

# **The Olde and Improved Ex Post Facto Clause**

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## **Introduction**

In the arena of criminal law, the Rehnquist Supreme Court will almost certainly be known for continuing the Burger Court's erosion of the constitutional protections painstakingly established the predecessor Warren Court. Of course, it will also be recognized for the stellar exception to this trend in the area of jury trial rights under the *Apprendi* doctrine.<sup>1</sup> The unusual five vote majority in the *Apprendi* cases signaled a peculiar coming together of Justices of the Court's "left," who bring at least some sensitivity to the rights of the accused and downtrodden, with the Court's far "right" constitutional fundamentalists, whose view of the jury trial right is animated by the jurisprudence of original intent and a true conservative suspicion of the expansive powers of government.

But there is a second area where the current Court's constitutional jurisprudence in the criminal law has bucked the trend, albeit on a somewhat smaller scale, and without the presence of a consistent five vote majority. With its recent opinions in *Carmell v. Texas* (2000) 529 U.S. 513 and *Stogner v. California* (2003) 539 U.S. 607, the Court has reinvigorated the ex post facto prohibition, expansively reading this pre-Bill of Rights limit on governmental power in a manner consistent with some of the earliest case law interpreting it, thereby bucking a century-long trend of constrained reading by the Court.

In this modest and (unfortunately) hastily written article, I want to examine a bit of the ancient and recent history of the Ex Post Facto Clauses, and provide the reader with some ideas about meritorious ex post facto challenges which can be raised in your own work as criminal appellate advocates.

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<sup>1</sup>*Apprendi v. New Jersey* (2000) 530 U.S. 466.

## A. **Historical Background**

### 1. **The Clause and Why it is There.**

The ex post facto prohibition has the most venerable pedigree of all the constitutional protections involving the criminal law. Nearly all other rights have their source in the Bill of Rights – a document enacted subsequent to the Constitution as a way of persuading Jeffersonian Republicans to support ratification of the Constitution – and the Fourteenth Amendment – enacted by a radical Republican majority largely to secure civil rights to freed slaves – and were generally not recognized as applicable to the states until the second half of the Twentieth Century. Yet the original Article I of the Constitution contains not just one, but two Ex Post Facto Clauses, the first limiting the power of Congress, and the second limiting the powers of the States.

The focus of this article is on the second provision, which will be referred to throughout as “the Ex Post Facto Clause.” It is found in Article I, section 10, clause 1, which contains a short list of subjects involving the private rights and liberties of citizens on which the States are precluded from legislating.

*No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.*

(U.S. Const., Art. I, § 10, cl. 1, emphasis added.)

It should be kept in mind that this provision of the Constitution was something of an anomaly. By and large, the purpose of the new Charter was to create a federal government with limited powers, and to retain to the States all remaining powers of sovereignty, leaving the Legislatures of the various states near-total authority over matters within their domain. For a good sense of what animated the Constitutional Convention to include this limiting provision, there is no better source than “Publius,” the nom de plume of the authors of the Federalist Papers. James Madison, the then-youthful father figure of the Constitution, had the following to say in Federalist No. 44:

Bills of attainder, ex-post-facto laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the State constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights; and I am much deceived if they have not, in so doing, as faithfully consulted the genuine sentiments as the undoubted interests of their constituents. The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more-industrious and less informed part of the community. They have seen, too, that one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting, which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society.

Federalist No. 44, <http://www.foundingfathers.info/federalistpapers/fed44.htm>

A review of this typically insightful and persuasive comment by Madison (as contrasted to the more Machiavellian Hamilton) should serve as a reminder that the double-edged nature of constitutional protections in the criminal law has been around since the Founding. Provisions such as the more familiar Bill of Rights and the less familiar Ex Post Facto Clauses are not only about the protection of individual rights, and the obligation to give fair notice, but have, as their primary purpose, the limitation of the arbitrary powers of government; they protect not only the accused criminal, but every citizen against government unreasonably changing the rules against them mid-stream.

Justice Chase's lead opinion in *Calder v. Bull* (1798) 3 U.S. 386, the first and foremost Supreme Court decision on the ex post facto prohibition, is well known for its very specific description of the categories of ex post facto laws, a subject which will be discussed extensively below. However, the same opinion merits careful review for its

excellent description of the principles of republican government which brought into existence the need for this safeguard, and for its enshrinement in the Constitution.

*Calder* refers to a “fundamental principle” which “flows from the very nature of our free Republican governments, that no man should be compelled to do what the laws does not require; nor to refrain from acts which the laws permit.” (*Id.*, at p. 389.)

A law that punished a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law . . . is against all reason and justice. . . . The prohibition against [the State Legislatures] making any ex post facto laws was introduced for greater caution, and very probably arose from the knowledge, that the Parliament of Great Britain claimed and exercised a power to pass such laws. . . .”

(*Ibid.*) Justice Chase’s opinion describes the nature of these acts, noting that some were with respect to the crime,

by declaring acts to be treason, which were not treason, when committed; at other times, they violated the rules of evidence (to supply a deficiency of legal proof) by admitting one witness, when the existing law required two; . . . or other testimony which the courts of justice would not admit; at other times they inflicted punishments, where the party was not, by law, liable to any punishment; and in other cases, the inflicted greater punishment than the law annexed to the offence. . . . With very few exceptions, the advocates of such laws were stimulated by ambition, or personal resentment, and vindictive malice. To prevent such, and similar, acts of violence and injustice, I believe the Federal and State Legislatures, were prohibited from passing any bill of attainder; or any ex post facto law.

(*Ibid.*, fns. omitted.)<sup>2</sup>

Two centuries later, of course, state legislators “stimulated by ambition, or personal resentment, and vindictive malice” continue to enact harsh laws against criminal defendants and seek to apply them retroactively. Thus we must be vigilant to safeguard both the accused criminal, and the general population, against such abuses of power.

## 2. **The *Calder* Categories and the Interpretation of the Clause**

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<sup>2</sup>It was not easy to omit footnotes which referenced case law such as “The banishment of Lord Clarendon, 1669 (19 Ca. 2. c. 10.)”].

Analysis of the question whether a challenged law is subject to the ex post facto prohibition always begins with a recitation of the categories set forth by Justice Chase in his *Calder* opinion. Interestingly enough, the list of categories is pure dicta in *Calder*, since the holding in the case was that the Ex Post Facto Clause applied only to criminal cases, and not the civil law probate issue at stake in *Calder*. Yet the application and interpretation of the *Calder* categories has become a principal staple of ex post facto jurisprudence.

I will state what laws I consider ex post facto laws, within the words and the intent of 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. 3d. 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.

(*Calder, supra*, 3 U.S. at p. 390.)

The scope of each of the *Calder* categories, with the possible exception of the first, has been subject to extensive and heated disputation over the past two centuries, as is demonstrated by a cursory review of some of the key U.S. Supreme Court cases on the subject.<sup>3</sup>

The aftermath of the Civil War gave rise to the next major ex post facto decision, *Cummings v. Missouri* (1866) 71 U.S. 277. A provision of the post-Civil War Missouri Constitution contained a “test oath” designed to ensure Union loyalty. 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,’

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<sup>3</sup> The case law review that follows borrows extensively from a thoughtful law review article by Professor Wayne Logan (Logan, “Democratic Despotism and Constitutional Constraint: an Empirical Analysis of Ex Post Facto Claims in State Courts,” 12 Wm. & Mary Bill of Rights J. 439, (Feb. 2004), and in particular from Part I of the article, “Ex Post Facto Clause Origins and Case Law,” at pp. 445-458.

manifested his adherence to the cause of the enemies of the United States, foreign or domestic.” 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.” (*Id.*, at pp. 316-317.) 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. (*Id.*, at pp. 281-282.)

Justice Field writing for the majority held that the loyalty oath violated the Ex Post Facto Clause, on the basis of several *Calder* categories. The oath violated the prohibition against punishing behaviors not punishable at the time of commission; enhanced the punishment of other behaviors already made criminal at the time of their commission; and subverted the “presumptions of innocence,” and thus altered rules of evidence. (*Id.*, at pp. 332, 327-328.) 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.

(*Id.*, at p. 325.)

In the late 1800s, the Court addressed a series of trial-related changes in state laws which prompted ex post facto challenges. In the first such case, *Kring v. Missouri* (1883) 107 U.S. 221, the defendant was charged with first-degree murder, ultimately pled guilty to second-degree murder, and later successfully appealed his sentence. On remand, he was convicted of first-degree murder and sentenced to death 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. (*Id.*, at pp. 222-224.)

The Court reversed on ex post facto grounds.<sup>4</sup> Two *Calder* categories were relied upon in this analysis. First, the Missouri law amounted to a change in a rule of evidence in that “what was conclusive evidence of innocence” of first-degree murder – actual conviction of a lower grade of homicide – was nullified by the new law. (*Id.*, at p. 228.) Second, the new law retroactively altered the quantum of punishment imposed on Kring, allowing him to be sentenced to death for first degree when he could not have been on his original second degree murder conviction. (*Id.*, at pp. 231-232.)

The Court explained that it backed a “liberal construction” of the Ex Post Facto Clause, “in manifest accord with the purpose of the constitutional convention to protect the individual rights of life and liberty against hostile retrospective legislation.” (*Id.*, at p. 229.) To this end, the Court took on the assertion that the law was “procedur[al]” in nature and thus outside the ambit of ex post facto coverage, a common bugaboo and misconception about the limits of the reach of the Ex Post Facto Clause which persists to this day. The Court first dismissed the notion that the Clause did not apply to procedural changes since that would include alterations in the rules of evidence, one of the *Calder* categories. Procedure, according to the majority, was simply too broad a concept for drawing a line limiting application of the Ex Post Facto Clause. (*Id.*, at pp. 231-232.)

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.

(*Id.*, at p. 232.) Quoting from a previous decision, *United States v. Hall* (1809) 2 Wash. CC. 366, the Court stated broadly that any retroactive law that “alters the situation of a party to his disadvantage” is ex post facto. (*Kring, supra*, at p. 235.)

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<sup>4</sup>Obviously, this procedure would not stand up to Double Jeopardy analysis; but it must be recalled that Bill or Rights protections had not been applied to the States as of the latter part of the Nineteenth Century.

Notwithstanding these broadly inclusive passages, *Kring* marked the beginning of the uncertainty that endures to this day over the place of ex post facto protections relative to legislative changes in the criminal law that can be classified as “procedural” in nature. Only one year after deciding *Kring*, the Court in *Hopt v. Utah* (1884) 110 U.S. 574 rejected an ex post facto challenge because, in the Court’s view, the retroactive legal change was procedural in nature. Hopt was convicted of first-degree murder, and his conviction was reversed on appeal. (*Id.*, at p. 575.) At his retrial, the prosecution’s case included the testimony of a convict then serving time for murder, as permitted by a recent change in state law, and Hopt was again convicted of first-degree murder. (*Id.*, at p. 587.) 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. (*Ibid.*)

The Court held that application of the new law did not violate the Clause because laws relating to witness competency failed to come within the ambit of the *Calder* categories. 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. (*Id.*, at pp. 589-590.) 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. . . .” (*Id.*, at p. 590.)

The Court’s reasoning in *Hopt* signals the beginning of a much more restrictive interpretation of the Ex Post Facto Clause. One could argue that the distinction drawn in *Hopt* was at odds with *Calder*, since prominent among the examples of ex post facto laws discussed in Justice Chase’s opinion was the retroactive removal of the second witness requirement in treason prosecutions and the bars against unsworn and interspousal testimony. (*Calder, supra*, 3 U.S. at p. 389.)

In a pair of decisions in 1898 involving different defendant named “Thompson,” the Court delineated a limited set of circumstances in which a “procedural” change could violate the Ex Post Facto Clause. The defendant in *Thompson v. Missouri* (1898) 171 U.S. 380 was convicted of first-degree murder by means of strychnine poisoning. At trial

the court admitted into evidence handwritten letters of Thompson so that they could be compared to the allegedly forged strychnine prescription. When the crime occurred such exemplars were inadmissible, but the Missouri legislature later allowed their consideration. Thompson challenged the admission of the letters on ex post facto grounds. (*Id.*, at pp. 380-382.)

The Court rejected the claim, reasoning that the legal change was procedural in nature, but provided some important elaboration. (*Id.*, at pp. 387-388.) 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.” (*Id.*, at p. 388.) 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.” (*Id.*, at p. 386.) 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.” (*Id.*, at p. 383.)

An example of such a procedural change was provided in the second case, *Thompson v. Utah* (1898) 179 U.S. 343. That defendant’s homicide crime was committed when applicable law guaranteed a jury of twelve. However, he was ultimately tried and convicted by a jury of eight, as permitted by a law newly enacted when Utah was admitted to the Union. Justice Harlan, writing yet again for the Court, concluded that the change in jury composition was of the procedural kind condemned in *Kring*. (*Id.*, at pp. 351-352.) This procedural change violated the Ex Post Facto Clause, Justice Harlan reasoned, because 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.” (*Id.*, at p. 351.) 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 enjoyed at the time of the commission of the offence charged against him.

(*Id.*, at p. 352.)

The uncertainty about “procedural” changes continued into the next century. The defendants in *Beazell v. Ohio* (1925) 269 U.S. 167 were jointly indicted for embezzlement. 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.” After being tried jointly and convicted, the defendants challenged the law on ex post facto grounds. (*Id.*, at pp. 168-169.)

The Court rejected the claim, and in so doing, put forward a hitherto novel formulation of the *Calder* categories. Eschewing the traditional four categories, *Beazell* Court put forward a three part test, concluding that 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 . . . .” (*Id.*, at p. 169.) This reformulation omitted both the second and fourth *Calder* categories, laws which aggravate a crime, and laws which alter the rules of evidence, and specified a new category, concerning any “defense” retroactively withdrawn by law. (*Id.*, at pp. 169-170.)

Applying these criteria, the Court concluded that the change in Ohio law was a procedural one, affecting only the conduct of the trial, which did not deprive the defendant “of any defense previously available, nor affect the criminal quality of the act charged . . . [or alter] the legal definition of the offense or the punishment to be meted out.” The law merely “restored a mode of trial deemed appropriate at common law, with discretionary power in the court to direct separate trials.” (*Id.*, at pp. 170-171.) While the Court acknowledged that some types of procedural changes can be ex post facto laws, it

refused to describe any recipe for discerning 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.

(*Id.*, at p. 171, citations omitted.)

Half a century later in *Dobbert v. Florida* (1977) 432 U.S. 282, the Court again grappled with the substance/procedure distinction. 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. After the murders, however, the state supreme court invalidated the law, and the Florida legislature adopted a new capital sentencing law. (*Id.*, at p. 288.) 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. (*Id.*, at p. 289, fn. 5.) 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. 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. (*Id.*, at p. 287.)

The Court concluded that the law was procedural in nature and rejected the claim. 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." For the first time, the *Dobbert* Court essentially concluded that designation of a law as procedural in nature was dispositive: "Even though it may work to the disadvantage of a defendant, a procedural change is not ex post facto." (*Id.*, at pp. 293-294.) Quoting its prior language in *Hopt*, 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.” (*Id.*, at p. 294, quoting *Hopt, supra*, 110 U.S. at pp. 589-590.)

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. (*Ibid.*) 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.” (*Id.*, at p. 295.)

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*. The majority characterized the argument as “sophistic,” “highly technical,” and “mock[ing] the substance of the Ex Post Facto Clause.” Regardless of the constitutional invalidity of the law, its existence in the Florida statutes “served as an ‘operative fact’” that provided sufficient warning to potential killers of the penalty Florida would seek upon a finding of culpability. (*Id.*, at pp. 297-298.)

*Collins v. Youngblood* (1990) 497 U.S. 37 signaled a continuation of the trend of narrow construction of the Ex Post Facto Clause. The defendant in *Collins* received both a prison sentence and a fine. However, the fine was not authorized by law, and this erroneous punishment entitled defendant to a new trial under Texas law. While defendant’s habeas petition was pending, the Texas legislature passed a statute expressly allowing appellate courts to reform improper verdicts, obviating any need for a retrial. The Texas Court of Criminal Appeals modified the verdict and reinstated the defendant’s prison term, and the defendant challenged this result as based on an ex post facto law. (*Id.*, at pp. 39-40.)

In rejecting the claim, the Court in *Collins* looked back to the reformulated

categories of *Beazell*, and further modified the *Calder* categories. Chief Justice Rehnquist, who authored the majority opinion, 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.” (*Id.*, at p. 43.) 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 concluded that this modification was proper, since “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.” (*Id.*, at p. 43, fn. 3.)

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. (*Id.*, at p. 44.) *Collins* reasserted the blanket statement in *Dobbert* that procedural changes do not create ex post facto laws, even if they concern substantial rights. The Court’s past efforts to distinguish such laws, according to the *Collins* majority, had “imported confusion” into ex post facto jurisprudence leading to an “undefined enlargement” of the reach of the Clause. 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. Concluding that its prior decisions in *Kring v. Missouri* and *Thompson v. Utah*, with their focus on “substantial protections” and “personal rights,” strayed from this “analytical framework” and “caused confusion,” the Court overruled the decisions. (*Id.*, at pp. 45-47.)

#### B. ***Carmell and Stogner.***

The framework is now set for the two most recent Supreme Court decisions on the Ex Post Facto Clause, *Carmell* and *Stogner*. As will be explained, these cases signal a startling return by a shifting majority of the Court to the “foundational” construction of the Clause by Justice Chase in *Calder*, and a rejection of the reformulation of the

meaning of an ex post facto law by the Court in *Beazell*, *Dobbert* and *Collins*.

1. ***Carmell***

The decision in *Carmell v. Texas* (2000) 529 U.S. 513 featured the stunning revival of the “given-up-for-dead” Fourth Category, pertaining to “a law which 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.” (*Calder*, *supra*, 3 U.S. at p. 390.) *Carmell*, like *Apprendi*, which was decided the same year, involved a “left-right” majority of five, with an opinion authored by Justice Stevens being joined by Justices Breyer, Souter, Scalia, and Thomas.<sup>5</sup>

Under Texas law, conviction in a rape case would not be allowed unless the complaining witness’ testimony was corroborated by other evidence or the victim informed another person of the offense within six months, and provided an exception for victims under the age of 14, whose uncorroborated testimony was sufficient for conviction. (*Carmell*, *supra*, at p. 517-518.) In 1993, Texas amended its law to extend the “child victim” exception to victims under the age of 18. (*Id.*, at p. 519.) Four of *Carmell*’s convictions were based on acts that took place before the new law went into effect and the uncorroborated testimony of the victim when she was between the age of 14 and 18. (*Ibid.*) *Carmell*’s ex post facto challenge to conviction on these counts was rejected by a Texas appellate court, which dutifully followed *Dobbert* and *Collins* and concluded that the new law was a mere “rule of procedure” which simply removed restrictions on the competency of certain witnesses without increasing the punishment for the crime or changing the elements of the offense. (*Id.*, at p. 520.)

Justice Stevens’ majority opinion retraced the sources of Justice Chase’s four categories of ex post facto laws in great detail, pointing out the centrality of the Fourth Category, both in the subsequent cases and scholarly interpretation. (*Id.*, at pp. 522-525,)

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<sup>5</sup> The majority in *Apprendi* was the same, except for a realignment of the two Clinton appointed members of the Court, with Justice Ginsburg joining the majority and Justice Breyer dissenting.

In particular, the *Carmell* court looked back to common law commentaries based on Fenwick’s Case, a classic ex post facto case discussed by the Court in *Calder*, in which Parliament had retroactively reduced the number of witnesses required to prove treason from two to one. (*Id.*, at pp. 526-530.)

Having established the pedigree of the Fourth Category, the opinion in *Carmell* had no problem concluding that the new Texas law was one which “alters the legal rules of evidence, and receives less, or different, testimony, than the law in effect at the time of the commission of the offense, in order to convict the offender.” The prosecution’s case, under the prior law, was legally insufficient without corroboration, and the new law allowed conviction on “less testimony . . .”, paralleling the circumstances of Fenwick’s case. (*Id.*, at p. 530.)

Justice Stevens’s opinion took considerable pains to emphasize that the revived Fourth Category “resonates harmoniously with one of the principal interests that the *Ex Post Facto* Clause was designed to serve, fundamental justice . . .”, noting that this basic concern of the Clause is more central than the requirement of fair warning to criminals, commenting cryptically that “there are few, if any, reliance interests in planning future criminal activities based on the expectation of less severe repercussions.” (*Carmell*, *supra*, at p. 531, & fn. 21.) *Carmell*, looking back to *Calder*, reminds us that ex post facto laws have long been considered “cruel and unjust.” The constitutional protection against them stands as a “bulwark in favour of the personal security of the subject . . .” and a protection “against the favorite and most formidable instruments of tyranny.” (*Id.*, at p. 532, quoting *Calder*, 3 U.S. at p. 390-391 and *The Federalist*, No. 84.)<sup>6</sup> The Fourth *Calder* category “addresses this concern precisely” because it is “grossly unfair” to reduce the quantum of evidence required to convict a defendant after the fact. In this situation, like that of other types of ex post facto laws, “the government refuses, after the

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<sup>6</sup>Ironically, Hamilton’s brief words in favor of the ex post facto prohibition come in the course of the general argument in *Federalist* No. 84 that a Bill of Rights was both “unnecessary” and “dangerous.” <http://www.vote-smart.org/reference/fedlist/fed84.htm>

fact, to play by its own rules, altering them in a way that is advantageous only to the State, to facilitate an easier conviction.” (*Id.*, at pp. 532-533.)

The *Carmell* majority expressly rejected a request by the federal government, as *amicus*, to abandon the Fourth Category, as well as the claim by Texas and the United States that the Court had already abandoned the fourth category in *Collins*. (*Id.*, at pp. 534-539.) The Court in *Carmell* also rejected Texas’s contention that the Fourth Category had to be limited to laws which reduce burden of proof. After acknowledging that *Cummings v. Missouri*, the Court’s prior leading case on the Fourth Category, did involve such a reduction, the Court found “no good reason to draw a line between laws that lower the burden of proof and laws that reduce the quantum of evidence necessary to meet that burden . . .” finding such laws to be “indistinguishable in all meaningful ways relevant to the concerns of the *Ex Post Facto Clause*.” (*Carmell, supra*, at pp. 540-541, quoting *Cummings, supra*, 71 U.S. at p. 325: “The legal result must be the same, for what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows.”)

Finally, the Court rejected the claim by Texas that the new law was a witness competency rule, which under *Hopt* did not violate the Ex Post Facto Clause. Pointing out that a victim in a rape case was always competent to testify, the Court characterized the new law as a “sufficiency of evidence rule . . .” because it lessened the “amount or degree of proof” needed to convict the defendant. (*Id.*, at pp. 544-545.) New laws which reduce the “quantum of evidence required to convict” cannot be compared to witness competency rules or other changes in the rules of evidence, which apply even-handedly to both parties in a criminal case, in that “[s]uch rules will *always* run in the prosecution’s favor, because they always make it easier to convict the accused.” (*Id.*, at p. 546.)

Thus the holding in *Carmell* signaled a two-way return to the earlier jurisprudence of the Ex Post Facto Clause, restoring the *Calder* Fourth Category to its rightful place, and eliminating the rigid “procedural” exception grafted onto the Clause by the Court in *Dobbert* and *Collins*.

## 2. *Stogner*

The Court's most recent word on the Good Olde Clause came in *Stogner v. California* (2003) 539 U.S. 607. If *Carmell* signaled a revival of the Fourth Category, *Stogner* involved a jurisprudentially novel issue concerning the Second Category – i.e., “[e]very law that aggravates a crime, or makes it greater than it was, when committed . . .” – which, like the Fourth Category, had been eliminated by the reformulation of the test in *Beazell* and *Collins*.

*Stogner*, as we all recall, concerned a change in the statute of limitations for certain sex crimes which, under Penal Code section 803(g), permitted charges to be brought in cases where the limitations statute had expired if the prosecution followed within one year of a complaint made to the police. The limitations period on *Stogner*'s crimes, committed between 1955 and 1973, had long since expired, yet he was prosecuted under the new limitations revival law enacted several decades later. (*Id.*, at pp. 609-610.) The California Supreme Court had rejected an ex post facto challenge to the same law in *People v. Frazer* (1999) 21 Cal.4th 737, holding that revivals of limitations statutes are not ex post facto laws because they “do not implicate the manner in which criminal conduct is defined and punished at the time it occurs – the sole concern of the ex post facto clause.” (*Id.*, at p. 763.)

Justice Breyer wrote the majority opinion in *Stogner*, with the Court dividing along the more common “Left/Right” split, with Justice O'Connor providing the decisive fifth vote. The majority concluded that laws which revive extinguished limitations statutes violate the second *Calder* category in three distinct senses. First, by retroactively permitting prosecutions which would otherwise have been forbidden,

the new statute threatens the kinds 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. *Calder v. Bull*, 3 Dall. 386, 391, 1 L. Ed. 648 (1798). Judge Learned Hand later wrote that extending a limitations period after the State has assured “a man that he has become safe from its pursuit . . . seems to most of us unfair and dishonest.”

*Falter v. United States*, 23 F.2d 420, 426 (1928).

(*Stogner, supra*, at p. 611.)

Justice Breyer’s opinion indicated that there were “notice” concerns implicated, in that the new law “deprived the defendant of the ‘fair warning,’ that might have led him to preserve exculpatory evidence.” (*Ibid.*) At the same time it emphasized the “fundamental liberty” aspect of the claim in *Stogner*, commenting that a Constitution that permits such an extension, by allowing legislatures to pick and choose when to act retroactively, risks both “arbitrary and potentially vindictive legislation,” and “erosion of the separation of powers.” (*Ibid.*, quoting *Weaver v. Graham* (1981) 450 U.S. 24, 29, and fn. 10.

The majority in *Stogner* also found that section 803(g) fell within the second *Calder* category by invoking Justice Chase’s “alternative description” of this category, where he described one type of ex post facto law as “inflict[ing] punishments, where the party was not, by law, liable to any punishment.” (*Id.*, at p. 614, quoting *Calder, supra*, 3 U.S. at p. 389.) Under this formulation, the new law “aggravated” *Stogner*’s crime because at the time of the amendment. *Stogner* was not “liable to any punishment.” Thus, under *Stogner*, the second category, which at first blush seems to be duplicative of the first category (making noncriminal conduct criminal) and the third category (increasing the punishment), actually sets forth a different restriction against laws which inflict punishment upon a person who was not, at the time the new law was passed, subject to such a punishment. (*Id.*, at p 613-614.)

Third, the Court in *Stogner* found it significant that the Congress, lower courts, and commentators had all but universally accepted the proposition that the Ex Post Facto Clauses barred laws which revived time-barred prosecutions, noting that the California Supreme Court’s contrary position in *Frazer* stood alone in its rejection of this principle. (*Id.*, at pp. 616-618.)

Finally, Justice Breyer took on the dissent’s contention that there was no constitutional “unfairness” in a limitations revival law, questioning “whether it is

warranted to presume that criminals keep calendars . . .”, and suggesting that the hurt to victims should “count the higher” as against the criminal’s “fictional reliance.” (*Id.*, at p. 650-652, dis. opin. of Kennedy, J.) The majority responded that the law was constitutionally unfair in that it violated “significant reliance interests” and ran counter to a “predominating constitutional interest” in government fairness because it “retroactively withdraws a complete defense to prosecution after it has already attached, and it does so in a manner that allows the State to withdraw this defense at will and with respect to individuals already identified.” (*Id.*, at p. 632.)

**C. Ex Post Facto Increases of Punishment in the Arena of Prison and Parole Law.**

Starting in 1981, the Court issued several decisions regarding the third *Calder* category, increases in punishment, all of which concerned retroactive modifications to the ability of prisoners to win early release. In *Weaver v. Graham* (1981) 450 U.S. 24, the High Court invalidated a Florida statute which repealed previous law by reducing amount of “gain time” for good conduct that can be deducted from a prisoner’s sentence, finding it violated Ex Post Facto prohibition because it “makes more onerous the punishment for crimes committed before its enactment.” *Id.*, at p. 36.

The Court found no ex post facto violation in *California Department of Corrections v. Morales* (1995) 514 U.S. 499. The new law at issue in *Morales* modified the intervals at which certain prisoners could be considered for parole release – from an annual basis to up to three years. Morales claimed that the retroactive change in the required frequency of opportunities for parole violated the Ex Post Facto Clause. (*Id.*, at pp. 503-504.) 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.” (*Id.*, at p. 507.) The new law merely “‘alter[ed] the method to be followed’ in fixing a parole release date under identical substantive standards.” (*Id.*, at p. 508, quoting *Miller v. Florida* (1987) 482 U.S. 423, 433.) 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. (*Id.*, at p. 509.) For the Clause to apply, the petitioner must show “a sufficient risk of increasing the measure of punishment attached to the covered crimes.” (*Ibid.*) Extending ex post facto coverage to laws having only conceivable effects on 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.” (*Id.*, at p. 508.)

*Lynce v. Mathis* (1997) 519 U.S. 433 concerned 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. Lynce benefitted 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). (*Id.*, at pp. 435-436.) 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. (*Id.*, at p. 443.) The Court had no difficulty finding the test satisfied, given that Lynce was rearrested after having been released. Unlike the mere lost “opportunity” and “merely speculative” lengthening of imprisonment contested in *Morales*, Lynce experienced greater punishment and, therefore, had a meritorious claim. (*Id.*, at pp. 446-447.) “[R]etroactive 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 p. 445, quoting *Weaver, supra*, at p. 32.)

*Weaver* and *Lynce* stand for the proposition that retroactive changes which restrict the way postconviction credits can be earned are violative of the ex post facto prohibition. This is so even when, as in *Weaver*, the in-prison behavior which can trigger the greater credit reductions occurs after the operative date of the new law, so long as the

conviction on which punishment was imposed, and credits are being restricted, occurred before.

#### **D. Areas of Recent Contestation and Suggestions of Possible Issues**

*Stogner* provides a fine example of why we should not be daunted when unenlightened California appellate courts reject facially meritorious ex post facto claims. What follows is an outline of some recent ex post facto challenges which have been put forward in California criminal appeals, with some suggestions about areas where additional challenges may be made.

##### **1. Ex Post Facto Credits Issues.**

Those of you who attend these seminars and read the materials may recall that I raised this issue in a prior seminar article about credits. I will recycle this same argument, as it is entirely apposite here.

Retroactive changes in credits laws can affect your client's "effective sentence" in some less-than obvious ways. With the extension and revival of limitation statutes in sex crime cases (and with non-limited crimes such as murder), it sometimes occurs that your client is sentenced in a current case for crimes committed prior to the enactment of particular credit restriction statutes. For example, a client may stand convicted for eight "violent felony" sex crimes committed prior to the effective date of the credit restrictions of section 2933.1. Or, a murder defendant may incur a conviction for a crime committed prior to enactment of section 2933.2. Or, in a somewhat more subtle application of the principle, your client may stand convicted of a crime, such as robbery, which was reclassified as a "violent felony" after Proposition 21, but which was not a violent felony when he committed his current robbery back in January of 2000. Application of these laws against your client retroactively is a clear violation of ex post facto prohibition, because they unquestionably increase his "effective sentence" by requiring him to serve a much longer sentence on good behavior. (*Weaver v. Graham, supra*, 450 U.S. at p. 32.)

##### **a. Section 2933.1 Ex Post Facto Issues.**

If, as in the first foregoing example, *all* your client's crimes were committed prior

to the effective date of section 2933.1, the ex post facto issue is a no-brainer, and we win. The problem arises (1) where some, but not all crimes are committed prior to the effective date of the new law, and (2) where an accusatory pleading under which your client is charged and convicted specifies a range of dates which *straddles* the effective date of section 2933.1, e.g., where a crime was allegedly committed, “on or between January 1, 1994 and December 31, 1995.”

In the former case, the answer seems obvious. If there are two violent felony convictions, one committed after the effective date of section 2933.1, and the other before, the 15 percent behavior credit limitations should apply only as to the post-enactment crime, and not to the pre-enactment offense. For, as *Weaver* makes clear, in ex post facto analysis “the critical question is whether the law changes the legal consequence of acts completed before its effective date.” (*Weaver, supra*, 450 U.S. at p. 31.) “Through [the ex post facto] prohibition the Framers sought to assure that legislative acts give fair warning of their effects and permit individuals to rely on their meaning until explicitly changed. . . .” (450 U.S. at pp. 28-29.) As to the crime committed before section 2933.1’s enactment, a defendant could have had no “fair warning” of the extreme credit limiting consequences and reduction of his “effective sentence” which would follow from his criminal acts.

The mischief arises because of the non-constitutional statutory construction of section 2933.1 as applying “to the offender, not the offense” by the court in *People v. Ramos* (1996) 50 Cal.App.4th 810. According to *Ramos*, if a defendant is convicted of a *single* qualifying violent felony, his entire sentence, including consecutive terms on non-violent felonies, is subject to the 15 percent credit limitations. (*Id.*, at p. 817.) Small minds, such as those inside the heads of many trial and appellate judges, could and have concluded that the logic of *Ramos* means that if the limitations of section 2933.1 applies to one post-enactment violent felony, the defendant is thus a “person” covered by the credit limits of section 2933.1, which would then apply to the entirety of his sentence, violent or nonviolent, predating or postdating the effective date of the law.

However, the constitutional prohibition of ex post facto laws means that the reasoning of *Ramos* cannot be applied to consecutive sentences imposed for crimes, violent or not, committed *prior* to the effective date of section 2933.1. The new law “changes the legal consequences” of these pre-enactment acts by stringently increasing the number of years a defendant must effectively serve as punishment for such crimes. On an eight year sentence, for example, with half-time credits under section 2933, a defendant’s “effective sentence” pre-2933.1 was 4 years; if 2933.1 is applied, his effective sentence is 6.8 years. Thus, the net affect of section 2933.1 is to increase the “effective sentence” in this example by more than fifty percent, a clear violation of the ex post facto prohibition as applied to the crime committed before the new law’s effective date.

One more twist on the same issue. What if, as suggested above, a crime for which your client was convicted after trial or on which he entered a plea was allegedly committed during a time period that *straddles* the effective date of section 2933.1? In that situation, you can still argue that the new law cannot be applied without violating ex post facto unless there is proof in the record of conviction, by at least a preponderance standard, that the criminal conduct actually took place after the effective date of the law. (See, e.g., *People v. Lewis* (1991) 229 Cal.App.3d 259 and Cal. Rules of Court, Rule 4.420(b), formerly Rule 420(b) [preponderance standard applies to proof of sentencing facts]; *McMillan v. Pennsylvania* (1986) 477 U.S. 79, 91-92 [preponderance standard for determination of sentencing facts satisfies Due Process Clause of 14th Amendment], disapproved on other grounds in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 484-487.)

There is one published appellate case on this issue, *People v. Palacios* (1997) 56 Cal.App.4th 252, but it applies only to the unique situation of the “continuing crime” of resident child molestation under section 288.5. The question presented in *Palacios* was whether application of the credit reduction provisions of section 2933.1 violated the ex post facto prohibitions as to a 288.5 charge when at least one of the alleged underlying acts was committed before the operative date of September 21, 1994. It did not,

according to the court in *Palacios*, because section 288.5

punishes a continuous course of conduct, not each of its three or more constituent acts . . . , [which] cannot logically be ‘completed’ until the last requisite act is performed. Where an offense is of a continuing nature, and the conduct continues after the enactment of a statute, that statute may be applied without violating the ex post facto prohibition.

(*Id.*, at p. 257, citations omitted.)

By contrast, other sex crimes, such as rape or lewd conduct, involve specific allegations of individual criminal acts, and not courses of conduct, even when their commission is alleged to have occurred within a wide period of time. As such, in order for section 2933.1 to apply without running afoul of the ex post facto prohibitions, there must be proof in the record, by preponderance of evidence, that these crimes occurred on or after September 21, 1994. (See Part I-A of the brief in *Villa*, Attachment E.)

A second twist and a cautionary note: If your client pled to pre-effective date sex crimes as part of a plea bargain, the Government will probably try to argue that he is estopped from challenging the credit limitations applied to his sentence because they were express terms of the plea bargain. (See, e.g., *In re Troglin* (1975) 51 Cal.App.3d 434 and *People v. Beebe* (1989) 216 Cal.App.3d 927.) Check the plea transcript carefully. If all there is on the record are misadvisements about penal consequences (e.g., “You will be required to serve 85 percent of your sentence because the crimes are violent felonies”), argue that this is not a term of the plea bargain, citing *People v. Walker* (1991) 54 Cal.3d 1013, 1022-1025 for the distinction, and that thus no estoppel applies. And, even if the credit limits are implicitly a part of the plea bargain, argue that no estoppel applies because the error here violates a clear constitutional principle, citing the negative pregnant of the opinion in *Troglin*, which involved a plea bargain whose terms violated section 654, where the court held that a defendant, like the prosecution, must be “held strictly to the terms” of a plea bargain “at least where no public policy, or statutory or decisional or constitutional principle otherwise directs. . . .” (*Id.*, at p. 438.) Here, a clear constitutional provision “otherwise directs,” and a defendant cannot be estopped from

challenging the portion of the plea bargain which seeks to impose an unconstitutional ex post facto sentence.

**b. Other Ex Post Facto Credits Issues**

Assume you are handling a case where your client stands convicted, after trial or plea, with crimes committed in the 1980s. It's important in this situation to check each component of the sentence imposed carefully to make sure that no portion of the sentence, fine, or order is based on a punishment provision enacted subsequent to your client's commission of his criminal act. One obvious example is the parole revocation fine imposed pursuant to section 1202.45 in all cases where a prison sentence is imposed. This fine is routinely imposed in cases where the crimes were committed prior to its effective date, August 3, 1995, in clear violation of the ex post facto prohibition. (See *People v. Callejas* (2000) 85 Cal. App. 4th 667.) Check the terms of the sentence and enhancements imposed against the terms in effect at the time the crime was committed, keeping in mind that old rules like the "double the base term" limit and no-more-than five year consecutive sentence limit may have still applied.

**2. Rosenkrantz and Gubernatorial Power to Veto Parole**

Continuing its recent trend of misreading the Ex Post Facto Clause, the California Supreme Court in *In re Rosenkrantz* (2002) 29 Cal.4th 616 held that the Clause was not violated by the retroactive initiative law which for the first time gave the Governor the authority to veto paroles granted by the Parole Board. The majority in *Rosenkrantz* reasoned that the new law did not increase Rosenkrantz's punishment because it did not alter the standards for determining parole suitability, but only added an additional layer of executive control over parole utilizing the same standards. (*Id.*, at pp. 650-652.)

In his dissenting opinion, Justice Chin correctly pointed out that the application of Proposition 89 to cases involving crimes committed prior to its enactment, when viewed in the context of former Governor Davis's policy and practice of denying parole to any prisoner he believed was properly convicted of murder, ran afoul of the ex post facto prohibition because it created a very significant risk of greater punishment. (See

*Rosenkrantz, supra*, pp. 690-696, diss. opin. of Chin, J., citing *Garner v. Jones* (2000) 529 U.S. 244, 255.) Justice Chin’s dissenting view appears to be entirely correct. Under *Garner v. Jones*, “[t]he controlling inquiry [is] whether retroactive application of the change in . . . law created ‘a sufficient risk of increasing the measure of punishment attached to the covered crimes.’” *Id.*, at p. 250, quoting *Dept. of Corrections v. Morales, supra*, 514 U.S. at 509. In *Morales*, there was no such “sufficient risk” because the new law there – which gave the Parole Board discretion to put off parole review for three years, instead of one, in cases involving multiple murders when it found a low likelihood of release – did not modify the statutory punishment or suitability standards, and “did not change the basic structure of California’s parole law.” (*Garner, supra*, 529 U.S. at pp. 250-251.)

*Garner* involved a law which retroactively increased the interval between parole hearings in Georgia, with the Supreme Court again rejecting an ex post facto challenge to this detrimental change in parole procedures. The key basis for the holding in *Garner* was that an exercise of discretion is implicit in the parole process, and that Constitutional interpretation must recognize that the manner in which discretion is exercised evolves over time. “The idea of discretion is that it has the capacity, and the obligation, to change and adapt based on experience. New insights into the accuracy of predictions about the offense and the risk of recidivism consequent upon the offender’s release, along with a complex of other factors, will inform parole decisions.” (*Id.*, at p. 253.)

Given that “[t]he controlling inquiry [is] whether retroactive application of the change in . . . law created ‘a sufficient risk of increasing the measure of punishment attached to the covered crimes . . . .’” *Id.*, at p. 250, *Garner* held further that “[w]hen the rule does not by its own terms show a significant risk, the respondent must demonstrate, by evidence drawn from the rule’s practical implementation by the agency charged with exercising discretion, that its retroactive application will result in a longer period of incarceration than under the earlier rule.” (*Id.*, at p. 255.)

This language from *Garner* sets up the *Rosenkrantz* issue very nicely. The

majority in *Rosenkrantz* treated the new law as merely “a new level of review . . .”, with no substantive change in the way parole discretion is exercised, and as thus no different than a change in personnel in the Parole Board. (*Rosenkrantz, supra*, 29 Cal.4th at p. 650-652.) Justice Chin’s dissent correctly points out the error of this analysis, explaining why the adding of a new level of gubernatorial parole review creates “a sufficient risk of increasing the measure of punishment attached to the covered crimes.” The purpose of Proposition 89, as stated in the ballot arguments, was to permit the governor to block paroles granted by the parole board, and thus to prolong the incarceration, and lengthen the punishment of persons affected by such a change. The petitioner in *Rosenkrantz* had demonstrated by undisputed evidence that the utilization of this power by the then-current governor was never used to reverse a denial of parole, and was used in a two year period to block 48 out of 49 paroles granted. Thus, while Proposition 89 might not, on its face, create a sufficient risk of increasing punishment, the petitioner in *Rosenkrantz*, and anyone in the same situation, could and did show from evidence of the new law’s “practical implementation” by the Governor, “that its retroactive application will result in a longer period of incarceration than under the earlier rule.” (*Garner*, at p. 255; see *Rosenkrantz, supra*, pp. 690-696, diss. opin. of Chin, J.)

While this issue will be lost in state courts under principles of stare decisis (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), it should be raised and preserved for federal review in all cases involving challenges to a gubernatorial veto of parole where the underlying crime was committed prior to November of 1988.

**3. Retroactive Application of Propensity Evidence Laws,  
Such as Evidence Code sections 1108 and 1109.**

The enactment of Evidence Code section 1108 in 1995 and section 1109 the following year created a major change in the law regarding admission of “other crime” evidence in sex crime and domestic violence cases. Prior to these enactments, other crime evidence could only come in, under Evidence Code section 1101(b), to prove discrete facts such as identity, intent, motive, or common plan. After these enactments,

prior crimes were admissible for any purpose, including proof of a propensity to commit sex crimes or engage in acts of domestic violence.

A strong argument can (and has) been made that these laws are ex post facto when applied to an offender whose crimes were committed prior to the operative date of the new law. This argument was rejected in the single published case to consider it, *People v. Fitch* (1997) 55 Cal.App. 4th 172. But the reasoning of *Fitch* on this point has now been entirely undermined. The premise of the holding in *Fitch* is that the Supreme Court's decisions in *Beazell*, *Dobbert* and *Collins* had abrogated *Calder*'s Fourth Category of ex post facto law, a premise which must perforce collapse in light of the contrary holding in *Carmell*, *supra*, 529 U.S. 513.

Section 1108 and 1109, when applied retroactively to crimes committed prior to their enactment, constitute classic instances of Fourth Category ex post facto laws. By allowing a jury to consider prior uncharged sexual crimes or domestic violence as propensity evidence from which they can infer a defendant's guilt as to charged crimes, the new laws permit conviction of current charged crimes on "different . . . testimony" than allowed at the time appellant's alleged crimes were committed. (*Calder*, *supra*, 3 U.S. at p. 390.) Instructions given to the jury pursuant to sections 1108 and 1109 allow a jury to conclude that a defendant "was likely to and did commit" the charged crimes from the fact that he committed an uncharged sex or domestic violence crime (See CALJIC 2.50.01 and 2.50.02); thus these new laws, when applied retroactively, amount to the kind of "sufficiency of evidence rule . . . lowering the quantum of evidence required to convict. . . ." (*Carmell*, *supra*, at p. 546)

Like the Texas law in *Carmell*, which eliminated the requirement that a rape victim's testimony be corroborated by other evidence in order to prove guilt, section 1108, by its nature, is an evidentiary rule which "will *always* run in the prosecution's favor [by] mak[ing] it easier to convict the accused. . . ." (*Ibid.*) Section 1108 is *only* applicable as against "the defendant" in "a criminal action" (§ 1108, subd. (a)), and is thus not a neutral evidentiary rule beyond the scope of *Calder*'s Fourth Category, since

such laws “are ordinarily evenhanded, in the sense that they may benefit either the State or the defendant in any given case.” (*Carmell, supra*, at p. 533, fn. 23.)

Since there will continue to be sex crime prosecutions under section 803(g) involving criminal acts committed between 1988 and 1995, the question whether Evidence Code section 1108 is an ex post facto law is one which can be expected to recur. Although the claim has been rejected in post-*Carmell* unpublished appellate opinions, no reported case has yet considered this issue in light of the obvious error in the holding in *Fitch* and the revival of the Fourth Category of ex post facto law. Thus, this issue should be raised in the trial courts and litigated on appeal, and has a strong likelihood of success on federal habeas review, if not in state court appeals.

#### **4. Retroactive Changes in Probation Revocation Procedures? A Failed Challenge.**

In *John L. v. Superior Court* (2004) 33 Cal. 4th 158, the California Supreme Court yet again rejected an ex post facto challenge to the retroactive application of a change in procedure, this time concerning amendments to the Juvenile Court Law mandated by Proposition 21. The new laws included provisions reducing the standard of proving a violation of juvenile probation from “beyond a reasonable doubt” to a preponderance of evidence, and allowing for the first time the admissibility of “reliable hearsay” to prove juvenile probation violations. (*Id.*, at p. 165.) The Supreme Court rejected the ex post facto claim on several grounds. Preliminarily, the court did not decide the question whether changes to the law involving probation violations that allegedly occurred after the change in law could be considered retroactive because they resulted in an increase of the confinement period for the original, pre-amendment section 602 offense, noting dictum in *Johnson v. United States* (2000) 529 U.S. 694, 700-701 favorable to the retroactivity claim.

The court then proceeded to reject ex post facto challenges based on the Fourth Category “change in evidence” and the Third Category “increase in punishment” claims. As to the first claim, the State Supreme Court concluded that the Fourth Category

recognized in *Calder* and *Carmell* applied only to changes in evidence law which make it easier to convict a defendant in adult court and in its juvenile counterpart, and not to changes in rules regarding violations of probation. (*Id.*, at pp. 179-280.) The court rejected the “increase in punishment” argument as well, concluding that the new amendments do no more than “enhance the juvenile court’s opportunity to exercise authority and discretion similar to what it possessed . . . in the pre-Proposition 21 form . . .” of the applicable laws. (*Id.*, at pp. 184-185.)

Unfortunately, the opinion in *John L.* overruled a better reasoned lower court opinion in the case of *In re Melvin J.* (2000) 81 Cal. App. 4th 742, 756, which reached a contrary result. To the extent that this issue can be challenged in federal court, the ex post facto challenge presented in these cases should continue to be raised and preserved for collateral review.

## CONCLUSION

The High Court’s latest pronouncements on the Ex Post Facto Clause show a return by the Court to the earliest, Founding impulses behind the creation of this primeval protection against arbitrary exercise of power by the States. After *Carmell* and *Stogner*, the original four *Calder* categories remain alive and well, and the dogma which excluded changes in “procedural” rules from the ambit of the ex post facto prohibition has been discredited.

However, the prior trend towards highly restrictive interpretations of the Clause continues in dark corners such as the California Supreme Court. Hopefully, *Stogner* will not be the last case where a federal court overturns a badly reasoned evasion of the “fundamental justice” of a meritorious ex post facto claim. (*Carmell, supra*, at p. 531, & fn. 21.)

It is hoped that the foregoing analysis and discussion has provided the reader with a better understanding of this oft-neglected first-principle of criminal Constitutional law, and that it will supply some useful tools for analyzing ex post facto claims which arise in your own criminal appellate practice.

