University of Richmond Law Review

Volume 38 | Issue 4 Article 7

5-1-2004

Does Time Eclipse Crime? Stogner v. California and the Court's Determination of the Ex Post Facto Limitations on Retroactive Justice

Ryan D. Frei

CASENOTES

DOES TIME ECLIPSE CRIME? *STOGNER V. CALIFORNIA* AND THE COURT'S DETERMINATION OF THE EX POST FACTO LIMITATIONS ON RETROACTIVE JUSTICE *

I. INTRODUCTION

Despite society's natural desire to punish criminal wrongdoing, Congress and state legislatures have historically been limited in their ability to enact penal laws that have retroactive effects.[1] The judiciary has long frowned upon ex post facto laws, which are "statute[s] that impose[] criminal liability on past transactions."[2] The purpose of the prohibition is "to protect defendants from prosecution under what was not law when they acted, but only became law later on as a result of a new enactment by a legislature."[3] Explicit provisions exist in the United States Constitution to prevent the passage of ex post facto laws by both Congress[4] and state legislatures.[5]

---

* This casenote was the first-place winner of the 2004 McNeill Writing Competition, sponsored by the McNeill Law Society of the University of Richmond School of Law.

1. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.9(b) (6th ed. 2000).

2. *Id.*; *see also* Watson v. Mercer, 33 U.S. (8 Pet.) 88, 110 (1834) ("In short, ex post facto laws relate to penal and criminal proceedings which [retrospectively] impose punishments or forfeitures . . . .").

3. Ethan Isaac Jacobs, Note, *Is* Ring *Retroactive?*, 103 COLUM. L. REV. 1805, 1830 (2003); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 6.2.3 (2d ed. 2002) (noting that a law is also ex post facto "if the government retroactively increases the punishment under a law").

4. U.S. CONST. art. I, § 9, cl. 3 ("No . . . ex post facto Law shall be passed.").

5. U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . ex post facto law . . . ."). This note focuses mainly on the Constitution's ex post facto prohibition in the context of state legislative enactments. However, any reference to the "Ex Post Facto Clause"

For more than two hundred years, the judiciary has used the four category approach proffered by Justice Samuel Chase in *Calder v. Bull* to determine the applicability of the Ex Post Facto Clauses' prohibitions to federal and state laws.[6] Although *Calder*'s four bright-line categories still constitute the binding definition of ex post facto laws,[7] not every ex post facto analysis can be easily resolved by attempting to place a law into one of the four categories.[8] In the early 1980s, spurred by a growing societal awareness of and sensitivity to child abuse,[9] both federal and state governments began to enact legislation lengthening the limitations periods for prosecuting child abuse cases.[10] With laws not always clearly fitting within one of the four *Calder* categories, the practice of extending criminal statutes of limitations has been a considerable "gray area"[11] in ex post facto jurisprudence over the past two decades.[12]

(singular) is meant to apply to both the state *and* federal provisions in the Constitution.

6. 3 U.S. (3 Dall.) 386, 390 (1798). Justice Chase considered ex post facto laws, prohibited within the words and the intent of the Constitution, to fit into one of four categories:

> 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*.

Id. For a more elaborate discussion of the four *Calder* categories and their treatment by the Supreme Court of the United States, see *infra* Part II.B.–C.

7. *See* Carmell v. Texas, 529 U.S. 513, 521–33 (2000) (describing *Calder*'s four categories as the relevant framework for analyzing an ex post facto issue); Collins v. Youngblood, 497 U.S. 37, 46 (1990) ("But the prohibition which may not be evaded is the one defined by the *Calder* categories.").

8. *See* R. Brian Tanner, Comment, *A Legislative Miracle: Revival Prosecutions and the Ex Post Facto Clauses*, 50 EMORY L.J. 397, 404 (2001) (arguing that the *Calder* criteria fail to advance a meaningful solution for uncertainties created through retroactive extensions of criminal statutes of limitations).

9. *See* Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 211 (2001) ("[S]ince the late 1970s, the problem of child sexual abuse has been 'discovered' as a malignant cultural secret . . . and elevated to the level of a 'national emergency.'").

10. *See* Alan L. Adlestein, *Conflict of the Criminal Statute of Limitations with Lesser Offenses at Trial*, 37 WM. & MARY L. REV. 199, 252 (1995) (explaining the trend of legislative enactments and stating that "[c]riminal statutes of limitations are thus flexible instruments of legislative policy and often reflect the social concerns of the particular time and locality").

11. Tanner, *supra* note 8, at 434.

12. *See id.* at 400 (labeling the *Calder* categories as "notoriously unhelpful in deter-

In 1993, California enacted a radical piece of legislation authorizing the prosecution of an individual for sexual abuse of children even when the statute of limitations previously governing the crime had long since expired.[13] Although other states enacted similar legislation during the 1980s and 1990s,[14] California's prosecution-reviving statute was the only such law consistently approved in its state courts.[15] In *Stogner v. California*,[16] the Supreme Court of the United States overruled the Court of Appeal of California by holding that the state statute authorizing the "revived" prosecution of a seventy-eight-year-old man for crimes that had been time-barred from prosecution for over twenty-two years was an unconstitutional ex post facto law.[17] The Court used *Stogner* as an opportunity to clarify the Ex Post Facto Clauses' application to criminal statutes of limitations, providing firm judicial guidance on a heated constitutional issue that had been left chiefly to lower state and federal courts to decide.[18]

This note examines the Court's decision in *Stogner*, including the controversies and probable impact of the holding. Part II reviews the history of ex post facto jurisprudence in the United States and explains the accepted categorization standard for determining ex post facto violations. Part III focuses on the California statute at issue, as well as the facts and procedural history of

---

mining whether an ex post facto violation [has] occur[red]"). Tanner further explains that "[c]ourts have consistently blurred the [*Calder*] analysis when deciding whether legislation that extends a criminal statute of limitations, *even to those charges already time-barred*, violates the ex post facto prohibition." *Id.* (emphasis added).

13. *The Supreme Court, 2002 Term—Leading Cases,* 117 HARV. L. REV. 268, 268 (2003) (referring to CAL. PENAL CODE § 803(g) (West Supp. 2004)).

14. *See generally* Gary M. Ernsdorff & Elizabeth F. Loftus, *Let Sleeping Memories Lie? Words of Caution About Tolling the Statute of Limitations in Cases of Memory Repression*, 84 J. CRIM. L. & CRIMINOLOGY 129, 150–53 (1993) (discussing legislative initiatives by states to extend, toll, or eliminate the statutory limitation periods applicable to childhood sexual offenses).

15. *See* People v. Frazer, 982 P.2d 180, 196–97 (Cal. 1999) (holding that reviving a time-barred prosecution does not implicate the ex post facto prohibition); *see also* Linda Greenhouse, *Justices Hear Debate on Extending a Statute of Limitations*, N.Y. TIMES, Apr. 1, 2003, at A14 (stating that other states' courts have rejected attempts by state legislatures to make similar revisions to statutes of limitations).

16. 123 S. Ct. 2446 (2003).

17. *Id.* at 2461.

18. *See* Pam Smith & Jahna Berry, *Cases Begin to Fall as Prosecutors, PDs React to Decision in* 'Stogner,' THE RECORDER (San Francisco), June 30, 2003, *available at* LEXIS, News & Business, Recrdr File (comparing the disappointment of concerned victims' advocates with the satisfaction of defense attorneys in response to *Stogner*).

Stogner. Part IV analyzes the holding in *Stogner*, highlighting the reasoning of the majority and dissenting opinions. Finally, Part V discusses the implications of the *Stogner* decision and the revised nature of ex post facto jurisprudence in the United States. More specifically, this note considers *Stogner*'s ramifications in light of current events confronting our society, ranging from clergymen molestation scandals to international terrorism.

II. EVOLUTION OF THE EX POST FACTO CONSTITUTIONAL PROHIBITIONS

A. *Influence of English Common Law Practices*

The modern constitutional prohibitions against ex post facto laws owe their existence to considerations drawn from the English common law.[19] That is not to say the Constitution's Ex Post Facto Clauses were based on a similar prohibition under common law. On the contrary, the authority to pass ex post facto laws in England admittedly belonged to the king, lords, and Parliament as "a part of the supreme power with which they ha[d] been clothed."[20] The English lawmakers' exercise of personal discretion served as the sole means to limit the practice.[21] The common law allowed for bills of attainder and similar acts to be used as "cruel and destructive weapons of personal or political vengeance"[22] against unsuspecting and often *innocent* people who could be executed without any form of a trial. The existence of such vindictive and invidious legislative practices in England served as a warning to the Framers of the Constitution—an example of how *not* to model the United States' rules on retroactive criminal laws.[23]

The desire to safeguard United States citizens against certain unfair common law practices likely motivated the Framers of the

---

19. *See* HENRY CAMPBELL BLACK, AN ESSAY ON THE CONSTITUTIONAL PROHIBITIONS AGAINST LEGISLATION IMPAIRING THE OBLIGATION OF CONTRACTS, AND AGAINST RETROACTIVE AND EX POST FACTO LAWS § 224, at 286 (1887).

20. WILLIAM P. WADE, A TREATISE ON THE OPERATION AND CONSTRUCTION OF RETROACTIVE LAWS, AS AFFECTED BY CONSTITUTIONAL LIMITATIONS AND JUDICIAL INTERPRETATIONS § 270, at 316 (1880).

21. *Id.*

22. BLACK, *supra* note 19, § 224, at 286.

23. *See id.*

Constitution to incorporate the ex post facto prohibitions.[24] Shortly after the drafting of the Constitution, the Supreme Court articulated the importance of honoring the prohibitions against ex post facto laws in the benchmark ex post facto case, *Calder v. Bull*.[25]

B. *The Supreme Court and* Calder v. Bull's *Ex Post Facto Categorization*

Decided in 1798, *Calder* has served as binding ex post facto authority for over two centuries.[26] Although the issue in *Calder*—whether a Connecticut statute that overturned the decision of a probate court and ordered a new hearing to determine the validity of a will constituted an ex post facto law[27]—involved *civil* consequences, the case was, nonetheless, monumental for ex post facto analysis in the criminal context.[28] The concurring Justices emphasized that the ex post facto analysis only applied in criminal cases.[29] More significantly, the majority opinion rebuked retroactive criminal punishments from the common law, expounded upon the importance of prohibiting criminal ex post facto laws in the United States, and devoted several pages to categorizing and describing four types of violations.[30]

Early into the Court's opinion, Justice Chase acknowledged the influence of the common law's use of harsh bills of attainder as the impetus for incorporating the Ex Post Facto Clauses into the Constitution.[31] Justice Chase argued that the Framers' knowledge of the injustice of the English common law's frequent use of malicious retroactive laws gave them greater caution in crafting the Constitution so as to avoid similar inequities in the United

---

24. *See id.* § 224, at 287.

25. 3 U.S. (3 Dall.) 386 (1798).

26. *See* Carmell v. Texas, 529 U.S. 513, 521–33 (2000).

27. *Calder*, 3. U.S. (3 Dall.) at 386–87.

28. *See id.* at 398–99 (Iredell, J., concurring) (pointing out that only criminal laws are subject to ex post facto scrutiny).

29. *Id.* at 397 (Paterson, J., concurring) (opining that the clause referred only "to crimes, pains, and penalties, and no further"); *id.* at 399 (Iredell, J., concurring) ("[T]he true construction of the prohibition extends to criminal, not to civil, cases.").

30. *See id.* at 388–91.

31. *Id.* at 389 (noting "[t]he prohibition against . . . making *any ex post facto laws* . . . very probably arose from the knowledge, that *the Parliament of Great Britain* claimed and exercised a power to pass *such laws*" to inflict unwarranted punishment).

States.[32] After mentioning the former practice in Great Britain of executing an individual for treason when his acts, at the time committed, did not constitute treason, Justice Chase explained that the federal and state ex post facto prohibitions were designed "[t]o prevent such, and similar, acts of violence and injustice."[33]

Justice Chase's justifications for strictly enforcing the Ex Post Facto Clauses were based upon a "social compact" formed by the people of the United States when they created the Constitution.[34] This social compact involved establishing justice, promoting the general welfare, securing the blessings of liberty, and protecting persons and property from violence.[35] An integral part of that social compact, and of democracy as a form of government, is to "determine and over-rule an *apparent and flagrant* abuse of *legislative* power . . . ."[36] Justice Chase held that permitting ex post facto laws would violate the social compact, amounting to "*political heresy*, altogether inadmissible in our *free republican governments*."[37]

Finally, Justice Chase recognized that the language of the prohibition—that neither the state nor the federal government shall pass any ex post facto law—necessarily required some explanation.[38] After all, "naked and without explanation, it is unintelligible, and means nothing."[39] Justice Chase, therefore, proffered four categories in an endeavor to "show *what law* is to be considered an *ex post facto law*, within the words and meaning of the prohibition in the *Federal* Constitution."[40] Each category was designed to encompass "manifestly *unjust and oppressive*" laws.[41] The *Calder* analysis has been interpreted such that when a statute possesses characteristics fitting into any *one* of the four categories, the statute "will be as obnoxious to [the Ex Post Facto Clause] as

32. *Id.*
33. *Id.*
34. *Id.* at 388.
35. *Id.*
36. *Id.*
37. *Id.* at 389.
38. *Id.* at 390.
39. *Id.*
40. *Id.*
41. *Id.* at 391.

though it possessed them all, expressed in clear and positive terms."[42]

1. Laws Criminalizing Acts Innocent When Done

Calder's first ex post facto category pertains to "[e]very law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action."[43] This language could arguably be interpreted as either: (1) describing only those actions by the criminal defendant that did not contravene any known law at the time they were committed; or (2) including both actions that were legal when committed *and* actions that were not legal when committed but had become unpunishable through a grant of amnesty or pardon (through the running of a statute of limitations, for example).[44] Most commonly, a statute fits into *Calder*'s first category if enacted by a legislature to remedy "past legislative errors or omissions," attaching criminal punishment to acts that were genuinely innocent and legal when done.[45]

2. Laws Aggravating or Enhancing an Already Defined Crime

A statute is ex post facto under *Calder*'s second category when it "*aggravates* a *crime*, or makes it *greater* than it was, when committed."[46] This type of statute changes the *character* of an act, such as changing an act that was a misdemeanor when committed to a felony after the alleged commission of the crime.[47] Similarly, a statute that graduates a crime to a higher criminal degree (changing second degree murder to first degree murder, for example) than it was when committed would be impermissibly ex post facto under *Calder*'s second category.[48] More fundamentally,

42. WADE, *supra* note 20, § 271, at 316.
43. *Calder*, 3 U.S. (3 Dall.) at 390.
44. Tanner, *supra* note 8, at 414.
45. WADE, *supra* note 20, § 272, at 317.
46. *Calder*, 3 U.S. (3 Dall.) at 390.
47. WADE, *supra* note 20, § 273, at 318.
48. *Id.*

a category-two statute inflicts a punishment upon a person not then subject to that punishment to any degree.[49]

3. Laws Retroactively Inflicting Greater Punishment Than Originally Allowed

The third *Calder* category applies to "[e]very law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed."[50] Category-three laws differ from category-two laws in that the former actually prescribe an additional, harsher punishment, while the latter impose a new label on the crime, to which a more severe punishment attaches.[51] When the statutory intent is "to add new rigors to the punishment of old offences, the statute is declared unconstitutional" under the third *Calder* category.[52]

4. Laws Altering the Rules of Evidence in Order to Facilitate a Conviction

The fourth ex post facto category Justice Chase provided was for "[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*."[53] This category most often applies to situations where under the new statute less evidence or a lesser quality of evidence is used to convict a person than the evidence required to convict a person for the same act at the time of the commission of the crime.[54] Category four was founded partly on the premise that "[t]he right of the accused to an impartial trial could never be practically guaranteed, so long as the evidence by which his guilt could be established was completely within the control of the law-making power."[55]

---

49. *Id.* ("[T]he enactment [of a category-two statute] simply gives to the proscribed act a new designation, to which [a] harsher punishment has already been annexed . . . .").

50. *Calder*, 3 U.S. (3 Dall.) at 390.

51. WADE, *supra* note 20, § 273, at 318.

52. *Id.* § 273, at 318–19.

53. *Calder*, 3 U.S. (3 Dall.) at 390.

54. WADE, *supra* note 20, § 280, at 326–27.

55. *Id.* § 280, at 327.

C. *Virtual Unanimity: Ex Post Facto Jurisprudence After* Calder v. Bull

In the more than two hundred years since the *Calder* decision, no case has overruled Justice Chase's four-category proposition as being the authoritative legal framework for determining and categorizing ex post facto violations.[56] As such, there have not been many changes in the standard for ex post facto analysis, though several notable Supreme Court cases have discussed and applied the *Calder* analysis to ex post facto determinations.

Following *Calder*, *Cummings v. Missouri*[57] was the next major case to address the Ex Post Facto Clauses.[58] *Cummings* considered a Missouri constitutional provision enacted shortly after the Civil War that required clergymen to take an oath declaring that they never aided or comforted individuals sympathetic to the South during wartime.[59] In a strong affirmation of *Calder*'s authority, the Court began its ex post facto analysis by declaring that Justice Chase's four categories had been "substantially adopted as the law."[60] According to the Court, the Missouri constitutional provisions assumed that there were persons in Missouri who were guilty of some of the acts designated and, therefore, altered the rules of evidence by subverting the presumptions of innocence.[61] Moreover, the provisions were aimed at past acts, not future acts, which helped the Court arrive at the inescapable con-

---

56. *See* David Stout, *Court Limits the Prosecution of Sexual Abusers of Children*, N.Y. TIMES, June 27, 2003, at A16 (stating that, although *Calder* was decided in 1798, its interpretation of the ex post facto prohibitions is "still regarded as definitive").

57. 71 U.S. (4 Wall.) 277 (1866).

58. Melisa L. Rockhill, Note, *Priests, Pedophiles, and Other Child Molesters: California Says Father Time Won't Help Them Now*, 24 WHITTIER L. REV. 1097, 1105 (2003).

59. *Cummings*, 71 U.S. (4 Wall.) at 284. The Court felt that the relevant clauses in the Missouri Constitution were intended:

> to operate upon parties who, in some form or manner, by action or words, directly or indirectly, had aided or countenanced the Rebellion, or sympathized with parties engaged in the Rebellion, or had endeavored to escape the proper responsibilities and duties of a citizen in time of war; and they were intended to operate by depriving such persons of the right to hold certain offices and trusts, and to pursue their ordinary and regular avocations.

Id. at 327. The Court interpreted the natural effect of these clauses to be "absolute and perpetual" deprivation of several rights enjoyed by U.S. citizens, which amounted to punishment imposed for past acts. *Id.*

60. *Id.* at 300.

61. *Id.* at 328. The effect of the clauses placed them squarely within *Calder*'s fourth category.

clusion that Missouri was in violation of the Ex Post Facto Clause.[62]

Another significant ex post facto decision was *Beazell v. Ohio*.[63] *Beazell* involved an issue of misjoinder, where the Ohio statute applicable at the time of the defendant's alleged criminal act provided for automatic severance from a co-defendant upon a motion by the defendant.[64] Before the two *Beazell* defendants were indicted, an amendment to the statute made severance a discretionary matter with the trial court.[65] The Court ultimately held that the statute did not violate the Ex Post Facto Clause.[66] The *Beazell* holding, nevertheless, constituted further approval of *Calder*'s ex post facto categories as the standard for judicial analysis.[67] *Beazell*, in fact, was perfectly consistent with *Cummings* and *Calder* because the Ohio legislature did not enact the statute under scrutiny to facilitate convictions that could not be obtained without the enactment of the statute.[68] Instead, the statute served to restore a mode of trial found to be satisfactory at the common law.[69]

---

62. *Id.* at 327–28. The Court explained that "some of the acts to which the expurgatory oath [was] directed were not offences at the time they were committed." *Id.* at 327. For example, prior to the incorporation of the constitutional clauses, it was not a crime to leave the State of Missouri in order to avoid being enrolled or drafted into military service. *Id.* Therefore, the Court opined, the clauses fit into *Calder*'s first category by imposing a punishment for an act not punishable at the time it was committed. *Id.*

63. 269 U.S. 167 (1925).

64. *Id.* at 168. The original statute read: "When two or more persons are jointly indicted for a felony, on application to the court for that purpose, each shall be separately tried." OHIO REV. CODE ANN. § 13,677 (Anderson 1921).

65. *Beazell*, 269 U.S. at 168–69. The amendment provided:

> When two or more persons are jointly indicted for a felony, except a capital offense, they shall be tried jointly, unless the court for good cause shown, on application therefore by the prosecuting attorney, or one or more of said defendants order that one or more of said defendants shall be tried separately.

OHIO REV. CODE ANN. § 13,677 (Anderson 1926). In another section, the amended statute applied to acts committed prior to the amendment's enactment, thereby affecting both *Beazell* defendants. *Beazell*, 269 U.S. at 169. The *Beazell* co-defendants wanted two separate trials—which, upon their motion, would have been automatic under the originally applicable statute—because their defenses would be different. *Id.* Furthermore, each man argued that he "would be prejudiced by the introduction of evidence admissible against his co-defendant, but inadmissible as to him . . . ." *Id.*

66. *Id.* at 171.

67. *See id.* at 170 (acknowledging the validity of *Calder*'s fourth category prohibiting laws that alter the rules of evidence).

68. Rockhill, *supra* note 58, at 1106.

69. *Id.*

Weaver v. Graham[70] was another example of the Court's "faithful adherence" to *Calder*'s ex post facto framework.[71] The Court in *Weaver* cited *Calder* several times and borrowed Justice Chase's ex post facto analysis.[72] *Weaver* involved a Florida statute that effectively reduced the accumulation of monthly "gain-time" credits for prisoners who had already accumulated a set amount of credits before the statute's enactment.[73] The prisoner-appellant alleged that the statute would require him to serve an additional two years in excess of his original fifteen-year sentence.[74] Answering the "critical question" at issue, the Court opined that the law changed the legal consequences of acts completed before its effective date.[75] The Court held that retroactive reduction of the availability of gain-time credits for prisoners had the effect of increasing punishment, thereby fitting into *Calder*'s third category.[76]

The Court's recent holding in *Carmell v. Texas*[77] served as a "resounding amplification" of the foregoing decisions, and of the principles espoused in *Calder* in particular.[78] *Carmell* dealt with an amendment to a Texas "outcry" statute that considerably relaxed previous corroboration requirements for victims of sexual abuse.[79] Recognizing *Calder*'s prohibition of laws altering the

---

70. 450 U.S. 24 (1981).

71. Rockhill, *supra* note 58, at 1107.

72. *Weaver*, 450 U.S. at 28–33.

73. *Id.* at 26–27. The original statute offered the following guidelines: "'(a) Five days per month off the first and second years of his sentence; (b) Ten days per month off the third and fourth years of his sentence; and (c) Fifteen days per month off the fifth and all succeeding years of his sentence.'" *Id.* at 26 (quoting FLA. STAT. ANN. § 944.27(1) (West 1975) (repealed 1978). The new statute reduced the benefits for prisoners: "(a) Three days per month off the first and second years of the sentence; (b) Six days per month off the third and fourth years of the sentence; and (c) Nine days per month off the fifth and all succeeding years of the sentence.'" *Id.* (quoting FLA. STAT. ANN. § 944.275(1) (West 1979)).

74. *Id.* at 27.

75. *Id.* at 31.

76. *Id.* at 35–36 ("Thus, the new provision constricts the inmate's opportunity to earn early release, and thereby makes more onerous the punishment for crimes committed before its enactment.").

77. 529 U.S. 513 (2000).

78. *See* Rockhill, *supra* note 58, at 1108.

79. *Carmell*, 529 U.S. at 517–19. Under the originally applicable statute, a child victim exception to the traditional corroboration requirement existed for victims under the age of fourteen. *Id.* at 517. The exception allowed for a conviction based upon a young victim's testimony alone, without any corroborating evidence. *Id.* The amendment extended the child victim exception to victims under eighteen years of age. *Id.* at 518. That amendment was critical for four of the defendant's counts, since the victim was more than fourteen years old at the time of the alleged offenses. *Id.* at 518–19. In short, the Court propounded that the validity of these four counts depended upon the application of the new

quantum of evidence necessary to convict as the ex post facto category at issue,[80] the Court "resurrected the fourth *Calder* category . . . that lower courts considered shorn by *Beazell* . . . ."[81] The Court rejected the notion that the decision in *Collins v. Youngblood*,[82] which cited the language of *Beazell*, had "effectively cast out [*Calder*'s] fourth category."[83] The State of Texas pointed out a section in the *Collins* opinion quoting a passage from *Beazell* that avoided any reference to alterations in the legal rules of evidence—*Calder*'s fourth category.[84] However, the Court in *Carmell* offered additional language from *Beazell* that it felt *distinguished*, rather than *overruled*, *Calder*'s fourth category.[85] Decided in 2000, *Carmell* explained that *Calder*'s four categories had long been "embraced by contemporary scholars,"[86] had been labeled by the Court in *Collins* as the "exclusive definition" of ex post facto laws,[87] and still constituted the modern standard upon which to base an ex post facto determination.[88]

D. *An Ex Post Facto Dilemma Emerges: Reviving Time-Barred Criminal Prosecutions Through Legislative Extension of Statutes of Limitations*

The purpose of criminal statutes of limitations is two-fold: (1) to protect the defendant from an unfair trial (due, possibly, to deteriorated evidence) and a potentially undeserved punishment; and (2) to protect "society from unprosecuted offenders, by using the sanction of preclusion to encourage law enforcement officials

---

law or the old law to the case, which further depended upon whether the new law violated the Ex Post Facto Clause. *Id.* at 519.

80. *Id.* at 532 (discussing how the Texas statute effectively reduced the quantum of evidence required to convict). The Court admitted that "*Calder*'s fourth category addresse[d] this concern precisely." *Id.*

81. Rockhill, *supra* note 58, at 1109.

82. 497 U.S. 37 (1990).

83. *Carmell*, 529 U.S. at 537. Responding to the claim that the Court in *Collins* had eliminated *Calder*'s fourth category, the Court emphasized that "*Collins* held no such thing." *Id.*

84. *Id.* at 538 (citing *Collins*, 497 U.S. at 43 n.3).

85. *Id.* (pointing to *Beazell*'s acknowledgement that "the law at issue in that case did not change '[t]he quantum and kind of proof required to establish guilt.'" (quoting Beazell v. Ohio, 269 U.S. 167, 170 (1925)).

86. *Id.* at 524.

87. *Id.* at 538.

88. *See id.* at 552.

to promptly investigate and prosecute crime."[89] However noble their purpose may be, criminal statutes of limitations are not mandatory; "they are solely a matter of legislative choice. Accordingly, the time periods in these statutes can be changed at the will of the legislature or can be eliminated entirely."[90]

1. Distinguishing Unexpired and Expired Statutes of Limitations

As a subtopic of ex post facto jurisprudence in the United States, the modern trend of lengthening criminal statutes of limitations has come to pose somewhat of a challenge to the judicial system.[91] To clarify, all federal circuits that have ruled on the issue have upheld the constitutionality of extending an *unexpired* criminal statute of limitations.[92] The constitutional uncertainty arises when a legislature enacts a statute permitting the revival of a previously time-barred prosecution through the retroactive lengthening of a criminal statute of limitations.[93]

2. Revived Prosecutions and the *Calder* Categories: One Size Does *Not* Fit All

Shortly after its inception, the Supreme Court in *Calder* attempted to devise a comprehensive list of categories of legislation

---

89. Adlestein, *supra* note 10, at 261–62; *see also* Andrew C. Bernasconi, Comment, *Beyond Fingerprinting: Indicting DNA Threatens Criminal Defendants' Constitutional and Statutory Rights*, 50 AM. U. L. REV. 979, 995 (2001) (mentioning, as part of the purpose for a criminal statute of limitations, the preservation of a defendant's right "to assemble evidence and prepare a vigorous defense").

90. Adlestein, *supra* note 10, at 250–51.

91. *See* Tanner, *supra* note 8, at 400 (opining that the practice of lengthening criminal statutes of limitation falls within a "problem category").

92. United States v. Grimes, 142 F.3d 1342, 1351 (11th Cir. 1998) ("[A]ll of the circuits . . . have uniformly held that extending a limitations period before the prosecution is barred does not violate the *Ex Post Facto* Clause."); United States v. Taliaferro, 979 F.2d 1399, 1402 (10th Cir. 1992) ("[T]he application of an extended statute of limitations to offenses occurring prior to the legislative extension, where the prior and shorter statute of limitations has not run as of the date of such extension, does not violate the *[E]x [P]ost [F]acto* [C]lause."); United States v. Richardson, 512 F.2d 105, 106 (3d Cir. 1975) ("Congress, of course, has the power to extend the period of limitations without running afoul of the [E]x [P]ost [F]acto [C]lause, provided the [original] period has not already run."). For a more extensive list of federal cases that have ruled on the issue, see Tanner, *supra* note 8, at 406 n.56.

93. *See* Tanner, *supra* note 8, at 407–09 (describing the difficulty of categorizing revival prosecution statutes within *Calder*'s framework, which resulted in the lack of a firm constitutional rule on point).

that would constitute ex post facto violations.[94] Unfortunately for the evolution of ex post facto jurisprudence, the *Calder* categories were not "sufficiently detailed to allow for ready categorization of every possible statute that might come before a court."[95] Deciding how to fit a prosecution-reviving statute into one of *Calder*'s categories exemplifies the difficulty inherent in ex post facto analysis of statutes of limitations.[96]

3. A Historical Lack of Respect for Statutes of Limitations as a Contributing Factor to Prosecution Revivals

Calder's categorization approach has served as a "stumbling block" for courts attempting to label extensions of criminal statutes of limitations within the *Calder* paradigms.[97] Perhaps courts' tendencies to blur the *Calder* analysis as applied to legislation extending criminal statutes of limitations can be attributed to a historical lack of respect for criminal statutes of limitations.[98] The existence of a criminal mens rea is irrelevant in determining the applicability of a criminal statute of limitations as a defense to a particular charge.[99] That is to say, a statute of limitations might render a guilty defendant immune from prosecution simply because of a *theoretical* lack of evidence due to the passage of time rather than an *actual* lack of incriminating evidence or the requisite mental state.[100] Since this defensive tool is "completely separate from the criminal nature of an act, many courts throughout history accorded statutes of limitation little respect as a valid defense."[101] Also, the English common law did not typically recognize criminal statutes of limitations.[102] Parliament very rarely

---

94. *See supra* Part II.B.1.–4.

95. Tanner, *supra* note 8, at 408.

96. *See id.* (explaining that the incompleteness of *Calder*'s categories has resulted in the denial of ex post facto protection to some defendants).

97. *See id.* at 400.

98. *See id.* at 405 (suggesting that many courts throughout history have not recognized a defense based on the statute of limitations as valid).

99. *See id.* at 404–05.

100. *See id.* at 407. A "theoretical lack of evidence" should be taken to represent the presumption that, as decades have passed, evidence deteriorates such that a defendant would be unable to adequately defend himself or herself. *See id.*

101. *Id.* at 405.

102. Adlestein, *supra* note 10, at 253–54.

promulgated statutes of limitations, and only for a limited number of crimes.[103]

The criminal statute of limitations has been viewed throughout history as a non-essential element of criminal justice not required by the Due Process Clauses of the Fifth[104] or Fourteenth[105] Amendments to the Constitution. By the end of the twentieth century, states regularly manipulated criminal statutes of limitations to address social concerns.[106] The passage of Penal Code section 803(g)[107] in 1993 by California's legislature tested the limits of constitutionality by authorizing the revival of previously time-barred criminal prosecutions.[108] Some California courts approved of the constitutional validity of the new statute, even in cases where a prosecution time-barred for many years had been revived.[109] Other courts held that the statute could not be applied retroactively without violating the Ex Post Facto Clause.[110] The Supreme Court of California resolved the split among the California appellate circuits by holding in *People v. Frazer*[111] that statutory revival of a time-barred prosecution would withstand ex post facto analysis.[112]

Having "never squarely faced the problem" of criminal statutes of limitations under the federal Ex Post Facto Clauses,[113] the Supreme Court of the United States granted certiorari in *Stogner v. California*[114] in order to consider the constitutionality of reviving a previously time-barred prosecution and to clarify modern ex post facto jurisprudence.[115]

---

103. *Id.* at 254.

104. U.S. CONST. amend. V.

105. U.S. CONST. amend. XIV, § 1.

106. *See* Adlestein, *supra* note 10, at 252.

107. CAL. PENAL CODE § 803(g) (West Supp. 2004).

108. The California legislature made this perfectly clear when it added a provision in 1996 explicitly stating that the statute "shall revive" a time-barred prosecution. *Id.* § 803(g)(3)(A). For a more detailed discussion of the statute, see *infra* Part III.A.

109. *See, e.g.*, People v. Maloy, 44 Cal. Rptr. 2d 691, 700 (Cal. Ct. App. 1995) (arguing that retroactive application would not necessarily offend the Ex Post Facto Clause).

110. *See, e.g.*, People v. Sowers, 48 Cal. Rptr. 2d 250, 256 (Cal. Ct. App. 1995) (holding that a statute extending a criminal limitations period could only lengthen an *unexpired* limitations period).

111. 982 P.2d 180 (Cal. 1999).

112. *Id.* at 195–98.

113. Tanner, *supra* note 8, at 406.

114. 123 S. Ct. 2446 (2003).

115. *See id.* at 2449.

III. HISTORY OF THE *STOGNER* CASE

A. *The Impetus for California's Enactment of Penal Code Section 803(g)*

California's enactment of a prosecution-reviving statute "grew out of an explosion of public awareness about sexual abuse that began in the early 1980s . . . ."[116] Around that time, legislatures nationwide began to realize that child victims of sexual abuse frequently refrain from reporting their abuse to authorities because "they are easily manipulated by offenders in positions of authority and trust, and because children have difficulty remembering the crime or facing the trauma it can cause."[117] States that limited the time for prosecuting child sex abuse cases began to significantly augment the time period for filing charges after the abuse.[118] These longer statutes of limitations were "based on the apparent premise that both past and future sex crimes against children would otherwise go largely unpunished."[119]

Serious and violent crime rates in California had reached record levels by the early 1990s and were of great concern to the state's citizens.[120] The nationally publicized kidnapping and murder of twelve-year-old Polly Klaas by a repeat, violent sex offender[121] produced considerable societal momentum to call for stricter criminal legislation.[122] The underlying concern over the inability of young victims of sex crimes to come forward in a timely manner prompted the California legislature to extend the

116. Richard Winton et al., *Bans on Gay Sex Ruled Unconstitutional; California Molestation Law Struck Down; Abuse: Hundreds of Convictions Will Be Tossed Out and Prosecutions Dropped, Some Involving Priests*, L.A. TIMES, June 27, 2003, at A1.

117. *Frazer*, 982 P.2d at 183–84.

118. *Id.* at 184.

119. *Id.*

120. James A. Ardaiz, *California's Three Strikes Law: History, Expectations, Consequences*, 32 MCGEORGE L. REV. 1, 1 (2000) (discussing the political and social factors influencing California's legislature and voters); *see also* Rebecca Gross, Comment, *The "Spirit" of the Three Strikes Law: From the* Romero *Myth to the Hopeful Implications of* Andrade, 32 GOLDEN GATE U. L. REV. 169, 170–71 (2002) (describing specific criminal cases that spurred the enactment of more strict criminal legislation).

121. *See* Gross, *supra* note 120, at 170 (pointing out that the murderer's prior convictions were burglary, sexual assault on a woman, and abducting a woman and forcing her to withdraw money from her bank account).

122. *Id.* at 170–71.

statute of limitations for sex crimes against children, regardless of whether or not the limitations period had already expired.[123]

Under California Penal Code section 803(g),

> a previously committed sex-related child abuse was subject to prosecution under the new limitations period on three conditions. First, a victim of abuse must have reported the act to the police. Second, the victim's allegations must be supported by clear and convincing evidence. Third, prosecution of the victim's allegations must start within a year of his or her report.[124]

In 1996, California's legislature added a provision to clarify that Penal Code section 803(g) revived crimes for which the statute of limitations had already expired.[125]

B. *Facts and Procedural History of* Stogner

In 1998, two adult sisters were speaking to police officers investigating allegations of child abuse within the sisters' extended family.[126] During their conversation, the sisters accused their father of molesting them when they were children.[127] Later in 1998, a California grand jury indicted Marion Stogner, the girls' father, for sex-related crimes he allegedly perpetrated against his daughters from 1955 to 1973.[128] At the time the crimes were allegedly committed, the statute governing prosecutions set forth a three-year statute of limitations, which had expired over twenty-two years before Stogner's indictment in 1998.[129]

Stogner moved for the complaint's dismissal on the grounds that the Ex Post Facto Clause disallowed the revival of a previously time-barred prosecution.[130] The trial court held that reviving a time-barred action was unconstitutional.[131] The Court of

---

123. *Frazer*, 982 P.2d at 184.

124. Christine Kim, Note, *Recent Court Decisions Impacting Juveniles*, 7 U.C. DAVIS J. JUV. L. & POL'Y 373, 393 (2003).

125. CAL. PENAL CODE § 803(g)(3)(A) (West Supp. 2004) ("This subdivision . . . *shall revive* any cause of action barred by [prior statutes of limitations] . . . .") (emphasis added).

126. Stout, *supra* note 56, at A16.

127. *Id.*

128. Stogner v. California, 123 S. Ct. 2446, 2449 (2003).

129. *Id.*

130. *Id.*

131. *Id.*

Appeal of California reversed, citing *People v. Frazer*,[132] a recent and contrary decision by the Supreme Court of California.[133] Stogner moved to dismiss his indictment on the grounds that his indictment violated both the Ex Post Facto Clause and the Due Process Clause.[134] The trial court denied Stogner's motion, and the Court of Appeal of California upheld the denial.[135]

The Supreme Court of the United States granted certiorari and overruled the Court of Appeal of California.[136] In a five to four decision written by Justice Breyer,[137] the Court held that "a law enacted after expiration of a previously applicable limitations period violates the *Ex Post Facto* Clause when it is applied to revive a previously time-barred prosecution."[138]

IV. ANALYSIS

A. *The Majority Opinion*

Revealing its conclusion in the first paragraph of its analysis, the Court opined that the features of California Penal Code section 803(g) produced the kind of retroactivity forbidden by the Constitution.[139] Justice Breyer based the first part of his analysis on three observations that supported the Court's holding. First, the statute at issue "threaten[ed] the kinds of harm that, in [the] Court's view, the *Ex Post Facto* Clause [sought] to avoid."[140] Second, the "statute [fell] literally within the categorical descriptions of *ex post facto* laws set forth by Justice Chase . . . in *Calder v. Bull*."[141] Third, "numerous legislators, courts, and commentators

132. 982 P.2d 180 (Cal. 1999).

133. *Stogner*, 123 S. Ct. at 2449.

134. *Id.*

135. *Id.*

136. *Id.* at 2461.

137. Justice Breyer's opinion was joined by Justices Stevens, O'Connor, Souter, and Ginsburg. *Id.* at 2448.

138. *Id.* at 2461.

139. *Id.* at 2449. In particular, Justice Breyer referred to three problematic aspects of the California statute: (1) its creation of a new criminal limitations period that extended the time for prosecution; (2) its authorization of criminal prosecutions that were time-barred; and (3) its enactment after prior limitations periods for Stogner's alleged offenses had expired. *Id.*

140. *Id.*

141. *Id.* at 2450.

have long believed it well settled that the *Ex Post Facto* Clause forbids resurrection of a time-barred prosecution."[142] Justice Breyer devoted the final part of his opinion to rebutting the dissent's stern critique of the Court's holding.[143]

1. Harm at Issue Prohibited by the Ex Post Facto Clause

The Court made it clear that California's statute threatened the type of "'manifestly *unjust and oppressive*' retroactive effects" prohibited by the Ex Post Facto Clause.[144] The Court cited Judge Learned Hand's observation that extending a limitations period after a state "has assured 'a man that he has become safe from its pursuit . . . seems to most of us unfair and dishonest.'"[145] The Court noted that in such a situation "the government has refused 'to play by its own rules,'"[146] and "has deprived the defendant of the 'fair warning'[147] that might have led him to preserve exculpatory evidence."[148] Furthermore, allowing a legislature "to pick and choose when to act retroactively, risks both 'arbitrary and potentially vindictive legislation'" that is detrimental to the goals of a democratic society.[149]

2. Fitting Within *Calder*'s Ex Post Facto Framework

To begin the Court's *Calder* analysis, Justice Breyer explained that the categorization approach Justice Chase conceived in *Calder v. Bull*[150] is still an authoritative account of the Ex Post Facto Clauses.[151] Justice Breyer paid particularly close attention to the

---

142. *Id.* at 2452. The Court focused its entire analysis on the ex post facto aspects of Stogner's arguments. The majority's only mention of due process concerns was in a citation to an Oregon appellate court case, wherein the court held that a law resurrecting a time-barred criminal case *did* violate the Due Process Clause. *Id.* at 2453 (citing State v. Cookman, 873 P.2d 335, 338 (Or. Ct. App. 1994)).

143. For a discussion of the majority's response to the dissent, see *infra* Part IV.C.

144. *Stogner*, 123 S. Ct. at 2449 (quoting Calder v. Bull, 3 U.S. (3 Dall.) 386, 391 (1798)).

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

146. *Id.* at 2450 (quoting Carmell v. Texas, 529 U.S. 513, 533 (2000)).

147. *Id.* (quoting Weaver v. Graham, 450 U.S. 24, 28 (1981)).

148. *Id.* (citation omitted).

149. *Id.* (quoting *Weaver*, 450 U.S. at 29).

150. 3 U.S. (3 Dall.) 386 (1798).

151. *Stogner*, 123 S. Ct. at 2450 (citing *Carmell*, 529 U.S. at 539).

second category involving laws that *"aggravate[] a crime, or make[] it greater than it was, when committed."*[152] The Court reasoned that, in the context of Parliament's earlier abusive acts, Justice Chase understood his second category to refer to the infliction of punishment where the party was not, by law, liable to that punishment to any degree.[153] Justice Breyer interpreted Justice Chase's discussion of parliamentary practices as an alternative means of defining *Calder's* second category.[154] As applied to Stogner's situation, after the original statute of limitations had expired, Stogner was not liable to any punishment. The Court held that California's new statute aggravated Stogner's crime because the law imposed a punishment for past criminal conduct that was not subject to prosecution at the time the legislature promulgated the new law.[155] The Court referred to a Supreme Court of New Jersey case[156] that dealt with a similar prosecution-reviving statute in which the Court labeled *Calder*'s second category as an exact fit for the statute at issue.[157]

As a final piece of authority regarding the applicability of *Calder*'s second category to California's statute, the Court referenced Justice Chase's discussion of certain Acts of Parliament.[158] Parliament sometimes passed laws banishing certain individuals accused of treason.[159] However, those laws were enacted after the crimes had been committed under circumstances where banishment was not a form of penalty that could be imposed by the courts.[160] That common law practice, like California's statute, "enabled punishment where it was not otherwise available 'in the ordinary course of law.'"[161] This was the type of vice that, accord-

152. *Id.* (quoting *Calder*, 3 U.S. (3 Dall.) at 390).

153. *Id.* at 2450–51.

154. *Id.* at 2451 ("[T]his understanding is consistent, in relevant part, with Chase's second category examples—examples specifically provided to illustrate Chase's *alternative* description of laws 'inflict[ing] *punishments*, where the party was not, by *law*, liable to *any punishment*.'" (quoting *Calder*, 3 U.S. (3 Dall.) at 389) (citation omitted)).

155. *Id.*

156. Moore v. State, 43 N.J.L. 203, 217 (1881).

157. *Stogner*, 123 S. Ct. at 2451.

158. *Id.* at 2451–52.

159. *Id.* at 2451.

160. *Id.*

161. *Id.* (quoting 2 R. WOODDESON, A SYSTEMATICAL VIEW OF THE LAWS OF ENGLAND 638 (1792)).

ing to the Court, corresponded with the purpose of Justice Chase's second category of ex post facto laws.[162]

Justice Breyer next explained that, in finding that California's law fell within the terms of *Calder*'s second category, the Court was not denying that the law might fall within another category.[163] The Court discussed the likely applicability of *Calder*'s fourth category dealing with laws altering the legal rules of evidence by diminishing "'the quantum of evidence required to convict.'"[164] The Court described a statute of limitations as "a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict."[165] As the Court reasoned, that interpretation of the purpose of a statute of limitations rests on evidentiary concerns that the passage of time causes memories to fade, evidence to disappear, and witnesses to be unavailable.[166] Consequently, reviving a time-barred prosecution eliminates the presumption that an act cannot be prosecuted, by allowing a person to be convicted using a quantum of evidence that was legally insufficient at the time the new law was enacted.[167] Arguably, therefore, California's law fits into *Calder*'s fourth category.[168] Nonetheless, the Court declined to hold that the law fit into *Calder*'s fourth category, because the statute satisfied *Calder*'s second category.[169]

3. A "Long Line of Authority"

The Court's third source of support for its holding was a long line of authority in the form of legislators, courts, and commentators.[170] For example, in the years following the Civil War, various congressmen "rejected a bill that would have revived time-barred

---

162. *Id.*

163. *Id.* at 2452.

164. *Id.* (quoting Carmell v. Texas, 529 U.S. 513, 532 (2000)).

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* ("[T]he new law would 'violate' previous evidence-related legal rules by authorizing the courts to 'receive evidence . . . which the courts of justice would not [previously have] admit[ted]' as sufficient proof of a crime." (citation omitted)).

169. *Id.*

170. *Id.* at 2452, 2455.

prosecutions" for wartime treason.[171] In their minds, such legislative retroactivity "threatened an injustice tantamount to 'judicial murder.'"[172] Additionally, the Court cited more than twenty state supreme court decisions holding that the revival of time-barred prosecutions violated the Ex Post Facto Clause.[173] Perhaps most persuasive was the Court's observation that courts upholding extensions of unexpired statutes of limitations had consistently distinguished such statutes from prosecution-reviving statutes.[174] According to Justice Breyer, courts' efforts to distinguish unexpired statutes from expired statutes suggested "a presumption that revival of time-barred criminal cases is *not* allowed."[175]

B. *The Dissenting Opinion*

Justice Kennedy's lengthy dissent, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, attacked virtually every argument found in the majority opinion.[176] The dissent based its critique primarily on alternative interpretations of precedent, history, and policy issues.[177]

---

171. *Id.* at 2452.

172. *Id.* at 2453 (quoting CONG. GLOBE, 39th Cong., 2d Sess. 69 (1866)).

173. *Id.*

174. *Id.*

175. *Id.* Supporting the historical presumption that reviving time-barred cases is not allowed, the Court noted that courts at both federal and state levels have held that the extension of existing limitations periods is not an ex post facto violation "provided," "so long as," "because," or "if" the prior limitations periods have not expired. *Id.* As an example of a federal court promoting this view, the Court cited, among others, *United States v. Madia*, 955 F.2d 538, 540 (8th Cir. 1992) ("'Congress, of course, has the power to extend the period of limitations without running afoul of the *ex post facto* clause, *provided* the [original] period has not already run.'" (second emphasis added) (quoting United States v. Richardson, 512 F.2d 105, 106 (3d Cir. 1975))). The Court also offered examples of state courts that used similar language:

> There appears also to be widespread agreement that a legislative body can extend the period of limitations as to criminal offenses which occurred prior to the effective date of the change without violating the constitutional prohibition against *ex post facto* laws, *so long as* the extended period does not apply to any case in which the accused has acquired, as of the effective date of the change, a right to acquittal through the running of the original statute.

People v. Anderson, 292 N.E.2d 364, 366 (Ill. 1973) (second emphasis added). Logically, the limiting words suggest that the legislation would be ex post facto if the prior limitations period had already expired.

176. *Stogner*, 123 S. Ct. at 2461 (Kennedy, J., dissenting).

177. *See id.* at 2461–72 (Kennedy, J., dissenting).

1. Shoehorning into the *Calder* Framework

Justice Kennedy's first objection was that the Court tried to force the California statute into *Calder*'s second category when it did not logically fit.[178] According to Justice Kennedy, "[a] law which does not alter the definition of the crime but only revives prosecution does *not* make the crime 'greater than it was, when committed.'"[179] The dissent argued that the Court's "long line of authority" supporting its *Calder* categorization of the California law was inadequate and misleading.[180] Justice Kennedy pointed out that of the twenty-two cases the Court cited to support its interpretation of *Calder*'s second category, only four had to decide whether a revival of expired prosecutions was constitutional—the issue posed by *Stogner*.[181] The dissent attempted to discredit the importance of those four decisions by distinguishing them from *Stogner*.[182] For example, Justice Kennedy noted the Court's reliance on *State v. Sneed*,[183] which recognized that retroactively lengthening a criminal statute of limitations had the effect of reviving the right of action and would be an ex post facto violation.[184] Justice Kennedy argued that *Sneed*'s unreasoned three-sentence-long analysis "scarcely support[ed] the majority's novel interpretation of *Calder's* second category."[185]

In Justice Kennedy's view, the Court has traditionally adhered to an interpretation of *Calder*'s second category that the majority's analysis distorted.[186] The second category, the dissent argued, prohibited only "those retroactive statutes which 'affect the criminal quality of the act charged [by] chang[ing] the legal definition of the offense.'"[187] The California statute, however, only

178. *Id.* at 2461. (Kennedy, J., dissenting).

179. *Id.* (Kennedy, J., dissenting) (emphasis added).

180. *Id.* (Kennedy, J., dissenting) ("The Court's list of precedents is less persuasive than it may appear at a first glance." (citation omitted)).

181. *Id.* (Kennedy, J., dissenting).

182. *Id.* at 2461–64 (Kennedy, J., dissenting). Justice Kennedy noted that the Court's cited precedent "flatly contradict[s]" its own arguments. *Id.* at 2462 (Kennedy, J., dissenting).

183. 25 Tex. 66 (1860).

184. *Id.* at 67.

185. *Stogner*, 123 S. Ct. at 2462 (Kennedy, J., dissenting).

186. *Id.* at 2465 (Kennedy, J., dissenting) ("The Court's new definition not only distorts the original meaning of the second *Calder* category, but also threatens the coherence of the overall *ex post facto* scheme.").

187. *Id.* (Kennedy, J., dissenting) (quoting Beazell v. Ohio, 269 U.S. 167, 170 (1925)).

changed the time period during which Stogner could be prosecuted; it did not change the *criminal quality* of the offense.[188] Furthermore, the dissent opined that the majority's use of *Calder*'s "alternative description" of the second category could not be viewed as classifying the California statute within the *official* second category.[189]

2. Misreading the Relevant History

The dissent strongly disputed the Court's version of the British parliamentary history to which *Calder* referred. Justice Kennedy argued that the Court's use of banishments as an example of a common law practice fitting within *Calder*'s second category was "not the most logical" explanation of history.[190] Since *Calder*'s second category only concerns laws which change the nature of the offense, subjecting the offender to increased punishment, the Court's banishment discussion was simply untrue.[191] After all, Parliament had the power to pass acts sanctioning banishment as a punishment for treason.[192] "By law, then, a charge of high treason would have made [individuals] liable to banishment, which is inconsistent with [*Calder*'s] formulation."[193] Overall, the dissent felt that the majority's "misconstruction of [*Calder*'s] historical examples [took] the second category out of [the] logical continuum."[194]

3. Public Policy

The dissent's most passionate argument was, perhaps, its appeal to public policy.[195] To demonstrate that California's law was

188. *Id.* (Kennedy, J., dissenting).

189. *Id.* (Kennedy, J., dissenting). Justice Kennedy went on to argue that Justice Chase intended his "alternative description" of the second category to describe the category's historical origins, not to provide a definitive description of the laws prohibited by the Ex Post Facto Clause. *Id.* (Kennedy, J., dissenting).

190. *Id.* at 2467 (Kennedy, J., dissenting).

191. *See id.* (Kennedy, J., dissenting).

192. *Id.* (Kennedy, J., dissenting).

193. *Id.* (Kennedy, J., dissenting).

194. *Id.* at 2469 (Kennedy, J., dissenting).

195. *See id.* at 2469–72 (Kennedy, J., dissenting) (describing several times the suffering, anguish, and intimidation of young victims of sexual crimes).

not arbitrary or vindictive legislation as labeled by the majority, the dissent emphasized the states' special concerns in addressing child abuse, including the frequent and understandable delay in reporting abuse.[196] As Justice Kennedy explained, the psychological phenomenon of repressed memory is a concern "amply supported by empirical studies."[197] Both of Stogner's daughters repressed their memories of abuse because of intimidation and fear of the consequences—two valid reasons for delaying their accusations.[198]

Additionally, the dissent denied the Court's assertion that the California statute was "'unfair and dishonest' because it violated the [s]tate's initial assurance to [Stogner] that 'he ha[d] become safe from its pursuit.'"[199] Justice Kennedy refuted the Court's argument that the California law destroyed Stogner's reliance interest.[200] The dissent labeled it a "fictional construct"[201] to imagine "that criminals keep calendars so they can mark the day to discard their records" supporting their defense.[202]

Finally, the dissent attempted to assuage concerns regarding the adverse effect a revived prosecution would have on the integrity and fairness of a criminal trial.[203] The dissent argued that concerns "about stale evidence [could] be addressed by the judge and the jury, and by the requirement of proof beyond reasonable doubt."[204] Furthermore, California's statute contained the additional safeguard of requiring the presentation of clear and convincing evidence that independently corroborates the victim's allegations.[205] Also, the general protection of the Due Process Clause would prevent an oppressive prosecution.[206]

---

196. *Id.* at 2469–70 (Kennedy, J., dissenting) ("The California statute can be explained as motivated by legitimate concerns about the continuing suffering endured by the victims of childhood abuse.").

197. *Id.* at 2470 (Kennedy, J., dissenting).

198. *Id.* (Kennedy, J., dissenting).

199. *Id.* (Kennedy, J., dissenting) (quoting Falter v. United States, 23 F.2d 420, 426 (2d Cir. 1928)).

200. *See id.* at 2470–71 (Kennedy, J., dissenting).

201. *Id.* at 2471 (Kennedy, J., dissenting).

202. *Id.* at 2470 (Kennedy, J., dissenting) (opining that this concept "does not exist as part of our traditions or social understanding").

203. *Id.* at 2471–72 (Kennedy, J., dissenting).

204. *Id.* at 2471 (Kennedy, J., dissenting).

205. *Id.* (Kennedy, J., dissenting).

206. *Id.* at 2472 (Kennedy, J., dissenting).

Ending in a blistering tone, the dissent described the Court's opinion as harming ex post facto jurisprudence as well as past and future victims of child abuse.[207]

C. *The Majority's Rebuttal of the Dissent*

In response to the dissent's criticism, the Court noted that the dissent undertook the "Herculean effort to prove that it is *not* unfair, in any constitutionally relevant sense" to revive the prosecution of an individual who had effectively been granted legal amnesty nearly a generation earlier.[208] According to Justice Breyer, the dissent failed in its efforts to support such a contention.[209] The Court found the dissent's reading of historical examples too narrow, its list of case law unconvincing, and its discussion of public policy misguided.[210]

1. Excessively Narrow Reading of History

The Court described the historical examples offered by the dissent as inaccurate, incomplete, vague, redundant, and impertinent.[211] Although Parliament had the authority to punish treason with banishment, that was not the common, ordinary practice.[212] As such, the Court's banishment examples were instances where an individual was punished "through legislation that subjected him to punishment otherwise unavailable . . . through 'the ordinary course of law,'" just as Justice Chase had discussed in *Calder*.[213] Justice Chase's alternative descriptions of his categories were still highly relevant in an ex post facto determination and helped reveal a second category broad enough to include retroactive statutory changes.[214]

---

207. *Id.* (Kennedy, J., dissenting) ("The Court . . . disregards the interests of those victims of child abuse who have found the courage to face their accusers and bring them to justice.").

208. *Id.* at 2455.

209. *Id.*

210. *Id.* at 2455–61.

211. *Id.* at 2455–58.

212. *Id.* at 2457.

213. *Id.* at 2456 (citing Calder v. Bull, 3 U.S. (3 Dall.) 386, 389 (1798)).

214. *Id.* at 2458.

2. Ineffective Case Law

Although the dissent criticized the Court's case law as unimpressive, the Court reemphasized its primary case law argument: "[C]ourts, 'with apparent unanimity until California's decision in *Frazer*, have continued to state' that 'laws reviving time-barred prosecutions are *ex post facto*' and, 'when necessary, so to hold.'"[215] Justice Breyer then argued that the dissent did not cite a single case outside of California that held or even *suggested* a contrary holding.[216] After explaining that the reasoning in cases from earlier centuries need not be perfectly consistent with modern conceptions of how legal analysis should proceed, the Court reiterated its most powerful observation—"the unanimity of judicial views that the kind of statute [at issue was] *ex post facto*."[217]

3. Predominating Constitutional Interests

In response to the dissent's public policy arguments, the Court argued that, although the state's interest in prosecuting child abuse cases is important, there is "a predominating constitutional interest in forbidding the State to revive a long-forbidden prosecution."[218] Contrary to the dissent's contention that the statute was fair, the Court pointed to the inherent injustice in failing to notify an accused of the need to preserve exculpatory evidence as *decades* pass.[219] As the Court reasoned, "[m]emories fade, and witnesses can die or disappear."[220] Also, in response to the dissent's discussion of repressed memories, the Court emphasized that faulty recovered memories, "nonetheless lead to prosecutions that destroy families."[221]

Unfazed by the dissent's extreme criticism and skepticism, the Court reiterated its holding that a law enacted after the expiration of a previously applicable limitations period violates the Ex Post Facto Clause when applied to revive a time-barred prosecution.[222]

---

215. *Id.* (quoting *id.* at 2453).
216. *Id.*
217. *Id.* at 2460.
218. *Id.* at 2461.
219. *Id.* at 2460.
220. *Id.*
221. *Id.*
222. *Id.* at 2461.

V. IMPLICATIONS OF THE *STOGNER* DECISION

In the aftermath of the decision, the ability of state and federal governments to pursue and punish sexual offenders has moved even deeper into the public light amid national controversy.[223] *Stogner* reached the Supreme Court at a time when widespread allegations of child molestation by Roman Catholic priests were bringing sharp attention to the issue of revival prosecutions.[224] Drawing more attention to the issue was the November 2003 kidnapping and disappearance of North Dakota college student Dru Sjodin, which shocked the nation when the primary suspect turned out to be a career sex offender who had been released from prison just months earlier.[225] For people indignant at the notion that a recidivist sex offender could be released and commit new crimes, the notion that an individual accused of sexually abusing children could be immune from prosecution solely due to the passage of time might be equally offensive.

At face value, the controversy surrounding the *Stogner* decision derives from its restrictive effects on the prosecution of child sexual abuse.[226] However, *Stogner* also has tremendous implications for the prosecution of many other kinds of crimes, and for laws and practices across the country.[227]

---

223. *Compare* Winton et al., *supra* note 116, at A1 (calling *Stogner* a "devastating loss" for victims of child abuse and a "terrible blow" to justice), *with* Smith & Berry, *supra* note 18 (mentioning how defense attorneys "celebrated [the] political ramifications" of the decision).

224. *See* Stout, *supra* note 56, at A16 ("The case has been closely watched because of its implications in prosecuting priests accused of molesting children many years ago, as well as its potential repercussions for other crimes.").

225. *See* Chuck Haga et al., *A Red Flag on Rodriguez,* STAR TRIB. (Minneapolis), Dec. 13, 2003, at A1 (describing the State Corrections Commissioner's "shocked" reaction that Rodriguez was released rather than civilly committed).

226. *See* Smith & Berry, *supra* note 18 (quoting a San Francisco Assistant District Attorney who characterized *Stogner*'s effect on child sexual abuse cases as a "tidal wave").

227. *See* Stout, *supra* note 56, at A16 (explaining *Stogner*'s effects above and beyond the prosecution of child sex abuse); *see also* Brief for the United States as Amicus Curiae Supporting Respondent at 1–2, Stogner v. California, 123 S. Ct. 2446 (2003) (No. 01-1757) [hereinafter *Amicus Curiae*], *available at* http://www.usdoj.gov/osg/briefs/2002/3mer/1ami/2001-1757.mer.ami.pdf (last visited Mar. 30, 2004) (outlining the adverse impact *Stogner* may have on several existing and proposed pieces of federal legislation). As the United States noted, "[b]ecause federal legislation is subject to ex post facto and due process limits that parallel the limits on state legislation, the decision in this case could affect the constitutionality of a recent Act of Congress and constrict Congress's authority to enact similar legislation." *Id.* at 2. The recent act to which the brief referred was the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Ob-

A. *What* Stogner *Does Not Impact*

As a preliminary matter, though highly influential, *Stogner* left certain aspects of ex post facto jurisprudence untouched. Two such aspects are the permissibility of extending unexpired statutes of limitations and the continued validity of seeking civil damages in cases where the criminal statute of limitations has run.

Stogner has no impact on statutes that allow for extensions of unexpired criminal statutes of limitations.[228] Cases decided subsequent to *Stogner* have acknowledged this distinction, allowing states to enhance their efforts to prosecute criminals, while also recognizing the constitutional limitations on such actions.[229]

Also, *Stogner* does not foreclose on a victim's ability to recover civil damages from an accused long after the alleged abuse occurred.[230] With the threat of criminal prosecution now removed in older sexual cases, a civil action can be a tool for retribution, restricting an accused individual's monetary rights, even if his personal liberty still remains.[231] Considering that more than three

---

struct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107–56, 115 Stat. 272 (2001). *Id.* at 1–2. The similar legislation included pending congressional attempts "to eliminate the statute of limitations for child abduction and felony sexual offenses and to toll statutes of limitations in any felony case in which the perpetrator is identified through DNA evidence." *Id.* at 2.

228. Stogner v. California, 123 S. Ct. 2446, 2453 (2003).

229. *See, e.g.*, Minton v. State, No. 48A02-0301-CR-22, 2004 Ind. App. LEXIS 151, at *9–10 (Ind. Ct. App. Jan. 29, 2004) ("In *Stogner*, the amended statute *revived* the defendant's previously time-barred prosecution. Here, the statute of limitation for Minton's offenses had not yet run when the 1993 amendment extended the time period for prosecution. Even the *Stogner* court approved the amendment of a limitation period in this context."); State v. Steele, No. C-020693, 2003 Ohio App. LEXIS 6099, at *7 (Ohio Ct. App. Dec. 12, 2003) ("Since this case involves the extension of an unexpired statute of limitations, not the resurrection of an expired one, *Stogner* by its own language does not apply."); State v. Lyles, 858 So. 2d 35, 56 (La. Ct. App. Sept. 16, 2003) (arguing that the reasoning in *Stogner* was not controlling since the defendant committed the crime after the Louisiana statute of limitations had been increased).

230. *See* Jean Guccione & William Lobdell, *Law Spurred Flood of Sex Abuse Suits; Hundreds Filed Claims in One-Year Window for Old Cases. Up to 800 People Target Dioceses in State*, L.A. TIMES, Jan. 1, 2004, at A1 (explaining that civil cases "took on more public significance" this past summer after *Stogner* precluded some criminal prosecutions); Winton et al., *supra* note 116, at A1 (indicating that *Stogner* has no impact on civil damage lawsuits brought against priests stemming from earlier abuse).

231. *See The Supreme Court, 2002 Term—Leading Cases*, *supra* note 13, at 276; *see also* Guccione & Lobdell, *supra* note 230, at A1 (mentioning an alleged victim of child sexual abuse who claimed that the *Stogner* decision "'left [her] with no options' for justice" other than a civil suit).

hundred Catholic priests have either resigned or retired because of allegations of sexual abuse, Catholic dioceses nationwide must remain ready to defend against civil suits alleging that abuse occurred decades ago.[232] The Court suggested that civil actions are limited by the Ex Post Facto Clause, but the majority failed to provide specific examples, leaving that issue open to future legislative and judicial interpretation.[233]

B. *What* Stogner *Does Impact*

1. Freeing Incarcerated Inmates and Ending Pending Prosecutions

The most obvious effect *Stogner* has on the realm of criminal justice is that it has resulted in the release of hundreds of prisoners and the termination of hundreds of prosecutions.[234] For example, in California, prosecutors and defenders have been striving to sift through their case files to identify all defendants or inmates affected by *Stogner*.[235] One tool prosecutors might use to avoid the release of certain inmates is to pursue other charges for which the relevant statute of limitations has not yet expired.[236] For defense attorneys whose clients were already sentenced under the now-unconstitutional statute, habeas corpus petitions appear to be the most likely response to *Stogner*.[237]

2. A Blow to "Repressed Memory" Advocates

The issue of repressed memories has become a highly relevant topic in criminal law over the past two decades as the number of

---

232. *See Court Upholds Statute of Limitations*, NEWSDAY (New York), June 27, 2003, at A21; *see also* Guccione & Lobdell, *supra* note 230, at A1 (describing multimillion-dollar settlements that have been reached with dioceses across the nation).

233. *Stogner*, 123 S. Ct. at 2460 ("[T]he dissent goes beyond our prior statements of what is constitutionally permissible even in the analogous civil context."). To support this argument, the Court cited *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 312 n.8 (1945). *Id. Donaldson* recognized that the extension of a civil statute of limitations period that has expired may be unconstitutional because it violates a "vested right." *See Donaldson*, 325 U.S. at 312 n.8.

234. *See* Smith & Berry, *supra* note 18.

235. *Id.*

236. *Id.* ("[Prosecutors] may be able to salvage some [old cases] that appear to be eligible for dismissal if there are other charges where the statute of limitations had not expired.").

237. *See id.*

psychological studies analyzing this phenomenon has increased dramatically.[238] Advocates of repressed memory syndrome claim that it is a real and common result of trauma that should not be employed as a mode of escaping prosecution.[239] Their principal argument has been that overwhelming senses of fear and shame often prevent younger abuse victims from coming forward until they are older, more confident, and more emotionally secure.[240] Additionally, advocates argue that victims often do not come forward with allegations until they learn that others have been subjected to the same abuse.[241] The most convincing argument for repressed memory advocates is perhaps specific instances where not respecting repressed memories results in the type of injustice that shocks one's conscience.[242]

Opponents of the concept believe that there is too great a risk of false memory syndrome, where therapists actually implant false memories, indistinguishable from real ones.[243] Even if not intentionally implanted in the minds of alleged abuse victims by

---

238. *See generally* Lynn Holdsworth, *Is It Repressed Memory with Delayed Recall or Is It False Memory Syndrome? The Controversy and Its Potential Legal Implications*, 22 L. & PSYCHOL. REV. 103 (1998) (detailing the controversy surrounding repressed memories).

239. *See* Brief of Amici Curiae American Psychological Association, National Association of Counsel for Children, American Professional Society on the Abuse of Children, and California Professional Society on the Abuse of Children in Support of Respondent, at 13–25, Stogner v. California, 123 S. Ct. 2446 (2003) (No. 01-1757), *available at* http://supreme.usatoday.findlaw.com/supreme_court/briefs/01-1757/01-1757.mer.ami.apa.pdf (last visited Mar. 30, 2004) [hereinafter *Amici Curiae American Psychological Association et al.*] (explaining the numerous reasons victims do not report childhood sexual abuse, the long-lasting devastating effects of childhood sexual abuse, and the threat child molesters pose to children throughout their lives).

240. *See id.* at 7.

241. *Id.* at 8. This notion is consistent with the facts of *Stogner*, as Marion Stogner's two adult daughters did not make their abuse allegations until they learned of similar abuse elsewhere within their family. Stogner v. California, 123 S. Ct. 2446, 2470 (2003) (Kennedy, J., dissenting).

242. *See Amici Curiae American Psychological Association et al., supra* note 239, at 9. The amici curiae brief included several victims' accounts from public safety hearings. *Id.* One example described a thirty-seven-year-old woman who reported being molested by her father between the ages of five and seventeen. *Id.* Her allegations were corroborated by siblings, and her father tacitly admitted his guilt to law enforcement. *Id.* However, the statute of limitations prevented prosecuting the father. *Id.* Another instance involved a fifty-six-year-old man who kept a journal entitled *My Erotic Experiences with Beautiful Little Girls*. *Id.* The journal graphically described sexual encounters with children over a twenty-year period. *Id.* Law enforcement officials found nine victims describing abuse "strikingly similar" to the acts recounted in the journal. *Id.* Nevertheless, the man was sentenced to only sixteen months in prison, because only one of the victims was abused within the limitations period. *Id.*

243. Holdsworth, *supra* note 238, at 107.

psychotherapists, memories are prone to errors in perception, retention, and retrieval.[244] As skeptics of repressed memories argue, because of the often lengthy duration between perception and recall of memories of past sexual abuse, such recollections are easily distorted.[245] Critics of the repressed memory phenomenon have conceded the existence of some "extremely convincing evidence pertaining to the *reality* of the . . . phenomenon."[246] They argue, however, that advocates have not sufficiently proven the phenomenon's accuracy such that it can be consistently and reliably used as evidence in courts.[247]

Prior to *Stogner*, courts were divided as to how to handle the admissibility of claims of childhood sexual abuse recalled years after the statute of limitations had run.[248] Now, the Supreme Court has recognized the dangers of validating repressed memories as justification for reviving a prosecution, and has effectively precluded their use in many criminal prosecutions.[249] *Stogner* presents a significant obstacle to the prospects of success in criminal litigation for advocates promoting the evidentiary legitimacy of repressed memories.

3. A Limit on DNA Evidence

The use of DNA evidence is another modern trend in criminal law affected by *Stogner*. DNA evidence has emerged as "an incredibly useful tool in solving crimes and resolving questions of identity."[250] When the accuracy of DNA matching became apparent, law enforcement officials and victims' advocates nationwide began urging legislation to extend or eliminate criminal statutes of limitations so that, when the money was found to process DNA samples and make comparisons, the alleged perpetrator could be

244. *See id.* at 115–16.

245. *Id.*

246. *Id.* at 128.

247. *Id.* at 128–29.

248. *Id.* at 129.

249. *See* Stogner v. California, 123 S. Ct. 2446, 2460 (2003).

250. Bernasconi, *supra* note 89, at 1001; *see also* Mark Ballard, *Several States Are Repealing Some Statutes of Limitations, Saying DNA Evidence Now Makes Justice Possible*, MIAMI DAILY BUS. REV., June 30, 2003, at 11 (quoting New York Governor George Pataki touting DNA as "'a powerful crime-fighting tool that helps convict the guilty, exonerate the innocent and bring justice for victims'" of abuse or other violent crimes).

prosecuted.[251] Unfortunately for victims' advocates, due to the cost and delay in obtaining samples, DNA evidence often comes after the relevant statute of limitations has expired.[252] Since *Stogner* did not carve out an exception for DNA evidence, it appears that even near-perfect reliability in linking a defendant to a crime will be insufficient to justify reviving a time-barred prosecution.[253]

4. Weakening the USA Patriot Act

The Court in *Stogner* made clear that "a constitutional principle must apply not only in child abuse cases, but in every criminal case."[254] While initial reactions to *Stogner* probably would not have conjured up images of terrorism, the Court's decision extends to all pieces of retroactive criminal legislation, even the USA Patriot Act[255] aimed at thwarting and punishing terrorist activities. Realizing *Stogner*'s potentially adverse impact on federal anti-terrorism legislation, the Bush administration filed a brief asking the Supreme Court to uphold California's law.[256] The brief argued that the United States had "a substantial interest in the resolution" of *Stogner*.[257] One of the main purposes of the brief was to warn the Court that overruling the California law could imperil several aspects of the USA Patriot Act, which had eliminated an existing eight-year time limit on prosecuting terrorism cases involving death or serious bodily injury.[258] Section 809 of the Act is titled boldly, "No Statute of Limitation for Certain Terrorism Offenses."[259] In relevant part, the Act, which amended previous statutory provisions regarding terrorism, states:

---

251. *See* Ballard, *supra* note 250, at 11 (presenting the view of some victims' advocates that "[t]here's no reason to maintain a statute of limitations with this new [DNA] science. The law must catch up with the science").

252. *Id. See generally* Bernasconi, *supra* note 89, at 998–1003 (discussing the history and modern application of statutes of limitations to DNA evidence).

253. Ballard, *supra* note 250, at 11.

254. *Stogner*, 123 S. Ct. at 2460.

255. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (amending 18 U.S.C. § 3286 (2000)).

256. *Amicus Curiae*, *supra* note 227, at 1–2, 30.

257. *Id.* at 1.

258. Charles Lane & Edward Walsh, *Court Strikes Down California Law That Lifted Statute of Limitations*, WASH. POST, June 27, 2003, at A17.

259. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, 18 U.S.C.A. § 3286 (West Supp. 2003).

> § 3286. Extension of statute of limitation for certain terrorism offenses
>
> . . . .
>
> b) No Limitation.—Notwithstanding any other law, an indictment may be found or an information instituted *at any time without limitation* for any offense listed in section 2332b(g)(5)(B), if the commission of such offense resulted in, or created a foreseeable risk of, death or serious bodily injury to another person.[260]

A statutory note accompanying the text states, "The amendments made by this section shall apply to the prosecution of any offense committed before, on, or after the date of the enactment of this section."[261]

The United States Department of Justice has been reviewing the *Stogner* decision over the past few months to determine the manner in which the USA Patriot Act will be affected.[262] Amending the Act to make it comport with *Stogner*'s holding is one option for the federal government, but that would limit its potency as an effective anti-terrorism tool. International terrorism often involves complex web-conspiracies, years in the making, which take a considerable amount of time to unravel in federal investigations. In light of the exceedingly difficult nature of locating and prosecuting terrorists, *Stogner* will, at the very least, be a frustrating impediment to the federal government's "War on Terror" in the future.

VI. CONCLUSION

Any decision resulting in the immediate exoneration of child sex abusers will inevitably draw heavy criticism from many sources. However, the Court's decision in *Stogner* signifies more than its natural effect of immunizing some guilty individuals from prosecution—it stands for the proposition that constitutional considerations are always a predominating interest in judicial analyses.[263] The Court emphasized a potential criminal defendant's fundamental need to preserve exculpatory evidence, which cannot be effectively maintained when a prosecution commences

260. *Id.* (emphasis added).
261. *Id.*
262. Winton et al., *supra* note 116, at A1.
263. *Stogner*, 123 S. Ct. at 2461.

after amnesty effectively has been granted.[264] While society's interests in punishing past criminal wrongdoing are undoubtedly important, the Court in *Stogner* implied that society's injuries, perhaps, "do not fester unendingly."[265]

After *Stogner*, the expiration of a criminal statute of limitations marks a point where the accused person's constitutional rights seemingly trump the alleged victim's entitlement to retribution.[266] Although the Court did not definitively rule upon civil statutes of limitations, its message in the criminal arena was perfectly clear: *Retroactive criminal justice must have constitutional limits*. Long clouded by disparate treatment in lower courts, ex post facto jurisprudence on revived prosecutions rings clearer now in the judicial system.

Ryan D. Frei

264. *Id.*
265. *The Supreme Court 2002 Term—Leading Cases*, *supra* note 13, at 277.
266. *See* Kim, *supra* note 124, at 396.

***