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Notes: Constitutional Law — Ex Post Facto — Was Adding the Requirement of Gubernatorial Approval of Parole to the Patuxent Institution's Parole Procedures and Reinstating Original Sentences a Violation of the Prohibition against Ex Post Facto Laws? Gluckstern v. Sutton, 319 Md. 634, 574 A.2d 898, cert. denied, 498 U.S. 950 (1990)

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NOTES

CONSTITUTIONAL LAW—EX POST FACTO—WAS ADDING THE REQUIREMENT OF GUBERNATORIAL APPROVAL OF PAROLE TO THE PATUXENT INSTITUTION'S PAROLE PROCEDURES AND REINSTATING ORIGINAL SENTENCES A VIOLATION OF THE PROHIBITION AGAINST EX POST FACTO LAWS? *Gluckstern v. Sutton*, 319 Md. 634, 574 A.2d 898, *cert. denied*, 498 U.S. 950 (1990).

I. INTRODUCTION

In *Gluckstern v. Sutton*,[1] the Court of Appeals of Maryland held that adding the requirement of gubernatorial approval for parole of a defendant committed to the Patuxent Institution and reinstating the original life sentence that was suspended under the old statutory scheme violated the prohibition against ex post facto laws. According to the *Sutton* court, this change required that an inmate sentenced under the prior law take an unnecessary and unconstitutional additional step before his parole could be granted.[2]

Both the Defective Delinquent Law[3] and the Patuxent Institute Act (the "1977 Act"),[4] however, are not penal laws, but civil laws to which the ex post facto prohibition does not apply. Further, the principles used to determine if there is a violation of the prohibition against ex post facto laws do not indicate that prisoner Sutton was disadvantaged by retrospective application of the requirement of gubernatorial approval of parole or the reinstatement of his original sentence.

II. FACTS

Richard Lee Sutton killed his estranged wife's parents with a handgun on March 5, 1974. On January 10, 1975, he was convicted on two counts of first degree murder and two counts of using a handgun in the commission of a felony or a crime of violence. Sutton was sentenced to two concurrent terms of life imprisonment for the

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1. 319 Md. 634, 574 A.2d 898, *cert. denied*, 498 U.S. 950 (1990).
2. *Sutton*, 319 Md. at 669, 574 A.2d at 915.
3. *See infra* notes 72-74 and accompanying text.
4. *See infra* notes 81-83 and accompanying text.

murders and two concurrent terms of twelve years for the handgun offenses to be served concurrently with the life sentences.[5]

The court also found reasonable ground to believe that Sutton was a defective delinquent, and he was sent to Patuxent Institution (Patuxent) for evaluation.[6] Sutton was declared a defective delinquent on July 17, 1975, and, pursuant to the Defective Delinquent Law then in effect, was committed to Patuxent for an indeterminate period. As a consequence of this determination, his original sentence was suspended.[7]

Thereafter, the Defective Delinquent Law was repealed and the 1977 Act was passed. The 1977 Act abolished the indeterminate sentence and replaced it with the provision that "[a] person confined at the [Patuxent] Institution shall be released upon expiration of his sentence in the same manner and subject to the same conditions as if he were being released from a correctional facility."[8] In 1982, an amendment was passed changing the procedures for granting parole from Patuxent to provide that a person serving a life sentence "shall only be paroled with the approval of the Governor."[9]

On October 4, 1984, the Board of Review of Patuxent recommended that Sutton be paroled. The governor refused to approve the parole. On June 5, 1986, the board again voted to parole Sutton and, again, the governor refused to approve the board's decision.

On November 6, 1987, Sutton filed a petition for a writ of habeas corpus arguing that application of the 1977 Act and the 1982 amendment violated the prohibition against ex post facto laws. The Circuit Court for Baltimore County held that reinstating the original sentence and retroactively applying the requirement for the governor's approval of parole disadvantaged Sutton "because it create[d] an additional step which was not required before."[10] Therefore, the court concluded that the prohibition against ex post facto laws found in the Maryland Declaration of Rights[11] and the United States Constitution[12] was violated. The Court of Appeals of Maryland granted Gluckstern's petition for writ of certiorari and affirmed the circuit court's decision.

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5. *Id.* at 638, 574 A.2d at 899-900.
6. *Id.* at 638, 574 A.2d at 900.
7. *Id.* at 638-39, 574 A.2d at 900.
8. *Id.* at 642, 574 A.2d at 901. An inmate serving a life sentence at an institution under the authority of the Department of Correction would not be considered for parole until fifteen years of his sentence had been served. *Id.* at 640, 574 A.2d at 901 (citing MD. ANN. CODE art. 41, § 122(b)). Any recommendation made by the Maryland Board of Parole had to be approved by the governor. *Id.* (citing MD. ANN. CODE art. 41, § 122(b)).
9. *Sutton*, 319 Md. at 643, 574 A.2d at 902.
10. *Id.* at 645, 574 A.2d at 903.
11. *See infra* note 14.
12. *See infra* note 14.

III. BACKGROUND

A. Ex Post Facto Laws

As one court noted, "[s]o much importance did the [C]onvention attach to [the ex post facto prohibition], that it is found twice in the Constitution."[13] Both the federal and state governments are prohibited from passing any ex post facto law by the United States Constitution.[14] The fundamental concern behind the prohibition against ex post facto laws is not an individual's right to less punishment, but the "lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated."[15]

What constitutes an ex post facto law was first set forth in *Calder v. Bull*:[16]

> 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.

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13. Kring v. Missouri, 107 U.S. 221, 227 (1883), *overruled by* Collins v. Youngblood, 497 U.S. 37 (1990) (holding that ex post facto prohibition is not violated by retroactively applying a statute allowing a court to reform a verdict rather than ordering a new trial).
14. U.S. CONST. art. I, § 9 ("No . . . ex post facto Law shall be passed."); U.S. CONST. art I, § 10, cl. 1 ("No State shall . . . pass any . . . ex post facto law . . . ."). The ex post facto prohibition in the Maryland Declaration of Rights has the same meaning as the ex post facto clause in the United States Constitution. Anderson v. Department of Health & Mental Hygiene, 310 Md. 217, 223, 528 A.2d 904, 907 (1987), *cert. denied*, 485 U.S. 913 (1988), *quoted in Sutton*, 319 Md. at 665, 574 A.2d at 913. The Maryland ex post facto clause reads as follows:
    > That retrospective Laws, punishing acts committed before the existence of such Laws, and by them only declared criminal, are oppressive, unjust and incompatible with liberty; wherefore, no *ex post facto* Law ought to be made; nor any retrospective oath or restriction imposed, or required.

    MD. CONST., DECL. OF RIGHTS, art. 17.
15. Weaver v. Graham, 450 U.S. 24, 30 (1981); Alston v. Robinson, 791 F. Supp. 569, 588 (D. Md. 1992).
16. 3 U.S. (3 Dall.) 386 (1798). The modern formulation of the prohibition against ex post facto laws is set forth in Beazell v. Ohio, 269 U.S. 167, 169-70 (1925):
    > It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute 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 the law at the time when the act was committed, is prohibited as *ex post facto*.

> 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 offense, *in order to convict the offender*.[17]

Civil legislation, however, is not affected by the prohibition against ex post facto laws.[18]

For there to be a violation of the prohibition, a law must be retrospective and must disadvantage the offender.[19] Even if a law is retrospective and disadvantages the offender, however, it may not be a violation of the ex post facto prohibition if it is merely procedural in nature.[20]

1. Retrospective Requirement

To violate the prohibition against ex post facto laws, a law must apply to events occurring before its enactment.[21] The prohibition is not limited to laws changing the penalty for the offense, but extends to any law enacted after the commission of a crime that effectively increases the punishment.[22]

For example, in *Weaver v. Graham*,[23] the Supreme Court stated that "good time"[24] for good conduct in prison is "part of the punishment annexed to the crime."[25] The prospect of reducing the amount of the sentence to be served by the use of good time is a "determinant of petitioner's prison term and . . . his effective sentence is altered once this determinant is changed."[26] It does not

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17. *Calder*, 3 U.S. (3 Dall.) at 390.
18. Baltimore & Susquehanna R.R. Co. v. Nesbit, 51 U.S. 395, 402 (1850); *see also* Collins v. Youngblood, 497 U.S. 37, 41 n.2 (1990).
19. *Weaver*, 450 U.S. at 29; *see also* Lindsey v. Washington, 301 U.S. 397, 401 (1932); *Calder*, 3 U.S. (3 Dall.) at 390.
20. Dobbert v. Florida, 432 U.S. 282, 293 (1977).
21. *Weaver*, 450 U.S. at 29. If a law "changes the legal consequences of acts completed before its effective date," it is retrospective. Miller v. Florida, 482 U.S. 423, 430 (1987) (quoting *Weaver*, 450 U.S. at 31).
22. 319 Md. 634, 665, 574 A.2d 898, 913 (quoting *In re* Medley, 134 U.S. 160, 171 (1890), *cert. denied*, 498 U.S. 950 (1990)).
23. 450 U.S. 24 (1981).
24. "'Good time' is awarded for good conduct and reduces the period of sentence which prisoner must spend in prison although it does not reduce the period of the sentence itself." BLACK'S LAW DICTIONARY 694 (6th ed. 1990).
25. *Weaver*, 450 U.S. at 31 (discussing material presented in Respondent's Brief).
26. *Id.* at 32. The court noted its long standing recognition that the defendant's decision to enter into a plea bargain, and the judge's calculation of the sentence to be imposed, is significantly affected by the chances for reduced imprisonment. *Id.* (citing Wolff v. McDonnell, 418 U.S. 539, 557 (1974); Warden v. Marrero, 417 U.S. 653, 658 (1974)).

matter that the change only applies to good time earned after the effective date of the law. As the Court stated: "It is the effect, not the form, of the law that determines whether it is *ex post facto*."[27]

Changes in parole requirements are considered retrospective if they "alter the consequences attached to a crime for which a prisoner already has been sentenced."[28] For example, parole eligibility is regarded as part of the law annexed to the crime.[29] In *Fender v. Thompson*,[30] the Fourth Circuit confronted an amended parole statute applied retroactively, making a prisoner permanently ineligible for parole. According to the court, the amended statute "expressly rescinded preexisting parole eligibility — and to that extent ran afoul of the *ex post facto* clause."[31] The court stated that "retrospective application of a statute modifying or revoking parole eligibility would . . . 'substantially alter[] the consequences attached to a crime already completed, and therefore change[] the quantum of punishment,'" and this is exactly what is forbidden by the prohibition against ex post facto laws.[32]

2. Disadvantage Requirement

Even if a law is retrospective, however, to be considered a violation of the prohibition against ex post facto laws it must also operate to the person's disadvantage.[33] The amount of "gain time"[34] that can be accumulated to reduce an inmate's term cannot be

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27. *Id.* at 31. Further, a statute requiring solitary confinement prior to execution was an ex post facto violation when applied to someone who committed the crime prior to the statute's enactment. *Id.* at 32. Laws altering the length of sentences or changing the maximum sentence from discretionary to mandatory are also retrospective. Lindsey v. Washington, 301 U.S. 397 (1937).
28. Burnside v. White, 760 F.2d 217, 220 (8th Cir.), *cert. denied*, 474 U.S. 1022 (1985).
29. Lerner v. Gill, 751 F.2d 450, 454 (1st Cir.), *cert. denied*, 472 U.S. 1010 (1985).
30. 883 F.2d 303 (4th Cir. 1989).
31. *Id.* at 305.
32. *Id.* at 306 (finding violation of ex post facto law prohibition where application of an amended statute to an inmate resulted in the inmate being eligible for parole at a later time, and served to effectively increase the punishment to be served on a previous conviction) (quoting *Weaver*, 450 U.S. at 33 (citing Dubbert v. Florida, 432 U.S. 282, 293-94 (1977))). Fixing the date of parole eligibility is part of the punishment, and punishment cannot constitutionally be made "greater or more severe." Schwartz v. Muncy, 834 F.2d 396, 398 (4th Cir. 1987).
33. Weaver v. Graham, 450 U.S. 24, 29 (1981). "Whether a retrospective state criminal statute ameliorates or worsens conditions imposed by its predecessor is a federal question." *Id.* at 33.
34. 'Gain time' is various kinds of time credited to reduce an inmate's prison term. *Weaver*, 450 U.S. at 25 n.1.

changed if doing so increases the time a person will spend in prison.[35] To hold otherwise results in imposing a punishment more severe than the punishment available under the law when the crime was committed.

The focus of the disadvantage inquiry is upon the challenged provision, and not "any special circumstances that may mitigate its effect on the particular individual."[36] For example, even if the defendant cannot show that he definitely would have been affected by the change, the law may still operate to his disadvantage. In *Lindsey v. Washington*,[37] the defendant was deprived of any opportunity to receive a lesser sentence by retrospective application of a law.[38] In *Dobbert v. Florida*, the Supreme Court stated that the *Lindsey* decision meant that "one is not barred from challenging a change in the penal code on ex post facto grounds simply because the sentence he received under the new law was not more onerous than that which he might have received under the old."[39]

It may not be to the prisoner's disadvantage to make changes which codify existing practices or to make discretionary practices mandatory. For example, it was not a violation of the ex post facto prohibition for a new statute to require dual hearings for inmates seeking parole and to increase the number of votes needed before parole would be granted, because the parole board had the discretion to do so when the inmates committed their crimes.[40]

A majority of courts hold that retrospective application of amended federal parole guidelines does not violate the ex post facto prohibition because the guidelines are not laws.[41] This is true even if the prisoner is disadvantaged by retrospective application of the amended guidelines.[42] Other courts take the position that federal

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35. *Id.* at 33.
36. *Id.*
37. 301 U.S. 397 (1937). When petitioner committed the crime, the law provided for a minimum sentence of six months and a maximum of fifteen years. By the time he was sentenced, the law provided for a mandatory fifteen year sentence.
38. *Id.* at 401-02 (citing Dobbert v. Florida, 432 U.S. 282, 299 (1977)).
39. 432 U.S. 282, 300 (1977).
40. United States *ex rel.* Chaka v. Lane, 685 F. Supp. 1069, 1072 (N.D. Ill. 1988); Davis-El v. O'Leary, 626 F. Supp. 1037 (N.D. Ill. 1986). Prior to the new law, the board possessed the power to review requests for parole and had established a practice of hearing certain cases en banc. The new requirement for an en banc procedure therefore codifies prior law and does not disadvantage those sentenced prior to the law. *Id.* at 1041.
41. *See, e.g.*, Yamamoto v. United States Parole Comm'n, 794 F.2d 1295, 1297 (8th Cir. 1986).
42. *Id.* The guidelines in effect at the time he committed the crime provided that he would be recommended for parole after a term of imprisonment of forty to fifty-two months. The guidelines as amended recommended parole after a

guidelines are merely discretionary, and that, therefore, the ex post facto prohibition does not apply.[43] Another view is that retrospective application of amended federal parole guidelines does not result in a more onerous punishment, and, therefore, is not a violation of the ex post facto prohibition.[44]

3. Procedure Versus Substance Distinction

The prohibition against ex post facto laws does not extend to "legislative control of remedies and modes of procedure which do not affect matters of substance."[45] This is the case even if the law is retrospective and operates to the prisoner's disadvantage. Procedural changes affecting substantive rights, however, may violate the ex post facto law prohibition "even if the statute takes a seemingly procedural form."[46]

Early cases applying the procedure/substance distinction involved changes in trial procedure or rules of evidence.[47] These early cases determined that the ex post facto prohibition does not give a person a right to be "tried, in all respects, by the law in force when the crime charged was committed."[48] For example, the ex post facto prohibition was not violated by changes in the law allowing a convicted felon to be called as a witness,[49] admitting previously inadmissible evidence,[50] changing the place of trial,[51] extending the

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term of one hundred months or more. Based on the new guidelines, petitioner had to serve fifty-six months before being paroled.

43. *Id.* at 1297-98; Warren v. United States Parole Comm'n, 659 F.2d 183, 195 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 950 (1982).
44. *Yamamoto*, 794 F.2d at 1298; Dufresne v. Baer, 744 F.2d 1543, 1549 (11th Cir. 1984), *cert. denied*, 474 U.S. 817 (1985).
45. Miller v. Florida, 482 U.S. 423, 433 (1987) (quoting Dobbert v. Florida, 432 U.S. 282, 293 (1977)).
46. *Miller*, 482 U.S. at 433 (quoting Weaver v. Graham, 450 U.S. 24, 29 n.12 (1981)). In Collins v. Youngblood, 497 U.S. 37 (1990), the Supreme Court defined the scope of the prohibition against ex post facto laws as it relates to laws affecting procedure. According to the Court, "by simply labelling a law 'procedural,' a legislature does not thereby immunize it from scrutiny under the *Ex Post Facto Clause*." *Id.* at 46. The "prohibition which may not be evaded, [however], is the one defined by the *Calder* categories." *Id.* The Court cautioned that the "substantial protections" and "personal rights" referred to in Duncan v. Missouri, 152 U.S. 377 (1894) and Malloy v. South Carolina, 237 U.S. 180 (1915) "should not be read to adopt without explanation an undefined enlargement of the *Ex Post Facto Clause*." *Id.*
47. Beazell v. Ohio, 269 U.S. 167 (1925).
48. Gibson v. Mississippi, 162 U.S. 565, 590 (1896).
49. Hopt v. Utah, 110 U.S. 574 (1884).
50. Thompson v. Missouri, 171 U.S. 380 (1898).
51. Gut v. State, 76 U.S. (9 Wall.) 35 (1869).

statute of limitations for a crime,[52] or abolishing a court for hearing criminal appeals and creating a different one in its place.[53] Such changes do not increase the punishment nor "change the ingredients of the offense or the ultimate facts necessary to establish guilt."[54]

The prohibition against ex post facto laws is violated, however, by changing the law to deprive "one charged with a crime of any defense available according to law at the time when the act was committed."[55] In *Dobbert v. Florida*,[56] the Supreme Court held that changing the role of the judge and jury when imposing the death penalty did not violate the prohibition against ex post facto laws.[57] Prior to the change, the jury determined whether the defendant would be sentenced to death and this decision was not subject to review by the judge. The new law provided that the jury's determination was not binding on the judge. The change was held to be procedural and not to affect a substantive right.[58] The statute "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."[59]

Later cases extended the procedure versus substance distinction beyond changes in trial procedure. In *Portley v. Grossman*,[60] parole guidelines different from those in effect when the petitioner was sentenced were used to determine the date he would be eligible for parole. The Supreme Court reasoned that simply because a defendant is disadvantaged by a change in the law does not mean that the prohibition against ex post facto law is violated.[61] The purpose of the prohibition is to "secure 'substantial personal rights' from retroactive deprivation and does not 'limit the legislative control of remedies and modes of procedure which do not affect matters of substance.'"[62] The *Portley* Court found the changes were of the procedural type deemed permissible in *Dobbert*.[63]

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52. United States *ex rel.* Massarella v. Elrod, 682 F.2d 688, 689 (7th Cir. 1982), *cert. denied*, 460 U.S. 1037 (1983); Clements v. United States, 266 F.2d 397, 399 (9th Cir.), *cert. denied*, 359 U.S. 985 (1959).
53. Duncan v. Missouri, 152 U.S. 377, 382-83 (1894).
54. *Massarella*, 682 F.2d at 689 (citing Weaver v. Graham, 450 U.S. 24, 29 n.12 (1981) (quoting Hopt v. Utah, 110 U.S. 574, 590 (1884))).
55. Beazell v. Ohio, 269 U.S. 167, 169 (1925).
56. 432 U.S. 282 (1977).
57. *Id.*
58. *Id.* at 292. The *Beazell* Court stated that a procedural change need not be ameliorative to survive an ex post facto challenge. *Beazell*, 269 U.S. at 167.
59. *Dobbert*, 432 U.S. at 293-94.
60. 444 U.S. 1311 (1980).
61. *Id.* at 1312.
62. *Id.* (quoting *Dobbert*, 432 U.S. at 293 (1977)).
63. *Id.* at 1313. Federal courts have held that adding a requirement that a victim

This trend was followed in *United States v. Molt*,[64] where the United States Court of Appeals for the Seventh Circuit held that applying a new standard for bail pending the appeal of a defendant already convicted of a crime did not violate the prohibition.[65] Although it would be more difficult to get bail, "[t]he change in the balance of advantages against the defendant is too slight to bring the change within the scope of the ex post facto clause."[66]

In *Raimondo v. Belletire*,[67] the Seventh Circuit reviewed a statutory change providing that the court and the state's attorney may review a mental hospital's decision to release a patient committed to the hospital after being acquitted of a crime because of insanity. According to the court, the change was procedural and the increase in hardship was negligible.[68] The court's decision was based upon the following factors: (1) review of the hospital's decision was discretionary and not automatic; (2) if the decision was reviewed by the court or the state's attorney, it must be shown by clear and convincing evidence that the patient needed continued hospitalization; and (3) the patient's other avenues of release were unaffected or enhanced.[69] Because of these safeguards, the change was "not so far-reaching that it significantly affect[ed] substantial personal rights."[70]

B. The Patuxent Institution

1. History

In 1951, after a great deal of research,[71] Maryland adopted the Defective Delinquent Law.[72] The law was passed to deal with a

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of a crime be notified of a parole request by a prisoner was only a procedural change and did not affect substantive rights. Mosley v. Klincar, 711 F. Supp. 463, 468 (N.D. Ill. 1989), *aff'd*, 947 F.2d 1338 (7th Cir. 1991); Alston v. Robinson, 791 F. Supp. 569, 591 (D. Md. 1992).

64. 758 F.2d 1198 (7th Cir. 1985).
65. *Id.* at 1200.
66. *Id.* at 1201.
67. 789 F.2d 492 (7th Cir. 1986).
68. *Id.* at 496.
69. *Id.*; *see also* Alston v. Robinson, 791 F. Supp. 569, 593 (D. Md. 1992).
70. *Raimondo*, 789 F.2d at 496.
71. Williams v. Director of Patuxent Inst., 276 Md. 272, 284-85, 347 A.2d 179, 185-86 (1975), *cert. denied*, 425 U.S. 976 (1976); Eggleston v. State, 209 Md. 504, 514, 121 A.2d 698, 702 (1956).
72. Act of Apr. 20, 1951, ch. 476, 1951 Md. Laws 1343 (codified at MD. ANN. CODE art. 31B), *repealed by* Act of May 26, 1977, ch. 678, 1977 Md. Laws 2723.

category of criminal who is legally sane and should be responsible for his acts, but who is of deficient intellect or is emotionally unbalanced and therefore lacks control.[73] The legislature felt that the welfare of the community would be best served by treating such people rather than punishing them.[74] The Patuxent Institution was opened on January 1, 1955, to house these people and has been characterized as "neither a prison, a hospital, nor an insane asylum, but an institution which exercises some of the functions of all three."[75]

A person found to be a defective delinquent[76] was confined to Patuxent for an indefinite period and the balance of the sentence imposed by the court suspended.[77] In this way, a defective delinquent

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73. Director of Patuxent Inst. v. Daniels, 243 Md. 16, 31, 221 A.2d 397, 405-06, *cert. denied*, 385 U.S. 940 (1966). Furthermore,

> the statute rejects the age old concept that every legally sane person possesses in equal degree the free will to choose between doing right and doing wrong. Instead it substitutes the concept that there is a category of legally sane persons who by reason of mental or emotional deficiencies "evidence a propensity toward criminal activity," which they are incapable of controlling.

Sas v. Maryland, 334 F.2d 506, 516 (4th Cir. 1964).

74. "For those in the category who are treatable it would substitute psychiatric treatment for punishment in the conventional sense and would free them from confinement, not when they have 'paid their debt to society,' but when they have been sufficiently cured to make it reasonably safe to release them." *Sas*, 334 F.2d at 516.

75. *Daniels*, 243 Md. at 32, 221 A.2d at 406 (quoting *Eggleston*, 209 Md. at 513, 121 A.2d at 702).

76. The Defective Delinquent Law defined a defective delinquent as

> an individual who, by the demonstration of persistent aggravated antisocial or criminal behavior, evidences a propensity toward criminal activity, and who is found to have either such intellectual deficiency or emotional unbalance, or both, as to clearly demonstrate an actual danger to society so as to require such confinement and treatment, when appropriate, as may make it reasonably safe for society to terminate the confinement and treatment.

Daniels, 243 Md. at 33, 221 A.2d at 407 (quoting MD. CODE ANN. art. 31B, § 5 (1957 & Supp. 1964)); *see also* Act of Apr. 20, 1951, ch. 476, § 5, 1951 Md. Laws 1348.

77. The Defective Delinquent Law stated:

> If the court or the jury, as the case may be, shall find and determine that the said defendant is a defective delinquent, the court shall so inform the defendant, and shall order him to be committed or returned to the institution for confinement as a defective delinquent, for an indeterminate period without either maximum or minimum limits. In such event, the sentence for the original criminal conviction, or any unexpired portion thereof, shall be and remain suspended, and the defendant shall no longer be confined for any portion of said original sentence, except as otherwise provided herein. Instead, the defendant shall thenceforth remain in the custody of the institution for defective

would not be released until it reasonably appeared that it was safe to return him to the community.[78] This provision recognized that mental illness is very difficult to cure "and will usually require confinement for considerable duration in order effectively to complete the treatment process."[79]

The Defective Delinquent Law was repealed in 1977 and replaced with the Patuxent Institution Act.[80] The 1977 Act provided that confinement was no longer for an indeterminate period, and the inmates' original sentences were reinstated.[81] The change was in response to criticisms that, under the old scheme, a person could remain confined in Patuxent long after expiration of the original sentence.[82]

2. Procedure for Release from Patuxent

Prior to 1977, the Board of Review of Patuxent[83] reviewed each person held at the institution at least once each year.[84] The board,

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delinquents, subject to the provisions of this article.

Gluckstern v. Sutton, 319 Md. 634, 639 n.3, 574 A.2d 898, 900 n.3 (quoting MD. ANN. CODE art. 31B § 9(b) (1971)), *cert. denied*, 498 U.S. 950 (1990); *see also* Act of Apr. 20, 1951, ch. 476, § 9(b), 1951 Md. Laws 1343, 1351.

78. *See supra* note 76 (providing definition of defective delinquent); *see also* Williams v. Director of Patuxent Inst., 276 Md. 272, 285, 347 A.2d 179, 186 (1975), *cert. denied*, 425 U.S. 976 (1976); *Daniels*, 243 Md. at 32, 221 A.2d at 406.
79. *Williams*, 276 Md. at 287, 347 A.2d at 187.
80. The Defective Delinquent Law was repealed by Act of May 26, 1977, ch. 678, 1977 Md. Laws 2723, which also enacted a new MD. ANN. CODE art. 31B, entitled "Patuxent Institution." The stated purpose of Patuxent Institution was "to provide efficient and adequate programs and services for treatment and rehabilitation of eligible persons." Act of May 26, 1977, ch. 678, § 2, 1977 Md. Laws 2723, 2729 (codified at MD. ANN. CODE art. 31B, § 2 (1990)). An eligible person was defined as a person who:

> (1) has been convicted of a crime and is serving a sentence of imprisonment with at least three years remaining on it, (2) has an intellectual deficiency or emotional imbalance, (3) is likely to respond favorably to the programs and services provided at Patuxent Institution, and (4) can be better rehabilitated through those programs and services than by other incarceration.

Id. § 1(g), 1977 Md. Laws 2723, 2729 (codified as amended at MD. ANN. CODE art. 31B, § 1(f)(1) (1990)); *see also* Watson v. State, 286 Md. 291, 298-99, 407 A.2d 324, 328 (1979).
81. Act of May 26, 1977, ch. 678, § 11(A), 1977 Md. Laws 2723, 2735 (codified at MD. ANN. CODE art. 31B, § 11(a) (1990)) provided that "[a] person confined at the [Patuxent] Institution shall be released upon expiration of his sentence in the same manner and subject to the same conditions as if he were being released from a correctional facility." *See also* Herd v. State, 37 Md. App. 362, 366, 377 A.2d 574, 576 (1977).
82. *Watson*, 286 Md. at 298, 407 A.2d at 328.
83. As of 1975, the Board of Review consisted of

at its discretion, could grant parole and impose conditions upon such release.[85] Furthermore, the board could

> request the court which imposed upon the person the original sentence resulting in his being subsequently classified as a defective delinquent, to reinstate the said original sentence; and the said court is authorized and empowered following such a request to reinstate and reimpose the said original sentence, and to cause the said person to be held in custody therefor . . . .[86]

If the sentence was reinstated, the person was returned to the Department of Correction where he served the sentence "upon which he was committed prior to being classified as a defective delinquent."[87]

If the Board of Review decided that a person's condition had improved enough that he could be unconditionally released from Patuxent, it informed the court that had jurisdiction over that person. That court then made a further study to determine whether the person should

> be released unconditionally from custody as a defective delinquent, released conditionally on a leave of absence or parole, returned to the custody of the Institution as a

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> the Director of the Patuxent Institution, the three associate directors, a University of Maryland Law School professor, a member of the Maryland Bar, and a sociologist who was required to be a faculty member of a Maryland institution of higher education.

Gluckstern v. Sutton, 319 Md. 634, 640 n.4, 574 A.2d 898, 900 n.4 (quoting MD. ANN. CODE art. 31B, § 12 (1971 & Supp. 1975)) *cert. denied*, 498 U.S. 950 (1990); *see also Williams*, 276 Md. at 291, 347 A.2d at 189 (quoting MD. ANN. CODE art. 31B, § 12 (1971 & Supp. 1974).

84. *Williams*, 276 Md. at 291, 347 A.2d at 189 (citing MD. ANN. CODE art. 31B, § 13(b) (1971 & Supp. 1974)). The defective delinquent could also periodically request a hearing to determine whether he is still a defective delinquent. *Id.* (citing MD. ANN. CODE art. 31B, §10 (1971 & Supp. 1974)).
85. *Sutton*, 319 Md. at 639-40, 574 A.2d at 900. The statute provided that
> [i]f the institutional board of review as a result of its review and reexamination of any person believes that it may be for his benefit and for the benefit of society to grant him a . . . parole from the institution for defective delinquents, it may proceed to arrange for such . . . parole . . . . The board may attach to any such . . . parole such conditions as to it seem wise or necessary. . . .

Id. at 640 n.4, 574 A.2d at 900 n.4 (quoting MD. ANN. CODE art. 31B, § 13(d) (1971 & Supp. 1975)) (alterations in original).
86. *Williams*, 276 Md. at 291-92, 347 A.2d at 189 (quoting MD. ANN. CODE art. 31B, § 13(d) (1971 & Supp. 1974)).
87. *Id.* at 292, 347 A.2d at 190 (quoting MD. ANN. CODE art. 31B, § 13(f) (1971 & Supp. 1974)).

> defective delinquent, or returned to the Department of Correction, to serve the original sentence upon which he was committed prior to being classified as a defective delinquent.[88]

As noted, the Defective Delinquent Law was repealed in 1977 and a new law adopted, providing that confinement would no longer be for an indeterminate period, and also providing for the reinstatement of the inmates' original sentences.[89] In 1982, the 1977 Act was amended (the "1982 Amendment") to provide that a person in Patuxent serving a life sentence would only be paroled upon approval of the governor.[90]

3. Civil Nature of the Defective Delinquent Law

In *Eggleston v. State*, the Court of Appeals of Maryland held that the Defective Delinquent Law was civil in nature.[91] In *Director of Patuxent Institution v. Daniels*,[92] the court stated that it was important to determine if the law was civil "because only if the statute is regulatory can the precise criminal procedures required to uphold the constitutionality of a penal statute be dispensed with."[93] According to the *Daniels* court, the legislative history of the Defective Delinquent Law indicated that its

> sole objective and purpose was not penal but an effort to segregate a known group of mentally disordered people who are found guilty of criminal acts, by confining them in an institution housing only members of their group in a sole effort to protect society and provide treatment to effect, if possible, a cure of the illness . . . .[94]

Part of this objective was to release the inmates when they are no longer a danger to themselves or to society.[95]

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88. *Id.* at 292, 347 A.2d at 189-90 (quoting MD. ANN. CODE art. 31B, § 13(f) (1971 & Supp. 1974)).
89. *See supra* note 81.
90. Acts of 1982, ch. 588, § 11(b)(2), 1982 Md. Laws 3479, 3480 (codified as amended at MD. ANN. CODE art. 31B, § 11(b)(3) (1990)). The statute was changed to add the following sentence: "an eligible person who is serving a term of life imprisonment shall only be paroled with the approval of the Governor." *Id.*; *see also Sutton*, 319 Md. at 643, 574 A.2d at 902.
91. Eggleston v. State, 209 Md. 504, 513-14, 121 A.2d 698, 703 (1956); *see also* Herd v. State, 37 Md. App. 362, 377 A.2d 574 (1977) (failure to cooperate with Patuxent Institution doctors constitutes only a civil contempt).
92. 243 Md. 16, 221 A.2d 397, *cert. denied*, 385 U.S. 940 (1966).
93. *Id.* at 37, 221 A.2d at 409.
94. *Id.* at 38, 221 A.2d at 410.
95. *Id.*

The court in *Daniels* stated that the face of the statute indicated that it is civil in nature.[96] Affirmative restraint is provided to protect society and to protect and treat the individuals. They are placed in an institution solely for defective delinquents; this type of punishment has long been regarded as regulatory. There is no requirement of scienter in the Act, and it was not enacted to promote the goals of punishment, retribution and deterrence. Defective delinquency is not a crime but a mental condition, and protecting society and attempting to treat those suffering from mental illness are valid state purposes. Further, the sanctions are not excessive, since most experts agree that treatment cannot be related to a fixed period of time.[97]

Categorizing the Defective Delinquent Law as a civil, rather than penal, law has important ramifications. For example, the *Daniels* court rejected the defendant's claim that, because he remained confined after his original sentence expired, his constitutional rights were violated because he was "twice placed in jeopardy for the same offense."[98] According to the court, confinement to Patuxent is a civil proceeding, and it does not involve a person "being placed in jeopardy for the commission of a crime."[99] In other cases, the court of appeals determined that there was no right to counsel during the defective delinquent examination, no privilege against self-incrimination, and no right to a speedy trial.[100] Further, there was no right to confront witnesses,[101] and the burden of proof was not "beyond a reasonable doubt."[102]

In response to a claim that the prohibition against ex post facto

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96. *Id.* at 39, 221 A.2d at 410. To determine whether an act is penal or civil in nature from the face of the act, the following must be considered:

> [W]hether the sanction involves an affirmative disability or restraint; whether it has historically been regarded as a punishment; whether it comes into play only on a finding of scienter; whether its operation will promote the traditional aims of punishment, that is, retribution and deterrence; whether the behavior to which it applies is already a crime; whether an alternative purpose to which it may rationally be connected is assignable for it; and whether it appears excessive in relation to the alternative purpose assigned.

Id. (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963)).

97. *Id.* at 40, 221 A.2d at 411.
98. *Id.* at 47, 221 A.2d at 415.
99. *Id.* at 47, 221 A.2d at 415-16.
100. Williams v. Director of Patuxent Inst., 276 Md. 272, 296, 347 A.2d 179, 192 (1975), *cert. denied*, 425 U.S. 976 (1976); Wood v. Director of Patuxent Inst., 243 Md. 731, 733, 223 A.2d 175, 176-77 (1966).
101. Mastromarino v. Director of Patuxent Inst., 243 Md. 704, 705-06, 221 A.2d 910, 911 (1966).
102. Dickerson v. Director of Patuxent Inst., 235 Md. 668, 670, 202 A.2d 765, 767 (1964).

laws had been violated, the Court of Appeals of Maryland stated in *Simmons v. Director of Patuxent Institution*[103] that the Defective Delinquent Law was civil, and not penal, in nature, and that the prohibition did not apply.[104] The court also took this position in *Monroe v. Director of Patuxent Institution*,[105] where a statute was changed to add the requirement that at least two-thirds of an inmate's original sentence must be served before a petition for redetermination could be made. The prior law provided that the inmate need only have been confined for two years before a petition could be made. The amendment also limited the right to appeal. According to the court, the fact that the change in the statute was made after Monroe was confined to Patuxent did not matter, since proceedings under the statute are civil, but not penal, in nature.[106]

4. The Civil Nature of the 1977 Act

It is not as clear that the 1977 Act is also civil in nature. In *Watson v. State*,[107] the court of appeals stated that although the Defective Delinquent Law was repealed, "the entire concept of the former law was not entirely abandoned."[108] As the court noted, the 1977 Act was adopted "to provide efficient and adequate programs and services for the treatment and rehabilitation of eligible persons."[109] An eligible person includes one who has been convicted of a crime, has an intellectual deficiency or emotional unbalance, is likely to respond to the programs and treatment offered at Patuxent, and is more likely to be rehabilitated through these services than by other incarceration.[110]

Applying the *Daniels* test,[111] it appears from the face of the 1977 Act that it is civil in nature. As with the Defective Delinquent Law, affirmative restraint is utilized to provide treatment, Patuxent only houses people who need such treatment,[112] and there is no scienter requirement. Even though a person transferred to Patuxent under

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103. 227 Md. 661, 177 A.2d 409 (1962).
104. *Id.* at 663, 177 A.2d at 411. In *Simmons*, the defendant claimed that since the issue of his being a defective delinquent was not raised at his trial, raising the issue in a later hearing deprived him of the protections afforded criminal defendants. *Id.*
105. 230 Md. 650, 653, 187 A.2d 873, 874 (1963); *see also* Herrman v. Director of Patuxent Inst., 229 Md. 613, 182 A.2d 351 (1962) (holding defective delinquent statute not a violation of ex post facto prohibitions).
106. *Monroe*, 230 Md. at 653, 187 A.2d at 874.
107. 286 Md. 291, 407 A.2d 324 (1979).
108. *Id.* at 298, 407 A.2d at 328.
109. *Id.* (quoting MD. ANN. CODE art. 31B, § 2(b) (1990)).
110. MD. ANN. CODE art. 31B, § 1(f)(1) (1990); *Watson*, 286 Md. at 298-99, 407 A.2d at 328.
111. *See supra* note 96.
112. MD. ANN. CODE art. 31B, § 1(f)(1) (1990).

the 1977 Act remains in the custody of the Department of Correction,[113] provisions of the 1977 Act indicate that it was not enacted to promote the goals of punishment, retribution and deterrence, but rather to treat those suffering from mental illness.[114] This is evidenced by one of the stated purposes of the 1977 Act, which is "to provide efficient and adequate programs and services for treatment with the goal of rehabilitation."[115] Staff members include psychiatrists, behavioral scientists, clinical psychiatrists, social workers and a physician.[116] Further, a treatment plan is prepared and implemented for each person.[117]

IV. RATIONALE OF THE COURT

According to the *Sutton* court, changing the parole procedures to require approval of the governor and the institution's Board of Review, together with reinstating Sutton's original life sentence, combined to violate the prohibition against ex post facto laws.[118]

The court noted that the prohibition against ex post facto laws is not limited to laws "directly changing the penalty for the offense."[119] The prohibition extends instead to any law enacted after the crime has been committed, which "inflicts a greater punishment

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113. *Id.* § 9(f).
114. *Id.* § 2(b).
115. *Id.*
116. *Id.* § 5(a).
117. *Id.* § 9(c).
118. There is some question as to the effect of the Supreme Court's decision in Collins v. Youngblood, 497 U.S. 37 (1990) (overruling Kring v. Missouri, 107 U.S. 221 (1883); Thompson v. Utah, 170 U.S. 343 (1898)), given the reasoning of the Court of Appeals of Maryland's decision in *Sutton*. Alston v. Robinson, 791 F. Supp. 569, 593 n.46 (D. Md. 1992). *Collins*, however, simply makes it clear that it is not enough that any "substantial personal right" be affected by a retroactive application of a law such that a person is disadvantaged. Rather, the prohibition against ex post facto laws is violated only if the person's situation is disadvantaged by an alteration in the "definition of crimes or [an] increase [in] the punishment for criminal acts" i.e., one of the "Calder" categories. *Collins*, 497 U.S. at 43. In Sutton's case, it is implicit in the court's reasoning that by making it more difficult for Sutton to obtain parole, his punishment was effectively increased. This falls squarely within one of the *Calder* categories and, if Sutton's punishment was in fact increased, then the prohibition against ex post facto laws would be violated.

    It is important to note that the *Collins* court cautioned that "by simply labelling a law 'procedural,' a legislature does not thereby immunize it from scrutiny under the Ex Post Facto Clause." *Id.* at 46. In the words of the Supreme Court, "the constitutional prohibition is addressed to laws, 'whatever their form,' which make innocent acts criminal, alter the nature of the offense, or increase the punishment. But the prohibition which may not be evaded is the one defined by the Calder categories." *Id.* (quoting Beazell v. Ohio, 269 U.S. 167, 170 (1925)) (citation omitted).
119. Gluckstern v. Sutton, 319 Md. 634, 665, 574 A.2d 898, 913, *cert. denied*, 498 U.S 950 (1990).

than the law annexed to the crime at the time it was committed . . . or which alters the situation of the accused to his disadvantage."[120] The prohibition extends to changes in parole requirements because they are a consequence of an offense, and a modification of parole eligibility "substantially alters the consequences attached to a crime already completed and therefore changes 'the quantum of punishment.' "[121]

The court determined that eligibility for parole was particularly important considering the fact that "a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed."[122] Numerous decisions were cited by the court holding that parole eligibility is part of the law annexed to the crime.[123]

The court emphasized that when Sutton committed his crimes, he faced the possibility of being found a defective delinquent and being committed to Patuxent for an indeterminate term without any provision for the governor to approve parole. Therefore, the court held that the 1977 Act and the 1982 Amendment combined to make parole more difficult to obtain because Sutton would now need the favorable decision of both the board and the governor.[124]

According to the court, the 1982 Amendment did not make the board's role advisory, nor did it substitute the governor for the board.[125] Also, unlike the federal parole guidelines, the requirement for gubernatorial approval is not a discretionary internal policy but has the force of law.[126] Therefore, these changes "clearly operated to Mr. Sutton's disadvantage"[127] by making it more difficult for him to be paroled.[128] Without further discussion, the court stated in dicta that, because the change involved parole eligibility and not trial procedure, the *Dobbert* procedure versus substance distinction to the prohibition against ex post facto laws did not apply.[129]

V. ANALYSIS

Despite the court's conclusion, it is arguable that no violation of the prohibition against ex post facto laws occurred in *Sutton*. The

120. *Id.* (quoting *In re* Medley, 134 U.S. 160, 171 (1890)).
121. *Id.* at 665, 574 A.2d at 913 (quoting Fender v. Thompson, 883 F.2d 303, 306 (4th Cir. 1989)).
122. *Sutton*, 319 Md. at 666, 574 A.2d at 913-14 (quoting Weaver v. Graham, 450 U.S. 24, 32 (1981)).
123. *Id.* at 665-69, 574 A.2d at 913-15.
124. *Id.* at 669, 574 A.2d at 915.
125. *Id.* at 671, 574 A.2d at 916.
126. *Id.* at 672, 574 A.2d at 916.
127. *Id.* at 669, 574 A.2d at 915.
128. *Id.* at 672, 574 A.2d at 916.
129. *Id.* at 670, 574 A.2d at 916.

civil nature of the Defective Delinquent Law and the 1977 Act indicate that the prohibition is inapplicable.[130] Further, the principles used to determine if there is a violation of the prohibition also indicate that retrospective application of the 1977 Act and the 1982 Amendment did not disadvantage Sutton by increasing his punishment.

The court did not discuss the line of cases holding that the Defective Delinquent Law was a civil law to which the prohibition against ex post facto laws did not apply.[131] Because the Defective Delinquent Law was in effect when Sutton committed his crimes, that law should have been applied. If precedent had been followed, therefore, reinstating the original sentence and adding the requirement of gubernatorial approval of parole would not have violated the prohibition regardless of whether the defendant was disadvantaged. The issue of whether the 1977 Act is also civil in nature was likewise not addressed by the court. Again, if the 1977 Act is civil in nature, the prohibition against ex post facto laws is inapplicable.

The *Sutton* court's view that parole eligibility is a consequence attached to a crime and, therefore, changes in parole requirements may violate the prohibition against ex post facto laws, is consistent with the current trend. Further, there is no question that the 1977 Act, reimposing Sutton's original sentence, and the 1982 Amendment, adding the requirement of the governor's approval of parole, were retrospectively applied to Sutton. It is not clear, however, that applying these laws disadvantaged Sutton if one looks to the policy behind the prohibition.[132]

The underlying policy of the prohibition against ex post facto laws is fairness.[133] The criminal must be aware of the consequences attached to a particular crime when it is committed. In this case, when Sutton committed his crime the law provided that, if convicted, he would serve his sentence in the Department of Correction.[134] Only after being sentenced to the Department of Correction would it be possible for him to be found a defective delinquent and committed to Patuxent. The chance of being sent to Patuxent, therefore, was only a remote consequence attached to his crime. The time at which the crime is committed determines whether there is a violation of the

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130. *See infra* notes 91-117 and accompanying text.

131. Williams v. Director of Patuxent Inst., 276 Md. 272, 347 A.2d 179 (1975), *cert. denied*, 425 U.S. 976 (1976); Monroe v. Director of Patuxent Inst., 230 Md. 650, 653, 187 A.2d 873, 874 (1963); Simmons v. Director of Patuxent Inst., 227 Md. 661, 177 A.2d 409 (1962).

132. Miller v. Florida, 482 U.S. 423, 430 (1987).

133. *Id.*; *see also* Weaver v. Graham, 450 U.S. 24, 28-29 (1981).

134. The parole regulations then in effect in the Department of Correction required that the governor approve parole. MD. ANN. CODE art. 41, § 122(b) (1957).

prohibition of ex post facto laws, not the time of sentencing or the determination that the defendant is a defective delinquent.[135]

The dissent supports the view that the 1977 Act and 1982 Amendment did not combine to result in unfair surprise, and, therefore, did not disadvantage the defendant.[136] The terms and conditions of Sutton's original sentence were reimposed, no additional time was added to the sentence, and the requirements for parole remained the same. The changes did not make the punishment more burdensome than it was at the time Sutton committed his crime,[137] but simply put Sutton in the same position he was in at the time he committed the murders.[138] At that time there was only a bare possibility that he would be found a defective delinquent and sent to Patuxent.[139]

It can be argued that the 1977 Act and the 1982 Amendment only served to make discretionary policies mandatory. Under the Defective Delinquent Law, the Board of Review, at its discretion, could grant parole.[140] The board could also, at its discretion, request that the court reimpose the original sentence.[141] If the original sentence was reimposed, the inmate was returned to the Department of Correction to serve his time.[142] The inmate was then subject to the department's procedures regarding parole which required the governor's approval of parole.[143] Also, if the board decided to unconditionally release the inmate, then the court having jurisdiction over

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135. A case recently decided by the United States District Court for the District of Maryland disagrees with this proposition. Alston v. Robinson, 791 F. Supp. 569 (D. Md. 1992). According to the court:

> Although it may be true that plaintiffs, once sentenced, are both initially and ultimately under the jurisdiction of the Maryland Division of Correction, the fact remains that for thirteen years prior to March 20, 1989, Patuxent Institution and the Division of Correction were operating under and applying different statutes with regard to parole. Although none of those inmates eligible to participate in the Patuxent program had any vested right to remain at that institution, once there, Patuxent's work release scheme became one of the determinates of those inmates' prison sentences.

Id. at 590. This reasoning fails to recognize, however, that it is the point at which the crime is committed that the ex post facto prohibition is triggered, not once a person is confined to a particular institution. In the cases of Alston and Sutton, confinement at Patuxent was only a remote possibility at the time their crimes were committed.

136. Gluckstern v. Sutton, 319 Md. 634, 673, 574 A.2d 898, 917, *cert. denied,* 498 U.S. 950 (1990).
137. *Id.* at 673, 574 A.2d at 917.
138. *Id.*
139. *Id.*
140. *See supra* notes 84-85 and accompanying text.
141. *See supra* note 86 and accompanying text.
142. *See supra* note 87 and accompanying text.
143. *See supra* note 8.

that person could return the inmate to the Department of Correction.[144] As other decisions have held, and as the court itself indicated, making a discretionary policy mandatory does not violate the prohibition against ex post facto laws.[145]

Finally, the court indicated that the procedure versus substance distinction was inapplicable in this case because changes in trial procedure were not involved.[146] The trend in other jurisdictions, however, is to extend this distinction beyond trial procedure to encompass changes made in parole eligibility requirements.[147]

VI. IMPACT OF THE DECISION

Aside from not following precedent and failing to note that the Defective Delinquent Law is a civil law, the *Sutton* court did not address the question of whether the 1977 Act is civil or penal in nature. The court proceeded instead upon the assumption that the 1977 Act is a penal law.

Characterizing the 1977 Act as penal in nature has important ramifications, for only if a law is civil can the "precise criminal procedures required to uphold the constitutionality of a penal statute" be dispensed with.[148] For example, if the 1977 Act is a penal law, inmates may have a right to counsel during the evaluation,[149] and it may be possible to invoke the privilege against self-incrimination.[150] Further, any change to the 1977 Act retrospectively applied to an inmate's disadvantage will be subject to the prohibition against ex post facto laws, as in *Sutton*.

Assuming that a person in Sutton's position is disadvantaged by retrospective application of the 1977 Act and the 1982 Amendment, and assuming that the 1977 Act is a penal law, the fatal flaw in the 1982 Amendment is that it requires approval of both the board and the governor to decide in favor of parole. The legislature should consider following the court's suggestion and make "the role of the Board simply advisory or substitute the Governor for the Board" in

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144. *See supra* note 89 and accompanying text.
145. United States *ex rel.* Chaka v. Lane, 685 F. Supp. 1069, 1072 (N.D. Ill. 1988); Davis-El v. O'Leary, 626 F. Supp. 1037, 1041 (N.D. Ill. 1986); *see also* Alston v. Robinson, 791 F. Supp. 569 (D. Md. 1992); *Sutton*, 319 Md. at 670-72, 574 A.2d at 916.
146. *Sutton*, 319 Md. at 670-72, 574 A.2d at 916.
147. Portley v. Grossman, 444 U.S. 1311, 1312 (1980).
148. Director of Patuxent Inst. v. Daniels, 243 Md. 16, 37, 221 A.2d 397, 409, *cert. denied*, 385 U.S. 940 (1966).
149. Williams v. Director of Patuxent Inst., 276 Md. 272, 347 A.2d 179 (1975), *cert. denied*, 425 U.S. 976 (1976); Wood v. Director of Patuxent Inst., 243 Md. 731, 733, 223 A.2d 175, 176-77 (1966).
150. *Williams*, 276 Md. 272, 347 A.2d 179; *Wood*, 243 Md. 731, 233 A.2d 175.

order for the law to survive a challenge based upon ex post facto grounds.[151] Another option suggested by the court that achieves the same result is to make the governor's approval discretionary or advisory.

Finally, the court takes a very narrow view of when the procedure versus substance distinction to the prohibition against ex post facto laws applies. The court suggests that only trial procedural changes fall within the *Dobbert* distinction. By taking this position, however, it has chosen not to follow the lead of the Supreme Court in *Portley v. Grossman*,[152] which extends the exception to changes with respect to parole requirements, or the courts in other jurisdictions that recognize the distinction in cases involving changes in the standard for granting bail[153] or in procedures for releasing inmates from mental institutions.[154]

VII. CONCLUSION

Prior decisions held that the Defective Delinquent Law was a civil law to which the prohibition against ex post facto laws did not apply. This was the law in effect when Sutton committed his crimes and, therefore, it was not necessary for the court to address the ex post facto question. In addition, a strong argument can be made that the 1977 Act is also a civil law to which the prohibition does not apply.

It is important that the procedure versus substance distinction to the prohibition against ex post facto laws not be limited to trial procedure. Rather, Maryland should consider following the lead of the United States Supreme Court and other jurisdictions and extend the distinction beyond trial procedure, at least to encompass changes in parole requirements.

The prohibition against ex post facto laws in the Maryland Declaration of Rights and the United States Constitution has a long history and serves an important purpose. Fundamental principles of fairness dictate that a person know the consequences attached to a crime when it is committed. In cases such as Sutton's, however, retrospective application of the requirement of gubernatorial approval of parole and reinstatement of the original sentence only served to put the defendant in the position he was in at the time the crime was committed. There is no unfair surprise and no increase in the punishment attached to the crime. Under such circumstances, it is

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151. Gluckstern v. Sutton, 319 Md. 634, 671, 574 A.2d 898, 916, *cert. denied*, 498 U.S. 950 (1990).
152. 444 U.S. 1311 (1980).
153. United States v. Molt, 758 F.2d 1198 (7th Cir. 1985).
154. Raimondo v. Belletire, 789 F.2d 492 (7th Cir. 1986).

hard to argue that a violation of the prohibition against ex post facto laws occurred.

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