

VICTOR VS. LOUISIANA, CIVIL RIGHTS SUIT/HABEAS

**IN THE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
HABEAS CORPUS NO. 24 - 686, SEC. "D" (2)**

Errol Victor, Sr., REVEREND, L.S., et.al.

Petitioner(s)

VERSUS

Gen. Mgr. Dept. of Corr., et.al.

Respondent(s)

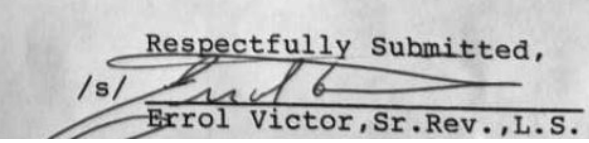
MOTION TO SUPPLIMENT JUDICIAL NOTICE

LEAVE TO SUPPLIMENT "JUDICIAL NOTICE" TO "MOTION TO CERTIFY CLASS ACTION" PURSUANT TO THE FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES, RULE 201 ET.SEQ., ADJUDICATED FACTS NOT SUBJECT TO DISPUTE.

NOW INTO COURT , comes, Errol Victor, Sr., REVEREND, L.S., who provides this Honorable Court with adjudicated facts and "Proof of Claim" that the parties of aggrieved African American injured and violated by the Louisiana unconstitutional nonunanimous jury verdict legislative scheme and "Bill of Attainder" to punish and hold captive and subject to the pains of hard labor without a valid Judicial Trial by Jury are indeed this class of African Americans targeted by the State Legislators, and adjudicated in concert by the State Judiciary Branch and enforced by it's State of Louisiana's Executive Branch. We move for Class Certification.

Exhibit(s) "A" and "B" Attached

VICTOR, ET.AL. vs. LA.DEPT.OF CORR., ET.AL.



Respectfully Submitted,
/s/ *Errol Victor*
Errol Victor, Sr. Rev., L.S.

HABEAS CORPUS 28USC, 2241

D.W.C.C., 613100, H-4-A
670 Bell Hill Road
Homer, La. 71040

* Propria Persona, Interim Counsel

VICTOR VS LOUISIANA, CIVIL RIGHTS SUIT / HABEAS CORPUS

Y E S T E R D A Y

P R O O F O F C L A I M (S)

E X H I B I T " A " (1-6)

Austin

U.S. v. State of La.

United States District Court E.D. Louisiana, Baton Rouge Division-November 27, 1963
225 F.Supp. 353 (Approx. 51 pages)

225 F.Supp. 353

United States District Court E.D. Louisiana, Baton Rouge Division.

UNITED STATES of America, Plaintiff,

v.

STATE OF LOUISIANA, Jimmie H. Davis, C. C. Aycock, J. Thomas Jewel, as
Members of the Board of Registration of the State of Louisiana, and Hugh E.
Cutrer, Jr., Director and ex officio Secretary of the Board of Registration of
the State of Louisiana, Defendants.

Civ. A. No. 2548.

Nov. 27, 1963,

Dissenting Opinion Dec. 31, 1963.

Synopsis

Action under Civil Rights Act by United States against State of Louisiana and certain
officials to invalidate state constitutional requirement that applicant for voting
registration be able to understand and give a reasonable interpretation of any
section of the state or federal Constitution. A three-judge District Court, Wisdom,
Circuit Judge, held that the interpretation test was unconstitutional because of its
unlawful purpose, operation, and inescapably discriminatory effect, and its use
would be enjoined as well as the use of new citizenship test in certain parishes as
disclosed in opinion.

Decree accordingly.

West, District Judge, dissented.

West Headnotes (26)

Attorneys and Law Firms

*355 Robert F. Kennedy, Burke Marshall, Washington, D.C., Louis Lacour, New
Orleans, La., John Doar, Washington, D.C., for plaintiff.

Jack P. F. Gremillion, Carroll Buck, Harry J. Kron, Jr., Baton Rouge, La., Henry
Roberts, Jr., Weldon Cousins, John Jackson, New Orleans, La., Thomas W.
McFerrin, Baton Rouge, La., for defendants.

Before WISDOM, Circuit Judge, and CHRISTENBERRY and WEST, District judges.

VICTOR VS. LOUISIANA, CIVIL RIGHTS SUIT / CLASS ACTION HABEAS

"A" (2)

E X C E R P T (s) U.S. of America vs. Louisiana

Racial relations in Louisiana deteriorated rapidly. In the fall of 1865 the Democrats in Louisiana adopted resolutions "that this is a Government of white people, made and to be perpetuated for the exclusive benefit of the white race", and declared the Constitution of 1864 a creature of fraud. 14 Radical Republicans, *365 refusing to recognize the existing Democratic Government in Louisiana and adopting the Sumner theory that Louisiana was reduced to the status of a territory and as such was entitled to a territorial delegate to Congress, met in convention and called an election for November 6, 1865, to elect a delegate. Henry Clay Warmoth, later Governor, generally regarded in Louisiana histories as a carpetbagger, was elected as the delegate-without opposition. 15 In that election, such as it was, for the first time in the history of the State, Negroes voted freely.

Ominous events progressively increased the friction between the races in the years between the Constitutions of 1864 and 1868. In 1864, relatively peacefully, the Free State Party attempted to establish a government "responsive to loyal white people; the demobilized Confederates, an administration which would Louisiana to its ante-bellum condition, except that peonage would replace slavery". 16 By 1865 Confederate veterans had returned in number and in an orderly election that year defeated the Free Staters and gained control of the legislature, mainly by opposing Negro suffrage. 17 The legislature and police juries promptly enacted new Black Codes which reduced the Negro to a "condition which lay between peonage and serfdom" 18 and intensified the activities of Republicans and Northern radicals for Negro suffrage. July 30, 1866, a bloody riot took place in New Orleans at Mechanics Institute. This "massacre" was provoked, it has been said, by "the attempt of some irresponsible white radicals to transfer the franchise from Confederate veterans to freed men". 19 In 1867 the Louisiana legislature rejected the Fourteenth Amendment. "There followed, as night the day, military reconstruction." 20

In 1868 General Phillip H. Sheridan, Commander of the Fifth Military District of Louisiana and Texas, called a constitutional convention to meet the conditions Congress imposed on the former States of the Confederacy: suffrage regardless of race and ratification of the Fourteenth Amendment. In the election of delegates to the convention, Confederate veterans and Democratic officeholders were barred from the polls. This was the first and last Louisiana constitutional convention to which Negro delegates were admitted; the president of the convention and forty-

nine of the ninety-eight delegates were Negroes. In the 1868 Constitution Negroes finally received the right to vote and to hold office. This Constitution disfranchised all persons who had participated directly or indirectly in the War 21 on the Confederate *366 side and, pouring salt on open wounds, required, as a condition to voting, a certificate from Confederate soldiers and Democratic officeholders that 'the late rebellion' was 'morally and politically wrong'. 22 The Constitution of 1868 desegregated the schools, adopted the bill of rights, rejected a literacy test, and prohibited discrimination in public conveyances and places of public accommodation. This was all 'that was needed to strengthen the determination of Southern whites to establish white supremacy, at whatever cost. The Constitution of 1868, therefore, instead of closing the breach between whites and blacks, served only to widen it.' 23

As a result of the disfranchisement of many former Confederate soldiers and the enfranchisement of Negroes, the 1868 election resulted in the election of Warmoth as Governor, and of Oscar J. Dunn, a Negro ex-slave, as Lieutenant Governor. Between 1868 and 1896, a number of Negroes held high office in the State: two congressmen, six high state officials, thirty-two state senators, ninety-five state representatives, and one United States Senator, who was not seated; 24 P.B.S. Pinchback served briefly as Governor.

The years from 1864 to 1876 in Louisiana were years of violence and disorder, notwithstanding the presence of federal troops during these years. In 1873 at Colfax, Grant Parish, fifty-nine Negroes and two white persons were killed. 25 After the Colfax riot additional federal troops were sent to Louisiana and stationed at various points to aid officials in keeping order. Louisiana became an armed camp. In 1874 six white Republican officeholders of Red River Parish were killed, after they had surrendered and had agreed to leave the State. 26 Elections were a farce, since 'Governor (Kellogg) appointed the registrars, and through them returned his friends to the legislature'; 'politicians bribed legislators for party and parish favors, and business men and corporations bribed the politicians for economic privileges' *367. 27 During most of the years between 1866 and 1877 there were two governors and two legislatures. The Republican governors and their elected associates were maintained in office only by the Returning Board and federal troops. Representative white citizens considered it a civic duty 28 to belong first to The Knights of the White Camelia, a secret organization equivalent to the Ku Klux Klan in other states, and, later, to join the White League, a statewide organization which openly advocated white supremacy 29 in a published platform. September 14, 1874, the Crescent City (New Orleans) White League, which was organized militarily, led by influential citizens, successfully fought a pitched battle in New Orleans against 3000 of Kellogg's Negro militia, 1000 Metropolitan Police 30 under General Longstreet, and several hundred federal troops. The *368 White League took over complete control of the City, then the Capitol of Louisiana, and established in the Statehouse Acting Governor Penn and, later, Governor McEnery. President Grant came to the rescue with sufficient troops to support Governor Kellogg's regime, and the White Leaguers returned to their homes without incident. Some years later, Liberty Place Monument was erected to the memory of the sixteen members of the White League who were killed. September 14 is still officially celebrated annually in New Orleans with public ceremonies as the day the tide turned in Louisiana against the Negroes, carpetbaggers, and scalawags who had been in control of state and local government. 31

The Battle at Liberty Place had an important effect on the election of 1876 when the 'Redeemers', the White Democrats under Francis T. Nicholls, defeated the Negro Republican candidate, S. B. Packard. Throughout the State, and especially in New Orleans, armed members of the White League policed the election. Governor Nicholls, who ran as the White League's choice but who had also promised Negroes the continued enjoyment of their constitutional privileges, managed to attract enough Negro ballots to win by a substantial, if contested, vote. Governor Kellogg's Returning Board and, later, the Republican Legislature, declared S. B. Packard elected. Nicholls and Packard were each inaugurated. January 9, 1877, the White League numbering 6000, marched on the Cabildo in New Orleans, where Packard's troops were stationed. The troops surrendered. President Grant, unwilling to take sides because of the pending Hayes-Tilden controversy, ordered the status quo preserved. For four months armed White Leaguers patrolled the streets of New Orleans. 32

Louisiana was the last of the Southern States to be freed from carpetbag government. In April 1877 President Hayes, as part of the Hayes-Tilden compromise, removed federal troops from Louisiana and recognized the Nicholls administration as the legal government of the state. 33 These events foreshadowed the 'lily white' primary, marked the emergence of the Democratic party in the south as 'the institutionalized incarnation of the will to White Supremacy,' 34 and led inexorably to the 'grandfather' *369 clause, the understanding or interpretation test, and the tricky registration application form as techniques to avoid another Reconstruction.

In 1879, with the State firmly in the control of the White League, another Constitution was adopted. 'Its chief objectives apparently, were to put 'white supremacy' back on a firm foundation and bring to an end the oppressive taxation, excessive public spending, and corrupt administration that had plagued the people for a decade.' 35 This was before the understanding clause was invented. The solution for the Negro problem devised by the Convention as to transfer powers to the Governor from the legislature and the police juries (county commissioners). 36 The public accommodations section and most of the provisions in the 1868 Constitution favorable to Negroes were eliminated, but the Constitution of 1879 did not restrict the Negro's right to vote. This may have been because of fear of another federal intervention or because the Negro-White unification movement under General Beauregard had collapsed. 37 Article 188 of that Constitution provided, 'No qualification of any kind for suffrage or office, nor any restraint upon the same, on account of race, color or previous condition shall be made by law.'

In the eighties and until 1898 Negroes in Louisiana continued to vote and to have their vote solicited by all parties. This is not surprising. In 1888 there were 127,923 Negro voters and 126,884 white voters on the registration rolls in Louisiana; 38 the population of the state was about fifty per cent Negro.

In the election of 1892, the Louisiana Lottery issue split both parties. Murphy J. Foster, a Democrat, was the successful candidate for governor, but the Negro vote was a decisive factor in Governor Foster's favor in many parishes, a disquieting circumstance necessarily regarded as a mixed blessing. In a four-man race, the Democrats polled only 79,388 votes against a total of 98,647 cast for the Republicans and the newly organized people's Populist party. 39 The next election, in 1896, was the turning point that led directly to the disfranchisement of the

Negro in Louisiana. In that election, Governor Foster, running for reelection, defeated John N. Pharr, the choice of a Fusion party of 'National' (Lily white) Republicans, Regular (Radical) *370 Republicans, Populists, and sugargrowers dissatisfied with low tariffs of 1894. It was a bitterly fought election. 40 "The main issue * * * was the problem of Negro suffrage."41 Again the Negro vote was decisive in many parishes. Again, Foster, who ran on a 'white supremacy' platform, had his heaviest majority in parishes where the Negro registration was the heaviest.42

At this point, the handwriting on the wall could be read as easily in Louisiana as it was read earlier in Mississippi: something had to be done about Negro Suffrage. Local issues or national issues could split the Democratic party wide open, giving the Negroes the balance of power. And the political ecology of Louisiana made factionalism inevitable. In Louisiana, as in Mississippi and Alabama, there were, and still are, fundamental social and economic differences between the areas controlled by a plantation economy and the areas controlled by a small farm economy. Two potent *371 additional facts of political life aggravate divisiveness in Louisiana: (1) North Louisiana is solidly Protestant, South Louisiana predominantly Catholic; (2) New Orleans and the rest of the State are like oil and water. See Fenton and Vines, Negro Registration in Louisiana, 51 Am.Pol.Sc.Rev. 704 (1957). By 1898, the moral as well as dollar-and-cents costs of buying victory at the polls were finally more than the purchasers were willing to pay.

Promptly after the important election of 1896, Governor Foster requested the Legislature to call a constitutional convention. Former Governor Nicholls, then Chief Justice of the Supreme Court of Louisiana, called the Convention to order February 8, 1898. Judge Thomas J. Semmes, Chairman of the Judiciary Committee of the Convention and a former president of the American Bar Association, described the purpose of the Convention: 'We (meet) here to establish the supremacy of the white race, and the white race constitutes the Democratic party of this State.'43 The Convention of 1898 'interpreted its mandate from the 'people' to be, to disfranchise as many Negroes and as few whites as possible.'44

The understanding clause, invented by Mississippi a few years before as an alternative to a literacy test, was strongly advocated by many of the delegates.45 After considerable debate, however, 'persuaded *372 that the understanding clause was 'based on fraud', the Louisiana Convention rejected it and invented the 'grandfather clause'.'46

*373 Under Article 197 of the 1898 Constitution,47 in order to register, an applicant had to meet educational and property qualifications-unless exempted by the 'grandfather' clause. The educational test required the applicant to be able to read and write and demonstrate the ability to do so by filling out the application form without assistance. The property test required the applicant to own property assessed at \$300 and to have paid the taxes due on the property.48 The grandfather clause exempted persons entitled to vote on or before January 1, 1867, or the son or grandson of such person.49 A similar provision exempted immigrants who came to this country after January 1, 1867. At the time, forty per cent of the registered voters in Louisiana were illiterate and most of the Negroes could not meet the property requirement. The result was disfranchisement of almost all of the Negro voters and of some twenty to thirty thousand white voters.50 Alcee Fortier, one of Louisiana's most respected historians, writing in

1904, succinctly stated the legislative purpose of the grandfather clause:

'The purpose of this section, known as the 'Grandfather Clause' was to allow many honorable and intelligent but illiterate white men to retain the right of suffrage, and the purpose of the educational or property qualification was to disfranchise the ignorant negroes who had been a menace to the civilization of the State since the adoption of the Fifteenth Amendment to the Constitution of the United States.' 4 Fortier, History of Louisiana 235.

On accepting the chair as President of the Convention, Ernest B. Kruttschnitt, a leading lawyer in New Orleans and a veteran of the White League, did not mince his words: 'We have here no political antagonism and I am called upon to preside over what is little more than a family meeting of the Democratic Party of the State of Louisiana. * * * We are all aware that this Convention has been called * * * principally to deal with one question * * * to eliminate from the electorate the mass of corrupt and illiterate voters who have during the last quarter century degraded our politics.' 51 The Convention voted that no ordinance should be considered until the report of the Committee on Suffrage and Election was finally acted upon by the Convention. Near the end of the Convention, President Kruttschnitt announced:

'We have not been free; we have not drafted the exact Constitution we should like to have drafted; otherwise we should have inscribed in it, if I know the popular sentiment of the State, Universal White Manhood Suffrage, and the exclusion from the suffrage of every man with a trace of African blood in his veins. * * * What care I whether it be more or less ridiculous or not? Doesn't it meet the case? Doesn't it let the white man vote, and doesn't it stop the negro from voting, and isn't that what we came here for?' 52

In his message to the legislature, Governor Foster was able to say:

'The white supremacy for which we have so long struggled at the cost of so much precious blood and treasure, is now crystallized into the Constitution as a fundamental part and parcel of that organic instrument, and that, too, by no subterfuge or other evasions. With this great principle thus firmly imbedded in the Constitution, and honestly enforced, there need be no longer any fear as to the honesty and purity of our future elections.' 53

THE FEDERAL GOVERNMENT HAS FAILED AND IS OFFERING NO PROTECTION FOR AFRICAN AMERICANS, MALES IN PARTICULAR, IN THE TERRITORY OF THE STATE OF LOUISIANA. A FACT THAT REMAINS UNCHANGED FOR MORE THAN A CENTURY AND CONTINUES...

E X H I B I T " B " (1 of 2)

T O D A Y

LOUISIANA IS STILL A MAJORITARIAN SEPARATIST WHITE SUPREMACY IDEOLOGICAL FUNCTIONING SYSTEM OF GOVERNMENT IN THE PRACTICE OF INTERPOSITIONING AND THE NULLIFICATION OF FEDERAL SUPREME LAW OF THE UNITED STATES CONSTITUTION. IT IS THE UNITED STATES' ATTORNEY GENERAL, UNITED STATES EASTERN AND WESTERN DISTRICT COURTS, FIFTH CIRCUIT COURT OF APPEAL, AND THE UNITED STATES SUPREME COURT, WHO STANDS BY IDOL ALLOWING THE STATE OF LA. TO ENACT AND ENFORCE " BILLS OF ATTAINDERS " AGAINST THE UNITED STATES AFRICAN AMERICAN CITIZENS IN THE TERRITORY OF THE STATE OF LOUISIANA WITHOUT ANY FEAR OF REPRISAL. A "BILL OF ATTAIDER" SUCH AS THE LOUISIANA CONSTITUTION ARTICLE 1, SECTION 17, AND LOUISIANA CODE OF CRIMINAL PROCEDURE 782, GRANDFATHERING THE STATE PUNISHING AND HOLDING AFRICAN AMERICANS ENSLAVED, UNDER THE COLOR OF LAW, IN DIRECT CONFLICT WITH THE U.S.C. ARTICLE 1 , SEC.9, CL.3' PROHIBITATION, WHICH EMPHATICALLY PROHIBITS, WITHOUT DISPUTE, THE PUNISHMENT OF ANY UNITED STATES CITIZENS, WITHOUT A VALID CONSTITUTIONAL JUDICIAL TRIAL... I.E. " TRIAL BY JURY ". THE STATE OF LOUISIANA IS HOLDING CAPTIVE IN VIOLATION OF THE 13TH AMENDMENT OF THE U.S.C., THE LAST AMERICAN SLAVES.....

La. Legislature revives George Wallace's racist theory

Sixty-seven members of the Louisiana House and 27 state senators have embarrassed themselves and the state by adopting a loony-radical resolution saying the state has "the sovereign right" to "nullify unconstitutional acts of the federal government."

This "nullification" idea is demonstrably, factually wrong - and dangerous. It was already discredited long before the Civil War by "none other than 'Father of the Constitution' James Madison." And that war itself, at the cost of some 750,000 lives, settled the issue once and for all.

Ranting racists such as Alabama Gov. George Wallace tried, maliciously and unsuccessfully, to revive it in the 1960s, to the effect that any assertion of nullification powers today automatically carries with it the stench of the foulest bigotry.

It isn't clear what precipitated the legislators' descent into nonsense that is simultaneously arrant, aberrant, and abhorrent, but descend they did. In 40 breathless "whereas" clauses, Senate Concurrent Resolution 21 by Sen. Stewart Cathey Jr., R-Monroe, lays out a tendentious case, full of historical and theoretical errors, for why a state supposedly has the right, on its own, to declare acts of the federal government to be null and void. While many of the principles cited by the resolution are indeed sound - yes, of course the Constitution reserves numerous powers to the states or to the people, rather than the federal government - it has long been established that states are not individually empowered to determine the scope of those boundaries.

The resolution cites the authority of the infamous Kentucky Resolutions of 1798, penned by Thomas Jefferson in response to President John Adams' inexcusable Alien and Sedition Acts. Not a single other state ever adopted the radical view of Jefferson, who was abroad when the Constitution was written and ratified. Even Jefferson's close ally Madison felt obliged to offer a materially more moderate version in the Virginia Resolution of the same year.

When the brilliant but racist hothead John Calhoun three decades later tried to assert states' "nullification" powers, Madison himself shot down his claims. In an 1830 letter, Madison explained at great and illuminating length that neither in the Constitution nor in the Virginia legislature in 1798 was there "any reference to a constitutional right in an individual state, to arrest by force, the operation of law of the United States." Moreover, he argued "against the assumed authority of a State Legislature to declare a law of the United States to be unconstitutional, which (is) an unwarrantable interference with the exclusive jurisdiction of the Supreme Court of the United States [emphases added]."

And, to show that he was not making a late-in-life change in attitude, Madison cited Federalist papers 39 and 44, both of which he wrote in 1788, and both of which give credence to his 1834 assertions. As well they should, because Article VI, paragraph 2 of the Constitution itself makes clear that "the judges in every state shall be bound" by "the supreme law of the land," and (as per Federalist 39) if there are "any disputes" about jurisdiction, "the tribunal which is ultimately to decide (the Supreme Court) is to be established under the general government."

The conservative Heritage Foundation strongly agrees, with its scholars describing the theory of nullification as an outright "heresy" against the Constitution.

Both in the pre-Civil War days and in Wallace's 1960s revival of the nullification theory, the specific goal was to keep Black Americans either enslaved (Calhoun) or oppressed (Wallace). It is almost inconceivable that any legislator, anywhere, could be so ignorant as to be unaware of the noxiously racist history of the nullification heresy. Yet here we have large supermajorities of both chambers of the Louisiana Legislature, with no specifically stated federal law in mind, passing a resolution asserting a unilateral power to nullify acts of the federal government.

The resolution is bizarre. It is akin to an eighth grade student council telling a school principal that the council on its own authority can abrogate school rules. And, because nullification's history is ineluctably associated with the worst of this nation's racial sins, the resolution makes Louisiana appear, to the rest of the country, to be a hotbed for redneck racists.

Fortunately, as a mere resolution rather than an actual law, the Legislature's nullification screed is no more than hot air or a vague threat of future action. Still, even that is bad enough. The resolution should be repealed. The governor should reconvene the Legislature, posthaste, to nullify its embarrassing handiwork.

New Orleans native Quin Hillyer is a senior commentary writer and editor for the Washington Examiner, working from the Gulf Coast. He can be reached at Qhillyer@WashingtonExaminer.com. His other columns appear at www.washingtonexaminer.com/author/quin-hillyer.

ARTICLE 1, Section 9, Clause 3 of the U.S.CONSTITUTION

NO BILL OF ATTAINDER or EX POST FACTO LAW SHALL BE PASSED:

The bill of attainder and ex post facto clause prohibits punishment that is imposed retroactively or by a legislature without trial by jury. In Addition, the concept of punishment is highly relevant to determining when, in criminal cases, the procedural safeguards of the Fifth and Sixth amendments apply, a pivotal element in due process analysis.

BLACK LAW DICTIONARY SPECIAL FIFTH EDITION

Bill of Attainder - Such special acts of the legislature as inflict capital punishments upon persons supposed to be guilty of high offense, such as treason and felony, without any conviction in the ordinary course of judicial proceedings. If an act inflicts a milder degree of punishment than death, it is called a "bill of pains and penalties." but both are included in the prohibition in the Constitution (Article 1, section 9). See, *Losier v. Sherman*, 157 Kan.159,138 P2d.272,273., *State v. Graves*, 352,Mo. 1102,182,S.W.2d 46, 54

Ex Post Facto - After the fact: by an act or fact occurring after some previous act or fact, and relating thereto; y

Ex Post Facto Law - A law passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such fact or deed. By Article 1, section 10, of the U.S. Constitution, the States are forbidden to pass any ex post facto law.

Note: A "ex post fact law" is defined as a law which provides for the infliction of punishment upon a person for an act done which, when it was committed, was innocent; a law which deprives persons accused of crime of some lawful protection to which they have become entitled or alters the situation of a person to his disadvantage. See, *Wilensky v. Fields*, Fla., 267 So.2d 1,5