
This publication explains how both the United States Constitution and the Minnesota Constitution prohibit passing laws that turn an event that occurred before enactment of a law into a crime. This is known as the prohibition on *ex post facto* laws.

The founders were concerned about *ex post facto* laws.

During the debate about creating a federal constitution, several founders were concerned that legislative bodies could pass laws that would reach back in time and turn actions that were legal when they were taken into crimes. In the Federalist Papers, James Madison (Federalist No. 44) and Alexander Hamilton (Federalist No. 84) warned against these “*ex post facto*” laws.

***Ex post facto* laws change the punishment for acts committed in the past.**

Laws that reach back in time and make conduct punishable in a way it could not be punished when it was done are *ex post facto* laws. A law only qualifies as an *ex post facto* law if it (1) applies to events occurring before its enactment and (2) creates a disadvantage to the person who committed the act by:

- creating a new crime;
- increasing the punishment for an existing crime;
- depriving a defendant of a defense available when the act was committed; or
- otherwise making an act punishable in a different, more disadvantageous manner.

A law is not *ex post facto* if the change is to trial procedures or rules of evidence and it creates a limited and unsubstantial disadvantage to the person accused of the crime. In addition, a law is not *ex post facto* if it is a regulatory law with a civil consequence that is not so punitive that it qualifies more as a punishment than a regulation.

***Ex post facto* laws violate the constitution.**

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.

Courts must sometimes decide if a law is a prohibited punishment or an acceptable regulation.

The legislature can pass some regulations that look at past conduct, but cannot pass punitive laws designed to look like regulations. A law is punitive if the legislature intended to punish someone for a past act and the law actually functions as punishment. When it is not clear if a law is a regulation or a punishment, courts must consider 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).

Examples of laws that violate the *ex post facto* clause.

Examples of laws found by Minnesota courts to violate the *ex post facto* clause or potentially raise *ex post facto* concerns include the following:

- 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.

Examples of laws that do not violate the *ex post facto* clause.

Courts have found that the following situations do not involve *ex post facto* laws:

- Previous DWI convictions could be used to increase a defendant's DWI offense from a misdemeanor to a gross misdemeanor under a new law that applied to repeat offenders.
- A law allowing restitution orders to be docketed as civil judgments could 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 address with law enforcement authorities are permitted because they are civil, regulatory laws.
- 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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