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This Article benefited from conversations over the years with many people, especially Manny Vargas and Christopher Meade. The Author gratefully acknowledges the financial support of the Filomeno D'Agostino Greenberg Research Fund and the excellent research assistance of Shannon McKinnon.

DETERMINING THE RETROACTIVE EFFECT OF LAWS ALTERING THE CONSEQUENCES OF CRIMINAL CONVICTIONS

*Nancy Morawetz**

INTRODUCTION

It has long been established that legislatures can pass laws that limit a person's rights based on past criminal convictions.[1] In *Hawker v. People of New York*,[2] the United States Supreme Court held that there was no ex post facto problem when a state statute prohibited the practice of medicine by a person with a past conviction, even though this consequence was not contemplated at the time of the conviction. In subsequent cases, the Court has made clear that other after-the-fact consequences, including mandatory deportation, present no ex post facto problem.[3] Although there are arguments that due process might nonetheless curb extreme uses of this legislative power, the constitutional landscape for litigation is constrained.[4]

At the same time, statutory arguments against retroactive application of new consequences of criminal convictions have become more robust. Despite the fact that immigration consequences are

* Professor of Clinical Law, New York University School of Law. In addition to writing about these issues, the Author has participated in some of the litigation described in this Article, including arguing *Domond v. I.N.S.*, 244 F.3d 81 (2d Cir. 2001), and participating in the briefing before the Supreme Court in *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001). This Article benefited from conversations over the years with many people, especially Manny Vargas and Christopher Meade. The Author gratefully acknowledges the financial support of the Filomeno D'Agostino Greenberg Research Fund and the excellent research assistance of Shannon McKinnon.

1. *See, e.g.*, Bugajewitz v. Adams, 228 U.S. 585, 608-09 (1913) (upholding a law that provided for the deportation of a women convicted of prostitution); Hawker v. New York, 170 U.S. 189, 199-200 (1898) (upholding a public health law which prohibited a person convicted of a felony from practicing medicine).

2. 170 U.S. at 191-92.

3. *See, e.g.*, Marcello v. Bonds, 349 U.S. 302, 314 (1955); *Bugajewitz*, 228 U.S. at 592.

4. *See* Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1929-31 (2000); Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 131-34 (1998) (discussing substantive due process challenges to retroactive deportation laws); Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 310-13 (2000).

widely treated as "collateral" to a conviction,[5] the Supreme Court's 2001 decision in *I.N.S. v. St. Cyr*[6] recognized that changes in the immigration consequences of a conviction can constitute a "new legal consequence" that cannot be imposed retroactively without clear congressional intent.[7] *St. Cyr* represents a major potential tool in protecting the rights of persons convicted of crimes from onerous new civil consequences.

St. Cyr leaves open many issues that will determine how powerful the decision will actually prove to be in practice. One of those issues is the core question of the date against which new legal consequences are measured.[8] Although it is well established in criminal law that retroactive effect is measured from the date of criminal conduct,[9] many courts have drawn a very different lesson from the Supreme Court's decision in *St. Cyr*. These courts have concluded that, for a new law to have a retroactive effect on those with past convictions, the conviction must arise from a plea, and the plea agreement must have predated the change in the laws.[10] This rule has led to many anomalous results, such as permitting new civil consequences based on past convictions for those who took their cases to trial years before a change in the law.[11]

This Article traces the roots of the current emphasis on plea agreements[12] to confusion about indicia of retroactivity in cases involving quasi-economic transactions[13] and those involving laws that

5. *See, e.g.*, People v. Ford, 657 N.E.2d 265, 268 (N.Y. 1995) (treating immigration consequences of convictions as "collateral" and concluding that a criminal court judge need not advise defendant of such consequences prior to accepting plea).

6. 533 U.S. 289 (2001).

7. *Id.* at 321.

8. *Id.* at 318-19.

9. *See, e.g.*, Johnson v. United States, 529 U.S. 694, 701-02 (2000) (applying the "clear statement" rule to conclude that a change in the terms of supervised release does not apply to cases in which the initial offense is before the effective date of the new law); Miller v. Florida, 482 U.S. 423, 435-36 (1987) (applying Ex Post Facto Clause to conclude that a change in sentencing guidelines does not apply to those whose crimes occurred prior to the new guidelines).

10. *See* Dias v. I.N.S., 311 F.3d 456, 458 (1st Cir. 2002) (per curiam); Chambers v. Reno, 307 F.3d 284, 290-91 (4th Cir. 2002); Perez v. Elwood, 294 F.3d 552, 559-60 (3d Cir. 2002); Armendariz-Montoya v. Sonchik, 291 F.3d 1116, 1121 (9th Cir. 2002); Domond v. I.N.S., 244 F.3d 81, 86 (2d Cir. 2001); DiSanto v. I.N.S., No. Civ. 4239, 2001 U.S. Dist. LEXIS 21763, at *12 (S.D.N.Y. Dec. 31, 2001); Lawrence v. I.N.S., No. Civ. 2154, 2001 U.S. Dist. LEXIS 10058, at *7-*9 (S.D.N.Y. July 20, 2001), *aff'd sub. nom*, Rankine v. Reno, 319 F.3d 93, 99-100 (2d Cir. 2003).

11. *Chambers*, 307 F.3d at 294-95, 298 (Goodwin, J., dissenting).

12. *See infra* text accompanying notes 23-32.

13. *See infra* text accompanying notes 56-67.

are targeted at wrongful conduct.[14] Although economic transactions are properly evaluated in terms of standards such as reliance, reliance has no proper application with respect to laws that govern wrongful conduct. Instead, when wrongful conduct is at issue, the proper question is whether the person had fair notice of the degree of consequences.

I. THE ROOTS OF A PLEA-BASED STANDARD OF RETROACTIVITY

At the heart of retroactivity case law is the question whether a law has a retroactive effect.[15] Without a retroactive effect, the law does not trigger any special form of scrutiny under either statutory or constitutional principles.[16] If there is a retroactive effect, however, the law will not be read as applying in a retroactive manner absent a clear expression of legislative intent to apply the law in that manner.[17] In addition, only a retroactive effect will trigger per se bar imposed by the Ex Post Facto Clause or require seperate justification under the Due Process Clause.[18]

Recent case law developments exploring the retroactive effect of changes in the immigration consequences of convictions began by asking the question whether a "collateral" consequence, such as being excluded from relief from deportation, could also be considered a new legal consequence of any past criminal act.[19] In a series of cases decided after the 1990 revisions to the immigration laws, many courts concluded that there was no retroactive effect from new laws that eliminated the right to a discretionary relief hearing prior to deportation.[20] These courts found that people who were deportable suffered no new legal consequence by the change in the

14. *See infra* text accompanying notes 70-82.

15. I.N.S. v. St. Cyr, 533 U.S. 289, 321 (2001).

16. *Id.* at 316-17.

17. *Id.* at 321; Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939, 939-40 (1997); Landgraf v. USI Film Prods., 511 U.S. 244, 294-96 (1994).

18. The Ex Post Facto Clause prohibits retroactive penal laws. *See, e.g.*, Miller v. Florida, 482 U.S. 423, 428-29 (1987) (reversing increased sentencing of defendant because application of new sentencing guidelines violated the Equal Protection Clause of the Constitution). In analyzing the Due Process Clause, courts will apply separate scrutiny to a legislative decision to apply a law retroactively. *See* Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 729 (1984); *see also* Morawetz, *supra* note 4, at 131-34.

19. *See* Scheidemann v. I.N.S., 83 F.3d 1517, 1521 (3d Cir. 1996); De Osorio v. I.N.S., 10 F.3d 1034, 1042 (4th Cir. 1993) (holding that Congress has the authority to attach present immigration consequences to past activity).

20. *See Scheidemann*, 83 F.3d at 1523, 1525 (stating that statutory provisions did not have a retroactive effect).

law.[21] They had been and remained deportable. The practical fact that they were denied any chance to remain through a showing of specific equities was treated as irrelevant.[22]

After Congress imposed more sweeping mandatory deportation laws in 1996,[23] courts faced a second wave of litigation. This time, retroactivity arguments received a more welcome reception in the courts. Ultimately, this litigation led to the Supreme Court's ruling in *I.N.S. v. St. Cyr*, where the Court concluded that a law has a retroactive effect if a past plea agreement mandates the deportation of a lawful permanent resident who previously was eligible for relief from deportation.[24]

The facts of *St. Cyr*, like the facts of most of the cases litigated in the aftermath of the 1996 laws, presented the Court with a person who had pled guilty to a crime at a time when the immigration consequences did not include mandatory deportation.[25] Thus, his case did not require the Court to take a position on what date constituted a proper date for finding a retroactive effect.[26] Indeed, St. Cyr's lawyers side-stepped this issue in their briefs, and instead suggested that under a variety of dates, including the date of the criminal conduct, the date of the plea or the date of the conviction, St. Cyr would have faced a retroactive change in consequences.[27] They noted that it was not unprecedented for the Court to rule on an issue of retroactivity without choosing a specific date;[28] indeed, the Court had done so just four years earlier in another retroactivity case.[29]

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21. *Id.* at 1523 (explaining that the consequences of petitioner's conduct were clear at the time of the conduct).

22. *Id.*; *see De Osorio*, 10 F.3d at 1042.

23. Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996); *see* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, 3009-46 (1996) (repealing discretionary relief under section 212 (c) of the Immigration and Naturalization Act); *see also* Nancy Morawetz, *Understanding the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1938-55 (2000) (describing the scope of the laws).

24. I.N.S. v. St. Cyr, 533 U.S. 289, 290 (2001).

25. *Id.* at 293 (pleading guilty to sale of controlled substance).

26. *Id.*

27. *See* Respondent's Brief at 44, I.N.S. v. St. Cyr, 533 U.S. 289 (2001) (No. 00-767) ("[W]hether the relevant event is considered the criminal conduct, the plea, or the conviction, all of the relevant events occurred for this respondent prior to the enactment of the new law.").

28. *Id.* at 43-44.

29. Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939, 946-47 (1997) (referring to conduct only as occurring "prior" to effective date of the statute).

Because the *St. Cyr* litigation proceeded without a specific theory of the proper date for judging retroactive effect, *St. Cyr* was able to draw on retroactivity jurisprudence from a variety of contexts to support the claim that he had been subjected to retroactive consequences.[30] Similarly, the Court's opinion drew from a variety of strands of retroactivity jurisprudence to support its decision.[31] What remains unclear is whether all of these strands must coalesce in a single case in order to find a retroactive effect.

Parts of the *St. Cyr* decision draw directly on the specific transaction that constitutes the plea agreement.[32] The Court noted that plea agreements constitute a "quid pro quo" between the criminal defendant and the government.[33] The Court further found that it was reasonable to believe that immigrants consciously relied on the expectation of eligibility when they made decisions to plead guilty.[34] Throughout the opinion, the Court repeatedly uses the term "reliance" to underscore the degree to which a specific transaction—namely the plea—was premised on expectations about whether that plea would lead to automatic deportation.[35]

Other parts of the *St. Cyr* decision look to a more expansive concept of retroactivity.[36] The Court discusses several concepts other than reasonable reliance as standards for evaluating retroactivity. It specifically speaks of the need for "fair notice" and a respect for

30. St. Cyr's brief relied on ex post facto cases to explain why St. Cyr had suffered a retroactive effect. Respondent's Brief at 44, *St. Cyr* (No. 00-767). In these cases, the relevant date is the date of conduct. It also relied on cases that referenced the specific deals made in plea negotiations. *Id.* at 38-39. In addition, it provided examples where fair warning could have made a difference, even in the absence of a quid pro quo arrangement. *Id.* at 40 (citing Slusser v. Commodity Futures Trading Comm'n, 210 F.3d 783, 786 (7th Cir. 2000), for how the knowledge of consequences can affect the financing of a defense).

31. I.N.S. v. St. Cyr, 533 U.S. 289, 314-26 (2001) (reviewing multiple analyses of retroactivity to find statute should not apply here).

32. *See id.* at 321-23 (explaining the significance of plea agreements to retroactivity analysis).

33. *Id.* at 321.

34. *Id.* at 322-23.

35. *Id.* at 321-23. The Court noted that there could be "people who entered into plea agreements with the expectation that they would be eligible for relief." *Id.* at 321. Moreover, the Court stated: "In exchange for some perceived benefit, defendants waive several of their constitutional rights . . . and grant the government numerous 'tangible benefits.'" *Id.* at 323 (quoting Town of Newton v. Rumery, 480 U.S. 386, 393 n.3 (1987)). The Court further noted that: "preserving the possibility of such relief [from deportation] would have been one of the principal benefits sought by defendants." *Id.* Finally, the Court emphasizes that a contrary ruling "would retroactively unsettle [alien defendants'] reliance on the state of the law at the time of their plea agreement." *Id.* at 325 n.55.

36. *See id.* at 315-21.

"settled expectations."[37] In addition, it underscores that there is no single formula for evaluating retroactive effect.[38] The Court proceeds to draw directly from cases that determined retroactive effect in the criminal context—a context where reasonable reliance has never been a key test.[39] Ultimately, the Court issued a decision where the holding was limited to persons who had entered plea agreements.[40] In contrast to the opinion of the Second Circuit, which it was reviewing,[41] the Supreme Court did not explicitly address the issue whether this was the only set of persons who would suffer an improper retroactive effect as a result of application of the new mandatory deportation rules.[42]

In the wake of *St. Cyr*, courts have faced the question whether the retroactive effect of the 1996 laws extends to those who did not enter a plea prior to the change in the law.[43] In general, courts have largely restricted the application of *St. Cyr* to those who entered pleas under the prior legal regime.[44] Despite a few thoughtful dissenting voices, the trend has been to limit *St. Cyr* to its facts.[45]

Behind judicial skepticism about retroactivity claims by those without plea agreements is a narrative presented in one of the early cases on the 1996 laws. In *LaGuerre v. Reno*, the Seventh Circuit considered the case of a person, like St. Cyr, whose conduct, plea, and conviction pre-dated the changes in the law.[46] Writing for the panel, Judge Posner said:

> It would border on the absurd to argue that these aliens might have decided not to commit drug crimes, or might have resisted

37. *Id.* at 323 (quoting Landgrad v. USI Film Prods., 511 U.S. 244, 255 (1994)).

38. *See id.* at 321 n.46.

39. *Id.* at 322-23.

40. *Id.* at 326.

41. St. Cyr v. I.N.S., 229 F.3d 406, 418 (2d Cir. 2000).

42. *See St. Cyr*, 533 U.S. at 326.

43. *See infra* text accompanying notes 47-53.

44. *See infra* text accompanying notes 47-53.

45. Judge Goodwin, from the Southern District of West Virginia, sitting by designation, wrote a thoughtful dissent in *Chambers v. Reno*, 307 F.3d 284, 293 (4th Cir. 2002) (Goodwin, J., dissenting). There is also a thoughtful opinion by Judge Gleeson of the Eastern District of New York, in *Mohammed v. Reno*, 205 F. Supp. 2d 39, 39 (E.D.N.Y. 2002), *aff'd*, 309 F.3d 95 (2d Cir. 2002). Judge Gleeson, however, felt bound by the Second Circuit's prior opinion in *Domond v. I.N.S.*, 244 F.3d 81, 84-89 (2d Cir. 2001) (holding that there were no retroactivity, ex post facto, or equal protection issues with applying the Anti-Terrorism and Effective Death Penalty Act to the defendant).

46. Laguerre v. Reno, 164 F.3d 1034, 1037 (7th Cir. 1998), *cert. denied*, 528 U.S. 1153 (2000).

> conviction more vigorously, had they known that if they were not only imprisoned but also, when their prison term ended, ordered deported, they could not ask for a discretionary waiver of deportation.[47]

Several years later, another panel backed off of the first part of this quote and concluded that the petitioner in that case had, in fact, relied on the state of immigration law at the time of his plea.[48] But the second part of the quote stuck. By the end of 2002, seventeen courts had quoted Judge Posner, either directly or indirectly, for the proposition that a criminal defendant relied on the state of the law when committing a crime and that, therefore, no retroactive effect could be applied.[49]

Of course, embedded in the *LaGuerre* quote, and generally unacknowledged, was the assumption that a retroactive effect would only exist if the criminal defendant had relied on immigration consequences when committing a crime. In narrative terms, the

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47. *Id.* at 1041.

48. In *Jideonwo v. I.N.S.*, 224 F.3d 692 (7th Cir. 2000), the Seventh Circuit described its reasoning in *LaGuerre* by saying:

> We based this conclusion [of no retroactive effect] on the rationale that "it would border on the absurd to argue that these aliens might have decided not to commit drug crimes" had they known they would become ineligible to receive discretionary relief from deportation. Therefore, we determined that removing eligibility for discretionary relief in this circumstance would not attach a new legal consequence to the decision to engage in past conduct.

Id. at 699 (citation omitted). The *Jideonwo* court proceeded to issue a decision that recognized the reliance interest in a plea agreement, without acknowledging the conflict with *LaGuerre*. *Id.* at 699-701. *Jideonwo* was later discussed in detail by the Supreme Court in *St. Cyr*. *See* I.N.S. v. St. Cyr, 533 U.S. 289, 323 (2001).

49. Mohammed v. Reno, 309 F.3d 95, 102 (2d Cir. 2002); Armendariz-Montoya v. Sonchik, 291 F.3d 1116, 1121 (9th Cir. 2002); Domond v. I.N.S., 244 F.3d 81, 84 (2d Cir. 2001); Lara-Ruiz v. I.N.S., 241 F.3d 934, 945 (7th Cir. 2001); St. Cyr v. I.N.S., 229 F.3d 406, 418 (2d Cir. 2000), *aff'd*, 533 U.S. at 289; *Jideonwo*, 224 F.3d at 699; Jurado-Gutierrez v. Greene, 190 F.3d 1135, 1150 (10th Cir. 1999), *cert. denied sub nom.* Palaganas-Suarez v. Greene, 529 U.S. 1041 (2000); Turkhan v. Perryman, 188 F.3d 814, 828 (7th Cir. 1999); Evangelista v. Ashcroft, 232 F. Supp. 2d 30, 35-36 (E.D.N.Y. 2002); Green-Mendoza v. Ashcroft, No. 99 Civ. 9911, 2002 WL 1870285, at *3 (S.D.N.Y. Aug. 14, 2002); Worrell v. Ashcroft, 207 F. Supp. 2d 61, 68 (W.D.N.Y. 2002); Iturralde-Manosalva v. Reno, No. Civ. 9735, 2001 WL 1398689, at *4 (S.D.N.Y. Nov. 9, 2001); Romero v. Reno, 198 F. Supp. 2d 276, 277 (W.D.N.Y. 2001); Soto v. Ashcroft, No. Civ. 5986, 2001 WL 1029130, at *5 (S.D.N.Y. Sept. 7, 2001); Lawrence v. I.N.S., No. Civ. 2154, 2001 WL 818141, at *6 (S.D.N.Y. July 20, 2001); Herrera v. I.N.S., No. Civ. 6158, 2000 WL 1349248, at *2 (S.D.N.Y. Sept. 19, 2000); Tam v. Reno, No. C-98-2835, 1999 WL 163055, at *10 (N.D. Cal. Mar. 22, 1999). A few other cases have quoted Judge Posner and offered criticisms of his rhetoric. *See, e.g.*, Beharry v. Reno, 183 F. Supp. 2d 584, 590 (E.D.N.Y. 2002), *rev'd sub. nom* Beharry v. Ashcroft, 329 F.3d 51 (2d Cir. 2003); Zgombic v. Farquharson, 89 F. Supp. 2d 220, 232 n.10 (D. Conn. 2000), *vacated by* No. 00-6165, 2003 WL 21243248 (2d Cir. May 29, 2003).

LaGuerre court presented the retroactive effect issue as placing the court at the scene of the crime and placing the spotlight on the criminal defendant as she revealed the thinking behind the criminal scheme.[50] Once posed in this manner, the answer appeared to be clear: a defendant was unlikely to have structured criminal activities with a specific reliance on deportation laws.[51] Unlike the defendant agreeing to a plea, the scene of the planning of the crime included no lawyer advising the defendant on the finer points of the law, and structuring a deal in light of those consequences. Once the *LaGuerre* narrative was accepted as relevant, the conclusion of no retroactive effect seemed inescapable.[52]

But the crucial underlying question was whether the *LaGuerre/ Jideonwo* court was asking the right question. Is conscious reliance, with a prototype of a lawyer-advised transaction, as recognized in *Jideonwo*, required for an effect to be retroactive? That is the essential issue with which so many post-*St. Cyr* courts have failed to grapple.

II. IDENTIFYING THE PROPER TEST FOR RETROACTIVE EFFECT IN CASES INVOLVING WRONGFUL CONDUCT

Underlying the courts' difficulty with finding a proper date by which to measure retroactivity is the courts' failure to acknowledge that retroactivity jurisprudence seeks to achieve different goals in different circumstances.[53] These different goals shape the judgment of whether any given new consequence is deemed a "new legal consequence" from the standpoint of retroactivity analysis.[54] Without an appreciation of the underlying goals of retroactivity jurisprudence, it is difficult to assess what event should be treated as the trigger date for the presumption against retroactivity.[55]

The concern in retroactivity cases about protection of reasonable reliance interests is rooted in cases where the central question is whether the government should be allowed to upset economic transactions formulated in light of government rules.[56] The paradigmatic economic-based cases are those concerning tax laws. In *United States v. Carlton*, for example, the Court considered the

50. *LaGuerre,* 164 F.3d at 1041.
51. *Id.*
52. *See id.*
53. *See infra* text accompanying notes 58-80.
54. *See infra* text accompanying notes 58-80.
55. *See infra* text accompanying notes 92-109.
56. *See infra* text accompanying notes 59-66.

constitutionality of changes in the federal estate tax laws.[57] Congress had revised the estate tax laws to allow the deduction of sales of stock to employee stock ownership plans.[58] After these amendments, tax specialists had used the new deductions in ways that Congress had not intended.[59] Congress then amended the laws to limit the use of the deduction and applied the new rules retroactively.[60] The question for the Court was whether these new limitations on the deduction were impermissibly retroactive.[61] Although the Court ruled that the new statute was constitutional, it had no question that the law was retroactive.[62] The laws had structured decisions made by individuals, with the advice of counsel, in a highly regulated system of economic transactions.

Much of the language of the *St. Cyr* opinion that centers on the plea process tracks the way that the *Carlton* Court thought about retroactivity.[63] Just as *Carlton* "was entitled to structure the estate's affairs to comply with tax laws while minimizing tax liability,"[64] the *St. Cyr* Court sought to respect the efforts of the immigrant charged with a crime to minimize the immigration consequences of any plea agreement.[65]

But while the economic transaction model dominates in many retroactivity settings, it is not the only model employed.[66] Another line of reasoning focuses not on what was going through the mind of the individual, but instead on a variety of fairness concerns, including the danger of selective lawmaking against those who are unpopular.[67] In the narrative about an unpopular group, the dominant majority fails to appreciate the unfairness of lawmaking that changes the consequences of past acts by persons or corporations that are unpopular or are seen as having acted wrongfully.[68] Ret-

57. United States v. Carlton, 512 U.S. 26, 29 (1994).
58. 26 U.S.C. § 2057 (1982).
59. *Carlton*, 512 U.S. at 28-30.
60. *Id.* at 29.
61. *Id.* at 30.
62. *Id.* at 29.
63. I.N.S. v. St. Cyr, 533 U.S. 289 (2001).
64. United States v. Carlton, 512 U.S. 26, 35 (1994) (O'Connor, J., concurring).
65. This is clearest in the Court's discussion of the case of Charles Jideonwo, where it notes that Jideonwo engaged in extensive negotiations with prosecutors with the sole objective of obtaining a plea that would leave him eligible for relief from deportation. *St. Cyr*, 533 U.S. at 323-24.
66. *See* Debra Lyn Bassett, *In the Wake of Schooner Peggy: Deconstructing Legislative Retroactivity Analysis*, 69 U. CIN. L. REV. 453, 506-16 (2001) (discussing multiple strands of retroactivity jurisprudence).
67. *Id.* at 512.
68. *Id.* at 513 n.342.

roactivity jurisprudence seeks to impose a norm of prospective law-making and stands as a check against easy use of this majority power to change the consequences of past acts.[69] The weakness of constitutional guarantees limits the courts' role, but it at least means that Congress must think carefully before it imposes new consequences on those who are unpopular.[70]

The check-on-unfair-exercise-of-power-against-the-unpopular model is illustrated by many of the Court's recent retroactivity cases. In *Landgraf v. USI Film Products*,[71] for example, the issue was whether a person who had committed sexual harassment could be subjected to new damage remedies.[72] In *Rivers v. Roadway Express*,[73] the Court addressed whether the perpetrator of racial harassment would face new damage remedies.[74] In *Hughes Aircraft Co. v. United States* ex rel. *Schumer*,[75] the issue was whether a company that had perpetrated a fraud on the government could invoke defenses to a private *qui tam* suit that were available at the time of the fraud, although the defense would never have been available if the government had initiated the litigation.[76] None of these cases involved a sympathetic plaintiff who was simply trying to follow the rules and had the rules changed midstream. On the contrary, each of these plaintiffs had acted illegally under the laws in effect at the time of the conduct.[77] In each case, the issue presented to the Court was whether Congress could be allowed to impose new consequences on past wrongful conduct.[78] Given the nature of the problem, the Court did not focus on a specific transaction that had the hallmarks of a conscious decision, similar to the lawyer-advised estate planning in *Carlton*[79] or the lawyer advised plea in *Jide-*

69. *Id.* at 513-14.

70. Limiting retroactivity jurisprudence to this kind of clear statement rule, of course, is of limited comfort to an unpopular group. By definition, it will have a hard time preventing Congress from expressly authorizing vindictive legislation. *See* Daniel Kanstroom, St. Cyr *or Insincere: The Strange Quality of Supreme Court Victory*, 16 GEO. IMMIGR. L.J. 413, 419 (2002).

71. 511 U.S. 244 (1994).

72. *Id.* at 250.

73. 511 U.S. 298 (1994).

74. *Id.* at 302.

75. 520 U.S. 939 (1997).

76. *Id.* at 941.

77. *Hughes Aircraft Co.*, 520 U.S. at 942-43; *Landgraf*, 511 U.S. at 248-49; *Rivers*, 511 U.S. at 282.

78. *Hughes Aircraft Co.*, 520 U.S. at 942-43; *Landgraf*, 511 U.S. at 248-49; *Rivers*, 511 U.S. at 282.

79. *See supra* notes 58-65 and accompanying text.

onwo,[80] where decisions were specifically made in light of pre-existing law.

In part, the Court has sought to protect those who are unpopular in economic cases as well. In *Carlton*, for example, Justice O'Connor wrote that the tax planner should not be seen as wrongful because of planning decisions motivated by a desire to avoid paying taxes.[81] Thus, no matter how despised tax planners may be when they exploit a loophole, they are allowed to rely on the state of the law. But the critical concern in *Carlton* was to respect the fact that tax laws are designed and expected to structure transactions.[82] In contrast, when a law imposes a new sanction for conduct that was wrongful from the start, the purpose of retroactivity jurisprudence is not to bless past action as appropriate, but to prevent an unfair imposition of greater consequences for that which was always wrong.[83] Thus, the Court never says that the sexual harassment in *Landgraf*[84] or the racial harassment in *Rivers*[85] were backed by legitimate expectations (as was the tax planning in *Carlton*). Instead, it says that the consequences for the wrongful conduct in each case should be measured by the law in effect at the time that the bad act took place.[86]

Once seen in this light, the plea agreement becomes a very strange trigger date for retroactivity analysis of the 1996 deportation laws. The Supreme Court itself recognized in *St. Cyr* that immigrants are an "unpopular group" and, as non-voters, are particularly vulnerable to adverse legislation.[87] This is all the more true of the persons facing deportation for past crimes, who bear the mark of being labeled as "criminal aliens."[88] Their wrongful conduct is at the heart of why they are targets of the legislation.

In the wrongful conduct context—where the goal of retroactivity jurisprudence is not to protect transactions but to limit the imposition of new penalties—the closest analogy are cases involving new criminal sanctions for conduct that was always criminal.[89] In these

80. *See supra* note 50 and accompanying text.

81. United States v. Carlton, 512 U.S. 26, 36 (1994) (quoting Helvering v. Gregory, 69 F.2d 809, 810 (2d Cir. 1934)).

82. *Id.*

83. *See id.* at 39-40.

84. Landgraf v. USI Film Prods., 511 U.S. 244 (1994).

85. Rivers v. Roadway Express, Inc., 511 U.S. 298 (1994).

86. *Carlton*, 512 U.S. at 35.

87. I.N.S. v. St. Cyr, 533 U.S. 289, 315 n.39 (2001).

88. *See id.* at 313.

89. *See, e.g.*, Johnson v. United States, 529 U.S. 694 (2000); Miller v. Florida, 428 U.S. 423 (1987); Lindsey v. Washington, 301 U.S. 397 (1937).

cases, courts confront an issue very similar to that presented in the context of new deportation consequences. The underlying conduct was always illegal, but the consequences of that conduct have changed.[90]

None of the cases limiting *St. Cyr's* holding to the plea context takes account of the long experience with analogous issues in the context of penal sanctions. In fact, this tradition is rich and very useful. For example, in *Johnson v. United States*,[91] decided one year prior to *St. Cyr*, the Supreme Court confronted the question of whether a new law on the sanctions following a revocation of supervised release could be applied to a defendant whose conduct preceded the change in the law.[92] In this case, the change in the law post-dated the defendant's initial offense and conviction, but pre-dated the conduct that led to the revocation of his supervised release.[93] A unanimous court[94] ruled that, under the presumption against retroactive application of new statutes, the new law should be read as applying only to those persons whose initial offense occurred after the effective date of the new law.[95] Nowhere in the Court's opinion is there any reference to whether the defendant took a plea or went to trial. Nowhere is there any reference to how he might have relied on the prior revocation scheme. Instead, the Court recognizes that the revocation scheme affects the system of possible punishment for the initial offense and that, as a result, no new scheme can be applied to a person whose conviction is based on conduct that pre-dated the change in the law.[96]

This same rule is found in countless of other criminal cases where the question of retroactive effect arises under the Ex Post Facto Clause rather than the clear statement doctrine. In *Miller v. Florida*,[97] for example, the Court considered whether new sentencing guidelines could be applied to a defendant.[98] The individual's conduct took place in April 1984; the sentencing guidelines were proposed in May 1984 and adopted in July 1984. The conviction was entered in August 1984, and the individual was sentenced in

90. *See, e.g.*, *Johnson*, 529 U.S. at 694; *Miller*, 428 U.S. at 423; *Lindsey*, 301 U.S. at 397.

91. 529 U.S. 694, 702 (2000).

92. *Id.* at 696.

93. *Id.* at 697-99.

94. Justice Scalia joined the majority on this point, although he dissented on the interpretation of the prior law. *Id.* at 715-27 (Scalia, J., dissenting).

95. *Id.* at 702.

96. *Id.* at 700-01.

97. 482 U.S. 423 (1987).

98. *Id.* at 424-25.

October 1984.[99] The government argued that it was sufficient that the defendant knew the guidelines at the time of sentencing, and that he knew at the time of his offense that he would be sentenced under whatever guidelines were in effect at the time of his sentencing.[100] The Court rejected this argument.[101] It concluded that the new guidelines were more onerous than those in effect at the time the criminal offense took place and therefore, it would be a retroactive effect to apply them to the defendant.[102]

Perhaps most relevant to the *St. Cyr* context is *Lindsey v. Washington*,[103] a case that concerned a change in sentencing that took the prior maximum penalty and made it a mandatory penalty.[104] As the *St. Cyr* Court recognized, *Lindsey* involved the same kind of change in consequences at issue in challenges to retroactive application of new mandatory deportation rule—changing a maximum penalty into a mandatory penalty.[105] In *Lindsey*, the defendant committed his crime in April 1935.[106] Several months later, but before the government initiated its prosecution, the sentencing law changed.[107] The Court ruled that it would be an impermissible retroactive effect for Lindsey to be subjected to a more onerous sentencing scheme other than the one in effect at the time of his crime.[108]

The test from these criminal cases is based on a norm that the government should abide by the rules in effect at the time that a person engages in conduct, whether or not that conduct is already proscribed under lesser sanctions.[109] This norm finds its roots in both principles of good government and in principles of fair notice.[110] Although the constitutional category of the conduct, civil or criminal, determines the strength with which courts will enforce a norm of prospectivity, the same norm applies in either context—

99. *Id.* at 426-27.
100. *Id.* at 430-31.
101. *Id.* at 431.
102. *Id.* at 431-32.
103. 301 U.S. 397 (1937).
104. *Id.* at 399.
105. *Id.* at 398-99.
106. State v. Lindsey, 61 P.2d 293, 294 (Wash. 1936), *rev'd*, 301 U.S. at 398.
107. *See Lindsey*, 301 U.S. at 398.
108. *Id.* at 401.
109. *See, e.g.*, *id.* at 402 (noting that the Constitution prohibits an additional punishment to a previously committed crime where it would be to the disadvantage of the defendant).
110. *See* Kring v. Missouri, 107 U.S. 221, 224 (1883) (noting how notice to a defendant of punishment for crime is necessary to legitimacy within the law); *see also* case cited *infra* note 115.

namely that new penalties should not be imposed for conduct that pre-dates the imposition of those penalties.[111]

The good government claim is simply that the government engenders greater respect for its laws if people can count on the laws being stable.[112] Unlike market expectations, governmental rules are official statements about what conduct is permissible and what consequences will flow from a failure to abide by government-issued standards of behavior. Changing rules after the fact thus implicates the rule of law and whether people can count on the government to play by the standards it has set.[113]

The fair notice claim is that people should have an opportunity to modify their conduct in light of the penalties the government will impose.[114] It proceeds not on the idea that it is wrong to change consequences for a person who consciously structured criminal acts in light of the penalties, but rather on the idea that the individual should have had proper warning of the penalties the government will impose.[115]

The difference between a requirement of reliance and a requirement of fair notice is subtle. After all, one purpose of notice is to have the opportunity to change your actions.[116] Those who have engaged in unlawful conduct have already failed to act in accordance with laws about which they are presumed to have notice. Having failed that opportunity, they might be presumed to be unaffected by the lack of notice of other consequences of their wrongful behavior.[117] This seems to be Judge Posner's point in *LaGuerre*.[118] Retroactivity jurisprudence, though, has never treated those who engaged in wrongful behavior so harshly. As the *Landgraf*, *Rivers*,

111. *See Lindsey*, 301 U.S. at 401.

112. *See* Chambers v. Reno, 307 F.3d 284, 296 (4th Cir. 2002) (Goodwin, J., dissenting) (citing Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1106 (1997)).

113. *See* Morawetz, *supra* note 4, at 136.

114. *Chambers*, 307 F.3d at 289.

115. *See id.* at 296 (Goodwin, J., dissenting) (stating "[r]egardless of whether a particular individual actually relies to his detriment on the legal regime, the government must at least give individuals the *opportunity* to know the law and behave accordingly.").

116. *See id.* at 290 (discussing defendant's interest in notice of eligibility for relief factoring into his decision to take a plea agreement).

117. *See* LaGuerre v. Reno, 164 F.3d 1035, 1041 (1998); *see also* discussion *supra* note 50.

118. *See supra* text accompanying note 50.

and *Hughes* cases illustrate, those who have acted wrongfully are still provided with protections of fair notice.[119]

There are many reasons for a rule of fair notice that goes beyond proven or inferred reliance. Fair notice, or fair warning, of the consequences of one's actions provides the person with an opportunity to avoid the actual penalty—not some other more minor penalty.[120] Thus, even if the person would have ignored the increased penalty, notice makes the higher penalty more fair.[121] It is this principle of fair warning of actual penalties that underlies the criminal retroactivity caselaw.[122] Second, if one of the purposes of retroactivity jurisprudence is to protect those who are singled out for unpopularity, concepts of fair notice track the actions that make the group unpopular.[123] In the case of those convicted of crimes, those actions are likely to be the criminal actions themselves rather than the actions taken in the course of criminal proceedings.[124] Finally, a fair notice rule recognizes that notice can affect action. Much of the law is premised on the notion that people will respond to the sanctions the law imposes on wrongful conduct.[125] Thus, the

119. *See* Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939, 946 (1997) (noting a presumption against retroactive legislation); Rivers v. Roadway Express, Inc., 511 U.S. 298, 310-14 (1994) (discussing retroactivity and holding that the act does not apply to pre-enactment conduct); Landgrad v. USI Film Prods., 511 U.S. 244, 270 (1994) (discussing retroactivity and fair notice).

120. *See* Morawetz, *supra* note 4, at 135-36 (discussing the concept of fair warning of the consequences of one's actions).

121. *See id.*

122. *See, e.g.*, Weaver v. Graham, 450 U.S. 24, 28-29 (1981) (discussing the ex post facto prohibition and fair notice).

123. *See* Morawetz, *supra* note 4, at 146-47 (discussing the unfair targeting of unpopular groups through retroactive legislation).

124. The same conclusion follows from Professor Chin's article for this symposium. As he argues, the civil label for a collateral consequence depends on the legislative purpose being geared to persons who have engaged in some conduct that makes that group undesirable. Otherwise, the legislature's actions should be seen as penal and, therefore, subject to more rigorous constitutional tests. Even if this view is rejected on the ground that the conviction may properly be used as easy proof of the conduct, the underlying argument stands that civil collateral consequences depend on a legislative purpose that is conduct-oriented. Thus, when imposed retroactively, a clear statement should be required for changing consequences of past conduct and not simply those of plea agreements. Gabriel Chin, *Are Collateral Sanctions Premised on Conduct or Conviction?: The Case of Abortion Doctors*, 30 FORDHAM URB. L.J. 1685, 1699-1700 (2003).

125. *See* Robert Kaatz, *Is There an Ex Post Facto Prohibition on Judicial Decisions that Retroactively Enlarge Criminal Punishment?*, 47 WAYNE L. REV. 1367, 1381 (2002) (stating that defendants often rely on expected punishment when deciding their plea). *But see* Danny Stevenson, *To Whom is the Law Addressed?*, 21 YALE L. & POL'Y REV. 105, 158 (2003) (arguing that the ex post facto rule is *not* to provide notice, and does not, but is to "discourage private bullying by the government.").

degree of a consequence (for example, mandatory deportation) might affect underlying action, even if lesser penalties failed to have that effect. Indeed, theories of deterrence in criminal justice are based on the assumption that penalties can affect action.[126] So, while Judge Posner's rhetoric was powerful, it is quite plausible that people who have broken the law would have acted differently if they had known that their wrongful conduct would carry extremely serious penalties.[127]

CONCLUSION

Retroactivity jurisprudence is a powerful potential tool to protect those with criminal convictions from collateral consequences.[128] The power of that tool, however, might be diminished by the courts' overly narrow reading of the appropriate trigger date for measuring retroactivity.[129] At this stage, Judge Posner's rhetoric from *LaGuerre*[130] has taken on such a life of its own that it may be difficult for courts to abandon the reliance test in judging retroactive effect. But when measured against other cases in which new consequences were imposed for past wrongful conduct and when thought of in terms of the broader goals of retroactivity jurisprudence, there is little analytic support for the judicial assumption that retroactivity only protects the reliance-backed planning decisions of immigrants with criminal convictions.[131]

126. *See* Stevenson, *supra* note 125, at 158-67 (discussing the role of deterrence in criminal justice).

127. *See supra* text accompanying notes 31 & 36.

128. *See* case cited *supra* note 5 and accompanying text.

129. *See* cases cited *supra* note 9 and accompanying text.

130. *See supra* text accompanying note 50.

131. *See, e.g.*, case cited *supra* note 31 and accompanying text.