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## Stogner v. California: A Collision between the Ex Post Facto Clause and California's Interest in Protecting Child Sex Abuse Victims

Ashran Jen

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# ***STOGNER v. CALIFORNIA: A COLLISION BETWEEN THE EX POST FACTO CLAUSE AND CALIFORNIA'S INTEREST IN PROTECTING CHILD SEX ABUSE VICTIMS***

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

## I. INTRODUCTION

In *Stogner v. California*,<sup>1</sup> the United States Supreme Court held that California Penal Code section 803(g),<sup>2</sup> which extended the statute of limitations for prosecuting child sex abuse crimes in California, violated the Ex Post Facto Clause<sup>3</sup> of the Constitution where the original statute of limitations had tolled before the drafting and implementation of 803(g).

This Note argues that the Supreme Court's decision was incorrect and that section 803(g) does not violate the Ex Post Facto Clause. While the majority used the correct analytical framework in considering the issue, it ultimately came to the wrong decision. It misinterpreted precedent and failed to adequately consider the comprehensive scientific literature documenting the unique traumas and recovery processes faced by child sex abuse victims. The dissent, however, did not provide a satisfactory response either because its framework for analyzing the issue was too narrow and discounted the importance of public policy.

A collective analysis of precedent, history, and public policy is necessary to determine the legality of section 803(g). With no case law having addressed this issue, precedent is sufficient only to establish the general categories of ex post facto laws and the historical underpinnings of ex post facto jurisprudence. To accurately determine whether section 803(g) fits the profile and characteristics of an ex post facto law, a consideration of the statute's public policy implications is necessary. The result of this analysis shows that section 803(g) does not have the unjust characteristics of an ex post facto law as it protects a unique victims'

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<sup>1</sup> 123 S. Ct. 2446 (2003).

<sup>2</sup> CAL. PENAL CODE § 803(g) (West 2003).

<sup>3</sup> U.S. CONST. art. I, § 10, cl. 1.

interest while adequately safeguarding against any harms that would trigger ex post facto concerns.

Finally, this Note predicts that similar provisions in other statutes seeking to extend expired limitations periods for prosecuting criminal offenses are likely in jeopardy. This will impact all types of legislation ranging from state laws covering child abuse crimes to the federal USA PATRIOT Act.<sup>4</sup> The unfortunate consequence of the *Stogner* holding is that courts will now have to rigidly invalidate statutes if they are similar to section 803(g). Such a restricted application of the law makes no sense because courts will be compelled to invalidate laws without considering the resulting impact on public policy.

## II. BACKGROUND

### A. EX POST FACTO CLAUSE

“Ex post facto” is translated from the Latin as “from a thing done afterward” and is colloquially understood to refer to actions, decisions, or formulations done after the fact and retroactively, particularly in relation to law.<sup>5</sup> The United States Constitution contains two Ex Post Facto clauses with the first applying to the federal government and the second applying to the states.<sup>6</sup>

The first Ex Post Facto Clause prohibits the United States Congress from passing an ex post facto law.<sup>7</sup> While *Stogner* did not involve a federal Congressional statute, the Supreme Court’s holding in *Stogner* does have direct ramifications on Congress’ ability to pass certain types of retroactive laws.<sup>8</sup> The second Ex Post Facto Clause prohibits a state from passing an

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<sup>4</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of 18 U.S.C.).

<sup>5</sup> See MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 410 (10th ed. 1993); BLACK’S LAW DICTIONARY 601 (7th ed. 1999).

<sup>6</sup> See U.S. CONST. art. I., §§ 9-10.

<sup>7</sup> U.S. CONST. art. I, § 9, cl. 3.

<sup>8</sup> This Note will consider *Stogner v. California*’s potential impact on the USA PATRIOT Act, the PROTECT Act, and other state statutes. See *infra* text accompanying notes 219-233. The USA PATRIOT Act contains a provision eliminating the statute of limitations for terrorist crimes which resulted in foreseeable death or severe bodily injury. See USA PATRIOT Act § 809, 115 Stat. at 272. The PROTECT Act eliminates the statute of limitations for prosecuting sexual and physical abuse and kidnappings committed against children under eighteen. See PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in section 202, 18 U.S.C. § 3283 (2003)).

ex post facto law,<sup>9</sup> and this is the constitutional clause at issue in Stogner's challenge against California.

#### B. CALDER V. BULL

In *Calder v. Bull*, a late eighteenth century case involving a probate dispute over the property of a Connecticut doctor, the Supreme Court for the first time set forth an explanation of ex post facto laws prohibited by the Constitution.<sup>10</sup> Justice Chase established four major categories of ex post facto laws:

1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different; testimony, than the law required at the time of the commission of the offence, in order to convict the offender. All these, *and similar laws*, are manifestly unjust and oppressive.<sup>11</sup>

In distinguishing unconstitutional ex post facto laws from constitutional retroactive laws, Justice Chase suggested that legitimate laws applied retroactively, such as pardons mitigating criminal punishments, do not have the onerous characteristics found in ex post facto laws which make previous lawful acts unlawful or laws that aggravate punishment.<sup>12</sup>

Justice Chase relied on several sources of authority in recognizing four major categories of ex post facto laws. First, language from the Constitutional Conventions of Massachusetts, Delaware, North Carolina, and Maryland all prohibited punishing individuals for crimes that were not criminal when committed.<sup>13</sup> Justice Chase also found that his four categories were consistent with a historical understanding of ex post facto doctrine articulated by legal practitioners, legislators, and scholars, but his opinion did not explain how his categories were consistent with these views.<sup>14</sup> Furthermore, the Court found a certain philosophical grounding that a "fundamental principle flows from the very nature of our free

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<sup>9</sup> "No state shall enter into any . . . ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility." U.S. CONST. art. I, § 10, cl. 1.

<sup>10</sup> 3 U.S. 386 (1798).

<sup>11</sup> *Id.* at 390 (emphasis added).

<sup>12</sup> *Id.* at 391. Further examples of permissible retrospective laws include those that "save time from the statute of limitations; or . . . excuse acts which were unlawful, and before committed, and the like." *Id.*

<sup>13</sup> *Id.* at 391-92.

<sup>14</sup> *Id.* at 391.

republican governments, that no man should be compelled to do what the laws do not require.”<sup>15</sup>

In explaining why the drafters of the U.S. Constitution added two Ex Post Facto clauses to limit the power of federal and state legislatures, Justice Chase suggested that the United States had witnessed and learned from Great Britain’s retroactive use of “acts of violence and injustice.”<sup>16</sup> One category of such unjust acts passed by Parliament included “times . . . they inflicted punishments, where the party was not, by law, liable to any punishment.”<sup>17</sup> While Justice Chase did not explicitly state that such acts were ex post facto, he clearly disapproved of these unjust Parliamentary actions.<sup>18</sup>

### C. OTHER EX POST FACTO JURISPRUDENCE

It is well established that extending the statute of limitations for prosecuting crimes which have not become time-barred is not a violation of the Ex Post Facto Clause.<sup>19</sup> However, aside from *Stogner*, not one United States Supreme Court case or any other federal court case has directly addressed the constitutionality of a statute extending the limitations period for an already expired statute in the criminal or civil context.<sup>20</sup> In *Falter v. United States*, a case involving the extension of a limitation period for an unexpired statute, Judge Learned Hand opined that “certainly it is one thing to revive a prosecution already dead, and another to give it a longer lease of life.”<sup>21</sup> Thus, “the question turns upon how much violence is done to our instinctive feelings of justice and fair play.”<sup>22</sup>

To add support to his comment, Judge Hand cited a New Jersey case, *Moore v. State*,<sup>23</sup> where the New Jersey Court of Errors and Appeals

<sup>15</sup> *Id.* at 388.

<sup>16</sup> *Id.* at 389.

<sup>17</sup> *Id.* Justice Chase was referring to the banishments of Lord Clarendon and the Bishop of Atterbury. See The 1911 Edition Encyclopedia, *Clarendon, 1st Earl of*, at [http://85.1911encyclopedia.org/C/CL/CLARENDON\\_1ST\\_EARL\\_OF.htm](http://85.1911encyclopedia.org/C/CL/CLARENDON_1ST_EARL_OF.htm) (last visited Mar. 1, 2004) (discussing how the House of Lords imposed banishment on Lord Clarendon after having agreed to drop previous treason charges against him).

<sup>18</sup> *Calder*, 3 U.S. at 389.

<sup>19</sup> See *United States v. Grimes*, 142 F.3d 1342, 1351 (11th Cir. 1998); *United States v. Brechtel*, 997 F.2d 1108 (5th Cir. 1993); *United States v. Madia*, 955 F.2d 538 (8th Cir. 1992); *United States ex rel. Massarella v. Elrod*, 682 F.2d 688 (7th Cir. 1982).

<sup>20</sup> See ARNOLD H. LOEWY, *CRIMINAL LAW IN A NUTSHELL* 296-300 (4th ed. 2003) (tracing the history of ex post facto jurisprudence beginning with *Calder*).

<sup>21</sup> 23 F.2d 420, 425 (2d Cir. 1928).

<sup>22</sup> *Id.* at 425-26.

<sup>23</sup> 43 N.J.L. 203 (N.J. 1881).

overturned the defendant Moore's conviction on the basis that the statute under which he was convicted was ex post facto because it extended the statute of limitations from two years to five years after the original two year statute of limitation for prosecuting the defendant had already expired.<sup>24</sup> The majority in *Moore* took the positions first, that Justice Chase's formulation of four ex post facto categories were dicta, and second, that Justice Chase never intended to make his four categories an exclusive definition of ex post facto laws.<sup>25</sup> The court determined that a public policy consideration of the statute's purposes, intentions, and "spirit" was necessary to determine whether it was an ex post facto law.<sup>26</sup> Using this framework, the court in *Moore* decided that the statute at issue was unjust because it was making Moore a criminal when he could not face criminal liability.<sup>27</sup>

Additional case law has attempted to define the scope of Ex Post Facto jurisprudence. In *Bezell v. Ohio*,<sup>28</sup> Justice Stone wrote:

It is settled, by decisions of this court . . . that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto.<sup>29</sup>

Furthermore, laws that retroactively make legal actions illegal or laws in which legislatures retroactively change the definition of an offense to impose greater punishment or change the nature of an offense are "harsh and oppressive."<sup>30</sup> Accepting what he termed the "*Bezell* formulation," Justice Rehnquist in *Collins v. Youngblood*<sup>31</sup> rejected the respondent's argument that while the challenged statute did not fit into one of the *Bezell* categories, the statute was ex post facto because it deprived him of "substantial protections."<sup>32</sup> Justice Rehnquist held that a retroactive application of a new criminal statute against the respondent was not ex post facto because the new criminal statute contained only procedural changes and not substantive changes to the nature of the offense.<sup>33</sup>

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<sup>24</sup> *Falter*, 23 F.2d at 425.

<sup>25</sup> See *Moore*, 43 N.J.L. at 216.

<sup>26</sup> *Id.* at 218.

<sup>27</sup> See *id.* at 215-20.

<sup>28</sup> 269 U.S. 167 (1925).

<sup>29</sup> *Id.* at 169-70 (emphasis omitted).

<sup>30</sup> *Id.* at 170.

<sup>31</sup> 497 U.S. 37 (1990).

<sup>32</sup> *Id.* at 43-44.

<sup>33</sup> *Id.* at 41-46.

It is clear from ex post facto jurisprudence that the *Calder* categories and their re-articulation in *Bezell* provide the framework for determining whether a law is ex post facto.<sup>34</sup> What is unclear from *Calder*, *Falter*, *Collins*, and every other ex post facto case, however, is whether a law is ex post facto only when it fits the strict language articulated in the *Calder* categories or whether the four categories merely provide a general framework that allows for a more expansive analysis beyond the strict language of *Calder*.

#### D. CALIFORNIA PENAL CODE SECTION 803(G)

Prior to 1993, failure to prosecute individuals accused of committing sex crimes against children before the statute of limitations had tolled precluded the possibility of prosecuting individuals for those crimes.<sup>35</sup> In 1993 California passed a statute allowing for the criminal prosecution of individuals where a prior statute of limitations already expired when: (1) the victim was less than eighteen years of age at the occurrence of the crime; (2) the crime involved substantial sexual abuse; (3) independent sources provide evidence "clearly and convincingly" corroborating the victim's allegations; (4) the victim reported the allegations to law enforcement; and (5) the state begins prosecution within one year of allegations made by the victim to law enforcement.<sup>36</sup> One of the main reasons cited by California Assembly members in support of this legislation was the growing recognition that many child abuse victims report the abuse they suffered as children to law enforcement later in their adulthood, precluding any criminal liability for the perpetrator.<sup>37</sup> The new statute section 803(g) would not allow child abusers to escape justice.<sup>38</sup>

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<sup>34</sup> See *supra* text accompanying notes 11-33.

<sup>35</sup> See generally *People v. Gordon*, 212 Cal. Rptr. 174 (Cal. Ct. App. 1985); Barbara Murphy, *Man Given 152 Years for Attacks on Daughter, Teen-Age Girl; Crime: The Woman Testified Her Father Sexually Assaulted Her From the Ages of 4 to 17*, L.A. TIMES, Oct. 23, 1993, at B4 (explaining that a father who sexually abused his daughter could not be tried for additional counts of child abuse due to the tolling of the limitations period); Mark I. Pinsky, *Suit Accusing Priest of Molesting Youth Settled*, L.A. TIMES, May 8, 1993, at A11 (explaining that a priest no longer faced criminal liability for sexually abusing an altar boy because the statute of limitations had tolled).

<sup>36</sup> CAL. PENAL CODE § 803(g) (West 2003). Substantial sexual conduct is defined by California statute as "penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object, oral copulation, or masturbation of either the victim or the offender." § 1203.066(b).

<sup>37</sup> An Act to Amend Section 803 of the Penal Code, Relating to Crimes, 1993: Hearings on AB 290 Before the Committee on Public Safety, *Should an Exception be Made to the Statute of Limitations to Provide that a Criminal Complaint May be Filed within One Year of the Date of a Report by Persons Under Certain Conditions that they Were a Victim of*

After the passage of section 803(g), however, many California courts, because of potential ex post facto implications, refused to apply section 803(g) for cases involving crimes in which the original statute of limitations for prosecuting the crimes had already tolled prior to the passage of section 803(g).<sup>39</sup> In response to the California judiciary's reluctance to enforce section 803(g), the California legislature passed an amendment to section 803(g) effective in 1997, inserting a clause stating that section 803(g) should apply to "a cause of action arising before, on, or after January 1, 1994."<sup>40</sup> In fact, committee hearings make it explicitly clear that the amendments were to give authority to prosecutors to file charges for crimes committed before 1994 even if the statute of limitations for those sex crimes had tolled before 1994.<sup>41</sup> Legislators reasoned that not allowing prosecutors to charge the sex offenders would make the abuse victims double victims—first for the sexual abuse they suffered as children, and second for being victimized by the judicial process if they were unable to see their abusers face criminal liability.<sup>42</sup>

In *People v. Frazer*,<sup>43</sup> the California Supreme Court addressed the very issue of whether section 803(g), allowing for the prosecution of lewd acts against minors, was an ex post facto law. However, unlike in *Stogner*, where the defendant challenged that section 803(g) was inapplicable as a statute, the defendant in *Frazer* agreed that section 803(g) was generally applicable but not to individuals like himself.<sup>44</sup> The California Supreme Court held that the defendant in *Frazer* could not prove section 803(g) to be ex post facto, reasoning that the holding from *Collins* directed the California court to determine that section 803(g) had neither changed the definition of the alleged offenses nor had it increased the amount of

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*Specified Sex Crimes?* 1993-1994 Reg. Sess. (Cal. 1993) (statement of Bob Epple, Chair of Assembly Committee on Public Safety).

<sup>38</sup> *Id.*

<sup>39</sup> See *Stogner v. Superior Court*, 114 Cal. Rptr. 2d 37, 41 (Cal. Ct. App. 2001); *Lynch v. Superior Court*, 39 Cal. Rptr. 2d 414 (Cal. Ct. App. 1995); *People v. Richard G.*, 42 Cal. Rptr. 2d 667 (Cal Ct. App. 1995).

<sup>40</sup> *Stogner*, 114 Cal. Rptr. 2d at 41. See section 803(g)(3) for exact wording of the statutory provision.

<sup>41</sup> An Act to Amend Section 803 of the Penal Code, Relating to Crimes, 1996: Hearings on AB 2014 Before the Assembly Committee on Public Safety, 1995-1996 Reg. Sess. (Cal. 1996) (summarizing arguments in favor of the legislation in a unanimous committee vote).

<sup>42</sup> *Id.*

<sup>43</sup> 982 P.2d 180 (Cal. 1999).

<sup>44</sup> See *id.* at 188.



punishment.<sup>45</sup> The California Supreme Court recognized that its decision ran counter to Judge Hand's dicta from *Falter* and the many federal and state cases<sup>46</sup> that have cited to Judge Hand's dicta, but the Court reasoned that no United States Supreme Court case had followed Judge Hand's dicta, and, furthermore, that Judge Hand's dicta ran counter to Justice Rehnquist's opinion in *Collins*.<sup>47</sup>

### III. FACTS AND PROCEDURAL HISTORY

#### A. FACTS<sup>48</sup>

Marion Stogner was over seventy years old in 1998 when police arrested him for the alleged sexual molestation and abuse of two of his daughters.<sup>49</sup> Police had been investigating Marion Stogner's son, Randy Stogner,<sup>50</sup> for unrelated sex crimes when one of Stogner's adult daughters came forward with allegations of sexual abuse against her father, Marion Stogner, when she was a child.<sup>51</sup> This daughter alleged that Stogner had molested her for a ten year period starting in 1955.<sup>52</sup> A second daughter then came forward with molestation allegations against Stogner claiming that her father sexually abused her as a child from 1967 to 1973.<sup>53</sup> The daughters explained to authorities that they had never come forward earlier because Stogner sexually abused them on such a regular basis from such an early age that they saw the abuse as a normal part of family life, akin to

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<sup>45</sup> See *id.* at 190-97; see *supra* text accompanying notes 31-33 (discussing the holding from *Collins*, in which Justice Rehnquist determined that the retroactive application of the criminal statute at issue resulted in merely procedural changes and not substantive changes).

<sup>46</sup> See *Frazer*, 982 P.2d at 197 n.25.

<sup>47</sup> See *id.* at 196-97.

<sup>48</sup> Marion Stogner challenged the constitutionality of his criminal prosecution early in the adjudication process, and, as a result, the State was unable to proceed with trial pending adjudication by various appellate courts. Consequently, there is no trial record and very little in the official appellate record documenting the facts and details of Stogner's alleged crimes. There is, however, an extensive record in various media publications which helps flesh out the details of the allegations against Stogner.

<sup>49</sup> See Charlie Goodyear, *Man Held in '50s Molest Case*, S.F. CHRON., July 30, 1998, at A17; *Molestation Case Nets Family Members*, L.A. TIMES, July 31, 1998, at A36 [hereinafter *Molestation Case*].

<sup>50</sup> Marion Stogner has another son, John Stogner, who served a seven year sentence for molesting children at a day-care center. See *Molestation Case*, *supra* note 49, at A36. For simplicity's sake, any reference to "Stogner" in this note means Marion Stogner. All other family relations will be identified by first and last name.

<sup>51</sup> See *id.*

<sup>52</sup> See Goodyear, *supra* note 49, at A17.

<sup>53</sup> *Stogner v. Superior Court*, 114 Cal. Rptr. 2d 37, 39 (Cal. Ct. App. 2001).

brushing one's teeth or going to church.<sup>54</sup> As children, they never understood the abuse to be wrong or unusual.<sup>55</sup> Stogner, in response, denied all allegations made against him, claiming that his daughters were seeking revenge for his having divorced their mother.<sup>56</sup>

## B. PROCEDURAL HISTORY

In April of 1998, prosecutors filed a criminal complaint against Stogner in Contra Costa<sup>57</sup> County Superior Court under California Penal Code section 288 for two counts<sup>58</sup> of committing lewd acts on children.<sup>59</sup> Prosecutors acknowledged that the statute of limitations under section 288 for prosecuting Stogner had already tolled, but they argued that section 803(g) gave them the authority to continue the prosecution because section 803(g) effectively invalidated section 288's clause on the statute of limitations.<sup>60</sup> Stogner demurred to the prosecution's complaint arguing that even if he had committed the sexual abuse, the statute of limitations for prosecuting him had passed by 1976, and section 803(g) was inapplicable as a statute because it was an ex post facto law.<sup>61</sup> The trial court agreed with Stogner in deciding that section 803(g) was an ex post facto law and

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<sup>54</sup> See Goodyear, *supra* note 49, at A17; *Molestation Case*, *supra* note 49, at A36; *Supreme Court Challenges Limits on Molesting Cases*, HOLLAND SENTINEL, Mar. 29, 2003, available at [http://www.hollandsentinel.com/stories/032903/new\\_032903022.shtml](http://www.hollandsentinel.com/stories/032903/new_032903022.shtml) (last visited Apr. 22, 2004); Brief for Respondent at 3-4, *Stogner v. California*, 123 S. Ct. 2446 (2003) (No. 01-1757) (citing the Contra Costa County court reporter's transcript of Stogner's indictment proceedings). Stogner's daughters accused their father of committing sodomy, digital penetration, oral copulation, and intercourse. See *id.*

<sup>55</sup> *Id.*

<sup>56</sup> See *Ex-Antioch Man Charged Under Quashed Molest Law 'Glad it's Over'*, S.F. CHRON., June 27, 2003, at A8.

<sup>57</sup> While Marion Stogner was arrested in Arizona where he was living with his second wife, he was brought back to California and prosecuted in Contra Costa County (one of the counties encompassing the San Francisco and Oakland areas), where the alleged child sexual abuse took place. See Goodyear, *supra* note 49, at A17.

<sup>58</sup> Prosecutors charged Stogner under California Penal Code section 288, which authorizes the prosecution of lewd and lascivious conduct that involves children. CAL. PENAL CODE § 288 (West 2003). While section 288 provides for a specific charge, section 803(g) determines the statute of limitations for prosecuting crimes covered under section 288. To provide some additional context, section 288 is the statute that prosecutors in the Santa Barbara County, California district attorney's office used in filing child molestation charges against singer and entertainer Michael Jackson in December 2003. Felony Complaint, *California v. Jackson*, No. 03-12-098996, Dec. 18, 2003.

<sup>59</sup> *Stogner v. Superior Court*, 114 Cal. Rptr. 2d 37, 39 (Cal. Ct. App. 2001).

<sup>60</sup> *Id.* at 39-40.

<sup>61</sup> *Id.* at 40.

therefore invalid.<sup>62</sup> The First Appellate District Court of Appeal reversed the trial court's decision holding in an unreported decision that section 803(g) did not violate the Ex Post Facto Clause.<sup>63</sup>

After a grand jury indicted Stogner, the prosecution moved to dismiss its original complaint, and on March 14, 2001, the prosecution charged Stogner on two counts of molesting children under section 288.<sup>64</sup> Stogner again demurred to the counts, and the trial court ruled for Stogner by holding that section 803(g) violated the Ex Post Facto Clause and Due Process.<sup>65</sup> The prosecution appealed the trial court's decision to the First Appellate District Court of Appeal, which issued a writ of mandate staying the selection of a trial date pending the appeal.<sup>66</sup>

The First Appellate District Court of Appeal ruled in favor of the prosecution by employing an extensive public policy analysis.<sup>67</sup> In determining the purpose of section 803(g), the First Appellate Court gave particular deference to the California legislature's intent.<sup>68</sup> First, the Court put forth the public policy argument that the California legislature did not want child molesters to get a free pass just because the victim, whether from memory loss, fear, or any other psychological reason, waited until adulthood to reveal past childhood trauma.<sup>69</sup> Second, because section 803(g) was implemented by the legislature after section 805.5,<sup>70</sup> the statute providing for a three years statute of limitations, the California legislature intended for section 803(g) to create an exception to section 805.5 and essentially supercede it.<sup>71</sup> Finally, the appellate court found that, in drafting

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 39 (citing the prior history of a non-published decision, *People v. Stogner*, No. A084772 (Cal. Ct. App. Oct. 14, 1999)).

<sup>64</sup> *Id.* at 40. The prosecution was procedurally able to ask for its own charge to be dismissed and to bring up charges through a grand jury indictment because grand juries are independent entities of state government authority. *See id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 42-43. The First Appellate District Court of Appeal of California filed its opinion on November 21, 2001. *Id.* at 37.

<sup>68</sup> *See id.* at 43.

<sup>69</sup> *Id.* at 44.

<sup>70</sup> CAL. PENAL CODE section 805.5 (West 2003) states that for criminal offenses committed before January 1, 1985 in the state of California, if the statute of limitations in place at the time the offense is committed tolls, then the tolled statute of limitations is what applies. *See id.* at 44. Thus, under section 805.5, when Stogner allegedly committed sex crimes against his children in 1973, the applicable statute of limitations in 1973 was a three year limitations period that ended in 1976. If prosecutors had attempted to prosecute Stogner in 1977, section 805.5 would have been a successful defense.

<sup>71</sup> *See Stogner*, 114 Cal. Rptr. 2d at 45 (pointing out that section 803(g) represented new goals of the California legislature that were not adequately addressed by section 805.5).

section 803(g), the legislature carefully weighed competing interests of the accused and victim, and it made sense for the legislature to set the start of statutes of limitations from the time the victim reported the crime instead of the date the crime occurred.<sup>72</sup>

Upon the reversal of his demurrer, Stogner petitioned the California Supreme Court for relief, but the California Supreme Court denied Stogner's petition for review in an unreported decision.<sup>73</sup> On December 2, 2002, the United States Supreme Court granted certiorari to determine whether prosecuting Stogner under section 803(g) violated the Ex Post Facto Clause and whether his prosecution was in violation of Due Process.<sup>74</sup>

#### IV. SUMMARY OF OPINIONS

##### A. MAJORITY OPINION<sup>75</sup>

In holding section 803(g) unconstitutional in violation of the Ex Post Facto Clause, Justice Breyer organized his opinion into two main sections: an analysis of the constitutional matters and a lengthy rebuttal of the dissenting opinion.<sup>76</sup>

The majority began its analysis by finding that section 803(g) fit Justice Chase's second category of ex post facto laws from *Calder v. Bull*.<sup>77</sup> The second *Calder* category prohibits, as illegal, laws which aggravate a crime, and the Court reasoned that section 803(g) aggravated Stogner's alleged crimes.<sup>78</sup> When police arrested Stogner in 1998, the statute of limitations for prosecuting Stogner under the original statute of limitations had already tolled by 1976, so Stogner had therefore been free from prosecution for more than twenty years. By arresting and prosecuting Stogner after he was no longer criminally liable, section 803(g) was, in essence, aggravating Stogner's condition from one of non-criminal liability to criminal liability.<sup>79</sup>

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<sup>72</sup> See *id.* at 45-46.

<sup>73</sup> See *Stogner v. Superior Court*, No. S103297, 2002 Cal. LEXIS 1545 (Cal. Feb. 27, 2002).

<sup>74</sup> *Stogner v. Superior Court*, 114 Cal. Rptr. 2d 37 (Cal. Ct. App. 2001), *cert. granted*, 537 U.S. 1043 (U.S. Dec. 2, 2002) (No. 01-1757).

<sup>75</sup> Justice Breyer wrote for the majority, which included Justices Ginsburg, O'Connor, Souter, and Stevens.

<sup>76</sup> *Stogner v. California*, 123 S. Ct. 2446, 2448-61 (2003).

<sup>77</sup> *Id.* at 2450.

<sup>78</sup> *Id.* at 2451.

<sup>79</sup> *Id.*

Furthermore, the Court held that Justice Chase in *Calder* had formulated an “alternative” description of his second ex post facto category.<sup>80</sup> Justice Breyer found this alternative description in Chase’s description of unjust acts committed by the British Parliament in “times they inflicted punishments, where the [accused] was not, by law, liable to any punishment.”<sup>81</sup> Justice Chase cited two banishment cases as examples of these unjust Parliamentary acts.<sup>82</sup> In those two cases, Parliament “had enacted those laws not only after the crime’s commission, but under circumstances where banishment ‘was simply not a form of penalty that could be imposed by courts.’”<sup>83</sup>

Applying Justice Chase’s alternative description of the second ex post facto category to the Stogner case, the majority found that section 803(g) was an ex post facto law because it made Marion Stogner, who was no longer liable to any punishment starting from 1976 due to the tolling of the limitations period, suddenly liable to punishment once his daughters came forward with their allegations in 1998.<sup>84</sup> The Court reasoned:

The example of Parliament’s banishment laws points to concern that a legislature, knowing the accused and seeking to have the accused punished for a pre-existing crime, might enable punishment of the accused in ways that existing law forbids. That fundamental concern, related to basic concerns about retroactive penal laws and erosion of the separation of powers, applies with equal force to punishment like that enabled by California’s law as applied to Stogner—punishment that courts lacked the power to impose at the time the legislature acted.<sup>85</sup>

To put it another way, there was finality when the first statute of limitations tolled in 1976, and just because the legislature found out too late about a past alleged crime, it could not vest the power to prosecute a crime when that power had already been lost.

While it focused heavily on Justice Chase’s second category of ex post facto laws and the alternative description, the majority also made it clear that section 803(g) could possibly fall into one of the other three *Calder* categories.<sup>86</sup> The majority used Justice Chase’s fourth category on evidence as an example.<sup>87</sup> Because “a statute of limitations reflects a legislative

<sup>80</sup> See *id.* at 2450-52.

<sup>81</sup> *Id.* at 2450 (quoting *Calder v. Bull*, 3 U.S. 386, 389 (1798)).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 2451 (quoting *Carmell v. Texas*, 529 U.S. 513, 523 (2000)).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 2451-52.

<sup>86</sup> *Id.* at 2452. However, the Court also made clear that focusing on Justice Chase’s second category of ex post facto laws was sufficient to determine the outcome of the case. See *id.* at 2452, 2455.

<sup>87</sup> See *id.* at 2452.

judgment that, after a certain time, no quantum of evidence is sufficient to convict,” passing a new statute of limitations “is to eliminate a currently existing conclusive presumption forbidding prosecution.”<sup>88</sup> However, the majority did not actively develop this argument or any arguments for the other two *Calder* categories.<sup>89</sup>

The majority then moved on to state that “numerous legislators, courts, and commentators have long believed it well settled that the *Ex Post Facto Clause* forbids resurrection of a time-barred prosecution.”<sup>90</sup> Support for this contention comes from as early as the post-Civil War Reconstruction Era,<sup>91</sup> when Radical Republicans controlling Congress refused to pass a bill that would prosecute Confederacy President Jefferson Davis and other leading Southern figures for treason because it was against the principles of *ex post facto* laws.<sup>92</sup> Justice Breyer then cited a string of over twenty federal and state cases prohibiting retroactive prosecutions and concluded that section 803(g) was just another statute seeking to revive time-barred prosecutions.<sup>93</sup>

Furthermore, even in cases where courts have upheld laws extending the statute of limitations where the original limitations period had not yet tolled, those courts clearly opined that extending the statute of limitations where the original limitations period had already tolled would be very different.<sup>94</sup> Many of these courts have held that statutes extending the limitations period where the original statute of limitations had not tolled yet “have done so by saying that extension of existing limitations periods is not *ex post facto* ‘provided,’ ‘so long as,’ ‘because,’ or ‘if’ the prior limitations periods have not expired,” so there is “a presumption that revival of time-barred criminal cases is *not* allowed.”<sup>95</sup>

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<sup>88</sup> *Id.*

<sup>89</sup> *See id.*

<sup>90</sup> *Id.*

<sup>91</sup> *See generally* ERIC FONER, RECONSTRUCTION, AMERICA’S UNFINISHED REVOLUTION, 1863-1877 (1988) (highlighting the political, economic, and social reconstruction in post-Civil War America).

<sup>92</sup> *Stogner*, 123 S. Ct. at 2452.

<sup>93</sup> *Id.* at 2453. The Court, however, did not find it necessary to discuss either *Beazell* or *Collins*, except to reaffirm that Chase’s *Calder* categories are the correct formulation of *ex post facto* laws. *See id.* at 2450.

<sup>94</sup> *Id.* at 2450.

<sup>95</sup> *Id.* at 2543.

B. DISSENTING OPINION<sup>96</sup>

In concluding that section 803(g) did not violate the Ex Post Facto Clause, Justice Kennedy presented four main arguments: (1) The four *Calder* categories alone determine whether a law is ex post facto; (2) Section 803(g) does not fit into Justice Chase's second category of ex post facto laws; (3) Justice Chase did not provide an alternative description of his second ex post facto category; and (4) Public policy supports upholding section 803(g).<sup>97</sup>

1. *The Calder Categories Alone Determine Whether a Law is Ex Post Facto*

According to Justice Kennedy, one of the errors in the majority opinion came from its failure to recognize that the "*Ex Post Facto* Clause is strictly limited to the precise formulation of the *Calder* categories."<sup>98</sup> While he did not provide a citation for this assertion, Justice Kennedy found support from *Collins* that Justice Chase's four categories "provide 'an exclusive definition of *ex post facto* laws.'"<sup>99</sup> The Supreme Court later in *Carmell v. Texas* interpreted the holding of *Collins* to state that "it was a mistake to stray *beyond Calder's* four categories."<sup>100</sup> Thus, a determination of whether section 803(g) is ex post facto should be made by analyzing the "precise formulation" of Justice Chase's four categories.<sup>101</sup>

2. *Section 803(g) Does Not Fit in Justice Chase's Second Category*

The dissent then determined that section 803(g) does not fit Justice Chase's second category because "a law which does not alter the definition of the crime but only revives prosecution does not make the crime 'greater than it was, when committed.'"<sup>102</sup> That is, sexual molestation is still sexual molestation regardless of when it occurred. The definition of the crime remains the same, the punishment for the crime is the same, and the only difference is the timing of the prosecution.

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<sup>96</sup> Justice Kennedy wrote for the dissent, which included Chief Justice Rehnquist and Justices Scalia and Thomas. *Id.* at 2461.

<sup>97</sup> *See id.* at 2461-72 (Kennedy, J., dissenting).

<sup>98</sup> *Id.* at 2462 (Kennedy, J., dissenting).

<sup>99</sup> *Id.* (Kennedy, J., dissenting) (quoting from language in *Collins v. Youngblood*, 497 U.S. 37, 42 (1990), stating that many earlier courts portrayed Justice Chase's four categories as being exclusive definitions of ex post facto laws).

<sup>100</sup> *Id.* at 2462 (Kennedy, J., dissenting) (quoting *Carmell v. Texas*, 529 U.S. 513 (2000)).

<sup>101</sup> *See id.* (Kennedy, J., dissenting).

<sup>102</sup> *Id.* at 2461 (Kennedy, J., dissenting) (incorporating Justice Chase's enumerated second category).

The dissent was not impressed by the majority's use of case law to fit section 803(g) into the second *Calder* category, arguing that of the twenty-two cases cited by the majority, only four of the cases were relevant, and the majority interpreted those four cases incorrectly.<sup>103</sup> One relevant case cited by the majority, *Moore v. State*,<sup>104</sup> was not good law because it contradicted the rule that only the "precise formulation" of *Calder* categories alone determine whether a law is ex post facto.<sup>105</sup> Justice Kennedy explained that the New Jersey Supreme Court in *Moore* improperly invalidated a statute as ex post facto because it used public policy arguments instead of the *Calder* category framework. Thus, the New Jersey court in *Moore* went beyond strict adherence to Justice Chase's categories.<sup>106</sup>

The dissent then criticized the majority's citation to Judge Learned Hand's dicta in *Falter v. United States*.<sup>107</sup> Justice Kennedy described as "unsupported" Hand's reasoning that while the law at issue in *Falter* was not ex post facto because it was extending the limitations period for an unexpired limitations period, if the law had extended the time limit for an already expired statute, the new law would be ex post facto.<sup>108</sup> Justice Kennedy found that Judge Hand had relied on the faulty analytical framework from *Moore* when he improperly relied on notions of equality and public policy rather than strictly adhering to *Calder*.<sup>109</sup> As a result of Judge Hand's faulty reasoning in dicta, other courts applied the same faulty reasoning from *Falter* in deciding cases in which the issue involved expired statutes of limitations.<sup>110</sup> The two remaining relevant cases cited in Judge Breyer's opinion also relied on Judge Hand's faulty reasoning in *Falter* and therefore could not support the majority's contention that section 803(g) should fit in Chase's second category.<sup>111</sup>

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<sup>103</sup> *Id.* at 2461-62 (Kennedy, J., dissenting). The Court found the other seventeen cases irrelevant because there was never even the issue of ex post facto laws in those cases. *See id.* at 2462 (Kennedy, J., dissenting).

<sup>104</sup> 43 N.J.L. 203 (N.J. 1881).

<sup>105</sup> *Stogner*, 123 S. Ct. at 2462-63 (Kennedy, J., dissenting).

<sup>106</sup> *Id.* (Kennedy, J., dissenting).

<sup>107</sup> *Id.* at 2463 (Kennedy, J., dissenting) (discussing *Falter v. United States*, 23 F.2d 420, 425 (1928)).

<sup>108</sup> *Id.* (Kennedy, J., dissenting).

<sup>109</sup> *Id.* (Kennedy, J., dissenting).

<sup>110</sup> *Id.* (Kennedy, J., dissenting).

<sup>111</sup> *Id.* (Kennedy, J., dissenting). The remaining three pertinent cases were *United States v. Fraidin*, 63 F. Supp. 271 (Md. 1945), *People v. Shedd*, 702 P.2d 267 (Colo. 1985) (en banc), and *Commonwealth v. Rocheleau*, 404 Mass. 129 (1989).



### 3. Justice Chase Did Not Provide 'Alternative Descriptions' of Ex Post Facto Categories

The dissent's third major argument was that Justice Chase's reference to "times [Parliament] inflicted punishments, where the party was not, by law, liable to any punishment" was not an alternative description of the second ex post facto category.<sup>112</sup> Justice Kennedy reasoned that the "alternative descriptions" were not actually "alternative" descriptions of ex post facto laws, but rather they provided historical context for the development of the four ex post facto categories.<sup>113</sup> Justice Chase discussed the Parliamentary acts in order to "refer to certain laws passed by the British Parliament which led the Founders to adopt the *Ex Post Facto Clause*; he did not intend them as a definitive description of the laws prohibited by that constitutional provision."<sup>114</sup>

To support its argument, the dissent analyzed the two banishment cases cited by Justice Chase as examples of Parliament inflicting punishment where none was available for the alleged offenses, and it concluded that both cases "confirm that *Calder's* second category concerns only laws which change the nature of an offense to make it greater than it was at the time of commission, thereby subjecting the offender to increased punishment."<sup>115</sup> That is, while Justice Chase accurately described the two banishment cases as cases involving punishment where punishment was not available, the reason why Parliament's actions were illegal was not because it imposed punishment where none was available but rather because Parliament had redefined the nature of the crimes.<sup>116</sup> In other words, the illegal redefining of crimes caused the resulting change in punishment. By focusing on punishment and claiming Justice Chase's description of punishment to be an alternative description of the second ex post facto category, the majority essentially focused on the result (changed punishment) of the illegal action (redefining a crime) rather than the illegal action itself.

In the case involving the Earl of Clarendon,<sup>117</sup> the British House of Commons initially impeached Clarendon on the charge of treason.<sup>118</sup>

<sup>112</sup> *Stogner*, 123 S. Ct. at 2465 (Kennedy, J., dissenting). See *supra* text accompanying note 17 for the alternative description.

<sup>113</sup> *Stogner*, 123 S. Ct. at 2464 (Kennedy, J., dissenting).

<sup>114</sup> *Id.* at 2465 (Kennedy, J., dissenting).

<sup>115</sup> *Id.* at 2466 (Kennedy, J., dissenting).

<sup>116</sup> See *id.* (Kennedy, J., dissenting).

<sup>117</sup> See SIMON SCHAMA, A HISTORY OF BRITAIN: THE WARS OF THE BRITISH 1603-1776, 256-61 (2001) for further background on the trials of Clarendon.

<sup>118</sup> See *Stogner*, 123 S. Ct. at 2466 (Kennedy, J., dissenting).

Finding that the allegations against Clarendon did not meet the legal definitions of treason, the House of Lords refused to permit a trial against Clarendon.<sup>119</sup> With the House of Commons and House of Lords in disagreement, Parliament eventually decided to pass a bill that banished Clarendon for treason.<sup>120</sup> Had Clarendon faced lower level charges in a court of law, the penalty of banishment would not have been available.<sup>121</sup>

Justice Kennedy found this Parliamentary act illegal because Parliament had taken the low level crimes that Clarendon may have committed, and that the House of Lords had originally recognized as not meeting the legal definition of treason, and aggravated the charge to the high crime of treason.<sup>122</sup> Thus, while it is accurate to describe Clarendon's trial as a case resulting in a type of punishment received (banishment) that otherwise would not have been available under lower charges in a court of law, it is the redefining of the charges that made Parliament's actions illegal.<sup>123</sup> The fact that Parliament enacted a punishment that otherwise was not available was a direct result of Parliament's illegal action of aggravating Clarendon's crimes by defining his crimes as treason even though his actions did not meet the definition of treason.<sup>124</sup> In other words, the differing punishments themselves did not make Parliament's actions illegal, but rather it was the underlying aggravation of crimes that was wrong.

The second banishment case cited by Justice Chase involved the Bishop of Atterbury.<sup>125</sup> Bishop Atterbury was accused of participating in Jacobite plots to overthrow the King, but little evidence was available to support these conspiracy accusations.<sup>126</sup> As a result, the House of Lords passed a bill declaring Atterbury a traitor and gave him the punishment of banishment and civil death.<sup>127</sup> Similar to the Clarendon case, the reason why Parliament's action was illegal was not because of its imposition of banishment, but rather it was because Parliamentary action had caused Bishop Atterbury's actions to be considered treason even though little evidence existed that Atterbury had done anything wrong.<sup>128</sup> The

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<sup>119</sup> *Id.* (Kennedy, J., dissenting).

<sup>120</sup> *Id.* (Kennedy, J., dissenting).

<sup>121</sup> *Id.* (Kennedy, J., dissenting).

<sup>122</sup> *Id.* (Kennedy, J., dissenting).

<sup>123</sup> *Id.* at 2467 (Kennedy, J., dissenting).

<sup>124</sup> *Id.* (Kennedy, J., dissenting).

<sup>125</sup> See generally G. V. BENNETT, *THE TORY CRISIS IN CHURCH AND STATE 1688-1730: THE CAREER OF FRANCIS ATTERBURY BISHOP OF ROCHESTER* (1975).

<sup>126</sup> *Stogner*, 123 S. Ct. at 2468 (Kennedy, J., dissenting).

<sup>127</sup> *Id.* at 2468-69 (Kennedy, J., dissenting).

<sup>128</sup> *Id.* (Kennedy, J., dissenting).

banishment was just the result of the illegal characterization of Atterbury's crimes.<sup>129</sup>

Thus, while Justice Chase accurately cited the two banishment cases as examples of a legislature imposing punishment where none had been available, the majority misinterpreted his language by equating punishment with the aggravation of crimes. The majority failed to recognize that it was the underlying redefinition of the crimes and not the punishment itself that constituted the illegal act. Finally, Justice Kennedy noted that no other Supreme Court case has based its holding on any "alternative description[s]" of Justice Chase's *ex post facto* categories.<sup>130</sup>

#### 4. Public Policy Reasons for Upholding Section 803(g)

The dissent found two public policy arguments particularly compelling in support of the legitimacy of section 803(g): protection of child abuse victims and illegitimate reliance interests on the part of child abusers.<sup>131</sup>

Justice Kennedy characterized section 803(g) as a statute protecting victim's rights.<sup>132</sup> Recognizing scientific studies documenting the difficulty children face in understanding and coping with sex abuse, the California legislature meant to protect child abuse victims unable to deal with their experiences until later in adulthood.<sup>133</sup> Section 803(g) makes sure that victims are adequately protected:

A familial figure of authority can use a confidential relation to conceal a crime. The violation of this trust inflicts deep and lasting hurt. [The victim's] only poor remedy is that the law will show its compassion and concern when the victim at last can find the strength, and know the necessity, to come forward.<sup>134</sup>

The dissent then rejected the notion that individuals have a reliance interest in receiving notice against potential accusations by questioning "whether it is warranted to presume that criminals keep calendars so they can mark the day to discard their records or to place a gloating phone call to the victim."<sup>135</sup> Citing two law review articles, Justice Kennedy noted that while defendants might rely upon the definition of crimes in calculating their own behavior, statutes of limitations have no deterrent effect on criminal behavior, and therefore statutes of limitations create no reliance in

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<sup>129</sup> *Id.* (Kennedy, J., dissenting).

<sup>130</sup> *Id.* at 2466 (Kennedy, J., dissenting).

<sup>131</sup> *See id.* at 2469-72 (Kennedy, J., dissenting).

<sup>132</sup> *Id.* (Kennedy, J., dissenting).

<sup>133</sup> *See id.* at 2469-70 (Kennedy, J., dissenting).

<sup>134</sup> *Id.* at 2471 (Kennedy, J., dissenting).

<sup>135</sup> *Id.* at 2470 (Kennedy, J., dissenting).

defendants.<sup>136</sup> In weighing a defendant's reliance interests against the victim's interests, "it is the victim's lasting hurt, not the perpetrator's fictional reliance, that the law should count the higher."<sup>137</sup> Because an individual who has committed sexual abuse knows that his actions are wrong, it makes sense to allow for the extension of expired statutes of limitations because "the difference between suspension and reactivation is so slight that it is fictional for the Court to say . . . the new policy somehow alters the magnitude of the crime."<sup>138</sup>

Finally, the dissent rejected the majority's concerns about stale evidence under an extended statute of limitations.<sup>139</sup> The accused would still have adequate protections because judges would handle evidentiary matters to prevent weak cases from proceeding, and the prosecution would still have to meet the high standard of proof beyond a reasonable doubt.<sup>140</sup> Furthermore, section 803(g) incorporated a clause requiring independent evidence to support an accuser's allegations, and the Due Process Clause offers protections as well.<sup>141</sup>

### C. THE MAJORITY'S CRITIQUE OF THE DISSENTING OPINION

Justice Breyer spent much of the Court's opinion responding to points made in the dissenting opinion.<sup>142</sup> The majority's critique has three parts: (1) a response to the dissent's conclusion, based on the two banishment cases, that there is no alternative description to Chase's second category, (2) a brief reexamination of ex post facto case law, and (3) further public policy arguments for invalidating section 803(g).<sup>143</sup>

#### 1. Historical Banishment Cases

Justice Breyer found the dissent's analyses of the *Clarendon* and *Atterbury* cases inaccurate. First, historical scholarship has shown that one of the charges against Clarendon "*did amount to treason.*"<sup>144</sup> By passing a

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<sup>136</sup> *Id.* (Kennedy, J., dissenting) (citing Note, *Retroactive Application of Legislatively Enlarged Statutes of Limitations for Child Abuse: Time's No Bar to Revival*, 22 IND. L. REV. 989 (1989) [hereinafter *Retroactive Application*] and Note, *Ex Post Facto Limitations on Legislative Power*, 73 MICH. L. REV. 1491 (1975)).

<sup>137</sup> *Id.* at 2471 (Kennedy, J., dissenting).

<sup>138</sup> *Id.* (Kennedy, J., dissenting).

<sup>139</sup> *Id.* (Kennedy, J., dissenting).

<sup>140</sup> *Id.* (Kennedy, J., dissenting).

<sup>141</sup> *Id.* at 2471-72 (Kennedy, J., dissenting).

<sup>142</sup> *See id.* at 2455-61.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 2456.

law banishing him, Parliament subjected Clarendon to a punishment that would not have been available to a court in “the ordinary course of law.”<sup>145</sup> A more accurate depiction of Clarendon’s case would be that “Parliament’s punishment of an individual who was *charged* before Parliament *with treason and satisfactorily proven to have committed treason*, but whom Parliament punished by imposing ‘banishment’” resulted in a punishment that ordinarily would not have been available.<sup>146</sup> That is, Parliament imposed a punishment which should not have been available, but it did not aggravate Clarendon’s crimes.

Furthermore, according to the majority, in its discussion of Bishop Atterbury’s trial, the dissent failed to explain how there was any re-characterization of crimes when Parliament charged Atterbury with conspiracy.<sup>147</sup> According to Justice Breyer, “the relevant point is that Parliament did not recharacterize the Bishop’s crime.”<sup>148</sup> Rather, what was relevant was that Parliament imposed the punishment of banishment which normally would not have been available but for this extraordinary act of Parliament.<sup>149</sup> Additionally, “[w]hen Justice Chase set forth his alternative language for the second category (the language that the historical examples are meant to illuminate), he said nothing about recharacterizing crimes,” so the dissent’s focus on re-characterization of crimes was misplaced.<sup>150</sup>

Even if one were to accept the dissent’s argument that Parliament recharacterized Clarendon and Atterbury’s crimes, no logical reason exists for why the re-characterization of a crime should be dispositive when there has been both a re-characterization of a crime and imposition of a new punishment that was not otherwise available.<sup>151</sup> Justice Breyer reasoned:

The presence of a recharacterization without new punishment works no harm. But the presence of the new punishment without recharacterization works *all* the harm. Indeed, it works retroactive harm—a circumstance relevant to the applicability of a constitutional provision aimed at preventing unfair retroactive laws. Perhaps this is why Justice Chase’s alternative description . . . does not mention recharacterization or the like.<sup>152</sup>

Thus, it is not as simple as the dissent suggests to separate Justice Chase’s description of punishment where none was available from the redefinition

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<sup>145</sup> *Id.* (citing Edward Earl of Clarendon’s Trial, 6 How. St. Tr. 292, 350 (1667) and Justice Chase’s formulation of ordinary course of law).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 2457.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 2457-58.

<sup>151</sup> *Id.* at 2458.

<sup>152</sup> *Id.*

of a crime because changing punishment could very well alter the nature of the crime.<sup>153</sup>

## 2. Use of Precedent

Rejecting the dissent's criticism that the majority's use of case law was either inaccurate or irrelevant, Justice Breyer did not provide much additional analysis aside from some commentary on the cases specifically discussed by the dissent. First, he disputed the dissent's reading of *Moore v. State* that the court went beyond the bounds of Justice Chase's four categories to justify its holding.<sup>154</sup> While the court in *Moore* determined that the statute at issue did not fit Justice Chase's first category, Justice Breyer explained that the *Moore* court explicitly found "that Chase's *alternative* description of second category laws *does* fit [the] case."<sup>155</sup> Next, Justice Breyer pointed out that it made sense to apply dicta from other cases, such as the language from Judge Hand's opinion in *Falter*.<sup>156</sup> Because there had not been any cases addressing the same issue as in *Stogner*, it only made sense to refer to persuasive authority.<sup>157</sup>

## 3. Public Policy

Justice Breyer began his public policy discussion by describing how section 803(g) "threatens the kinds of harms that, in this Court's view, the Ex Post Facto Clause seeks to avoid."<sup>158</sup> These harms include infringing generally upon notions of fairness and justness, granting the government oppressive and potentially abusive powers, eliminating an individual's right to fair warning, placing the potentially accused at a disadvantage because those who do not have fair warning are less likely to preserve evidence, and threatening the constitutional separation of powers.<sup>159</sup>

The majority also pointed out an inconsistency in the dissent's position: the dissent had first argued that determining whether a law is ex post facto should be based on a literal analysis of the *Calder* categories but then went on to make non-*Calder*-related public policy arguments as well.<sup>160</sup> In considering the dissent's public policy arguments as well as its

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<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 2458-59.

<sup>155</sup> *Id.* at 2459.

<sup>156</sup> *Id.*

<sup>157</sup> *See id.*

<sup>158</sup> *Id.* at 2449.

<sup>159</sup> *Id.* at 2449-50.

<sup>160</sup> *Id.* at 2460 (agreeing ultimately that public policy along with case law and history are important for addressing this issue).

own arguments, the majority engaged in a similar balancing test to that conducted by the dissent in its public policy analysis.<sup>161</sup> While recognizing the interest in prosecuting sex offenders, the majority decided that there was a “predominating constitutional interest” in prohibiting a state from prosecuting individuals where the original statute of limitations had already tolled.<sup>162</sup>

## V. ANALYSIS

The majority used the correct framework to analyze the facts in *Stogner*, but its reasoning within that framework was flawed and resulted in the wrong decision. First, section 803(g) does not fit into any of the four enumerated *Calder* ex post facto categories. Second, a determination of whether section 803(g) or any other statute is an ex post facto law must go beyond just a simple determination of whether a statute fits one of the *Calder* categories. A consideration of public policy is necessary to determine the legality of section 803(g), and section 803(g) should survive the Ex Post Facto Clause because it protects a unique interest of child abuse victims without infringing upon the accused’s rights. Finally, this Note considers the impact of the Court’s holding in *Stogner* on the viability of federal and state statutes containing similar statute of limitation provisions. Such provisions will likely be invalidated, but only the provisions unrelated to child sex abuse crimes will be rightfully invalidated.

### A. SECTION 803(G) DOES NOT FIT ANY *CALDER* EX POST FACTO CATEGORY

Section 803(g) survives an initial challenge to its legality because it does not fit into any of the four *Calder* ex post facto categories. First, a facial reading of the second *Calder* category shows that section 803(g) does not belong in the second category. Second, the majority’s attempt to place section 803(g) into the second *Calder* category is unconvincing. Finally, section 803(g) does not fit into any of the other three *Calder* categories.

#### *1. A Literal Reading of the Second Category Shows That Section 803(g) Does Not Fit the Second Category*

A literal reading of Justice Chase’s second category shows that section 803(g) does not fit the category.<sup>163</sup> The timeframe for assessing a

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<sup>161</sup> *Id.* at 2461.

<sup>162</sup> *Id.*

<sup>163</sup> See *supra* text accompanying note 11 for the exact wording of Justice Chase’s second ex post facto category.

criminal's alleged actions under Justice Chase's second category is "when committed," and in Stogner's case, his alleged abusive activities took place from 1955 to 1965 and 1967 to 1973.<sup>164</sup> Taking these two time periods, the critical issue is whether section 803(g) either aggravated the sexual molestation charge from actions committed during those periods or made the sexual molestation charge greater than it was. Section 803(g) did not alter or aggravate the charge against Stogner. The prosecution charged him under section 288, which is the same statute for prosecuting lewd acts committed against children with which the prosecution would have had to charge Stogner back in 1973.<sup>165</sup> The prosecution did not charge Stogner with greater crimes such as sexual assault or rape. Rather, they charged him with the same crime which they would have charged him with in 1955 and 1965: committing lewd and lascivious acts that involved children.<sup>166</sup> Thus, section 803(g) did not aggravate the charges against Stogner as Stogner would have faced the same charges under section 288.

## 2. *The Majority's Reasoning for Section 803(g) Fitting Into the Second Category is Not Convincing*

The argument made by the majority for fitting section 803(g) into Chase's second category is not convincing because it stretches the meaning of Justice Chase's language too far.<sup>167</sup> To argue that section 803(g) fits into the second category because it aggravated Stogner's crime from no liability to criminal liability goes against the meaning of Justice Chase's language because at the time Stogner allegedly committed sexual abuse against his children, he certainly would have been charged under section 288 if law enforcement had known about the crimes.<sup>168</sup> Furthermore, the term aggravation is commonly used to describe a crime that has somehow been made worse.<sup>169</sup> For example, *Black's Law Dictionary* defines aggravated

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<sup>164</sup> See *supra* text accompanying notes 52-53.

<sup>165</sup> See *supra* note 58 regarding section 288.

<sup>166</sup> See *supra* text accompanying notes 57-59; Brief for the Respondent at 6, *Stogner v. California*, 123 S. Ct. 2446 (2003) (No. 01-1757) (arguing that "[a] change in the statute of limitations, standing alone, simply has no bearing on how a crime will be punished").

<sup>167</sup> See *supra* text accompanying notes 77-79 to review the majority's argument for fitting section 803(g) into the second *Calder* category.

<sup>168</sup> See *supra* text accompanying note 58. Because there has been no substantive change in the definition of the crimes covered under section 288, if Stogner had been arrested and charged in 1955, prosecutors would have had to charge him under section 288 just as they did in 1998. See CAL. PENAL CODE § 288 (West 2003).

<sup>169</sup> See BLACK'S LAW DICTIONARY 65 (7th ed. 1999) for the definition of "aggravated."



assault as “criminal assault accompanied by circumstances that make it more severe” and not as non-assault that has been changed into assault.<sup>170</sup>

### 3. Section 803(g) Does Not Fit Any of the Other *Calder* Categories

While the majority and dissent focused much of their *Calder* analyses on the second category, it is necessary to briefly evaluate the other three categories to see whether section 803(g) fits any of the other enumerated ex post facto laws. The statute clearly does not fit the first category because section 803(g) has nothing to do with making prior innocent actions retroactively illegal.<sup>171</sup> Section 803(g) also does not fit the third category because it only deals with limitations periods and has nothing to do with changing the punishment and penalties for the crime of lewd conduct committed against children.<sup>172</sup> Finally, section 803(g) does not fit the fourth category, either, because it does not alter any rules of evidence as the laws of evidence remain the same under section 803(g).<sup>173</sup>

## B. DETERMINING WHETHER SECTION 803(G) IS EX POST FACTO REQUIRES GOING BEYOND A SIMPLE DETERMINATION OF WHETHER THE STATUTE FITS INTO ONE OF THE FOUR *CALDER* CATEGORIES

It is insufficient to conclude that section 803(g) survives an ex post facto challenge just because it does not fit into one of the four *Calder* categories. Justice Chase never intended for his four *Calder* categories to be an exclusive list of ex post facto laws because he explicitly wrote that laws “similar” to those he enumerated in *Calder* can be ex post facto. In determining that section 803(g) was a “similar” law, the majority in *Stogner* declared that Chase’s description of Parliamentary banishment acts were an “alternative description” of Chase’s second category. However, historical evidence and precedent do not support the majority’s contention.

### 1. Justice Chase’s Four Ex Post Facto Categories Are Not Exclusive

Justice Chase did not intend the four enumerated categories to be an exclusive listing of ex post facto laws as he wrote: “[a]ll these, and similar laws, are manifestly unjust and oppressive.”<sup>174</sup> This strongly implies that the four categories are not an exclusive accounting of what constitutes ex

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<sup>170</sup> *Id.* at 109.

<sup>171</sup> See *Calder v. Bull*, 3 U.S. 386, 390 (1798); CAL. PENAL CODE § 803(g) (West 2003).

<sup>172</sup> § 803(g).

<sup>173</sup> *Id.*

<sup>174</sup> *Stogner v. California*, 123 S. Ct. 2446, 2450 (2003) (emphasis added).

post facto laws. Indeed, the court in *Moore v. State* correctly recognized that Justice Chase's four categories provided guidelines but not firm standards.<sup>175</sup> Since there is no explicit guidance from *Calder* in terms of what these similar laws might be, there exists at least the possibility that what Justice Breyer termed an "alternative description" of category two very well may be a "similar" law under which section 803(g) fits.<sup>176</sup>

*2. Historical Analysis of the Two Banishment Cases Offers No Conclusive Evidence That Justice Chase's Description of Parliamentary Acts Was an Alternative Description of the Second Ex Post Facto Category*

The majority attempted to categorize section 803(g) as a "similar" law to the second *Calder* category by declaring Justice Chase's description of Parliamentary acts to be an "alternative description," but such a declaration has no conclusive support in the evidence. No affirmative language from Justice Chase suggests any intent that his descriptions of harassing Parliamentary actions be an "alternative" description of his ex post facto categories. Chase also did not explain what aspect of the two banishment cases made the Parliamentary acts illegal.<sup>177</sup> Thus, he could have found Parliament's actions illegal because they re-characterized the charges, because they imposed banishment where punishment had not been available, or because of both results. No amount of wrangling over the historical details by the majority and dissent can shed any light on Chase's reasoning when he cited the two banishment cases. There simply is not enough evidence to make a determinative judgment one way or another based on only two banishment cases cited in footnotes without any explanation from Justice Chase.

Even if the dissent's historical analysis of the *Clarendon* and *Atterbury* cases is true, the possibility still exists that Justice Chase intended laws which imposed punishment where originally punishment had not been available to be ex post facto laws. In citing the two banishment cases, Chase did not introduce a category of Parliamentary acts involving the re-characterization of charges, but rather he described the acts as resulting in punishments where none had been available before by law. It is also undisputed that Justice Chase characterized situations where Parliament imposed punishments where "a party was not, by law, liable to any punishment" as acts "of violence and injustice."<sup>178</sup> Furthermore, Justice Chase made no indication that the two banishment cases were somehow

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<sup>175</sup> See *Moore v. State*, 43 N.J.L. 203, 216 (N.J. 1881).

<sup>176</sup> See *Calder*, 3 U.S. at 386-95.

<sup>177</sup> See *id.* at 389.

<sup>178</sup> *Id.*

different from all the other oppressive laws listed as abusive and illegal.<sup>179</sup> No evidence suggests that Justice Chase considered as acceptable and legitimate those laws which retroactively made punishment available when punishment otherwise would not have been available.

At the same time, just because Justice Chase found the two Parliamentary banishment cases to be “violent” and unjust, no affirmative evidence supports the majority’s holding that Justice Chase determined the banishment bills and laws inflicting punishment where none had been available to be *ex post facto*. He certainly found the cases to be wrong and unjust, but he did not say that they were *ex post facto*, and he very clearly did not declare his account of Parliamentary actions to be “alternative descriptions” of his official categories. Justice Chase was presenting the historical development of laws in England which influenced the drafters of the Constitution to prohibit *ex post facto* laws, but he did not declare that all of his descriptions of unjust Parliamentary acts were *ex post facto* acts.<sup>180</sup>

Due to the lack of affirmative evidence in both the majority and the dissent’s arguments, it does not make sense nor is it possible to determine solely from the historical analyses of the two banishment cases whether Justice Chase intended for an alternative description of his second *ex post facto* category.

### *3. The Case Law Offers No Conclusive Evidence That Chase’s Description of Parliamentary Acts Constituted Alternative Descriptions of the Calder Categories*

No case has analyzed Justice Chase’s description of Parliamentary actions from the perspective of whether the descriptions constituted alternate descriptions of the enumerated *ex post facto* categories. Thus, the case law creates no affirmative support for the majority’s attempt to pronounce an “alternative description” and, at best, leaves open the possibility that Justice Chase’s reference to the two banishment cases may constitute an alternative description of the second category.

The majority and dissent both cited *Moore v. State*<sup>181</sup> to support their respective arguments.<sup>182</sup> The court in *Moore* opined that “Judge Chase did not consider his classes as exhaustive” because he was describing “the characteristics by which he had formulated his rules.”<sup>183</sup> While the dissent

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<sup>179</sup> See generally *id.* at 386-95.

<sup>180</sup> See *id.* at 389.

<sup>181</sup> 43 N.J.L. 203 (N.J. 1881).

<sup>182</sup> See *supra* text accompanying notes 25-29, 104-05.

<sup>183</sup> *Moore*, 43 N.J.L. at 216.

in *Stogner* found the *Moore* court's reasoning invalid, no other court has overturned this contention in *Moore*.

Judge Hand in *Falter v. United States*<sup>184</sup> touched on the issue of extending expired limitations periods but only indirectly and in dicta by saying, without reference to *Calder*, that the extension of expired statutes of limitations would be unconstitutional.<sup>185</sup> The dissent correctly pointed out that no Supreme Court case has based its holding on Judge Hand's dicta from *Falter*, but that has mostly been due to the fact that there had not been a Supreme Court case addressing the issue of Judge Hand's dicta until *Stogner*.<sup>186</sup> Conversely, using the dissent's reasoning, no decision of the Supreme Court has rejected Judge Hand's dictum either, at least not until in the dissent.

The dissent's reliance on *Collins*<sup>187</sup> as support that ex post facto cases must be viewed only through the lens of the four enumerated *Calder* categories is not an accurate reading of *Collins*.<sup>188</sup> First, Justice Rehnquist in *Collins* was actually addressing the issue of whether a Texas law constituted a mere procedural change or represented a more structural change.<sup>189</sup> Furthermore, Justice Stevens agreed with the Court's decision but argued that the real issue of the case was whether the Texas law "effected a 'substantial' deprivation" of rights as defined by Court precedent with no mention of the *Calder* factors.<sup>190</sup>

While there is some support in the case law for the proposition that Justice Chase's four categories are guidelines rather than exclusive listing of ex post facto laws, none of this support is dispositive for purposes of the analysis in *Stogner* because none of the cases mention Justice Chase's discussion of banishment cases and Parliament's imposition of punishment where no punishment was available by law.<sup>191</sup> There may very well be no cases discussing this part of Justice Chase's opinion. It would seem both wise and logical to take a closer look at section 803(g) itself, its purposes, and its potential infringements into an accused's rights rather than trying to examine the wording of a 1798 decision using what little evidence exists to determine Justice Chase's alternative categories.

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<sup>184</sup> 23 F.2d 420 (2d Cir. 1928).

<sup>185</sup> *Id.* at 425-26.

<sup>186</sup> See *Stogner v. California*, 123 S. Ct. 2446, 2454 (2003).

<sup>187</sup> *Collins v. Youngblood*, 497 U.S. 37 (1990).

<sup>188</sup> See *supra* text accompanying notes 31-32.

<sup>189</sup> *Collins*, 497 U.S. at 44-52.

<sup>190</sup> *Id.* at 53 (Stevens, J., concurring).

<sup>191</sup> See *generally supra* text accompanying notes 11-33.

Thus, after the majority and dissent's inconclusive analyses into both history and precedent, the question remains whether section 803(g) is a "similar" statute to the laws in the *Calder* categories and, therefore, in violation of the Constitution. The only possible way to answer this question is to consider the public policy implications of section 803(g) by weighing the interests of the accused against victims of child sex abuse to see whether section 803(g) has the characteristics of an ex post facto law.

C. SECTION 803(G) SHOULD SURVIVE THE EX POST FACTO CLAUSE  
BECAUSE THE INTERESTS OF CHILD ABUSE VICTIMS OUTWEIGH  
THE INTERESTS OF THE ACCUSED

Consideration of section 803(g)'s public policy implications is the best and most logical way to determine whether section 803(g) is a "similar" law to those in Justice Chase's four ex post facto categories. Because there is no established case law providing guidance on what is "similar," the public policy implications of section 803(g) will show whether the statute exhibits the characteristics of ex post facto laws.<sup>192</sup> A consideration of section 803(g)'s impact on the interests of the accused and child sex abuse victims adequately captures the public policy implications of the statute, and identifying the interests of the accused and victims is a relatively easy task. The result of such an analysis is that section 803(g) is not a "similar" law because section 803(g) protects the unique traumas and recoveries faced by child abuse victims while providing strong safeguards for the accused.

*1. An Analysis of Section 803(g)'s Impact on the Accused and Victims is  
Necessary to Determine the Legality of Section 803(g)*

This Note has argued that section 803(g) does not fit into any of the four official *Calder* categories. However, the analysis was not complete because Justice Chase explicitly wrote that laws "similar" to the laws enumerated in his four *Calder* categories could be ex post facto.<sup>193</sup> The majority suggested that Chase's listing of oppressive Parliamentary acts was either an "alternative description" or fit the definition of "similar" laws, but evidence from history and precedent is not conclusive in determining whether the "alternative description" really represented ex post facto laws. Because section 803(g) has the possibility of being a "similar" law to the four *Calder* categories of laws, and due to the dearth of evidence and controlling precedent about what constitutes a "similar" law, a

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<sup>192</sup> See *supra* text accompanying notes 11-34 regarding the lack of case law pertinent to the issue in *Stogner*.

<sup>193</sup> *Calder v. Bull*, 3 U.S. 386, 391 (1798).

consideration of those interests impacted by the statute is necessary to determine the purposes, costs, and benefits of section 803(g) and whether it looks like a “similar” law.

It is important and necessary to weigh public policy considerations in determining the legality of section 803(g). Only by considering the purposes for drafting section 803(g) and the possible dangers of allowing section 803(g) can one get an accurate picture of the statute and consider whether it is “similar” to Justice Chase’s *ex post facto* categories. Furthermore, finding evidence to weigh the public policy interests of section 803(g) is a relatively easy task. Unlike the analysis of the eighteenth-century *Calder* case and historical banishment cases from four centuries ago which required extrapolation from oftentimes insufficient evidence, it is much easier to understand the intent of the proponents of section 803(g) as well as the potential dangers of the statute to determine whether it meets the spirit of *ex post facto* laws.

## *2. Analyzing the Accused’s Interests and the Victim’s Interests*

Victims, as well as the accused, have strong protectable interests, and section 803(g) is a statute that adequately protects the accused’s interests while recognizing a unique interest on the part of child victims of sex abuse.

The accused have several critical interests that must be protected. First, at the most general level, the *Ex Post Facto* Clause “safeguards fundamental fairness by requiring the government to abide by the rules it established to govern the circumstances under which it could deprive people of their liberty.”<sup>194</sup> Perhaps the greatest potential incursion into this “fundamental fairness” is the possibility of exculpatory evidence going stale, because the “[p]assage of time, whether before or after arrest, may impair memories, cause evidence to be lost, deprive the defendant of witnesses, and otherwise interfere with his ability to defend himself.”<sup>195</sup> After all, there is always the possibility that someone who thinks he is free of criminal liability because a limitations period has tolled may get rid of evidence that would help prove his innocence.<sup>196</sup>

Another concern is that “the California Legislature, like many in society at large, may have borne some special resentment against persons

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<sup>194</sup> Brief of Amici Curiae National Association of Criminal Defense Lawyers et al. at 3, *Stogner v. California*, 123 S. Ct. 2446 (2003) (No. 01-1757).

<sup>195</sup> *United States v. Marion*, 404 U.S. 307, 321 (1971).

<sup>196</sup> See NACDL Brief at 17, *Stogner* (No. 01-1757).

accused of sexual offenses.”<sup>197</sup> Certainly, if the only reason California had passed section 803(g) was because it had deemed repugnant a certain class of individuals, this statute would look similar to the oppressive British Parliamentary actions mentioned by Justice Chase in *Calder*. Furthermore, there is a reliance interest on statutes of limitations because often individuals do not know if they have broken the law and rely on tolling of statutes to give them a clean slate.<sup>198</sup> Finally, upholding the constitutionality of section 803(g) would open the door for similar statutes extending and reviving limitations periods for other crimes.<sup>199</sup>

There are pre-existing safeguards for some of the above-mentioned potential violations of the accused’s rights. Section 803(g) explicitly addressed the concern about stale evidence by requiring strong independent evidence to corroborate the victim’s allegations.<sup>200</sup> Weak cases with little independent evidence would not be accepted, and judges could easily weed out the cases with no independent evidence. Furthermore, while the National Association of Criminal Defense Lawyers argued in its amicus brief that individuals rely on stated limitations periods because limitations periods provide repose after a certain time period,<sup>201</sup> such an argument is not persuasive in the case presented in *Stogner* because there is no similar uncertainty of the legality of one’s actions when a person sexually abuses a child.

What makes section 803(g)’s allowance for retroactive prosecutions of child abusers unique and constitutional are the numerous studies in law, psychology, and psychiatry documenting the survival and recovery process of children who were sexually abused and the long period of time it takes for these victims, if ever, to report their abusers. The long-term effects of sex abuse on children include among many things depression, anxiety, alcohol and drug abuse, sexual dysfunction, sleep disorders, high rates of re-victimization, higher rates of prostitution, and suicidal behavior.<sup>202</sup> Most

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<sup>197</sup> *Id.* at 18 (discussing potential abuses by politicians and quoting *Weaver v. Graham*, 450 U.S. 24 (1981) that the ex post facto Clause prohibits a government from passing retroactive legislation that is vindictive).

<sup>198</sup> *Id.* at 25 (explaining that while individuals often know whether their crimes have constituted child abuse or robbery, there are other individuals such as businessmen who do not know if their actions have been criminal and therefore rely on a statute of limitations to make future plans in light of past conduct).

<sup>199</sup> *See id.* at 26-27 (discussing the possible expansion of limitation period revivals for amnesty cases and weakening Fifth Amendment protections).

<sup>200</sup> *See supra* text accompanying notes 36-37.

<sup>201</sup> *See* NACDL Brief at 24-26, *Stogner* (No. 01-1757).

<sup>202</sup> *See* Note, *Retroactive Application*, *supra* note 136, at 991 (citing various studies on the effects of child sexual abuse on its victims); Rosemary Ferrante, *The Discovery Rule: Allowing Adult Survivors of Childhood Sexual Abuse the Opportunity for Redress*, 61

victims of childhood sexual abuse never report the abuse they experienced,<sup>203</sup> and some of their reasons for not reporting include fear of threats and retribution from their abusers,<sup>204</sup> an inability as an immature child to recognize that what the abuser has done is wrong,<sup>205</sup> feelings of shame,<sup>206</sup> and fear that authorities and family will not believe them.<sup>207</sup> For these reasons and many more, “it often takes years before [victims of childhood sexual abuse] are ready to discuss the traumatic events and confront their abusers.”<sup>208</sup> In many circumstances where child victims of sexual abuse do tell a trusted adult about the abuse, the adult does not tell law enforcement.<sup>209</sup> Thus, “victims often are shamed, intimidated, or otherwise compelled to keep childhood sexual abuse a secret their whole lives.”<sup>210</sup>

Under a criminal justice system utilizing a pre-section 803(g) statute of limitations regime, “[t]he emotional and psychological barriers to reporting child sex abuse frequently foreclose the victim’s opportunity for legal redress and preclude social intervention.”<sup>211</sup> Rejecting section 803(g) makes it extremely difficult for victims to seek legal redress in the criminal court system and allows for child abuse offenders to go unpunished merely because children are not psychologically ready and competent to report

BROOK. L. REV. 199, 207 (1995) (citing a study on child sex abuse survivors and another study on child sex abuse and post-traumatic stress disorder); Brief of Amici Curiae American Psychological Association et al. at 11-14, 18, *Stogner v. California*, 123 S. Ct. 2446 (2003) (No. 01-1757) (citing Elliot C Nelson et al., *Association Between Self-Reported Childhood Sexual Abuse and Adverse Psychosocial Outcomes: Results from a Twin Study*, 59 ARCHIVES GEN. PSYCHIATRY 139 (2002)).

<sup>203</sup> See APA Brief at 11-14, *Stogner* (No. 01-1757) (referencing a study by Rochelle Hanson estimating that only twelve percent of sexual assaults on children get reported to authorities).

<sup>204</sup> See *id.* at 13-15 (reporting from a study by Rochelle Hanson finding that “[t]hreats of violent reprisals against a child or the child’s loved ones often are used by child molesters to intimidate their victims into silence”).

<sup>205</sup> See *id.* at 15 (citing a survey by Daniel Smith finding that most sexual abusers were people that the victim knew, and these people, often immediate family members and relatives, used their familial relationship to take advantage of the victim).

<sup>206</sup> See *id.* at 15-16 (citing other studies which find that victims are often embarrassed by the sexual abuse and feel responsible for what has happened, and quite often this feeling of shame extends far into adulthood).

<sup>207</sup> See *id.* at 16-17 (citing more studies finding that victims are fearful of disclosing their abusers for many various reasons).

<sup>208</sup> *Id.* at 10.

<sup>209</sup> See *id.* at 12 (citing a study by Christopher Bagley and Richard Ramsay which found that “75% of disclosures to adults did not result in reports to authorities”).

<sup>210</sup> *Id.* at 4.

<sup>211</sup> Note, *Retroactive Application*, *supra* note 202, at 994 (assessing the legal consequences of limited statutes of limitations).



their crimes.<sup>212</sup> Extending the statute of limitations for victims who report crimes committed before the 1993 implementation of section 803(g) ensures that victims will get their day in court.

The California Assembly could have alternatively passed a law extending the statute of limitations beginning at an effective date without any retroactive effect. Such a law, however, would have an arbitrary effect, essentially penalizing victims who were sexually abused before that effective date where the original limitations period had ended. If California had simply extended the statute of limitations for prosecuting child sex abusers beginning effective January 1, 1994, sexual predators who abused victims long ago, and for whom the original three year limitations period had ended, would arbitrarily get a free pass. Their victims would be double-victims.

It is for all these reasons that victims of childhood sexual abuse require special protection in extending and reviving expired limitations periods. It is not because the California legislature somehow wanted to vindictively punish child abusers. Rather, the legislature was recognizing that the effects of child abuse continue far beyond the actual physical trauma. Extending the limitations period is a recognition of continuing residual harms suffered by victims without infringing on any substantive rights of the abuser.<sup>213</sup>

Thus, section 803(g) is not an *ex post facto* law. It does not fit the second *Calder* category, and it does not fit any of the remaining three *Calder* categories. While section 803(g) would fit Justice Chase's "alternative description" of the second category, no evidence supports the legitimacy of an alternative description. However, determining whether a statute is *ex post facto* should not be limited to a strict analysis of the four *Calder* categories, and public policy provides the best method for determining whether section 803(g) is a "similar" law to other *ex post facto* laws. A weighing of public policy interests shows that section 803(g) does not exhibit the nefarious characteristics necessary to make it a "similar" law to *ex post facto* laws. The interests of protecting victims' rights due to their unique conditions as children outweigh any reliance or evidentiary interests of the accused because section 803(g) adequately protects the accused's interests.

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<sup>212</sup> *Id.* at 995-96.

<sup>213</sup> *See supra* text accompanying notes 35-42.

## D. BEWARE: THE SLIPPERY SLOPE

There is a dangerous slippery slope problem to consider because opening the door for the extension of limitations periods in child sex abuse cases may encourage legislators to pass other laws that would act retroactively and illegally. Many of these new laws would have difficulty surviving judicial review under the test set forth in this Note. For a criminal statute seeking to extend an expired limitations period to be constitutional, the victims' interests must outweigh the interests of the accused, and an overriding characteristic of the crime must be that the victims' suffering and recovery are tied to a temporal process in which applying a finite statute of limitations makes no sense.

For all the reasons mentioned earlier in this Note, victims of childhood sexual abuse are in a unique position because an overwhelming number of studies have shown that the damage done to the victims makes them highly unlikely and unable to seek relief within the arbitrary cutoff points in statutes of limitations, such as California's pre-803(g) six year limitations period for child sex abuse crimes.<sup>214</sup> A revival of expired limitations periods for child abuse victims to report their crimes is valid because scientific research shows that child abuse victims are largely unable, while still children and even often into adulthood, to report the crimes committed against them.<sup>215</sup> Holding section 803(g) unconstitutional is akin to taking away a child abuse victim's rights in the criminal justice system.

For non-child-sex-abuse-related crimes, it is not enough for a court to validate an extension of an expired limitations period just because the court determines that the victim's interests outweigh the interests of the accused. There must be a temporal element in which the victim was unable to report the crimes within the statute of limitations because getting to the point of being able to report the crimes was a major characteristic of the suffering and recovery process. This temporal element and the suffering and recovery processes must be supported by overwhelmingly uncontroverted scientific evidence. Furthermore, the scientific evidence must demonstrate that victims of a particular crime must, as a class, generally exhibit the temporal element and the suffering and recovery processes. For example, just because an abnormally sensitive eggshell victim may have been spit on by someone twenty years ago and suffered greatly such that the victim could not cope with his situation until twenty years later, it does not mean that the "spitter" should be prosecuted. A temporal element must be proved by scientific evidence showing that reasonable victims of spitting, as a

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<sup>214</sup> See *supra* text accompanying notes 202-13.

<sup>215</sup> See *id.*

whole, would require a great deal of time to recover and be ready to report the crimes.

Many people may remember former President Bill Clinton admitting that he “experimented” with marijuana.<sup>216</sup> Could the passing of retroactive laws extending expired limitations periods result in a future prosecution of the former President for an incident which occurred more than three decades ago? It is not that inconceivable to imagine a state legislature passing a law to eliminate the statute of limitations for prosecuting all drug crimes because of a great interest in combating drug problems. What would result then? While this example may seem preposterous now, what it is attempting to highlight is that allowing for exceptions beyond statutes involving victims whose suffering and recovery is tied to scientifically documented temporal processes, such as where children have been documented as requiring time to heal sufficiently to be ready to report their abusers, opens the door to a dangerous array of potential violations against constitutional protections for the accused. Allowing any looser standards than this would open the door to the erosion of individual rights.

#### E. THE IMPACT OF *STOGNER*: WHAT HAPPENS NOW?

The Supreme Court’s decision in *Stogner* will have important implications for a number of federal and state statutes. This Note will briefly consider *Stogner*’s impact on the USA PATRIOT Act,<sup>217</sup> the PROTECT Act,<sup>218</sup> and state legislation and policymaking receiving recent press coverage. The likely result of the holding in *Stogner* is that courts will uniformly invalidate any provision seeking to extend an expired statute of limitation.

##### 1. USA PATRIOT Act

The USA PATRIOT Act was passed by Congress in October 2001 in response to the September 11th attacks against the United States, and its purpose is “[t]o deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes.”<sup>219</sup> Section 809 of the USA PATRIOT Act effectively

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<sup>216</sup> See, e.g., Gwen Ifill, *Clinton Admits Experiment with Marijuana in 1960’s*, N.Y. TIMES, Mar. 30, 1992, at A15. While Clinton admitted that he “experimented” with marijuana, he said that he never inhaled. *Id.*

<sup>217</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), 115 Stat. 272 (codified as amended in scattered sections of 18 U.S.C.).

<sup>218</sup> 18 U.S.C. § 3283 (2003).

<sup>219</sup> § 809, 115 Stat. at 272.

eliminates the statute of limitations for prosecuting individuals committing terrorist offenses as defined by 18 U.S.C. § 2332b(g)(5)(B),<sup>220</sup> “if the commission of such offense resulted in, or created a foreseeable risk of, death or serious bodily injury to another person.”<sup>221</sup> Similar to the California statute, section 803(g), the USA PATRIOT Act includes a provision that would allow for “the prosecution of any offense committed before, on, or after the date of the enactment of this section.”<sup>222</sup>

Given the similarity in the language between the statute of limitation provisions in section 803(g) and the USA PATRIOT Act, it is very likely that when a challenge is made against § 809 of the USA PATRIOT Act, the Supreme Court under its current holding in *Calder* will determine § 809 to be an ex post facto law under Justice Chase’s second category. An additional factor that would favor ruling § 809 unconstitutional is the fact that § 809 does not have a protective clause such as section 803(g) had, requiring substantial independent evidence to corroborate the victim’s accusations.<sup>223</sup>

The better and correct question to ask is whether § 809 is a “similar” law to those prohibited by the *Calder* categories, and such a determination should be made by considering public policy. A court should then conduct an analysis to weigh the effects of the statute on the rights of the accused as well as the rights of terrorist victims. Unless scientific evidence overwhelmingly substantiates terrorist victims’ long-term temporal struggles in recovery and, therefore, triggers the rationale for having to extend a statute of limitations, then § 809 of the USA PATRIOT Act should be invalidated as an ex post facto law.

## 2. PROTECT Act

The PROTECT Act is a federal statute passed in 2003 that is very similar to section 803(g).<sup>224</sup> According to its purpose statement, the PROTECT Act was drafted “[t]o prevent child abduction and the sexual

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<sup>220</sup> See 18 U.S.C. § 2332b(g)(5)(B) (2003). Terrorist crimes as defined under 18 U.S.C. § 2332b(g)(5)(B) include destroying aircraft facilities, attacks on mass transportation systems, assassination attempts against the President, homicide and other violent acts committed against American nationals outside of the United States, harboring terrorism, and financing terrorism. *Id.* For a complete list, see § 2332b(g)(5)(B).

<sup>221</sup> § 809, 115 Stat. at 272.

<sup>222</sup> *Id.*

<sup>223</sup> See *supra* text accompanying note 36 for section 803(g)’s independent evidence clause.

<sup>224</sup> Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (“PROTECT Act”), Pub. L. No. 108-21, 117 Stat. 650 (2003) (codified as amended in scattered sections of 18 U.S.C.).

exploitation of children, and for other purposes.”<sup>225</sup> Passage of the federal PROTECT Act followed the Amber Alert system pioneered and made famous in California in summer 2002.<sup>226</sup>

Section 202 of the PROTECT Act (§ 202) provides: “No statute of limitations that would otherwise preclude prosecution for an offense involving the sexual or physical abuse, or kidnapping, of a child under the age of 18 years shall preclude such prosecution during the life of the child.”<sup>227</sup> With § 202 of the PROTECT Act and section 803(g) being so similar, it is hard to imagine that § 202 will be able to survive judicial review. It is almost identical to section 803(g), and it seems very likely that the Supreme Court would invalidate § 202 as a second *Calder* category *ex post facto* law. Unlike the USA PATRIOT Act, which has separate public policy interests in prosecuting terrorist acts, there is no different public policy in § 202 compared to section 803(g). Furthermore, § 202 also does not have the substantial independent evidence clause for corroborating a victim’s allegations.

The one difference between § 202 and section 803(g) is that section 803(g)’s statute of limitations tolls one year after a report by the victim to law enforcement,<sup>228</sup> but under § 202, the statute of limitations does not toll until the death of the child victim.<sup>229</sup> This, however, does not seem like a substantial enough difference to distinguish between § 202 and section 803(g). It seems clear that the purpose in both section 803(g) and § 202’s particular extensions of their statute of limitations was to give an indefinite amount of time for victims who have suffered traumatic experiences as children to come forward later in life once they have begun to successfully face their pasts.<sup>230</sup> Because of the closeness between section 803(g) and § 202, it appears likely that § 202 will be wrongfully invalidated as *ex post facto*.

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<sup>225</sup> *Id.*

<sup>226</sup> See Scott Gold, *Kidnapped Boy is Found*, L.A. TIMES, Aug. 31, 2002, at B1 (describing the highway motorist system of passing along information in catching child abductors); Caitlin Liu, *Officials Aim to Improve Amber Alerts*, L.A. TIMES, Aug. 10, 2002, at B3 (describing the information network and the first several usages of the Amber Alert system).

<sup>227</sup> 18 U.S.C. § 3283 (2003).

<sup>228</sup> See *supra* text accompanying note 36 for a fuller description of section 803(g)’s statute of limitations provision.

<sup>229</sup> See *supra* text accompanying note 227.

<sup>230</sup> See *supra* text accompanying notes 35-42.

### 3. Effect on State Statutes

The immediate impact for California of the Supreme Court's decision in *Stogner* has been, of course, the elimination of section 803(g) as a valid statute. What this has meant practically for California is that approximately eight hundred cases involving this statute have to be reviewed, and individuals convicted under section 803(g), where their crimes took place and the original statute of limitations tolled before section 803(g)'s implementation, will likely go free.<sup>231</sup>

Massachusetts, where tremendous publicity and attention have been focused on the child abuse scandal with the Roman Catholic Church, has found itself in a similar situation to California in 1993 where accused child abusers have lived without prosecution beyond the state's statute of limitations.<sup>232</sup> As a result of the public furor over the scandals, Massachusetts legislators have rushed to introduce legislation eliminating the statute of limitations for prosecuting sexual offenses committed against children, but the Massachusetts legislature will likely have to reconsider how it plans on treating the statute of limitations issue given the decision in *Stogner*.<sup>233</sup>

## VI. CONCLUSION

The Supreme Court's decision in *Stogner v. California* was wrong. Couching its language in vague notions of justice and equity, the Court declared as *ex post facto* a California statute extending the limitations period for prosecuting sex abuse committed against children where the original limitations period had expired. By doing so, the Court went

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<sup>231</sup> See *Ex-Priests Facing Abuse Charges are Freed from Los Angeles Jail*, L.A. TIMES, June 29, 2003, § 1, at 23 (detailing the story of two Roman Catholic priests accused of molesting children several decades ago but now set free due to the decision in *Stogner*).

<sup>232</sup> See Ralph Ranalli, *Bills Aim for Stricter Abuse Laws*, BOSTON GLOBE, July 25, 2003, at B1 (discussing how under the current law prosecutions must occur either before the victim turns thirty-one years old or within fifteen years of the victim's first report to law enforcement, whichever condition occurs first).

<sup>233</sup> See 2003 Mass. Acts 1063, 183rd Gen. Court, Reg. Sess. (Mass. 2003) (pending legislation currently uncodified). According to the proposed bill, actions for sexual assault or rape of an individual who is eighteen or older when the offense occurred

shall be commenced within 3 years of the acts alleged to have caused an injury . . . or, if law enforcement was notified of such assault within 1 year of its occurrence and the commonwealth is unable to determine the identity of the perpetrator . . . during this 3-year period, 1 year from the date on which the identity of the alleged perpetrator is established by DNA analysis, whichever date is later.

*Id.* § 4D.

beyond established ex post facto jurisprudence to expand the reach of the Ex Post Facto Clause.

Section 803(g) does not violate the Ex Post Facto Clause. First, section 803(g) does not fit into any of the four enumerated *Calder* ex post facto categories. Second, while section 803(g) could fit Justice Chase's description of Parliamentary bills that inflicted punishment where no punishment was available, neither historical evidence nor case law provide any conclusive proof that Justice Chase intended this description to be an "alternative description" of the second *Calder* category. Because "similar" laws to the ones fitting the four *Calder* categories are also ex post facto laws, an analysis of section 803(g)'s public policy implications is necessary to determine whether section 803(g) is a law "similar" to the *Calder* ex post facto laws. After weighing the interests of the accused and the victims, the result is that section 803(g) uniquely protects child abuse victims and recognizes the time needed to recover and seek redress while also having built-in protections to prevent incursions onto any of the accused's rights.

*Stogner* will have many ramifications on federal and state statutes as well as future federal and state policy decision-making. Given the contentiousness of the issue, the close five to four split, and the implications for state and federal statutes, the Supreme Court is likely to re-address this issue soon.

Ashran Jen