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The Ex Post Facto Clause

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EX POST FACTO CLAUSE

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The U.S. Supreme Court decided two cases involving the Ex Post Facto Clause during its most recent term. One case, Carmell v. Texas, 120 S.Ct. 1620 (2000), addressed an issue long undecided. In a 5-4 decision, the Court adopted an expansive interpretation of the Clause. The case is also noteworthy because the usual factions on the Court were ruptured by this opinion – with Justice Scalia and Thomas joining the majority and Justice Rehnquist in dissent. In addition, ex post facto issues have arisen recently as new legislation concerning sexual predator and DNA databank statutes has swept through the country.

This article examines the Ex Post Facto Clause and the Ohio counterparts.

U.S. CONSTITUTION

The U.S. Constitution prohibits the ex post facto application of criminal laws. See 1 LaFave & Scott, Substantive Criminal Law § 2.4 (1986). Article I, § 9, clause 3 provides that Congress shall not pass any "ex post facto Law." Another provision, Article I, § 10, is directed to the States: "No State shall ... pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts."

Calder v. Bull

In one of its earliest criminal procedure decisions, Calder v. Bull, 3 Dall. 386, 390 (1798), the Supreme Court addressed the scope of the Ex Post Facto Clause. After noting that the term "ex post facto" was a term of art with an established meaning, the Court set forth the contours of this prohibition:

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

Although the Calder formulation indicates that there are four aspects to the Clause, these can be combined into three because the second aspect – aggravation of a crime – can be considered an increase in punishment.

Subsequent cases set out further principles. First, the law must be retroactive, "that is, it must apply to events occurring before its enactment," and the law "must disadvantage the offender affected by it." Weaver v. Graham, 450 U.S. 24, 29 (1981). Second, the Clause applies only to legislation, not judicial opinions. The Supreme Court, however, has recognized a due process principle in this context, a subject discussed later in this article. Third, "[a]lthough the Latin phrase 'ex post facto' literally encompasses any law passed 'after the fact,' it has long been recognized by this [Supreme] Court that the constitutional prohibition on ex post facto laws applies only to penal statutes which disadvantage the offender affected by them." Collins v. Youngblood, 497 U.S. 37, 41 (1990). This limitation, restricting the Clause to penal statutes, plays a significant role in the sexual predator and DNA databank cases.

OHIO LAW

Ohio Constitution

Article II, § 28 of the Ohio Constitution prohibits the General Assembly from enacting "retroactive" laws. Ohio cases often cite this provision along with the federal Ex Post Facto Clause. For example, in State v. Sargent, 126 Ohio App.3d 557, 566, 710 N.E.2d 1170 (1998), the court of appeals wrote that the "*Ex Post Facto* Clause prohibits the states from passing laws that inflict punishment upon a person for an act which was innocent when it was committed, aggravate a crime or make it greater than when it was committed, or change the punishment or inflict a greater punishment than was provided when the crime was committed. Section 10, Article I, United States Constitution; Section 28, Article II, Ohio Constitution."

In applying the Retroactivity Clause, courts must determine whether statutes are "substantive or remedial in their operation on preexisting rights." State v. Hawkins, 87 Ohio St.3d 311, 314, 720 N.E.2d 521 (1999); State v. Dowen, 93 Ohio Misc.2d 23, 25-26, 702 N.E.2d 164, 165 (C.P. 1997)

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("Section 28, Article II of the Ohio Constitution bans retroactive laws that affect substantive rights.... The Franklin County Court of Appeals upheld the constitutionality of the statute before it, concluding that the new statute does not impose penalties for past OMVI violations, but rather serves notice for future violations.").

Revised Code 1.48

R.C. 1.48 effectuates the constitutional provision by providing that a "statute is presumed to be prospective in its operation unless expressly made retrospective." See State v. Hawkins, 87 Ohio St.3d 311, 314, 720 N.E.2d 521 (1999)("R.C. 1.48 and Section 28, Article II serve to guard against the unjustness of retrospective legislation.").

These provisions are more expansive than the federal counterpart. The prosecution can also cite them. State v. Hawkins, 87 Ohio St.3d 311, 720 N.E.2d 521 (1999), illustrates this point. Hawkins was indicted for felonious assault on August 4, 1976. At that time, the maximum prison term was 15 years. Hawkins was found not guilty by reason of insanity and was committed to Lima State Hospital. During the next 20 years, Hawkins underwent periodic reviews, all of which resulted in his continued commitment. Under the extant law, a defendant could remain committed indefinitely. However, R.C. 2945.401, which became effective in July 1, 1997, provided that defendants could be committed until the expiration of the maximum prison term that could have been imposed if convicted of the most serious offense.

At Hawkins' recommitment hearing on September 2, 1997, his attorney moved to have him discharged on the basis of R.C. 2945.401. Since the maximum prison term Hawkins could have received was 15 years and he had already been committed for over 20 years, his attorney argued that the trial court could not continue to order Hawkins' commitment. The trial court disagreed and ordered continued commitment.

The court of appeals reversed, rejecting the state's argument that application of R.C. 2945.401 to a person found not guilty by reason of insanity prior to the statute's July 1, 1997 effective date was a retrospective application of law in violation of Article II § 28 of the Ohio Constitution and R.C. 1.48. In the courts' view, the provisions of the statute did not turn on the time a defendant was adjudicated not guilty by reason of insanity, but turned instead on the time that post-adjudication commitment hearings were conducted. The court also stated that the provisions of R.C. 2945.401 "do not change any determinations about guilt, innocence, or commitment made prior to July 1, 1997. Nor do they take away any vested rights, create any new obligations, impose any new duties, or attach any new disabilities with respect to the 1976 offense with which the defendant was charged." 87 Ohio St.3d at 312.

The Ohio Supreme Court affirmed. The Court found that the case involved a "straightforward application" of the statute, since Hawkins' September 2, 1997 recommitment hearing occurred after the July 1, 1997 effective date of the statute. Id. at 314. The statue was prospective in nature and therefore not affected by Ohio's ex post facto laws, which guard against retrospective legislation. The Court relied in part on State v. Jackson, 2 Ohio App.3d 11, 440 N.E. 2d 1199 (1981), in which a similar statute was upheld by the court of appeals. In that case, the court found that since the defendant was not being punished for a crime, but was instead being treated for an illness, the legislation was not ex post facto. In addition, the court in *Jackson* found that the provisions in question were "prospective in nature, since they are intended to govern treatment and discharge procedures after the law's effective date. The new provisions of the law do not take away any vested rights and do not attach any new obligations." Id. at 13-14.

NEW CRIMES OR DEFENSES

The most basic prohibition recognized by the Ex Post Facto Clause is the creation of retroactive crimes. For example, in City of Gahanna v. Jones-Williams, 117 Ohio App.3d 399, 404, 690 N.E.2d 928 (1997), the court of appeals wrote: "[I]t is clear that Ordinance 86-94 made the failure to file a return criminal, and such action was not criminal under the version of Gahanna Section 161.16 that was in effect as of April 15, 1993."

Defenses

The prohibition on new crimes also applies to the retroactive application of statutes that limit defenses. A law that "deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*." Beazell v. Ohio, 269 U.S. 167, 169 (1925). See also Collins v. Youngblood, 497 U.S. 37, 43 (1990)(The "*Beazell* formulation is faithful to our best knowledge of the original understanding of the *Ex Post Facto Clause*: Legislatures may not retroactively alter the definition of crimes or increase the punishment of criminal acts."); State v. Rush, 83 Ohio St.3d 53, 59, 697 N.E.2d 634 (1998) ("Legislation violates the *Ex Post Facto* Clause if it ... deprives the accused of a defense available at the time the crime was committed.").

This principle is merely a recognition that there are several ways in which a crime may be redefined, one is eliminating an element from the definition of the crime and another is limiting a defense. State v. Luff, 85 Ohio App.3d 785, 793, 621 N.E.2d 493 (1993), appeal dismissed, 67 Ohio St.3d 1464, 619 N.E.2d 698 (1993), cert. denied, 510 U.S. 1136 (1994), illustrates this rule. It concerned the change in the Ohio definition of insanity, an affirmative defense. "Because R.C. 2901.01(N) significantly changed the evidentiary standard of insanity, the court's retrospective application of R.C. 2901.01(N) deprived Luff of a defense that was available to him according to the law at the time the crimes were committed."

INCREASED PUNISHMENT

The *Calder* decision recognized a second way in which the Clause may be violated – a retroactive increase in punishment. More recent decisions reaffirm this principle. "Legislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts." Collins v. Youngblood, 497 U.S. 37, 43 (1990). See also State v. Rush, 83 Ohio St.3d 53, 59, 697 N.E.2d 634 (1998) ("Legislation violates the *Ex Post Facto* Clause if it ... *increases* the punishment for a crime after its commission ...."); City of Gahanna v. Jones-Williams, 117 Ohio App.3d 399, 404, 690 N.E.2d 928 (1997)("Ordinance 86-94 increased the punishment by increasing the fine for a first offense, and by arguably permitting jail time for a first offense."); State v. Gleason, 110 Ohio App.3d 240, 246, 673 N.E.2d 985 (1996) ("Because a violation of the dissemination statute in 1984 and 1985 under the facts and circumstances of this case would have resulted in a minimum term of imprisonment of six months, and because application of the statute's current provisions resulted in a minimum term

of imprisonment of one year, the trial court erred in applying the current classifications ...."); State v. Hartup, 126 Ohio App.3d 768, 770, 711 N.E.2d 315, 317 (1998) ("The court found ... (2) as applied to offenses committed prior to its effective date, R.C. 2953.36 '[made] the punishment for a certain class of crimes more burdensome, after their commission, and thus is an impermissible *ex post fact* law, in violation of Art. I, § 10, of the United States Constitution.'").

The cases examining increased punishment involve a myriad of diverse issues – from the elimination of good time credit to the extension of parole hearing intervals.

Mandatory Sentencing

In Lindsey v. Washington, 301 U.S. 397, 401 (1937), the defendants were sentenced under a law requiring a sentence of 15 years, while the law in effect at the time of the offense gave the judge discretion to impose a lesser sentence. The Court struck down the conviction, commenting:

> [T]he *ex post facto* clause looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed. ... Removal of the possibility of a sentence of less than fifteen years, at the end of which petitioners would be freed from further confinement and the tutelage of a parole revocable at will, operates to their detriment in the sense that the standard of punishment adopted by the new statute is more onerous than that of the old.

Good-Time Credit

Weaver v. Graham, 450 U.S. 24, 32 (1981), involved inmates whose good-time credit was legislatively reduced across the board, even if they had not violated any prison regulation. The Court ruled that the elimination of good time-credit constituted an increase in punishment because "a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed."

Statutory Guidelines

In Miller v. Florida, 482 U.S. 423 (1987), the defendant was convicted of sexual battery. At the time the crime was committed, Florida's sentencing guidelines required a presumptive sentence of 3 to 4 years imprisonment. Revised guidelines in effect at the time of sentencing called for a presumptive sentence of 5 to 7 years imprisonment. The trial court applied the revised guidelines, imposing a seven-year sentence. The Supreme Court reversed, finding application of the revised sentencing guidelines constitutionally defective. The guidelines were imposed retrospectively, they disadvantaged the defendant by subjecting him to the possibility of increased punishment, and they could not be characterized as "procedural."

Frequency of Parole Hearings

In California Department of Corrections v. Morales, 514 U.S. 499 (1995), the Court held that a statutory amendment that permitted the Board of Prison Terms to decrease the frequency of parole suitability hearings under certain conditions did not violate the ex post facto prohibition. The California statute in question was amended after Morales' conviction to allow parole boards to defer suitability hearings for three years for individuals convicted of more than one offense involving the taking of a life. Previously, prisoners were allowed annual suitability hearings. Morales argued that such a law made parole less accessible, thus making his sentence longer in violation of the Ex Post Facto Clause.

Justice Thomas wrote that the statute did nothing to affect Morales' indeterminate sentence (15 to life), and it did not alter the "substantive formula for securing any reductions to the sentencing range." Id. at 507. The statutory amendment simply altered the method for fixing a parole release date so that the parole board would not have to hold another hearing in the year or two after the initial hearing. The Court emphasized that it had long refused to articulate any particular formula for measuring when legislative adjustments are of "sufficient moment" to transgress the Ex Post Facto Clause. This case did not require such an articulation because the amended statute's chance for increasing the measure of punishment was far too "speculative and attenuated."

As the Court pointed out, the amended statute only affected those who had been convicted of crimes involving loss of life more than once. Morales killed his wife while on parole for a prior murder conviction. The early release of prisoners for this class of crime is highly unlikely. In addition, "it affects the timing only of *subsequent* hearings. Moreover, the Board has the authority to tailor the frequency of subsequent hearings." Id. at 511.

This term, in Garner v. Jones, 120 S.Ct. 1362 (2000), the Court once again confronted this issue. The question before the Court was whether the retroactive application of a Georgia law permitting the extension of intervals between parole considerations violated the Clause. In 1974 respondent began serving a life sentence. He escaped five years later and committed another murder. Apprehended and convicted in 1982, he was sentenced to a second life term. At the time of respondent's second conviction, the Parole Board was required to consider parole after three years. In 1985, the rules were amended to require reconsideration every eight years. The board reinstated its earlier three-year rule and considered respondent for parole in 1992 and 1995. He was denied both times. In 1995, the Board resumed scheduling parole reconsiderations at least every eight years, and so at respondent's 1995 review it set the next consideration for 2003. The Board's policy permits the inmates to show a change in their individual circumstances, which could expedite reconsideration for parole.

On review, the Supreme Court ruled as follows: "The States must have due flexibility in formulating parole procedures and addressing problems associated with confinement and release." Id. at 1368. "The idea of discretion is that it has the capacity, and the obligation, to change and adapt based on experience." Id. at 1369. "The Board's stated policy is to provide for reconsideration at 8-year intervals 'when, in the Board's determination, it is not reasonable to expect that parole would be granted during the intervening years." Id. at 1369-70. Thus, the State's new policy did not act to increase respondent's punishment for the crime he committed prior to the enactment of the new policy.

Early Release Provisions

In Lynce v. Mathis, 519 U.S. 433 (1997), the Supreme Court considered an ex post facto claim arising from the retroactive cancellation of a prisoner's provisional early release credits, which had been awarded to alleviate prison overcrowding. In 1983, the Florida Legislature established the early release program, and Lynce was released in 1992. Subsequently, the state Attorney General interpreted a 1992 statute as canceling retroactively credits for those who had committed murder or attempted murder. Because Lynce fell into this category, he was rearrested and returned to prison.

The Supreme Court ruled that this action violated the Ex Post Facto Clause. The Clause is violated when the state increases punishment for an offense after it has been committed. The Court stated that the motivation of the legislature was irrelevant. For the Court, the critical issue was the effect of the legislation – here, the cancellation of 1,869 days of accumulated provisional credits lengthened the petitioner's incarceration. "[R]etroactive alteration of parole or early release provisions, like the retroactive application of provisions that govern initial sentencing, implicates the *Ex Post Facto* Clause because such credits are 'one determinant of petitioner's prison term ... and ... [the petitioner's] effective sentence is altered once this determinant is changed." Id. at 445 (quoting Weaver v. Graham, 450 U.S. 24, 32 (1981)).

The Court distinguished a prior case, *Morales*. "Unlike the California amendment at issue in *Morales*, the 1992 Florida statute did more than simply remove a mechanism that created an *opportunity* for early release for a class of prisoners whose release was unlikely; rather, it made ineligible for early release a class of prisoners who were previously eligible – including some, like petitioner, who had actually been released." Id. at 447.

Recidivist Statutes

State v. Sargent, 126 Ohio App.3d 557, 566, 710 N.E.2d 1170 (1998), involved a recidivist enhancement scheme, which increased punishment for second offenders. The court of appeals wrote that "[s]tatutes which enhance the penalty for repeat offenders based in part upon criminal conduct occurring prior to passage of the enhancement provision do not constitute ex post facto legislation. The enhancement provisions do not punish the past conduct; rather, the enhancement provisions merely increase the severity of a penalty imposed for criminal behavior that occurs after passage of the enhancement legislation."

Expungement Statutes

In State v. Hartup, 126 Ohio App.3d 768, 772, 711 N.E.2d 315, 318 (1998), the court of appeals considered the ex post facto implications of a retroactive change in an expungement statute: "That the General Assembly saw fit to remove the 'privilege' of seeking expungement from certain offenders does not equate to increasing the punishment for the offense. On its most basic level, R.C. 2953.36 does not increase any 'punishment' for the offense of gross sexual imposition.... It merely removes the possibility of having a record of conviction sealed.... Because R.C. 2953.36 does not impose greater punishment, it does not violate the *ex post facto* clause of the United States Constitution."

Ohio Sentencing Guidelines

Several retroactivity issues arose with the enactment of the new sentencing law. In State v. Rush, 83 Ohio St.3d 53, 697 N.E.2d 634 (1998), cert. denied, 119 S.Ct. 1052 (1999), the Ohio Supreme Court examined some of them. Rush pled guilty to one count of aggravated trafficking for selling cocaine. The alleged offense occurred on September 15, 1995, but Rush was sentenced after July 1, 1996, the effective date of Senate Bill 2. The trial court overruled Rush's motion to be sentenced in accordance with Senate Bill 2 and sentenced him to 3 to 15 years under the laws in place when the offense was committed. Senate Bill 2 provided for 1 to 5 years.

Unlike the other cases discussed in this article, the new law favored the defendant in this situation, and R.C. 1.58 provides that when penalties are reduced before sentencing has occurred, penalties should be imposed in accordance with the amended statute. However, Senate Bill 2 specified that it did not apply to people not yet sentenced, as long as the offense occurred prior to the statute's effective date. The court of appeals found a conflict between R.C. 1.58 and Senate Bill 2. In construing the statutes strictly against the State and liberally in favor of Rush, the court held that Rush should be sentenced in accordance with Senate Bill 2.

The Ohio Supreme Court reversed, finding that Senate Bill 2 did not apply to this category of offenders because the General Assembly specifically provided that the statute applied only to offenses committed after the effective date. The Court rejected the defendant's reliance on R.C. 1.58, stating that the statute "does not create a vested right to be sentenced according to amended laws: it is a general rule of statutory construction." Id. at 56. The Court held that the "notwithstanding" language in Senate Bill 2, in effect exempting the application of R.C. 1.58, was permissible. The Court stated, "It is the General Assembly, of course, that possesses authority to determine the effective dates of enactments passed pursuant to its legislative powers." Id. at 57.

The Court also held that Senate Bill 2 did not violate the Ex Post Facto Clause of the U.S. Constitution or the Ohio Constitution's ban against retroactive laws, since it did not increase punishment. In addition, the Court ruled that a law is not retroactive unless the legislature so specifies, and in this case, the General Assembly clearly stated that the law would be prospective – applying only to acts occurring after July 1, 1996.

CHANGES IN EVIDENCE RULES

Calder specified that changes in the law of evidence may also violate the Ex Post Facto Clause. In a later case, the Supreme Court indicated that a statute that required "less proof, in amount or degree" would violate the Clause. Thompson v. Missouri, 171 U.S. 380, 385 (1898). In contrast, in Hopt v. Utah, 110 U.S. 574 (1884), the Court held that a statute that enlarged the class of witnesses who could testify did not violate the Clause because the new rule applied to defense as well as to prosecution witnesses. Similarly, in *Thompson* the Court ruled that the retroactive application of a statute making handwritten documents admissible as handwriting exemplars did not violate the Clause. 171 U.S. at 386-87.

This term in Carmell v. Texas, 120 S.Ct. 1620 (2000), the Supreme Court addressed this subject for the first time in many years. Prior to September 1, 1993, a Texas statute required one of three types of support for testimony by victims in certain sex crimes prosecutions – indecency with a child, sexual assault, and aggravated sexual assault. These included: (1) corroboration by other evidence, (2) corroboration by someone whom the witness informed within six months of the offense (a type of "fresh complaint" rule), or (3) the testimony alone, even without corroboration or fresh complaint, if the victim was younger than 14 at the time of the offense. Effective September 1, 1993, the statute was amended. The new statute included the same three requirements, but the age for the victim in the third category was changed to under 18.

Carmell was convicted of 15 counts of sexual offenses against his stepdaughter. He appealed four of his convictions, which involved conduct prior to September 1, 1993, during which time the victim was older than 14. Carmell ar-

gued that application of the new statute violated the Ex Post Facto Clause. Under the old statute, the victim's testimony would require corroboration. A Texas appellate court found against Carmell, ruling that the statute was procedural and did not increase the punishment nor change the elements of the offense.

The Supreme Court reversed, in an opinion delivered by Justice Stevens and joined by Justices Scalia, Souter, Thomas, and Breyer. The Court determined that the statute violated the Ex Post Facto Clause because it "alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender." Id. at 1627 (quoting *Calder*). Texas relied on *Hopt*, in which the retroactive application of a witness competency provision was upheld as constitutional. Texas argued that the statute in Carmell's case was likewise a witness-competency rule that did not affect the definition of the crime, its punishment, or the sufficiency of the evidence required to convict. The Court rejected this argument, ruling that the statute was not a mere witness-competency provision but was instead a sufficiency-of-the-evidence rule. The language in the Texas statute stated that "[a] conviction ... is supportable on," whereas the language in *Hopt* referred to "determining the competency of witnesses."110 U.S. at 587-88. Consequently, the Texas statute did not "simply enlarge the class of persons who may be competent to testify," nor did it "only remove existing restrictions upon the competency of certain classes of persons as witnesses." Id. at 589-90.

In reversing, the Supreme Court quoted from Joseph Story's comments on the Ex Post Facto Clause:

> If the laws in being do not punish an offender, let him go unpunished; let the legislature, admonished of the defect of the laws, provide against the commission of future crimes of the same sort. The escape of one delinquent can never produce so much harm to the community, as may arise from the infraction of a rule, upon which the purity of public justice, and the existence of civil liberty, essentially depend. Commentaries on the Constitution § 1338, at 211 n.2.

CHANGES IN PROCEDURE

Calder did not specify that retroactive changes in "criminal procedure" as opposed to "evidence" were covered by the Clause. See Duncan v. Missouri, 152 U.S. 377, 382-83 (1894) (depriving an accused of "substantial protections with which the existing law surround the person accused of crime are not considered within the constitutional inhibition"). The Supreme Court, however, held in later cases that certain changes in criminal procedure violated the Clause – procedural changes that deprive the defendant of a substantial right. See Beazell v. Ohio, 269 U.S. 167, 171 (1925) (A procedural change may constitute an ex post facto violation if it "affected matters of substance").

In Kring v. Missouri, 107 U.S. 221 (1883), the prior law provided that a plea of guilty to second degree murder results in an automatic acquittal to first degree murder even if the plea was later set aside. After Kring's offense, a new law provided that if the plea is later set aside the defendant could be tried for first degree murder. The Court found an ex post facto violation because the new law deprived the accused of a substantial right. Similarly, in Thompson v. Utah, 170 U.S. 343 (1898), the Court ruled that the retroactive reduction of the number of jurors from 12 to 8 denied Thompson of a substantial right.

Other cases found certain procedural changes not violative of the Clause. For example, in Beazell v. Ohio, 269 U.S. 167 (1925), the prior law provided for separate trials of jointly indicted defendants as a matter of right. After the offense was committed, the law was changed to make severance a matter of judicial discretion. This was not considered a violation because it was not a substantial right.

The Court, however, eventually changed directions. In Collins v. Youngblood, 497 U.S. 37 (1990), a new law allowed the reformation of an improper jury verdict. The jury imposed a fine in addition to life imprisonment in Youngblood's case. The fine was not authorized, and under Texas procedure the judgment was voided and a new trial required. The new law permitted an appellate court to reform an improper verdict that assessed a punishment not authorized by law. Applying this provision, the state appellate court ordered the deletion of the fine but denied the request for a new trial. The Supreme Court reversed *Kring* and *Thompson*, holding that the historical purpose of the Clause did not extend to procedural changes. "The *Beazell* formulation is faithful to our best knowledge of the original understanding of the *Ex Post Facto* Clause: Legislatures may not retroactively alter the definition of crimes or increase the punishment of criminal acts." Id. at 43.

Moreover, the Court found the phrase "substantial protections" had "imported confusion" into the interpretation of the Clause that was not justified by the historical record. Id. at 45. The Court also noted that "by simply labeling a law 'procedural,' a legislature does not thereby immunize it from scrutiny under the Ex Post Facto Clause." Id. at 46.

JUDICIAL DECISIONS

The Ex Post Facto Clause applies only to the legislative branch. See Marks v. United States, 430 U.S. 188, 191-92 (1977) ("The Ex Post Facto Clause is a limitation upon the powers of the legislature, and does not of its own force apply to the judicial branch of government. But the principle on which the Clause is based – the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties – is fundamental to our concept of constitutional liberty. As such, that right is protected against judicial action by the Due Process Clause ....") (citations omitted).

The Supreme Court held in Bouie v. Columbia, 378 U.S. 347, 353-54 (1964), that the retroactive application of judicial decisions that significantly change prior law may violate due process:

> [A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law .... If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.

The Ohio Supreme Court has recognized this principle in several cases. E.g., State v. Garner, 74 Ohio St.3d 49, 57-58, 656 N.E.2d 623 (1995) (principle not applicable in this case; not a new rule); State v. Webb, 70 Ohio St.3d 325, 330 n. 1, 638 N.E.2d 1023 (1994). Citing *Bouie*, the Court in State v. Saylor, 6 Ohio St.2d 139, 141, 216 N.E.2d 622 (1966), wrote: "It has been suggested that the requirement of mens rea is not in the statute; but, even so, any attempt at this time to eliminate the mens rea requirement would

confront serious due process objections.").

SEXUAL PREDATOR STATUTES

Ohio has had a sex offender registration statute since 1963, but the General Assembly rewrote the statute in 1996. The 1996 revision included three classifications for offenders: sexually oriented offender, habitual sex offender, and sexual predator. These classifications became effective January 1, 1997. An offender is automatically classified as a sexual predator if convicted of violent sexually-oriented offense and a sexual-predator specification was included in the indictment. Otherwise, a person can be classified as a sexual predator by the trial court, after a hearing. The hearing takes place at or before sentencing.

The 1996 version of the law also included a new registration provision, which became effective July 1, 1997. Offenders are to register with their county sheriff, providing a home address, the name and address of employer, a photograph, the license plate number of cars owned or registered in their name, as well as any other information required by the Bureau of Criminal Identification and Investigation. The offender must periodically verify his address. The frequency and duration of the verification depends on the offender's classification: sexually oriented offenders must verify annually for 10 years, habitual sexual offenders must verify annually for 20 years, and sexual predators must verify every 90 days for life. The registration provision applies (no matter the date of offense) (1) if the offender was released from confinement on or after July 1, 1997, (2) if the offender was sentenced on or after July 1, 1997, or (3) if immediately prior to July 1, 1997, the offender was classified as a habitual sex offender.

The revised law also contained a community notification provision, something not in the former statute. The provision requires the county sheriff to notify certain community members, law enforcement agencies, officials responsible for the safety of children, and some victims of the offender's place of residence. The community notification provision applies no matter when the offense was committed.

In State v. Cook, 83 Ohio St.3d 404, 700 N.E.2d 570 (1998), the Ohio Supreme Court addressed the retroactive aspects of the new law. Cook was indicted on two counts of gross sexual imposition on November 14, 1996; he pled guilty to one count and the other was dismissed. The sentencing hearing was held on February 14, 1997, during which time the trial court found Cook to be a sexual predator. The court of appeals reversed, ruling that the sex offender registration statute violated the Ohio Constitution's ban on retroactive laws, since Cook's conduct occurred prior to the statute's effective date of January 1, 1997. The Supreme Court disagreed. In deciding that the statute did not violate the Ex Post Facto Clauses of the United States and Ohio Constitutions, the Court first determined that the General Assembly specifically intended the law to be retroactive. This determination was necessary because R.C. 1.48 provides that a "statute is presumed to be prospective in its operation unless expressly made retrospective."

The Court then considered whether the statute was substantive or remedial, since under Van Fossen v. Babcock & Wilcox Co., 36 Ohio St.3d 100, 522 N.E.2d 489 (1988), remedial statutes do not violate the Ohio Constitution, even if retroactive. The Court held that R.C. 2950 was remedial, as most of the provisions require action by law enforcement officials and courts, not the offender. Since habitual sex offenders were required to register under the old law, the statute could not be classified as imposing additional burdens. The new law did change the frequency and duration of registration, and it changed the classification of offenders from one (habitual sex offender) to three (sexually-oriented offender, habitual sex offender, and sexual predator). However, these changes were considered to be "de minimis procedural requirements that are necessary to achieve the goals of R.C. Chapter 2950." 83 Ohio St.3d at 412. The Court referred to Doe v. Poritz 142 N.J. 1, 13-14 662 A.2d 367 (1995), in which the New Jersey Supreme Court stated,

> Had the Legislature chosen to exempt previously-convicted offenders, the notification provision of the law would have provided absolutely no protection whatsoever on the day it became law, for it would have applied to no one. The Legislature concluded that there was no justification for protecting only children of the future from the risk of reoffense by future offenders, and not today's children from the risk of reoffense by previously-convicted offenders.

As to the new community notification requirements, the Court held that they were also remedial. The notification requirements do not infringe on any substantive right of the offender, since convictions are public records and since the burden is placed on the sheriff, not the offender. The Court did acknowledge the damage to the offender's reputation, but pointed out that any consequences of notification are "not as a direct result of the sexual offender law, but instead as a direct societal consequence of [the offender's] past actions." Id. at 412 (quoting State v. Butler, App. No. CA97-03-060, unreported, 1997 WL 786216 (1997)).

After making the substantive-remedial determination, the Court turned to whether the statute is civil or criminal. This determination is important, because the federal Ex Post Facto Clause applies only to criminal laws. The Court first looked to the General Assembly's intent, deciding that the statutory language demonstrated a remedial purpose, to promote public safety, as opposed to a punitive purpose. The Court next looked to whether the effect of the statute was remedial or punitive. In doing so, the Court considered the elements in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963):

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

The Court first determined that, while registering may be inconvenient, it is not a disability or restraint. Historically, the Court noted, registration has been a "valid regulatory technique with a remedial purpose." 83 Ohio St.3d at 418. The Court also held that the registration and notification provisions protect the public and are not intended to be retributive or a deterrent. The Court pointed out that there may be some deterrent effect, but that in itself was not enough to make a statute punitive. Since the Court found the statute to be remedial, not punitive, it held that the statute did not violate the Ex Post Facto Clause.

See also State v. White, 131 Ohio App.3d 547, 590, 723 N.E.2d 158 (1998)("Although the Cook court did not specifically address R.C. 2950.09(C), the rationale applied by the court in its determination that R.C. 2950.09(B) violates neither the *Ex Post Facto* Clause of the United States Constitution nor the Retroactivity Clause of the Ohio Constitution applies to R.C. 2950.09(C)."); State v. Lee, 128 Ohio App.3d 710, 716 N.E.2d 751 (1998) (because the successive burdens imposed by R.C. 2950 are nonpunitive, civil remedies, neither the Double Jeopardy Clause, the Ex Post Facto Clause, nor Section 28, Article II of the Ohio Constitution (prohibiting retroactive laws) is implicated).

DNA DATABANKS

The adoption of DNA database statutes in every state produced a flood of litigation concerning the ex post facto application of such provisions. Although each state legislates the conditions under which DNA samples are taken, the FBI has established a national databank system, called CODIS (Combined DNA Index System), into which the state profiles can be entered. Now states can search the databases of other states.

Non-Penal Purpose

Some courts have ruled that the ex post facto prohibition does not apply because databanking statutes are not *penal* in nature. For example, the Ninth Circuit rejected such a challenge to the Oregon statute because its "obvious purpose is to create a DNA data bank to assist in the identification, arrest, and prosecution of criminals, not to punish convicted murderers and sexual offenders." Rise v. Oregon, 59 F.3d 1556, 1562 (9th Cir. 1995), cert. denied, 517 U.S. 1160 (1996). Accord Shaffer v. Saffle, 148 F.3d 1180, 1182 (10th Cir. 1998) (Because the "statutes have a legitimate, non-penal legislative purpose, they do not run afoul of the Ex Post Facto Clause under these circumstances."), cert. denied, 525 U.S. 1005 (1998); Gilbert v. Peters, 55 F.3d 237, 239 (7th Cir. 1995)("The blood specimen statute thus does not run afoul of the *Ex Post Facto* Clause."); Jones v. Murray, 962 F.2d 302, 309 (4th Cir. 1992)("[A] statute that is not penal cannot be ex post facto. Thus it cannot be said that the DNA testing, itself, runs afoul of the *Ex Post Facto* Clause.").

The ex post facto issue, however, does not necessarily disappear merely by labeling a statute as "non-penal." Ex post facto principles apply when punishment is retroactively increased, and that may occur if a sanction for refusal to provide a DNA sample is the denial of parole or the forfeiture of good time credits. Much depends on how a parole or good time statute is written.

Parole

If parole is purely discretionary, a parole board may consider a refusal to comply with a valid prison regulation, such as one requiring a DNA sample, in determining the appropriateness of parole. In contrast, an increase in the length of a sentence caused by new conditions in a mandatory parole jurisdiction is suspect. For example, the Virginia parole statute mandated parole six months before the sentence release date, and the Fourth Circuit ruled that withholding release for failure to provide DNA samples would be unconstitutional. Jones v. Murray, 962 F.2d 302, 310 (4th Cir. 1992)("[T]he continued incarceration beyond a time six months prior to the end of the actual sentence of an inmate convicted prior to the enactment of [the statute] for any reason not reflected in the terms of the mandatory parole provision, would constitute a retroactive extension of the inmate's sentence which is prohibited by the *Ex Post Facto Clause*.").

Good-Time Credit

Reduction of good-time credit raises somewhat different issues. In Weaver v. Graham, 450 U.S. 24, 32 (1981), the Supreme Court ruled that the elimination of good time-credit constituted an increase in punishment because "a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed."

Weaver, however, involved inmates whose good-time credit was legislatively reduced across the board, even if they had *not* violated any prison regulation. Several courts have distinguished databank statutes on this basis, finding that at the time of sentencing good-time credits were known to be contingent on compliance with legitimate prison regulations and the nature of those regulations may be amended while the prisoner is serving penitentiary time. See Gilbert v. Peters, 55 F.3d 237, 239 (7th Cir. 1995) ("Disciplinary measures imposed on inmates for failing to obey orders ... do not violate the *Ex Post Facto* Clause."); Ewell v. Murray, 11 F.3d 482, 486 (4th Cir. 1993)(Prison officials may, "consistent with the Ex Post Facto Clause, reasonably increase the penalties for prospective violations by inmates of reasonable prison regulations when the penalties may involve the loss of good conduct time credits."), cert. denied, 511 U.S. 1111 (1994); Jones v. Murray, 962 F.2d 302, 309-10 (4th Cir. 1992)("The Ex Post Facto Clause does not prevent prison administrators from adopting and enforcing reasonable regulations that are consistent with good prison administration, safety and efficiency. ... It is precisely because reasonable prison regulations, and subsequent punishment for infractions thereof, are contemplated as part of the sentence of every prisoner, that they do not constitute an additional punishment and are not classified as *ex post facto*. Moreover, since a prisoner's original sentence does not embrace a right to one set of regulations over another, reasonable amendments, too, fall within the anticipated sentence of every inmate.").