SUPREME COURT OF THE UNITED STATES

No. 98–7540

SCOTT LESLIE CARMELL, PETITIONER *v.* TEXAS

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS, SECOND DISTRICT

[May 1, 2000]

JUSTICE STEVENS delivered the opinion of the Court.

An amendment to a Texas statute that went into effect on September 1, 1993, authorized conviction of certain sexual offenses on the victim's testimony alone. The previous statute required the victim's testimony plus other corroborating evidence to convict the offender. The question presented is whether that amendment may be applied in a trial for offenses committed before the amendment's effective date without violating the constitutional prohibition against State *"ex post facto"* laws.

I

In 1996, a Texas grand jury returned a 15-count indictment charging petitioner with various sexual offenses against his stepdaughter. The alleged conduct took place over more than four years, from February 1991 to March 1995, when the victim was 12 to 16 years old. The conduct ceased after the victim told her mother what had happened. Petitioner was convicted on all 15 counts. The two most serious counts charged him with aggravated sexual assault, and petitioner was sentenced to life imprisonment on those two counts. For each of the other 13 offenses (5 counts of sexual assault and 8 counts of indecency with a

child), petitioner received concurrent sentences of 20 years.

Until September 1, 1993, the following statute was in effect in Texas:

> "A conviction under Chapter 21, Section 22.011, or Section 22.021, Penal Code, is supportable on the uncorroborated testimony of the victim of the sexual offense if the victim informed any person, other than the defendant, of the alleged offense within six months after the date on which the offense is alleged to have occurred. The requirement that the victim inform another person of an alleged offense does not apply if the victim was younger than 14 years of age at the time of the alleged offense." Tex. Code Crim. Proc. Ann., Art. 38.07 (Vernon 1983).[1]

We emphasize three features of this law that are critical to petitioner's case.

The first is the so-called "outcry or corroboration" requirement. Under that provision, a victim's testimony can support a conviction for the specified offenses only if (1) that testimony is corroborated by other evidence, or (2) the victim informed another person of the offense within six months of its occurrence (an "outcry"). The second feature is the "child victim" provision, which is an exception to the outcry or corroboration requirement. According to this provision, if the victim was under 14 years old at the time of the alleged offense, the outcry or corroboration requirement does not apply and the victim's testimony alone can support a conviction— even without any corroborating evidence or outcry. The third feature is that Article 38.07

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[1]The chapter and sections to which this statute refers cover all the charges contained in the 15-count indictment against petitioner. Chapter 21 includes the offense of indecency with a child; §22.011 covers sexual assault; §22.021 criminalizes aggravated sexual assault.

establishes a sufficiency of the evidence rule respecting the minimum quantum of evidence necessary to sustain a conviction. If the statute's requirements are not met (for example, by introducing only the uncorroborated testimony of a 15-year-old victim who did not make a timely outcry), a defendant cannot be convicted, and the court must enter a judgment of acquittal. See *Leday* v. *State*, 983 S. W. 2d 713, 725 (Tex. Crim. App. 1998); *Scoggan* v. *State*, 799 S. W. 2d 679, 683 (Tex. Crim. App. 1990). Conversely, if the requirements are satisfied, a conviction, in the words of the statute, "is supportable," and the case may be submitted to the jury and a conviction sustained. See *Vickery* v. *State*, 566 S. W. 2d 624, 626–627 (Tex. Crim. App. 1978); see also *Burnham* v. *State*, 821 S. W. 2d 1, 3 (Tex. Ct. App. 1991).[2]

Texas amended Article 38.07, effective September 1, 1993. The amendment extended the child victim exception to victims under 18 years old.[3] For four of petitioner's

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[2]Texas courts treat Article 38.07 as a sufficiency of the evidence rule, rather than as a rule concerning the competency or admissibility of evidence. Ordinarily, when evidence that should have been excluded is erroneously admitted against a defendant, the trial court's error is remedied on appeal by reversing the conviction and remanding for a new trial. See, *e.g.*, *Miles* v. *State*, 918 S. W. 2d 511, 512 (Tex. Crim. App. 1996); *Beltran* v. *State*, 728 S. W. 2d 382, 389 (Tex. Crim. App. 1987). A trial court's failure to comply with the requirements of Article 38.07, by contrast, results not in a remand for a new trial, but in the reversal of conviction and remand for entry of an order of acquittal. See, *e.g.*, *Scoggan*, 799 S. W. 2d, at 683. At oral argument, Texas agreed that the foregoing is an accurate description of Texas law. See Tr. of Oral Arg. 28–29, 32, 40–41.

[3]The new statute read in full:

"A conviction under Chapter 21, Section 22.011, or Section 22.021, Penal Code, is supportable on the uncorroborated testimony of the victim of the sexual offense if the victim informed any person, other than the defendant, of the alleged offense within one year after the date on which the offense is alleged to have occurred. The requirement that the victim inform another person of an alleged offense does not apply if

counts, that amendment was critical. The "outcry or corroboration" requirement was not satisfied for those convictions;[4] they rested solely on the victim's testimony. Accordingly, the verdicts on those four counts stand or fall depending on whether the child victim exception applies. Under the old law, the exception would *not* apply, because the victim was more than 14 years old at the time of the alleged offenses. Under the new law, the exception would apply, because the victim was under 18 years old at that time. In short, the validity of four of petitioner's convictions depends on whether the old or new law applies to his case, which, in turn, depends on whether the *Ex Post Facto* Clause prohibits the application of the new version of Article 38.07 to his case.

As mentioned, only 4 of petitioner's 15 total convictions are implicated by the amendment to Article 38.07; the other 11 counts— including the 2 convictions for which petitioner received life sentences— are uncontested. Six counts are uncontested because they were committed

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the victim was younger than 18 years of age at the time of the alleged offense." Tex. Code Crim. Proc., Ann., Art. 38.07, as amended by Act of May 29, 1993, 73d Leg., Reg. Sess., ch. 900, §12.01, 1993 Tex. Gen. Laws 3765, 3766, and Act of May 10, 1993, 73d Leg., Reg. Sess., ch. 200, §1, 1993 Tex. Gen. Laws 387, 388.

[4]The victim did not make an outcry until March 1995, more than six months after the alleged offenses. Although the 1993 amendment to Article 38.07 extended the outcry period from six months to one year, see n. 3, *supra*, the victim's outcry did not come within that time period either. Accordingly, that change in the outcry provision is immaterial to this case.

The State argues that there is evidence corroborating the victim's testimony, so it does not help petitioner even if the old law applies. See Brief for Respondent 4, n. 2. Before the state court, however, petitioner argued that "there was nothing to corroborate [the victim's] version of events," 963 S. W. 2d 833, 836 (Tex. Ct. App. 1998), and that court accepted the contention as correct for the purposes of its decision. We do the same here.

when the victim *was* under 14 years old, so his convictions stand even under the old law; the other five uncontested counts were committed after the new Texas law went into effect, so there could be no *ex post facto* claim as to those convictions. See *Weaver* v. *Graham*, 450 U. S. 24, 31 (1981) ("The critical question [for an *ex post facto* violation] is whether the law changes the legal consequences of acts completed before its effective date"). What are at stake, then, are the four convictions on counts 7 through 10 for offenses committed between June 1992 and July 1993 when the victim was 14 or 15 years old and the new Texas law was not in effect.

Petitioner appealed his four convictions to the Court of Appeals for the Second District of Texas in Fort Worth. See 963 S. W. 2d 833 (1998). Petitioner argued that under the pre-1993 version of Article 38.07, which was the law in effect at the time of his alleged conduct, those convictions could not stand, because they were based *solely* on the victim's testimony, and the victim was not under 14 years old at the time of the offenses, nor had she made a timely outcry.

The Court of Appeals rejected petitioner's argument. Under the 1993 amendment to Article 38.07, the court observed, petitioner could be convicted on the victim's testimony alone because she was under 18 years old at the time of the offenses. The court held that applying this amendment retrospectively to petitioner's case did not violate the *Ex Post Facto* Clause:

> "The statute as amended does not increase the punishment nor change the elements of the offense that the State must prove. It merely 'removes existing restrictions upon the competency of certain classes of persons as witnesses' and is, thus, a rule of procedure. *Hopt v. Utah*, 110 U. S. 574, 590 . . . (1884)." *Id.*, at 836.

The Texas Court of Criminal Appeals denied discretionary review. Because the question whether the retrospective application of a statute repealing a corroboration requirement has given rise to conflicting decisions,[5] we granted petitioner's *pro se* petition for certiorari, 527 U. S. 1002 (1999), and appointed counsel, *id.*, at 1051.

II

To prohibit legislative Acts "contrary to the first principles of the social compact and to every principle of sound legislation,"[6] the Framers included provisions they considered to be "perhaps greater securities to liberty and republicanism than any [the Constitution] contains."[7] The provisions declare:

> "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . ." U. S. Const., Art. I, §10.[8]

The proscription against *ex post facto* laws "necessarily requires some explanation; for, naked and without explanation, it is unintelligible, and means nothing." *Calder* v. *Bull*, 3 Dall. 386, 390 (1798) (Chase, J.). In *Calder* v. *Bull*, Justice Chase stated that the necessary explanation is derived from English common law well known to the Framers: "The expressions '*ex post facto laws*,' are *techni-*

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[5] Compare *Utah* v. *Schreuder*, 726 P. 2d 1215 (Utah 1986) (finding *ex post facto* violation); *Virgin Islands* v. *Civil*, 591 F. 2d 255 (CA3 1979) (same), with *New York* v. *Hudy*, 73 N. Y. 2d 40, 535 N. E. 2d 250 (1988) (no *ex post facto* violation); *Murphy* v. *Sowders*, 801 F. 2d 205 (CA6 1986) (same); *Murphy* v. *Kentucky*, 652 S. W. 2d 69 (Ky. 1983) (same). See also *Idaho* v. *Byers*, 102 Idaho 159, 627 P. 2d 788 (1981) (judicial change in witness corroboration rule may not be applied retroactively); *Bowyer* v. *United States*, 422 A. 2d 973 (DC 1980) (same).

[6] The Federalist No. 44, p. 282 (C. Rossiter ed. 1961) (J. Madison).

[7] *Id.*, No. 84, at 511 (A. Hamilton).

[8] Article I, §9, cl. 3, has a similar prohibition applicable to Congress: "No Bill of Attainder or ex post facto Law shall be passed."

cal, they had been in use long before the Revolution, and had acquired an appropriate meaning, by *Legislators, Lawyers*, and *Authors*." *Id.*, at 391; see also *id.*, at 389 ("The prohibition . . . very probably arose from the knowledge, that *the Parliament of Great Britain* claimed and exercised a power to pass *such laws* . . ."); *id.*, at 396 (Paterson, J.). Specifically, the phrase *"ex post facto"* referred only to certain types of criminal laws. Justice Chase catalogued those types as follows:

> "I will state *what laws* I consider *ex post facto laws*, within the *words* and the *intent* of the prohibition. 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*." *Id.*, at 390 (emphasis in original).[9]

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[9] Elsewhere in his opinion, Justice Chase described his taxonomy of *ex post facto* laws as follows:

"Sometimes [*ex post facto* laws] respected the crime, by declaring acts to be treason, which were not treason, when committed; at other times, they violated the rules of evidence (to supply a deficiency of legal proof) by admitting one witness, when the existing law required two; by receiving evidence without oath; or the oath of the wife against the husband; or other testimony, which the courts of justice would not admit; at other times they inflicted punishments, where the party was not, by law, liable to any punishment; and in other cases, they inflicted greater punishment, than the law annexed to the offence." 3 Dall., at 389 (emphasis deleted).

It is the fourth category that is at issue in petitioner's case.

The common-law understanding explained by Justice Chase drew heavily upon the authoritative exposition of one of the great scholars of the common law, Richard Wooddeson. See *id.*, at 391 (noting reliance on Wooddeson's treatise).[10] Wooddeson's classification divided *ex post facto* laws into three general categories: those respecting the crimes themselves; those respecting the legal rules of evidence; and those affecting punishment (which he further subdivided into laws creating a punishment and those making an existing punishment more severe).[11] See 2 R. Wooddeson, A Systematical View of the

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[10] Wooddeson was well known for his treatise on British common law, A Systematical View of the Laws of England, which collected various lectures he delivered as the Vinerian Professor and Fellow of Magdalen College at Oxford. Though not as well known today, Justice Chase noted that Wooddeson was William Blackstone's successor, 3 Dall., at 391, (Blackstone held the Vinerian chair at Oxford until 1766) and his treatise was repeatedly cited in the years following the ratification by lawyers appearing before this Court and by the Court itself. See, *e.g.*, *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, 562–563 (1819) (argument of Daniel Webster); *id.*, at 668, 676 (Story, J.); *Town of Pawlet* v. *Clark*, 9 Cranch 292, 326, 329 (1815) (Story, J.); *The Nereide*, 9 Cranch 388, 449 (1815) (Story, J.); *Cooper* v. *Telfair*, 4 Dall. 14, 16–17 (1800) (arguments of Edward Tilghman, Jared Ingersoll, and Alexander Dallas); *Hannum* v. *Spear*, 2 Dall. 291 (Err. App. Pa. 1795); *Glass* v. *Sloop Betsey*, 3 Dall. 6, 8 (1794).

[11] Specifically, in the former category Wooddeson included those laws that make "some innovation, or creat[e] some forfeiture or disability, not incurred in the ordinary course of law." 2 R. Wooddeson, A Systematical View of the Laws of England 638 (1792). In the latter category, he placed those laws that "imposed a sentence *more severe* than could have been awarded by the inferior courts." *Id.*, at 639. As examples of the former category Wooddeson cited the bills passed by Parliament that banished Lord Clarendon in 1669 and Bishop Atterbury in 1723. Those punishments were considered "innovation[s] . . . not incurred in the ordinary course of law" because banishment, at those times, was simply not a form of penalty that could be imposed by the

Laws of England 625–640 (1792) (Lecture 41) (hereinafter Wooddeson). Those three categories (the last of which was further subdivided) correlate precisely to *Calder*'s four categories. Justice Chase also used language in describing the categories that corresponds directly to Wooddeson's phrasing.[12] Finally, in four footnotes in Justice Chase's opinion, he listed examples of various Acts of Parliament illustrating each of the four categories. See 3 Dall., at 389, nn. *, **d**, ‡, ¦.[13] Each of these examples is exactly the same as the ones Wooddeson himself used in his treatise. See 2 Wooddeson 629 (case of the Earl of Strafford); *id.*, at 634 (case of Sir John Fenwick); *id.*, at 638 (banishments of Lord Clarendon and of Bishop Atterbury); *id.*, at 639 (Coventry Act).

Calder's four categories, which embraced Wooddeson's formulation, were, in turn, soon embraced by contemporary scholars. Joseph Story, for example, in writing on the *Ex Post Facto* Clause, stated:

"The general interpretation has been, and is, . . . that

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courts. See 11 W. Holdsworth, A History of English Law 569 (1938); Craies, The Compulsion of Subjects to Leave the Realm, 6 L. Q. Rev. 388, 396 (1890).

[12] See 2 Wooddeson 631 (referring to laws that "respec[t] the crime, determining those things to be treason, which by no prior law or adjudication could be or had been so declared"); *id.*, at 633–634 (referring to laws "respecting . . . the rules of *evidence* [rectifying] a deficiency of legal proof" created when only one witness was available but "a statute then lately made requiring two witnesses" had been in effect); *id.*, at 638 (describing "acts of parliament, which principally affect *the punishment*, making therein some innovation, or creating some forfeiture or disability, not incurred in the ordinary course of law"); *id.*, at 639 (referring to instances where "the legislature . . . imposed a sentence *more severe* than could have been awarded by the inferior courts"). Compare n. 9, *supra*.

[13] The instances cited were the case of the Earl of Strafford, the case of Sir John Fenwick, the banishment of Lord Clarendon and of Bishop Atterbury, and the Coventry Act.

> the prohibition reaches every law, whereby an act is declared a crime, and made punishable as such, when it was not a crime, when done; or whereby the act, if a crime, is aggravated in enormity, or punishment; or whereby different, or less evidence, is required to convict an offender, than was required, when the act was committed." 3 Commentaries on the Constitution of the United States §1339, p. 212 (1833).

James Kent concurred in this understanding of the Clause:

> "[T]he words *ex post facto laws* were technical expressions, and meant every law that made an act done before the passing of the law, and which was innocent when done, criminal; or which aggravated a crime, and made it greater than it was when committed; or which changed the punishment, and inflicted a greater punishment than the law annexed to the crime when committed; or which altered the legal rules of evidence, and received less or different testimony than the law required at the time of the commission of the offence, in order to convict the offender." 1 Commentaries on American Law 408 (3d ed. 1836) (Lecture 19).

This Court, moreover, has repeatedly endorsed this understanding, including, in particular, the fourth category (sometimes quoting Chase's words verbatim, sometimes simply paraphrasing). See *Lynce* v. *Mathis,* 519 U. S. 433, 441, n. 13 (1997); *Dobbert* v. *Florida,* 432 U. S. 282, 293 (1977); *Malloy* v. *South Carolina,* 237 U. S. 180, 183–184 (1915); *Mallett* v. *North Carolina,* 181 U. S. 589, 593–594 (1901); *Thompson* v. *Missouri,* 171 U. S. 380, 382, 387 (1898); *Hawker* v. *New York,* 170 U. S. 189, 201 (1898) (Harlan, J., dissenting); *Gibson* v. *Mississippi,* 162 U. S. 565, 589–590 (1896); *Duncan* v. *Missouri,* 152 U. S. 377, 382 (1894); *Hopt* v. *Territory of Utah,* 110 U. S. 574, 589 (1884);

Kring v. *Missouri*, 107 U. S. 221, 228 (1883), overruled on other grounds, *Collins* v. *Youngblood*, 497 U. S. 37 (1990); *Gut* v. *State*, 9 Wall. 35, 38 (1870); *Ex parte Garland*, 4 Wall. 333, 390–391 (1867) (Miller, J., dissenting); *Cummings* v. *Missouri*, 4 Wall. 277, 325–326, 328 (1867). State courts, too, in the years following *Calder*, adopted Justice Chase's four-category formulation. See *Boston & Gunby* v. *Cummins*, 16 Ga. 102, 106 (1854); *Martindale* v. *Moore*, 3 Blackf. 275, 277 (Ind. 1833); *Davis* v. *Ballard*, 24 Ky. 563, 578 (1829); *Strong* v. *State*, 1 Blackf. 193, 196 (Ind. 1822); *Dickinson* v. *Dickinson*, 7 N. C. 327, 330 (1819); see also *Woart* v. *Winnick*, 3 N. H. 473, 475 (Super. Ct. 1826).[14]

III

As mentioned earlier, Justice Chase and Wooddeson both cited several examples of *ex post facto* laws, and, in particular, cited the case of Sir John Fenwick as an example of the fourth category. To better understand the type of law that falls within that category, then, we turn to Fenwick's case for preliminary guidance.

Those who remained loyal to James II after he was deposed by King William III in the Revolution of 1688 thought their opportunity for restoration had arrived in 1695, following the death of Queen Mary. 9 T. Macaulay,

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[14]The reception given the four categories contrasts with that given to *Calder*'s actual holding– that the *Ex Post Facto* Clause applies only to criminal laws, not to civil laws. The early criticism levied against that holding, see, *e.g.*, *Satterlee* v. *Matthewson*, 2 Pet. 380, 416, 681–687 (App. I) (1829) (Johnson, J., concurring); *Stoddart* v. *Smith*, 5 Binn. 355, 370 (Pa. 1812) (Brackenridge, J.), was absent with respect to the four categories. Although Justice Chase's opinion may have somewhat dampened the appetite for further debate in the courts, that consideration would not necessarily have an effect on scholarly discourse, nor does it explain why judges would be reluctant to express criticism of the four categories, yet harbor no compunction when it came to criticizing the actual holding of the Court.

History of England 31 (1899) (hereinafter Macaulay). Sir John Fenwick, along with other Jacobite plotters including George Porter and Cardell Goodman, began concocting their scheme in the spring of that year, and over the next several months the original circle of conspirators expanded in number. *Id.*, at 32, 47–48, 109–110. Before the conspirators could carry out their machinations, however, three members of the group disclosed the plot to William. *Id.*, at 122–125. One by one, the participants were arrested, tried, and convicted of treason. *Id.*, at 127–142. Fenwick, though, remained in hiding while the rest of the cabal was brought to justice. During that time, the trials of his accomplices revealed that there were only two witnesses among them who could prove Fenwick's guilt, Porter and Goodman. *Id.*, at 170–171. As luck would have it, an act of Parliament proclaimed that two witnesses were necessary to convict a person of high treason. See An Act for Regulateing of Tryals in Cases of Treason and Misprision of Treason, 7 & 8 Will. III, ch. 3, §2 (1695–1696), in 7 Statutes of the Realm 6 (reprint 1963).[15] Thus, Fenwick knew that if he could induce either Porter or Goodman to abscond, the case against him would vanish. 9 Macaulay 171.

Fenwick first tried his hand with Porter. Fenwick sent his agent to attempt a bribe, which Porter initially accepted in exchange for leaving for France. But then Porter

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[15] That Act read, in relevant part:

"And bee it further enacted That . . . noe Person or Persons whatsoever shall bee indicted tryed or attainted of High Treason . . . but by and upon the Oaths and Testimony of Two lawfull Witnesses either both of them to the same Overtact or one of them to one and another of them to another Overtact of the same Treason unlesse the Party indicted and arraigned or tryed shall willingly without violence in open Court confesse the same or shall stand Mute or refuse to plead or in cases of High Treason shall peremptorily challenge above the Number of Thirty five of the Jury . . . ."

simply pocketed the bribe, turned in Fenwick's agent (who was promptly tried, convicted, and pilloried), and proceeded to testify against Fenwick (along with Goodman) before a grand jury. *Id.*, at 171–173. When the grand jury returned an indictment for high treason, Fenwick attempted to flee the country himself, but was apprehended and brought before the Lord Justices in London. Sensing an impending conviction, Fenwick threw himself on the mercy of the court and offered to disclose all he knew of the Jacobite plotting, aware all the while that the judges would soon leave the city for their circuits, and a delay would thus buy him a few weeks time. *Id.*, at 173–174.

Fenwick was granted time to write up his confession, but rather than betray true Jacobites, he concocted a confession calculated to accuse those loyal to William, hoping to introduce embarrassment and perhaps a measure of instability to the current regime. *Id.*, at 175–178. William, however, at once perceived Fenwick's design and rejected the confession, along with any expectation of mercy. *Id.*, at 178–180, 194. Though his contrived ploy for leniency was unsuccessful in that respect, it proved successful in another: during the delay, Fenwick's wife had succeeded in bribing Goodman, the other witness against him, to leave the country. *Id.*, at 194–195.[16]

Without a second witness, Fenwick could not be convicted of high treason under the statute mentioned earlier. For all his plotting, however, Fenwick was not to escape. After Goodman's absence was discovered, the House of

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[16]This time, Fenwick's wife handled the bribe with a deftness lacking in the first attempt. Not only was Goodman (popularly called "Scum Goodman," see 9 Macaulay 32) an easier target, but Lady Fenwick's agent gave Goodman an offer he couldn't refuse: abscond and be rewarded, or have his throat cut on the spot. *Id.*, at 195. Goodman's instinct for self-preservation prevailed, and the agent never parted company with him until they both safely reached France. *Ibid.*

Commons met and introduced a bill of attainder against Fenwick to correct the situation produced by the combination of bribery and the two-witness law. *Id.*, at 198–199. A lengthy debate ensued, during which the Members repeatedly discussed whether the two-witness rule should apply.[17] Ultimately, the bill passed by a close vote of 189 to 156, *id.*, at 210, notwithstanding the objections of Members who (foreshadowing *Calder*'s fourth category) complained that Fenwick was being attainted "upon less Evidence" than would be required under the two-witness law,[18] and despite the repeated importuning against the passing of an *ex post facto* law.[19] The bill then was taken

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[17] See, *e.g.*, The Proceedings Against Sir John Fenwick Upon a Bill of Attainder for High Treason 40 (1702) (hereinafter Proceedings) ("'Tis Extraordinary that you bring Sir *John Fenwick*, here to Answer for Treason, when . . . you have but one Witness to that Treason . . . . Treason be not Treason unless it be proved by two Witnesses . . ."); *id.*, at 103 ("It hath been objected, That there ought to be two Witnesses, by the late Statute"); *id.*, at 227 ("I do take it to be part of the Law of the Land, That no Man should be condemned for Treason without two Witnesses"); *id.*, at 256–257 ("[I]f we sit here to Judge, we sit to Judge him according to the Law of *England* . . . . Will you set up a Judgment . . . upon one Witness, when the Law says you shall have two; and after all, say 'tis a reasonable Proceeding?").

[18] See, *e.g.*, *id.*, at 270 ("I believe this House can't take away any Persons Life upon less Evidence than Inferiour Courts could do"); *id.*, at 288 ("Shall we that are the Supream Authority . . . go upon less Evidence to satisfie ourselves of Sir *John Fenwick*'s Guilt, than other Courts?"); *id.*, at 317 ("I can't satisfie my self in my Conscience, and should think some misfortune might follow me and my Posterity, if I passed Sentence upon Sir *John Fenwick*'s Life, upon less Evidence than the Law of *England* requires"); *id.*, at 342 ("But the Liberty of the People of *England* is very much concerned in the Revocation of that Act; and none of the Arguments that have been used can Convince me, That I ought to give Judgment upon less Evidence than is required by that Act").

[19] See, *e.g.*, *id.*, at 145 ("I can't say, but those Persons, who in the last Sessions of Parliament, were Imprisoned by an Act *Ex Post Facto*, and subsequent to the Fact Complained of, yet when it was passed into a

up and passed by the House of Lords, and the King gave his assent. *Id.*, at 214–225; see also An Act to Attaint Sir John Fenwick Baronet of High Treason, 8 Will. III, ch. 4 (1696). On January 28, 1697, Sir John Fenwick was beheaded. 9 Macaulay 226–227.

IV

Article 38.07 is 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." Under the law in effect at the time the acts were committed, the prosecution's case was legally insufficient and

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Law, they were Legally Detained: but, I hope, I may take notice of their Case, as some kind of Reason against this, to the end that those Laws may not grow familiar, that they may not easily be obtained; because Precedents generally grow, and as that Law *Ex Post Facto*, extended to Liberty, so this extends to Life . . ."); *id.*, at 152–153 ("It would be too much at once to make a *subsequent Law* to condemn a Man to Death . . . . I am afraid none are safe if that be admitted, That a *subsequent Law* may take away a Man's Life . . ." (emphasis added)); *id.*, at 197 ("Sir, It hath been urged to you, of what ill Consequence it would be, and how much Injustice to make a Law to Punish a Man, *Ex post Facto* . . ."); *id.*, at 256 ("But how shall they Judge? By the Laws in being. . . . That you may Judge that to be Treason in this House, *that was not so by the Law before.* So that give me leave to say, therefore there is no such Power reserved to the Parliament, to Declare any thing Treason that is not Treason before" (emphasis added)); *id.*, at 282–283 ("[F]or according to your Law, no Man shall be declared Guilty of Treason, unless there be two Witnesses against him . . . . But how can a Man satisfie his own Conscience, to Condemn any Man by *a Law that is subsequent to the Fact*? For that is the Case . . .") (emphasis added); *id.*, at 305 ("I think I may confidently affirm, there is not so much as one Precedent where a Person . . . was taken away from his Tryal, . . . and cut off extrajudicially by an Act made on purpose, *Ex post Facto*"); *id.*, at 331–332 ("Those Acts that have been made since, are made certainly to provide, That in no Case whatsoever, a Man should be so much as accused without two Witnesses of the Treason. . . . Then this is a Law; *ex post facto*, and that hath been always condemned . . .").

petitioner was entitled to a judgment of acquittal, unless the State could produce both the victim's testimony *and* corroborative evidence. The amended law, however, changed the quantum of evidence necessary to sustain a conviction; under the new law, petitioner could be (and was) convicted on the victim's testimony alone, without any corroborating evidence. Under any commonsense understanding of *Calder*'s fourth category, Article 38.07 plainly fits. Requiring only the victim's testimony to convict, rather than the victim's testimony plus other corroborating evidence is surely "less testimony required to convict" in any straightforward sense of those words.

Indeed, the circumstances of petitioner's case parallel those of Fenwick's case 300 years earlier. Just as the relevant law in Fenwick's case required more than one witness' testimony to support a conviction (namely, the testimony of a second witness), Texas' old version of Article 38.07 required more than the victim's testimony alone to sustain a conviction (namely, other corroborating evidence).[20] And just like Fenwick's bill of attainder, which permitted the House of Commons to convict him with less evidence than was otherwise required, Texas' retrospective application of the amendment to Article 38.07 permitted petitioner to be convicted with less than the previously required quantum of evidence. It is true, of course, as the Texas Court of Appeals observed, that "[t]he statute as amended does not increase the punishment nor change the

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[20] Texas argues that the corroborative evidence required by Article 38.07 "need not be more or different from the victim's testimony; it may be entirely cumulative of the victim's testimony." Brief for Respondent 19; see also *post*, at 9, n. 6 (dissenting opinion). The trouble with that argument is that the same was true in Fenwick's case. The relevant statute there required the "Testimony of Two lawfull Witnesses *either both of them to the same Overtact* or one of them to one and another of them to another Overtact of the same Treason." See n. 15, *supra* (emphasis added).

elements of the offense that the State must prove." 963 S. W. 2d, at 836. But that observation simply demonstrates that the amendment does not fit within *Calder*'s first and third categories. Likewise, the dissent's remark that "Article 38.07 does not establish an element of the offense," *post*, at 7, only reveals that the law does not come within *Calder*'s first category. The fact that the amendment authorizes a conviction on less evidence than previously required, however, brings it squarely within the fourth category.

V

The fourth category, so understood, resonates harmoniously with one of the principal interests that the *Ex Post Facto* Clause was designed to serve, fundamental justice.[21]

Justice Chase viewed all *ex post facto* laws as "manifestly *unjust and oppressive.*" *Calder*, 3 Dall., at 391. Likewise, Blackstone condemned them as "cruel and unjust," 1 Commentaries on the Laws of England 46 (1765), as did every state constitution with a similar clause, see n. 25, *infra*. As Justice Washington explained in characterizing "[t]he injustice and tyranny" of *ex post facto* laws:

> "Why did the authors of the constitution turn their attention to this subject, which, at the first blush, would

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[21] The Clause is, of course, also aimed at other concerns, "namely, that legislative enactments give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed," *Miller* v. *Florida*, 482 U. S. 423, 430 (1987) (internal quotation marks omitted), and at reinforcing the separation of powers, see *Weaver* v. *Graham*, 450 U. S. 24, 29, n. 10 (1981). But those are not its only aims, and the absence of a reliance interest is not an argument in favor of abandoning the category itself. If it were, the same conclusion would follow for *Calder*'s third category (increases in punishment), as there are few, if any, reliance interests in planning future criminal activities based on the expectation of less severe repercussions.

> appear to be peculiarly fit to be left to the discretion of those who have the police and good government of the State under their management and control? The only answer to be given is, because laws of this character are oppressive, unjust, and tyrannical; and, as such, are condemned by the universal sentence of civilized man." *Ogden* v. *Saunders*, 12 Wheat. 213, 266 (1827).

In short, the *Ex Post Facto* Clause was designed as "an *additional* bulwark in favour of the personal security of the subject," *Calder*, 3 Dall., at 390 (Chase, J.), to protect against "the favorite and most formidable instruments of tyranny," The Federalist No. 84, p. 512 (C. Rossiter ed. 1961) (A. Hamilton), that were "often used to effect the most detestable purposes," *Calder*, 3 Dall., at 396 (Paterson, J.).

Calder's fourth category addresses this concern precisely. A law reducing the quantum of evidence required to convict an offender is as grossly unfair as, say, retrospectively eliminating an element of the offense, increasing the punishment for an existing offense, or lowering the burden of proof (see *infra*, at 25–28). In each of these instances, the government subverts the presumption of innocence by reducing the number of elements it must prove to overcome that presumption; by threatening such severe punishment so as to induce a plea to a lesser offense or a lower sentence; or by making it easier to meet the threshold for overcoming the presumption. Reducing the quantum of evidence necessary to meet the burden of proof is simply another way of achieving the same end.[22]

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[22] Lowering the burden of persuasion, to be sure, is not precisely the same thing as lowering (as a matter of law) the amount of evidence necessary to meet that burden. But it does not follow, as the dissent appears to think, that only the former subverts the presumption of innocence. *Post*, at 9–10.

All of these legislative changes, in a sense, are mirror images of one another. In each instance, the government refuses, after the fact, to play by its own rules, altering them in a way that is advantageous only to the State, to facilitate an easier conviction. There is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life.[23]

Indeed, Fenwick's case is itself an illustration of this principle. Fenwick could claim no credible reliance interest in the two-witness statute, as he could not possibly have known that only two of his fellow conspirators would be able to testify as to his guilt, nor that he would be successful in bribing one of them to leave the country. Nevertheless, Parliament had enacted the two-witness law, and there was a profound unfairness in Parliament's retrospectively altering the very rules it had established, simply because those rules prevented the conviction of the traitor– notwithstanding the fact that Fenwick could not

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[23]We do not mean to say that every rule that has an effect on whether a defendant can be convicted implicates the *Ex Post Facto* Clause. Ordinary rules of evidence, for example, do not violate the Clause. See *infra*, at 28–33. Rules of that nature are ordinarily even-handed, in the sense that they may benefit either the State or the defendant in any given case. More crucially, such rules, by simply permitting evidence to be admitted at trial, do not at all subvert the presumption of innocence, because they do not concern whether the admissible evidence is sufficient to overcome the presumption. Therefore, to the extent one may consider changes to such laws as "unfair" or "unjust," they do not implicate the same *kind* of unfairness implicated by changes in rules setting forth a sufficiency of the evidence standard. Moreover, while the principle of unfairness helps explain and shape the Clause's scope, it is not a doctrine unto itself, invalidating laws under the *Ex Post Facto* Clause by its own force. Cf. *W. S. Kirkpatrick & Co.* v. *Environmental Tectonics Corp., Int'l*, 493 U. S. 400, 409 (1990).

truly claim to be "innocent." (At least one historian has concluded that his guilt was clearly established, see 9 Macaulay 203–204, and the debate in the House of Commons bears out that conclusion, see, *e.g.*, Proceedings 219, 230, 246, 265, 289.) Moreover, the pertinent rule altered in Fenwick's case went directly to the general issue of guilt, lowering the minimum quantum of evidence required to obtain a conviction. The Framers, quite clearly, viewed such maneuvers as grossly unfair, and adopted the *Ex Post Facto* Clause accordingly.[24]

VI

The United States as *amicus* asks us to revisit the accuracy of the fourth category as an original matter. None of its reasons for abandoning the category is persuasive.

First, pointing to Blackstone's Commentaries and a handful of state constitutions cited by Justice Chase in *Calder*, see 3 Dall., at 391–392, the United States asserts

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[24] Fenwick's case also illustrates how such *ex post facto* laws can operate similarly to retrospective increases in punishment by adding to the coercive pressure to accept a plea bargain. When Fenwick was first brought before the Lord Justices, he was given an opportunity to make a confession to the King. Though he squandered the opportunity by authoring a plain contrivance, Fenwick could have reasonably assumed that a sincere confession would have been rewarded with leniency– the functional equivalent of a plea bargain. See 9 Macaulay 125. When the bill of attainder was taken up by the House of Commons, there is evidence that this was done to pressure Fenwick into making the honest confession he had failed to make before. See, *e.g.*, Proceedings 197 ("'Tis a matter of Blood, 'tis true, but I do not aim at this Gentleman's Life in it . . . all I Propose by it, is to get his Confession"); *id.*, at 235 ("[W]e do not aim at Sir *John Fenwick's* Blood, (God forbid we should) but at his Confession"); *id.*, at 255 ("Why, give me leave to say to you, 'tis a new way not known in *England*, that you will Hang a Man unless he will Confess or give Evidence . . ."). And before the House of Lords, Fenwick was explicitly threatened that unless he confessed, they would proceed to consider the bill against him. 9 Macaulay 218.

that Justice Chase simply got it wrong with his four categories. Blackstone wrote: "There is still a more unreasonable method than this, which is called making of laws *ex post facto*; when *after* an action is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it . . . ." 1 Commentaries on the Laws of England, at 46 (emphasis in original). The *ex post facto* clauses in Ratification-era state constitutions to which Justice Chase cited are of a piece.[25] The United States directs our attention to the fact that none of these definitions mentions Justice Chase's fourth category.

All of these sources, though, are perfectly consistent with Justice Chase's first category of *ex post facto* laws. None of them is incompatible with his four-category formulation, unless we accept the premise that Blackstone and the state constitutions purported to express the *exclusive* definition of an *ex post facto* law. Yet none appears to do so on its face. And if those definitions were read as exclusive, the United States' argument would run up

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[25] Massachusetts' clause read as follows: "Laws made to punish for actions done before the existence of such laws, and which have not been declared crimes by preceding laws, are unjust, oppressive, and inconsistent with the fundamental principles of a free government." Constitution of Massachusetts, Pt. I, Art. 24 (1780), in 5 W. Swindler, Sources and Documents of U. S. Constitutions 95 (1975) (hereinafter Swindler). The Constitutions of Maryland and North Carolina used identical words: "That retrospective laws, punishing facts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust, and incompatible with liberty; wherefore no *ex post facto* law ought to be made." Maryland Constitution, A Declaration of Rights, Art. 15 (1776), in 4 Swindler 373; North Carolina Constitution, A Declaration of Rights, Art. 24 (1776), in 7 Swindler 403. And Delaware's Declaration of Rights and Fundamental Rules, Art. 11 (1776), in 2 Swindler 198, stated, "That retrospective Laws, punishing Offenses committed before the Existence of such Laws, are oppressive and unjust and ought not to be made."

against a more troubling obstacle, namely, that neither Blackstone nor the state constitutions mention *Calder*'s third category either (increases in punishment). The United States, in effect, asks us to abandon two of *Calder*'s categories based on the unsupported supposition that the Blackstonian and state constitutional definitions were exclusive, and upon the implicit premise that neither Wooddeson, Chase, Story, Kent, nor subsequent courts (state and federal) realized that was so. We think that simply stating the nature of the request demonstrates why it must be rejected.[26]

Next, the United States contends Justice Chase was mistaken to cite the case of Sir John Fenwick as an example of an *ex post facto* law, because it was actually a bill of attainder. Fenwick was indeed convicted by a bill of attainder, but it does not follow that his case cannot also be an example of an *ex post facto* law. Clearly, Wooddeson thought it was, see 2 Wooddeson 641, as did the House of Commons, see n. 19, *supra*, and we are aware of no rule stating that a single historical event can explain one, but not two, constitutional Clauses (actually, three Clauses, see Art. III, §3 (Treason Clause)). We think the United States' observation simply underscores the kinship between bills of attainder and *ex post facto* laws, see *Nixon* v. *Administrator of General Services*, 433 U. S. 425, 468, n. 30 (1977); *United States* v. *Lovett*, 328 U. S. 303, 323 (1946) (Frankfurter, J., concurring); see also Z. Chafee,

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[26] Nor does it help much to cite Justice Iredell's statement that *ex post facto* laws include those that "inflict a punishment for any act, which was innocent at the time it was committed; [or] increase the degree of punishment previously denounced for any specific offence," *Calder* v. *Bull*, 3 Dall. 386, 400 (1798). The argument still requires us to believe that Justice Iredell– and only Justice Iredell– got it right, and that all other authorities (now including Blackstone and the state constitutions) somehow missed the point.

Three Human Rights in the Constitution of 1787, pp. 92–93 (1956) (hereinafter Chafee), which may explain why the Framers twice placed their respective prohibitions adjacent to one another. And if the United States means to argue that category four should be abandoned because its illustrative example was a bill of attainder, this would prove entirely too much, because *all* of the specific examples listed by Justice Chase were passed as bills of attainder.[27]

Finally, both Texas and the United States argue that we have already effectively cast out the fourth category in *Collins* v. *Youngblood*, 497 U. S. 37 (1990). *Collins* held no such thing. That case began its discussion of the *Ex Post Facto* Clause by quoting verbatim Justice Chase's "now familiar opinion in *Calder*" and his four-category definition. *Id.*, at 41–42. After noting that "[e]arly opinions of the Court portrayed this as an exclusive definition of *ex post facto* laws," *id.*, at 42, the Court then quoted from our opinion in *Beazell* v. *Ohio*, 269 U. S. 167 (1925):

> "'It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which

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[27] See An Act for the Attainder of Thomas Earle of Strafford of High Treason, 16 Car. I, ch. 38 (1640), in 5 Statutes of the Realm 177 (reprint 1963); An Act for Banishing and Disenabling the Earl of Clarendon, 19 & 20 Car. II, ch. 2 (1667–1668), in 5 Statutes of the Realm, at 628; An Act to Inflict Pains and Penalties on Francis (Atterbury) Lord Bishop of Rochester, 9 Geo. I, ch. 17 (1722); An Act to Prevent Malicious Maiming and Wounding (Coventry Act), 22 & 23 Car. II, ch. 1 (1670). While the bills against the Earl of Clarendon and Bishop Atterbury appear to be bills of pains and penalties, see Chafee 117, 136, as does the Coventry Act, see 2 Wooddeson 638–639, those are simply a subspecies of bills of attainder, the only difference being that the punishment was something less than death. See *Drehman* v. *Stifle*, 8 Wall. 595, 601 (1870).

> makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto.*'" *Collins*, 497 U. S., at 42 (quoting *Beazell*, 269 U. S., at 169–170).

Collins then observed in a footnote that "[t]he *Beazell* definition omits the reference by Justice Chase in *Calder* v. *Bull*, to alterations in the 'legal rules of evidence.' As cases subsequent to *Calder* make clear, this language was not intended to prohibit the application of new evidentiary rules in trials for crimes committed before the changes." 497 U. S., at 43, n. 3 (citations omitted). *Collins* then commented that "[t]he *Beazell* formulation is faithful to our best knowledge of the original understanding of the *Ex Post Facto* Clause." *Id.*, at 43.

It seems most accurate to say that *Collins* is rather cryptic. While calling *Calder*'s four categories the "exclusive definition" of *ex post facto* laws, it also calls *Beazell*'s definition a "faithful" rendition of the "original understanding" of the Clause, even though that quotation omitted category four. And while *Collins* quotes a portion of *Beazell* omitting the fourth category, the immediately preceding paragraph in *Beazell* explains that the law at issue in that case did not change "[t]he quantum and kind of proof required to establish guilt," 269 U. S., at 170, a statement distinguishing, rather than overruling, *Calder*'s fourth category.

If *Collins* had intended to resurrect a long forgotten original understanding of the *Ex Post Facto* Clause shorn of the fourth category, we think it strange that it would have done so in a footnote. Stranger still would be its reliance on a single case from 1925, which did not even implicate, let alone purport to overrule, the fourth category, and which did not even mention Fenwick's case. But

this Court does not discard longstanding precedent in this manner. Further still, *Collins* itself expressly overruled two of our prior cases; if the Court that day were intent on overruling part of *Calder* as well, it surely would have said so directly, rather than act in such an ambiguous manner.

The better understanding of *Collins'* discussion of the *Ex Post Facto* Clause is that it eliminated a doctrinal hitch that had developed in our cases, which purported to define the scope of the Clause along an axis distinguishing between laws involving "substantial protections" and those that are merely "procedural." Both *Kring* v. *Missouri*, 107 U. S. 221 (1883), and *Thompson* v. *Utah*, 170 U. S. 343 (1898)– the two cases *Collins* overruled– relied on just that distinction. In overruling them, the Court correctly pointed out, "the prohibition which may not be evaded is the one defined by the *Calder* categories." 497 U. S., at 46. Accordingly, *Collins* held that it was a mistake to stray *beyond Calder*'s four categories, not that the fourth category was itself mistaken.[28]

VII

Texas next argues that even if the fourth category exists, it is limited to laws that retrospectively alter the

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[28]The dissent would have us dismiss our numerous and repeated invocations of the fourth category, see *supra*, at 10–11, because they were merely "mechanical . . . recitation[s]" in cases that did not depend on the fourth category. *Post*, at 17. Instead, the dissent would glean original meaning from *Beazell* v. *Ohio*, 269 U. S. 167 (1925), and *Collins* v. *Youngblood*, 497 U. S. 37 (1990). *Post*, at 16–17. First of all, the dissent is factually mistaken; *Cummings* v. *Missouri* relied on the fourth category in invalidating the laws at issue there. See *infra*, at 26–27. And *Hopt* v. *Territory of Utah*, 110 U. S. 574 (1884) (discussed *infra*, at 28–33) specifically *distinguished* category four. See *post*, at 19 ("*Hopt* . . . retain[ed] *Calder*'s fourth category"). Second, as mentioned above, neither *Beazell* nor *Collins* relied on the fourth category, so it is not apparent why the dissent would place so much emphasis on those two cases that did not depend on category four.

burden of proof (which Article 38.07 does not do). See also *post*, at 20–21 (dissenting opinion). It comes to this conclusion on the basis of two pieces of evidence. The first is our decision in *Cummings* v. *Missouri*, 4 Wall. 277 (1867). The second concerns Texas' historical understanding of Fenwick's case.

Cummings v. *Missouri* addressed an *ex post facto* challenge to certain amendments to the Missouri State Constitution made in 1865. When read together, those amendments listed a series of acts deemed criminal (all dealing with the giving of aid or comfort to anyone engaged in armed hostility against the United States), and then declared that unless a person engaged in certain professions (*e.g.*, lawyers and clergymen) swore an oath of loyalty, he "shall, on conviction [for failing to swear the oath], be punished" by a fine, imprisonment, or both. *Id.*, at 279–281. We held that these provisions violated the *Ex Post Facto* Clause.

Writing for the Court, Justice Field first observed that "[b]y an *ex post facto* law is meant one which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required." *Id.*, at 325–326. The Court then held the amendments violated the *Ex Post Facto* Clause in all these respects: some of the offenses deemed criminal by the amendments were not criminal acts before then, *id.*, at 327–328; other acts were previously criminal, but now they carried a greater criminal sanction, *id.*, at 328; and, most importantly for present purposes, the amendments permitted conviction on less testimony than was previously sufficient, because they "subvert the presumptions of innocence, and alter the rules of evidence, which heretofore, under the universally recognized principles of the common law, have been supposed to be fundamental and

unchangeable," *ibid.* The Court continued: "They assume that the parties are guilty; they call upon the parties to establish their innocence; and they declare that such innocence can be shown only in one way– by an inquisition, in the form of an expurgatory oath, into the consciences of the parties." *Ibid.*

It is correct that *Cummings* held Missouri's constitutional amendments invalid under the fourth category because they reversed the burden of proof. But *Cummings* nowhere suggests that a reversal of the burden of proof is all the fourth category encompasses. And we think there is no good reason to draw a line between laws that lower the burden of proof and laws that reduce the quantum of evidence necessary to meet that burden; the two types of laws are indistinguishable in all meaningful ways relevant to concerns of the *Ex Post Facto* Clause. See *supra*, at 17–20; see also *Cummings*, 4 Wall., at 325 ("The legal result must be the same, for what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows").

As for Texas' second piece of evidence, it asserts that the law in Fenwick's case, requiring two witnesses to convict a person for high treason, traces its origins to the ancient Roman law concept known as the "rule of number," under which "the probative value of testimony would be increased if others testifying to the same facts swore an oath." Brief for Respondent 20. The "less testimony" to which Fenwick's case refers, the argument runs, concerns lowering the probative value required to convict, *i.e.*, a reduction in the burden of proof.

Even if that historical argument were correct, the same response to Texas' *Cummings*-based argument is applicable. But we think the historical premise is mistaken. If the testimony of one witness rather than two truly reflected a less credible showing, and if the House of Commons truly thought it labored under a lesser burden of

proof, then one would expect some sort of reference to that in Fenwick's case. Yet the few direct references to the burden of proof that were made during the debates are to the contrary; they indicate something roughly the equivalent of a beyond-a-reasonable-doubt standard.[29] And at least one Member expressly declared that the number of witnesses testifying bore no relationship to the overall credibility of the Crown's case.[30] It also appears that "[a]fter the middle of the 1600s there never was any doubt that the common law of England in jury trials rejected entirely" the Roman law concept of the rule of number. Wigmore, Required Numbers of Witnesses; A Brief History of the Numerical System in England, 15 Harv. L. Rev. 83, 93 (1901). Though the treason statute at issue in Fenwick's case, and related antecedent acts, have a superficial resemblance to the rule of number, those acts in fact reflected a concern with prior monarchical abuses relating to the specific crime of treason, rather than any vestigial belief that the number of witnesses is a proxy for probative value. *Id.*, at 100–101; see also 7 J. Wigmore, Evidence §2037, pp. 353–354 (J. Chadbourn rev. 1978).

VIII

Texas argues (following the holding of the Texas Court of Appeals) that the present case is controlled by *Hopt* v. *Territory of Utah*, 110 U. S. 574 (1884), and *Thompson* v. *Missouri*, 171 U. S. 380 (1898). In *Hopt*, the defendant

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[29] See, *e.g.*, Proceedings 75 ("If upon what I hear, I am of Opinion, he is notoriously Guilty, I shall freely pass the Bill. If I do so much as doubt that he is Guilty, according to the old Rule, *Quod dubitas ne feceris* [where you doubt, do nothing], I shall not be for it . . ."). See also *Coffin* v. *United States*, 156 U. S. 432, 456 (1895).

[30] "[O]ne single Witness, if credited by Twelve Jury-men, is sufficient; and an Hundred Witnesses, if not so credited, is not sufficient to Convict a Person of a Capital Crime." Proceedings 210; see also *id.*, at 223–226.

was convicted of murder. At trial, the prosecution introduced the testimony of a convicted felon that tended to inculpate the defendant. Hopt objected to the competency of the witness on the basis of a law in place at the time of the alleged murder, which stated: "[T]he rules for determining the competency of witnesses in civil actions are applicable also to criminal actions . . . ." The relevant civil rules, in turn, specified that "'all persons, without exception . . . may be witnesses in any action or proceeding'" but "'persons against whom judgment has been rendered upon a conviction for felony . . . shall not be witnesses.'" 110 U. S., at 587–588. After the date of the alleged offense, but prior to defendant's trial, the last provision (excluding convicted felons from being witnesses) was repealed.

The defendant argued that the retrospective application of the felon witness-competency provision violated the *Ex Post Facto* Clause. Because of the emphasis the parties (and the dissent) have placed on *Hopt*, it is worth quoting at length this Court's explanation for why it rejected the defendant's argument:

> "Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not *ex post facto* in their application to prosecutions for crimes committed prior to their passage; for they do not attach criminality to any act previously done, and which was innocent when done; nor aggravate any crime theretofore committed; nor provide a greater punishment therefor than was prescribed at the time of its commission; *nor do they alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed.*
>
> "The crime for which the present defendant was indicted, the punishment prescribed therefor, and *the quantity or the degree of proof necessary to establish*

> *his guilt*, all remained unaffected by the subsequent statute. Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offence was committed, might, in respect of that offence, be obnoxious to the constitutional inhibition upon *ex post facto* laws. But alterations which do not increase the punishment, nor change the ingredients of the offence or the ultimate facts necessary to establish guilt, but– leaving untouched the nature of the crime and the amount or degree of proof essential to conviction– only remove existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the State, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury, can be made applicable to prosecutions or trials thereafter had, without reference to the date of the commission of the offence charged." *Id.*, at 589–590 (emphasis added).

Thompson v. *Missouri*, also relied upon by Texas, involved a similar *ex post facto* challenge to the retrospective application of a law permitting the introduction of expert handwriting testimony as competent evidence, where the rule in place at the time of the offense did not permit such evidence to be introduced. Mainly on the authority of *Hopt*, the Court rejected Thompson's *ex post facto* challenge as well.

Texas' reliance on *Hopt* is misplaced. Article 38.07 is simply not a witness competency rule.[31] It does not "sim-

[31] We recognize that the Court of Appeals stated Article 38.07 "merely 'removes existing restrictions upon the competency of certain classes of persons as witnesses'" 963 S. W. 2d, at 836 (quoting *Hopt*, 110 U. S., at

ply enlarge the class of persons who may be competent to testify," and it does not "only remove existing restrictions upon the competency of certain classes of persons as witnesses." 110 U. S., at 589–590. Both before and after the amendment, the victim's testimony was competent evidence. Texas Rule of Criminal Evidence 601(a) already prescribes that "[e]very person is competent to be a witness except as otherwise provided in these rules," and Rule 601(a)(2) already contains its own provision respecting child witnesses.[32] As explained earlier, see *supra*, at 2–3, 15–17, Article 38.07 is a sufficiency of the evidence rule. As such, it does not merely "regulat[e] . . . the mode in which the facts constituting guilt may be placed before the jury," (Rule 601(a) already does that), but governs the sufficiency of those facts for meeting the burden of proof. Indeed, *Hopt* expressly *distinguished* witness competency laws from those laws that "alter the degree, or lessen the

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590); see *supra*, at 5. Whether a state law is properly characterized as falling under the *Ex Post Facto* Clause, however, is a federal question we determine for ourselves. Cf. *Lindsey* v. *Washington*, 301 U. S. 397, 400 (1937).

[32] That subsection contains an exception for "[c]hildren or other persons who, after being examined by the court, appear not to possess sufficient intellect to relate transactions with respect to which they are interrogated."

It is also worth observing that before 1986, Rule 601(a) was codified as Tex. Code Crim. Proc. Ann., Art. 38.06 (Vernon 1979)– the section immediately preceding the law at issue in this case. (The provision then read: "All persons are competent to testify in criminal cases," and contained a similar exception for child witnesses.) We think it fair to infer that Texas was well aware of the differences in the language used in these adjacent provisions, and understood that the laws served two different functions. The dissent views Article 38.07 as an exception to the general rule of former Article 38.06. It finds it logical that the exception would be placed next to the general rule, *post*, at 12, n. 8, but does not suggest a reason why it would be logical for the supposed exception to be phrased in language so utterly different from the general rule.

amount or measure, of the proof which was made necessary to conviction when the crime was committed." 110 U. S., at 589; see also *id.*, at 590 (felon witness law "leav[es] untouched . . . the amount or degree of proof essential to conviction").

It is profitable, in this respect, to compare the statutes in *Hopt* and *Thompson* with the text of Article 38.07. The law in *Hopt* proscribed a "'rul[e] for determining the competency of witnesses'" that stated "'persons . . . convict[ed of a] felony . . . shall not be witnesses.'" 110 U. S., at 587–588. The statute in *Thompson*, similarly, specified that "'comparison of a disputed writing . . . shall be permitted to be made by witnesses, and such writings . . . may be submitted to the court and jury as evidence.'" *Thompson*, 171 U. S., at 381. Article 38.07, however, speaks in terms of whether "[a] conviction . . . is supportable on" certain evidence. It is Rule 601(a), not Article 38.07, that addresses who is "competent to testify." We think the differences in these laws are plain.[33]

Moreover, a sufficiency of the evidence rule resonates with the interests to which the *Ex Post Facto* Clause is addressed in a way that a witness competency rule does not. In particular, the elements of unfairness and injustice in subverting the presumption of innocence are directly implicated by rules lowering the quantum of evi-

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[33] The dissent seems unwilling to concede this distinction. Though it admits that under Article 38.07 the uncorroborated victim is "not literally forbidden from testifying," *post*, at 12, it also insists that testimony is "inadmissible," *post*, at 20, and that "the jury will not be permitted to consider it," *post*, at 4, n. 3. See also *post*, at 5, 6, 14 (referring to Article 38.07 as a rule about witness "credibility"); *post*, at 4, 11, 18, 24 (referring to Texas's law as a rule of "admissibility"); *post*, at 1, 6, 11, 12, and n. 8, 13, 24 (referring to the law as one about "competency"). We think it is clear from the text of Article 38.07 and Rule 601, however, that the victim's testimony alone is not inadmissible, it is just insufficient.

dence required to convict. Such rules will *always* run in the prosecution's favor, because they always make it easier to convict the accused. This is so even if the accused is not in fact guilty, because the coercive pressure of a more easily obtained conviction may induce a defendant to plead to a lesser crime rather than run the risk of conviction on a greater crime. Witness competency rules, to the contrary, do not necessarily run in the State's favor. A felon witness competency rule, for example, might help a defendant if a felon is able to relate credible exculpatory evidence.

Nor do such rules necessarily affect, let alone subvert, the presumption of innocence. The issue of the admissibility of evidence is simply different from the question whether the properly admitted evidence is sufficient to convict the defendant. Evidence admissibility rules do not go to the general issue of guilt, nor to whether a conviction, as a matter of law, may be sustained. Prosecutors may satisfy all the requirements of any number of witness competency rules, but this says absolutely nothing about whether they have introduced a quantum of evidence sufficient to convict the offender. Sufficiency of the evidence rules (by definition) do just that– they inform us whether the evidence introduced is sufficient to convict as a matter of law (which is not to say the jury *must* convict, but only that, as a matter of law, the case may be submitted to the jury and the jury may convict). In the words of Article 38.07, "[a] conviction . . . is supportable" when its requirements are met.

IX

The dissent contends that Article 38.07 is not a sufficiency of the evidence rule. It begins its argument by describing at length how the corroboration requirement "is premised on a legislative judgment that accusations made by sexual assault victims above a certain age are not inde-

pendently trustworthy." *Post*, at 4; see also *post*, at 5–7. But it does not follow from that premise that Article 38.07 cannot be a sufficiency of the evidence rule. Surely the legislature can address trustworthiness issues through witness competency rules and sufficiency of the evidence rules alike. Indeed, the statutory history to which the dissent points cuts against its own argument. Article 38.07's statutory antecedent, the dissent says, was a "replac[ement]" for the old common law rule that seduced females were "incompetent" as witnesses. *Post*, at 6. In 1891, Texas substituted a law stating that "'the female alleged to have been seduced *shall be permitted to testify;* but *no conviction* shall be had upon the testimony of the said female, *unless the same is corroborated. . . .*'" *Post*, at 6 (emphasis added). That statute was recodified as Article 38.07 in 1965, was repealed in 1973, and then replaced in 1975 by another version of Article 38.07. As reenacted, the law's language changed from "no conviction shall be had" to its current language that "[a] conviction . . . is supportable." We think this legislative history, to the extent it is relevant for interpreting the current law, demonstrates that Texas perceived the issue of witness trustworthiness as *both* an admissibility issue *and* as a sufficiency question; that it long ago abandoned its rule that victims of these types of crimes are incompetent as witnesses; and that Article 38.07 codifies Texas' sufficiency of the evidence solution to the trustworthiness issue.

Next, the dissent argues that under Texas' law "the prosecution need not introduce the victim's testimony at all, much less any corroboration of that testimony." *Post*, at 7. Instead, "[u]nder both the old and new versions of the statute, a conviction could be sustained on the testimony of a single third-party witness, on purely circumstantial evidence, or in any number of other ways." *Id.*, at 7–8. Because other avenues of prosecution– besides the victim's

testimony (with or without corroboration or outcry)— remain available to the State, Article 38.07 "did not change the quantity of proof necessary to convict *in every case*." *Post*, at 9 (emphasis added in part and deleted in part); see also *post*, at 10 ("Article 38.07 has never dictated what it takes *in all cases* . . . for evidence to be sufficient to convict" (emphasis added)). Accordingly, the dissent urges, more evidence (in the form of corroboration) is not really *required* under Article 38.07. See *post*, at 8, 22. It is unclear whether the dissent's argument is that laws cannot be sufficiency of the evidence rules unless they apply to *every* conviction for a particular crime, or whether the dissent means that sufficiency rules not applicable in every prosecution for a particular crime do not fall within *Calder*'s fourth category, which refers to less testimony "*required* . . . in order to convict the offender." 3 Dall., at 390 (emphasis added in part and deleted in part). Either way, the argument fails.

Fenwick's case once again provides the guide. The dissent agrees that "[t]he treason statute in effect at the time of John Fenwick's conspiracy, like the Treason Clause of our Constitution, embodied . . . a quantitative sufficiency [of the evidence] rule." *Post*, at 22. But, it argues, Fenwick's law and the Treason Clause are different from Article 38.07; with the first two laws, "two witnesses [were] *necessary* to support a conviction," *post*, at 22 (emphasis added), whereas with Article 38.07, the victim's testimony plus corroboration is not "*necessary* to convict *in every case*," *post*, at 9 (emphasis added). But a closer look at Fenwick's law and at the Treason Clause shows that this supposed distinction is simply incorrect. Fenwick's law stated that no person could be convicted of high treason "but by and upon the Oaths and Testimony of Two lawfull Witnesses . . . *unlesse the Party indicted and arraigned or tryed shall willingly without violence in open Court confesse the same or shall stand Mute or refuse to plead* . . ." See n. 15, *supra*, (emphasis added). And the Treason Clause, of course, states that "No Person

shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, *or on Confession in open Court*." U. S. Const., Art. III, §3 (emphasis added). Plainly, in neither instance were two witnesses "*necessary* to support a conviction," as the dissent claims. Accordingly, its assertion that Article 38.07 "is nothing like the two-witness rule on which Fenwick vainly relied," appears erroneous, as does its accusation that our reliance on Fenwick's case "simply will not wash." *Post*, at 22.[34]

The dissent's final argument relies upon *Hopt* and runs something like this. The "effect" of Article 38.07, it claims, is the same, in certain cases, as a witness credibility rule. See *post*, at 7, 10–14, 24. However differently *Hopt*-type laws and Article 38.07 may seem to operate on their face, in practical application (at least in certain instances) their consequences are no different, and, accordingly, they ought to be treated alike. For example, if there were a rule declaring a victim to be incompetent to testify unless she was under a certain age at the time of the offense, or had made an outcry within a specified period of time, or had other corroborating evidence, and the prosecution attempted to rest its case on the victim's testimony alone without satisfying those requirements, the end result would be a judgment of acquittal. *Post*, at 13. Likewise, under Article 38.07, if the prosecution attempts to rest its case on the victim's testimony alone without satisfying the Article's requirements, the result would also be an acquittal. Thus, *Hopt*-type laws and Article 38.07 should be treated the same

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[34] Perhaps one can draw a distinction between convictions based on confessions in open court and convictions based on third-party evidence and the like (though how such a distinction would comport with the language of the fourth category is not apparent). For example, an accused's confession might be thought to be outside of the State's control. But see n. 24, *supra*. It is not clear at all, though, that the availability of evidence other than the victim's testimony is any more within the State's control than is the defendant's confession.

way for *ex post facto* purposes.

This argument seeks to make *Hopt* controlling by ignoring what the case says. *Hopt* specifically distinguished laws that "alter the degree, or lessen the amount or measure, of the proof" required to convict from those laws that merely respect what kind of evidence may be introduced at trial. See *supra*, at 31–32. The above argument, though, simply denies any meaningful distinction between those types of laws, on the premise that they produce the same results in some situations. See *post*, at 12 ("Such a victim is of course not literally forbidden from testifying, but that cannot make the difference for *Ex Post Facto* Clause purposes between a sufficiency of the evidence rule and a witness competency rule"); *post*, at 20 ("*Hopt* cannot meaningfully be distinguished from the instant case"). In short, the argument finds *Hopt* controlling by erasing the case's controlling distinction.

The argument also pays no heed to the example laid down by Fenwick's case. Surely we can imagine a witness competency rule that would operate in a manner similar to the law in that case (*e.g.*, a witness to a treasonous act is not competent to testify unless corroborated by another witness). Plainly, the imagined rule does not mean that Fenwick's case is not an example of an *ex post facto* law. But if that is so, why should it be any different for Article 38.07? Just as we can imagine a witness competency rule that would operate similarly to the statute in Fenwick's case, the above argument imagines a witness competency rule that operates similarly to Article 38.07. If the former does not change our view of the law in Fenwick's case, why should the latter change our view in the present circumstances?

Moreover, the argument fails to account for what *Calder*'s fourth category actually says, and tells only half the story of what a witness competency rule does. As for what *Calder* says, the fourth category applies to "[e]very 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 Dall., at 390 (emphasis deleted). The last six words are crucial. The relevant question is whether the law affects the quantum of evidence required *to convict;* a witness competency rule that (in certain instances at least) has the practical effect of telling us what evidence would result in *acquittal* does not really speak to *Calder*'s fourth category.

As for relating only half the story, the dissent's argument rests on the assertion that sometimes a witness competency rule will result in acquittals in the same instances in which Article 38.07 would also demand an acquittal. That may be conceded, but it is only half the story– and, as just noted, not the most relevant half. The other half concerns what a witness competency rule has to say about the evidence "required . . . in order to convict the offender." The answer is, nothing at all. As mentioned earlier, see *supra*, at 33, prosecutors may satisfy all the requirements of any number of witness competency rules, but this says absolutely nothing about whether they have introduced a quantum of evidence sufficient to convict the offender. Sufficiency of the evidence rules, however, tell us precisely that.[35]

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[35] The dissent contends that the witness competency rule "would produce the same results" as a sufficiency rule, *post*, at 13 (emphasis deleted), and above we have been willing to assume as much for argument's sake. But the dissent's statement is not entirely correct. It would not be the witness competency rule that would produce the same result, but that rule in combination with the normally operative sufficiency rule. Failure to comply with the requirements of Article 38.07, by contrast, would mean that the evidence is insufficient to convict *by the force of that law alone.* That difference demonstrates the very distinction between witness competency rules and sufficiency of the evidence rules, points to precisely the distinction that *Hopt* drew, and illustrates why (contrary to the dissent's contention) our conclusion about Article 38.07 does not apply to "countless evidentiary rules."

X

For these reasons, we hold that the petitioner's convictions on counts 7 through 10, insofar as they are not corroborated by other evidence, cannot be sustained under the *Ex Post Facto* Clause, because Texas' amendment to Article 38.07 falls within *Calder*'s fourth category. It seems worth remembering, at this point, Joseph Story's observation about the Clause:

> "'If the laws in being do not punish an offender, let him go unpunished; let the legislature, admonished of the defect of the laws, provide against the commission of future crimes of the same sort. The escape of one delinquent can never produce so much harm to the community, as may arise from the infraction of a rule, upon which the purity of public justice, and the existence of civil liberty, essentially depend.'" 3 Commentaries on the Constitution §1338, at 211, n. 2.

And, of course, nothing in the *Ex Post Facto* Clause prohibits Texas' *prospective* application of its amendment. Accordingly, the judgment of the Texas Court of Appeals is reversed, and the case is remanded for further proceedings

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Post, at 20.

That is also why the dissent's statement that we have been "misdirected" by the plain text of Article 38.07 is wrong. *Post*, at 12. The dissent asserts that "any evidence" admitted under an applicable rule of evidence could "potentially" support a conviction, *ibid.*, and therefore Article 38.07's explicit specification that a conviction "is supportable" if its requirements are met does not distinguish it from ordinary rules of evidence. Once again, we point out that whether certain evidence can support a conviction is *not* determined by the rule of admissibility itself, but by some other, separate, normally operative sufficiency of the evidence rule. The distinction the dissent finds illusive is that Article 38.07 *itself* determines the evidence's sufficiency (that is why it is a sufficiency of the evidence rule), while witness competency rules and other ordinary rules of evidence do not (because they are admissibility rules, not sufficiency rules). See also nn. 23, *supra*.

not inconsistent with this opinion.

It is so ordered.