

Prohibition Against *Ex Post Facto* Laws

What is an ex post facto law?

Laws that reach back in time and make conduct punishable in a way it was not punishable for when it was done are *ex post facto* laws. Such a law (1) applies to events occurring before its enactment and (2) disadvantages the person affected by it. A law creates a disadvantage if it:

- creates a new crime;
- increases the punishment for an existing crime;
- deprives a defendant of a defense available when the act was committed; or
- otherwise renders an act punishable in a different, more disadvantageous manner than when the person committed the act.

A law is not *ex post facto* if it merely changes trial procedures or rules of evidence and operates in a limited and unsubstantial manner to the accused's disadvantage. In addition, a law is not *ex post facto* if it is a civil, regulatory law and is not sufficiently punitive in purpose or effect to negate the civil label.

Can the state pass ex post facto laws?

No. [Article I, section 10](#), of the United States Constitution and [Article I, section 11](#), of the Minnesota Constitution prohibit the state from enacting *ex post facto* laws. The purpose of the ban is to ensure that individuals have fair warning of changes in law and to protect people from a government's unjust or oppressive use of power.

How do courts determine whether a law involves a punishment or a regulation?

A law is punitive if the legislature intended to punish an offender for a past act and the law actually functions as punishment. When the legislature does not state whether it intends a statute to be punitive or regulatory, the court considers a number of factors. These factors are whether:

- the sanction involves an affirmative disability or restraint,
- the sanction has historically been regarded as a punishment,
- the sanction comes into play only on a finding of either intent or knowledge of wrongdoing,
- the sanction's operation will promote the traditional aims of punishment—retribution and deterrence,
- the behavior to which the sanction applies is already a crime,
- an alternative purpose to which the sanction may rationally be connected is assignable for it, and
- the sanction appears excessive in relation to the alternative purpose assigned.

Kennedy v. Mendoza-Martinez, [372 U.S. 144](#), 168-69 (1963).

What types of laws have been found to violate the ex post facto clause?

The following cases are examples of laws found by Minnesota courts to violate the *ex post facto* clause or potentially raise *ex post facto* concerns:

- An 18-year-old may not be prosecuted in adult court for a crime committed when 18-year-olds were under juvenile court jurisdiction.
- An offender's "criminal history score" may not include a felony point for a previous out-of-state crime which, at the time it was committed, was equivalent to a gross misdemeanor crime under Minnesota law.
- An offender's sentence may not include court-ordered restitution in addition to an executed sentence because the law in effect at the time of defendant's crime did not authorize the imposition of both sanctions.
- A statutory defense to a crime may not be eliminated retroactively.

What types of laws have survived an ex post facto challenge?

The following cases describe situations where the court found no violation.

- Previous DWI convictions may be used to elevate a defendant's current DWI offense from a misdemeanor to a gross misdemeanor under a new law increasing penalties for repeat offenders.
- Criminal statute of limitations may be lengthened and applied to crimes committed before the effective date of the change if prosecution of that crime was not time-barred when the new limitation took effect.
- A law allowing the docketing of court-ordered restitution orders as civil judgments may be applied to a defendant who committed the crime before the law took effect but was sentenced after that date.
- A law limiting the medical privilege in child abuse cases applies in prosecutions of crimes committed before the law took effect because it neither creates a new crime nor changes the standard of proof.
- New state procedures for imposing federal firearms restrictions on convicted offenders were allowed because (1) the provision did not create a new crime or impose a harsher punishment, and (2) the defendant was on constructive notice that he would be subject to even harsher federal restrictions if convicted for his ongoing criminal acts.
- A new law requiring a defendant to pay extradition costs was permissible because it sought to reimburse the state, not punish defendants.
- Laws permitting the civil commitment of sexually dangerous persons and requiring sex offenders to register their living address with law enforcement authorities are civil, regulatory laws that are not sufficiently punitive in purpose or effect so as to negate their civil label.
- A law allowing courts to extend an order for protection for up to 50 years is not an *ex post facto* law even though courts can consider events that occurred before passage of the law because orders for protection are civil remedies, not criminal penalties.

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