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WRONG TURN ON THE EX POST FACTO CLAUSE

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Wrong Turn on the Ex Post Facto Clause

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ABSTRACT

* University of Michigan Law School, Clinical Professor of Law. For this article we took inspiration for the title (as well as style cues) from David Shapiro's pungent "comment" *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61 (1984).

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The Ex Post Facto Clause bars any increase in punishment after the commission of a crime. But deciding what constitutes an increase in punishment can be tricky. At the front end of a criminal case, where new or amended criminal laws might lengthen prisoners' sentences if applied retroactively, courts have routinely struck down such changes under the Ex Post Facto Clause. At the back end, however, where new or amended parole laws or policies might lengthen prisoners' sentences in exactly the same way if applied retroactively, courts have used a different standard and upheld the changes under the Ex Post Facto Clause. Because the harm is identical and lies at the core of what the Ex Post Facto Clause is supposed to protect against, we think the asymmetry is mistaken.

Parole is an integral part of punishment: it determines how much time people will serve on their sentences. Until the 21st century, black-letter law forbade even modest parole changes that were adverse to prisoners. If a change in the parole regime might lead to longer sentences, then courts insisted that the change be applied prospectively only. Over the last two decades, relying on language in two US Supreme Court parole cases decided in 1995 and 2000, the lower courts have shifted parole-ex post facto doctrine by 180 degrees. Prisoners can no longer prevail even when the change in the state parole regime is almost certain to lead to significantly longer sentences.

In the context of parole, the courts have repudiated past doctrine and strayed far from the purposes of the Ex Post Facto Clause. In this article, we review the history, show how the current case law is misguided and illogical, and put forward a new framework that would restore the Ex Post Facto Clause to its rightful place.

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INTRODUCTION

The Ex Post Facto Clause says, “No State shall . . . pass any . . . ex post facto Law”¹ Although the Latin phrase “*ex post facto*” literally encompasses any law passed “after the fact,” by 1800 the US Supreme Court had recognized, in *Calder v. Bull*, that the constitutional prohibition on ex post

1. U.S. Const., art. I, § 10, cl. 1.

facto laws applies only to penal statutes.² In *Calder*, Justice Chase described the reach of the Ex Post Facto Clause as follows:

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*.³

Justice Chase's four categories in *Calder* were originally viewed as exclusive: if a change of law did not fit within those four categories, then it was not covered by the Ex Post Facto Clause.⁴ For much of the nineteenth century, the

2. 3 U.S. 386, 390–392 (1798); *but see* Evan C. Zoldan, *The Civil Ex Post Facto Clause*, 2015 WISC. L. REV. 727 (arguing that the historical doctrine is misplaced and that the clause should apply to civil as well as criminal laws); *see also* Thomas Jefferson, *Letter to Isaac McPherson*, August 13, 1813 (“The sentiment that ex post facto laws are against natural right is so strong in the United States, that few, if any, of the State constitutions have failed to proscribe them. The federal constitution indeed interdicts them in criminal cases only; but they are equally unjust in civil as in criminal cases and the omission of a caution which would have been right, does not justify the doing what is wrong.”).

3. *Calder*, 3 U.S. at 390.

4. Justice Chase himself may have taken a broader view, noting that “All these, *and similar laws*, are manifestly unjust and oppressive.” *Calder*, 3 Dall. at 391. *See also* Zoldan, *supra* note 3, at 743-749 (citing historical material in support of the broader view).

Ex Post Facto Clause played a fairly narrow role: it was primarily invoked to prevent new punishments from being imposed retroactively for past criminal conduct.⁵

In the late 1800s, however, the precise contours of the Ex Post Facto Clause became less clear as the US Supreme Court struggled to apply the *Calder* categories consistently. In that epoch the Court expanded the reach of the Ex Post Facto Clause to bar not just substantive changes to criminal laws, but also some arguably procedural changes that affected significant rights or seriously disadvantaged criminal defendants.

Two cases exemplify the Court's more expansive interpretation. First, in 1883, in *Kring v. Missouri*,⁶ the Court held that "any law passed after the commission of an offence which . . . 'in relation to that offence, or its conse-

5. See e.g., *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138-39 (1810) (invalidating retroactive law that forfeited title and permitted state seizure of estates for past criminal acts); *Cummins v. Missouri*, 71 U.S. 277 (1866) (invalidating state constitutional provision that barred people from holding public office or practicing their professions absent taking an oath stating that they had not supported the rebellion); Wayne Logan, *Democratic Despotism and Constitutional Constraint: an Empirical Analysis of Ex Post Facto Claims in State Courts*, 12 WM. & MARY BILL OF RTS. J. 439 (2004).

6. 107 U.S. 221 (1883). *Kring* involved a plea to second-degree murder that was overturned on appeal, resulting in a conviction for first-degree murder (and a death sentence) on remand. The law in effect when the defendant committed his crime and pled guilty treated his plea as an acquittal of the higher charge. But a new state constitution, applied retroactively, abrogated that law. The state court held that the "change is a change, not in crimes, but in criminal procedure, and such changes are not *ex post facto*." *Id.* at 224 (citation omitted). The U.S. Supreme Court reversed, holding (5-4) that the amendment could not be applied retroactively. The label "crime" or "criminal procedure" was of no moment: what mattered was the change in circumstances to the defendant's detriment. *Id.* at 228-229.

quences, alters the situation of a party to his disadvantage,’ is an *ex post facto* law.’⁷ Second, in 1898, in *Thompson v. Utah*,⁸ the Court held that retroactive procedural statutes can violate the Ex Post Facto Clause unless they “leave untouched all the substantial protections with which existing law surrounds the person accused of crime.”⁹ In *Thompson* the Court struck down a Utah law that retroactively reduced the size of criminal juries from twelve to eight persons, because the change deprived the defendant of “a substantial right involved in his liberty.”¹⁰

7. *Id.* at 235 (citation omitted). On the other hand, the very next year the Court held that permitting a felon to testify against an accused was *not* an *ex post facto* violation even though felons were forbidden from testifying in criminal cases when the defendant committed his crime; the change was viewed as merely procedural. *See Hopt v. Utah*, 110 U.S. 574 (1884).

8. 170 U.S. 343 (1898).

9. *Id.* at 352.

10. *Id.* at 351-52 (holding that the change violates the Ex Post Facto Clause because it “materially impairs the right of the accused”). Later in the same term, in *Thompson v. Missouri*, 171 U.S. 380 (1898), the Court distinguished *Kring*, saying that the right at issue in *Kring* was “a substantial one—indeed, it constituted a complete defense against the charge of murder in the first degree—that could not be taken from the accused by subsequent legislation,” and therefore was “not simply a change in procedure.” *Id.* at 383-84. In *Thompson*, handwriting samples were admitted against the accused, resulting in his conviction; on appeal the court held that the admission of the samples was error and reversed on that basis. In the meantime, the state amended its laws to allow the admission of handwriting samples, which were then used at the trial on remand to convict the defendant again. The Court found no *ex post facto* violation because the evidentiary change did not “affect the substantial rights of one put on trial for a crime” nor did it “require ‘less proof, in amount or degree,’ then was required at the time of the commission of the crime. . . .” *Id.* at 387.

It took almost another hundred years before the Court's more expansive interpretation of the Ex Post Facto Clause was put to rest.¹¹ In the 1990 case *Collins v. Youngblood*,¹² the Court reversed *Kring* and *Thompson*, holding that those decisions went beyond Justice Chase's definitions in *Calder*. The Court rejected the *Kring* and *Thompson* rationale (that the defendant need only be

11. Other cases skirted the issue but without resolving it. For example, in *Beazell v. Ohio*, 269 U.S. 167 (1925), at the time of the crime (embezzlement) joint defendants were entitled by state law to separate trials. By the time of the trial, joint defendants were no longer entitled to separate trials (except in capital cases). *Id.* at 169. The Court found no ex post facto violation, stating that "... it is now well settled that statutory changes in the mode of trial or the rules of evidence, which do not deprive the accused of a defense and which operate only in a limited and unsubstantial manner to his disadvantage, are not prohibited." *Id.* at 170. The *Beazel* Court cited with approval *Kring* and *Thompson*, as well as *Hopt* and *Thompson v. Missouri*, even though those two sets of cases are not easy to reconcile. *Id.* at 171.

Likewise, in *Dobbert v. Florida*, 432 U.S. 282 (1977), the Court held that a retroactive change in state law did not violate the Ex Post Facto Clause. In *Dobbert*, at the time of the crime (capital murder), state law forbade the imposition of the death penalty if a majority of the jury recommended mercy. By the time of trial, the law had been amended to make the jury's decision a recommendation that was not binding on the court. The trial court rejected the jury's 10-2 recommendation for mercy and imposed the death penalty. The Court said it is "well settled ... that '[t]he inhibition upon the passage of ex post facto laws does not give a criminal a right to be tried, in all respects, by the law in force when the crime charged was committed.' *Gibson v. Mississippi*, 162 U.S. 565 (1896). '[T]he constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation, see *Malloy v. South Carolina*, 237 U.S. 180, 183 (1915), and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance.' *Beazell v. Ohio, supra*, at 171." *Dobbert*, 432 U.S. at 293. The Court described the change as "procedural" with no change in "the quantity or degree of proof necessary to establish [the defendant's] guilt." *Id.* at 294 (quoting *Hopt v. Utah*, 110 U.S. at 589-590).

12. 497 U.S. 37 (1990).

“substantially disadvantaged”) because “the prohibition which may not be evaded is the one defined by the *Calder* categories,”¹³ and *Calder* says nothing about “disadvantaging” defendants. Accordingly, retroactive changes do not run afoul of the Ex Post Facto Clause unless they make innocent conduct criminal (*Calder* category 1), aggravate the crime (category 2), increase the punishment (category 3), or change the type or quantum of proof required for a conviction (category 4).¹⁴ Post-*Collins*, a significant “disadvantage” to the defendant is not enough unless the change *also* fits within one of the four *Calder* categories.¹⁵

13. *Id.* at 46 (internal citations omitted); *see also* *Beazell*, 269 U.S. at 169-70 (1925).

14. *Collins*, 497 U.S. at 46. In *Collins*, the Court upheld the reformation of an improper conviction pursuant to a law that was passed after the defendant committed his crime but was applied retroactively to him. Absent the new statute, the error would have entitled the defendant to a new trial. The Supreme Court said that the statute did not “punish as a crime an act previously committed, which was innocent when done; nor make more burdensome the punishment for a crime, after its commission; nor deprive one charged with crime of any defense available according to law at the time when the act was committed. Its application to respondent therefore is not prohibited by the *Ex Post Facto* Clause” *Id.* at 52. For a modern case addressing the sufficiency of the evidence prong of the Ex Post Facto Clause, *see* *Carmell v. Texas*, 529 U.S. 513 (2000) (holding that a statutory amendment changing the corroborating evidence requirement for convictions of sexual offenses violates the Ex Post Facto Clause when applied retroactively); *see also* Danielle Kitson, *It’s An Ex Post Facto: Supreme Court Misapplies the Ex Post Factor Clause to Criminal Procedure Statutes*, 91 J. CRIM. L. & CRIM. 429 (2001) (discussing *Carmell*).

15. The debate about what can be shoehorned into the *Calder* categories has continued into the twenty-first century. In *Stogner v. California*, 539 U.S. 607 (2003), the defendant was convicted of crimes committed several decades earlier, subject to a then-existing 3-year statute of limitations. But a retroactive amendment permitted such charges to be brought within a year of their being reported to state authorities. The California courts found no ex post facto violation. The US Supreme Court

With this history as a backdrop, we examine the Ex Post Facto Clause through the lens of parole. In Part I, we trace the robust ex post facto protections against increases in punishment via delayed or deferred parole, which were firmly established by the Supreme Court and entrenched in the lower courts by the end of the twentieth century. In Part II, we describe the Court's subtle but important shift to a less protective ex post facto regime in two parole cases just before and at the millennium. In Part III, we show how lower federal courts have taken the Court's modest shift and turned the Ex Post Facto Clause on its head vis-à-vis parole, all but eliminating parole from the clause's coverage.

reversed (5-4), with acrimonious opinions on both sides. Justice Breyer, writing for the majority, invoked Justice Chase for the proposition that “the Clause protects liberty by preventing governments from enacting statutes with ‘manifestly *unjust and oppressive*’ retroactive effects.” *Stogner*, 539 U.S. at 611 (citing *Calder v. Bull*, 3 Dall. 386, 391 (1798)). Breyer concluded that “The second [*Calder*] category—including any ‘law that *aggravates a crime*, or makes it *greater* than it was, when committed,’—describes California’s statute as long as those words are understood as Justice Chase understood them—*i.e.*, as referring to a statute that ‘inflict[s] *punishments*, where the party was not, by *law*, liable to *any punishment*.” *Id.* at 613. Justice Kennedy, writing for the dissent, strongly disagreed. He said that the words of the second *Calder* category “do not permit the Court’s holding, but indeed foreclose it. 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.’ Until today, a plea in bar has not been thought to form any part of the definition of the offense.” *Id.* at 633. For academic discussion of *Stogner*, see, e.g., Ashran Jen, *Stogner v. California: A Collision Between the Ex Post Facto Clause and California’s Interest in Protecting Child Sex Abuse Victims*, 94 AMER. J. OF CRIM. L. & CRIMINOLOGY 723 (2004); Joan Comparet-Cassani, *Extending the Statute of Limitations in Child Molestation Cases Does Not Violate the Ex Post Facto Clause of Stogner*, 5 WHITTIER J. CHILD & FAM. ADVOC. 303 (2006).

In Part IV, we diagnose the causes of this constitutional “wrong turn” and disentangle the doctrinal morass that ex post facto law has become in the context of parole. We propose a way forward that makes sense of and harmonizes the US Supreme Court’s doctrine, the constitutional history, and the underlying purposes of the Ex Post Facto Clause. Specifically, we distinguish two categories of ex post facto claims that have been raised but not treated separately in the cases—namely obvious or per se violations versus those that require some factual development—and we set out a framework for analyzing these distinct categories of ex post facto claims. In addition to keying off the history and purpose of the clause, we keep an eye on the practical needs of the people affected by the Court’s doctrine (prisoners), who have few resources to litigate these cases and no political influence to promote doctrinal change on their own.

I.

THE EX POST FACTO CLAUSE AND PAROLE: EARLY PROTECTION AGAINST CHANGES THAT MIGHT INCREASE PUNISHMENT

Modern penal codes enacted starting in the early-to-mid-twentieth century raised new ex post facto questions. In many states and in the federal system, indeterminate sentencing replaced flat sentencing. Prisons started offering school, job, and mental health programs that created incentives for prisoners to work toward their own rehabilitation, with the hope of early release. Parole boards proliferated, with the goal of making informed, professional, and consistent decisions about early release. As these new penal models were introduced and flourished, the US Supreme Court had to decide if the Ex Post Facto Clause applied to the many and various new features of these models—features

like indeterminate sentencing, “good time” and other sentence credits, as well as parole itself.¹⁶ Any or all of these features could affect how much time a person would serve on a given sentence. Parole was the paradigmatic example, because if statutory, regulatory, or policy changes made parole harder to get (than it had been when people committed their crimes), and if the changes applied retroactively, then by definition *some* people might serve more time in prison than they would have served but for the retroactive changes.

Before the Court examined these new penal models, its landmark ex post facto case on changes in *sentencing* had been *Lindsey v. Washington*, decided in 1937.¹⁷ In *Lindsey*, the Court found an ex post facto violation where an amended statute changed a criminal penalty from “not more than fifteen years,” with a judge-set minimum of six months to five years, to a flat fifteen years, but giving the parole board authority to determine the actual length of imprisonment after the prisoner had served six months. Even though prisoners *could* have served up to fifteen years under the old statute, the Court held that the retroactive application of the new statute violated the Ex Post Facto Clause because the “standard of punishment adopted by the new statute is more onerous than that of the old.”¹⁸ Whether the prisoners would have received or

16. For an interesting discussion of *lex mitior*, a doctrine which bars imposing the greater, original punishment if the punishment is later decreased—the inverse of ex post facto protection—see Peter Westen, *Lex Mitior: Converse of Ex Post Facto and Window into Criminal Desert*, 18 NEW CRIM. L. REV. 167 (2015) (discussing *lex mitior* and the implications for purposes of punishment and “desert”).

17. 301 U.S. 397 (1937).

18. *Id.* at 400-01.

served shorter sentences under the former statute was immaterial, given that the amendment created the *potential* for at least some prisoners to serve longer sentences under the new regime.

Lindsey quoted text from *Kring* and *Thompson*—namely that “[i]t is plainly to the substantial disadvantage of petitioners to be deprived of all opportunity to receive a sentence which would give them freedom from custody and control prior to the expiration of the fifteen-year term.”¹⁹ This language was later disavowed in *Collins*, yet the *Collins* Court did not reverse *Lindsey* (as it had *Kring* and *Thompson*) because it conceded that some *Lindsey* prisoners might wind up serving longer sentences than they could have served when they committed their crimes, and thus their ex post facto claim satisfied the third *Calder* category of “increase in the punishment.”²⁰

In 1980—again before the Court had narrowed the reach of the Ex Post Facto Clause in *Collins*²¹—the Court finally had to address a feature of a back-end modern penal code, as opposed to a direct front-end sentencing issue, as in *Lindsey*. In *Weaver v. Graham*,²² the Court barred the state from retroactively

19. *Id.* at 401-02.

20. *Id.*

21. *See* 497 U.S. at 45 (holding that changes that “disadvantage” the defendant but were otherwise unrelated to the crime or the punishment or the type or quantum of evidence required as set forth in the *Calder* categories were not sufficient to make out an ex post facto claim); *see supra* notes 12-15 and accompanying text.

22. 450 U.S. 24 (1981). *Weaver* was a unanimous decision; the concurring Justices did not disagree with the majority’s analysis of the Ex Post Facto Clause, but took issue only with whether the new statute in fact operated retrospectively, or whether its benefits (which for some prisoners could

reducing the “gain time” that prisoners could earn to hasten their parole-eligibility date. The Court made clear that retroactive changes that could lengthen the time served on a sentence fell within the rubric of “punishment” and thus also fell within the ambit of the Ex Post Facto Clause.

The *Weaver* Court recognized that retroactive changes to such early release provisions are no different from retroactive changes to initial sentencing provisions (like those that were at issue in *Lindsey*): they implicate the Ex Post Facto Clause because they are “one determinant” of how long a person will serve, and because the person’s “effective sentence is altered once this determinant is changed.”²³ Suspending or withdrawing such provisions constitutes an increase in punishment because a “prisoner’s eligibility for reduced imprisonment is a significant factor entering into both the defendant’s decision to plea bargain and the judge’s calculation of the sentence to be imposed.”²⁴ The Court also noted that relief under the Ex Post Facto Clause is based not on the individual’s right to less punishment, but rather on the *values* the Ex Post Facto Clause was designed to protect—namely to ensure fair notice of the punishment at the time when the crime is committed, and to restrain “arbitrary and potentially vindictive legislation”²⁵ against the politically weakest members of society (like criminals and prisoners).

permit or speed up parole eligibility in new ways) might outweigh its harms enough to excuse what would otherwise be an ex post facto violation. *See id.* at 36-39.

23. *Id.* at 32.

24. *Id.* (internal citations omitted).

25. *Id.* at 29.

Weaver is notable because it applied the Ex Post Facto Clause where the increase in punishment took the form of a delay in parole *eligibility*, despite the uncertainty as to whether or not the individual prisoner would in fact have been paroled.²⁶ The Court said the inquiry is a facial one: it “looks to the challenged provision, and not to any special circumstances that may mitigate its effect on the particular individual.”²⁷ *Weaver*, like *Lindsey* before it, viewed the question as a pure question of law to be decided by the Court.²⁸ If the statute under review might result in some prisoners serving longer sentences than they could have served when they committed their crimes, then retroactive application is barred by the Ex Post Facto Clause. It made no difference that *Lindsey* was a front-end sentencing case while *Weaver* was a back-end parole case because the interest and the harm were identical in both cases.

Weaver, like *Lindsey*, sent a strong signal to the lower courts that almost any retroactive change that *could* delay prisoners’ release date renders their sentence “more onerous” and thus is prohibited by the Ex Post Facto Clause.²⁹ Based on *Lindsey* and *Weaver*, and despite the narrowing of the Ex Post Facto

26. *Id.* at 30. “Evaluating whether a right has vested is important for claims under the Contracts or Due Process Clauses, which solely protect pre-existing entitlements. The presence or absence of an affirmative, enforceable right is not relevant, however, to the *ex post facto* prohibition, which forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred.” *Id.* at 29-30 (citations omitted).

27. *Id.* at 33 (citations omitted). *But see* *Dobbert v. Florida*, 432 U.S. 282, 300 (1977) (suggesting that a defendant *in a criminal case* cannot bring an ex post facto claim “where the change has had no effect on the defendant in the proceedings of which he complains”).

28. *Lindsey*, 301 U.S. 397 (1937); *Weaver*, 450 U.S. 24 (1981).

29. *Weaver*, 450 U.S. at 36.

Clause that occurred in 1990 in *Collins*, from the late 1970s to the mid-1990s, numerous US circuit courts of appeal and state supreme courts struck down retroactive parole changes with such effects. These included not just changes in the substantive standard to obtain parole, but also arguably procedural changes or mixed changes that might be described as procedural or substantive, but which could still delay parole consideration or a prisoner's release. Examples included less frequent parole review,³⁰ loss of good time or other credits,³¹ increases in the minimum time to be served,³² and hurdles making it harder for

30. See e.g., *Rodriguez v. U.S. Parole Commission*, 594 F.2d 170 (7th Cir. 1979) (reduced opportunity for parole review under federal rules violates Ex Post Facto Clause); *Watson v. Estelle*, 859 F.2d 105, *vacated on other grounds*, 886 F.2d 1093 (9th Cir. 1989) (same, for extending parole review from every year to every three years); *Akins v. Snow*, 922 F.2d 1558 (11th Cir. 1991) (same, for changing annual parole review to review every eight years, following a parole denial); *Roller v. Cavanaugh*, 984 F.2d 120 (4th Cir. 1993) (same, changing parole review from annual to biennial review); see also *Tiller v. Klinciar*, 561 N.E.2d 576 (Ill. 1990) (changing parole review from every year to every three years "constitutes ex post facto punishment . . . [because] the new law 'constricts the inmate's opportunity to earn early release, and thereby makes more onerous the punishment for crimes committed before its enactment,'" *id.* at 580 (citing *Weaver*, 450 U.S. at 35-36); *Griffin v. State*, 433 S.E.2d 862 (S.C. 1993) (same, for extending parole review from every year to every two years).

31. See e.g., *Arnold v. Cody*, 951 F.2d 280 (10th Cir. 1991) (emergency overcrowding credit statute amendment, which made it more difficult for prisoners who had been denied parole to obtain release, imposes eligibility requirement which had not existed under earlier statute and thus violates the Ex Post Facto Clause); *Greenfield v. Scafati*, 277 F. Supp. 644 (Mass. 1967) *summarily aff'd*, 390 U.S. 713 (1968) (affirming judgment of three-judge court that found an ex post facto violation in a statute that eliminated gain time for the first six months following parole revocation as applied to an inmate whose crime occurred before the law's enactment).

32. *Devine v. New Mexico Dept. of Corrections*, 866 F.2d 339 (10th Cir. 1989) (unforeseeable judicial enlargement of a state criminal statute (raising the minimum term of defendant's

prisoners to petition for review or leniency.³³ And as in *Lindsey* and *Weaver*, the courts treated these issues as pure questions of law, to be decided by the court. By 1995, it was black-letter law that any significant change in the parole process that (a) applied retroactively, and (b) *might* delay a prisoner's release, was close to a per se violation of the Ex Post Facto Clause.³⁴

sentence from ten years to thirty years), applied retroactively, operates precisely like an ex post facto law; "If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, . . . a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction," *id.* at 342, citing *Bouie v. City of Columbia*, 378 U.S. 347, 353-54 (1964); *see also* *Marks v. U.S.*, 430 U.S. 188, 192 (1977) (same)).

33. *State v. Reynolds*, 642 A.2d 1368 (N.H. 1994) (changing the period for filing a petition for suspension of sentence from every two years to every four years violates the Ex Post Facto Clause).

34. As to ex post facto *sentencing* cases, the U.S. Supreme Court has stayed the course that it set in *Lindsey* back in 1937. In *Miller v. Florida*, 482 U.S. 423 (1987), Florida had amended its sentencing guidelines between the time Miller had committed his crime and his sentence. The sentencing court applied the amended guidelines, raising Miller's presumptive sentence; he was then sentenced to the *new* top end of the range. The Florida Supreme Court found no ex post facto violation, but the U.S. Supreme unanimously reversed. Although it used the pre-*Collins* ex post facto test in its analysis, the Court found that the parole guidelines "directly and adversely" affected the sentence the defendant received, making "more onerous the punishment for crimes committed before [their] enactment," citing *Weaver*, 540 U.S. at 36. *Miller*, 482 U.S. at 435. *Miller*, too, therefore survived *Collins*, because the change fit snugly within the third *Calder* category. *See* *California Dept. of Corr. v. Morales*, 514 U.S. 499, 506 n 3 (1995), discussed next in Part II.A.

II.

LATE-TWENTIETH-CENTURY SUPREME COURT DOCTRINE

A. *Morales: A Modest Change of Course*

In 1995, in *California Dept. of Corrections v. Morales*,³⁵ the US Supreme Court slightly tightened the parole ex post facto standard. In *Morales*, California had reduced the frequency of parole review for murderers who committed a second murder. California law still required an annual paper review, as well as an individualized finding that the delay in parole review would not harm the inmate's chances for parole.³⁶ On those limited, unusual facts, the Court held that the less frequent parole review was not a per se violation of the Ex Post Facto Clause. Rather, the test was whether, all things

35. 514 U.S. 499 (1995).

36. On these facts, the Ninth Circuit had held: "By increasing the interval between parole hearings, the state has denied Morales opportunities for parole that existed under prior law, thereby making the punishment for his crime greater than it was under the law in effect at the time his crime was committed. Logic dictates that because a prisoner cannot be paroled without first having a parole hearing, a parole hearing is a requirement for parole eligibility. *Akins v. Snow*, 922 F.2d 1558, 1562 (11th Cir.), *cert. denied*, 501 U.S. 1260 (1991). Accordingly, any retrospective law making parole hearings less accessible would effectively increase the sentence and violate the ex post facto clause. We base this conclusion on the Supreme Court's observation that the denial of parole is a part of a defendant's punishment. *Warden v. Marrero*, 417 U.S. 653, 662 (1974). The [Supreme] Court went on to note that 'a repealer of parole eligibility previously available to imprisoned offenders would clearly present the serious question under the *ex post facto* clause . . .'" *Morales v. Cal. Dept. of Corrections*, 16 F.3d 1001, 1004 (9th Cir. 1994) (parallel cites omitted).

considered, the change “produces a sufficient risk of increasing the measure of punishment attached to the covered crimes.”³⁷

Morales was a narrow, practical decision. For obvious reasons, prisoners who are incarcerated for murder and who then commit a second murder are highly unlikely to be paroled, especially in the early years after the second homicide. So changing their in-person review from every year to every three years (*and* conducting an annual paper review instead, *and* making an individualized finding that the delayed review will not increase their risk of an erroneous parole denial, *and* preserving the board’s ability to shorten the period if warranted), is hardly a high-risk venture. The *Morales* Court rejected the prisoner’s argument that the legal standard should be “any conceivable risk of affecting a prisoner’s punishment.”³⁸ The Court said that such an amorphous standard would necessarily include anything that “might create some speculative, attenuated risk of affecting a prisoner’s term of confinement,”³⁹ even such petty changes as reduced access to the prison law library, or a slightly shorter parole hearing, or the replacement of an old parole board member by someone new.⁴⁰ The Court distinguished such “attenuated” changes from the statute before it, which applied only to a very small number prisoners, who were provided with several layers of protection, and who were highly unlikely to be paroled in any event. *Morales* was thus only the smallest step away from the universally accepted legal regime described above—that the Ex Post Facto

37. *Morales*, 514 U.S. at 509.

38. *Id.* at 508.

39. *Id.* at 508–509.

40. *Id.*

Clause prohibits retroactive changes that might increase the time some prisoners would serve.⁴¹

Indeed, just two years later, in 1997, in *Lynce v. Mathis*,⁴² the Court again held that the Ex Post Facto Clause applies to increased punishment in the form of the retroactive loss of *opportunities for parole*, citing with approval *Weaver's* admonition that a “prisoner’s eligibility for reduced imprisonment is

41. Writing for the Court in *Morales*, Justice Thomas suggested that courts should be realistic about how parole boards use their limited resources. If multiple murderers are extremely unlikely to be paroled, and if the state screens such cases carefully to ensure that the modest increased interval between parole hearings will not delay cases that deserve to be heard, then no prisoners will be harmed and the board can concentrate on cases in which a real parole decision needs to be made. As the Court noted, “the evident focus of the California amendment was merely ‘to relieve the [Board] from the costly and time-consuming responsibility of scheduling parole hearings’ for prisoners who have no reasonable chance of being released,” citing *In re Jackson*, 39 Cal.3d 464, 473; 703 P.2d 100, 106 (1985) (quoting legislative history). *Morales*, 514 U.S. at 507.

In dissent, Justice Stevens belittled the cost/burden rationale, noting that murderers who commit a second murder are a tiny class, of fiscal/resource insignificance. He argued that the state was more forthcoming in its own briefs, inviting “the Court to ‘reexamine’ its *ex post facto* jurisprudence ‘[i]n view of the national trend towards the implementation of harsher penalties and conditions of confinement for offenders and inmates.’ Brief for Petitioners 11 (footnote omitted).” *Id.* at 521. “The danger of legislative overreaching against which the *Ex Post Facto* Clause protects is particularly acute when the target of the legislation is a narrow group as unpopular (to put it mildly) as multiple murderers. There is obviously little legislative hay to be made in cultivating the multiple murderer vote. For a statute such as [the California amendment], therefore, the concerns that animate the *Ex Post Facto* Clause demand enhanced, and not (as the majority seems to believe) reduced, judicial scrutiny.” *Id.* at 522. Justice Stevens was prescient in believing that acceptance of the state’s invitation would lead to longer sentences for all, retrospectively as well as prospectively. *See infra* notes 47 through 51 and accompanying text.

42. 519 U.S. 433 (1997).

a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed.⁴³ In *Lynce*, state law authorized the department of corrections to award early release credits to prisoners when the prison population exceeded pre-set levels. A later statute canceled the credits for some offenders after the credits had been awarded, and in some cases after the prisoners had been released.

The state tried to distinguish *Weaver* on the grounds that it had involved credits earned by the prisoner, rather than credits provided by the state to alleviate overcrowding. The Court dismissed that distinction: “[I]n *Weaver*, we relied not on the subjective motivation of the legislature in enacting the . . . credits, but rather on whether objectively the new statute ‘lengthen[ed] the period *that someone in petitioner’s position* must spend in prison.’”⁴⁴

In *Lynce* the Court made clear that the Ex Post Facto Clause forbids changes that retroactively reduce a prisoner's *opportunity* for parole. This is so because the reduced opportunity includes the risk of a longer sentence for some prisoners, *and* because the defendant relies on the parole system in place when entering (or rejecting) a plea, and the judge relies on the parole system in place when determining what the sentence will be.⁴⁵ The Court credited what

43. *Lynce*, 519 U.S. at 445-46, citing *Weaver*, 450 U.S. at 32. *Lynce* came seven years after *Collins*, and thus necessarily the Court was applying a legal standard consistent with *Calder* and *Collins*. See *id.* at 441, n 13 (explaining that the law in question falls within the four *Calder* categories).

44. *Id.* at 442 (emphasis added). Here, too, the prisoner-plaintiff did not have to prove that *he* would serve more time, but only that someone in the same position could suffer that fate under the amendment as written.

45. *Weaver*, 450 U.S. at 32; *Lynce*, 519 U.S. at 445-46.

prosecutors and criminal defense lawyers know in their bones— that the parole regime in place when a person commits a crime influences not just what will happen at the back end of the sentence, many years down the road, but also what happens at the front end, namely whether the defendant will plead guilty or go to trial, and what sentence the judge will impose.

B. An Opening for Opponents of Parole Release

But sometimes all it takes is a few words in an opinion to trigger a seismic shift. As noted above, before *Morales* (and even in *Morales* itself) the Supreme Court had decided its Ex Post Facto Clause cases as pure questions of law. Courts could read the new or amended statute, figure out if any prisoners to whom it applied might serve longer sentences as a result of the law's retroactive application, and, if the answer was yes, enjoin its retrospective use. Even *Morales* can be viewed as a straightforward application of this black-letter law. The Court simply said, on the unique facts of the California statute, that the risk of any prisoners ever serving a longer sentence (than they would have served but for the deferred parole review) was so remote as not to present an actionable ex post facto claim.

The problem with *Morales* was not what it *did*, but what it *insinuated* with a few words that Justice Thomas wrote and the tone in which he wrote them. First, in disparaging the prisoner's claim that the Ex Post Facto Clause forbids a change that has "any conceivable risk of affecting a prisoner's punishment," Thomas said that such an approach "would require that we invalidate any of a number of minor (and perhaps inevitable) mechanical changes that might produce some remote risk of impact on a prisoner's expected term of confinement. . . . [T]he judiciary would be charged under the *Ex Post Facto*

Clause with the micromanagement of an endless array of legislative adjustments”⁴⁶

Second, in responding to a comment in Justice Stevens’ dissent, Justice Thomas dropped a short footnote about the plaintiffs’ burden of persuasion in these cases. Justice Stevens had criticized the majority for saying that the prisoner’s claim of increased punishment was “speculative” because Stevens believed that the amended California law would “inevitably delay the grant of parole in some cases.”⁴⁷ Stevens accused the *majority* of speculating about the accuracy of the board’s predictions, the suitability of an entire class of prisoners for parole in the future, and the length of time that would actually elapse between hearings (despite the board’s ability, in theory, to intercede early in exceptional cases). Justice Stevens further argued that “[t]o engage in such pure speculation while condemning respondent’s assertion of increased punishment as ‘speculative’ seems to me not only unpersuasive, but actually perverse.”⁴⁸

In responding to this accusation, Justice Thomas said that Stevens’ suggestion that the speculation “should run in the other direction” (to favor the prisoner) “effectively shifts to the State the burden of persuasion.”⁴⁹ “Although

46. *Morales*, 514 U.S. at 508.

47. *Id.* at 525. Stevens was concerned not so much with the prisoners’ delayed review in the early years. Rather, he feared that as time went by and prisoners approached the date when they would get serious board consideration, the less-favorable schedule would surely result in delayed parole for some people. In our view his concern was justified and prescient, given the holdings of later cases (as will be shown below).

48. *Id.* at 526.

49. *Id.* at 510, n 6 (internal quotation marks omitted).

we have held that a party asserting an ex post facto claim need not carry the burden of showing that he would have been sentenced to a lesser term [under the prior statutory scheme], . . . we have never suggested that the challenging party may escape the ultimate burden of establishing that the measure of punishment itself has changed.”⁵⁰

Well, yes and no. Up to and including *Morales*, the Court’s exclusive focus had been on whether a retroactive law created a sufficient risk that some prisoners might serve more time than they would have served but for the change. This was treated as a question of a law that the Court had decided without much input from the parties—and, if anything, the Court had given the benefit of the doubt to prisoners. As Justice Stevens noted, “In light of the importance that the Framers placed on the *Ex Post Facto* Clause, we have always enforced the prohibition against the retroactive enhancement scrupulously.”⁵¹

Put another way, although the Court did not approach these cases from a burden-of-proof or burden-of-persuasion perspective, based on the Court’s decisions for decades, in practice the prisoners’ burden had been feather-like. All they had to show was a sufficient risk that, either at sentencing *or* at parole, some prisoners might serve more time as a result of the change in law. That was so because relief under the Ex Post Facto Clause, as the Court unanimously held in *Weaver*, is based not on an individual’s right to less punishment, but on the *values* the Clause was designed to protect—namely, to ensure

50. *Id.* (citation omitted).

51. *Id.* at 516.

fair notice of the punishment at the time when the crime is committed, and to restrain “arbitrary and potentially vindictive legislation,” especially against unpopular groups.⁵²

Not long after *Morales* was decided in 1995, however, the circuit courts of appeal were already reading the decision broadly, perhaps reflecting the “get-tough-on-crime” mentality that was sweeping the country and that Justice Stevens had alluded to in his *Morales* dissent.

For example, in *Shabazz v. Gabry*,⁵³ the Sixth Circuit reviewed a facial attack on a law that reduced the frequency of in-person parole interviews for parolable lifers from the fourth year of incarceration and every two years thereafter to the tenth year and every five years thereafter. The change came on the heels of the election of a new governor and legislative majority who had run in part on a “law and order” platform.

The Michigan law was implemented with none of the protections provided in *Morales*. All 800+ qualified parolable lifers got blanket notices that their next scheduled review would be deferred by three years (to implement a

52. *Weaver*, 450 U.S. at 29.

53. 123 F.3d 909 (6th Cir. 1997). We focus on the Sixth Circuit here because it is our home circuit. We know its cases best, but we also think its cases are representative. (Full disclosure: the authors’ clinical law program was counsel of record in some of these cases.) Examples from other circuits include *Hamm v. Latessa*, 72 F.3d 947 (1st Cir. 1995) (statutory amendment excluding inmates with “from-and-after” sentences from parole board hearings did not violate the Ex Post Facto Clause); *Roller v. Gunn*, 107 F.3d 227 (4th Cir. 1997) (same, for amendment reducing frequency of parole reconsideration hearings); *Ellis v. Norris*, 232 F.3d 619 (8th Cir. 2000) (repeal of statute that gave prison officials discretion to award additional good-time credits did not violate the Ex Post Facto Clause).

new five-year review schedule), no matter how long the prisoners had served or how close the board's vote to deny parole had been at their last previous review. Thereafter, they would be reviewed for parole only every five years. The change did not include any individualized assessment of the prisoners. This was a classic "retroactive change" that before *Morales* unquestionably would have been struck down under the Ex Post Facto Clause.

But the Sixth Circuit held, "The *Morales* test requires a showing of sufficient risk of increased punishment, not merely 'some ambiguous sort of disadvantage' suffered by an inmate."⁵⁴ The court found that the plaintiffs had not proven that the postponement of review (in and of itself) *necessarily* produced a "sufficient risk of increasing the measure of punishment attached to the covered crimes."⁵⁵

54. *Id.* at 914 (internal citation and quotation marks omitted). The Sixth Circuit's phrasing drew on the Supreme Court's rejection in *Collins* of the *Kring* and *Thompson* line of cases, which held generally that a mere "disadvantage" was insufficient to support an ex post facto claim, thus restoring the exclusivity of the four *Calder* categories. *Id.* at 912. In doing so, however, the Sixth Circuit ignored the import of the Court's *parole* ex post facto cases—namely, that *Weaver* had survived *Collins* despite relying on the "disadvantaged" rationale, and that *Lynce* had been decided in the prisoners' favor (unanimously) *after Collins*. Both decisions were based not on a hypothetical or attenuated disadvantage, but on the Court having found that some prisoners might well wind up serving longer sentences—which is all the Court had ever required in the context of sentencing *or* parole.

55. *Id.* The court noted that "no reliable statistical analysis was available . . . because the statute had been in effect for too short a period." *Id.* at 914. The Sixth Circuit said that the district court had erred in relying on "anecdotal observations and personal speculation to conclude that the amendments *may* present sufficient risk of increased punishment." *Id.* at 914-15 (emphasis added). Based on the limited data available (from 1993 to 1995), the court of appeals found that the prisoners had failed to prove that the delay in parole hearings would inevitably lead to delayed paroles.

C. *Garner v. Jones: A Wrong Turn Initiated*

The Sixth Circuit's interpretation of *Morales* got a big boost from the Supreme Court in 2000 in *Garner v. Jones*.⁵⁶ In *Garner*, Georgia had reduced the frequency of parole review from every third year to every eighth year for lifers who had previously been denied parole. In finding an ex post facto violation, the Eleventh Circuit had distinguished the Georgia rule from the California law upheld in *Morales* because:

[T]he set of inmates affected by the retroactive change [namely all prisoners serving life sentences] is 'bound to be far more sizeable than the set [of murderers who commit a new murder] . . . at issue in *Morales*' The Georgia law sweeps within its coverage . . . 'many inmates who can expect at some point to be paroled,' and thus 'seems certain to ensure that some number of inmates will find the length of their incarceration extended in violation of the *Ex Post Facto* Clause'⁵⁷

56. 529 U.S. 244 (2000). For another case in the same term that was more amenable to an ex post facto claim and that reinvigorated the *Calder* analysis, see *Carmell v. Texas*, 529 U.S. 513 (2000). That case was decided a few months after *Garner*, and, in finding an ex post facto violation, it characterized *Collins* as defining the fourth category in *Calder*, instead of eliminating it, as some had suggested. *Carmell* overturned a conviction obtained on the testimony of a child victim alone, which was not allowed under the law in effect when the crime was committed. The Court said that the amendment was "unquestionably a 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,'" citing *Calder*'s fourth category of forbidden retroactive changes. *Carmell*, 529 U.S. at 530.

57. *Garner*, 529 U.S. at 249, citing *Jones v. Garner*, 164 F.3d 589, 594-95 (11th Cir. 1999).

The Supreme Court nevertheless reversed. It reiterated that retroactive parole changes fall within the ex post facto prohibition if they create “a sufficient risk of increasing the measure of punishment attached to the covered crimes.”⁵⁸ Although the *Garner* Court acknowledged that the requisite risk could be inherent in the text authorizing the change, the Court held that less frequent review *alone* did not make the risk self-evident, “and it ha[d] not otherwise been demonstrated on the record.”⁵⁹

One would think (as the Eleventh Circuit had found, and as Justice Souter argued in dissent in *Garner*)⁶⁰ that if nearly all parole review for a large class of prisoners is postponed from every three years to every eight years, then surely *some* prisoners would serve longer sentences than they would have served under the previous, more generous review schedule. This would be especially true the longer the new rule remained in place. Over time, more and more prisoners would approach the date when the board might well view them as good candidates for parole, yet most would still be reviewed only every eight years instead of every three years. Statistically, it seems all but certain

58. *Id.* at 250; see also Robert Renjel, *Casenote: Garner v. Jones: Restricting Prisoners’ Ex Post Facto Challenges to Changes in Parole Systems*, 52 MERCER L. REV. 761, 772-74 (2001) (discussing *Garner* and interpreting it to mean that the prisoner must show a “sufficient risk of increased punishment” and noting that the Court did not address the evidence required to make this showing).

59. *Id.* at 251.

60. *Id.* at 261.

that some prisoners would serve more time than they would have served but for the retroactive, deferred review.⁶¹

But in *Garner*, writing for the majority, Justice Kennedy played down the specifics of the California law that controlled the outcome in *Morales* and played up the language that counseled a hands-off approach to all parole-related discretionary decisions. Justice Kennedy also paid homage to the specter of “micromanagement” and said that “[s]tates must have due flexibility in formulating parole procedures and addressing problems associated with confinement and release.”⁶² The Court relied heavily on two important qualifications in the Georgia parole law. One gave the board discretion to shorten the eight-year period for worthy candidates, and the other permitted

61. Justice Souter emphasized this very point in his dissent. *Id.* at 260-61. (“Before the board changed its reconsideration Rule, a prisoner would receive a second consideration for parole by year 10, whereas now the second consideration must occur only by year 15; those who would receive a third consideration at year 13 will now have no certain consideration until year 23, and so on. . . . If a prisoner who would have been paroled on his fourth consideration in year 16 under the old Rule has to wait until his third consideration in year 23 under the new Rule, his punishment has been increased regardless of the average.”) We think he is right. In any other context it is hard to imagine that a similar blanket delay of discretionary decision making—where a decision is necessary in order to get the sought-after benefit—would be *assumed* to have a benign effect.

62. *Id.* at 252. Avoiding micromanagement and granting flexibility are appropriate where retroactive changes create little or no risk of longer sentences. But if the purpose of the Ex Post Facto Clause is to prevent states from increasing after the fact the amount of time that prisoners serve, then the focus should be not on the level of intrusion exercised by the courts—which might well be a valid concern in prison *conditions* cases—but rather on the effect of the change in the law. *See* Part IV, below. As the Court itself noted, “The presence of discretion does not displace the protections of the *Ex Post Facto* Clause.” *Id.* at 253.

expedited review if new information warranted it. (There was no record of whether the board in fact did either.)

Garner also went well beyond *Morales* with regard to the prisoner's burden. Without citation, the *Garner* Court said, "In the case before us, respondent must show that as applied to his own sentence the law created a significant risk of increasing his punishment."⁶³ To the contrary, as noted above, in order to make out an ex post facto violation in the past, the Court had only required a finding that some prisoners might serve longer sentences due to the retroactive application of the new or changed law.⁶⁴

In *Garner* the Court was also unclear about whether proof as to others would suffice. It said that the board's "policy statements, along with [its] actual practices, provide important instruction as to how the Board interprets its enabling statute and regulations, and therefore whether, as a matter of fact, the amendment . . . created a significant risk."⁶⁵ Accordingly, "[w]hen the rule does not by its own terms show a significant risk, the [inmate] must demonstrate, by evidence drawn from the rule's practical implementation by the agency charged with exercising discretion, that its retroactive application will

63. *Id.* at 255.

64. The one possible exception was the case of criminal appeals, *see Dobbert*, 432 U.S. 282, 300-01 (holding that there can be no ex post facto violation where the change in law "had no effect on the defendant in the proceedings of which he complains."). But *Garner* was a Section 1983 action, which challenged the retroactive parole laws and policies directly. It is hard to see why it would be viewed as an "as applied" challenge as opposed to a facial challenge, given the legal standard used by the Court in *Weaver*, *Lynce*, and *Morales*.

65. *Garner*, 529 U.S. 244, 256 (2000).

result in a longer period of incarceration than under the earlier rule.”⁶⁶ The Court remanded the case to give the prisoner the chance to make a factual record.⁶⁷

III.

POST-GARNER: WRONG TURN COMPLETED

A. *Garner’s Reading by the Courts of Appeal*

A number of circuit cases show how far the pendulum swung after *Garner*. In *Dyer v. Bowlen*,⁶⁸ a state parole board denied parole based on the new (stricter) substantive standard that was in effect at the time of the prisoner’s parole hearing rather than on the old (more lenient) standard that was in effect when the prisoner had committed his crimes more than twenty years before.⁶⁹ The prisoner was denied relief in the state courts, and he then filed a federal habeas petition, which he lost. Again, one would think that this would be an easy case for an ex post facto violation because the *substantive standard for parole* had changed to the prisoner’s disadvantage. But, citing *Garner*, the

66. *Id.* at 255 (*emphasis added*). In this sentence, the Court conspicuously omitted *for whom* the longer period of incarceration must be demonstrated—the prisoner bringing the claim or any prisoners subject to the same regime.

67. *Id.* at 256-57.

68. 465 F.3d 280 (6th Cir. 2006).

69. The two changes highlighted by the appellate court were that the new standard placed an importance on the seriousness of the offense unrelated to the offender’s rehabilitative efforts, which had not been part of the earlier standard, and that the new standard provided that if conditions were met, the board “may” grant parole, whereas the earlier standard had stated that the board “shall” grant parole. *Id.* at 282-83.

Sixth Circuit held that the only way to be sure if the change amounted to an ex post facto violation was to vacate and remand the case for additional fact-finding.⁷⁰ The court said:

Intuitively, the retroactive application of new parole statutes . . . might effectuate a sufficient risk of increased punishment, but the ultimate result depends upon how the parole board actually exercises its discretion. . . . [T]he Supreme Court has made clear that in order for us to conduct the necessary ex post facto inquiry, we must determine whether [the prisoner] has produced specific evidence of a sufficient risk of increased punishment.⁷¹

The court conceded that under the *Garner* standard the plaintiff need not show that he “*actually received* a more serious punishment,” but only that he suffered the requisite risk.⁷²

A third illustrative Sixth Circuit case is *Foster v. Booker*.⁷³ In *Foster*, the plaintiffs were parolable lifers who historically had been paroled at roughly the

70. A dissenting judge in *Dyer* agreed that the case should be vacated but said that remand for fact-finding was unnecessary. In the dissent’s view, the change violated the Ex Post Facto Clause on its face. The dissent would have remanded for the board to “make its determination under substantive criteria no more onerous than those applicable at the time of the . . . crime.” *Id.* at 295.

71. *Id.* at 286.

72. *Id.* at 288; cf. *Richardson v. Penn. Bd. of Probation and Parole*, 423 F.3d 282, 292 (3rd Cir. 2005) (holding that an ex post facto violation was not established because the inmate failed to prove that the new law created a significant risk of increasing his punishment).

73. 595 F.3d 353 (6th Cir. 2010). Note that in the trial court, the pleadings were titled *Foster-Bey v. Rubitschun*, but Westlaw reported the district court’s decision as *Bey v. Rubitschun*, 2007 WL

same time as prisoners who had committed similar crimes but were given long indeterminate sentences.⁷⁴ As noted above,⁷⁵ after Michigan elected a conservative new governor and legislature, the new administration amended the parole laws to abolish the existing parole board and to give the governor authority to appoint a new board.⁷⁶ The new board quickly adopted a “life

7705668 (E.D. Mich. Oct. 23, 2007), which reverted to *Foster v. Booker* on appeal, by which time a new “official capacity” state defendant had been substituted into the case.

74. *Id.* at 360. The parole board sought parity because in Michigan most serious felonies are punishable by “life or any term of years.” Mich. Comp. L. § 791.234. Due to an anomaly in the state’s parole law and practice, parole eligibility could actually be attained *sooner* under the lifer law than on a long indeterminate sentence. As a result, for decades many defendants requested, and many judges imposed, a life sentence in order to give well-behaved prisoners the chance for an *earlier* parole. The board therefore viewed lifers and long indeterminate prisoners alike. See *Bey v. Rubitschun*, No. 05-71318, 2007 WL 7705668, at *4, *13-14 (E.D. Mich. Oct. 23, 2007).

75. See the discussion of *Shabazz v. Gabry*, 123 F.3d 909 (6th Cir. 1997), *supra* at 126-27 and note ___.

76. *Foster*, 595 F.3d at 363. The plaintiffs in *Foster* challenged the *cumulative* effect of a series of statutory and policy changes that the plaintiffs said created the requisite risk of delayed release as applied retroactively to the class. The changes included not just delaying parole review for lifers (which was challenged in *Shabazz*) but also included eliminating mandatory in-person interviews after the first review and substituting paper (file) reviews; increasing the size of the parole board from seven to ten members (but still requiring a majority vote for lifer paroles); taking the parole board out of civil service and thus eliminating board tenure and substituting four-year terms; firing the existing, non-partisan board and replacing it with the governor’s political appointees (who came mostly from law enforcement and prosecutors’ offices); requiring that a majority of the board members have no past connection to the department of corrections (when in the past nearly all board members had come from the DOC); and eliminating prisoners’ right to appeal an adverse parole decision to court while granting such a right to the prosecutor and the victim. See *Bey v. Rubitschun*, 2007 WL 7705668, at *4, (district court summary of the statutory changes). As to delayed parole review, the district court

means life” policy (even though the ostensible substantive standard for parole had not changed), with the result that release rates for parolable lifers—which had already declined sharply due to parole-board resource issues and a mushrooming prison population—fell to microscopic levels compared to long-term historical averages.⁷⁷ The board also stopped treating parolable lifers and long indeterminate prisoners the same in making its parole decisions.⁷⁸

The Sixth Circuit nevertheless reversed the district court’s grant of summary judgment in the prisoners’ favor. The court held that any risk of more onerous punishment could be attributed to the changes in the board’s exercise of its discretion. Citing *Garner*, the court stated, “[T]he most that can be said here is that, based on experience, the new Board’s discretion was informed and then exercised in a way that made it more difficult for plaintiffs to secure release on parole.”⁷⁹ Ultimately, the *Foster* court required that in order for prisoner-plaintiffs to prevail, they must prove that any adverse changes could

found that, in practice, the board almost never reduced the longer period of review. Some board members were unaware they could even do so. *Id.* at *17-18.

77. *Id.* at 19-23 (district court’s factual findings).

78. *Id.* at 11 (“Representatives of the Parole Board from the years leading up to 1992 consistently testified that nonmandatory lifers were treated the same as prisoners serving long indeterminate sentences . . . for purposes of parole, whereas now the board aligns non-mandatory lifers with mandatory lifers.”); *id.* at 13-14.

79. *Foster v. Booker*, 595 F.3d. at 364, citing *Garner*, 529 U.S. at 253. But as noted above, *Garner* also held that the mere fact that a board decision is discretionary “does not displace the protections of the *Ex Post Facto* Clause,” because there is always the “danger that legislatures might disfavor certain persons after the fact . . . even in the parole context.” 529 U.S. at 253.

not be accounted for by how the board exercises its discretion—a standard that is nearly impossible to meet in any discretionary setting.⁸⁰

An even more extreme example is the Fourth Circuit’s holding in *Burnette v. Fahey*.⁸¹ In *Burnette*, Virginia had ended indeterminate sentencing and parole (both prospectively) in 1995. From that date forward, the parole board only dealt with prisoners who had been sentenced under the prior parole regime. But after 1995 the board also changed its internal parole policies and practices. It ceased using risk-assessment instruments; it stopped interviewing prisoners and instead farmed out parole review to non-board parole examiners;

80. *Foster* contrasts sharply with *Mickens-Thomas v. Vaughn*, 321 F.3d 374 (3rd Cir. 2003), one of the rare post-*Garner* cases in which the prisoner prevailed. In *Mickens-Thomas*, the Pennsylvania parole board had changed its parole criteria (based on a statutory amendment) to make “concern for public safety” the overriding factor for parole. *Id.* at 380. The predictable result was that violent offenders got far less sympathetic review, and the number of paroles plummeted. *Id.* The Third Circuit conducted a thorough review of all the evidence, including statements by the board before and after the change, and statistical data comparing release rates before and after the change.

The court concluded that the board “mistakenly construed [the statutory change] to signify a substantive change in its parole function.” *Id.* at 391. The court found that the change—as applied retroactively in a habeas case—violated the Ex Post Facto Clause, and it remanded to the board with instructions to reconsider the prisoner’s case under the former standard. The prisoner had served over forty years, and his original mandatory life sentence had been commuted by the governor (based on the recommendation of an earlier board). When on remand the board again denied parole, the Third Circuit found that the board had failed to comply with the court’s mandate and instead had again used the very factor that violated the Ex Post Facto Clause. The court issued a writ of *habeas corpus* granting the prisoner his unconditional release. *Mickens-Thomas v. Vaughn*, 355 F.3d 294 (3rd Cir. 2004).

81. 687 F.3d 171 (4th Cir. 2012).

and it mostly stopped meeting as a board and instead voted electronically.⁸² Before the changes, the board had relied on fourteen factors listed in its policy manual in making the parole decisions. After the changes, the board relied on “the serious nature and circumstances of the crime”—something the prisoner cannot change no matter how long the prisoner serves—to deny parole in 45 percent of the cases (95 percent in geriatric cases),⁸³ even when the other factors in the board’s manual or in the statute favored release. Parole rates for violent felonies dropped precipitously—initially from over 40 percent to below 20 percent, and then (from 2002 to 2008) to around 3 percent.⁸⁴ In other words, these prisoners were some *thirteen or fourteen times* less likely to be granted parole than before the changes. Prisoners with violent felonies typically served about 38 percent of their sentence before the changes, but afterward, of the much smaller group who were paroled, many had served 85 percent of their sentence.⁸⁵

On these facts, the district court granted the state’s motion to dismiss based on the pleadings alone, without discovery. The Fourth Circuit affirmed. Citing the Sixth Circuit’s decision in *Foster*, the Fourth Circuit said that the prisoners had failed to prove that the parole rates could not have occurred just by changes in the way the board exercised its discretion:

[T]he de facto abolition of discretionary parole . . . is at the crux of the Inmates’ complaint. . . . [I]t is implausible based on the facts alleged

82. *Id.* at 176.

83. *Id.*

84. *Id.* at 176-77.

85. *Id.*

that the Board has adopted any such policy. The factual allegations suggest that the Board has become harsher with respect to violent offenses, but they do not indicate that the Board has implemented a de facto prohibition of parole for persons convicted of [violent] offenses. In the absence of such facts, we cannot reasonably infer that the Board is failing to exercise its discretion as required by state law.⁸⁶

This is an exceedingly odd statement of an ex post facto claim. Prisoners *do not* have to prove that the parole board has “de facto abolished discretionary parole,” but only have to demonstrate a “sufficient risk” of increased punishment.⁸⁷ Compared to cases like *Weaver* and *Lynce*—where the plaintiffs prevailed on their ex post facto claims because some prisoners might plausibly spend more time in prison than before the changes took effect—the claim in the Virginia case seems like the easiest of calls (in the prisoners’ favor). The plaintiffs showed that their chances for parole were reduced by around 93 percent (from a 40+ percent parole rate to a 3 percent parole rate in the years before and after the 1995 changes, respectively).⁸⁸ As *Garner* made clear, the issue in ex post facto cases is not *whether* the board is exercising discretion, but *how* it is exercising its discretion, in the real world, on the ground.⁸⁹ *Burnette* is especially striking because the prisoner-plaintiffs were never given the chance to conduct discovery or demonstrate how the board was exercising its discretion.

86. *Id.* at 185, citing *Garner*, 529 U.S. 244, 256 (2000).

87. *Burnette*, 687 F.3d at 185 (4th Cir. 2012); *Garner v. Jones*, 529 U.S. 244, 250 (2000).

88. *See* Burnett, at 176-77.

89. *Garner*, 529 U.S. at 256.

B. Coda on the Ex Post Facto Clause at Sentencing

Peugh v. U.S., a 2013 front-end sentencing case that relies on *Weaver*, *Morales*, and *Garner*, deserves special attention.⁹⁰ In *Peugh*, the US Supreme Court had to decide if changes to the federal sentencing guidelines violated the Ex Post Facto Clause.⁹¹ When Mr. Peugh committed his crime, his guideline range was thirty to thirty-seven months.⁹² By the time he was sentenced, however, changes in the guideline scoring system had raised his range to seventy to eighty-seven months.⁹³ He argued that the change was a textbook ex post facto violation. The government argued that the guidelines were not “laws” covered by the Ex Post Facto Clause,⁹⁴ because after *U.S. v. Booker*⁹⁵

90. 569 U.S. 530, 133 S. Ct. 2072 (2013); see also *Morales*, 514 U.S. 499, 508 (1995) (suggesting parallel application of the Ex Post Facto Clause to sentencing and parole when the Court stated that it was concerned “with the micromanagement of an endless array of legislative adjustments to parole and sentencing procedures”).

91. *Id.*; see also Andrew C. Adams, *One-Book, Two Sentences: Ex Post Facto Considerations of the One-Book Rule after United States v. Kumar*, 39 AM. J. CRIM. L. 231, 245 (2012) (describing circuit split in application of U.S. Sentencing Guidelines at that time).

92. *Peugh*, 133 S. Ct. at 2078.

93. *Id.* at 2079.

94. This argument resurfaced a debate as to whether the Ex Post Facto Clause applies only to statutes (“any ex post facto . . . Law”) or also applies to other regulations, rules, or policies that might or might not be binding upon the parole board or other state authorities. Before *Garner*, most courts had extended the Ex Post Facto Clause to formal rules and regulations that have the force and effect of law, and that are binding on the state officials who administer them. See, e.g., *Barna v. Travis*, 239 F.3d 169 (2nd Cir. 2001) (holding that the Ex Post Facto Clause does not apply to guidelines that do not create mandatory rules for release but are promulgated simply to guide the parole board in the exercise of its discretion); *Himes v. Thompson*, 336 F.3d 848, 854 (9th Cir. 2003) (holding that more

the guidelines were only advisory: they could not “control” the defendant’s sentence, which remained at the discretion of the trial court. The district court and the Seventh Circuit agreed and found no constitutional violation.

The Supreme Court reversed (5-4), noting that:

Each of the parties can point to prior decisions of this Court that lend support to its view. On the one hand, we have never accepted the proposition that a law must increase the maximum sentence for which a defendant is eligible in order to violate the *Ex Post Facto* Clause. See, e.g., *Lindsey v. Washington* (1937). Moreover, the fact that the sentencing authority exercises some measure of discretion will also not defeat an *ex post facto* claim. See *Garner v. Jones* (2000). On the other

onerous parole regulation violated the Ex Post Facto Clause and that the term “laws” includes “every form in which the legislative power . . . is exerted,” including ‘a regulation or order’”) (internal citation omitted). After *Garner*, some courts extended the Ex Post Facto Clause to informal rules or practices that influence or control decision making in practice. See, e.g., *Michael v. Ghee*, 498 F.3d 372, 383 (6th Cir. 2007) (noting that, for ex post facto purposes, the issue is not whether the parole guideline is a law but whether the challenged “guidelines present a significant risk of increasing the plaintiff’s amount of time actually served”); *Fletcher v. Dist. of Columbia*, 391 F.3d 251 (D.C. Cir. 2004) (noting that the Supreme Court in *Garner* has “foreclosed our categorical distinction between a measure with the force of law and ‘guidelines [that] are merely policy statements,’” holding that either can be the source of an ex post facto violation) (internal citation omitted); *Mickens-Thomas*, 355 F.3d at 384 (finding that parole policies can be the source of an ex post facto violation). Both *Garner* and *Peugh* lean heavily toward the more liberal view, though that view may have its limits. See, e.g., *Peugh*, 133 S. Ct. at 2091 (Thomas, J., dissenting) (“It is difficult to see how an advisory Guideline, designed to lead courts to impose sentences more in line with fixed statutory objectives, could ever constitute an *ex post facto* violation.”).

hand, we have made it clear that mere speculation or conjecture that a change in law will retrospectively increase the punishment for a crime will not suffice to establish a violation of the *Ex Post Facto* Clause. See *California Dept. of Corrections v. Morales* (1995). The touchstone of this Court’s inquiry is whether a given change in law presents a “sufficient risk of increasing the measure of punishment attached to the covered crimes.” *Garner*, quoting *Morales*. The question when a change in law creates such a risk is “a matter of degree”; the test cannot be reduced to a “single formula.”⁹⁶

The Court held that because “[t]he federal system adopts procedural measures intended to make the [g]uidelines the lodestone of sentencing . . . a retrospective increase in the [g]uidelines range . . . creates a sufficient risk of a higher sentence to constitute an *ex post facto* violation.”⁹⁷

The *Peugh* majority obviously viewed its opinion as a straightforward application of the general *ex post facto* standard set forth in *Lindsey*, *Morales*, and *Garner*. But unlike in the back-end parole cases post-*Garner*, to prevail Mr. Peugh had to prove only that the new procedures and scoring rules created a “sufficient risk” of a higher sentence.⁹⁸ In short, while *Peugh* strongly supports our view that there is a unitary *ex post facto* standard that applies to all cases in theory, *Peugh* also highlights how *sentencing* cases and *parole* cases are treated differently in reality. In *Peugh*, the judge’s discretion in apply-

96. *Peugh*, 133 S. Ct. at 2081-82 (internal citations omitted or shortened).

97. *Id.* at 2084.

98. The proof was easy in his case because he was in fact sentenced to the top of the new range. *Id.* at 2079.

ing the guidelines was not determinative, in sharp contrast to the *Garner*-based cases, like *Foster* and *Burnette*, where the board's discretion was fatal to the plaintiffs' claim. If the Supreme Court applied the Ex Post Facto Clause to parole in the same way that it applied the clause to sentencing (in *Peugh*), then it is hard to see how *Garner* (and consequently cases like *Foster* and *Burnette*) would not come out the other way.

To sum up, over the last twenty-plus years—from *Morales* in 1995 to today—the legal standard to be applied in ex post facto *parole* cases turned 180 degrees from what it had been for the fifty-plus years before *Morales*. It went from a regime in which any retroactive change that *might* harm prisoners' opportunity for parole was treated as close to a per se ex post facto violation, to a regime in which almost no retroactive change in a parole statute, regulation, or policy can ever rise to the level of an ex post facto violation. The burden of persuasion also switched from a near presumption that any retroactive change that *might* delay parole consideration violates the Ex Post Facto Clause, to a near presumption that anything having to do with parole is effectively unchallengeable because it involves the exercise of discretion. Under current ex post facto doctrine, in practice the prisoner must show that other prisoners' (or even the individual plaintiff's) delayed release is all but certain, *and* must prove that changes in *how* the board exercises its discretion could not account for the delayed consideration or release.⁹⁹

99. For example, in *Foster* the prisoners produced evidence showing (1) that the changes were proposed and implemented to make current violent felons serve longer prison terms, (2) that in practice parolable lifers were being evaluated under a harsher substantive standard than before, and (3) that parolable lifers were released at record low levels in the decade after the change. *Bey*, 2007 WL

IV.

IDENTIFYING THE WRONG TURN AND GETTING BACK ON THE RIGHT TRACK

In this section, we diagnose how the wrong turn occurred, and we propose a fix that we think is consistent not just with Supreme Court case law, but also with the history and purpose of the Ex Post Facto Clause, and with the practicalities of litigation brought by prisoner-plaintiffs who lack the resources of other litigants.

Several errors have given rise to the wrong turn. First, courts have glossed over the fact that some ex post facto claims are easy or obvious violations on the face of the changed statute, regulation, rule, or policy, or in its operation, while other ex post facto claims require additional proofs to determine if the claim has merit. Second, courts (in applying *Morales* and *Garner*) have misanalyzed the role and relevance of “discretionary” decision making. Third, based on the sparse language of *Garner*, lower courts have imposed burdens in ex post facto cases that are inconsistent with the purpose of the clause, are contrary to the Court’s own analysis in *Weaver*, *Morales*, and *Lynce*, as well as in *Peugh*, and are impossible to meet given the realities facing prisoner-plaintiffs in the courts.

A. *Distinguishing Two Categories of Ex Post Facto Claims*

Having already fingered *Garner* as the primary source of the wrong turn on the Ex Post Facto Clause, we think a closer look at *Garner* is warranted. First, we note that *Garner* left one crucial aspect of previous ex post facto law

7705668, at *10-15, *19-23 (factual findings of the district court). But that still wasn’t enough for the prisoners to prevail in the Sixth Circuit.

undisturbed. Before *Garner*, the Court had typically treated ex post facto claims as presenting questions of law that could be resolved by looking at the language or the operational effect of the statute, regulation, rule, or policy that was the source of the alleged change. *Weaver* had made the clearest statement of this approach:

Whether a retrospective state criminal statute ameliorates or worsens conditions imposed by its predecessor is a federal question. The inquiry looks to the challenged provision, and not to any special circumstances that may mitigate its effect on the particular individual.¹⁰⁰

Garner did not change or reject this analysis. In fact, *Garner*'s language reinforces that a category of ex post facto claims exists where the courts should need to look only to the law, regulation, rule, or policy that is being challenged in order to determine whether, as a matter of law, there is a "sufficient risk of increasing the measure of punishment attached to the covered crimes."¹⁰¹ We agree that where the risk of a longer sentence is apparent, or is predictable with reasonable certainty, then the plaintiff should win under the Ex Post Facto Clause as a matter of law. We will refer to this first group as "per se" ex post facto claims because nothing more is required for the trial court to determine that the risk of increased punishment is sufficiently high.¹⁰²

100. *Weaver*, 450 U.S. at 33 (citations omitted).

101. *Garner*, 529 U.S. at 250.

102. The same would be true for a losing case, where it is facially obvious or easily predictable that the alleged risk is too low, and the plaintiff should *lose* as a matter of law.

As to cases where the risk is not apparent or predictable from the text or operation of the statute, regulation, rule, or policy, *Garner* says that

the [plaintiff must] . . . demonstrate, by evidence drawn from the rule’s practical implementation by the agency charged with exercising discretion, that its retroactive application will result in a longer period of incarceration than under the earlier rule.¹⁰³

Thus, while recognizing the familiar category of historical amendments or changes of the sort presented in *Lindsey*, *Weaver*, *Morales*, and *Lynce*—all classic “per se” cases—*Garner* also implicitly admits of a second category of cases where the effect of the changes cannot be readily discerned or predicted by the text or overt operation of the changed law or policy. In these cases, factual development is needed to determine whether or not there is an ex post facto violation.¹⁰⁴ We will refer to this second group as “possible” ex post facto claims.

Though we see *Garner* as allowing for both kinds of ex post facto cases—“per se” and “possible” cases—we disagree, as noted above, with the Court’s holding that the facts of *Garner* fall into what we are calling the second “possible” group. Let’s look again at the change: review of potential parolees was deferred from every three years to every eight years; the change covered all parolable lifers who had been denied parole at least once before; and the

103. *Id.* at 255.

¹⁰⁴ *Id.* (“When the rule does not by its own terms show a significant risk, the respondent must demonstrate, by evidence drawn from the rule’s practical implementation by the agency charged with exercising discretion, that its retroactive application will result in a longer period of incarceration than under the earlier rule.”)

new review schedule had no time limit (meaning that prisoners whose likelihood of parole increased with the passing years would still be reviewed only every eight years forever into the future). The change was applied wholesale against a large class of prisoners and lacked the extra procedural protections guaranteed by the California statute in *Morales* (which included not just an annual paper review, but also a particularized finding that the two-year delay *would not harm* the individual prisoner). As in the Sixth Circuit’s *Foster* case, the delay was not tied to how close the board’s vote had been in the previous review, or how much time the prisoner had served.¹⁰⁵ We think that when legislators or prison authorities change the normative rules of parole sufficiently to result in the likely delayed release of some prisoners over time, *that* alone should be sufficient to meet the traditional legal standard under the Ex Post Facto Clause as a matter of law, in line with *Weaver*, *Morales*, and *Lynce*. We view *Garner* as squarely such a “per se” case.

By implicitly holding that deferral of parole review for five years for all lifers was *not* a “per se” case, the Court blurred the bright line that had been set in *Weaver*, *Lynce*, and *Morales*. As a result, even core “per se” cases (like *Dyer v. Bowlen*, where the parole board had applied a new harsher *substantive* parole standard retroactively, yet the Sixth Circuit still thought it had to “get more facts” and remanded the case for discovery) are being viewed by the lower courts as “possible” cases, contrary to *Weaver*, *Lynce*, and *Morales* (and contrary to the rationale of *Peugh*). Yet in each of those four cases the same

105. As noted in the *Foster* case, the delayed review became so routine over time that some board members were unaware that the review period could be shortened. *See supra* notes 73 through 79 and accompanying text.

argument could have been made; namely, that you cannot know *for sure* what the effect will be until you see it played out. The takeaway of *Weaver*, *Lynce*, *Morales*, and *Peugh*, however, is that where the risk of increased punishment is sufficiently clear on the face of the change, that is enough to make out an ex post facto claim, and nothing more is required.

Moreover, to do otherwise—as *Garner* (perhaps inadvertently) has encouraged the lower courts to do—thwarts the purpose of the Ex Post Facto Clause. The Framers viewed the Clause as a bulwark against vindictive legislatures¹⁰⁶ and ex post facto laws as “contrary to the first principles of the social compact.”¹⁰⁷ From the early nineteenth century, the Supreme Court recognized that the Ex Post Facto Clause protects people from legislatures (or policy makers, in modern parlance) inflamed by the “feelings of the moment” or subject to “sudden and strong passions.”¹⁰⁸ Indeed, in *Weaver*, the Court (unanimously) noted that the clause not only ensures notice to the public of crimes and punishments, but also serves to protect disfavored groups from such vindictive changes, and promotes separation of powers by making legislatures the authors of prospective criminal laws and courts the enforcers of those laws after they are passed.¹⁰⁹

106. See Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 AM. CRIM. L. REV. 1261, 1267 (1998).

107. THE FEDERALIST NO. 44, at 287 (James Madison); see also THE FEDERALIST NO. 48 (Alexander Hamilton).

108. *Fletcher v. Peck*, 10 U.S. 87, 138 (Marshall, C.J.).

109. *Weaver*, 450 U.S. at 28-29. See also Evan C. Zoldan, *Reviving Legislative Generality*, 98 MARQ. L. REV. 624, 654 (2014) (“When a legislature enacts retroactive legislation, it acts with the knowledge of conduct that has already occurred. As a result, ...retroactive legislation permits the

B. *The Red Herring of Discretionary Decision Making*

In *Garner*, the Court deferred to the parole board in part because the decision to extend the review interval had been made by the board itself, and therefore, like the decisions of prison officials in conditions cases, could be characterized as “discretionary.”¹¹⁰ What is striking about *Garner* is that it reads not like an ex post facto case at all, but rather like a prison conditions case of the same period. In the years before the millennium, the Court had decided several prison cases that were designed in no small part to get courts out of the business of supervising prisons, and to reduce the federal courts’ burgeoning docket of prisoners’ rights litigation.¹¹¹ These cases emphasized the broad *discretion* that prison authorities needed (in order to run their institutions safely), and at bottom said that interference by federal courts was appropriate

legislature to punish . . . an individual without naming him specifically but with knowledge of whom the legislation will . . . harm.”)

110. *Garner*, 529 U.S. at 259.

111. See e.g., *Sandin v. Conner*, 515 U.S. 472 (1995) (holding that discipline in segregated confinement did not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest). The *Sandin* Court said that “the involvement of federal courts in the day-to-day management of prisons often squander[s] judicial resources with little offsetting benefit to anyone. In so doing, it has run counter to the view expressed in several of our cases that federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment.” *Id.* at 482-83, citing *Wolff v. McDonald*, 418 U.S. 539, at 561–563; *Hewitt v. Helms*, 459 U.S. 460, at 470–471; *Jones v. North Carolina Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 125 (1977). The Court said, “Such flexibility is especially warranted in the fine-tuning of the ordinary incidents of prison life” *Sandin*, 515 U.S. at 483 (1995). Congress had expressed similar sentiments in passing the Prison Litigation Reform Act, 42 U.S.C. § 1997 *et. seq.* (1996) (making it much harder for prisoners to file, or to win, civil rights cases in federal courts).

only in exceptional circumstances. As a result, prisoners could, for example, be transferred from one prison to another,¹¹² or they could be moved from general population into a disciplinary setting,¹¹³ and prison libraries could be maintained and modified,¹¹⁴ without undue judicial interference. *Garner* was decided at a time when prison authorities got huge deference from the Court in prison *conditions* cases. We think this blurred the lines, and obscured the key jurisprudential differences, between cases brought under the Due Process Clause (alleging deprivation of a constitutional liberty or property interest) or the Eighth Amendment (alleging cruel and unusual punishment), and cases brought under the Ex Post Facto Clause (alleging a prohibited retroactive increase in punishment).

Despite the *Garner* Court's importation of the term "discretionary," the Court did little to explain what the parole board's exercise of discretion regarding parole vis-à-vis the Ex Post Facto Clause has to do with prison officials' exercise of discretion regarding prison management or conditions vis-à-vis the Due Process Clause or the Eighth Amendment.¹¹⁵ We think the

112. *Meachum v. Fano*, 427 U.S. 215 (1976).

113. *Sandin v. Conner*, 515 U.S. 472 (1995).

114. *Lewis v. Casey*, 518 U.S. 343 (1996).

115. If legislators or executive officials were to take steps—even "discretionary" steps—to increase prisoners' punishment after the fact (for example, by making prisoners serve more time, or to require hard labor where none had been required before), we think the Ex Post Facto Clause would apply to such changes. Conditions cases, where the discretion involves things like moving prisoners from one facility to another or changing out the volumes in the prison law library, bear only the most attenuated connection to *punishment*, as *Morales* (correctly) makes clear. *Morales*, 514 U.S. at 508-11. But just because we defer to prison officials on some issues (that get marginal protection under a

answer is very little, and that the Court misapplied any such assumed or subconscious analogy.¹¹⁶

The Ex Post Facto Clause protects against changes in law or policy (typically aimed at *classes* of prisoners and applied retrospectively to all such individuals) that increase punishment, and it should apply regardless of whether prison officials or parole boards are making “discretionary” policy decisions or are carrying out the mandatory will of the legislature or the executive.¹¹⁷ The ability of the parole board to use its discretion to change its

different part of the Constitution) does not mean that we should defer to prison officials or parole boards if the effect of their actions is to increase sentences or to impose other forms of *punishment* retroactively in violation of the Ex Post Facto Clause.

116. In his concurrence in *Garner*, Justice Scalia made it seem like almost any discretionary decision of the board would be beyond judicial review—though it isn’t clear if that is because in his view discretionary decisions cannot ever come under the Ex Post Facto Clause because they are not laws, or because they are discretionary. *Compare Garner*, 529 U.S. at 257-58 with *id.* at 259 (Scalia, J., concurring).

117. *Foster v. Booker* presented an interesting issue in this regard. Over time, statutory changes in sentencing laws had resulted in much longer felony sentences. The result was a mushrooming prison population without a concomitant increase in the size of the parole board or its resources. In response, the parole board made a “discretionary” decision to focus on short-term prisoners who could be released quickly and easily, freeing up badly needed bed space. Consequently, long-term prisoners, and especially parolable lifers, did not get reviewed on the schedule required by statute. *See Bey v. Rubitschun*, No. 05-71318, WL 7705668, *21-23 (E.D. Mich. Oct. 23, 2007). Although prisoners had sued (and had won declaratory and injunctive relief) under the Due Process Clause to enforce the statutorily mandated parole review schedule, *see Swearington v. Johnson*, 709 F.2d 1509 (6th Cir. 1983), we think the Ex Post Facto Clause is the better claim. The parole board’s policy favored one group of prisoners over another, with the result that people convicted of more serious crimes wound up serving more time than they would have served had their review not been delayed. As the then chair of

administrative rules is distinct from its ability, once it is applying those rules, to make the discretionary decision whether to grant or deny parole in a given case. It is in the latter kind of decision-making that discretion typically gets the most deference from reviewing courts; yet even *there* courts should step in if the board is violating the Ex Post Facto Clause in a specific case.¹¹⁸ If we are wrong, and if “discretion” in the broadest sense gets the board a free pass, then it is hard to see why the Ex Post Facto Clause would prevent a board, for example, from deciding “in its discretion” not to release prisoners until they have served, say, 80 percent of their sentences, or for that matter to eliminate parole altogether, even if those changes overturn decades of consistent policy to the contrary.¹¹⁹ Indeed, we reiterate that *Garner* itself acknowledges that

the board noted, “It is fair to say that the board was overwhelmed by the numbers at some point, and that we had to put our energy and resources into interviewing prisoners who were most likely to be paroled. Lifer interviews got pushed back, and even when we did lifer interviews, it was more to comply with the law, and not with an eye to moving anyone forward to parole, because we were so far behind in our work. In the best of circumstances we kept just marginally abreast of the regular parole cases, and no doubt . . . the lifers suffered for it.” See Plaintiffs’ Brief in Support of Cross-Motion for Summary Judgment at 38, *Foster-Bey v. Rubitschun*, No. 05-cv-71318 (E.D. Mich. Nov. 1, 2006), ECF No. 114. And of course in *Foster-Bey* itself the district court found that the parole board did not just gradually get more conservative over time, but rather the Governor signed legislation that eliminated the existing parole board and created a new board for the purpose of making violent prisoners serve longer sentences. *Bey v. Rubitschun*, 2008 WL 7020690, at *10-12, *reversed*, *Foster v. Booker*, 595 F.3d at 353. We think that is the very definition of an ex post facto violation.

118. See *Mickens-Thomas (I)* and *Mickens-Thomas (II)*, discussed *supra* at note 80.

119. The elimination of parole is the paradigmatic example. The entire criminal justice system is built upon the parole regime in place when the defendant commits the crime. The prosecutor relies on it in choosing what to charge and what to offer by way of plea bargain; the defense counsel relies

“[t]he presence of discretion does not displace the protections of the *Ex Post Facto* Clause.”¹²⁰

Peugh also undercuts the *Garner* Court’s and other courts’ reliance on “discretion.” In *Peugh*, the government argued that the Ex Post Facto Clause did not apply because judges retained *discretion* in sentencing and were not

on it in counseling the defendant whether to plead guilty or go to trial; the defendant relies on it in making that choice; the probation department relies on it in recommending a sentence; and the judge relies on it imposing the sentence. If, after the fact, the board can simply (in its discretion) stop granting paroles, so that all prisoners must serve the maximum term instead of having a fair chance at parole upon serving the minimum, then the Ex Post Facto Clause is a worthless shell. We think the historical legal standard is spot on: if the change of law that triggers or governs the board’s altered exercise of its discretion creates a sufficient risk that some prisoners will serve more time than they would have served in the past absent the change, then the Ex Post Facto Clause should prohibit the change, period.

120. *Garner*, 529 U.S. at 253. We concede that in parole decision-making *some* organic change should be expected over time, as old parole board members leave and new ones are appointed. We see similar cyclical swings with appellate courts, as the mood of the country or the mores of the majority shift. But with parole boards, as with courts, typically the “shape” of these cycles will be a relatively flat sine curve with a fairly long amplitude. As noted above, in *Foster-Bey* the parole board had civil service protection and lifetime tenure for decades before statutory amendments eliminated the parole board and replaced it with new gubernatorial appointees. See *Bey v. Rubitschun*, 2007 WL 7705668, at *4, discussed at note 76. Cf. Julio A. Thompson, *A Board Does Not A Bench Make: Denying Quasi-Judicial Immunity to Parole Board Members in Section 1983 Damages Actions*, 87 MICH. L. REV. 241, 252 (1988) (noting that, as of 1988, parole board members were typically selected by governors, subject to legislative approval, and usually appointed for three to six years). When parole rates decline sharply from long-term historical norms on the heels of a new administration taking power and amending parole laws or regulations, that is exactly the kind of retroactive increase in punishment that we think the Ex Post Facto Clause was intended to prevent. See *e.g.*, *Burnette v. Fahey*, discussed *supra* at 137-139, or *Mickens-Thomas (I)* and *Mickens-Thomas (II)*, discussed *supra* at note 80.

bound by the sentencing guidelines.¹²¹ The Court rejected that argument, holding that because the guidelines served as the “lodestone” in sentencing, changing the guidelines—even if they were discretionary—nevertheless presented a sufficient risk that some prisoners would get or would serve longer sentences.¹²²

Accordingly, we think that “discretion” is a bright-red herring in ex post facto analysis. As to both “per se” cases *and* as to “possible” cases, whether the change is “discretionary” should have little or nothing to do with the Court’s analysis under the Ex Post Facto Clause. We therefore think the increasingly ubiquitous *Garner*-based notion in the lower courts—that prisoner-plaintiffs must *also* prove that the change could not have occurred as a result of the board’s “exercise of its discretion”—is dead wrong, and ought to be excised from ex post facto analysis.

C. A Sustained Look at “Possible” Ex Post Facto Cases

We now turn to the second category of ex post facto cases—the “possible” cases—where it is the implementation of the change of law or policy that will determine whether or not there is a sufficient risk of prisoners serving longer sentences. We agree that this second category makes good sense analyt-

121. *Peugh*, 133 S. Ct. at 2085-87.

122. *Peugh*, 133 S. Ct. at 2084. We also note that legislatures exercise their “discretion” when they choose to amend a statute, and governors exercise their “discretion” when they sign the amended legislation into law. No one is forcing them to do these things. Yet despite the fact that they are exercising their discretion, if the text or the effect of the change is to increase punishment after the fact, the changes cannot be applied retroactively consistent with the Ex Post Facto Clause.

ically where changes in parole law or policy may not explicitly or obviously increase punishment. Prisoners are prone to challenge even *de minimus* changes, and this second category provides a useful mechanism to review what *Morales* called the more “attenuated” cases, which may require a fact-based decision. The category of “possible” ex post facto cases also illustrates that what at first blush might look like a benign change *can* violate the Ex Post Facto Clause if the change creates a sufficient risk that some prisoners will serve longer sentences.

In *Garner*, the Court held that “[t]he requisite risk is not inherent in the framework of [the] amended Rule . . . , and it has not otherwise been demonstrated on the record.”¹²³ The Court thus treated the case as a “possible” ex post facto case and remanded it back to the trial court for factual development.¹²⁴ The Court said that the relevant inquiry would look at how the board is implementing the change, whether the change is being used to deny parole and lengthen terms of custody, what policies animated the change, and how the board is actually exercising its discretion on the ground.¹²⁵ These

123. *Garner*, 529 U.S. at 251 (internal citation omitted).

124. *See supra* Part IV.A. (discussing why we think placing *Garner* into the group of “possible” ex post facto claims was a mistake). On remand in *Garner*, the district court was to determine whether the amended Georgia rule, in its operation, created a significant risk of increased punishment. *See Jones v. Garner*, 211 F.3d 1225 (Mem) (11th Cir. 2000). But the plaintiff died before that inquiry could be completed. The district court found that the ex post facto claim did not survive the plaintiff’s death and dismissed his claims as moot. Order, *Jones v. Garner*, No. 95-cv-03012 (N.D. Ga. June 19, 2001), ECF No. 81.

125. *Garner*, 529 U.S. at 255 (suggesting that “the general operation of the Georgia parole system may produce relevant evidence and inform further analysis on the point.”)

strike us as appropriate things to do with an underdeveloped “possible” ex post facto claim.¹²⁶

But more factual development should only be required for *true* “possible” cases, where the changes to the parole regime are arguably *de minimus* or attenuated, yet not so *de minimus* or attenuated that the trial court can dismiss the cases outright on the pleadings under Rule 12(b)(6). But *Garner* also muddled the treatment of ex post facto cases (and especially “possible” ex post facto cases) in two important ways, which we tackle next.

1. *Burdens of Proof and Persuasion*

First, the *Garner* Court sent a confusing message by the awkward way it addressed the question of the prisoner’s burden of persuasion. Up to and including *Morales*, the Supreme Court’s legal standard in ex post facto cases had been “whether a given change in law presents a ‘sufficient risk of increasing the measure of punishment attached to the covered crimes.’”¹²⁷ In *Garner*, however, the Court substituted the word “significant” for “sufficient”—almost as if the two were synonymous.¹²⁸ Justice Kennedy did not do so consistently, and he still *recited* the legal standard as set forth above (using

126. As noted above, on the facts of *Garner*, we think this procedure is unnecessary or misguided, and a major deviation from the Court’s jurisprudence before and after *Garner* (in *Lindsey*, *Weaver*, *Morales*, and *Peugh*). See Part IV, *supra*.

127. *Peugh*, 133 S. Ct. at 2081-82 (citing *Garner* quoting *Morales*). In *Peugh*, the Court reaffirmed that the line between an ex post facto violation and a permissible change “is a matter of degree.” *Id.* at 2082, quoting *Morales* at 509.

128. See generally *Garner*, 529 U.S. 244 (2000).

the “sufficient” language).¹²⁹ But reading the opinion, one cannot help but come away with the feeling that the prisoner-plaintiff lost (what we view as) his “per se” claim in no small part because he failed to prove a “significant” risk that he (or others) might serve more time.¹³⁰ No one on the Court seemed to have noticed the switch, but the lower courts certainly did!¹³¹

The shift is subtle but extremely “significant.” It is also wrong. The only time the Court had used the words “significant” or “substantial” regarding an ex post facto claim was back in the pre-*Collins* day, when defendants or prisoners could win an ex post facto claim (even if they did not fit within the four *Calder* categories) by showing, variously, “a legal signification more injurious to the accused than was attached to them by the law existing at the time of the transaction,”¹³² or a change that deprived them of a “substantial right involved in [their] liberty,”¹³³ or that the retroactive change “substantially alter[ed] the consequences attached to a crime already completed”¹³⁴ In this context the words “significant” and “substantial” were used to give criminal defendants or prisoners *extra* protections that the *Calder* categories did not otherwise cover.

129. *Garner*, 529 U.S. at 250.

130. *Id.* at 251, 254.

131. The post-*Garner* losing cases consistently use the word “significant.” See e.g., *Burnette v. Fahey*, 687 F.3d 171, 184-85 (4th Cir. 2012); *Foster v. Booker*, 595 F.3d 353, 361 (6th Cir. 2010); *Dyer v. Bowlen*, 465 F.3d 280, 289-90 (6th Cir. 2006); *Richardson v. Penn. Bd. of Probation and Parole*, 423 F.3d 282, 293-94 (3d Cir. 2005).

132. *Kring*, 107 U.S. at 249.

133. *Thompson*, 497 U.S. at 352.

134. *Weaver*, 450 U.S. at 33.

But after *Collins*, any use of those terms would be improper, because either the claim fits within one of the four *Calder* categories, or it does not. The Court has said unequivocally that the Ex Post Facto Clause applies equally to sentencing and to parole because both determine how long the person will serve (and both affect the sentence imposed).¹³⁵ Since sentencing and parole lie at the heart of the third *Calder* category (increased punishment), requiring a *higher* burden of persuasion than in *Weaver*, *Morales*, *Lynce*, and *Peugh* cannot be right, as all four of those cases are likewise third-*Calder* third-category cases. In *Garner*, the switch from “sufficient” risk to “significant” or “substantial” risk occurred without citation to any authority, and none exists. We think the only question (as to the plaintiff’s burden of persuasion) is whether or not a “sufficient risk of increased punishment” has been shown, and of course the plaintiff’s burden of proof (at least in a Section 1983 action) is the same as in any other civil case: 51 percent (a preponderance of the evidence).

Nor is there any policy reason to raise the burden of persuasion from “sufficient risk” to “significant risk” — or , for that matter, to require prisoners to prove the negative fact that any increased punishment could not be attributable to the board’s exercise of its discretion. To the contrary, the default in ex post facto cases should run the other way *because of the nature of the harm*. The harm at stake in ex post facto cases is the worst legal harm that people can suffer short of state-imposed death—namely, the forced loss of liberty.¹³⁶ No

135. See *supra* notes 34 and 54.

136. Nor is any after-the-fact damage remedy likely to be available. A Section 1983 action for unlawful confinement would require the prisoner-plaintiff to show that the illegality of the law in question was “clearly established” in order to overcome the defense of qualified immunity. See, e.g.,

increased punishment can be imposed, absent notice when the crime was committed (as to what the punishment would be). The very foundation of the Ex Post Facto Clause is to *prevent* the state from illegally extending a person's loss of liberty after the fact. So a doctrine that effectively requires the harm to occur, or the risk of the harm to be "significant," before courts will say that the Ex Post Facto Clause has been violated would be anathema to the Framers¹³⁷ and is a cold comfort to prisoners. Yet that is exactly the situation today, as *Garner* has been read by the lower courts.¹³⁸ Prisoners have little hope of ever meeting the current legal standard *until the harm to them has already occurred*.

Wilson v. Layne, 526 U.S. 603, 609 (1999) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

But, by definition, the law would not be "clearly established" unless or until the prisoner had won the ex post facto case, and so the state would rarely if ever pay damages for the illegal extra imprisonment it imposed. *See, e.g., Taylor v. Reilly*, 685 F.3d 1110, 1114-17 (D.C. Cir. 2012) (holding that parole officials applying current parole regulations to prisoners would not have reason to know that doing so would create significant risk of prolonged incarceration, which is required for prisoners' rights under the Ex Post Facto Clause to be clearly established).

137. *See generally* THE FEDERALIST NO. 84 (Alexander Hamilton) ("The creation of crimes after the commission of the fact, or, in other words, the subjecting of men to punishment for things which, when they were done, were breaches of no law, and the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny.")

138. If hindsight is 20/20, then we can say with confidence that current ex post facto doctrine reaches the wrong result nearly every time. For example, when (in 1993) parolable lifers in Michigan first challenged the increase in the interval between their parole reviews, the prisoners lost because the Sixth Circuit held that not enough time had elapsed for them to *prove* that the delays alone would inevitably result in longer prison terms. *Shabazz v. Gabry*, 123 F.3d 909, 914-915 (6th Cir. 1997). When (in 2005) they brought a global challenge to *all* the retroactive changes of the previous decade, the prisoners lost because the Sixth Circuit held that they couldn't *prove* that the changes were not

Moreover, the *kind* of proof required (to demonstrate that the risk of delayed release is “significant” *and* that changes in how the board exercises its discretion could not account for the delayed consideration or release) is a kind of proof that prisoners are uniquely ill-equipped and ill-positioned ever to acquire. Most prisoners’ rights cases are filed *in pro per*,¹³⁹ and there is no reason to think cases raising ex post facto claims are an exception to the rule.¹⁴⁰

caused by the board’s exercise of its discretion. See *Foster v. Booker*, 595 F.3d 353, 361 (6th Cir. 2010).

What we know in hindsight is that parolable lifers in Michigan wound up serving vastly longer sentences than they would have served under the regime that existed when they were sentenced, and vastly longer sentences than they likely would have served but for the legislative, executive, and board policy changes that were applied retroactively to them in the late-twentieth and early-twenty-first centuries. See e.g., CAPPS, *When “life” did not mean life: A Historical Analysis of Life Sentences Imposed in Michigan Since 1900* (Lansing, Sept. 2006), <http://www.capps-mi.org/wp-content/uploads/2013/04/When-life-did-not-mean-life-2006.pdf>. Indeed, the changes were so clear and so harsh that (in 2014) twenty-seven employees and former employees of the Michigan Department of Corrections signed a statement decrying the plight of the state’s parolable lifers and urging reforms. See MDOC Professionals Comment on Lifer Paroles (February 2014) at <http://www.capps-mi.org/wp-content/uploads/2014/02/rev-Michigan-Department-of-Corrections-Professionals-Comment-on-Lifer-Paroles.pdf>. The signatories included three long-serving former MDOC directors, a deputy director, two parole board chairs (including the one who had chaired the post-1992 conservative “life means life” board), as well as a raft of wardens, deputy wardens, and former parole board members. *Id.*

139. See Margo Schlanger, *Trends in Prisoner Litigation, as the PRLA Enters Adulthood*, 5 U.C. Irvine L. Rev. 153, 166-67 (2015).

140. In a study that our clinic did in the late 1980s, we looked at twelve months of *pro se* prisoners’ filings in the Eastern District of Michigan. The study (using random sampling) showed that of the 585 cases filed, 40 percent of the cases were dismissed by magistrate judges under 28 U.S.C. § 1915(d) before service of process. Another 57 percent were dismissed on motions to dismiss or on

It is one thing to say, as Justice Thomas said in *Morales*,¹⁴¹ that prisoners have the “burden of persuasion” in “per se” cases like *Lynce*, *Weaver*, and *Morales*, where in reality the Court read the statute and held as a matter of law that the challenged amendments did (or as in *Morales* did not) “produce[] a sufficient risk of increasing the measure of punishment attached to the covered crimes.”¹⁴² It is a completely different thing to require prisoners to prove a “significant risk”¹⁴³ and to prove the negative fact that any harm they suffer could not be the result of a change in the way the board exercises its discretion.¹⁴⁴

To meet these burdens under current ex post facto doctrine would require not just lawyers to represent the plaintiffs, but also elaborate and expensive discovery. It almost certainly would also require the services of high-end statistical experts to exclude all other variables that might arguably be the cause of longer prison terms. None of this is within the reach of unrepresented prisoners. Nor can prisoners amass the sort of practical on-the-ground evidence

summary judgment, and in most of those cases the prisoners never filed another document after the form complaint. At any point in the process, less than 7 percent of the prisoners ever had a lawyer, and in those cases the lawyer withdrew before the end of the case about 60 percent of the time. *See Hardin v. Straub*, 490 U.S. 536 (1989), Plaintiff’s Reply Brief, Appendix (on file with the authors). These findings were consistent with more detailed studies at the time. *See e.g.*, T. Eisenberg and S. Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641 (1987) (noting that “[o]ver the three years studied, only seventeen prisoner constitutional tort cases were counseled . . .”).

141. *See supra* note 46 - 48, and accompanying text.

142. *Morales*, 514 U.S. at 509, 510 n.6.

143. *Garner*, 529 U.S. at 250-51.

144. *Foster v. Booker*, 595 F.3d 353 (6th Cir. 2010).

that would be the focus of the factual inquiry, and that invariably requires depositions, document requests, and other in-depth discovery. If a prisoner must produce “specific evidence” of the risk, as a practical matter his action is usually doomed, especially if he is proceeding *pro se*.¹⁴⁵ We note that even *with* lawyers who have the time and resources to do elaborate and expensive discovery, the burden has still proven to be too high.¹⁴⁶

2. *How Individualized Must an Ex Post Facto Showing Be?*

Second, *Garner* is unclear about whether the prisoner must show that some prisoners will serve longer sentences or must show that the prisoner-plaintiff himself will serve a longer sentence. Again, as with “sufficient” versus “significant,” *Garner* appears to say both.¹⁴⁷ This, too, has confused the lower courts, leading them to require a higher burden of persuasion or burden of proof—for example, by making prisoners show a risk of increased confinement with respect to the *specific plaintiff* raising the claim as opposed to similarly situated potential parolees.¹⁴⁸ This kind of showing is familiar to courts where the plaintiff must prove individualized harm in order to win both on liability

145. One of the ironies of the current doctrine is that ex post facto *sentencing* claims—where the legal standard is easier to meet—are more likely to be brought by *appointed* trial or appellate counsel, while ex post facto *parole* cases arise long after the prisoner has a right to counsel.

146. See e.g., *Foster v. Booker*, 595 F.3d 353, 361 (6th Cir. 2010) (holding that plaintiff must show that his harm is not attributable to board’s exercise of discretion); *Richardson v. Penn. Bd. of Probation and Parole*, 423 F.3d 282, 284 (3rd Cir. 2005) (holding that the parole board may be using improper standard but plaintiff failed to show that he was *individually* harmed by it).

147. See *Garner*, 529 U.S. at 250-54 (suggesting either or both).

148. See e.g., *Burnette*, 687 F.3d at 184; *Richardson*, 423 F.3d at 291.

and damages (or to win injunctive relief) and may have been mistakenly invoked as a kind of default, but it should not be used in ex post facto cases. On this issue, even the *Morales* Court consistently referred to “classes” of prisoners, “some prisoners,” “any prisoner’s actual term of confinement,” and the like.¹⁴⁹ The Court pointedly did *not* require a showing that Mr. Morales’ own punishment would increase.¹⁵⁰ *Garner* is unique in *suggesting* such a requirement when *Weaver*, *Morales*, *Lynce*, and *Peugh* do not.

D. “Possible” Cases: Putting It Together

Where further factual development is required (which will be the norm for “possible” ex post facto claims), there is yet one more reason why the burden of persuasion on prisoner-plaintiffs should be light. In nearly all of these cases, it is the state *defendants* (prison staff, corrections administrators, parole board members) or their agents who possess the information that the court needs in order to make an informed decision. The state defendants will be the keepers of the statistics that reveal parole rates: they will have the memos and emails that reveal the state’s motivation in implementing the changes (to the extent that motivation or credibility might be relevant), the parole files and notes bearing on how the changes have affected the board’s actual decision making on the ground, among other potentially relevant information.

In other situations of information asymmetry, courts have often imposed a series of shifting burdens. In workplace discrimination cases, for example, the plaintiff must make out a *prima facie* case showing that discrimination could

149. *Morales*, 514 U.S. at 512-13, 520.

150. *Id.* at 512-14.

account for the alleged harm.¹⁵¹ The burden then shifts to the employer to rebut this *prima facie* case by articulating some legitimate, nondiscriminatory reason for the employment action.¹⁵² If the defendants succeed, the plaintiff still gets a chance to avoid dismissal if the plaintiff can show that the innocent explanation is a pretext.¹⁵³ A similar evidentiary progression is used in *Batson*¹⁵⁴ challenges—where a criminal defendant alleges discriminatory jury strikes by the prosecution—for the same reasons.¹⁵⁵ A claim brought by a prisoner under the Religious Freedom Restoration Act (RFRA)¹⁵⁶ shares this structure as well.¹⁵⁷ While these areas of law may have distinctive characteristics, the consistent parallel—and the one that matters in the context of *ex post facto*

151. *McDonnell Douglas Corp. v. Green* 411 U.S. 792, 802-03 (1973) (laying out this framework for Title VII workplace discrimination claims).

152. *Id.* *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), clarified that in the context of Title VII claims, the employer bears a “burden of production” at this stage and that the plaintiff retains the “ultimate burden of persuading the court that she has been the victim of intentional discrimination.” *Id.* at 255-56.

153. *McDonnell Douglas*, 411 U.S. at 804.

154. *Batson v. Kentucky*, 476 U.S. 79 (1986).

155. *Id.* at 93-94.

156. 42 U.S.C. § 2000bb.

157. Another area of law in which a similar burden-shifting structure exists is the antitrust Rule of Reason, where the plaintiff must initially show that the restraint produces anticompetitive effects in the relevant market, then the burden shifts to the defendant to come forward with a legitimate precompetitive justification for the restraint, and then the burden shifts back to the plaintiff. See *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *Board of Trade of City of Chicago v. United States*, 246 U.S. 231 (1918); see also Daniel C. Fundakowski, *The Rule of Reason: From Balancing to Burden Shifting*, 1 PERSPECTIVES IN ANTITRUST 1 (2013).

prisoner litigation—is the significant information asymmetry between the plaintiff and the defendants. Although these burden-shifting schemes are not without trenchant critiques¹⁵⁸—which we do not take lightly—we nonetheless think that, in an area that at present lacks coherent doctrine, looking to familiar and (relatively) easy-to-implement structures may help courts make decisions that are more consonant with the purpose of the Ex Post Facto Clause and more consistent from case to case. Burden shifting is one such possibility, though courts should be open to others as well.

If burden shifting were adopted for “possible” ex post facto claims, evidence that might carry the plaintiff’s initial burden could include: a prima facie showing that the prisoner’s “eligibility for reduced imprisonment [was] a significant factor entering into both the defendant’s decision to plea bargain and the judge’s calculation of the sentence to be imposed,”¹⁵⁹ evidence that the purpose of the change was to “get tough” on prisoners or otherwise to extend sentences, or evidence from past or present DOC or parole board officials that similarly-situated prisoners seem to be serving longer sentences than in the past. We also think that in “possible” ex post facto cases the trial court should appoint coun-

158. See Martin J. Katz, *Reclaiming McDonnell Douglas*, 83 NOTRE DAME L. REV. 109, 170 (2007) (“[C]ritics argue that *McDonnell Douglas* stacks the deck against plaintiffs by requiring them to disprove every reason offered by the defendant for its action”); Elizabeth C. Williamson, *City of Boerne v. Flores and the Religious Freedom Restoration Act: The Delicate Balance Between Religious Freedom and Historic Preservation*, 13 J. LAND USE & ENVTL. L. 107, 124-25, 138-39 (1997) (explaining that concerns that “RFRA’s ‘boundless’ requirement that the least restrictive means be used when neutral laws affect religious freedom . . . will surely affect governments’ abilities to protect religious structures”).

159. *Lynce*, 519 U.S. at 445-46, citing *Weaver*, 450 U.S. at 32.

sel and permit discovery as early as practicable but certainly if the prisoner-plaintiff meets his initial burden of persuasion as to the plausible effect of the change.

The burden would then shift to the government to show that, in its operation, the challenged change does not pose a “sufficient risk” of increasing punishment, which the plaintiff could then challenge as pretextual or wrong. This might still pose a high bar for prisoner-plaintiffs, but it would be a sea change over their current burden of having to prove both that there is a “significant” risk of increased incarceration *and* that the harm they have suffered cannot be attributable to the exercise of the board’s discretion. In our view, the initial burden on the plaintiff *should* be quite light, given the extraordinary nature of the harm, the historical legal standard applied in these cases, and the prophylactic purpose of the Ex Post Facto Clause.

E. A New (Old) Approach to Ex Post Facto Doctrine

To summarize, the Ex Post Facto Clause is all but gutted if (1) prisoners cannot prove their ex post facto claims until *after* they have already suffered the very harm (increased punishment) that the Clause was designed to protect against, and (2) the prisoners’ burden of proof is raised to the point that *pro se* litigants (or even represented plaintiffs) can never meet it. Yet under current ex post facto doctrine, almost no changes to parole regimes can be challenged successfully, no matter how harmful their effect.¹⁶⁰ The irony, of course, is that

160. Before *Morales* and *Garner*, prisoner-plaintiffs won nearly every ex post facto case relating to obstacles put in the way of their parole eligibility. See *supra* Part I. Since *Morales* and *Garner*, it is hard to find a winning parole ex post facto case on those issues. See *e.g.*, *Wallace v.*

until very recently, nearly all the statutory and policy changes regarding parole over the past fifty years have been in the direction of harsher treatment for prisoners, as a result of political shifts from the 1960s to the 2000s, combined with the fact that the Court has not accepted a parole ex post facto case since *Garner* in 2000.¹⁶¹

In this section we have tried to make sense of the Court's cases and impose some order by clarifying two types of ex post facto claims—those in which there is a “per se” violation that can be decided as a matter of law and those in which there is a “possible” violation that requires fact-finding. In both of these types of cases, where the criminal defendant or prisoner-plaintiff is challenging a normative, structural-type of change that affects all similarly situated prisoners, we think the Supreme Court's long-established legal

Quarterman, 516 F.3d 351 (5th Cir. 2008) (changing parole board voting requirement from three-member panels to the entire eighteen-person board does not violate the Ex Post Facto Clause); Richardson v. Penn. Bd. of Probation and Parole, 423 F.3d 282 (3rd Cir. 2005) (parole board may be using improper old standard but prisoner-plaintiff failed to show that it harmed him individually); Newman v. Beard, 617 F.3d 775 (3rd Cir. 2010) (new requirements that prisoners attend sex offender therapy and admit guilt in therapy in order to be parolable do not violate the Ex Post Facto Clause).

161. Only in the last few years has the pendulum begun to shift back, as the cost of mass incarceration has spiraled upward, fueling a reaction rooted not primarily in notions of justice but in efforts to save or to redistribute public tax dollars (and perhaps rooted also in modern research showing that imprisonment rates and crime rates have less to do with each other than we once thought). See e.g., Michelle Alexander, *The New Jim Crow* 101 (2012) (noting that “violent crime is not responsible for mass incarceration. As numerous researchers have shown, violent crime rates have fluctuated over the years and bear little relationship to incarceration rates—which have soared during the past three decades regardless of whether violent crime was going up or down. Today violent crime rates are at historically low levels, yet incarceration rates continue to climb.”).

standard remains good law and should always apply. As the Court confirmed in *Peugh*, “The touchstone of [the] Court’s inquiry is whether a given change in law presents a ‘sufficient risk of increasing the measure of punishment attached to the covered crimes.’”¹⁶²

If *Garner* is read narrowly, as *Peugh* read it, and as we think it should be read, then most parole ex post facto cases should fit comfortably into the first category of obvious “per se” claims. Historically, the Court has had little trouble determining *as a matter of law* whether a change in a sentencing or parole regime creates a sufficient risk of increasing some prisoners’ punishment. *Morales* is a good example even though it went against the prisoner: the harm to twice-convicted murderers of slightly delayed parole review was negligible. *Peugh* is also a good example: there the disagreement among the Justices was about whether the changes to the parole guidelines fell within the ambit of the Ex Post Facto Clause, but no one doubted that some prisoners would serve longer sentences as a result of those changes. We think *Garner* itself was also good example (just gone wrong): the delayed parole review met the standard of *Weaver*, *Morales*, and *Lynce* (as later applied by the Court in *Peugh*) and therefore should have been treated as a “per se” ex post facto violation.

CONCLUSION

Today the Ex Post Facto Clause no longer protects a powerless disenfranchised minority (prisoners) from “arbitrary and potentially vindictive legislation” and the passing political forces that give rise to it, as the Supreme

162. *Peugh*, 133 S. Ct. at 2082 (quoting *Garner*, 529 U.S. at 250).

Court said the Ex Post Facto Clause must.¹⁶³ To the contrary, the Court's modest "about face" in *Morales* and its abstruse opinion in *Garner* have resulted in far longer sentences for some prisoners whom the legislative or executive branches specifically targeted for harsher treatment long after the prisoners committed their crimes. The harsher treatment has resulted in precisely the harm that the Ex Post Facto Clause was designed to prevent. The extra time people serve on the back end of their sentences—as the result of delayed or denied parole—can add years to their incarceration, and cumulatively can add hundreds of millions of dollars to the costs of corrections nationally, now with close to zero constitutional protection under the Ex Post Facto Clause. At the same time, in its *sentencing* ex post facto cases (most recently represented by *Peugh*), the Court has continued to apply its traditional scrupulous ex post facto standard, holding that changes which *might* result in longer sentences for some defendants cannot be applied retroactively. While the Court's analytical split may be inadvertent and may have been heightened by the lower courts, it is no less illogical. The Ex Post Facto Clause remains robust when applied to sentencing, but the clause has become toothless as applied to parole, despite historically identical doctrine and identical harm. The wrong turn needs to be corrected.

163. *Weaver*, 450 U.S. at 29 (1981).