also deemed an increase in punishment.<sup>263</sup>

Finally, retroactive changes to laws regarding violation of probation and parole conditions warranted relief thirty-three percent of the time. Of the fifteen claims in the study, the vast majority (thirteen) related to new laws in California (ten) and Florida (three), which changed the handling of juvenile probation violations.<sup>264</sup> In California, juveniles challenged the retroactive application of a new provision, codified as a result of successful voter initiative Proposition 21, which modified probation revocation hearings by permitting the use of hearsay to establish violations; rescinding the prior requirement that the trial court expressly find that the previous disposition was ineffective in rehabilitating the juvenile; and lowering the state’s burden of proof in establishing the underlying violation (from beyond a

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<sup>259</sup> 514 U.S. 499 (1995). For discussion of *Morales*, see *supra* notes 135–42 and accompanying text.

<sup>260</sup> See, e.g., *Miller v. Ignacio*, 921 P.2d 882, 885 (Nev. 1996). For an instance of a successful pre-*Morales* challenge on this basis, see *Walker v. Klinicar*, 613 N.E.2d 295, 297 (Ill. App. Ct. 1993).

<sup>261</sup> See, e.g., *Bollinger v. Bd. of Parole & Post-Prison Supervision*, 920 P.2d 1111, 1114 (Or. Ct. App. 1996), *aff’d*, 992 P.2d 445 (1999).

<sup>262</sup> See *State v. Swartzendruber*, 853 P.2d 842, 846 (Or. Ct. App. 1993); *State v. Couraud*, 848 P.2d 628, 629 (Or. Ct. App. 1993); *State v. Harding*, 840 P.2d 113, 114 (Or. Ct. App. 1992).

<sup>263</sup> See *People v. Perez*, 80 Cal. Rptr. 2d 188, 193–94 (Cal. Ct. App. 1998); *People v. Munoz*, 857 P.2d 546, 548 (Colo. Ct. App. 1993); *State v. Reynolds*, 642 A.2d 1368, 1371 (N.H. 1994).

<sup>264</sup> In the two remaining claims, retroactive changes to the handling of probation violations met with mixed results. See *State v. Leistikio*, 844 P.2d 97, 100 (Mont. 1992) (granting challenge to law allowing modification of terms of suspended sentences); *State v. Monson*, 518 N.W.2d 171, 172–73 (N.D. 1994) (denying challenge to law allowing revocation of probation after probation period had ended).

reasonable doubt to a preponderance of the evidence).<sup>265</sup> Juvenile petitioners whose initial grant of probation occurred before the law's effective date, but alleged misconduct occurred afterwards, challenged the law contending that its retroactive application violated the fourth *Calder* category, resurrected by the Supreme Court in 2000 in *Carmell v. Texas*.<sup>266</sup>

In nine of ten instances, California appellate courts rebuffed challenges,<sup>267</sup> raising some question over both the jurisprudential effect of *Carmell*, and a statement made by the Court in another case decided in 2000, *Johnson v. United States*.<sup>268</sup> In *Johnson*, while not reaching the merits of an ex post facto claim challenging changes to a federal law governing revocation of supervised release,<sup>269</sup> the Court stated that sanctions imposed as a result of revocation are to be conceived as "part of the penalty for the initial offense."<sup>270</sup> According to the California courts, the aforementioned language in *Johnson* amounted to dictum,<sup>271</sup> and otherwise

<sup>265</sup> See CAL. WELF. & INST. CODE § 777 (West 2000).

<sup>266</sup> 529 U.S. 513 (2000). For discussion of *Carmell*, see *supra* notes 150–78 and accompanying text.

<sup>267</sup> See, e.g., *In re Dustin R.*, No. E029356, 2002 WL 220338 (Cal. Ct. App. Feb. 8, 2002); *In re Lincoln F.*, No. A097292, 2002 WL 1988175 (Cal. Ct. App. Aug. 28, 2002); *In re Brant O.*, No. A096471 2002 WL 1753144 (Cal. Ct. App. July 29, 2002). The California Supreme Court agreed to hear one such challenge in July 2001; as of this writing oral argument has not yet been set. See *John L. v. Superior Court*, 106 Cal. Rptr. 2d 209 (Cal. Ct. App. 2001), *rev. granted*, 26 P.3d 1040 (Cal. 2001).

<sup>268</sup> 529 U.S. 694 (2000).

<sup>269</sup> The Court granted *certiorari* to resolve a conflict among the circuits over whether the new provision constituted retroactive punishment, with the split arising over whether revocation amounted to punishment for the underlying conviction, occurring before the law's effective date, or the violation of supervised release that occurred afterwards. See *id.* at 698–99. The Court, however, ultimately failed to decide whether retroactive application violated ex post facto doctrine, instead concluding that Congress did not intend for the law to be retroactively applied, and the trial court thus lacked authority to invoke the new law. *Id.* at 701–03.

<sup>270</sup> *Id.* at 700; see also *id.* at 701 (stating that the Court "attribute[s] postrevocation penalties to the original conviction"). The Court added that "such treatment is all but entailed by our summary affirmance of *Greenfield v. Scafati* in which a three-judge panel forbade on ex post facto grounds the application of a Massachusetts statute imposing sanctions for violation of parole to a prisoner originally sentenced before its enactment." *Id.* (citing *Greenfield v. Scafati*, 277 F. Supp. 644 (D. Mass. 1967), *summarily aff'd*, 390 U.S. 713 (1968)).

<sup>271</sup> Whether the *Johnson* Court's language amounted to dictum is of course highly questionable because, as noted, the Court granted *certiorari* to "resolve the conflict[]" among circuits over whether the law concerned "revocation and reimprisonment . . . for the original offense" or punishment for violation of the conditions imposed on Johnson. *Johnson*, 529 U.S. at 699. The Court devoted several paragraphs to discussing the issue, and only then proceeded to assess whether Congress intended the law to be retroactive — a question not

lacked binding effect because, unlike the federal law in question in *Johnson*, the new juvenile revocation law did not authorize any new or increased sanctions in the event of revocation.<sup>272</sup> Rather, the new law merely changed “the standards and evidentiary rules” for determining whether revocation is appropriate, triggering application of harsher sanctions contained in the preexisting law.<sup>273</sup> As a result, the change was in keeping with what the California courts considered key language in *Carmell*, where the Court at one point broadly acknowledged (before assessing the category four claim) that “[t]he critical question [for ex post facto purposes] is whether the law changes the legal consequences of acts completed before its effective date.”<sup>274</sup> Furthermore, while the new law reduced the “nature and quantum of evidence” necessary to revoke a juvenile’s probation, it could be applied consistently with *Carmell*, because the key date for retroactivity purposes is when the alleged violation occurred (not the date of the predicate conviction).<sup>275</sup> According to one panel of the California Court of Appeals:

It bears repeating that the critical question when analyzing a claimed ex post violation is whether the challenged law changes the legal consequences of acts completed before its effective date. Although change in the array of sanctions available at the time of the original offense alters the legal consequences of the original conduct and renders the date of the original offense pivotal for purpose of an ex post facto analysis of changes in probation revocation sanctions, *changes in the procedural standards and evidentiary rules for determining whether a juvenile has engaged in later conduct warranting revocation of probation does not alter the legal consequences of acts completed before*

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actually raised by the litigants. *See id.* at 699–702. As these California cases make clear, *Johnson* did nothing to clarify the important question of how retroactivity is to be assessed for purposes of revocation, likely serving to inspire continued confusion among the courts.

<sup>272</sup> *See* John L. v. Superior Court, 106 Cal. Rptr. 2d 209, 217–18 (Cal. Ct. App. 2001), *rev. granted*, 26 P.3d 1040 (Cal. 2001).

<sup>273</sup> *Id.* at 219.

<sup>274</sup> *Carmell v. Texas*, 529 U.S. 513, 520 (2000) (quoting *Weaver v. Graham*, 450 U.S. 24, 31 (1981)).

<sup>275</sup> *John L.*, 106 Cal. Rptr. 2d at 220. The California court based its inference on language at the very outset of *Carmell*, setting forth the procedural posture of the case, where the Supreme Court noted that *Carmell* did not contest eleven of his fifteen convictions, either because at the time of the particular instances of alleged sexual abuse the applicable evidentiary law allowed for conviction, or the misconduct at issue admittedly occurred after the new law took effect. *Carmell*, 529 U.S. at 519–20. *Carmell*, however, omits any discussion of how retroactivity is to be assessed, and the *Carmell* majority’s condemnation of Texas’s application of its new evidentiary law to *Carmell*’s earlier, preenactment behavior suggests a contrary understanding.

*its effective date if the conduct constituting the probation violation occurs after the effective date of the statute.*<sup>276</sup>

Taken together, the aforementioned cases highlight a decided effort to minimize the language in *Johnson*, suggesting that for ex post facto purposes the date of the initial misconduct warranting probation, not the alleged misconduct serving as a basis to revoke, should serve as the trigger date for retroactivity purposes. The cases also highlight a decidedly narrow reading of the fourth *Calder* category, disregarding the *Carmell* Court's explicit concern over whether the state's evidentiary burden is unfairly eased, regardless of whether punishment is increased under the new law (actually a *Calder* category three concern).<sup>277</sup> As a result, while presumably California would be precluded from retroactively increasing the sanctions for a probation violation, it nonetheless remains free to ease the method by which it can justify revocation and thus impose previously available sanctions, themselves harsher than those imposed at the time of initial adjudication.<sup>278</sup>

In the Florida cases, juveniles challenged the retroactive application of a new law that removed the six-year cap on sentences in existence when the juveniles committed the offenses leading to probation.<sup>279</sup> In all three challenges, Florida courts granted relief.<sup>280</sup> In the most recent decision, the petitioner challenged his fifteen-year sentence, imposed pursuant to the new law.<sup>281</sup> Like other courts before it, the court of appeals concluded that the crucial date for ex post facto retroactivity purposes was the date on which the petitioner committed the criminal act leading to probation, not the date on which the probation violation occurred.<sup>282</sup> To hold otherwise, the court reasoned, would "clearly serve[] to increase the length of incarceration to which he could be subject," and hence violate *Calder* category three.<sup>283</sup>

<sup>276</sup> *In re Lincoln F.*, No. No. A097292, 2002 WL 1988175, at \*6 (Cal. Ct. App. Aug. 28, 2002) (emphasis added) (citation omitted).

<sup>277</sup> *Carmell*, 529 U.S. at 531–33. Indeed, in *Carmell* the Texas Legislature did not increase the punishment *Carmell* faced, but rather only made easier the government's means of winning a conviction and hence a prison term.

<sup>278</sup> California courts have either disagreed with or distinguished the sole decision in the survey granting ex post facto relief with regard to the new juvenile probation revocation law. See *In re Melvin J.*, 96 Cal. Rptr. 2d 917, 927 (Cal. Ct. App. 2000).

<sup>279</sup> See FLA. STAT. ANN. §§ 958.04(2)(a) & 958.14 (West 2003).

<sup>280</sup> See *Windom v. State*, 835 So. 2d 1174, 1175 (Fla. Dist. Ct. App. 2002); *Darden v. State*, 641 So. 2d 431, 432 (Fla. Dist. Ct. App. 1994); *Reeves v. State*, 605 So. 2d 562, 562 (Fla. Dist. Ct. App. 1992).

<sup>281</sup> *Windom*, 835 So. 2d at 1174–75.

<sup>282</sup> *Id.* at 1175.

<sup>283</sup> *Id.*

### 3. Juvenile Justice

Ex post facto claims based on changes in the treatment of juvenile offenders achieved success twenty-four percent of the time. Here, the most common contention was that laws either broadening the capacity of authorities to transfer juveniles to adult court, or lengthening the temporal jurisdiction of juvenile court supervision (for example, from eighteen to twenty-one years of age), violated *Calder* category three. With respect to the former, courts typically concluded that transfer was procedural in nature, and hence permissible for ex post facto purposes, despite rendering juveniles subject to harsher adult sanctions.<sup>284</sup> However, the Montana Supreme Court deemed ex post facto a law that retroactively expanded the authority of courts to transfer juveniles to adult probation and parole supervision, thereby both expanding the duration of such supervision, and creating the risk of adult jail time.<sup>285</sup> Similarly, the Illinois Court of Appeals barred retroactive application of a law requiring (as opposed to permitting) that juveniles convicted of murder be transferred to the adult system, exposing them to a harsher range of potential punishment.<sup>286</sup> The change in the law was therefore “substantive and not procedural.”<sup>287</sup>

Laws lengthening the duration of juvenile court jurisdiction, and hence supervision, met with more mixed results. According to the Missouri Court of Appeals, juvenile jurisdiction by definition is civil in nature and hence not subject to ex post facto constraints.<sup>288</sup> On the other hand, the New Mexico Court of Appeals prohibited retroactive application of a law extending jurisdiction of the juvenile court past the age of eighteen, reasoning that it increased the quantum of punishment imposed on juveniles.<sup>289</sup>

### 4. Sentence Enhancements and Substantive Criminal Law Changes

Changes to laws affecting sentence enhancements and those making changes to the substantive criminal law achieved about equal measures of success. With respect to enhancements, *Calder* category number three was typically invoked. In addressing such claims, courts drew a clear distinction between first-time offenders

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<sup>284</sup> See, e.g., *In re M.C.*, 745 N.E.2d 122, 126–27 (Ill. App. Ct. 2001); *In re Fultz*, 535 N.W.2d 590, 595 (Mich. Ct. App. 1995), *rev'd on other grounds*, 554 N.W.2d 725 (Mich. 1996); *State v. Walls*, 775 N.E.2d 829, 841–42 (Ohio 2002).

<sup>285</sup> See *In re Young*, 983 P.2d 985, 988 (Mont. 1999).

<sup>286</sup> See *In re R.T.*, 729 N.E.2d 889, 896–97 (Ill. App. Ct. 2000).

<sup>287</sup> *Id.* at 897.

<sup>288</sup> See *In re RLC, Jr.*, 967 S.W.2d 674, 678 (Mo. Ct. App. 1998).

<sup>289</sup> See *State v. Adam M.*, 953 P.2d 40, 42–43 (N.M. Ct. App. 1997).



and recidivists, being far more inclined to grant relief to the former. For example, courts invalidated laws that retroactively increased the statutory maximum or mandatory minimum prison terms of offenders;<sup>290</sup> increased the prescribed amount of prison time for particular offenses;<sup>291</sup> added a post-release condition (completion of a sex offender treatment program) threatening re-imprisonment in the event of failure;<sup>292</sup> or introduced a new basis for sentence enhancement (for example, firearm use, commission of a crime while on prison release, or sexual motivation).<sup>293</sup> On the other hand, challenges were rejected when the law involved only a technical clarification of a preexisting sentence-related law;<sup>294</sup> actually did not serve to increase the amount of prison time permitted;<sup>295</sup> or failed to qualify as actual punishment (for example, requiring specimens for HIV or DNA analysis or removing home confinement as a sentencing option).<sup>296</sup>

Recidivist laws proved virtually impregnable to *ex post facto* challenges. In over ninety percent of claims, courts reasoned that laws increasing the punishment for recidivist offenders did not run afoul of the third *Calder* category. Typically this was because, rather than retroactively increasing punishment for the initial offense, the new laws were seen as enhancing punishment for the most recent misconduct.<sup>297</sup> Similarly, new laws expanding the "cleansing period," the temporal window used to count prior convictions for purposes of deeming an offender a recidivist, were deemed permissible because they did not enhance the punishment

<sup>290</sup> See, e.g., *Fleming v. State*, 523 S.E.2d 315, 318 (Ga. 1999); *Lozier v. Commonwealth*, 32 S.W.3d 511, 514 (Ky. Ct. App. 2000); *McGowan v. State*, 742 So. 2d 1183, 1187 (Miss. Ct. App. 1999).

<sup>291</sup> See, e.g., *People v. Bennett*, No. A094648, 2002 WL 70687 (Cal. Ct. App. Jan. 18, 2002) (child molestation); *Holtapp v. City of Fayetteville*, 431 S.E.2d 403, 405 (Ga. Ct. App. 1993) (driving under the influence); *State v. Jackson*, 896 S.W.2d 77, 84 (Mo. Ct. App. 1995) (sodomy).

<sup>292</sup> See *Purvis v. Commonwealth*, 14 S.W.3d 21, 24 (Ky. 2000).

<sup>293</sup> See, e.g., *State v. Stewart*, 866 P.2d 677, 682–83 (Wash. Ct. App. 1994) (sexual motivation), *review granted* 879 P.2d 293 (Wash. 1994), *aff'd* 890 P.2d 457 (Wash. 1995).

<sup>294</sup> See, e.g., *People v. Cherkendov*, No. B147347, 2002 WL 1065563, at \*9–10 (Cal. Ct. App. May 28, 2002).

<sup>295</sup> See, e.g., *State v. Daniels*, 40 P.3d 611, 622–25 (Utah 2002).

<sup>296</sup> See, e.g., *People v. Adames*, 62 Cal. Rptr. 2d 631, 639–40 (Cal. Ct. App. 1997) (HIV); *Cooper v. Gammon*, 943 S.W.2d 699, 704 (Mo. Ct. App. 1997) (DNA); *State v. Desjarlais*, 731 A.2d 716, 718 (R.I. 1999) (home confinement). Courts, not surprisingly, also rejected arguments that new laws *decreasing* punishment *must* be retroactively applied, reasoning that the *Ex Post Facto* Clause does not affirmatively require application of laws with ameliorative effects. See, e.g., *State v. Woodman*, 702 N.E.2d 974, 978 (Ohio Ct. App. 1997); *Pierce v. State*, 526 S.E.2d 222, 226–27 (S.C. 2000).

<sup>297</sup> See, e.g., *State v. Oliver*, 745 A.2d 1165, 1169 (N.J. 2000); *State v. Carpenter*, 573 S.E.2d 668, 676 (N.C. Ct. App. 2002); *State v. Clever*, 70 S.W.3d 771, 776–77 (Tenn. Ct. App. 2001).

for the prior offense.<sup>298</sup> Another basis for rejecting such challenges was simply that the law preceded the date of the offense(s) in question.<sup>299</sup> On those rare (eight) occasions in which courts found *ex post facto* violations, it was reasoned that the enhancements were enacted after the offender committed the latter crime triggering recidivist status.<sup>300</sup>

Legislative changes to the substantive criminal law potentially implicate several of the *Calder* categories. Laws modifying the definition of already existing criminal prohibitions, creating new crimes, or altering burdens of proof, typically draw into question whether the first or fourth *Calder* categories have been violated. Success here should perhaps come as no surprise given that such laws can be readily distinguished merely by comparing when the conduct occurred against the effective date of the legislation in question.<sup>301</sup> Courts, however, were not always quick to summarily conclude that the effective date of new laws is dispositive and compels constitutional relief. Indeed, the majority of the time relief was denied, with rationales including that the law in question merely clarified an extant criminal provision;<sup>302</sup> did not disadvantage the defendant;<sup>303</sup> actually was contained in the statute books in some form when the behavior in question occurred;<sup>304</sup> or (most commonly) addressed behavior occurring before and after the effective date and hence was a continuing crime.<sup>305</sup> Challenges to laws expanding the categories of persons (convicted felons, almost without exception) prohibited from owning or

<sup>298</sup> See, e.g., *State v. Chapman*, 685 A.2d 423, 425 (Me. 1996); *State v. Watkins*, 939 P.2d 1243, 1245 (Wash. Ct. App. 1997).

<sup>299</sup> See, e.g., *People v. Connell*, No. C037771, 2002 WL 1064090, at \*4 (Cal. Ct. App. May 28, 2002).

<sup>300</sup> See, e.g., *Richardson v. Moore*, 754 So. 2d 64, 65 (Fla. Dist. Ct. App. 2000); *Settle v. State*, 709 N.E.2d 34, 36 (Ind. Ct. App. 1999); *State v. Robinson*, 713 So. 2d 828, 832 (La. Ct. App. 1998).

<sup>301</sup> See, e.g., *Lepak v. State*, 707 So. 2d 805, 806 (Fla. Dist. Ct. App. 1998) (domestic violence); *State v. Chittim*, 775 A.2d 381, 384 (Me. 2001) (defacing license plate); *State v. Price*, 59 P.3d 1122, 1125–27 (Mont. 2002) (felonious nonsupport); *State v. Sears*, 774 N.E.2d 357, 360 (Ohio Com. Pl. 2002) (student-teacher contact); *State v. George W. H.*, 439 S.E.2d 423, 429–30 (W. Va. 1993) (sexual abuse by a person with custodial authority).

<sup>302</sup> See, e.g., *Carlson v. State*, 27 Fla. L. Weekly D2162 (Fla. Dist. Ct. App. 2002).

<sup>303</sup> See, e.g., *State v. Warren*, 499 S.E.2d 431, 452–53 (N.C. 1998); *State v. Ashcraft*, 859 P.2d 60, 64–66 (Wash. Ct. App. 1993).

<sup>304</sup> See *People v. Trammel*, 723 N.Y.S.2d 545, 546 (N.Y. App. Div. 2001); *Sparkman v. State*, 997 S.W.2d 660, 668–69 (Tex. Ct. App. 1999).

<sup>305</sup> See *People v. Grant*, 973 P.2d 72, 78 (Cal. 1999) (sexual abuse of a child); *People v. Koepfel*, 646 N.Y.S.2d 1007, 1012–13 (N.Y. Sup. Ct. 1995) (rent gouging); *Gilson v. State*, 8 P.3d 883, 915 (Okla. Crim. App. 2000) (child abuse), *cert. denied*, 532 U.S. 962 (2001); *State v. Zelinka*, 882 P.2d 624, 629 (Or. Ct. App. 1994) (murder by abuse); *State v. Pelz*, 765 A.2d 824, 830–31 (R.I. 2001) (felony failure to pay child support); *State v. Ramirez*, 633 N.W.2d 656, 662 (Wis. Ct. App. 2001) (identity theft).

possessing a firearm under pain of punishment were denied on the ground that they did not retroactively punish the earlier, preenactment offense, but rather the "new" offense of owning or possessing a firearm.<sup>306</sup> Two courts rejected claims on the rationale that the prohibition, despite carrying criminal consequences for its violation, was regulatory in nature and hence not subject to *ex post facto* limits.<sup>307</sup> In the words of one of the courts, the new law was "aimed not at punishment but at protecting public safety through firearm regulation."<sup>308</sup> The two courts granting relief implicitly found new firearm-related laws to be punitive, and concluded that the expanded prohibitory reach of the laws in effect increased the punishment of prior conduct.<sup>309</sup>

Statutory changes to criminal law defenses met with uniform disapproval, despite the absence among the *Calder* categories of any express reference to defenses.<sup>310</sup> In four of the five cases, changes regarding the proof requirements of insanity were altered to the disadvantage of defendants. Illinois courts, on two occasions, found *ex post facto* fault with changes that increased defendants' burden of proving insanity (from a "preponderance" to "clear and convincing") and otherwise changed elements of the defense.<sup>311</sup> The Illinois Supreme Court concluded that the abolition of an affirmative defense such as insanity is *ex post facto* because "it expands the scope of a criminal prohibition after the act is done."<sup>312</sup> Using language evocative of *Calder* category four, the court concluded that abolition of the defense made it "easier for the state to secure a conviction."<sup>313</sup> Appellate courts in Michigan and Ohio, likewise, found that changes to their respective insanity laws effectively altered the evidentiary standard and made conviction easier, resulting in an *ex post facto* violation.<sup>314</sup> In the final case granting *ex post facto* relief, the Illinois Court of Appeals reversed a conviction based on a new law making it easier for the state to rebut evidence of police entrapment, citing

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<sup>306</sup> See, e.g., *People v. Mills*, 8 Cal. Rptr. 2d 310, 314–15 (Cal. Ct. App. 1992).

<sup>307</sup> See *State v. Adams*, 840 P.2d 745, 747 (Or. 1992); *State v. Thiel*, 524 N.W.2d 641, 645 (Wis. 1994).

<sup>308</sup> *Thiel*, 524 N.W.2d at 645.

<sup>309</sup> See *State v. Trower*, 629 N.W.2d 594, 598 (S.D. 2001); *Goodman v. State*, 935 S.W.2d 184, 186 (Tex. Ct. App. 1996).

<sup>310</sup> The defense category, as discussed earlier, formally surfaced first in *Beazell v. Ohio*, 269 U.S. 167 (1925) and was repeated in *Collins v. Youngblood*, 497 U.S. 37 (1990). See *supra* notes 88–99, 117–31 and accompanying text.

<sup>311</sup> See *People v. Ramsey*, 735 N.E.2d 533, 534 (Ill. 2000); *People v. Gill*, 713 N.E.2d 124, 128 (Ill. App. Ct. 1999).

<sup>312</sup> *Ramsey*, 735 N.E.2d at 535 (quoting *Collins v. Youngblood*, 497 U.S. 37, 49 (1990)).

<sup>313</sup> *Id.*

<sup>314</sup> See *People v. McRunels*, 603 N.W.2d 95, 97 (Mich. Ct. App. 1999); *State v. Luff*, 621 N.E.2d 493, 498–99 (Ohio Ct. App. 1993).

*Collins* for the proposition that the Ex Post Facto Clause is violated when a defense available at the time of the offense is withdrawn.<sup>315</sup>

Finally, during the study period the courts were decidedly averse to challenges to laws that revive prosecutions otherwise barred by expired statutes of limitations, ultimately deemed ex post facto by the U.S. Supreme Court in *Stogner v. California* in 2003.<sup>316</sup> In fifteen of seventeen cases (eighty-eight percent), courts concluded that the laws were procedural in nature and therefore did not warrant ex post facto protection.<sup>317</sup> The California Supreme Court, in a decision serving as precedent for the lower court opinion in *Stogner*, adopted a different tact. In *People v. Frazer*,<sup>318</sup> the court, invoking *Collins* for the narrow proposition that the Clause only bars laws that “alter the definition of crimes or increase the punishment for criminal acts,”<sup>319</sup> held that the revival statute did neither and barred relief.<sup>320</sup> By contrast, two state courts during the period found revival statutes to be ex post facto, in both instances granting relief without meaningful elaboration.<sup>321</sup> Finally, in the balance of cases courts uniformly rejected ex post facto claims against laws extending unexpired limitations periods,<sup>322</sup> a legal change that the *Stogner* Court itself was at pains to distinguish as permissible.<sup>323</sup>

## 5. Death Penalty

If special concern were to be warranted over any type of retroactive law making, that relating to capital punishment would appear especially deserving. However, as Table 2 reflects, such concern is not manifest in rates of success. In

<sup>315</sup> See *People v. Criss*, 719 N.E.2d 776, 783–85 (Ill. App. Ct. 1999).

<sup>316</sup> 123 S. Ct. 2446 (2003). For discussion of *Stogner* see *supra* notes 179–99 and accompanying text.

<sup>317</sup> See, e.g., *Christmas v. State*, 700 So. 2d 262, 266–67 (Miss. 1997); *State v. Wright*, 38 P.3d 772, 774 (Mont. 2001).

<sup>318</sup> 982 P.2d 180 (Cal. 1999), *cert. denied*, 529 U.S. 1108 (2000).

<sup>319</sup> *Id.* at 192 (quoting *Collins v. Youngblood*, 497 U.S. 37, 43 (1990)). The Court elaborated that “*Collins* made clear that the two categories of impermissible retroactive legislation — redefining criminal conduct and increasing punishment — are exclusive.” *Id.*

<sup>320</sup> The *Frazer* court further concluded the revival statute did not rescind an available defense because it did not, as required by *Collins*, affect the “definition” or “elements” of the crime charged or modify “an excuse or justification for the conduct underlying such a charge.” *Id.* at 192–93 (quoting *Collins*, 497 U.S. at 50).

<sup>321</sup> See *State v. Wiemer*, 533 N.W.2d 122, 132 (Neb. Ct. App. 1995); *Murphy v. State*, 871 P.2d 916, 919 (Nev. 1994).

<sup>322</sup> See, e.g., *State v. Schultzen*, 522 N.W.2d 833, 835 (Iowa 1994); *State v. Martin*, 643 A.2d 946, 948 (N.H. 1994). In addition, one other ex post facto claim was rejected because the limitations period was not actually changed to the defendant’s disadvantage. See *State v. Ricci*, 914 S.W.2d 475, 477–81 (Tenn. 1996).

<sup>323</sup> *Stogner v. California*, 123 S. Ct. 2446, 2453–54 (2003).

rejecting claims, the Supreme Court's 1977 decision in *Dobbert v. Florida*<sup>324</sup> played a pivotal role. In *Dobbert*, discussed above,<sup>325</sup> the Court held that no ex post facto violation occurs if a new law does not alter "substantial personal rights," but merely alters "modes of procedure which do not affect matters of substance."<sup>326</sup> When *Dobbert* committed his crime, Florida law permitted death unless a majority of jurors recommended life. A new law, used at trial, permitted the judge to impose death, perhaps over the life recommendation of the jury, based on statutorily prescribed findings. The *Dobbert* Court concluded that the changes were procedural and ameliorative inasmuch as under the old law death was "presumed" unless the jury voted in favor of mercy.<sup>327</sup> The *Dobbert* Court also concluded that no ex post facto violation occurred by virtue of Florida's death penalty law being invalid when the crime was committed, reasoning that its presence on the statute books served as an "operative fact" that the state might target eligible killers with death.<sup>328</sup>

Applying *Dobbert*, courts during the study period regularly deemed changes to capital regimes procedural and hence permissible. For instance, claims were rejected with regard to new Oklahoma and Pennsylvania laws that authorized full sentencing proceedings by juries on remand in the event error is discovered on appeal, in lieu of prior laws requiring automatic imposition of life by the appellate court.<sup>329</sup> Similarly, the Delaware Supreme Court upheld retroactive application of a law that, as in *Dobbert*, altered the roles of judge and jury in capital decisions.<sup>330</sup> Also, again as in *Dobbert*, courts rejected ex post facto challenges based on capital sentences imposed pursuant to laws that were constitutionally invalid on the rationale that the laws served as "operative fact[s]."<sup>331</sup> Using similar reasoning, the Mississippi Supreme Court rejected an ex post facto claim brought by a defendant who committed his crime when the state mandated death for all convicted murderers,<sup>332</sup> an approach invalidated by the Supreme Court.<sup>333</sup> At the defendant's trial, the State used its new capital statute, under which death was not mandated but rather decided in an independent proceeding on the basis of aggravating and

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<sup>324</sup> 432 U.S. 282 (1977).

<sup>325</sup> See *supra* notes 100–16 and accompanying text.

<sup>326</sup> *Dobbert*, 432 U.S. at 293 (quoting *Bezell v. Ohio*, 269 U.S. 167, 171 (1925)).

<sup>327</sup> *Id.*

<sup>328</sup> *Id.* at 298.

<sup>329</sup> See, e.g., *Nguyen v. State*, 844 P.2d 176, 181 (Okla. Crim. App. 1992); *Commonwealth v. Wharton*, 665 A.2d 458, 460 (Pa. 1995).

<sup>330</sup> *Gattis v. State*, 697 A.2d 1174, 1187 (Del. 1997).

<sup>331</sup> See, e.g., *State v. Cobb*, 743 A.2d 1, 92 (Conn. 1999).

<sup>332</sup> *Johnston v. State*, 618 So. 2d 90, 95–96 (Miss. 1993).

<sup>333</sup> See *Woodson v. North Carolina*, 428 U.S. 280 (1976).

mitigating circumstances. The changes, the Mississippi Supreme Court concluded, were "ameliorative and procedural."<sup>334</sup>

Relying on *Collins* (and *Bezell*), rather than *Dobbert*, courts rejecting claims also attached particular importance to the fact that changes to the death decision-making process did not affect the quantum of potential punishment, change the definition of a crime, or deprive the defendant of a defense. For instance, the Louisiana Supreme Court rejected an *ex post facto* claim against a new law allowing jurors to be instructed that in the event death was imposed commutation by the governor was possible, reasoning that the change did not function to increase punishment.<sup>335</sup> Laws elevating the importance of prior convictions were upheld on the rationale that they did not increase the punishment for the previous crime, but rather heightened the culpability of the killing being prosecuted (as with enhancement claims more generally, noted above).<sup>336</sup> Laws making changes to the method by which death was imposed, as the Supreme Court concluded in several cases in the early twentieth century,<sup>337</sup> also failed to garner *ex post facto* relief.<sup>338</sup>

The increasing availability of life without parole (LWOP) during the study period led to some interesting results worthy of mention. Several courts deemed the new option ameliorative (compared to death) and thus rejected efforts by death row inmates to invoke the *Ex Post Facto* Clause to require its retroactive application.<sup>339</sup> Under particular facts, however, courts granted *ex post facto* relief when the LWOP option was retroactively applied. In *State v. Willie*, for instance, the Oregon Supreme Court held that the Clause barred retroactive imposition of LWOP as a presumptive sentence (not a term of thirty years) in the event death was not imposed.<sup>340</sup> In *State v. Conner*,<sup>341</sup> the North Carolina Supreme Court held that LWOP was not ameliorative compared to the noncapital option (life) in effect at the time of the killings, and that the Clause thus barred the jury from being informed,

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<sup>334</sup> *Johnston*, 618 So. 2d at 95.

<sup>335</sup> See *State v. Loyd*, 96-1805 (La. 2/13/97), 689 So. 2d 1321, 1326 (1997).

<sup>336</sup> See, e.g., *Arthur v. State*, 711 So. 2d 1031, 1063-64 (Ala. Crim. App. 1996); *People v. Sims*, 658 N.E.2d 413, 431 (Ill. 1995); see also *People v. Schulman*, 658 N.Y.S.2d 794, 797-98 (N.Y. 1997) (rejecting challenge to new law authorizing consideration of other killing that occurred within a twenty-four-hour period to permit the elevation of the charge to first-degree murder).

<sup>337</sup> See *supra* note 133.

<sup>338</sup> See *Langford v. State*, 951 P.2d 1357, 1361-62 (Mont. 1997); *In re Benn*, 952 P.2d 116, 149 (Wash. 1998).

<sup>339</sup> See *Brantley v. State*, 486 S.E.2d 169, 172 (Ga. 1997); *Conley v. State*, 790 So.2d 773, 803 (Miss. 2001).

<sup>340</sup> 858 P.2d 128, 139 (Or. 1993); see also *Salazar v. State*, 859 P.2d 517, 518-19 (Okla. Crim. App. 1993).

<sup>341</sup> 480 S.E.2d 626 (N.C. 1997).

as required by the new law, that if death was not imposed the defendant would be ineligible for parole.<sup>342</sup>

Successful capital-related claims in the main were based on new laws increasing the variety of factual circumstances codified as aggravating factors for juries to consider when deciding life or death, serving to heighten the chances that death would result. Florida courts, for instance, reversed and remanded death sentences based upon the new aggravator that the underlying murder was committed while the defendant was released in the community on felony probation.<sup>343</sup> Likewise, a new law making the advanced age of victims an aggravator warranted ex post facto relief.<sup>344</sup> The Arkansas Supreme Court invalidated a capital sentence based on a new aggravating factor singling out "cruel or depraved" killings; the court "[could] hardly say that a 'standard' for application of the death penalty is merely procedural. We regard it as a substantive provision that cannot be applied retroactively."<sup>345</sup>

## 6. Evidence

Retroactive legislative changes to the rules of evidence have inspired particular confusion among courts over the years. Indeed, until the Supreme Court in *Carmell v. Texas*<sup>346</sup> rehabilitated the fourth *Calder* category expressly relating to such changes, claims were reflexively deemed as procedural in nature and hence not worthy of constitutional relief. Statutory changes permitting the admission of victim impact testimony, which allows survivors to describe homicide victims' positive traits and their personal and economic loss occurring as a result of the killing,<sup>347</sup> provide a ready illustration of this. In fifteen of sixteen challenges, courts characterized the

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<sup>342</sup> *Id.* Although the court deemed the prospect "speculative and unsupported by any evidence in the record," *id.* at 631, a substantial body of empirical research supports the view that providing the option of LWOP to capital sentencing juries reduces the likelihood of death being imposed. See, e.g., William J. Bowers & Benjamin D. Steiner, *Death By Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605, 671–702 (1999); Theodore Eisenberg et al., *The Deadly Paradox of Capital Jurors*, 74 S. CAL. L. REV. 371, 390–97 (2001).

<sup>343</sup> See, e.g., *Lebron v. State*, 799 So. 2d 997, 1019–20 (Fla. 2001).

<sup>344</sup> See *State v. Hootman*, 709 So. 2d 1357, 1360–61 (Fla. 1998).

<sup>345</sup> *Bowen v. State*, 911 S.W.2d 555, 562–64 (Ark. 1995).

The sole other successful claim during the study period turned on a more particularized feature of the state law challenged. In *People v. Aguayo*, 840 P.2d 336, 339 (Colo. 1992), the Colorado Supreme Court held that death could not be imposed when the savings provisions of a capital law, later invalidated, specified that in the absence of the death penalty life must be imposed.

<sup>346</sup> 529 U.S. 513 (2000). For discussion of *Carmell*, see *supra* notes 150–78 and accompanying text.

<sup>347</sup> See *supra* note 234 and accompanying text.

changes as merely procedural and only affecting the scope of evidence permitted,<sup>348</sup> notwithstanding that the changes permitted juries to impose harsher sentences than before based on evidence that was previously irrelevant (indeed unconstitutional).<sup>349</sup> Other courts, on similar reasoning, rejected challenges to retroactive application of laws expanding the consideration at trial of prior convictions<sup>350</sup> and uncharged misconduct.<sup>351</sup> In a case highlighting the close relation of evidentiary rules to the elements of crimes themselves, the South Dakota Supreme Court concluded that in the context of a new stalking law, the state could use “other acts” evidence occurring before the law’s enactment to support the statutory elements of “intent” and “course of conduct.”<sup>352</sup> Despite its role in satisfying the elements of stalking, the Court concluded that “[i]n this case, we are considering the admissibility of other acts evidence, not the ‘retroactive alteration of a defined crime or an increase in punishment.’”<sup>353</sup>

The only two cases granting relief during the study period both concerned the Texas “outcry” statute ultimately invalidated by the Court in *Carmell*. In one case, relief was granted before *Carmell* was decided,<sup>354</sup> in the other, after the Court issued its decision.<sup>355</sup>

The very low rate of success for fourth category *Calder* challenges should perhaps come as no surprise given that for all but two years in the study period the category was in jurisprudential limbo. It is important to note, however, that in cases decided after *Carmell*, as apparent in the discussion above regarding California’s treatment of changes to probation revocation standards, courts have interpreted the category narrowly.<sup>356</sup> Rather than focusing on the *Carmell* majority’s avowed concern over retroactive changes to evidentiary rules that are “advantageous only to the State, to facilitate an easier conviction,”<sup>357</sup> as emphasized in *Calder* itself,<sup>358</sup>

<sup>348</sup> See, e.g., *Burns v. State*, 699 So. 2d 646, 653 (Fla. 1997); *Speed v. State*, 512 S.E.2d 896, 906 (Ga. 1999); *State v. Clark*, 990 P.2d 793, 810 (N.M. 1999).

<sup>349</sup> Indeed, in many jurisdictions victim impact evidence is classified as a statutory aggravator in death penalty decisions. See Logan, *supra* note 234, at 170–71.

<sup>350</sup> See, e.g., *People v. Fitch*, 63 Cal. Rptr. 2d 753, 761 (Cal. App. 3d 1997); *Bunn v. Commonwealth*, 466 S.E.2d 744, 746 (Va. Ct. App. 1996).

<sup>351</sup> See, e.g., *People v. Balle*, 601 N.E.2d 788, 796 (Ill. App. Ct. 1992); *State v. Douglas*, 917 S.W.2d 628, 631 (Mo. Ct. App. 1996); *Brooks v. State*, 822 S.W.2d 765, 769 (Tex. Ct. App. 1992).

<sup>352</sup> *State v. McGill*, 536 N.W.2d 89, 91 (S.D. 1995).

<sup>353</sup> *Id.* at 93 (quoting *Cal. Dep’t of Corr. v. Morales*, 514 U.S. 499, 504 (1995)).

<sup>354</sup> See *Bowers v. State*, 914 S.W.2d 213, 217 (Tex. Ct. App. 1996).

<sup>355</sup> See *Gagliardo v. State*, 78 S.W.3d 469, 478 (Tex. Ct. App. 2001).

<sup>356</sup> See *supra* notes 267–78 and accompanying text.

<sup>357</sup> *Carmell v. Texas*, 529 U.S. 513, 533 (2000) (stating that “[t]here is plainly a fundamental fairness interest . . . in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life”).

<sup>358</sup> See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 391 (1798) (condemning laws that “change



courts have demonstrated a decided propensity to focus on the majority's concern over laws changing "the *quantum of evidence* necessary to sustain a conviction."<sup>359</sup>

For instance, several California decisions have rejected *ex post facto* claims against a new law permitting propensity evidence in sexual abuse trials.<sup>360</sup> Distinguishing the Texas law at issue in *Carmell* as one improperly lessening the quantum of evidence, the California law "simply added a new type of evidence which the jury may consider when deciding the charge has been proven beyond a reasonable doubt," and hence "falls squarely within *Collins* rather than *Carmell*."<sup>361</sup> Using similar reasoning, the Texas Court of Appeals rejected a challenge to a law permitting evidence of uncharged criminal sexual acts, previously admissible only under limited conditions.<sup>362</sup> Again, the Court distinguished *Carmell*, concluding that the new law "simply provides that a specific type of evidence will be admissible."<sup>363</sup> "Here, the question is the admissibility of the evidence, not whether the properly admitted evidence is sufficient to convict . . ."<sup>364</sup> Referencing language in *Carmell*, the Texas court stated:

Though it is correct to say that the admissibility of evidence under [the new law] runs in the State's favor, the retrospective application of the statute cannot be said to violate the *ex post facto* clause on this basis alone. The statute does not alter the quantum of proof required for conviction.<sup>365</sup>

Finally, in *State v. Dionne*, the Florida Court of Appeals rejected an *ex post facto* challenge to a new law allowing the admission of an extrajudicial confession

the rules of evidence, for the purpose of conviction").

<sup>359</sup> *Carmell*, 529 U.S. at 530 (emphasis added). As noted by Justice Ginsburg in her dissent joined by three colleagues, the majority's constitutional concern that the Texas law improperly required "less testimony . . . to convict" could be taken to extend to numerous other evidentiary laws, including the felon competency rule long ago condoned in *Hopt*. There, as in *Carmell*, "a conviction based on evidence previously deemed inadmissible was sustained pursuant to a broadened rule regarding the competency of testimonial evidence." *Id.* at 571 (Ginsburg, J., dissenting).

<sup>360</sup> See *People v. Moreno*, No. H018928, 2002 WL 433037 (Cal. Ct. App. Mar. 14, 2002), cert. denied, 123 S. Ct. 450 (2002); *People v. Schroeder*, No. H018928, 2002 WL 436944 (Cal. Ct. App. Mar. 14, 2002); *People v. Mejia*, No. F034801, 2002 WL 273764 (Cal. Ct. App. Feb. 26, 2002).

<sup>361</sup> *Mejia*, 2002 WL 273764, at \*12; see also *Schroeder*, 2002 WL 436944, at \*8 (concluding that the challenged law "deems more evidence relevant and makes more evidence admissible, but it does not thereby eliminate or lower the quantum of proof required or in any way reduced the prosecutor's burden or proof").

<sup>362</sup> *McCulloch v. State*, 39 S.W.3d 678 (Tex. Ct. App. 2001).

<sup>363</sup> *Id.* at 684.

<sup>364</sup> *Id.*

<sup>365</sup> *Id.*

in the absence of independent evidence establishing the *corpus delicti* of the crime.<sup>366</sup> The *Dionne* court reasoned that the change was a “procedural rule of evidence” that did not alter the “evidence necessary to support a conviction.”<sup>367</sup> Despite lifting a prohibition on confessions, perhaps the most compelling piece of evidence at the state’s disposal,<sup>368</sup> the statutory change was found to merely “regulate[] the mode in which facts constituting guilt may be placed before the jury.”<sup>369</sup>

## 7. Other Categories

As Table 2 reflects, the remaining categories, “Post-Custody Sanctions,” “Judicial Administration,” “Jury/Trials Rights,” “Institutional Administration,” and “Miscellaneous,” overall accounted for a very low rate of success. Claims in the “Post-Custody Sanctions” category achieved the only meaningful measure of success, and there it was very limited. Overwhelmingly, the courts deemed the sanctions nonpunitive in nature, and hence outside *ex post facto* protection,<sup>370</sup> or in the context of violations of newly imposed sex-offender registration requirements, permissible because the laws punished only the new crime of failing to comply with the new requirements.<sup>371</sup> In a handful of cases, laws in the “Post-Custody” category were deemed punitive and warranted *ex post facto* relief because courts reasoned that they retroactively increased the quantum of punishment experienced by petitioners.<sup>372</sup>

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<sup>366</sup> 814 So. 2d 1087 (Fla. Ct. App. 2002).

<sup>367</sup> *Id.* at 1094–95.

<sup>368</sup> See Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266 (1996) (citing studies showing significant influence of confessions among jurors); Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.–C.L. L. REV. 105 (1997); see also *Hopt v. Utah*, 110 U.S. 574, 585 (1884) (characterizing a confession as “the strongest evidence against the party making it”).

<sup>369</sup> *Dionne*, 814 So. 2d at 1094. For a vigorous defense of the *corpus delicti* rule, with emphasis on its crucial role in preventing the admission of unreliable confessions, see David A. Moran, *In Defense of the Corpus Delicti Rule*, 64 OHIO ST. L.J. 817 (2003).

<sup>370</sup> See, e.g., *Toia v. People*, 776 N.E.2d 599, 604–05 (Ill. 2002) (refusal to expunge drunk driving conviction); *State v. Flam*, 587 N.W.2d 767, 768–69 (Iowa 1998) (drivers’ license revocation); *Rodriguez v. State*, 93 S.W.3d 60, 79 (Tex. Crim. App. 2002) (sex offender registration requirement); *Petersen v. State*, 36 P.3d 1053, 1055 (Wash. Ct. App. 2000) (sex offender commitment).

<sup>371</sup> See, e.g., *State v. Armbrust*, 59 P.3d 1000, 1004 (Kan. 2002).

<sup>372</sup> See, e.g., *State v. C.M.*, 746 So. 2d 410, 419 (Ala. Crim. App. 1999) (community notification law prohibiting juvenile sex offenders from living at home and subjecting them to notification); *Hills v. Iowa Dep’t of Transp. & Motor Vehicle Div.*, 534 N.W.2d 640, 642 (Iowa 1995) (drivers’ license revocation).

## III. FORTIFYING THE CLAUSE

As the preceding discussion should make clear, despite the unmistakable clarity of the ex post facto command and the central place the Framers intended the Ex Post Facto Clause to play in the nation's constitutional democracy, the empirical record of ex post facto challenges is far from impressive. Of course, in itself, the low rate of success perhaps should not give rise to concern, or at least surprise, given the acknowledged institutional aversion of reviewing courts to find constitutional fault with legislative enactments.<sup>373</sup> At the same time, however, state courts, during the study period, interpreted and applied the Clause with substantial disregard for the Framers' acute concern for legislative excess.

A. *The Structural Role of the Clause*

As the Justices in *Calder v. Bull*<sup>374</sup> were at pains to recognize, criminal laws have always held special allure for law makers.<sup>375</sup> "If there is any sphere in which politicians would have an incentive simply to please the majority of voters," William Stuntz more recently observed, "it's criminal law."<sup>376</sup> For legislators, the promulgation of criminal laws affords an irresistible chance to align themselves with the victims of crime and against the criminal element, a compelling political symmetry accentuated in modern times by the soundbite imagery of the media.<sup>377</sup>

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<sup>373</sup> See, e.g., *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 399 (1798) (opinion of Iredell, J.) (noting that judicial authority to invalidate a law is "of a delicate and awful nature," to be done only "in a clear and urgent case"); see also Robert A. Shapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 690 (2000) (noting in the context of state court constitutional interpretation that "[w]hile Supreme Court deference to Congress has declined in many areas, state court deference to state legislatures continues to be strong"); cf. *Smith v. Doe*, 123 S. Ct. 1140, 1156 (2003) (Souter, J., concurring) (stating that "[w]hat tips the scale" in federal courts' deciding whether a state law is punitive for ex post facto purposes "is the presumption of constitutionality normally accorded a State's law").

<sup>374</sup> 3 U.S. (3 Dall.) 386 (1798).

<sup>375</sup> See *supra* note 21 and accompanying text.

<sup>376</sup> William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 529–30 (2001).

<sup>377</sup> See generally KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* 14–27, 62–63 (1997) (discussing influence of popular media reports on criminal justice legislation); KATHLYN TAYLOR GAUBATZ, *CRIME IN THE PUBLIC MIND* 5–8 (1995). As David Garland has noted, "TV has changed the rules of political speech. The TV encounter — with its soundbite rapidity, its emotional intensity, and its mass audience — has tended to push politicians to be more populist, more emotive, more evidently in tune with public feelings." DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 7 (2001).

Moreover, legislating in the criminal law arena bears little risk for politicians, as for the most part those ensnared in the justice system lack political recourse.<sup>378</sup> Given these realities, it has been argued that the *ex post facto* ban singles out retroactive criminal laws for prohibition, not civil ones, because the ballot box can more possibly protect against governmental arbitrariness in the civil context.<sup>379</sup> That the ban extends to retroactive laws, in particular, is also explainable in political process terms. With retroactivity, legislators can single out wrongdoers with greater ease, such as California did with alleged pedophile Marion Stogner, confident in the knowledge that the vast majority of voters will herald the targeting.

Amid this powerful motivational dynamic, the *Ex Post Facto* Clause plays a crucial role, serving as a check on legislative tendencies to target the politically unpopular, in particular those suspected or convicted of criminal wrongdoing. It thus ideally functions, as has been noted by Adrian Vermeule, to promote a “veil of ignorance,” which guards against legislative overreach motivated by political self-interest.<sup>380</sup> Veil rules, Professor Vermeule observes, suppress self-interest among decisionmakers “by subjecting [them] to uncertainty about the distribution of benefits and burdens that will result from a decision.”<sup>381</sup> By requiring prospectivity in criminal lawmaking, the Clause serves to prevent legislators from battenning themselves at the expense of persons ensnared in the criminal process.<sup>382</sup> If criminal laws are to be enacted, they must apply prospectively, targeting only potential (not identified) criminals.<sup>383</sup> Veil rules, as Professor Vermeule asserts,

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<sup>378</sup> See *supra* note 217 and accompanying text.

<sup>379</sup> Harold J. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking*, 84 GEO. L.J. 2143, 2167 (1996).

<sup>380</sup> Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399 (2001) (drawing on the work of JOHN RAWLS, *A THEORY OF JUSTICE* 118–23 (rev. ed. 1999)).

<sup>381</sup> *Id.* at 399.

<sup>382</sup> See RONALD D. ROTUNDA & JOHN E. NOVAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 15.9, at 658 (3d ed. 1999) (noting that a “legislature can benefit or harm disfavored citizens more easily with retroactive laws than it can with prospective laws”); see also *Johnson v. United States*, 529 U.S. 694, 701 (2000) (asserting that the “*Ex Post Facto* Clause raises to the constitutional level one of the most basic presumptions of our law: legislation, especially of the criminal sort, is not to be applied retroactively”).

<sup>383</sup> According to Professor Vermeule:

The simplest tactic for introducing uncertainty is to entrench a constitutional requirement that rules be prospective — enacted in advance of the events they govern. The power of retroactive legislation, for example, enables legislators to identify the winners and losers from proposed policies — to know who will bear costs and benefits as well as what those costs and benefits will be. The opportunities for legislative self-dealing are obvious if legislators can match up identified winners and losers with past or future friends and enemies, respectively. Under a prospectivity requirement, however, legislators are hard

thus supplement separation of power limits that are "the baseline constitutional strategy for suppressing self-interested decision making."<sup>384</sup>

Seen in these terms, the Court's recent decisions in *Carmell v. Texas*<sup>385</sup> and *Stogner v. California*<sup>386</sup> can be said to have re-veiling effects, functioning to reinforce the structural safeguard assured by separation of powers doctrine.<sup>387</sup> Both cases served notice on the legislative branches of the states that the Ex Post Facto Clause, one of the select affirmative limits on legislative prerogative contained in what Alexander Hamilton referred to as our "limited Constitution,"<sup>388</sup> is to be respected in carrying out their lawmaking function.<sup>389</sup> Importantly, moreover, both

put to match up consequences with allegiances, because prediction is intrinsically more difficult and less certain than backward-looking observation, and because targets who know of the law will be able to steer clear of its prohibitions.

Vermeule, *supra* note 380, at 408. See also Krent, *supra* note 379, at 2171 (noting that "[p]rospectivity ensures that the legislature is at least willing to impose punishment on a larger group of people whose identities are unknown. The generality of the prospective provision helps prevent singling-out").

<sup>384</sup> Vermeule, *supra* note 380, at 405; see also *Weaver v. Graham*, 450 U.S. 24, 29 n.10 (1981) (observing that the Ex Post Facto Clause "upholds the separation of powers by confining the legislature to penal decisions with prospective effect"). For a similar application of veil rules, in relation to judicial application of equal protection principles in particular, see Deborah Jones Merritt, *Communicable Disease and Constitutional Law: Controlling AIDS*, 61 N.Y.U. L. REV. 739, 787 (1986).

<sup>385</sup> 529 U.S. 513 (2000).

<sup>386</sup> 123 S. Ct. 2446 (2003).

<sup>387</sup> See *Plaut v. Spendthrift Farm*, 514 U.S. 211, 239 (1995) (observing that "separation of powers is a *structural safeguard* rather than a remedy to be applied only when specific harm . . . can be identified. In its major features . . . it is a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict.").

<sup>388</sup> THE FEDERALIST NO. 78, at 438 (Alexander Hamilton) (Isaac Kranmick ed., 1987) ("By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as it shall pass no bills of attainder, no *ex post facto* laws, and the like."); see also John Harrison, *The Constitutional Origins and Implications of Judicial Review*, 84 VA. L. REV. 333, 341 (1998) (observing that "[a]ffirmative limitations qualify the authority otherwise granted to the legislature, with the result that even properly enacted *ex post facto* laws are invalid and legally ineffective, to be treated by the courts as legal nullities").

<sup>389</sup> The tenability of this argument of course largely turns on whether the Court's wisdom is received by, in Paul Brest's words, the "conscientious legislator," susceptible of heeding constitutional directives. See Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STANFORD L. REV. 585 (1975). For Supreme Court pronouncements underscoring the existence of such an expectation, see, for example, *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (noting the expectation that Congress "legislates in the

decisions did so by underscoring the central role of the Ex Post Facto Clause in ensuring governmental constraint, independent of notice and reliance concerns (the latter being of recent jurisprudential vintage).<sup>390</sup> As noted by the *Carmell* Court, “[t]here is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life.”<sup>391</sup> Indeed, as the Court noted with respect to retroactive increases in punishment (*Calder* category three, the most common alleged violation surveyed here), “there are few, if any, reliance interests in planning future criminal activities

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light of constitutional limitations”); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (noting that “Congress . . . is bound by and swears an oath to uphold the Constitution,” and that therefore the Court “will . . . not lightly assume that Congress intended to infringe constitutionally protected liberties”).

However, whether the constitutional dictates can prevail over competing political interests remains an enduring, critically important question. *See* Brest, *supra*, at 601 (noting that “[p]erhaps it is naive to assume that the Constitution will often prevail when political interests are threatened”); Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 92–93 (1995) (concluding that “given that the American political system does not penalize legislators for voting for good (in the eyes of voters) policies that are determined by the courts to be unconstitutional, one would expect members of Congress to be anything but risk-averse”). For additional discussion in this regard, see Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707 (1985); Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587 (1983); Mark Tushnet, *Evaluating Congressional Constitutional Interpretation: Some Criteria and Two Informal Case Studies*, 50 DUKE L.J. 1395 (2001).

<sup>390</sup> The Court’s emphasis on notice and reliance first appeared in *Dobbert v. Florida*, 432 U.S. 282 (1977), without precedential support, where the Court held that an invalid death penalty law served as an “operative fact” and hence alleviated ex post facto concern. Justice Stevens filed a vigorous dissent in *Dobbert*, emphasizing the Clause’s role as “a barrier to capricious government action,” *id.* at 309 (Stevens, J., dissenting), a view that would resurface twenty-three years later when he authored *Carmell*. For an extended critique of the notice and reliance emphasis of *Dobbert*, echoed in *Weaver v. Graham*, 450 U.S. 24 (1981) and *Collins v. Youngblood*, 497 U.S. 37 (1990), see *People v. District Court*, 834 P.2d 181, 213, 218–25 (Colo. 1992) (Lohr, J., concurring).

<sup>391</sup> *Carmell v. Texas*, 529 U.S. 531, 533 (2000); *see also* *Stogner v. California*, 123 S. Ct. 2446, 2449, 2461 (2003) (emphasizing “fairness” concerns of the Ex Post Facto Clause and stating that “the Clause protects liberty by preventing governments from enacting statutes with ‘manifestly unjust and oppressive’ retroactive effects”) (citing *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 391 (1898)); *Lynce v. Mathis*, 519 U.S. 433, 440 (1997) (noting that “the Constitution places limits on the sovereign’s ability to use its lawmaking power to modify bargains it has made with its subjects”); *cf.* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 629 (2d ed. 1988) (observing that “regularity — with its associated norms of prospectivity, generality, and impartiality—serves both to express and to implement ends quite separate from those of respecting reliance and protecting settled expectations”).

based on the expectation of less severe repercussions."<sup>392</sup> Ultimately, what the emphasis does is compel the politically difficult, but structurally necessary, judicial task of second-guessing a legislative decision to value criminal law interests over the imperative that government exercise restraint in dealing with its citizens.<sup>393</sup>

Taken together, the Court's recent decisions in *Stogner* and *Carmell*, although both five-to-four majorities, promise to reinvigorate the structural role of the Ex Post Facto Clause as a constraint on the powerful influences compelling state legislatures to enact criminal laws with retroactive effect.<sup>394</sup> With their mutual

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<sup>392</sup> *Carmell*, 529 U.S. at 531 n.21; see also *Miller v. United States*, 482 U.S. 423, 431 (1987) (rejecting a claim that the Ex Post Facto Clause is satisfied by warning *ex ante* that sentencing guidelines are subject to amendment, stating that the ex post facto prohibition "cannot be avoided merely by adding to a law notice that it might be changed"). Predominant emphasis on governmental fairness, moreover, avoids the unseemly necessity of honoring an offender's reliance interest, for instance attaching importance to the possibility that persons such as Marion Stogner might "keep calendars so they can mark the day to discard their records or . . . place a gloating call to the victim." *Stogner*, 123 S. Ct. at 2470 (Kennedy, J., dissenting).

<sup>393</sup> See *Stogner*, 123 S. Ct. at 2461 ("[W]e agree that the State's interest in prosecuting child abuse cases is an important one. But there is also a predominating constitutional interest in forbidding the State to revive a long-forbidden prosecution."); see also THE FEDERALIST NO. 78, at 438 (Alexander Hamilton) (Isaac Karmnick ed., 1987) ("Specified exceptions to the legislative authority . . . [such as the ex post facto bar] can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the . . . Constitution void."); cf. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 25, 26 (2d ed. 1986) (observing that "courts have certain capacities for dealing with matters of principle that legislatures and executives do not possess," and benefit from an institutional separateness that "lengthen[s] everyone's view"). In this sense, as John Hart Ely famously observed over twenty years ago, by guarding against constitutional violations that are unlikely to be rectified by the ordinary legislative process, judicial review effectively functions to redeem democratic values. See JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 87-88 (1980) (characterizing judicial review as "representation-reinforcing").

<sup>394</sup> In this sense, the separation of powers function of the Ex Post Facto Clause differs from that of the Bill of Attainder Clause, also contained in Article I. The Attainder Clause bars legislation, not necessarily of retroactive effect, "that appl[ies] either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial." *United States v. Lovett*, 328 U.S. 303, 315 (1946); see also *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468 (1976) (holding that legislatures cannot "determine[] guilt and inflict[] punishment upon an identifiable individual without provision of the protections of a judicial trial"). The attainder bar thus honors separation of powers concerns by barring legislative usurpation of judicial authority in individual cases. The Ex Post Facto Clause, on the other hand, bars retroactive criminal laws of general effect that do not necessarily intrude upon the adjudicative function, yet nonetheless constitute "arbitrary and potentially vindictive legislation." *Weaver v. Graham*,

emphasis on fairness and governmental constraint, in particular, the decisions can hopefully hasten an era of greater clarity of analytic purpose in ex post facto jurisprudence. However, as the results outlined above demonstrate, it remains to be seen whether a similar reinvigoration will occur among state courts.

### *B. Challenges to Come*

To optimize the structural role of the Ex Post Facto Clause as a constraining influence on legislative excess, the jurisprudence informing it ideally should set forth clear guidelines to facilitate its application, consistent with its animating purpose. At present, two major obstacles stand in the way of this: judicial interpretation of the scope of the Ex Post Facto Clause itself, and the enduring confusion over the extent to which, if any, laws denominated procedural in nature should come within the ambit of ex post facto protection. This section discusses these two major areas of uncertainty.

Confusion over the intended scope of the Ex Post Facto Clause dates back to 1798 and the Court's seminal decision in *Calder v. Bull*, where Justice Chase identified four categories of particular "instances" of ex post facto laws, noting that "these and similar laws" were of concern to the Framers.<sup>395</sup> Over time, the Court

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450 U.S. 24, 29 (1981) (citations omitted); *see also id.* at 29 n.10 (noting that the Clause helps assure separation of powers by "confining the legislature to penal decisions with prospective effect").

As a practical matter, the distinction between bills of attainder and ex post facto laws can dissolve, such as when changes made to the criminal law substantially guarantee conviction of a specified individual or group of individuals. In such instances, a challenge may succeed on both grounds, as in *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867) and *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1867), where the Court invoked both Clauses to invalidate retroactively imposed loyalty oaths singling out members of particular professions. This perhaps explains the unfortunate tendency of some to obfuscate the important separation of powers differences of the respective provisions. In her *Carmell* dissent, for instance, Justice Ginsburg wrote that "like its textual and conceptual neighbor the Bill of Attainder Clause, the Ex Post Facto Clause aims to ensure that legislatures do not meddle with the judiciary's task of adjudicating guilt and innocence in individual cases." *Carmell*, 529 U.S. at 566 (Ginsburg, J., dissenting) (citing *Weaver*, 450 U.S. at 29 n.10). Justice Ginsburg's dissent, moreover, highlights the significance of failing to distinguish the separation of powers distinctions at play. Having found no notice or reliance interest jeopardized by the Texas statute challenged, Justice Ginsburg proceeded to discount any separation of powers concern because there was "no indication that the Texas Legislature intended to single out this defendant or any class of defendants for vindictive or arbitrary treatment." *Id.* at 567.

<sup>395</sup> *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390-91 (1798). In essence, the *Calder* Court identified what Jed Rubenfeld has called "paradigm cases of a right's applicability," which



has lent varying weight to the *Calder* categories, ranging from expansive decisions that call into question their basic role as a heuristic for implementing the Clause,<sup>396</sup> to, as it has more recently, decisions that view the categories as rigidly delimiting its reach.<sup>397</sup> Even when embracing the latter view, however, the Court has managed to obfuscate matters. Perhaps most notably, in *Collins v. Youngblood*,<sup>398</sup> while condemning earlier Courts for taking what the majority saw as undue liberty with *Calder*, the Court at once prescribed a new category (defenses), deleted two others (relating to rules of evidence and "aggravation"), and ultimately endorsed what has been accepted as an essentially two-category standard.<sup>399</sup> This, while steadfastly insisting that "the prohibition which may not be evaded is the one defined by the *Calder* categories."<sup>400</sup> Sixty-five years before, in *Beazell v. Ohio*,<sup>401</sup> a decision upon which the *Collins* Court heavily relied, and extolled as "faithful to [the Court's] best knowledge of the original understanding of the Ex Post Facto Clause,"<sup>402</sup> the Court set forth a three-part test.<sup>403</sup> Finally, only in 2000 and 2003, with *Carmell* and

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are historic instances courts can use "to illuminate . . . what particular abuses most provoked those who framed and ratified the provision in question, and what it was about those abuses that most provoked them." Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119, 1170 (1995). According to Professor Rubenfeld, such cases can play an indispensable role in constitutional exegesis: "The judiciary gives interpretive content to a constitutional provision by deriving principles and rules of application that capture the provision's paradigm cases." *Id.* The difference with *Calder*, of course, is that the paradigmatic "instances" of ex post facto laws identified by Justice Chase have been employed to delimit the application of the Ex Post Facto Clause itself, not merely to assist in its purpose-based interpretation.

<sup>396</sup> See, e.g., *Thompson v. Utah*, 170 U.S. 343, 354 (1898) (reversing conviction of a defendant who was tried by an eight-person jury because, at the time of his offense, the law mandated a twelve-person jury), *rev'd*, *Collins v. Youngblood*, 497 U.S. 37 (1990).

<sup>397</sup> See, e.g., *Carmell v. Texas*, 529 U.S. 513, 525 (2000) (asserting that *Calder* categories define the reach of Ex Post Facto Clause); *Collins v. Youngblood*, 497 U.S. 37, 42 (1990); see also *Stogner v. California*, 123 S. Ct. 2446, 2462 (2003) (Kennedy, J., dissenting) ("Our precedents hold that the reach of the *Ex Post Facto* Clause is strictly limited to the precise formulation of the *Calder* categories.").

<sup>398</sup> 497 U.S. 37 (1990).

<sup>399</sup> *Id.* at 43 ("Legislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts."). See also *Cal. Dep't of Corr. v. Morales*, 514 U.S. 499, 510 n.7 (1995) ("The *ex post facto* standard we apply today is constant: It looks to whether a given legislative change has the prohibited effect of altering the definition of crimes or increasing punishments.").

<sup>400</sup> *Collins*, 497 U.S. at 46.

<sup>401</sup> 269 U.S. 167 (1925).

<sup>402</sup> *Collins*, 497 U.S. at 43.

<sup>403</sup> See *Beazell*, 269 U.S. at 169–70. The Court elaborated as follows:

It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which [1] punishes as a crime an act previously

*Stogner*, did the Court at long last ascribe constitutional meaning and weight to the second and fourth *Calder* categories.

Beyond these troubling inconsistencies, the Court's espoused (albeit inconsistent) fealty to the *Calder* categories themselves can only be taken as a curious incident of constitutional history. Even presuming that they are not mere "gloss" on the Constitution, and hence unworthy of deference,<sup>404</sup> it should be recalled that the categories, limiting a protection contained in Article I no less, constituted dictum.<sup>405</sup> More importantly, the procrustean categories themselves plainly endure in strained relation with the competing premise that the Ex Post Facto Clause is "levelled [sic] at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised."<sup>406</sup> The Court's recent decision in *Stogner* is illustrative of this tension, where the five-member majority struggled to situate laws reviving expired statutes of limitations within the *Calder* categories, ultimately having to resort to Justice Chase's "alternative description" of the second *Calder* category.<sup>407</sup>

To a significant degree, the Court has thus, to borrow a phrase from Akhil Amar fashioned in another context, adopted a "frozen in amber" approach<sup>408</sup> to its ex post facto jurisprudence, evincing a rigid historicism arguably unmatched elsewhere in

committed, which was innocent when done; [2] which makes more burdensome the punishment for a crime, after its commission, or [3] which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*.

*Id.*

<sup>404</sup> See *South Carolina v. Gathers*, 490 U.S. 805, 825 (1989) (Scalia, J., dissenting) (positing that judges are duty-bound to enforce the Constitution, "not the gloss which [the Court] may have put on it") (quoting William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949)); see also *Bd. of Educ. v. Dowell*, 498 U.S. 237, 245–46 (1991) (stating that the Court's doctrine should not be treated as though it were part of the Constitution); *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 491–92 (1939) (Frankfurter, J., concurring) ("[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it.").

<sup>405</sup> As Justice Ginsburg noted in her *Carmell* dissent, "Justice Chase's formulation was dictum, of course, because *Calder* involved a civil statute and the Court held that the statute was not *ex post facto* for that reason alone." *Carmell v. Texas*, 529 U.S. 513, 567 (2000) (Ginsburg, J., dissenting).

<sup>406</sup> *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1866); see also *Weaver v. Graham*, 450 U.S. 24, 31 (1980) (asserting that "it is the effect, not the form, of the law that determines whether it is *ex post facto*").

<sup>407</sup> See *Stogner v. California*, 123 S. Ct. 2446, 2450 (2003).

<sup>408</sup> Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 818 n.230 (1994).

its constitutional canon.<sup>409</sup> This includes, most notably, the closely related Bill of Attainder Clause,<sup>410</sup> the interpretation of which has also been premised on early dictum from the Court.<sup>411</sup> Rather than adhering to a "narrow historic reading" of attainder, which at common law pertained exclusively to capital sanctions, the Court instead has broadly construed the Bill of Attainder Clause to apply to *any* "legislative punishment, of any form or severity, of specifically designated persons or groups."<sup>412</sup> As the Court emphasized in 1977, its "treatment of the scope of the [Attainder] Clause has never precluded the possibility that new burdens and deprivations might be legislatively fashioned that are inconsistent with the bill of attainder guarantee."<sup>413</sup>

Despite the foregoing, indeed despite the verity that *Calder's* basic historical understanding is today widely subject to dispute,<sup>414</sup> the Court must be taken at its

<sup>409</sup> The Court's Fourth Amendment jurisprudence, for instance, an area where it has paid frequent lip service to history as a guide for assessing "unreasonable" searches and seizures, in reality most often reflects the Court's application of modern sensibilities. See Tracy Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895, 926–46 (2002) (discussing the Court's recent Fourth Amendment jurisprudence and noting the same).

<sup>410</sup> See *supra* note 394.

<sup>411</sup> The seminal attainder case is *Fletcher v. Peck*, 10 U.S. (6 Cranch.) 87, 138 (1810), a decision addressing the Contracts Clause, where Chief Justice Marshall interpreted attainder to include *more than* that known to the Framers — including "pains and penalties" (i.e., noncapital sanctions). For a vigorous critique of *Fletcher*, and the Court's subsequent departure from the common law understanding of attainder, see Raoul Berger, *Bills of Attainder: A Study of Amendment by the Court*, 63 CORNELL L. REV. 355 (1978).

<sup>412</sup> *United States v. Brown*, 381 U.S. 437, 447 (1965); see also *United States v. Lovett*, 328 U.S. 303, 315 (1946) (stating that "[w]ithin the meaning of the Constitution, bills of attainder include bills of pains and penalties" (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323 (1866) (emphasis added))).

<sup>413</sup> *Nixon v. Adm'r of Gen. Serv.*, 433 U.S. at 475 (stating also that "[t]he Court, therefore, often has looked beyond mere historical experience and has applied a functional test"). For more on the Court's "functional" approach to attainder cases, see Thomas B. Griffith, Note, *Beyond Process: A Substantive Rationale for the Bill of Attainder Clause*, 70 VA. L. REV. 475, 477–92 (1984).

<sup>414</sup> Perhaps most fundamentally, its assertion that only laws of a criminal nature, not civil, were of concern to the Framers is now widely questioned. See Caleb Nelson, *Originalism and Interpretative Conventions*, 70 U. CHI. L. REV. 519, 578–85 (2003); see also *supra* note 40. As Leonard Levy has observed, upon noting the diversity of Framing-era views on the Clause, "[s]eeking original intent in the opinions of the Framers is seeking a unanimity that did not exist on complex and divisive issues contested by strong-minded men. Madison was right when he spoke of the difficulty of verifying the intention of the Convention." LEVY, *supra* note 40, at 294–95.

Moreover, the *Calder* categories themselves, despite being taken as definitive and exclusive, lack particular support in the historical record. See Oliver P. Field, *Ex Post Facto*

word that the *Calder* categories will endure as the exclusive benchmark for ex post facto analysis.<sup>415</sup> Even so, the continued proliferation of laws impacting the criminal justice system, including, perhaps most notably, changes in evidentiary laws with outcome-influencing consequences, will continue to strain the analytic capacity of courts, and hence function to muddy the waters of the legislative process.

A second major area of uncertainty stems from the ongoing confusion over whether laws denominated procedural in nature warrant ex post facto attention, notwithstanding that *Calder* itself made no mention whatsoever of the distinction. The matter promised to be put to rest finally in *Dobbert v. Florida*<sup>416</sup> and *Collins v. Youngblood*.<sup>417</sup> *Dobbert*, which rejected an ex post facto challenge to changes in Florida's capital punishment scheme, made clear that "[e]ven though it may work to the disadvantage of a defendant, a procedural change is not *ex post facto*."<sup>418</sup> *Collins* rejected a challenge to a Texas law that allowed reformation of an improper jury verdict without the necessity of remand for retrial, ostensibly attaching particular importance to whether one or more of the *Calder* categories is transgressed,<sup>419</sup> not the "label" ascribed to a particular legal change.<sup>420</sup> Having said this, however, the *Collins* Court categorized the Texas verdict reformation law as a "procedural change," and denied relief.<sup>421</sup> Moreover, despite overruling two

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*in the Constitution*, 20 MICH. L. REV. 315, 321–22 (1922) (noting that the Convention debates contain "not a single mention of the practice of the British Parliament to which Justice Chase referred"). For evidence of this uncertainty, one need look no further than the majority and dissenting opinions in *Carmell and Stogner*, which jostled over the proper interpretation of seventeenth- and eighteenth-century British parliamentary enactments. See *Stogner v. California*, 123 S. Ct. 2446, 2455–58 (2003); *Carmell v. Texas*, 529 U.S. 513, 548–49 (2000).

<sup>415</sup> If change were to come, it might originate, ironically, from one or more conservative members of the Court. Justice Thomas, for instance, has signaled his interest in a broader conceptualization of the Ex Post Facto Clause, at least with respect to its traditional limitation to retroactive criminal laws in particular. See *E. Enter. v. Apfel*, 524 U.S. 498, 539 (1998) (Thomas, J., concurring) (acknowledging a "willing[ness] to reconsider *Calder* and its progeny to determine whether a retroactive civil law that passes muster under our current Takings Clause jurisprudence is nonetheless unconstitutional under the *Ex Post Facto* Clause").

<sup>416</sup> 432 U.S. 282 (1977).

<sup>417</sup> 497 U.S. 37 (1990).

<sup>418</sup> *Dobbert*, 432 U.S. at 293.

<sup>419</sup> *Collins*, 497 U.S. at 46.

<sup>420</sup> *Id.* (stating that "by simply labeling a law 'procedural,' a legislature does not thereby immunize it from scrutiny under the *Ex Post Facto* Clause").

<sup>421</sup> *Id.* at 44.

nineteenth-century decisions finding procedural changes *ex post facto*,<sup>422</sup> it left intact language in numerous other decisions that attached importance to the onerous consequences of laws possibly classified as procedural.<sup>423</sup> Seven years later, in *Lynce v. Mathis*, the Court deemed it significant whether a change in the law was "merely procedural."<sup>424</sup> Even more recently, in 2000, the *Carmell* Court was at pains to distinguish mere procedural changes from legal changes in evidentiary rules that "subvert[] the presumption of innocence," with only the latter being prohibited by *Calder* category four.<sup>425</sup>

The resilience of the substance/procedure divide, and the analytic appeal of an amorphous catch-all category that by definition does not warrant *ex post facto* analysis,<sup>426</sup> is readily apparent in the state court cases surveyed here. Significant numbers of claims throughout the study period were rejected on the rationale that

<sup>422</sup> *Id.* at 47 (overruling *Kring v. Missouri*, 107 U.S. 221 (1883), and *Thompson v. Utah*, 170 U.S. 343 (1898)).

<sup>423</sup> See, e.g., *Weaver v. Graham*, 450 U.S. 24, 29 n.12 (1981) (stating that "[a]lteration of a substantial right . . . is not merely procedural, even if the statute takes a seemingly procedural form"); *Dobbert*, 432 U.S. at 293 (stating that no *ex post facto* violation occurs if a law does not impinge "substantial personal rights," but merely alters "modes of procedure which do not affect matters of substance") (quoting *Bezell v. Ohio*, 269 U.S. 167, 171 (1925)); *Bezell*, 269 U.S. at 170 (stating that procedural laws affecting defendants in a "harsh and arbitrary manner" are *ex post facto*); *Thompson v. Missouri*, 171 U.S. 380, 383–84, 388 (1898) (noting that a procedural change can be invalid when it "alter[s] the situation of a party to his disadvantage" or "entrench[es] upon any of the essential rights belonging to one put on trial").

Similarly, language in several of the Court's decisions more generally has attached significance to the disadvantages associated with challenged laws. See, e.g., *Miller v. Florida*, 482 U.S. 423, 431, 433 (1987) (stating that the Ex Post Facto Clause prohibits any law that "clearly disadvantages" or alters a "substantial right"); *Lindsey v. Washington*, 301 U.S. 397, 401 (1937) (stating that the Ex Post Facto Clause forbids criminal laws accruing "to the detriment or material disadvantage of the wrongdoer"); *Bezell*, 269 U.S. at 171 (asserting that the Ex Post Facto Clause "was intended to secure substantial personal rights against arbitrary and oppressive legislation") (citing *Malloy v. South Carolina*, 237 U.S. 180, 183 (1915)); *Malloy*, 237 U.S. at 183 (finding *ex post facto* laws infringe on "substantial personal rights"); *Duncan v. Missouri*, 152 U.S. 377, 382–83 (1894) (finding *ex post facto* laws deprive the person of "substantial protections with which the existing law surrounds the person accused of [the] crime").

<sup>424</sup> 519 U.S. 433, 447 n.17 (1997).

<sup>425</sup> *Carmell v. Texas*, 529 U.S. 513, 532 (2000). At the same time, the Court characterized *Collins* as attempting to "eliminate[] a doctrinal hitch . . . which purported to define the scope of the Clause along an axis distinguishing between laws involving 'substantial protections' and those that are merely 'procedural.'" *Id.* at 539.

<sup>426</sup> See, for instance, the broad definition offered by the *Collins* Court: procedural changes refer to "changes in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes." *Collins v. Youngblood*, 497 U.S. 37, 45 (1990).

they work a procedural, not substantive, change in the law. Retroactive changes to statutes of limitations prior to *Stogner*, for instance, were regularly upheld against attack by virtue of their purported procedural nature.<sup>427</sup> Both before and after *Carmell*, moreover, changes to evidentiary laws were designated procedural and thus upheld, including laws allowing the retroactive admission of victim impact evidence in capital sentencing proceedings,<sup>428</sup> and expanded consideration of “other acts” evidence in trials (especially involving prior alleged sexual abuse).<sup>429</sup> This, despite the inescapable inference that such laws patently advantage the state, easing its path to conviction and punishment.<sup>430</sup>

In short, the effort to distinguish procedural changes for ex post facto purposes has certainly “prove[d] elusive,”<sup>431</sup> notwithstanding the Court’s apparent effort in *Collins* to render the distinction constitutionally irrelevant. The upshot of this confusion is that state legislatures have been afforded another means to avoid the unambiguous retroactivity prohibition of the Ex Post Facto Clause, allowing them to indulge their natural political predilection for retroactive laws with criminal cast.<sup>432</sup> Along with the strategic benefit of camouflaging punitive laws as civil ones,

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<sup>427</sup> See *supra* note 317 and accompanying text.

<sup>428</sup> See *supra* notes 347–49 and accompanying text.

<sup>429</sup> See *supra* notes 350–51 and accompanying text.

<sup>430</sup> In this regard, it is instructive to compare such changes to those condoned by the Court in its two seminal cases illustrative of procedure. In *Hopt v. Utah*, 110 U.S. 574 (1884), the Court allowed retroactive application of a law that permitted a convicted felon to testify; in *Thompson v. Missouri*, 171 U.S. 380 (1898), the Court approved the use of handwriting evidence, not previously admissible. To state the obvious, allowing capital jurors to hear emotional testimony of victims’ worth when weighing death, and allowing jurors to consider of prior crimes or bad acts, especially of a sexual nature, likely have a considerably greater bearing on justice outcomes.

<sup>431</sup> *Miller v. Florida*, 482 U.S. 423, 433 (1987); see also *Murphy v. Kentucky*, 465 U.S. 1072, 1073 (1984) (White, J., dissenting from denial of *certiorari*) (noting “evident confusion” among courts in drawing distinction); *Carper v. W. Va. Parole Bd.*, 509 S.E.2d 864, 868 (W. Va. 1998) (“Just what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibition cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree.”) (citation omitted).

This same line-drawing challenge of course has bedeviled federal courts for years in the context of choice-of-law determinations, an expansive body of law benefitting from no greater degree of certainty. See generally PETER W. LOW & JOHN C. JEFFRIES, JR., *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* 2–31 (4th ed. 1998). Similar difficulties are evidenced in habeas corpus jurisprudence, where courts struggle to determine whether a ruling announces a “substantive” change in law, requiring its retroactive application to cases on collateral review. See generally 2 RANDY HERTZ & JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* § 25.1, at 1030–32 (4th ed. 2001 & Supp. 2003).

<sup>432</sup> See *supra* notes 20–24 and accompanying text.

which functions to avoid ex post facto coverage altogether,<sup>433</sup> legislatures wishing to pass retroactive criminal laws have every incentive to package and portray laws as procedural. The effect, ultimately, is to undercut the constraining structural force of the Ex Post Facto Clause, allowing application of laws, in James Madison's words, that "are contrary to the first principles of the social compact and the every principle of sound legislation."<sup>434</sup>

#### IV. CONCLUSION

The temptation for state legislatures to pass criminal laws with retroactive effect is age-old and, if recent history is to serve as a guide, will not abate any time soon. The Ex Post Facto Clause, as Chief Justice Marshall observed not long after the

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<sup>433</sup> A ready example of this phenomenon is the effort by state legislatures to codify involuntary commitment provisions for "sexually violent predators" in various noncriminal parts of their codes, thereby militating against a judicial finding that the laws are punitive for ex post facto purposes. In *Kansas v. Hendricks*, 521 U.S. 346 (1997), for instance, the Court inferred a nonpunitive purpose because Kansas labeled its law a "civil commitment procedure," and relegated it to the innocuous confines of the probate code. *Id.* at 361 (asserting that the state's "objective to create a civil proceeding is evidenced by its placement of the Act within the [state's] probate code, instead of criminal code") (citations omitted). If a law is deemed facially nonpunitive, a petitioner must adduce the "clearest proof" that the law in either "purpose or effect" contradicts such "manifest intent." *Id.* (citing *United States v. Ward*, 448 U.S. 242, 248–49 (1980)). For criticism of this deferential standard as being contrary to the exacting judicial scrutiny required by the Ex Post Facto Clause, see Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 AM. CRIM. L. REV. 1261, 1289–91 (1998).

The Court's recent decision in *Seling v. Young*, 531 U.S. 250 (2001), in turn, serves to enhance the significance of the threshold judicial determination of whether a particular sanction is nonpunitive for ex post facto purposes. In *Young*, the Court rejected an "as applied" challenge to a law, previously deemed nonpunitive for ex post facto purposes, characterizing it as "unworkable." *Id.* at 263. As a result, the determination of whether a law is punitive for ex post facto purposes turns on the assessment of the nature of the law itself, without regard for how the law is subsequently implemented. *Id.* at 262–63; see also *id.* at 269 (Scalia, J., concurring) (noting that ex post facto analysis turns on legislative purpose and the "effects apparent upon the face of the statute"). For discussion of *Young* and the unique interpretative work of courts in assessing ex post facto, as opposed to substantive due process challenges, see Eric S. Janus & Wayne A. Logan, *Substantive Due Process and the Involuntary Confinement of Sexually Violent Predators*, 35 CONN. L. REV. 319, 336–37 (2003).

<sup>434</sup> THE FEDERALIST NO. 44, at 282 (James Madison) (Clinton Rossiter ed., 1961); see also *Johnson v. United States*, 529 U.S. 694, 701 (2000) (acknowledging that the "Ex Post Facto Clause raises to the constitutional level one of the most basic presumptions of our law: legislation, especially of the criminal sort, is not to be applied retroactively").

nation's formation, was designed to guard against such laws, inspired by the "feelings of the moment" and the "sudden and strong passions" that can beset legislative bodies.<sup>435</sup> The Court's recent decisions in *Carmell* and *Stogner* appear to signal a new determination that the judiciary seek to ensure that the government play "by its rules" in the criminal justice arena, despite the compelling social and political reasons favoring retroactive application of criminal laws.<sup>436</sup> In so doing, the Court, albeit in both cases by a five-to-four vote with distinctly different majorities, heeded its own critically important admonition that the applicability of a particular constitutional provision should turn on the "reasons" it was included in the Constitution and "the evils it was designed to eliminate."<sup>437</sup>

For civil libertarians, this determination can only be taken as surprising but very good news, given the Rehnquist Court's more typical hands-off attitude in relation to state crime control efforts. Indeed, this attitude has resulted in the recent undercutting of other constitutional limits applicable to such state activity, the Due Process Clause and Eighth Amendment in particular, elevating the role of the Ex Post Facto Clause to even greater significance than before. In terms of due process, in 2001 the Court significantly curtailed constitutional limits on the kindred authority of courts to apply their criminal law decisions retroactively to the disadvantage of defendants,<sup>438</sup> which will surely make due process claims even more difficult to sustain.<sup>439</sup> In terms of the Eighth Amendment, earlier in 2003, before *Stogner* was decided, the Court upheld California's uniquely draconian "three strikes" sentencing law, confirming that for all intents and purposes the Amendment exercises no durational constraint on the capacity of state legislatures to imprison offenders.<sup>440</sup>

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<sup>435</sup> *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 137–38 (1810).

<sup>436</sup> Quoting Joseph Story at the end of its opinion, the *Carmell* majority emphasized the basic constitutional value judgment that courts must enforce when evaluating the constitutionality of retroactive criminal laws:

If the laws in being do not punish an offender, let him go unpunished; let the legislature, admonished of the defect of the laws, provide against the commission of future crimes of the same sort. The escape of one delinquent can never produce so much harm to the community, as may arise from the infraction of a rule, upon which the purity of public justice, and the existence of civil liberty, essentially depend.

*Carmell v. Texas*, 529 U.S. 513, 552–53 (2000) (quoting JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION § 1338, at 211 n.2 (Lawbook Exchange 2001) (1858)).

<sup>437</sup> *United States v. Brown*, 381 U.S. 437, 442 (1965).

<sup>438</sup> *See Rogers v. Tennessee*, 532 U.S. 451, 462 (2001).

<sup>439</sup> *See* Harold J. Krent, *Should Bouie Be Buoyed? Judicial Retroactive Lawmaking and the Ex Post Facto Clause*, 3 ROGER WILLIAMS U. L. REV. 35, 57–77 (1997) (surveying cases, *pre-Rogers*, and noting that successful due process claims are "few and far between").

<sup>440</sup> *See Ewing v. California*, 123 S. Ct. 1179, 1190 (2003).



The relative uniqueness of the Court's recent treatment of the Ex Post Facto Clause, by conservative and liberal justices alike, might ultimately be explained by not just its storied history but also its palpable explicitness, compared to other potentially constraining but more indeterminate provisions, such as the Eighth Amendment's prohibition of "cruel and unusual punishment."<sup>441</sup> However, as the Court's decisions demonstrate, and the results and rationales of state courts surveyed here underscore, the scope of protection afforded by the Ex Post Facto Clause is far from clear-cut, and considerable work remains to be done if it is to serve as the constitutional bulwark envisioned by the Framers.

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<sup>441</sup> U.S. CONST. amend. VIII.