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Ex Post Facto in the Civil Context: Unbridled Punishment

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INTRODUCTION

Over the past ten years, the federal government has made increasing use of the civil law as a device for punishing wrongdoers. The recent controversy in the United States Congress over the funding of the National Endowment for the Arts, and in particular the Endowment's support of Robert Mapplethorpe's work, gave America a glimpse of the power of Congress to retroactively punish organizations and individuals.[1] Since this funding controversy arose in the civil context, the restrictions on funding were viewed by many as constitutionally inoffensive. However, cries were made that such acts infringed upon the Ex Post Facto Clause or were unconstitutional bills of attainder.[2] Similar cries are often heard when the government seizes assets under the authority of laws that allow seizure of property suspected to have been purchased with the proceeds of an illegal endeavor.[3] Those civil forfeiture statutes allow property seizure from citizens even without conviction. These actions are

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[1] *See* Judith Bresler, *Art, Obscenity and the First Amendment*, 14 NOVA L. REV. 357, 364-67 (1989-90).

[2] *See* Arthur I. Jacobs, *"One if by Land, Two if by Sea,"* 14 NOVA L. REV. 343, 349 (1989-90). Jacobs notes that the United States Senate attempted to punish two art organizations through a bill of attainder for involvement with the Mapplethorpe exhibit. *Id.* The Senate amendment provided that funds were not to be allocated to the National Endowment for the Arts if such funds were to be "used for a direct grant to the Southern Center for Contemporary Art (SECCA) in Winston-Salem, North Carolina or for the Institute of Contemporary Art at the University of Pennsylvania." 135 CONG. REC. S8762, S8774 (daily ed. July 26, 1989) (amendment of Sen. Helms).

[3] This action was authorized by the Comprehensive Drug Abuse Prevention and Control Act of 1970, § 511(a)(6), 21 U.S.C. § 881(a)(6) (1988), which provides for the forfeiture to the United States government of

> [a]ll moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter.

Id.

civil in nature and require no criminal proceedings. As a result they have been repeatedly challenged on constitutional grounds.

One of the constitutional theories often used in these challenges is drawn from the Ex Post Facto Clause. However, courts consistently find that since the statute in question is civil in nature, the Ex Post Facto Clause is not applicable.[4] The standard retort to the laments of unjustified punishment is that the Ex Post Facto Clause applies only in a criminal context and therefore places no restriction on these civil legislative acts.[5] Indeed, as interpreted by modern courts, such an observation may seem to be true. However, the sense of uneasiness and unfairness that many Americans felt as Congress attempted to retroactively restrict arts funding or that frustrated citizens feel as their property is seized, finds recognition among the drafters of the United States Constitution.

The drafters firmly believed that the power to create ex post facto laws was one of the hallmarks of tyranny.[6] Such laws place the citizens at the mercy of the government, unable to know the consequences of their acts and constantly subject to the possibility of legislative vindictiveness. The framers incorporated the ex post facto bar into the Constitution in two places, thus prohibiting both federal and state legislatures from passing retroactively applicable legislation.[7] The Constitution makes no distinction between laws on the basis of whether they are civil or criminal in form. There is a strong argument to be made that the framers debated the issue and determined that all retroactive laws were suspect and that only upon a showing of necessity should a civil law be allowed to have retrospective effect.[8]

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[4] At least one court has found, however, that the Ex Post Facto Clause barred civil forfeiture. *United States v. Lot No. 50*, 557 F. Supp. 72 (D. Nev. 1982). This case, however, was specifically overruled by *United States v. $5,644,540.00 in U.S. Currency*, 799 F.2d 1357 (9th Cir. 1986).

[5] A key decision holding that forfeiture under the Comprehensive Drug Abuse Prevention and Control Act of 1970 is a civil penalty and therefore not subject to the Ex Post Facto Clause is *United States v. D.K.G. Appaloosas, Inc.*, 829 F.2d 532 (5th Cir. 1987), *cert. denied*, 485 U.S. 976 (1988). In *D.K.G.*, the court held that the Ex Post Facto Clause was not violated by the government's seizure of nine gold bars under the Comprehensive Drug Abuse Prevention and Control Act of 1970 even though the gold bars were purchased prior to the law's enactment. *Id.* at 544-45. The court noted that "it is beyond dispute that the *ex post facto* clause applies only to criminal cases." *Id.* at 540.

[6] James Iredell noted that an Ex Post Facto Clause prevented the exercise of "tyranny that . . . would be intolerable . . . ."James Iredell, *Observations on George Mason's Objections to the Federal Constitution*, *in* PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 368, 369 (Paul L. Ford ed. 1888).

[7] *See* U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."); U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . ."). These provisions, though actually comprising two separate clauses, will be referred to as the Ex Post Facto Clause.

[8] James Madison appears to have based some of his comments concerning the ability of courts to prevent laws affecting an existing contract upon a belief that such actions were prohibited by the Ex Post Facto Clause. MADISON'S DEBATES 479 (Gaillard Hunt et al. eds., 1920). Gaillard Hunt, one

Despite the impassioned voices that echo in the legislative history, the courts have diluted the force of the Ex Post Facto Clause. In the criminal arena, the Clause is interpreted with maximum protection for the disadvantaged offender, but when the ex post facto law takes civil form, there is a strong presumption of legitimacy. Before an ex post facto violation is found in the civil context, the law's opponent must show that the civil law is unmistakably punitive.[9] In many cases, such a law may be deemed necessary in order to effect expansive regulatory schemes. However, the values that underlie the Ex Post Facto Clause demand that there be some protection against civil laws that are punitive in nature.

While the drafters anticipated that the proponent of a retroactively effective law would be required to show the necessity for such retroactivity, modern courts have seemingly shifted this burden, requiring instead that the law's challenger show by unmistakable evidence that the law is punitive before recognizing the existence of an ex post facto violation.[10] Obviously, the mere recitation of a legitimate governmental purpose should not be sufficient to save a statute from ex post facto review. However, when dealing with such mixed-motive statutes, the dilution of the values underlying the Ex Post Facto Clause can be seen to have essentially cleared the path for such deference to the government.[11]

The protection against ex post facto laws was of the highest importance to the drafters of the Constitution[12] and these values are offended whether

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of the editors of MADISON'S DEBATES, argues that Madison thought the terms ex post facto and retrospective had the same meaning. This serves to illustrate that in Madison's view the Ex Post Facto Clause should apply to civil statutes as well as criminal. 2 MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787 440 (2d ed. 1937). Other commentators have noted that "[i]t is improbable that Madison alone understood the terms [of the Ex Post Facto Clause] to have the meaning he attaches to them." Oliver P. Field, *Ex Post Facto in the Constitution*, 20 MICH. L. REV. 315, 320 (1920-21).

[9] *See, e.g.*, United States v. P.K.G. Appaloosa's, Inc., 829 F.2d at 544 (The Court held that since "Congress intended section 881 to be a civil statute, we must now determine whether 'the clearest proof' exists that the purpose or effect of the forfeiture is so punitive that it requires us to override Congress' preference for a civil sanction.").

[10] *See* Flemming v. Nestor, 363 U.S. 603, 619 (1960) (The Court held that "unmistakable evidence of punitive intent . . . is required before a Congressional enactment [regulating Social Security] may be struck down.").

[11] *See infra* notes 200-44 and accompanying text.

[12] I am not endorsing the "intent of the drafters" philosophy with respect to constitutional interpretation. However, when looking at the constitutional history of the Ex Post Facto Clause, it is striking that the framers were passionately concerned about the evil effects of retrospective laws. The statements of the drafters concerning the need for the Clause–so as to avoid the potential for tyranny–and the values that were to be served by its incorporation into the Constitution, are forceful reminders of the importance of such a prohibition. *See* Iredell, *supra* note 6, at 369. Furthermore, these debates give some idea of what degree of proof should be required to justify the use of a retrospective punitive law. For instance, Madison suggested that to survive a constitutional challenge, the law must be required by "necessity" and in the interest of "public safety." 2 FARRAND, *supra* note

the punitive law takes civil or criminal form. Therefore, this sharp distinction based on the form of the law is unjustified. In order to provide the protection required by the Ex Post Facto Clause, the law's challenger should only be required to put forth prima facie evidence of the law's punitiveness. Upon such a showing, the burden should shift to the state, which then would be required to negate the implication of punitiveness and to demonstrate that the purpose of the law is regulatory, not punitive. If the law appears to be penal in character, or a product of mixed regulatory and punitive motives, then it should be struck down as a violation of the Ex Post Facto Clause.

This Article outlines the historical background of the Ex Post Facto Clause, focusing on the intent of the framers and the Supreme Court's narrowing of the Clause to apply only to criminal statutes and any civil statutes that are unmistakably punitive in nature.[13] The focus then shifts to the problem of mixed motives in legislative acts, with particular emphasis on a series of recent cases involving an ex post facto challenge to a law that suspends the payment of social security benefits to incarcerated felons.[14]

Despite some evidence of punitive intent, courts have consistently found that the suspension of prisoners' social security benefits does not violate the Ex Post Facto Clause.[15] The D.C. Circuit has called this the closest case, implying that the civil statute was nearly an ex post facto violation, yet failed to invalidate the law.[16] Such holdings demonstrate the limitations that the courts have placed on the use of the Ex Post Facto Clause in challenging civil laws that are punitive in nature. Drawing from these judicial limitations and the developing case law, this Article identifies the underlying factors that the courts have used to gauge the punitiveness of a given provision and suggests a more appropriate test for use in a civil law context.[17] Finally, this test is applied to the social security law that has thus far survived ex post facto scrutiny.

8, at 640. Interestingly, the same scholars that have been the main proponents of the "intent of the drafters" approach to constitutional jurisprudence have also argued for a more restrictive view of the relationship between individual rights and the government. *See* James W. Torke, *Book Review*, 11 IND. L. REV. 501 (1978) (reviewing BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977)). Yet here, if one were to follow the intent of the drafters, there would be a substantial restriction on the power of the government to apply laws retroactively.

[13] The concept of punishment has been discussed by many legal commentators and philosophers and is an enormously interesting and complex topic. While I draw on some of the insights of these thinkers, the debate on what is punishment is beyond the scope of this Article. For insights on the topic, however, I suggest HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (Stanford University Press 1968); PHILIP BEAN, PUNISHMENT (Martin Robertson & Co. 1981); and Henry H. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958).

[14] *See infra* notes 200-44 and accompanying text.

[15] *See* cases cited *infra* note 221.

[16] Wiley v. Bowen, 824 F.2d 1120, 1122 (D.C. Cir. 1987); *see also infra* notes 200-44 and accompanying text (discussing congressional efforts to restrict social security benefits to incarcerated felons).

[17] *See infra* notes 190-204 and accompanying text.

I. THE HISTORY OF THE CIVIL/CRIMINAL DISTINCTION IN THE EX POST FACTO CLAUSE: THE INTENT OF THE FRAMERS

The history of the Ex Post Facto Clause reveals the sharp departure that the United States Supreme Court has taken from what was originally intended when the Clause was included in the Constitution.[18] Early debates focused on the invidious nature of all laws that had retrospective application.[19] In addition, justices have not universally agreed that the term "ex post facto" reaches only retrospective criminal laws. For example, Justice Johnson in *Satterlee v. Matthewson*[20] strongly objected to the Court's holding in *Calder v. Bull*[21] that the Ex Post Facto Clause applied only to criminal laws.[22] Furthermore, some scholars have argued that former Chief Justice John Marshall opposed[23] the Court's holding in *Calder*. The framers were clear on the harm to be avoided,[24] and this harm can take both criminal and civil form.

Having witnessed as colonists the potential for oppressiveness in government, the framers considered protection against ex post facto and other unjust laws essential for the new constitutional government.[25] The ex post facto laws that the colonies suffered

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[18] *See* Field, *supra* note 8, at 315-16. Field notes that it is unclear whether the Ex Post Facto Clause would be found to apply only to criminal laws if the debate were to be reopened. *Id.* at 315. Furthermore, Field notes that it was clear to many who debated the significance of the Ex Post Facto Clause within various states' ratifying conventions that the Clause applied to civil laws. *Id.* at 322-26. For example, George Mason argued that laws affecting the support of the value of paper currency could be declared a violation of the Ex Post Facto Clause. *Id.* at 323. Patrick Henry also presented arguments based upon a belief that the Ex Post Facto Clause applied to civil enactments. *Id.* Note that the language of the Ex Post Facto Clause places a restriction on the legislative branch, prohibiting Congress, as well as the state legislatures, from passing any ex post facto law. *See supra* note 7 and accompanying text. Literally, ex post facto means a law that is retrospective in that it imposes a sanction for an act that was completed before the law's enactment. The scope of the ex post facto prohibition has been a topic of debate since its inclusion in the Constitution. Although the Ex Post Facto Clause by its own terms applies only to legislative acts, the Due Process Clause has been used to strike down attempts to retroactively apply expansive judicial decisions in the criminal context. *See* Rabe v. Washington, 405 U.S. 313 (1972) (per curiam); Bouie v. City of Columbia, 378 U.S. 347 (1964).

[19] *See supra* notes 6, 8; *infra* notes 36-44 and accompanying text.

[20] Satterlee v. Matthewson, 27 U.S. (2 Peters) 380 (1829) (Johnson, J., dissenting).

[21] 3 U.S. (3 Dall.) 386 (1798).

[22] *Satterlee*, 27 U.S. (2 Peters) at 414-16.

[23] *See* Field, *supra* note 8, at 316.

[24] *See* Iredell, *supra* note 6, at 369. The Ex Post Facto Clause was incorporated into the Constitution late in the process. The original floor motion in support of a clause prohibiting ex post facto laws and bills of attainder was introduced by Mr. Gerry and Mr. McHenry on Wednesday, August 22, 1787. FARRAND, *supra* note 8, at 375.

[25] *See generally* FARRAND, *supra* note 8, at 375-76 (debates concerning the Ex Post Facto Clause). The framers of the Constitution appear to have been determined to provide against the

under British rule took the form of both civil and criminal statutes.[26] Unfortunately, after the Revolutionary War, many states began to enact similar legislation.[27] Nonetheless, given the pernicious nature of these laws, some of the framers believed that the prohibition against ex post facto laws was so rooted in the very concept of the rule of law that it need not be articulated in the Constitution.[28] Still, out of caution the protection was incorporated into the body of the Constitution.[29]

The body of the Constitution was chiefly concerned with delineating the powers and functions of government; individual rights within the new constitutional government were embodied in the Bill of Rights. The fact that concern about "legislative excess" led the framers to incorporate the Ex Post Facto Clause into the original *body* of the Constitution is perhaps indicative of the importance attributed to such provisions; rather than granting individuals the right to be free

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reoccurrence of such abusive acts in the United States so that "bills of attainder and other acts of party violence" might not ruin individuals here "as they [had] frequently done in England." 2 GRIFFITH J. MCREE, LIFE AND CORRESPONDENCE OF JAMES IREDELL 173 (1949).

[26] Bills of attainder are a special kind of ex post facto law that are designed to convict persons without providing the targeted individuals with the benefit of a judicial trial. Such laws are egregious in effect and violate the concept of the separation of powers because the legislature is invading the province of the judiciary. Other forms of ex post facto laws may have similar effect, but they generally are not considered as pernicious as bills of attainder. However, like attainder, ex post facto laws violate the separation of powers doctrine by invading the judicial province of meting out punishment. Bills of attainder originated in England. For example, the Langcastrians and Yorkists used acts of attainder as a tool to destroy each other. The Tudors also employed these devious acts to further their aims. *See* THOMAS P. TASWELL-LANGMEAD, ENGLISH CONSTITUTIONAL HISTORY 261-62 (10th ed. 1946). Furthermore, the Treason Act of Edward III gave Parliament the power to create ex post facto treasons. *Id.* at 573. And, Thomas Haxley was condemned to death in 1397 by an ex post facto law. *Id.* at 195-96. Such an act was last used in England in 1696 against Sir John Fenwick. *See* H. ST. CLAIR FEILDEN, A SHORT CONSTITUTIONAL HISTORY OF ENGLAND 157 (3d ed. 1895).

[27] Many states passed laws confiscating the property of those individuals who remained loyal to England during the Revolution. Obviously, those loyalists had no notice that loyalty to the Crown would cost them their property. Most of the egregious laws of the period took the form of bills of attainder. Thomas Jefferson drew up a bill of attainder for the purpose of putting Josiah Phillips to death for committing depredations and murders in Norfolk and Princess Anne. Phillips was attainted on vague reports, not allowed to put forward evidence on his own behalf and eventually executed. *See* JONATHAN ELLIOT, 3 DEBATES OF THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 66-67 (1836).

[28] *See* Oliver Ellsworth, *Landowner*, *in* ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 150 (B. Franklin 1970) (1892). Ellsworth argued that there was no need to incorporate an Ex Post Facto Clause into the Constitution because it was unrealistic to believe that the government of the newly formed republic would pass such laws. Furthermore, Ellsworth argued that since such a law would violate the natural rule of law, it would be void without the aid of any additional constitutional protection. Id. at 163.

[29] *See supra* note 7 and accompanying text. The importance of the ex post facto provision to the early Supreme Court can be seen in the case of *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). In this case, Justice Chase noted that no people with a sense of reason and justice would entrust the government with the power to pass ex post facto laws, because any such act by a legislature would offend natural law even if it were not prohibited by the Constitution. *Id.* at 388.

from such abuses, the framers instead directly curtailed governmental power to enact ex post facto laws.[30]

This safeguard was built into the very concept of separation of powers.[31] As James Iredell said, "This very clause I think is worth ten thousand declarations of rights, if this, the most essential right of all, was omitted in them."[32] Comments such as Iredell's reveal that the framers were aware of the fact that legislators are human beings subject to human frailties but imbued with the power to make law. If such power were left unchecked during times of turmoil, legislators would be in the position to infringe upon the rights of the individual. Thus, the Ex Post Facto Clause provided an inherent limitation on the law-making ability of the legislature.

Thus, the Ex Post Facto Clause serves a vital role in the preservation of the essential values of a constitutional government that is based upon separation of powers. Since retroactive legislation tends to create instability, the framers incorporated into the Constitution the notion that citizens should have fair notice of the laws that will be affecting them and therefore, as a general rule, laws should operate prospectively so as to provide such notice.[33] The requirement that laws be prospective in their application would also ensure that punitive legislation would serve its core purpose of specific deterrence. Such a restriction on law making requires legislatures to understand and respect the reliance of citizens upon the current state of the law in order to protect the settled expectations of the nation's citizens.

Fair notice, however, is not the only value recognized and served through the Ex Post Facto Clause. The Clause also prevents the

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[30] The public concern about ex post facto laws was articulated by Madison in *The Federalist* Number 43:

> Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the Convention added this constitutional bulwark in favor of personal security and private rights; and I am much deceived if they have not, in so doing, as faithfully consulted the genuine sentiments as the undoubted interests of their constituents. The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences in cases affecting personal rights become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the community ....

THE FEDERALIST No. 43 at 244, 246 (James Madison) (Colonial Press ed. 1901).

[31] *See supra* note 7 and accompanying text. The ex post facto prohibition was considered so important that it was a restriction placed upon both the state governments and the federal government. For a discussion of the importance of the Ex Post Facto Clause in the Constitution, see Breck P. McAllister, *Ex Post Facto Laws in the Supreme Court of the United States*, 15 CAL. L. REV. 269 (1927).

[32] Iredell, *supra* note 6, at 368.

[33] *See* Madison, *supra* note 30, at 246.

punishment under recently enacted legislation of those persons who were aware that their act was wrong, but not illegal, at the time of its commission. Furthermore, the Ex Post Facto Clause prevents the creation of statutes that are not universally applicable, but are instead designed to apply to a particular person. The framers recognized from their experience the potential for legislative abuse of retroactive laws–laws that were often the tools of tyrants to achieve politically motivated results. The Ex Post Facto Clause was designed to stand in the way of such legislative vindictiveness. As stated by Alexander Hamilton:

> How easy it is for men . . . to change their principles with their situations–to be zealous advocates for the rights of the citizens when they are invaded by others, and as soon as they have it in their power, to become the invaders themselves–to resist the encroachments of power, when it is in the hands of others, and the moment they get it into their own to make bolder strides than those they have resisted.[34]

The Ex Post Facto Clause was a tool by which the framers could ensure that policies chosen by the government would either (1) apply only to those who engaged in the precipitating behavior after the law took effect or (2) be phrased at a level of such generality that it would be impossible to identify in advance which and to what extent particular individuals would be affected by the law. The concerns identified by the drafters are as relevant today as they were two hundred years ago. Government has expanded and the use of regulatory law to control behavior has grown substantially since 1787. Today, just as in 1787, citizens have not lost their need to have notice of what the consequences of their acts will be, nor have legislators been visited with some divine benevolence that prevents legislative vindictiveness.[35]

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[34] Alexander Hamilton, *Letter from Phocion*, *in* PAPERS 485, 542-543 (Jan. 1784), *reprinted in* CLINTON ROSSITER, ALEXANDER HAMILTON AND THE CONSTITUTION 132 (1964).

[35] Unfortunately, the drafters' predictions about the foibles of legislators have proven to be accurate. Many of the laws that have been challenged since the Clause's incorporation into the Constitution have been the product of the inflamed passions of the legislature or the electorate. These include laws that prevented entry into certain professions of persons who had been allied with the Confederacy and, in the 1950s, persons who had been Communists. *See* Flemming v. Nestor, 363 U.S. 603 (1960) (upholding the termination of old age benefits for an alien after deportation); De Veau v. Braisted, 363 U.S. 144 (1960) (upholding statute barring convicted felons from holding office in a labor organization); Galvan v. Press, 347 U.S. 522 (1953) (upholding statute allowing deportation of aliens having membership in the Communist Party); Harisiades v. Shaughnessy, 342 U.S. 580 (1952) (upholding deportation of aliens due to membership in the Communist Party); United States v. Lovett, 328 U.S. 303 (1946) (striking down a statute that prohibited certain persons from government service based on prior supposed disloyalty); Hawker v. New York, 170 U.S. 189 (1898)

The debate on the inclusion of the Ex Post Facto Clause gives considerable insight into the intended substantive content of the ex post facto provisions. The fact that the debate includes discussion about the Clause's applicability to civil laws[36] indicates that modern limitations on the Clause[37] depart from the drafters' intentions. Madison argued for an expansive view of the Ex Post Facto Clause. In Madison's opinion, the Ex Post Facto Clause should apply to retrospective civil and criminal laws.[38] A motion to strike the Clause due to a fear that it would unduly restrict the power of the government to act civilly was defeated during the debate on the inclusion of the Clause.[39] The federal convention notes reveal that the Clause was incorporated with the intention that it would cover all laws. Only when "necessity and public safety require them" would retrospective laws be allowed.[40] In the words of James Iredell,

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(upholding a statute barring convicted felons from the practice of medicine); *Ex Parte* Garland, 71 U.S. (4 Wall.) 333 (1866) (striking down a law that prevented attorneys from practice until an oath of loyalty was taken); Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866) (invalidating a law that required priests to take an oath of loyalty).

[36] Madison assumed that the ex post facto prohibition would prevent the imposition of retrospective civil laws. This is apparent from a debate on how the Ex Post Facto Clause interacted with the Contracts Clause. The argument was made that the clause prohibiting the impairment of contract was not needed because the Ex Post Facto Clause was sufficient to protect freedom of contract. This belief is echoed by a question asked by Madison during the debate: "Is not that already done by the prohibition of the *ex post facto* laws, which will oblige the Judges to declare such interference null & void?" JAMES MADISON, NOTES ON THE DEBATES IN THE FEDERAL CONVENTION OF 1787, 543 (Ohio Univ. Press 1984) (1840). Throughout the debate, the words ex post facto and retrospective were used interchangeably. Furthermore, there is a notable lack of discussion on the relationship between the Ex Post Facto Clause and criminal affairs as the debate is focused exclusively on examples of civil disabilities. *Id.* at 541-44. For a discussion of the debate's focus on the civil aspect of the Ex Post Facto Clause see Field, *supra* note 8. This Article also uses the debates of the states on their constitutions to add to the argument that the Ex Post Facto Clause was intended to cover all retrospective laws.

[37] *See infra* notes 38-43 and accompanying text.

[38] *See* Madison, *supra* note 30, at 246.

[39] *See* 2 FARRAND, *supra* note 8, at 617. The motion was made in a colloquy by Mr. Mason, who was motivated by the fact that it was not clear that the phrase was limited to criminal cases. Mr. Gerry spoke to this, asserting that clearly the clause applied to civil cases as well as criminal laws. *Id.* Mason later opposed the Constitution and cited this as one of his reasons. William W. Crosskey, *The Ex Post Facto and the Contracts Clauses in the Federal Convention: A Note on the Editorial Ingenuity of James Madison*, 35 U. CHI. L. REV. 248, 252-54 (1968) (discussing the internal and external inconsistencies of Madison's notes with respect to the scope of the Ex Post Facto Clause).

[40] On September 15, Mason noted:

> Both the general legislature and the State legislature are expressly prohibited making ex post facto laws; though there never was nor can be a legislature but must and will make such laws, when necessity and the public safety require them; which will hereafter be a breach of all the constitutions in the Union, and afford precedents for other innovations.

2 FARRAND, *supra* note 8, at 640.

The conversion from gold and silver to paper money provided the basis for an argument against an absolute prohibition on ex post facto laws. In 1760, a dispute arose over the issuance of a bond to be paid in "good public bills of the province of Massachusetts Bay, or current lawful money of New England, with interest." Deering v. Parker, 4 Dall. 23, 23 (P.C. 1760), *reprinted in* 4 U.S. (4 Dall.) at 925. After the defendant in this case had made numerous payments, he tendered a large sum

"*Ex post facto* laws may sometimes be convenient, but that they are ever absolutely necessary I take the liberty to doubt, till that necessity can be made apparent."[41] At the time of the framing, the drafters expressed concern that an absolute bar on retrospective legislation would make it impossible for the new government to deal with problems as they arose with any degree of flexibility.[42] However, they recognized that the flexibility of the government must be tempered. As Iredell said:

> A man may feel some pride in his security, when he knows what he does innocently and safely today in accordance with the laws of his country, cannot be tortured into guilt and danger tomorrow. But if it should happen, that a great and overruling necessity, acknowledged and felt by all, should make a deviation from this prohibition excusable, shall we not be more safe in having the excuse for an extraordinary exercise of power rest upon the apparent equity of it alone, than to leave the door open to a tyranny that it would be intolerable to bear?[43]

The framers saw the evil as retroactivity in the law, whether civil or criminal, although they conceded that on rare occasions such retroactive civil laws may be justified. The idea of a general rule subject to rare exceptions suggests that the framers believed that the prohibition of ex

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in the bills of credit then current in New Hampshire which, if accepted, would result in the plaintiff suffering a significant loss in value. The plaintiff refused to accept the tender offer, and the determination was made to divide the loss between the parties instead of adopting the plaintiff's position to base the appropriate value on the price of silver at the time of the contract. It was argued by Lord Mansfield that although much could be said for adopting as a rule that the value at the time of the contract, he believed that such a ruling would be inappropriate. *Id.* at 925-26.

Both the colonies and the states issued large amounts of paper money, often resulting in a high level of inflation that led to an erosion of the currency's purchasing power. This left many persons defrauded by the impairment of public credit since they were forced to tender their public debt holdings for depreciated currency. The Ex Post Facto Clause that extended its protection to the states, *see supra* note 7, included a clause prohibiting the impairment of the obligation of contract. The purpose of this clause was to prohibit the states from passing stay and tender laws that prevented or delayed the collection of private debts. Patrick Henry and George Mason objected in the Virginia Convention that states and individual speculators had bought large amounts of paper money at a low price. Furthermore, both objected that the Contracts Clause compelled payment in paper money at the nominal value in gold and silver, and that the prohibition on ex post facto laws tied the hands of both the federal and state governments to alter exchange values. This combination had lead to the amassing of great fortunes by men who began speculating in the currency market. *See* DAVID HUTCHISON, THE FOUNDATIONS OF THE CONSTITUTION 155-60 (1975). In a letter to Governor Huntington of Connecticut, Roger Sherman and Oliver Ellsworth declared that the restraint on the state legislatures regarding the "emitting of bills of credit, making anything but money a legal tender in payment of debts, or impairing the obligation of contracts by *ex post facto* laws, was thought necessary as a security to commerce, in which the interests of foreigners, as well as the citizens of different states may be affected." *Id.* at 160.

[41] Iredell, *supra* note 6, at 368.

[42] *Id.*

[43] *Id.* at 369.

post facto laws was best implemented by requiring the government to carry the burden of justifying retroactive legislation on the basis of extraordinary necessity. As the case law has developed, however, the burden has shifted to the challenger of an ex post facto civil law to show that the statute is both retroactive and "unmistakably" punitive.[44] This clearly is not the way the framers contemplated the application of the Ex Post Facto Clause. In light of the drafters' intent, a reassessment of the modern test used for ex post facto scrutiny of civil laws is necessary.

II. THE APPLICABILITY OF THE EX POST FACTO CLAUSE IN A CIVIL CONTEXT: THE COURT'S DEVELOPING DOCTRINE

The Supreme Court provided a definition of an ex post facto law in its first case, challenging a law as ex post facto. The case, *Calder v. Bull*,[45] focused upon a resolution of the Connecticut legislature that set aside a decree of a probate court and granted a new hearing on the construction of a will.[46] The definition established in *Calder*, which has been drawn upon throughout the development of the ex post facto doctrine, classified as ex post facto:

> 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, 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.[47]

Criminal laws fall neatly within the ambit of ex post facto protection as contemplated in *Calder*. The common denominator of all of the contemplated laws is that they serve to increase punishment or the chance of punishment. But the *Calder* language leaves a great deal to court interpretation.[48] The Court in *Calder* concluded that there was no ex

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[44] Flemming v. Nestor, 363 U.S. 603, 619 (1960).

[45] Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798).

[46] *Id.*

[47] *Id.* at 390.

[48] This definition was simplified in United States v. Hall, 2 F. Cas. 366, 366 (C.C.D.C. 1809) (No. 15,285), *aff'd*, 10 U.S. 171 (1810). *Hall* defined an ex post facto law as one that "in its operation, makes that criminal or penal, which was not so at the time the action was performed; or which increases the punishment; or, in short, which in relation to the offense, or its consequences, alters the situation of a party to his disadvantage." *Id.*

post facto violation because no vested property right had been disturbed.[49] However, *Calder* prompted much discussion among the justices.

The *Calder* Court split in many directions, as evidenced by the fact that each justice wrote his own opinion about how the Ex Post Facto Clause should be construed.[50] The opinion of Justice Chase introduced the possibility that the Ex Post Facto Clause would be applicable in the civil context,[51] but Justices Paterson and Iredell each noted in separate opinions that the Ex Post Facto Clause should apply only in criminal cases.[52]

Despite the intimation by the Supreme Court in *Calder* that ex post facto analysis was only to be applied to criminal statutes, twelve years later the Court found that a civil statute that revoked land grants to bona fide purchasers without notice offended the ex post facto provisions of the Constitution, as well as the general principles common to our free institutions.[53] The Court noted that "[a]n *ex post facto* law is one that renders an act punishable in a manner in which it was not punishable when it was committed. Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury."[54]

In its 1854 decision in *Carpenter v. Pennsylvania*,[55] the Court again sought to confine the Ex Post Facto Clause to criminal laws. The Court reasoned that since the debates in the federal convention had used Blackstone's definition of the term "*ex post facto* laws," the Clause was intended to be applied only to criminal statutes.[56] According to James Madison, John Dickinson mentioned Blackstone's restrictive definition[57] during the debate and opined that some further provision was needed to

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[49] 3 U.S. (3 Dall.) at 394.

[50] *Id.* at 386, *passim*. In the end, the Court concluded that the resolution setting aside the decree of the probate court and granting a new hearing on the construction of the will after the right of appeal had expired was not an ex post facto law. *Id.* at 395.

[51] *Id.* at 394.

[52] Justice Paterson looked at the three guarantees of the clause, the ex post facto ban, the ban on bills of attainder and the ban on contract impairments, and argued that the presence of the bar for impairment of contracts suggested that the framers used the ex post facto prohibition in its "standard meaning," referring to crimes, pains and penalties and no further. *Id.* at 397 (Paterson, J., concurring). Justice Iredell looked to the purpose behind the Clause and argued that it did not extend to civil cases, stating that "[s]ome of the most necessary and important acts of legislation are, on the contrary, founded upon the principle, that private rights must yield to public exigencies." *Id.* at 400 (Iredell, J., concurring).

[53] Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 139 (1810).

[54] *Id.* at 138.

[55] 58 U.S. (17 How.) 456 (1854).

[56] *Id.* at 463.

[57] 1 WILLIAM BLACKSTONE, COMMENTARIES *46. Blackstone wrote that when "after an action (indifferent in itself) is committed, the legislature then for the first time declares it to have been a crime, and inflicts punishment upon the person who has committed it," the legislature has created an ex post facto law. *Id.*

prevent the imposition of retrospective civil laws.[58] William Crosskey, a constitutional scholar, suggests that it is highly improbable that Dickinson actually said this because the statement would have been inconsistent with previous debates in which the Ex Post Facto Clause[59] was understood to be applicable to civil laws.[60] Crosskey suggests that the reason for Madison to engage in such deception was his change of heart in his old age about the power of Congress to regulate commerce. During the first Congress, Madison had argued that the Congress was constitutionally possessed of power "to regulate the mode in which every species of business should be transacted,"[61] but in his old age, he retreated significantly from that position.[62]

Furthermore, some commentators who have reviewed Blackstone's "definition" suggest that the idea that the Ex Post Facto Clause was to be applied only in the criminal context is the result of a misinterpretation of Blackstone. It appears to have derived from interpreting an example offered by Blackstone as if it were intended to represent the exclusive application of the ex post facto doctrine.[63] The idea that the Ex Post Facto Clause applied only to criminal statutes, as expressed in *Carpenter*,[64] was rejected twelve years later.[65]

Although the Court has struck down many civil laws as violating the Ex Post Facto Clause,[66] a reliance on the criminal-versus-civil "bright line" test gives free rein to Congress and renews the possibility for the type of legislative vindictiveness that prompted the inclusion of the Ex Post Facto Clause in the Constitution in the first place.[67] Without some idea of what distinguishes an improper civil provision from a proper one, one is at a loss to determine if a retrospective enactment is subject to ex

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[58] 2 FARRAND, *supra* note 8, at 448-49.

[59] *See supra* note 7.

[60] Crosskey, *supra* note 39, at 251.

[61] *Id.* at 254.

[62] *Id.* The Official Journal of the Convention was published in 1819, but the most valuable source of information about the debates, Madison's notes on the debates, was not published until 1840. *See generally* MADISON, *supra* note 36.

[63] *See* Field, *supra* note 8, at 327-28.

[64] 58 U.S. (17 How) at 463.

[65] Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 320 (1866); *see infra* notes 79-96 and accompanying text.

[66] *See supra* note 35 and accompanying text.

[67] Furthermore, even if such a distinction were functional, some retrospective criminal laws do not offend the Ex Post Facto Clause. *See, e.g.*, Dobbert v. Florida, 432 U.S. 282 (1977) (death penalty statute found only procedural when there had been a former death penalty statute in place at the time of the act that had been declared unconstitutional under the state constitution); Beazell v. Ohio, 269 U.S. 167 (1925) (statute requiring joint trials for felons); Ross v. Oregon, 227 U.S. 150 (1913) (conversion); Hopt v. Utah, 110 U.S. 574 (1884) (statute enlarging class of persons competent to testify). The suggestion that the Ex Post Facto Clause applies only to criminal statutes parallels the Court's treatment of the Eighth Amendment's prohibition of cruel and unusual punishments, which has been held to apply only to criminal punishment. *See* Ingraham v. Wright, 430 U.S. 651 (1977).

post facto challenge. This determination might turn on whether the retroactive regulation is deemed to be regulatory or punitive in nature. An ostensibly regulatory burden will not be deemed "punitive" if it directly promotes the objectives of the overall regulatory scheme. As the Court noted in *De Veau v. Braisted*:[68]

> The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation . . . .[69]

The problem with identifying civil statutes that are punitive in nature is that while some laws may be disadvantageous to those persons retrospectively covered by the statute, the disadvantage may be "a relevant incident to a regulation of a present situation."[70] These laws with "mixed motives" create the greatest challenge for the courts.

It now appears settled that in order for a civil law to be invalidated on ex post facto grounds, it must be both retrospective *and* punitive.[71] Today, the debate focuses upon the determination of the point at which a civil statute becomes so punitive in nature as to violate the Ex Post Facto Clause.[72]

III. DETERMINING PUNITIVE MOTIVE IN RETROACTIVE CIVIL STATUTES

The criminal domain is not the only area of American law that involves the application of punishments. Many laws that take civil form in fact serve the purpose and have the effect of punishing an offender.[73]

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[68] 363 U.S. 144 (1960).

[69] *Id.* at 160.

[70] *Id.*

[71] *See supra* notes 25, 66-69 and accompanying text.

[72] *See supra* notes 69-71 and accompanying text. Regulatory and punitive measures have much in common; they both use general directives prohibiting or requiring described conduct and they both use society's tribunals to enforce those directives. *See* Henry H. Hart, Jr., *supra* note 13, at 403.

[73] *See* United States v. Lovett, 328 U.S. 303 (1946) (act cutting off pay to certain named individuals found by Congress to be guilty of disloyalty held to violate the Ex Post Facto Clause); Schwab v. Doyle, 258 U.S. 529 (1922) (act applying a tax on the transfer of every decedent dying after its passage violative of the Ex Post Facto Clause when it applies to transactions consummated before its passage); Burgess v. Salmon, 97 U.S. (7 Otto) 381 (1878) (act imposing monetary penalty on other goods for failure to pay additional tax on tobacco, enacted after the failure to pay such tax, was found to be punishment and violative of the Ex Post Facto Clause); Cummings v. Missouri, 71 U.S. 277 (4 Wall.) (1866) (requiring Roman Catholic priests to take a test oath in order to continue in their profession found to be punitive and therefore a violation of the Ex Post Facto Clause); *Ex Parte* Garland, 71 U.S. (4 Wall.) 333 (1866) (act prohibiting attorneys from practicing law unless

Although it is true that most punitive legislation takes the form of a criminal statute, the harm exacted by ex post facto criminal laws, with their potential to be unjust and vindictive, is no less significant when it is exacted by what is in essence an ex post facto law enacted as a civil statute. The concern surrounding the act of punishing conduct through civil legislation is heightened by the expanded role of government regulatory agencies. Government increasingly has the opportunity to either punish conduct that was not subject to regulation at the time of the act, or to change the punishment for the act after the fact by promulgating new regulations.[74] Examples of civil laws that are punitive in effect are statutes that provide for punitive damages, penalties in a tax suit or the loss of a license to practice a profession.

It is important to note that sometimes it is necessary to enact civil statutes that are retroactive in order to ensure the efficient functioning of a legitimate regulatory plan.[75] Furthermore, many civil statutes that have

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they first take an oath that they have never been hostile to the United States held violative of the Ex Post Facto Clause); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) (act purporting to annul a huge land grant of the previous legislature held to be in violation of the Ex Post Facto Clause). *But see* De Veau v. Braisted, 363 U.S. 144 (1960) (act disqualifying persons who have been convicted of felonies, who have not subsequently been pardoned or had disability removed, from holding office in any waterfront labor organization, held not to be in violation of the Ex Post Facto Clause); Flemming v. Nestor, 363 U.S. 603 (1960) (act calling for termination of alien's old age benefits pursuant to § 202(n) of the Social Security Act after the alien was deported under § 241(a) of the Immigration and Naturalization Act for having been a previous member of the Communist Party found not punitive and therefore not in violation of the Ex Post Facto Clause); Galvan v. Press, 347 U.S. 522: 98 L.Ed. 911; 74 S. Ct. 737 (1954) (deportation of a resident alien shown to be a voluntary member of the Communist Party not violative of the Ex Post Facto Clause); Harisiades v. Shaughnessy, 342 U.S. 580 (1952) (deportation of legally resident aliens whose membership in the Communist Party terminated before enactment of the Alien Registration Act of 1940 held not to be punitive and therefore not violative of the Ex Post Facto Clause); Johannesen v. United States, 225 U.S. 227 (1912) (law depriving a person of citizenship when the person was never rightfully a citizen held not to be punitive); Hawker v. New York, 170 U.S. 189 (1898) (act prohibiting any person who has been convicted of a felony from practicing medicine held not to violate the Ex Post Facto Clause); Carpenter v. Pennsylvania, 58 U.S. (17 How.) 456 (1854) (explanatory act refining a law by defining property subject to taxation held not to be punitive); Watson v. Mercer, 33 U.S. (8 Peters) 88 (1843) (law curing all defective deeds held to be civil and not violative of the Ex Post Facto Clause); Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) (state resolution refusing to record a will that allowed appeal in 6 months held not to be an ex post facto violation).

The use of civil law for punitive effect has been discussed most thoroughly in articles about punitive damages. *See* Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408 (1967); Note, *The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages*, 41 N.Y.U. L. REV. 1158 (1966).

[74] For example, Minnesota recently adopted parole regulations that abolished the previous system's requirement of an annual review of the inmate's release date. The practical effect of the regulation is to modify substantially the punishment of the inmate. Nonetheless, this change was not found to be in violation of the Ex Post Facto Clause. *See* Bailey v. Gardebring, 940 F.2d 1150, 1156-57 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 1516 (1992).

[75] For example, in Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984), the Court upheld the application of a federal statute that resulted in the imposition of monetary liability on an employer who withdrew from a covered pension plan before a statute allowing for such

a retroactive effect are the result of judicial suggestion.[76] Therefore, it would be inappropriate for the courts to effect a bar against all retroactive legislation. However, if legislation is tinged with a punitive motive, the concerns that prompted many of the framers of the Constitution to adopt a hard-line approach with respect to ex post facto legislation of any kind are raised and should be addressed by the courts. In *Burgess v. Salmon*,[77] the Supreme Court recognized this concern, holding that the effect of the Ex Post Facto Clause could not be evaded by giving civil form to what is "essentially criminal."[78]

The Court has provided some guidance in determining what makes a statute punitive in nature. For example, in 1866, the Court struck down as ex post facto a civil law that purported to set the standards for specified professions in the state of Missouri.[79] Missouri had recently passed a new constitution that required all people to swear that they never supported armed hostility against the United States government.[80] Citizens who failed to take such an oath could not exercise many of the rights of citizenship.[81] Furthermore, they could not pursue certain professions, such as that of a lawyer or a member of the clergy.[82] Finally, under this statute if a person took the oath and committed perjury, he or she was subject to criminal sanctions.[83] Cummings, a Roman Catholic priest, refused to take the oath and challenged it on a number of grounds. One of Cummings's arguments was based on the theory that such a statute was in violation of the Ex Post Facto Clause.[84]

The State of Missouri argued that the oaths were merely a legitimate exercise of the state's power to regulate, and that the key to ex post facto analysis was not that "it [rendered] a past innocent action a crime, but in the fact that it undertakes, after so declaring, to punish it."[85] The State

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damages was passed into law. The statute was signed into law several months before its effective date. The five-month retroactive application period was upheld as rationally related to a legitimate government purpose. That purpose was to ensure that employers did not pull out of the plans while the bill was before Congress. There was no showing of any punitive intent. In affirming the retroactive application of the statute, the Court rejected the application of more restrictive tests for retroactive laws. *Id.* at 731. These tests included assessing the reliance of the parties on the previous state of the law, *id.*, the interest impaired, *id.* at 732-33, and the equities of imposing the legislative burden and the impact of such burden on the parties. *Id.* at 733-34.

[76] See Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692 (1960).

[77] 97 U.S. (7 Otto) 381 (1878).

[78] *Id.* at 385.

[79] Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866).

[80] *Id.* at 279-81.

[81] *Id.* at 281.

[82] *Id.*

[83] *Id.*

[84] *Id.* at 281-84.

[85] *Id.* at 297-98.

characterized punishment as the taking away of life, liberty or property. Absent such an action, according to the argument of the State of Missouri, there is no punishment, and where there is no punishment to be found, there can be no ex post facto violation.[86] In addition to this line of reasoning, the State also argued that the Ex Post Facto Clause was applicable only to criminal statutes.[87] However, the Court rejected the State's contentions.

The Supreme Court found no correlation between the fitness for the particular office and the qualifications included in the oath.[88] According to the Court, the statute revealed its punitive nature through its design to reach the *person*, not the calling.[89] The oaths did not indicate fitness for the job but instead reflected moral blameworthiness.[90] Furthermore, the Court flatly rejected the argument that the sole indicator of punishment was the taking of life, liberty or property.[91] In the words of the Supreme Court:

> The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the cause of the deprivation determining this fact. . . .[92]
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> . . . The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. It intended that the rights of the citizen should be secure against the deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding.[93]

The *Cummings* opinion gives some insight into what constitutes a punitive civil statute. First, the Court applied a relevancy test to determine whether the qualifications for the profession were reasonably related to the qualities sought in the particular profession. In *Cummings*, the Court found no correlation.[94] Secondly, the Court asked whether the statute was directed toward the person rather than the thing to be regulated.[95] Finally, the Court examined whether the

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[86] *Id.* at 298.
[87] *Id.* at 301.
[88] *Id.* at 319.
[89] *Id.* at 320.
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.* at 325.
[94] *Id.* at 319.
[95] *Id.*

law's effect was avoidable: "To make a right dependent upon an impossible condition is equivalent to an absolute denial of the right under any condition, and such denial enforced for a past act, is nothing less than punishment imposed for that act."[96]

In 1898, the Supreme Court in *Hawker v. New York*[97] split 5-4 on an ex post facto challenge to another civil statute that regulated qualifications for the medical profession. The statute prohibited anyone with a former felony conviction from practicing medicine. Dr. Hawker, a physician with a twenty-year-old felony conviction that had occurred long before the enactment of the law establishing the "no felony" criterion, challenged the law on the ground that it increased the punishment for an offense committed before the law's enactment and thus violated the Ex Post Facto Clause.[98]

The Court's majority analyzed the case by first establishing that a state has the power to regulate the qualifications of its doctors; that good moral character was a reasonable qualification for a person entrusted with the public's health; and that the state's police power included the power to presume conclusively that a person who has committed a felony is not of good moral character.[99] The Court recognized the property value of the right to practice medicine,[100] but found that the effect on Dr. Hawker's property right was only *incidental* to the legitimate purpose of regulating the profession, as opposed to the *central* concern of the legislation.[101] *Hawker* clearly stands for the proposition that statutes that render prior conduct more onerous than under the previous law do not necessarily violate the Ex Post Facto Clause, provided the statute is not found to be punitive.

The *Hawker* Court found no ex post facto violation because there was a reasonable, nonpunitive explanation for the law.[102] The Court distinguished *Cummings* by stating that the test oaths qualification had no connection to the professions in that "many of the [required affirmations] had no bearing on their fitness to continue in their professions."[103] In *Hawker*, the Court found that the legislature had made a permissible and reasonable inference from the existence of a former felony conviction that the person did not have the necessary moral character to be a licensed medical practitioner in the state.[104]

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[96] *Id.* at 327.
[97] 170 U.S. 189 (1898).
[98] *Id.* at 191.
[99] *Id.* at 193-95.
[100] *Id.* at 191.
[101] *Id.* at 196.
[102] *Id.* at 197.
[103] *Id.* at 199 (quoting Dent v. West Virginia, 129 U.S. 114, 128 (1889)).
[104] *Id.* at 197.

Four justices dissented, stating that the statute was clearly intended to increase the punishment for an act done before its enactment, and arguing that the Ex Post Facto Clause prohibited any retroactive increase in the disadvantages that the offender had to bear. The dissent noted that good moral character in the present is not necessarily precluded by a former felony conviction. For example, the dissent argued that the legislature's failure to take into account present behavior, as well as the singling out of former felons, served as indicators of the punitive intent of the statute, thereby making it violative of the Ex Post Facto Clause.[105]

The *Hawker* dissent also identified as indicia of punitive intent factors such as whether the challenged statute focused on moral blameworthiness[106] or identified a class of persons traditionally subject to punishment and created a condition that made it impossible for a person to opt out of the class.[107] Unfortunately, like the Court's opinion in *Cummings*, *Hawker* gives little guidance as to how close the correlation between the past act and the qualifications must be to show that there is a regulatory rather than a punitive purpose for the statute. Nonetheless, in light of the Court's decision in *Cummings*, if a statute's effect on an individual based on a past act is found to be punitive in nature, a violation of the Ex Post Facto Clause will be found to have occurred.[108]

IV. BALANCING PUNITIVE INTENT AGAINST LEGITIMATE PURPOSE: THE PROBLEM OF MIXED MOTIVES

The Court has held that civil laws are subject to ex post facto analysis only when they are found to be punitive in nature.[109] The question remains, however, of how to evaluate a statute appropriately in light of the Ex Post Facto Clause when the statute includes some indicia of punitiveness, but also has a legitimate nonpunitive purpose. In other words, how punitive must a "mixed motive" statute be to negate its legitimate basis?

All statutes are subject to due process review in order to determine if at a minimum the statute is rationally related to a legitimate governmental goal.[110] When fundamental rights are

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[105] *Id.* at 204 (Harlan, J., dissenting).

[106] *Id.*

[107] *Id.* at 205.

[108] *See supra* notes 79-96 and accompanying text.

[109] *See* Flemming v. Nestor, 363 U.S. 603, 619 (1960).

[110] *See, e.g.*, Mathews v. deCastro, 429 U.S. 181, 185 (1976) (upholding differential treatment for wives who live with their husbands and divorced wives as the act could have been rationally related to a legitimate goal and not merely "a display of arbitrary power").

involved, the degree of scrutiny increases. Generally, the justification required of government tends to increase as the severity of the restriction on the protected right increases.[111] For example, in this context the Supreme Court has used the Due Process Clause of the Fifth and Fourteenth Amendments to void some retrospective legislation.[112] The framers of the Fifth and Fourteenth Amendment Due Process Clauses, however, did not design these amendments specifically to cover retroactive legislation. Therefore, there is little historical guidance as to when such retroactivity violates these constitutional principles. The Ex Post Facto Clause, however, was designed as a check on retroactive legislation. While the fact that the Ex Post Facto Clause coexists with the Due Process Clause implies that the mere recitation of a legitimate purpose in the face of evidence of punitive motive is insufficient to survive ex post facto scrutiny, case law indicates that there is a very strong presumption that a civil law will survive an ex post facto challenge if there is any articulated legitimate basis.[113]

In 1960, the Supreme Court addressed the issue of when a statute's purpose will be characterized as punitive in *Flemming v. Nestor*.[114] The plaintiff challenged a law that terminated social security benefits to an alien individual deported for being a Communist pursuant to the Immigration and Nationality Act.[115] The lower court had found the statute to be an unconstitutional violation of the Due Process Clause.[116] After determining that the statute did not offend due process, the Court turned to the ex post facto claim.[117] The primary focus of the Court's analysis was to determine if the law constituted punishment.[118] The Court stated:

> In determining whether legislation which bases a disqualification on the happening of a certain past event imposed a punishment, the Court has sought to discern the objects on which the enactment in question was focused. Where the source of the legislative concern can be thought to be the activity or status from which the individual is barred, the disqualification

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[111] *See, e.g.*, Sosna v. Iowa, 419 U.S. 393, 410 (1975) (upholding state statute that required a one-year residency within the state before obtaining a divorce, relying on the fact that the law did not amount to a "total deprivation," but "only [to a] delay" in a person's ability to obtain a divorce).

[112] *See* Hochman, *supra* note 76, at 694.

[113] *Cf.* United States v. O'Brien, 391 U.S. 367, 383 (1968) (holding that if there is a valid regulatory purpose for a law, even evidence of a desire to penalize certain conduct will not vitiate the law).

[114] 363 U.S. 603, 603 (1960).

[115] *Id.* at 605.

[116] *Id.* at 606.

[117] *Id.* at 612.

[118] *Id.* at 613.

> is not punishment even though it may bear harshly upon one affected. The contrary is the case where the statute in question is evidently aimed at the person or class of persons disqualified.[119]

The Court analyzed several factors to determine if the statute was punitive. First, the Court noted that deportation was not considered punishment under the developed case law and therefore should not be considered additional punishment.[120] Secondly, the Court noted that the challenged action was the "mere denial of a noncontractual government benefit" and not punishment in the traditional sense.[121] The Court determined that the primary focus for determining punitiveness is the intent of the statute.[122] While determining the intent of a statute is often problematic, the Court provided some examples of how to approach this task. For example, evidence of intent is often revealed by the legislative history, the events that led up to the enactment of the law, other purposes that underlie the statute, and the particular facts of the case.[123]

The *Flemming* Court, however, stated that there must be "the clearest proof of [punitiveness] to establish unconstitutionality of a statute on such a ground."[124] The evidence of punitive intent must be "unmistakable."[125] Given this substantial burden, the Court found that the legislative history did not prove that Congress was concerned solely with the grounds for deportation and did not rest the operation of the statute on the occurrence of an underlying act.[126] The Court held that without such unmistakable evidence, the presumption of legitimate regulatory purpose holds. Furthermore, the Court counseled lower courts to refrain from inquiring into the congressional motives that might underlie the outward nonpunitive rationale. In the words of the Court:

> Judicial inquiries into Congressional motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it

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[119] *Id.* at 613-14.

[120] *Id.* at 616-19. The notion that deportation is not punishment is a jurisprudential reality backed by substantial case law. Although counter-intuitive, the immigration law has its own special rules, including the determination that to deport is not to punish. *See* Galvan v. Press, 347 U.S. 522 (1953); Harisiades v. Shaughnessy, 342 U.S. 580 (1951).

[121] *Flemming*, 363 U.S. at 617. This distinction is a curious one given the language of *Cummings* and the fact that the taking away of benefits certainly affect one's property interest to one's disadvantage. *Flemming* has been cited for this proposition in other social security cases. The right/privilege distinction has been eroded in the due process area. *See* Goldberg v. Kelly, 397 U.S. 254 (1970). *Flemming* does not rely on the nature of the benefit for its holding that the law does not offend the Ex Post Facto Clause. Rather, the Court finds no punitive intent.

[122] *Flemming*, 363 U.S. at 617.

[123] *Id.* at 614-15.

[124] *Id.* at 617.

[125] *Id.* at 619.

[126] *Id.* at 620.

> becomes a dubious affair indeed. Moreover, the presumption of constitutionality with which this enactment, like any other, comes to us forbids us lightly to choose that reading of the statute's setting which will invalidate it over that which will save it.[127]

The *Flemming* dissent, however, pointed out several flaws in the majority's analysis. Justice Black indicated that the test used by the majority amounted to a minimal scrutiny test of the Due Process Clause.[128] According to Black, an ex post facto law demands stricter review[129] by virtue of the fact that the Constitution requires, by incorporation of the Ex Post Facto Clause, that a law not only be rational, but also that it not constitute retroactive punishment. Under this analysis, a duty of further inquiry arises when the Court examines laws that apply retroactively. Black further argued that several factors demonstrated the punitive nature of the statute at issue in *Flemming*, not the least of which was the fact that the statute was directed toward a clearly ascertainable group (Communists).[130]

Justice Brennan in his dissent suggested an alternative test. He argued that the Court should examine the act and its consequences to ascertain whether there was a demonstrated congressional concern for administration of the social security system in a manner that would require the government to focus upon a particular group.[131] If so, then the statute should survive ex post facto scrutiny in the face of two opposing inferences.[132] In addition, Brennan noted that the law terminated benefits only for certain categories of deportees.[133] The common ground for those deportees whose social security benefits were terminated was that they all had engaged in morally blameworthy acts.[134] That common characteristic lent credence to the claim that the law was motivated by punitive intent.

The majority held that "omission of [certain groups of deportees from the termination of benefits] cannot establish, to the degree of certainty required, that Congressional concern was wholly with the acts leading to deportation,

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[127] *Id.* at 617. The Court has often expressed the sentiment that it is reluctant to look into legislative motivation. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 383 (1968). In *O'Brien*, the Court noted that when there is a valid regulatory purpose for a law, even explicit proof of a desire to penalize certain conduct (Such as burning draft cards) for other reasons (to suppress dissent) will not vitiate the law. It can be argued that the principles underlying the Ex Post Facto Clause explicitly call for judicial scrutiny of congressional motivations: the Clause is designed to curb vindictive acts on the part of inflamed legislatures, which necessarily involves some assessment of the reasons for the passage of retroactive laws. *Id.*

[128] *Flemming*, 363 U.S. at 625 (Black, J., dissenting).

[129] *Id.* at 628.

[130] *Id.* at 627.

[131] *Id.* at 637 (Brennan, J., dissenting).

[132] *Id.*

[133] *Id.*

[134] *Id.* at 638.

and not with the fact of deportation."[135] The "degree of certainty required" was not defined. However, that requirement, coupled with the Court's additional requirement of "unmistakable evidence of punitive intent,"[136] seems to indicate that a very strong presumption of legitimacy (nonpunitiveness) exists when there is a legitimate regulatory purpose for the otherwise punitive punishment.[137] As a result of this apparent quantum and characterization of the evidence required by the *Flemming* court, a litigant's ability to show an ex post facto violation when the law challenged is a civil statute is greatly reduced.

Flemming's restrictive standard for showing punitive intent may have been moderated two years later in *Kennedy v. Mendoza-Martinez*.[138] While the Court in this case never specifically addressed the quantum of evidence required to allow a finding of punitive intent, the Court did consider the constitutionality of acts of Congress that divested citizenship for evading the draft by leaving the country.[139] Like *Flemming*'s unique status as an immigration case, *Mendoza-Martinez* was unique because it drew upon Congress's war powers. Nevertheless, the Court found that denial of citizenship was punitive and therefore could not in accordance with the Ex Post Facto Clause be imposed on the basis of acts that occurred before the law's enactment.[140]

In *Mendoza-Martinez*, the Court specifically detailed the factors to be considered in determining whether a law was punitive or was instead legitimately regulatory in nature. The indicators of punitiveness were

> whether the [law] 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–retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may be rationally connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . . .[141]

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[135] *Id.* at 620. The Court appears to imply that unless a statute is wholly punitive, it would always survive ex post facto scrutiny.

[136] *Id.* at 619.

[137] *See* Arlington Heights v. Metropolitan Hous. Dev., 429 U.S. 252, 270 (1977) (city's refusal to change zoning restrictions from single to multifamily found to be constitutional); Washington v. Davis, 426 U.S. 229, 250 (1976) (written personnel test used to determine whether applicants possessed necessary verbal skills for police force work was deemed constitutional despite its disproportionate impact on blacks because the "positive relationship between the test and the training-course performance was sufficient to validate the [test]").

[138] 372 U.S. 144 (1962).

[139] *Id.* at 146.

[140] *Id.* at 169.

[141] *Id.* at 168-69.

It appears that the *Mendoza-Martinez* Court retreated from the aversion to making any inquiry into legislative intent that was expressed firmly in *Flemming*.[142] In fact, the Court specifically instructed that the legislative history of an act should be analyzed in order to ascertain a punitive intent.[143] If, however, conclusive evidence of congressional intent as to the penal nature of a statute cannot be found in the act's legislative history, it then becomes necessary to consider the factors articulated by the Court.[144] The government offered nonpunitive rationales for the statute but the Court rejected them.[145]

If *Flemming* appeared to mandate that any nonpunitive reason for a statute should be accepted, then *Mendoza-Martinez* moderated that proposition. The *Mendoza-Martinez* decision also serves to modify the *Flemming* requirement that the punitive intent be established by "unmistakable evidence"[146] in that the *Mendoza-Martinez* decision allows courts to apply common sense in assessing factors that are indicative of punitive intent. In the wake of *Mendoza-Martinez*, it appears as if the substantive standard articulated in *Flemming* has changed, although the Court did not explicitly state this in the opinion. Such a change, however, can be inferred from the facts of *Mendoza-Martinez*.[147]

In *Nixon v. Administrator of General Services*,[148] the Court was faced with another determination of what constitutes "punishment" and how punitive intent should be weighed against a legitimate purpose. The Court again considered the substantive standard for determining punitiveness and identified factors that indicate punitive intent. President Nixon sued the Administrator of General Services to prevent the confiscation of his Presidential documents. The Administrator sought to pursue confiscation under authority granted by a recently enacted statute that allowed confiscation to prevent the destruction of presidential papers.[149] President Nixon

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[142] *See supra* notes 118-20 and accompanying text.

[143] 372 U.S. at 168-69.

[144] *See supra* note 141 and accompanying text.

[145] 572 U.S. at 182. The government asserted that the motivation for the statute stemmed from several considerations including the need to bolster soldier morale, to maintain military discipline, and to promote the societal good by keeping people out of the country who choose to abandon it in time of need. *Id.* at 189-90.

[146] Flemming v. Nestor, 363 U.S. 603, 619 (1960).

[147] In the alternative, one could read this case much more narrowly. A narrow reading allows one to conclude that where the law imposes an affirmative disability or restraint that historically has been regarded as punishment, or if the law only comes into play on a finding of scienter and operates to deter and exact retribution for conduct that is already a crime, then that law is "unmistakably punitive" within the meaning of *Flemming*. A similar argument could be made if the law is found to have no rational alternative purpose or is excessive in relation to an otherwise rational alternative purpose.

[148] 433 U.S. 425 (1976).

[149] *Id.* at 429-30.

challenged the law on the ground that it was an unconstitutional bill of attainder.[150]

The definition of punishment used in bill of attainder cases and in ex post facto cases is essentially the same.[151] In *Nixon*, the Court used a specific analysis to determine whether the law at issue was punitive.[152] Under this test, a court first determines whether the law takes the form of traditional punishment, such as execution, "imprisonment, banishment, or the punitive confiscation of property."[153] Such laws, as well as legislative enactments barring designated individuals from specific professions or employment, are considered punitive.[154] Even if the sanction does not fall within one of the traditional notions of punishment, the Court noted that "new burdens and deprivations might be legislatively fashioned and therefore found to be punitive."[155]

In light of the open-ended nature of the Court's approach, it is clear that the Court's analysis goes beyond historical experience and applies a functional test that is similar to the test developed in *Mendoza-Martinez*.[156] That test determines

> [W]hether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes. . . . [W]here such legitimate legislative purposes do not appear, it is reasonable to conclude that punishment of individuals disadvantaged by the enactment was the purpose of the decisionmakers.[157]

Such a test appears to indicate that the recital of a legitimate governmental purpose is sufficient to override indications of punitiveness.

Because the act in *Nixon* reflected a clear congressional intent to preserve presidential documents for posterity, as well as for use in a criminal

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[150] *Id.* at 468. Nixon asserted that "the Act is pervaded with the key features of a bill of attainder: a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provisions of the protection of a judicial trial." *Id.* The Court said that it was not sufficient to show that an individual or group is "compelled to bear burdens which the individual or group dislikes" but that additionally, the act must be shown to be inflicting punishment. *Id.* at 470.

[151] Traditionally, bills of attainder were legislative acts that imposed the death penalty without the benefit of trial. Laws that imposed lesser penal sanctions without benefit of trial were called bills of pains and penalties. *See* Raoul Berger, *Bills of Attainder: A Study of Amendment by Court*, 53 CORNELL L. REV. 355, 373-76 (1978); Comment, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 YALE L.J. 330, 330-31 (1962). The Constitution contains two bill of attainder clauses that apply to the federal and state government. *See supra* note 7.

[152] *Nixon*, 433 U.S. at 473-84.

[153] *Id.* at 474.

[154] *Id.*

[155] *Id.* at 475.

[156] *See supra* notes 138-46 and accompanying text.

[157] *Nixon*, 433 U.S. at 475-76.

prosecution, the Court rejected Nixon's punitive arguments.[158] The Court found the legislative goals of the act to be within the legitimate exercise of Congress's regulatory authority.[159]

As evidenced by the Court's heavy reliance on the circumstances surrounding the enactment of the statute, the Court in *Nixon* relied on an analysis of congressional intent.[160] Thus, the Court sent a signal to lower courts reviewing laws for ex post facto violations to determine whether the legislative record evinces a congressional intent to punish.[161] Therefore, if the legislative history of an act contains condemnation of behavior as morally blameworthy it could be used as evidence to show punitive intent.[162]

The Court contrasted the lack of punitiveness in the *Nixon* case with the evident punitive intent found in the law struck down as a bill of attainder in *United States v. Lovett*.[163] The Court in *Nixon* described the individuals affected in *Lovett* as "subversive ... and ... unfit ... to continue in Government employment."[164] The Court noted, however, that something less than an outright condemnation can establish punitive intent.[165] The *Nixon* Court, however, provided little guidance with respect to legislation in which punitive intent coexists with a legitimate legislative goal, because the Court found no indication of punitive intent.[166]

In the wake of *Nixon*, the Court addressed whether the denial of a benefit to a discreet group of individuals constituted punishment for bill of attainder purposes in *Selective Service System v. Minnesota Public Interest Research Group*.[167] In this decision, the Court upheld a federal statute that denied federal higher education assistance to male students who failed to register for the draft. In upholding the statute, the Court

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[158] *Id.* at 476-77.

[159] *Id.* at 477. The Court also noted that there appeared to be no less burdensome alternative that would serve the legitimate ends sought. *Id.* at 483.

[160] *See id.* at 478-80.

[161] *Id.*

[162] The Court in *Nixon* noted that the trial court had unequivocally found that there was no evidence of an intent to punish presented at trial or reflected in the legislative record. The Supreme Court found nothing in its independent examination of the legislative record reflecting a desire to punish President Nixon. No aspersions were cast on Nixon's personal conduct and no condemnation of his behavior indicative of a punitive intent appeared in the legislative history. The floor debates on the measure were devoid of any evidence of an intent to encroach on the judicial function or to punish an individual for blameworthy offenses. *Id.* at 477-78.

[163] 328 U.S. 303 (1946).

[164] *Nixon*, 433 U.S. at 480.

[165] *Id.* The Court looked at the factual realities of the case and determined that there were no indications of punitiveness. For example, the law provided President Nixon with ready access to his papers, the papers were housed where he had planned to house them, there were provisions for just compensation if there were a taking of the property. *Id.* at 480-81. Furthermore, the General Service Administration was directed to insure the protection of any party's ability to exercise "any legally or constitutionally" available rights including the right to challenge the legality of the statute. *Id.* at 481.

[166] *Id.* at 476-77.

[167] 468 U.S. 841 (1984).

noted that it allowed students to receive benefits even if they registered more than thirty days after their eighteenth birthday.[168] Again, the Court was able to avoid deciding the constitutional implications of a finding of mixed motives because the Court found no punitive motive.

Chief Justice Burger summarized in his majority opinion what constitutes punishment for bill of attainder purposes. These guidelines are useful by analogy when conducting an ex post facto analysis.[169]

> In deciding whether a statute inflicts forbidden punishment, we have recognized three necessary inquiries: (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes; and (3) whether the legislative record evinces a congressional intent to punish.[170]

The substantive standard governing ex post facto challenges to civil statutes is convoluted and unclear. The Court has identified several factors that indicate punitiveness, but has given little guidance as to the quantum of proof necessary to show punitive intent. The presumption of legitimacy may be so substantial that statutes that clearly reflect punitive origins may be saved by merely reciting some regulatory basis for the law. Such a result is contrary to the history of the Ex Post Facto Clause and to the values that it was designed to serve.[171]

V. THE CONTRAST: EX POST FACTO IN THE CRIMINAL SPHERE

Ex post facto analysis of criminal statutes has developed much as the drafters might have intended. There is a presumption against retroactive criminal laws and the burden of showing that the law is not punitive lies with the law's proponent.[172] This is in stark contrast to the ex post facto analysis used when considering civil statutes. The degree of difference in the Court's treatment of such laws is not justified in light of the history surrounding the initial consideration of an ex post facto clause.[173] Nonetheless, the

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[168] *Id.* at 849.

[169] *See supra* notes 153-55 and accompanying text.

[170] 468 U.S. at 852. In applying these criteria to the draft registration requirement, the Court found: (1) the denial of educational benefits did not constitute a punishment historically associated with bills of attainder; (2) the denial reasonably furthered the nonpunitive goal of limiting aid to those people who fail to meet their responsibilities to the U.S. government; and (3) the legislative history provided convincing support that Congress sought to promote compliance with draft registration and fairness in allocating scarce federal benefits.

[171] *See supra* notes 6-8 and accompanying text.

[172] *See infra* notes 192-98 and accompanying text.

[173] *See supra* notes 6-8, 26-43 and accompanying text.

substantive standard used in criminal statutes may provide some guidance for a more equitable consideration of retroactive civil laws that are disadvantageous and punitive in their effect.

In a rare 9-0 decision, the Supreme Court in *Miller v. Florida*[174] outlined the test for determining when a criminal law offends the Ex Post Facto Clause. The test employed by the Court consists of two critical elements. First, it is necessary to consider whether the statute is retroactive. If so, it becomes necessary to determine if the new law is disadvantageous to the offender affected by it. If both determinations are made, the law cannot be applied to the offender in question because to do so would result in a violation of the Ex Post Facto Clause.[175]

When James Ernest Miller committed his crimes, the sentencing guidelines in place established a presumptive sentence of three and one-half to four and one-half years in prison.[176] However, by the time Miller was convicted, those guidelines had been changed so that the presumptive sentence was five and one-half to seven years in prison.[177] Under the new guidelines, he was sentenced to seven years.[178] Had Miller received seven years under the former guidelines, the judge would have been required to give clear and convincing reasons in writing for his deviation from the presumptive sentence and that exercise of discretion would have been subject to appellate review.[179] As this route for appeal was foreclosed to the defendant, the sentence was challenged as a violation of the Ex Post Facto Clause.[180]

The government raised several points to overcome this ex post facto challenge. First, the government asserted that no ex post facto violation could have resulted because the law provided for the possibility that a court could depart upward from the established guidelines.[181] However, this argument was rejected by the Court, which held that if such a

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[174] 482 U.S. 423 (1987). The case was brought after the defendant was sentenced under state sentencing guidelines that were adopted after the defendant engaged in the criminal act. *Id.* at 424-25. These guidelines allowed the judge to sentence convicted sexual offenders to a prison sentence in excess of what was allowable under the guidelines in effect at the time of the criminal act. *Id.* at 425. The U.S. Supreme Court held in this case that defendant Miller should have been sentenced under the guidelines in place at the time of his offense because by retrospectively applying the change in the law to him, he had been disadvantaged in the sentencing process. *Id.* at 435. That disadvantage was substantive, not procedural. *Id.* at 434-35. That was enough, however, to invoke the protection of Article 1 of the Constitution.

[175] *Id.* at 430.

[176] *Id.* at 424.

[177] *Id.*

[178] *Id.*

[179] *Id.* at 426.

[180] *Id.* at 423. Many of the recent ex post facto challenges that have been heard by the Supreme Court originated in Florida. *See* Weaver v. Graham, 450 U.S. 24 (1981); Dobbert v. Florida, 432 U.S. 282 (1977).

[181] *Miller*, 482 U.S. at 430-31.

provision could save a statute, it would swallow the effectiveness of the Ex Post Facto Clause.[182]

The government next argued that the new law was not more onerous than the law in place at the time the petitioner committed the unlawful act.[183] The Court rejected this argument on the grounds that the revised guidelines exposed the petitioner to a greater possible sentence, in the absence of explanation by the court, than he could have received under the former guidelines.[184] However, if the law had been a civil statute, in the absence of a showing of clear punitive intent the fact that the statute was designed to increase judicial efficiency would probably have been a sufficient legitimate basis to overcome the disadvantage to the particular individual.

The Court held that Miller did not need to prove that he would have received a lesser sentence in order to show an ex post facto violation.[185] The Court found it sufficient that the law substantially disadvantaged the petitioner by taking away the *opportunity* to have the lower presumptive sentence.[186] This loss of opportunity was sufficient to establish an ex post facto violation.[187] In contrast, in light of the Court's earlier decisions,[188] the loss of opportunity in the civil context would not be considered punitive *per se* and would probably not overcome a purported legitimate basis.[189]

Finally, the government attempted to characterize the change in the law as procedural. The Court rejected this labeling, holding that the guidelines constituted substantive law that served to strictly define the

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[182] *Id.* The Court distinguished *Dobbert* by pointing out that in *Dobbert* the defendant had notice that he could face death and he received that sentence. Here, the petitioner had notice of a possible five-and-a-half year sentence and received seven-and-a-half years in prison.

[183] *Id.* at 431. The Court noted that the change in the offense-scoring points alone made the statute factually more onerous. The legislative history of the statute indicated that the purpose of this change was to increase the punishment of sexual offenders. *Id.*

[184] *Id.* at 425-27. Under the Florida guidelines, sentences were determined by a total offense score which was tallied for each defendant based on prior convictions and present convictions. Using a grid, the total offense score indicated the presumptive sentence for the primary offense. The new guidelines raised by 20% the number of points assigned to a sexual offense and therefore raised the total number of offense points for the petitioner. The higher score necessitated a longer presumptive sentence. Under the previous law, the petitioner would have had a lower offense score and a lesser presumptive sentence. Miller could have received the greater sentence under the old guidelines, but this would have required written reasons. The Court found nothing ameliorative about the statute to distinguish it from *Dobbert*. *Id.* at 426-27.

[185] *Id.* at 432.

[186] *Id.*

[187] *See supra* note 180 and accompanying text.

[188] *See supra* notes 109-71.

[189] For example, the enactment of a civil statute that served to restrict an incarcerated felon's right to receive social security was not considered to be punitive *per se* as evidenced by the fact that courts were willing to look for a legitimate, nonpunitive congressional intent. *See infra* notes 226-39 and accompanying text.

exercise of judicial discretion.[190] The Court found that this new law had directly and adversely affected Miller's sentence and that an Ex Post Facto Clause violation could not be avoided by calling the new law a "procedural change."[191]

As stated above, the *Miller* case establishes a test for assessing if a criminal law as applied violates the Ex Post Facto Clause. The case stands for the proposition that if a criminal law is retrospective, and the law disadvantages the offender affected by it, then the law runs afoul of the Ex Post Facto Clause.[192] Whether a defendant is disadvantaged is determined by assessing the impact the application of the new law has on the defendant. If the offender receives a greater sentence or is deprived of substantial rights that he or she would have had under the old statute then he or she is disadvantaged.[193] Furthermore, only the potential for more onerous treatment need be demonstrated under the challenged criminal statute; the defendant need not demonstrate that a less harsh result would in fact have occurred under the old law.[194] In the criminal context, the judicial focus is on the effect of the law on the offender rather than the law's overall intent. In the civil context, however, the Court looks toward the intent of the legislature. Any individual effect may be considered merely an incident of a legitimate regulatory scheme.[195]

Unlike retroactive criminal laws, retroactive procedural changes in the law that are not intended to work to the disadvantage of an offender are not prohibited by the Ex Post Facto Clause.[196] To determine if a law constitutes a mere procedural change, the Court attempts to determine if the purpose of the statute is ameliorative[197] by examining its effect and its legislative history.[198]

In the criminal context, the Court will look behind the statute's purported justification to its effect. In the civil context, however, it appears that if there

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[190] 482 U.S. at 435. Florida asserted that the guidelines were merely to guide and channel the sentencing judge's discretion much like parole guidelines that have withstood ex post facto scrutiny. *Id.* The Court rejected the analogy, stating that parole guidelines were not laws whereas here, the Florida Legislature had promulgated a law. Secondly, these were not "flexible guideposts"; the legislature had created a high hurdle for the exercise of judicial discretion in sentencing. *Id.*

[191] *Id.*

[192] *Id.* at 430.

[193] *Id.*

[194] *Id.* at 432.

[195] *See supra* notes 139-46 and accompanying text, and cases cited *infra* notes 224-25, 236-37.

[196] *Miller*, 482 U.S. at 432.

[197] Ameliorative in this context means that the statute is intended to remedy some problem in the functioning and application of the law and is not directed toward further punishment. If the statute results in greater protection for the rights of accused or convicted persons, then it is not punitive and, therefore, not covered by the Ex Post Facto Clause. If the statute works to the substantial disadvantage of the offender, the court will treat it as a substantive law, not a procedural change and not ameliorative. *Id.*

[198] *Id.*

is any rational basis for the purported justification, it will be accepted by the Court and the burden will fall on the law's opponent to demonstrate that the rationale is irrational or that the punitive purposes of the law unmistakably outweigh the purported legitimate basis.[199]

VI. THE PROBLEM OF MIXED MOTIVES: A CASE ANALYSIS

The problem of creating an inordinately strong presumption of legitimacy for challenging a retrospective civil law is best demonstrated by looking in detail at recent lower court cases that have considered ex post facto challenges against civil laws. One ex post facto challenge in particular demonstrates the need for a more substantive analysis of the harm posed by retrospective application of civil legislation.

At roughly the same time that the Supreme Court was reviewing its latest ex post facto challenge to a criminal statute, the lower courts were reviewing a possible punitive sanction clothed in civil form. The challenge concerned a change in social security law that prohibited the payment of benefits to incarcerated felons. The law retrospectively suspended the benefits of prisoners who were receiving benefits at the time of the law's enactment. The lower courts have consistently held that this law does not amount to a violation of the Ex Post Facto Clause.[200]

In 1979, Congress was alerted to the fact that David Berkowitz, the celebrated "Son of Sam" killer, was allegedly receiving an array of social security benefits.[201] Inflammatory newspaper articles detailing Berkowitz's receipt of benefits suggested that up to 30,000 prisoners nationwide were receiving $60 million annually in disability benefits alone.[202] These accounts were later determined by the Congressional Research Service to be greatly exaggerated, but the initial public outcry generated a swift and predictable response from Congress.[203]

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[199] *See supra* notes 141-45 and accompanying text.

[200] *See infra* notes 221-27 and accompanying text.

[201] THE LIBRARY OF CONGRESS, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS PUB. NO. 81163, SOCIAL SECURITY BENEFITS FOR PRISONERS 2 (1983) [hereinafter CRS REPORT]. Berkowitz had been terminated from the Social Security rolls at the time of the articles.

[202] *Id.* at 2.

[203] Data from the sample of prisoners conducted by the General Accounting Office revealed that only 224 prisoners in federal penal institutions, out of the total of 17,000 possessing Social Security cards, were receiving some form of Social Security benefits as of April 1980. CRS REPORT, *supra* note 201, at 2-3. A more extensive GAO study conducted in July 1982 concluded that 4300 inmates in state and federal penal institutions (out of a total population of 314,000) were receiving disability benefits in 1980, when the enactment of Public Law No. 96-473 rendered them ineligible. The GAO found that 82% of prisoners formerly receiving disability benefits had become disabled prior to their incarceration. The GAO study also found that only 1376 felons nationwide were receiving the old-age and survivors' insurance benefits subsequently affected by 42 U.S.C. § 402(x) (1988). CRS REPORT, *supra*, at 5-6.

Numerous bills restricting or eliminating social security benefits to prisoners were introduced in the 96th Congress. In 1980, the House Subcommittee on Social Security held widely publicized hearings on the subject.[204] During those hearings numerous members of Congress came forward detailing the complaints of constituents that prisoners would be eligible for Social Security benefits and calling for swift action to suspend such benefits.[205] Representative Whitehurst, the chief architect of the proposed legislation prohibiting prisoners from receiving benefits, stated that the purpose of the bill was to "make crime stop paying in our country" by "end[ing] this preposterous system of subsidizing criminals with this Nation's precious social security dollars."[206] Testifying in support of similarly restrictive legislation, Congressman Courter noted that "these payments are unfair to the general public, which prefers to believe that once a convict is behind bars, he will be punished for his crime."[207] Representative Daniel stated that "[i]nstead of punishing [the criminal], we are paying him overtime."[208] He volunteered that convicted felons should be deprived of their entitlement to social security benefits "[j]ust as [they] are generally deprived of their right to vote."[209]

The legislators were not unaware that their action might tread on ex post facto grounds. Several witnesses and members of the Committee expressed the fear that retrospective suspension of Social Security benefits to prisoners would not survive a constitutional challenge based upon the Ex Post Facto Clause.[210] Representative Jacobs specifically noted that the retrospective disabilities imposed on prisoners by the legislation under consideration bore striking similarity to the retroactive financial penalties

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[204] *See Receipt of Social Security Benefits by Persons Incarcerated in Penal Institutions: Hearing Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 96th Cong., 2d Sess. (1980) [hereinafter *Hearings*].

[205] *See, e.g., Hearings, supra* note 204, at 2 (remarks of Rep. Pickel); *id.* at 4 (statement of Sen. Wallop); *id.* at 10 (statement of Rep. Whitehurst).

[206] *Id.* at 8 (statement of Rep. Whitehurst). Rep. Whitehurst also stated:

> And like you Mr. Chairman, I, too, agree that it is ridiculous for someone like David R. Berkowitz, New York City's "Son of Sam" mass murderer, to be allowed to collect several hundred dollars each month in social security benefits because of some asinine qualification procedure. For what possible reason can there be in paying an animal like this from our country's already strained social security fund? What must the families of this creature's victims think? Have our laws become so inflexible that our social security administrators must bend over backwards to make sure that another parasite is added to suck the life out of the social security host?

Id.

[207] *Id.* at 24 (statement of Rep. Whitehurst).

[208] *Id.* at 83.

[209] *Id.*

[210] *See, e.g., id.* at 2 (remarks of Rep. Conable); *id.* at 24, 29, 39 (remarks of Rep. Pickle); *id.* at 37-38 (statement of Lawrence Thompson, Associate Commissioner for Policy, Social Security Administration); *id.* at 57 (statement of Steven R. Schlesinger, Associate Professor, Catholic University).

invalidated under the Ex Post Facto Clause in *Hiss v. Hampton*.[211] The subcommittee initially moved to consider the potential ex post facto conflict by proposing that any statutory restriction on the receipt of social security benefits by prisoners be wholly prospective by applying the statute only to persons convicted and incarcerated after the enactment of the prohibitory legislation.[212] Congress did not adopt the prospective response, but instead adopted a retrospective law prohibiting the payment of social security disability to claimants who were incarcerated felons regardless of whether the claimants had committed their crimes before the law's passage. The law did provide that if the felon was in a court-approved rehabilitation program while in prison, his or her benefits would be reinstated.[213]

Some nonpunitive reasons were offered for the prohibition. A few representatives testified that eliminating the payment of social security benefits to inmates was consistent with a sound fiscal policy as the needs of the inmate were already met. The Senate Report accompanying H.R. 5295 sought to explain the motivations of the House of Representatives:

> The committee believes that the basic purposes of the social security program are not served by the unrestricted payment of benefits to individuals who are in prison or whose eligibility arises from the commission of a crime. The disability program exists to provide a continuing source of monthly income to those whose earnings are cut off because they have suffered a severe disability. The need for this continuing source of income is clearly absent in the case of an individual who is being maintained at public expense in prison.[214]

The Committee Hearings also suggest another nonpunitive purpose for the suspension of payment of benefits to incarcerated felons. The Committee received evidence that cash payments to prisoners created

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[211] 338 F. Supp. 1141 (D.D.C. 1972). In the Alger Hiss case, the court held that a statute requiring the Civil Service Commission to deny federal old-age insurance benefits to former employees who had falsely testified in connection with a matter involving national security or who had falsely answered questions concerning membership in the Communist Party was void as a violation of the Ex Post Facto Clause. *Id.* at 1153.

[212] *See Hearings*, *supra* note 204, at 40 (remarks of Rep. Pickle) (noting that he was assuming that the restriction of social security payments would only apply to those who acted criminally after the enactment of the restrictive law); *id.* at 57 (statement of Prof. Schlesinger). A blanket provision precluding payment of benefits to anyone who had been convicted of a subversive crime was abandoned in favor of a discretionary and prospective amendment after members of the Conference Committee expressed reservations that the original proposal would violate the ex post facto prohibition. *See* H.R. REP. No. 2936, 84th Cong., 2d Sess. 35-37, *reprinted in* 1956 U.S.C.C.A.N. 3954, 3966-68; *see also* 102 CONG. REC. 13,093-94 (1956) (remarks of Sen. Williams); CRS REPORT, *supra* note 201, at 2.

[213] 42 U.S.C. § 402(x) (1988).

[214] S. REP. No. 987, 96th Cong., 2d Sess. 8 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4787, 4794.

discipline problems within some prisons as inmates used the money as capital to support dealings in illicit commodities.[215] In other instances, fellow prisoners allegedly "strong-armed" the payments from the recipients.[216]

In 1983, the suspension of social security disability benefits to incarcerated felons was extended to include old-age retirement benefits.[217] There is virtually no legislative history pertaining to this extension. During floor debates on the proposed extension of the prisoner suspension provision, the sponsor of the Senate amendment, Senator Grassley, candidly stated that "[t]he basic goal in adopting such a law is not to [save] revenues."[218] He referred to comments from angry constituents criticizing the receipt of social security benefits by incarcerated felons. Furthermore, Senator Grassley went on to urge the inclusion of the amendment in order to send a signal to Americans that Congress was serious about eliminating benefits to such "unintended recipients."[219] The Conference Committee accepted the Senate amendment that served to deny Social Security old-age benefits to incarcerated felons.[220]

Since 1980, many persons retrospectively affected by the 1980 and 1983 amendments to the social security laws have unsuccessfully challenged them on ex post facto grounds.[221] Most courts disposed of the claims in short, conclusory opinions that merely state that there is no ex post facto violation.[222] While this could be a result of the limited legal resources available to a pro se litigant, it might also be the result of the courts' application of *Flemming* to support the proposition that the taking of a social security benefit is never punishment.[223] Many courts

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[215] *Hearings*, *supra* note 204, at 64, 68.

[216] *Id.* at 25, 28.

[217] Social Security Amendments of 1983, Pub. L. No 98-21, § 339(a), 97 Stat. 65, 133-34 (1983) (codified as amended in 42 U.S.C § 402(x) (1988)).

[218] 129 CONG. REC. S3627 (daily ed. Mar. 22, 1983) (statement of Sen. Grassley).

[219] *Id.* at S3628.

[220] *Id.*

[221] *See* Wiley v. Bowen, 824 F.2d 1120 (D.C. Cir. 1987); Zipkin v. Heckler, 790 F.2d 16, 18-19 (2d Cir. 1986); Buccheri-Bianca v. Heckler, 768 F.2d 1152, 1154-55 (10th Cir. 1985); Jenson v. Heckler, 766 F.2d 383, 385 (8th Cir. 1985), *cert. denied*, 474 U.S. 945 (1985); Washington v. Secretary of Health and Human Services, 718 F.2d 608, 611 (3d Cir. 1983); Greenwell v. Walters, 596 F. Supp. 693, 696 (M.D. Tenn. 1985); Hopper v. Heckler, 596 F. Supp. 689, 693 (M.D. Tenn. 1984); Pace v. United States, 585 F. Supp. 399, 401-02 (S.D. Tex. 1984); Anderson v. Social Security Administration, 567 F. Supp. 410, 413 (D. Colo. 1983).

[222] *See* cases cited *supra* note 221.

[223] Flemming v. Nestor, 363 U.S. 603 (1960). The argument has been made that since social security benefits are mere noncontractual government benefits, their suspension is never a punishment. *Id.* at 617. This flies in the face of case law that has traditionally advocated a factual determination of whether an imposed disadvantage constitutes a punishment. As noted in Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866): "The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation

have found that this is a purely regulatory statute and therefore is not punitive. Under such an analysis, the law would survive a constitutional attack under the Ex Post Facto Clause.[224] Those decisions that do include a discussion supporting the constitutionality of the social security amendments indicate that the holding is based upon the finding of a legitimate, nonpunitive governmental purpose for the amendments.[225] It appears that even a very weak nonpunitive reason for a statute may make it immune from an ex post facto challenge.

This willingness to accept weak nonpunitive governmental interests in upholding constitutional challenges to the social security amendments under the Ex Post Facto Clause is evident in the D.C. Circuit's holding in *Wiley v. Bowen*.[226] In *Wiley*, the government argued that the suspension of social security benefits is a legitimate exercise of regulatory power as opposed to a punitive measure. The government argued that the needs of incarcerated persons are provided for by the state, thereby eliminating the need for a continuing source of income.[227] The government's analysis was based upon the holding in *Flemming* that absent "unmistakable evidence of punitive intent," there is no ex post facto violation.[228]

To support the argument that the government's actions unmistakably lacked punitive intent, the Social Security Administration noted that under the law benefits are suspended only during the time the recipient is incarcerated. The Administration noted that if Congress wanted to punish felons because they were morally blameworthy, it would have made the disqualification permanent, not temporary.[229] Second, the government argued that the suspension of benefits does not attach to particular conduct, but hinges on the state of incarceration.[230] Finally, it was noted that family members who qualify using the incarcerated felon's earnings can still receive social security benefits.[231]

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determining the fact." *Id.* at 320. The Court has also refused to require that a loss be of a vested right before it is considered punishment. The right/privilege distinction has eroded. *See* Goldberg v. Kelly, 397 U.S. 254 (1970).

[224] *See, e.g.*, Andujar v. Bowen, 802 F.2d 404 (11th Cir. 1986); Jones v. Heckler, 774 F.2d 997 (10th Cir. 1985); Jenson v. Heckler, 766 F.2d 383 (8th Cir.), *cert. denied*, 106 S. Ct. 311 (1985); Hopper v. Schweiker, 596 F. Supp. 689 (M.D. Tenn. 1984), *aff'd per curiam*, 780 F.2d 1021 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 1522 (1986); Pace v. United States, 585 F. Supp. 399 (S.D. Tex. 1984); Anderson v. Social Security Administration, 567 F. Supp. 410 (D. Colo. 1983).

[225] *See, e.g.*, Jones v. Heckler, 774 F.2d 997 (10th Cir. 1985).

[226] 824 F.2d 1120 (D.C. Cir. 1987). The author was attorney of record in the case.

[227] *Id.* at 1122.

[228] *Id.* at 1121-22 (discussing Flemming v. Nestor, 363 U.S. 603, 619 (1960).

[229] Brief for Appellee, Wiley v. Bowen, 824 F.2d 1120 (D.C. Cir. 1987) [hereinafter Appellee's Brief] (citing Selective Service System v. Minnesota Public Interest Research Group, 468 U.S. 841, 853 (1984)).

[230] Appellee's Brief, *supra* note 229, at 17.

[231] *Id.*

The Court of Appeals for the District of Columbia reviewed the claim that the retroactive suspension of Social Security benefits was barred by the Ex Post Facto Clause and found, like all other courts that had considered the measure, that the law was constitutional. The court reached its decision after applying the standard articulated in *Flemming v. Nestor*,[232] expressing some discomfort with the decision: "Nevertheless, we pause to note that appellant's *ex post facto* claim is a troublesome one. Indeed, it appears that in this case Congress has come about as close as possible to the line of unconstitutionality without actually crossing it."[233] The court noted that the principal justification for the statute, to eliminate payment of retirement benefits to individuals whose basic needs are already provided at public expense, is undermined by restricting the law's applicability to incarcerated felons. The singling out of felons "makes one quite suspicious that its intent was punitive."[234] The court also noted that the legislative history reflected a punitive motivation.[235] Nonetheless, the court ultimately relied upon the *Flemming* Court's statement that "[j]udicial inquiries into Congressional motives are at best a hazardous matter."[236] As a result, despite the evidence of punitive intent, the court concluded: "Thus, we are left with the rule that 'only the clearest proof could suffice to establish the unconstitutionality of a statute' on the ground 'that a punitive purpose in fact lay behind the statute.'"[237]

In light of *Wiley*, it is clear that the United States Court of Appeals for the District of Columbia endorses the view that in the area of civil statutes there must be "unmistakable evidence of punitive intent . . . before a Congressional enactment of this kind may be struck down."[238] *Wiley* is clearly a case involving a mixture of legitimate nonpunitive motives with punitive intent. Yet the court credits the nonpunitive rationale. Therefore, the burden of overcoming the strong presumption of legitimacy necessary to prove an ex post facto violation approaches insurmountability.[239]

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[232] 363 U.S. 603, 619 (1960).

[233] *Wiley*, 824 F.2d at 1122.

[234] *Id.*

[235] *Id.*

[236] *Id.*

[237] *Id.*

[238] Flemming v. Nestor, 363 U.S. 603, 619 (1960).

[239] There are several ways that the *Wiley* decision can be interpreted. One could argue that it is just a misapplication of the standards for detecting punitiveness laid down in cases involving the rights of convicted felons, as modified by post-conviction legislation. *See supra* notes 174-95 and accompanying text for a discussion of the treatment of such a law by the Court in Miller v. Florida, 482 U.S. 423 (1987). However, its reasoning is a logical extension of the manner in which courts have treated cases involving statutes that reveal mixed motives. *See, e.g.*, Flemming v. Nestor, 363

The substantive standard is different when a statute is criminal; if a criminal statute retrospectively burdens an offender, unless it can be shown to be ameliorative or purely procedural, it violates the Ex Post Facto Clause.[240] In the civil context, however, the law is presumed to be regulatory absent a significant showing of "unmistakable evidence of punitive intent."[241] Therefore, if a civil statute retrospectively disadvantages the one affected by it, he or she must show that it is *not* ameliorative or procedural.[242] In the civil context the plaintiff bears the burden of showing the statute is punitive and the presumption of regulatory purpose is extremely strong.[243] In the opinion of the author, the strength of the presumption of legitimacy is inconsistent with the intent of the framers and the values that underlie the Ex Post Facto Clause.[244]

VII. A BETTER TEST: BREAKING DOWN THE CIVIL/CRIMINAL DISTINCTION IN EX POST FACTO LAW

In order to reassess the Court's developed case law dealing with ex post facto challenges to civil statutes, it is important to determine why there is a strict distinction between civil and criminal laws in determining the degree of punitiveness required in order to assert a successful constitutional challenge under the Ex Post Facto Clause. When analyzing civil statutes for ex post facto violations, what does it take to show punitive intent, and when does punitive intent vitiate an otherwise valid retroactive statute? *Flemming v. Nestor* argues for "unmistakable evidence" when dealing with civil laws.[245] Clearly, if there is an articulated, rationally related nonpunitive reason for the statute, that reason will be weighed against the punitive intent. But there is some case law that suggests that the articulation of *any* nonpunitive ground for the statute will ensure constitutional validity.[246] This, of course, serves to preclude a serious ex post facto analysis in the civil area as such a standard rests upon a rational relationship test that requires minimal scrutiny. Because the Supreme Court has stated that punitive measures cannot be disguised in civil form,[247] civil statutes that pass due process

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U.S. 603, 619 (1960).

[240] *See Miller*, 482 U.S. at 432.

[241] *Flemming*, 363 U.S. at 619.

[242] *See Miller*, 482 U.S. at 430.

[243] *Flemming*, 363 U.S. at 619.

[244] *See supra* notes 6, 8, 30-34 and accompanying text.

[245] 363 U.S. at 619.

[246] Wiley v. Bowen, 824 F.2d 1120 (D.C. Cir. 1987). *Wiley* seems to indicate that if there are mixed motives, one nonpunitive, the other punitive, the court will credit the nonpunitive purpose. The court noted that "[j]udicial inquiries into Congressional motives are at best a hazardous matter." *Id.* at 1122 (alteration in original) (citations omitted).

[247] Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 325 (1866); *see supra* notes 88-96 and

scrutiny when applied prospectively should also be subject to more stringent ex post facto scrutiny if applied retrospectively.

Ex post facto scrutiny of a criminal law does not involve speculation about possible nonpunitive rationales for such statutes. Instead, the court is instructed to determine if the change in the law serves to make the punishment of the offender more severe. If the law is found to disadvantage the persons affected, there is a presumption against an "ameliorative" purpose.[248]

It is unclear why courts have adopted such a complicated ex post facto analysis when the challenged statute is purportedly civil in nature.[249] While the need for flexibility in government supports the position that the person challenging the law should bear the burden of proving that a retrospective civil law is punitive, it does not logically follow that the presumption of regulatory character and lack of punitive intent should be so strong as to foreclose any serious constitutional challenge under the Ex Post Facto Clause.[250] The underlying concerns of fair notice and the need to curb legislative vindictiveness that prompted the inclusion of the Ex Post Facto Clause do not rest upon a distinction about the form of the law.[251] In fact, these evils were "self-evident" to the drafters.[252] As the government's power grows through the use of civil regulation to control behavior, the need to curb legislative vindictiveness and to ensure fair notice becomes increasingly important. Nonetheless, current case law seems to indicate that ex post facto claims against civil laws may be essentially unrecognizable.[253]

This sharp distinction between the constitutional tests applied to criminal laws and punitive civil statutes lacks any legitimate historical or jurisprudential basis. In this respect, the Court has failed to provide meaningful guidance for legislators, litigants and the lower courts with respect to what factors indicate that a civil law is punitive and what quantum of evidence is necessary to support a judicial finding that the civil statute is unconstitutionally retrospective in its application. And while the intent of the drafters may have been to place the burden of

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accompanying text.

[248] *See* Miller v. Florida, 482 U.S. 423, 431-32 (1987).

[249] Of course, criminal laws are presumed to be penal in nature while civil laws are presumed to be regulatory in nature. Because of this distinction, it is appropriate to give some weight to the nonpunitive reasons for the civil statute. Nonetheless, the standard applied should not result in the ending of the analysis upon the finding of any legitimate, nonpunitive rationale to support the validity of the law in question.

[250] The problem of dealing with retroactive laws that impair the obligations of contract is dealt with in Hochman, *supra* note 76, at 694.

[251] See *supra* notes 6-8, 24-32 and accompanying text.

[252] *See supra* notes 28-34 and accompanying text.

[253] This is most true if the Court chooses to adopt a narrow reading of Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1962). *See supra* notes 138-49 and accompanying text.

constitutionality on the law's proponents,[254] in light of the modern complex regulatory schemes that are necessary for efficient functioning of the federal government, it may be appropriate to shift this burden to the challenger of a civil law, as the modern courts have done. Nonetheless, that burden should not be virtually impossible for a litigant to bear.[255]

The case law squarely places the burden of showing the punitive intent behind a civil law on the law's challenger and defines that burden as the production of unmistakable evidence.[256] These cases, however, reflect both bad policy and an incorrect interpretation of the Constitution. A better rule would be to ban retroactive civil laws in addition to retroactive criminal laws—even those civil laws with a valid regulatory purpose—when those laws are poisoned by punitive intent. This would have the desired effect of placing the burden on the law's challenger to establish a prima facie showing that the statute is punitive in design. Once this punitive intent is demonstrated, the burden should shift to the law's proponent, who would face a two-pronged analysis. First, the law's proponent would have to illustrate a legitimate government purpose for the civil law. Next, the law's proponent would be required to negate the evidence of punitive intent.

An analysis of those cases that have identified punitive intent, or the lack of punitive intent, in ex post facto challenges to civil laws reveals a fairly complex set of factors developed to determine if a law is punitive. The legislative history is an important source for determining if the civil statute is punitive, as the legislative history of the statute may reveal an intent to punish. The punitive intent can be overtly stated or demonstrated by showing a "hidden intent." Hidden intent focuses on what the statute's drafters intended to be the effect of the statute. Therefore, if the effect is to punish, then a hidden intent to punish may be found.[257] For instance, a punitive intent may be "hidden" by a carefully crafted statute that is directed toward a particular individual or a particular class of individuals. Similarly, a hidden intent may be revealed when the persons covered by the statute are readily ascertainable so that the specific individuals harmed could have been known to the legislature when the bill was passed.[258]

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[254] It is the opinion of the author that the drafters of the Constitution would place the burden on the law's proponent to prove that the law did not violate the Ex Post Facto Clause in light of their fear that such laws have the potential for tyranny. *See supra* notes 6-8, 27-28 and accompanying text.

[255] *See supra* notes 114-27 and accompanying text.

[256] Flemming v. Nestor, 363 U.S. 603, 619 (1960).

[257] For a discussion of "hidden intent" in the bill of attainder area, see Note, *Punishment: Its Meaning in Relation to Separation of Power and Substantive Constitutional Restrictions and Its Use in the* Lovett, Trop, Perez, *and* Speiser *Cases*, 34 IND. L.J. 251 (1958-59).

[258] This concern dates back to the inclusion of the Ex Post Facto Clause in the Constitution as a curb on legislative vindictiveness. *See* Madison, *supra* note 30, at 266.

It is important to note that ex post facto analysis under the proposed test should not end with the consideration of the law's legislative history. It is necessary to determine if other indicia of punitiveness are present. Such indicia include the following:

(1) The disability imposed by the statute is in the form of traditional punishment or of excessive punishment;[259]

(2) The statute identifies a fixed class of persons covered by the statute coupled with the inability of the class members to opt out of the class, the so-called "impossible condition" created by the statute. If the group is a small number of persons, this would be stronger evidence of an intent to punish;[260]

(3) The persons affected by the statute are morally blameworthy; the act in question may involve moral turpitude of some kind;[261]

(4) The statute uses the deprivation as an instrument as opposed to having the detriment be incidental to the regulation.[262] This would inject proportionality into the assessment of punitive design;

(5) The goal of the statute serves one or more of the traditional aims of punishment: retribution, deterrence, rehabilitation or incapacitation;

(6) The statute is a reflection of the political climate surrounding its inception or appears to be the product of an inflamed legislature;[263]

(7) There exist less burdensome alternatives that the legislature could have adopted to meet its legitimate nonpunitive ends.[264]

Once the law's opponent makes a prima facie showing of punitive intent, the law's proponent must show that any disadvantage posed by the retrospectivity of the statute is merely an unintended incident to the regulation. The ills that the law-making body wishes to remedy should be described and the regulation must be shown to flow from an intent to deal with those ills. To survive the ex post facto challenge, the effect of the statute should be consistent with the nonpunitive rationales offered by the law's proponent.[265]

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[259] *See* Trop v. Dulles, 356 U.S. 86, 100 (1957) ("Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect."); *see also* Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1962) (focusing upon the attempted deportation of United States citizens as a punitive use of Congress's regulatory power).

[260] *See, e.g.*, Flemming v. Nestor, 363 U.S. 603 (1960).

[261] Henry M. Hart argues that the key characteristic of conduct that constitutes a crime is that it is deserving of moral condemnation. For an interesting discussion of the limits of what should constitute criminal conduct see Hart, *supra* note 18, at 402-06.

[262] This idea is developed in George H. Dession, *Sanctions, Law and Public Order*, 1 VAND. L. REV. 8, 14-15 (1947).

[263] *See, e.g.*, *Flemming*, 363 U.S. at 615 (discussing the significance of historic circumstances in determining punitive intent).

[264] *See, e.g.*, Nixon v. Administrator of Gen. Serv., 433 U.S. at 425.

[265] For example, when the statute includes a disadvantageous effect that appears punitive in nature, the law's proponent should be able to articulate reasons why the statute must be applied

In the case of statutes involving mixed motives, the mandate of the Ex Post Facto Clause requires the courts to abandon the general presumption of legitimate regulatory purpose. The law should be considered "essentially criminal" in nature, thus invoking the test employed when considering retroactive criminal laws. Under this proposed analysis, if the law, when retroactively applied, disadvantages the offender affected, it should be found to violate the Ex Post Facto Clause.

VIII. THE TEST APPLIED: AN ANALYSIS OF THE SOCIAL SECURITY LAW

The social security cases provide a useful example of the problem of mixed motives. These cases focus on incarcerated felons–people who are being punished for crimes wholly unrelated to social security–yet they involve a benefit that apparently serves no purpose when punishment is being administered. From one perspective, the law restricting the payment of benefits to felons serves the nonpunitive goal of conserving resources.[266] From another, however, the law serves to penalize those who have been convicted of felonies.[267] There is no way to tease these two strands of purpose apart and conclude that one dominates the other.[268] The evidence seems to establish that both purposes underlie the law.[269] In these situations the substantive rule articulated above should be applied.[270] Applying this test to the social security law suspending benefits to felons would change the result that troubled the D.C. Circuit.[271]

First, the court should determine if the statute is punitive in nature. The legislative history of this statute is at best equivocal, including both punitive and nonpunitive reasons for its passage.[272] Since there is some

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retroactively to effect the regulatory scheme. Furthermore, the law's proponent should be able to prove that the operation of the portion of the act that is challenged does not, in effect, disrupt the smooth operation of the regulatory plan as such a showing would clearly demonstrate a lack of legitimate basis. Merely speculating about a possible nonpunitive rationale should not be sufficient to offset the overt or hidden punitive intent.

[266] *See supra* notes 214, 218 and accompanying text.

[267] *See supra* note 206 and accompanying text.

[268] *Cf.* CHARLES D. BROAD, CONSCIENCE AND CONSCIENTIOUS ACTION, ETHICS AND THE HISTORY OF PHILOSOPHY 244-62 (1952) (discussing how it is impossible to determine how a person would have acted if one of the motives of an act had been absent).

[269] An argument could certainly be made that even though both purposes underlie the law, the punitive concern is a but-for cause.

[270] *See supra* notes 262-65 and accompanying text.

[271] *See supra* notes 237-40 and accompanying text.

[272] *See supra* notes 234-42 and accompanying text.

indication that the law may be punitive, it is appropriate to look at other factors that may confirm its penal character.

It is important to note that this law does not involve traditional punishment because the law does not call for the extension of a felon's sentence. Nevertheless, it may be characterized as a fine or monetary penalty that is associated with an inmate's status as a felon. Those benefits, earned by the person during his or her working life, are not paid during the period of incarceration.[273] While it may be argued that the statute in question is not punitive because it only affects benefits while incarcerated, the argument is weakened by the fact that there is always an absolute loss in income. Furthermore, this lost amount may be substantial if the inmate faces a long sentence or life imprisonment.

The statute does identify a fixed class of persons–felons–who cannot opt out of the class. If they are incarcerated felons, the loss established in the law must be applied to them. Proponents of the law may argue that the class is not fixed,[274] as the law does allow for benefits to be reinstated for those persons who are actively participating in a court-approved rehabilitation program.[275] In reality, the fact that some incarcerated felons can receive benefits while being housed and fed at state expense actually undercuts the law's proponents' purported nonpunitive objective of not having to pay twice for persons who are incarcerated. Furthermore, by creating an incentive for rehabilitation, the statute *promotes* a traditional goal of punishment.

In addition to the evidence of punitive intent found in the legislative history, the fact that the group identified by the statute is a "morally blameworthy" group raises some suspicion that the intent of the statute is punitive. First, the statute specifically identifies felons rather than misdemeanants.[276] While it could be argued that this distinction rests upon the probability that felons will be incarcerated longer at state expense than a misdemeanant, Congress could have constructed a statute

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[273] Note, however, that these benefits could be reinstated if the inmate entered into a court-approved rehabilitation program. *See* 42 U.S.C. § 402(x) (1988).

[274] *See* Note, *supra* note 257, at 239-43.

[275] 42 U.S.C. § 402(x) states:

> (1) Notwithstanding any other provision of this subchapter, no monthly benefits shall be paid under this section or under section 423 of this title to any individual for any month during which such individual is confined in a jail, prison, or other penal institution or correctional facility, pursuant to his conviction of an offense which constituted a felony under applicable law, unless such individual is actively and satisfactorily participating in a rehabilitation program which has been specifically approved for such individual by a court of law and, as determined by the Secretary, is expected to result in such individual being able to engage in substantial gainful activity upon release and within a reasonable time.

Id.

[276] *Id.*

that suspended the benefits of all persons who are sentenced to a year or more, thereby demonstrating the nonpunitive concern in the drafting of the statute. Instead, by identifying felons as the class to be affected, the law focuses on the *act* rather than the *length* of incarceration. This allows for an anomalous result. For example, a felon who receives a four-month sentence would have his benefits suspended while the misdemeanant sentenced to nine months would continue to receive social security benefits.[277]

It is unclear whether the deprivation of benefits included in the statute is something that is "incidental" to the regulation. The nonpunitive goal of stopping the double payment of benefits to incarcerated felons certainly requires the suspension of the benefits. In that sense, the deprivation is incidental. However, by providing a rehabilitation-program incentive to have the benefits reinstated, the "incidental" effects of the law become more "instrumental." This indicates that the law may be designed to punish the behavior of the recipient and therefore may run afoul of the Ex Post Facto Clause.

The political climate surrounding the introduction of this statute also points to its punitive origins. Congressional concern over the payments of social security benefits to prisoners was generated by newspaper articles in 1979 that claimed the celebrated "Son of Sam" killer was receiving benefits.[278] The general public outcry about the fact that criminals were allowed to receive benefits is well documented in the legislative history.[279] Under the proposed ex post facto analysis, the fact that the law was conceived under "inflamed" circumstances indicates its punitive quality and detracts from the validity of the asserted legitimate purpose.

As a final comment, the statute as enacted is grossly underinclusive. To reach the nonpunitive goal articulated in the statute, there are better nonpunitive alternatives than the one drafted. For example, if the goal of the statute is to stop paying benefits to those persons who are already

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[277] The argument that the law manifests an intent to affect persons who are morally blameworthy is furthered by the fact that the Social Security Administration continues to pay social security benefits to persons who are housed and fed at state expense in state hospitals such as public nursing homes and mental institutions. These persons do not carry the moral taint of a felony conviction, but they do fall within the nonpunitive concern of Congress that taxpayers not be forced to pay double for social security recipients. In fact, it is possible that the cost saving that would be realized if persons housed in state hospitals were taken off the social security rolls would be substantially greater than the saving that occurs with the termination of felons. For a discussion of the cost of savings projected for removing felons from the list of those receiving social security, see CRS REPORT, *supra* note 201. When this law was passed, Senator Grassley, the sponsor of the Senate amendment, candidly stated that "[t]he basic goal in adopting such a law is not to generate revenues." 129 CONG. REC. S3627 (daily ed. Mar. 22, 1983) (statement of Senator Grassley).

[278] *See generally* CRS REPORT, *supra* note 201, at 2.

[279] *See supra* notes 205-09 and accompanying text.

supported by the state, the statute should be extended to all persons that fall within that category, including inmates in prisons, public mental institutions and VA hospitals. If there are administrative problems with suspending benefits to those persons who are incarcerated or held in an institution only for a short period of time, then the statute could be written so that it applies only if the person will be housed in an institution for more than a specified period of time.

Similarly, if the nonpunitive purpose is to prevent the strong-arming of inmates in prisons for their money, then a law requiring that all social security benefits going to prisoners be placed immediately in the inmate's prison account would meet this goal. The presence of such narrowly drawn alternatives to the law that better meet the nonpunitive goals of the statute serve as additional evidence that the statute was intended to be punitive.

Given this substantial evidence of punitive intent, the test articulated in *Miller v. Florida*[280] should be used to determine if the Social Security law offends the Ex Post Facto Clause. First, it is necessary to determine if the law is being applied retroactively. In this case, for the suspension to come into being, the person must be a felon. If any inmates disadvantaged by the measure attained this classification as felon prior to the law's enactment, the suspension of benefits is being applied to them retroactively. Obviously, it must be determined if the statute in fact disadvantages the offender affected by it. Here, clearly the loss of several hundred dollars per month works to the inmate's disadvantage. Therefore, as applied retroactively, the statute offends the Ex Post Facto Clause and should not be applicable to any claimant whose felony conviction preceded the enactment of the statute. As for those persons who are incarcerated for felonies committed *since* the enactment of the statute, the law is not a violation of the Ex Post Facto Clause.

CONCLUSION

At the time of the framing of the United States Constitution, the drafters voiced deep concern about the evils of retroactive laws. The debates focused on *all* retrospective laws and made no distinction between civil and criminal statutes. The framers thus recognized the need for people to have notice of what laws would apply to them. Armed with such notice, citizens could act with reasonable certainty about the legal consequences of their acts and have some stability with respect to past transactions. The Constitution included the Ex Post Facto Clause to protect these values. Since the ratification of the Constitution, the need

[280] 482 U.S. 423 (1987); *see* discussion *supra* notes 174-98 and accompanying text.

for notice and stability has not changed, nor has the potential for vindictive acts on the part of Congress. Yet the score of ex post facto protection has been narrowed by judicial action.

The Court has interpreted the ex post facto prohibition in such a way that retroactive criminal laws achieve the degree of protection envisioned by the framers. Retroactive civil laws, on the other hand, receive very little scrutiny by the courts. Any disadvantage imposed by a civil law is presumed to be incidental to a legitimate regulatory purpose. That presumption is so strong that in the face of mixed motives–a legitimate motive and a punitive design–the presumption of legitimacy holds.[281]

The courts have virtually created a means for the legislature to penalize through the use of civil statutes. By clothing a statute in civil dress it is rendered essentially immune from ex post facto scrutiny. Today, most who fall within the ambit of an ex post facto civil statute may tend to be those who are considered morally blameworthy and therefore worthy of legislative vindictiveness. But under the Constitution, if such a law can be passed to cover morally blameworthy individuals, it can also be passed to cover any citizen. This is the foundation of tyranny.

The framers could not have anticipated the development of complex regulatory schemes that would make a ban on all retrospective civil laws inappropriate. Nevertheless, when retroactive civil legislation is punitive, even if coupled with a legitimate regulatory purpose, the degree of concern that fuels the scrutiny of criminal law should also fuel scrutiny of civil law. The evils that motivated the framers are clearly present. Legislatures should be forced to rewrite civil legislation that runs afoul of the Ex Post Facto Clause. Such protection may cool the legislative passion to punish through civil statutes. This type of dialogue between the legislature and the judiciary could provide meaningful protection against ex post facto laws while permitting reasonably necessary retroactive regulation.

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[281] *See supra* notes 201-42 and accompanying text.