

Return of the King. Rediscovering the joys of a bill of attainder?[1]

Bill of Attainder: introduction and definition

The U.S. Constitution is supposed to provide a framework to ensure and promote good and legitimate “liberal” government. [2] The Constitution thus has detailed circumscriptions on the limits and duties of the Federal and the many State governments. In particular, one proscription is a “bill of attainder.” [3] But what is a bill of attainder and why should we care?

According to former U.S. Supreme Court Chief Justice William Rehnquist:

a bill of attainder is a precise legal term which had a meaning under English law at the time the United States Constitution was adopted. A bill of attainder was a legislative act that singled out one or more persons and imposed punishment on them, without benefit of a judicial trial. Such actions were regarded as odious by the framers of the Constitution because they understood that the traditional role of a court was to judge an individual case, first to determine guilt and only thereafter to impose punishment. [4]

No thanks to Rehnquist’s exposition, claiming that a bill of attainder has four parts, we are still left to wonder “how might we recognize a bill of attainder if we saw one?” As part of a technical legal analysis, we would need to find: (1) a legislative act – relatively straightforward, save question about joint resolutions [5]; (2) a particular or easily defined group or individual – again relatively overt, but questionable as to the significance, see *Nixon v. Administrator of General Services*, 433 US 425 (1977) *infra*; (3) a punishment [6] – well-established in American jurisprudence to including the loss of life, liberty, property, and or freedom to work; and (4) the lack of a judicial trial. The latter two criteria would seem easily noted, but legal analysis must consider questions of when and if the punishment is imposed (prior to or post the trial or hearing), or if there is a *meaningful* trial and whether such trial does not or does offend so-called notions of due process.

Perhaps Rehnquist is not to blame for his cloudy definition. In American jurisprudence, bill of attainder cases are rare and those opinions and rulings that invoke the term do not make the concept clear. [7] Nearly 150 years ago in *Cummings v. Missouri*, 71 US 277 (1867), the Supreme Court struck a Missouri statute that required, among other persons, members of the clergy to swear a loyalty oath that they had not supported the government of the rebellion, lest they be forbidden from working. [8] Because many citizens of Missouri were loyal to the Confederacy, they could not make such an attestation, lest they be subject to imprisonment for perjury. [9] Though the language of the opinion does not help us clarify the question of “how to recognize a bill of attainder,” the Court held that the Missouri law acted as an unconstitutional bill of attainder [10] and wrote:

“A bill of attainder, is a legislative act which inflicts punishment without judicial trial and includes any legislative act which takes away the life, liberty or property of a particular named or easily ascertainable person or group of persons because the legislature thinks them guilty of conduct which deserves punishment” [yet for which no court has adjudged them guilty]. [11]

Through the opinion in *Cummings* we see the justification for the bill of attainder prohibition – it is a means to protect individual liberty and private property (or interest in private property, namely future wages). Along with the writ of Habeas Corpus, the bill of attainder clause stands as a fundamental guardian of the blessings of liberty, established and protected though American federalism. [12]

The Need to Address the Bill of Attainder in the Constitution

Why would those men who designed and crafted what they envisioned as the best system of government possible, a republican government, see a need to prohibit bills of attainder, and why did Madison and Hamilton include the prohibition it in the original text of the Constitution? [13] The answer lay in what they saw everyday and knew from British history – even well-intentioned and well-structured government can go wrong. As Madison wrote in the fourth paragraph of Federalist #51, “If men were angels, no government would be necessary.” [14]

The bill of attainder (also called a “bill of pains and penalties”), first employed in England as early as 1459, was a parliamentary act sentencing one or more specific persons to death (or punishment). [15] British monarchs often obtained bills of attainder from the parliament in sixteenth, seventeenth and eighteenth century as a means of dealing with persons who had attempted, or threatened to attempt, to overthrow the government. *United States v. Brown*, 381 US 437, 441 (1965). The method became infamous during the reign of the Tudor monarchs – especially Henry VIII – who used the attainder blatantly to punish political dissenters, many of whom could not be found guilty in an otherwise lawful manner – with a trial and judicial finding of guilt. [16]

The British parliament issued bills of attainder in colonial America against those who were disloyal to the Crown, i.e. wealthy landowners and colonial leaders most likely to call for independence. Yet the use of bills of attainder and bills of pains and penalties were not limited to England. Shortly after the American Revolution, in the late 1770s, the legislatures of all thirteen States passed statutes directed against the Tories – those loyal to the British crown; among these statutes were a large number of bills of attainder and bills of pains and penalties. [17] *Brown* at 442

Hence drafters and signers of the Constitution were well aware of such bills, their practice and abhorrent nature. [18] In a natural law sense, the decree of attain is abhorrent for when a person was attainted, through legal condemnation, the “attaint” corrupted *in his blood*. Subsequently the attainted one’s land and other property were forfeited to the Crown. [19]

Because the blood was corrupted, the *outlaw* (literally one who was outside the protection of the laws and the sovereign) could neither inherit land nor transmit land (or any other property) to his children.^[20] Against the allegation of the “sins of the father,” there was no defense – one was guilty through an association over which one had no control, i.e. a link due to their biology.

Appealing to their sense of legitimate, Lockean government^[21] thus, the Framers spelled out the prohibition to a bill of attainder three times, Article I §§ 9 and 10, and Article III § 3. In fact, part of their objection to nature of the bill of attainder is explicit in Article III § 3, cl. 2:

“Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture [of property] except during the life of the person attainted.”

That is, they stated clearly that the property inherited or owned by descendants or relatives of the attainted one are not be confiscated by the government. Under the Constitution then, the “sins of the father” are not to be borne by the son.

Language about the corruption of blood aside, the Bill of Attainder Clause is to be read liberally. *United States v. Brown*, 381 US 437 (1965).

The Bill of Attainder Clause was not intended as a narrow, technical and soon to be outmoded prohibition, but rather as an implementation of the doctrine of “separation of powers,”^[22] a safeguard against legislative exercise of the judicial function as to prevent trial by legislature. *Brown* at 442.

In fact the bill of attainder prohibition is rightfully invoked to challenge laws condemning status (biology) and political or religious association. See *In re Yung Sing Hee*, 36 F 437 (1888). Though they did not speak on the topic precisely, in *Scales v. United States*, 367 US 203 (1961), the Court insisted that “[i]n our jurisprudence guilt is personal” and that “membership without more” cannot subject one to punishment. *Scales* at 224, 225. Most often discussed in regards to rights and liberties protected by the First and Fifth Amendments, nonetheless the declaration in *Scales* about guilt being attributable only to action, not mere innocent or uncontrollable association, invokes adherence to natural law concepts expressed in the Bill of Attainder Clause.

Still with so few bill of attainder cases before American courts, we have to wonder if the clause *was* soon to be outmoded. Consider, the bill of attainder proscription is only needed to protect political minorities and enemies of those with political and economic power, especially an unscrupulous authority. Citing Federalist papers #47 and #48 on the issue of separation of powers (codified in a prohibition against Bills of Attainder), the Court in *Brown* wrote:

“in a representative republic ... where the legislative power is exercised by an assembly ... yet not incapable of pursuing the objects of its passions ... ,” barriers had to be erected to ensure that the legislature would not overstep [its] bounds. The Bill of Attainder Clause was regarded as such a barrier. *Brown* at 443-444

But over the years, American society, legislatures, and courts have decided that once undesirable and “out” groups like American Indians, women, Blacks, Latinos, and homosexuals – in particular circumstances – deserve equal standing with Whites and males under law. Stricken are former laws that denied civil rights to Indians^[23] and women, e.g. voting^[24] or serving on juries.^[25] No longer do we have laws that segregate public facilities and accommodations based on race ^[26] and the Court has decided that miscegenation cannot be criminalized. *Loving v. Virginia*, 388 US 1 (1967). Recently the Supreme Court declared that in all States, private, adult, consensual, non-commercial sex is legal^[27] and in nearly every State, save Florida, homosexuals can adopt children.^[28]

Perhaps then, a process of social enlightenment explains how is it that so rarely courts have overturned convictions or punishments as unlawful bills of attainder? With the bill of attainder prohibition acting as the bulwark against government tyranny and oppression, or serving as a marker to guide the conscience of government, we might believe that the United States of the 18th century has evolved to that point where Congress and State legislatures have internalized the type of justice and equal treatment demanded by the bill of attainder prohibition. As a result, one might argue, American legislatures simply refrain from singling out groups or individuals and imposing wrongful punishments upon them. Another explanation might show a glaring failure in the education of lawyers and judges, whereby they almost never see bills of attainder or twist their reasoning so far as to deny its existence.

Misreading the law or turning a blind eye? Cases of *Nixon* and *Oregon v. Smith*

Not long ago the Supreme Court discussed the bill of attainder doctrine in *Nixon v. Administrator of General Services*, 433 US 425, 468-484 (1977). In *Nixon*, the former president challenged a federal law mandating that he turn over all the records, notes and tapes recordings he made as President to the General Services Administration. Among other claims, Nixon alleged the law violated the bill of attainder clause. The Court went to great lengths to find that the Act in question: (a) did not single-out the President *wrongly*; (b) did not punish him; (c) was not intended to punish him; and (d) was necessary as Congress had no other alternative to achieve a legitimate Congressional objective – gaining access to the President’s records. To critique the Court’s ruling, let us review the Court’s opinion regarding Bills of Attainder in general and Nixon’s particular challenge.^[29]

[Section V]. The Bill of Attainder Clause

... [Nixon] argues that the Act constitutes a bill of attainder. [Nixon] argues that Congress acted on the premise that he had engaged in misconduct, was an unreliable custodian of his own documents, and generally was deserving of a legislative judgment of blameworthiness...

[Nixon] argues, the Act is pervaded with features of a bill of attainder: a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial. *United States v. Brown*, 381 US 437, 445, 447 (1965); [*469] *United States v. Lovett*, 328 US 303, 315-316 (1946); *Ex parte Garland*, 71 US 333, 377 (1867); *Cummings v. Missouri*, 71 US 277, 323 (1867).

Brown provides the Court's most recent decision on the Bill of Attainder Clause. *Brown* invalidated § 504 of the Labor-Management Reporting and Disclosure Act of 1959, that made it a crime for a Communist Party member to serve as an officer of a labor union. [Section 504] worked as a bill of attainder by focusing upon easily identifiable members of a class - members of the Communist Party - and imposing ... the sanction of mandatory forfeiture of a job or office. Such forfeiture was long deemed [a] punishment within the [meaning] of the Bill of Attainder Clause. *Lovett* at 316; *Cummings* at 320. *Brown*, *Lovett*, and earlier cases gave broad meaning to ... bills of attainder. But appellant's reading is broader still. [Nixon] argues that *Brown* establishes that the Constitution is offended whenever a law imposes undesired consequences on an individual or on a class [*470]... The Act [singles] out appellant, as opposed to all other Presidents or members of the Government, for disfavored treatment.

...[Nixon's] view would cripple the very process of legislating. [A]ny individual or group ... made the subject of adverse legislation can complain that the lawmakers could and should have defined the relevant affected class at a broader level of generality. [*471] ... In the present case, the Act's specificity - [*472] it refers to appellant by name - does not offend the Bill of Attainder Clause. ... [According to the Solicitor General] "[Nixon's actions] ... created an imminent danger that tape recordings would be destroyed." In short, appellant constituted a legitimate class of one...

Even if the specificity element were deemed to be satisfied, the Bill of Attainder Clause would not automatically exist. Forbidden legislative punishment is not involved merely because the Act imposes burdensome consequences. Rather, we must inquire whether [the act]... inflicts punishment within the constitutional [*473] proscription against bills of attainder. In England, a bill of attainder originally connoted a parliamentary Act sentencing [persons deemed treasonous or enemies of invading armies] to death, whereby all the property of the attainted passed to the crown, not their heirs. Article I § 9, however, also [*474] proscribes Acts inflicting punishment other than execution. *Lovett* at 323-324; *Cummings v. Missouri* at 323. [*475]

... One may contend that the Government has punitively confiscated ... property, [when] the "owner is [no longer] in the same position monetarily as he would have occupied if his property had not been taken." *United States v. Reynolds*, 397 US 14, 16 (1970).

But our inquiry is not ended by the determination that [an] Act imposes no punishment traditionally judged to be prohibited by the Bill of Attainder Clause. [*476] Where ... legitimate ... purposes do not appear, [we] conclude that punishment of individuals disadvantaged by the enactment was the purpose of the [Act].

[*478] A third ... test of punishment is strictly a motivational one: [did Congress] intent to punish. *Lovett* at 308-314; *Kennedy v. Mendoza-Martinez* at 169-170. The District Court unequivocally found:

There is no evidence ... found in the legislative record, to indicate that Congress' design was to impose a penalty upon Mr. Nixon ... for alleged past wrongdoings ... the Act before us is regulatory and not punitive in character. 408 FSupp at 373.

[*479] Nor do the floor debates ... suggest that Congress was intent on encroaching on the judicial function of punishing an individual for blameworthy offenses. When one of the opponents of the [Act] ... stated that it is "a bill of attainder" [*480] 120 *Cong. Rec.* 33872 (1974), Sen. Hruska, a key sponsor of the measure responded:

"This bill does not contain a word to the effect that Mr. Nixon is guilty of any violation of the law."

In this respect, the Act stands in marked contrast to that invalidated in *Lovett*, where a House Report expressly characterized individuals as "subversive..., unfit... to continue in Government employment." HR Rep. No. 448, 78th Cong., 1st Sess., 6 (1943). We do not suggest that such a formal legislative announcement of moral blameworthiness or punishment is necessary to an unlawful bill of attainder. *Lovett* at 316. But the absence from the legislative history of congressional sentiments expressive of this purpose ... largely undercuts the concern...

...[*481] We also agree with the District Court that "specific aspects of the Act ... just do not square with the claim that the Act was a punitive measure." 408 FSupp at 373. ...the Act provides that "Richard M. Nixon, or any person whom he may designate in writing, shall at all times have access to the tape recordings and other materials..., " § 102 (c). ... [Further] if we assume that there is merit in appellant's complaint that his property has been confiscated, the Act expressly provides for ... just compensation under § 105 (c).

[*482] One final consideration ... [i]n determining whether a legislature sought to inflict punishment on an individual, it is ... useful to inquire into the existence of less burdensome alternatives by which [Congress] could have achieved its legitimate non-punitive objectives. ...[*483] A rational and fair minded Congress, therefore, might well have decided that the carefully tailored law that it enacted would be less objectionable to appellant than [any alternative].

After disposing of every one of Nixon's protests under the definition of a bill of attainder, the Court affirmed the District Court ruling that demanded Nixon make his tapes and records available. But did the Court truly consider Nixon's arguments in earnest?

Of the four components of a bill of attainder, two were admitted: there was an Act and there was no place for a court to make a determination or intervene as to prevent or redress Nixon's penalty. That is, as to the fourth attribute, there was no

meaningful trial to be had whereby Nixon might challenge “charges” and avoid punishment. Thus the Court focused its attention to whether or not Nixon was *wrongly* or specifically targeted, and whether he was subject to punishment or punished by the act.

Ignoring the problematics of its silent concession on two properties of the law, the Court starts by changing the definition of “punishment” both its ordinary meaning and as used to define a bill of attainder. The Court held that bills of attainder only exist, and hence are only proscribed, if the punishment imposed by law *is not legitimate*. *Nixon* at 476 (emphasis added). This ruling is contrary to the plain reading of the Bill of Attainder Clause of the Constitution which bars punishment *per se*, when attendant with the other three criteria.

The Bill of Attainder Clause does not ban only *illegitimate* punishments. The reason is obvious. Imposition of illegitimate punishment is *always* unlawful and unconstitutional as a violation of due process, e.g. the Fifth or Fourteenth Amendment, what is presently referred to as “substantive due process” in American jurisprudence. When scrutinizing a Bill of Attainder, analysis of the degree, intent or type of punishment is unnecessary for the punishment is being delivered through an unlawful act – an unconstitutional Bill of Attainder. It is not the illegitimate status of the punishment that creates a Bill of Attainder, rather the punishment *is* illegitimate because it flows from an unlawful act.

Still we must consider if the act in question subjected Nixon to suffer a punishment. Recall, at question in the case was that Congress passed a law that demanded Nixon turn over personal property. Standard Fifth Amendment “takings” analysis then would look to the question of compensation and if the property were being taken for public use. [30] Under the act, Nixon was to be compensated, hence not punished for suffering a deprivation to his property. *Nixon* at 481. However unlike so many eminent domain cases involving real estate, Nixon’s papers and tapes were not sought for *public use* as the plain language of the Fifth Amendment *demand*s. *And as the Legislature, not a court, ordered Nixon to hand over his property, the Act compelled his involuntary servitude – which is undoubtedly a punishment.*

Further as the Court reinvents the meaning of punishment, it sees the need to add a discussion about the intent of the Congress. The Court posits that an Act that would otherwise be an unconstitutional bill of attainder, *may include a punishment*, so long as the Legislature *did not intend* to impose one. *Nixon* at 478-80. The flaw in the argument and position is so obvious as to be a grotesque disfigurement of the plain meaning of what should be a non-problematic clause of the Constitution.

The Court’s logic is as follows: Congress may enact an unconstitutional law, so long as Congress did not mean to do so. This argument and the analysis therewith are immaterial to evaluate whether an Act is unconstitutional and the Court knows it. Since the 1920s courts have held that mere intention, even when overtly unconstitutional, has no bearing on the constitutionality of legislative acts. [31] Hence legislative intent is irrelevant when Congress adopts a law that: (1) violates a constitutional prohibition; or (2) falls outside the constitutional authority granted to Congress.

A few recent examples show the principles applied by the Supreme Court when judging the rightness of statutes and the question of legislative intent to comport with the Constitution. The bottom line is that mere intent to comply with the Constitution will not save an otherwise unconstitutional law. Take for instance laws that imposed poll taxes, [32] banned abortion [33] or compelled sheriffs to conduct criminal background checks on would-be gun purchasers. [34] In each instance, State legislators or the U.S. Congress, collectively, passed laws that presumably a sufficient number of members believed were in accord with the Constitution. Nevertheless in these instances, the U.S. Supreme Court found that these laws violated the U.S. Constitution. And in each instance the Court did not inquire about the motives of lawmakers – it was not relevant.

In fact, as reflected in their opinions, books, and law review articles, many jurists subscribe to a school of thought understood as judicial conservatism, the ideology that holds courts have no business examining the motives of the legislature, which is strictly a political matter. [35] Adherents to this form of judicial conservatism refrain from examining the political motives of legislation. The position, long supported by the Supreme Court, goes so far to say that even if legislators intend to enforce a law or policy which *is* unconstitutional, e.g. regulating intra-state medical practices, so long as Congress effects its aim through a legitimate exercise of power, e.g. levying taxes, the law in question will be upheld. *United States v. Doremus*, 249 US 86 (1919).

Even accepting the Court’s position about the legality of the unintended punishment, in reference to particulars of the fight between Congress and President Nixon, undoubtedly the weakest argument of the Court was to hold that even though Congress had singled out Nixon in the Act and distinguished him as the focus of the law, opposed to any President or government official with access to the records in question or like documents, the Court held that Nixon remained a legitimate “class of one.” *Nixon* 470-472. That is, in *Nixon* the Court admitted that Nixon was singled out, yet it held that Congress could not write any other law to obtain *his* documents.

Again such argument frustrates the plain meaning of the Bill of Attainder Clause and turns what is to be read as a broadly applied prohibition on government action, into one where the victim has the burden to prove each and every element. Another aspect of the case that points to the wrongful nature of the act against Nixon is that at the time of the controversy between Congress and Nixon, normal criminal law discovery procedures and subpoena powers allowed *courts* to obtain the records as necessary in the pursuit of civil and criminal prosecutions.

To re-examine Nixon’s challenge to the law as an unlawful Bill of Attainder hence we see that: (1) the law was unnecessary,

but apparently Members of Congress saw no alternative means to punish Nixon, the very reason British parliaments first created, and the drafters of the Constitution sought to prohibit, Bills of Attainder; (2) it was not the least restrictive alternative, a requirement of the “substantive” Due Process clause, to obtain the documents; (3) and the Act only targeted Nixon. In sum, easily the Court could have seen the Act as an unconstitutional Bill of Attainder. For other reasons, *Oregon v. Smith*, 494 US 872 (1990) also should have brought to light the existence of an unconstitutional bill of attainder, but neither petitioners nor the Court raised the issue, much less made a finding of one. In *Smith*, two American Indians, Alfred Smith and Galen Black, members of the Klamath tribe, and elders in the Native American Church, were fired from their jobs as drug counselors, after it was discovered that they smoked peyote as part of their religious rites. *Smith* at 874. Even though Smith and Black did not use peyote or other drugs while on the job, they were denied unemployment insurance, on the grounds that they committed “work-related misconduct.” *Ibid*. Though these American Indian appellees won a “freedom of religion” challenge and hence the right to secure unemployment compensation for wrongful termination in the Oregon State Courts, they never raised a bill of attainder challenge. *Smith* at 883-884. Ultimately the U.S. Supreme Court overturned the Oregon Supreme Court ruling, holding that the First Amendment did not grant a freedom to use [sic] peyote[36] in a religious setting, when such violated a criminal law of general application, and denied the right of Smith and Black to receive unemployment payments.

Scalia, writing the opinion of the Court, claimed that Oregon’s criminal prohibition against peyote possession was one of general application, “not specifically directed at their religious practice.” *Smith* at 878. Scalia had no evidence that the law was written so benignly – and he included no citations to support his invented history.[37] The absence was probably due to the fact that even a cursory review of anthropological and historical records would have shown that American Indians were the only discernable group who used peyote throughout Mexico and the American West and against whom State legislatures, comprised of White men, imposed laws to criminalize native social and religious practices.[38]

Scalia’s knowledge of and determinations of American history aside, drug prohibition (and even alcohol restrictions) in the United States, starting with California’s prohibitions against Chinese opium smokers in the 1870s, has always targeted easily distinguished ethnic groups and political minorities, namely non-Anglos and non-English speakers.[39] In the 20th century, across the western States in particular, Texas, Utah, Colorado, and Montana, Whites lead what amounted to a pogrom against Indians, Mexicans, and Mexican-Americans as well as Blacks and other undesirables.[40] Drug prohibition generally, and selective enforcement of such laws, was just one part of a regime of systematic race-based oppression. Given that the Native American Church was first incorporated under the laws of the State of Oklahoma in 1918[41] and that Oregon did not pass any prohibitions on peyote until long after, what should we conclude about the motives and focus of Oregon Revised Statute 475.922, what Scalia called a criminal law of “general application?”

Let us examine ORS 475.922 as a bill of attainder applied to Smith and Black. First there was an act that criminalized peyote possession (not smoking peyote as Scalia claimed). *Smith* at 875, 877-878. Second as part of history of state-instituted racism, and legal oppression against Indians, this drug law targeted a group or easily discernable group of individuals. Third ORS 475.922 imposes punishments, fines, imprisonment, and collateral harms including job loss, lack of access to a state-issued benefit, interference with one’s freedom of religion, and social stigma brought with state condemnation and conviction.[42]

The ultimate question under a bill of attainder analysis then focuses on the “trial.” With a law that criminalizes one’s religious practices, and those cultural practices of a particular group, there can be no meaningful trial. That is, in the language of present-day court, for cases involving religious expression, where one would have to choose between renunciation of their faith or a religious rite and prison, the defendant is denied substantive due process.[43] To invoke older bill of attainder cases, *Cummings v. Missouri*, 71 US 277, 323 (1867) and *In re Yung Sing Hee*, 36 F 437 (1888), like those earlier cases, the Oregon law made the status of the petitioners (as religious devotees) criminal, not their action.[44] As it was for Cummings and Yung Sing Hee, Smith and Black had no meaningful defense. And parallel to what the court found in *Yung Sing Hee*, Smith and Black were only fired and then denied unemployment compensation because they worked as drug counselors rather than as teachers, doctors, police officers, judges, etc.

Punishment for and the crime of association?

Though the term “bill of attainder” seems a bit anachronistic and its application long gone since the days of the Red Scare, [45] some legal scholars believe that current asset-forfeiture laws, most often associated with controlled substances,[46] and now applicable to “supporters” of foreign terrorist organizations[47] constitute bills of attainder under another name.[48] Under the guise of pursuing and preventing drug trafficking, Federal and State asset forfeiture laws allow authorities to seize the property of people who have neither been tried nor convicted of crimes.[49] Authorities confiscate homes, boats, and cars when drugs are found even when no one has been found guilty of a crime.[50] For some, their property is seized though they are never charged with a drug-related offense.[51] Thomas Saunders holds that “asset forfeiture is almost the exact tyranny as Americans fought against in the Revolutionary War.” [52] Saunders adds, “[w]ithout bill of attainder defined in the law, police, judges and prosecutors can ignore the rights, liberties and protections Americans are supposed to have. That is what has happened.”[53] As we review the U.S. Supreme Court cases and decisions, it is not that the idea of a Bill of Attainder is undefined, rather, courts redefine reality, obscure the simple meaning of punishments, etc., to avoid finding an unconstitutional act. In the area of property confiscation, courts have decided that the processes are legal, i.e. not

[unlawful bills of attainder, for these confiscations of property fail to satisfy one of the conditions that define a bill of attainder – the imposition of punishment. In 1946\[54\] and then again in 1977,\[55\] the Supreme Court announced:](#)

“The fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking all discomfiting action may be deemed punishment because it deprives [one] of what otherwise would be enjoyed.[56] But there may be reasons other than punitive for such deprivation”[57]

When police or other executive agents make seizures, they are usually, if not always, acting on laws that, facially, apply to all persons, i.e. laws of general application like money laundering, and by definition there has been: (a) either a judicial process, e.g. issuance of a search warrant; or (b) a seizure that falls within the range of exceptions to the Fourth Amendment.[58] After the issuance of a warrant and seizure have taken place, if one were to challenge and bring a Bill of Attainder claim, the key line of inquiry for the court would be to determine if seizure constitutes a punishment. The degree to which the courts fail to find that seizures are punishment seems beyond belief. In what can only be seen as the worst type of abuse, a proprietor of a family-owned pizzeria, Anthony Lombardo, lost access to over \$500,000 of his hard-earned money, for more than four years. *United States v. \$506,231*, 125 F3d 442 (7th Cir 1997). Further in order to recover the *res*, Lombardo had to pay his attorney more than \$75,000. Hence without committing a wrongful or criminal act (as he was exonerated and federal courts ordered authorities to return the money taken from Lombardo’s pizzeria), Lombardo lost a considerable amount of money – yet no court judged him to have suffered a punishment.

Unlawful and oppressive punishments aside, punishment *per se* administered through acts that work as bills of attainder do not befall those tied to criminal acts only, but extend to what heretofore was protected association. Though the issue was neither raised nor discussed, pair of U.S. Supreme Court cases from 2002 highlight the power of legislative fiat that was abhorrent to the founders. In the merged cases of *U.S. Dept. of Housing and Urban Development, v. Pearlie Rucker et al.*, and *Oakland Housing Authority, et al. v. Pearlie Rucker et al.*, reported at 535 US 125 (2002) the Court reviewed the constitutionality of a federal rule:

Title 42 USC §1437d(1)(6) provides that each “public housing agency shall utilize leases ... provid[ing] that ... any drug-related criminal activity on or off [federally assisted low-income housing] premises, engaged in by a public housing tenant, any member of the tenant’s household, or any guest or other person under the tenant’s control, shall be cause for termination of tenancy.”

In a unanimous opinion (8-0), the Court ruled the inclusion of the provision into public housing leases was legal (rather than creating an impermissible adhesion contract) and more importantly the Court held that public housing tenants could suffer eviction if any occupant or one-time “guest” ever engaged in “drug-related criminal activity” (DRCA) – on or off the property.

On simple due process grounds one could take issue with the ruling, but the realization that the law in question works as an unlawful bill of attainder should be without question. In the language of “substantive due process,” i.e., a lack of sufficient notice or vagueness,[59] part of the injustice of the *Rucker* decision is that DRCA is neither defined in the particular enabling legislation, the federal code, the leases, nor by the justices in any way. That is, defendants were left to guess at the meaning of the term “drug-related criminal activity.” Though we might reasonably include drug convictions and even indictments as evidence of or meeting the definition of DRCA, the parties who sought and were denied relief in *Rucker* faced eviction though no drug crimes existed. Further as the law at question in *Rucker* fails to provide a definition for DRCA, law enforcement, in this instance the local housing authority, is able to act without any minimum guidelines making the law overly broad and violative of due process guarantees for adequate notice.[60]

The other outrage, as noted by the federal Ninth Circuit Court of Appeals, which ruled in favor of Rucker and others in *Rucker v. Davis*, 237 F3d 1113 (2001), is that the statute is so vague as to permit eviction of tenants for DRCA that occurs anywhere and any time after of before said DRCA-doer visited or lived in the residence.

The federal rule provides that a tenant living in federally subsidized housing can be evicted on the mere accusation, much less filing of a criminal charge or conviction that someone *other than the tenant* has engaged in DRCA. Though a local court must find that the tenant acted [sic] in violation of the lease, which according to the Supreme Court means that the tenant either knowingly permitted or failed to deny entry to a person who at [sometime, either in the past or the future, engaged in DRCA, regardless if the tenant knew or had reason to know the person did or would engage in DRCA, because the innocent person can be punished, i.e. evicted.\[61\] for the act of another, this particular federal law functions as a bill of attainder.](#) [62]

In a real sense, the federal rule regarding leases in public housing allows tenants to be punished, deprived of property – their right to dwell in a living space at a rent substantially lower than market rate – for the acts of another. Further there is no plausible defense that the tenant can bring to resist the landlord’s eviction demand as such demand will come via court order through an unlawful detainer hearing.

In order to get a court order for an eviction, the housing agency need only show two things in a civil court proceeding. One, that a given person was at one time in the particular apartment rented by the tenant; and two that at some time, somewhere – anywhere – that same person engaged in DRCA.[63] The first factor is likely to be met via having someone’s name on the lease as a dependent and or in the case of a guest or visiting workers, an admission that said person was in the apartment. As to the second factor, typically the housing authority can meet the burden without challenge. The relevant housing authority

is most likely to bring the unlawful detainer suit only after the tenant's dependant or guest is charged with a crime, like marijuana or cocaine possession. Once the charge is brought, the renter cannot challenge the landlord's accusation in civil court that said guest or family member engaged in DRCA. That is, the person being charged or perhaps under felony indictment, will have not defeated the charge via a probable cause hearing. [64] Hence the housing agency is able to use the legal rule of collateral estoppel or the power of the full faith and credit clause of Article IV of the U.S. Constitution to prevent the tenant from challenging the second factor necessary to show the tenant has violated the lease. The only defense, outside any Constitutional prohibition on a bill of attainder, left to the tenant would be to argue that the guest/family member never entered the apartment. Such a defense would not pass the laugh test. For all intents and purposes then, under this HUD rule and federal law, the renter is punished for the acts of another.

The *Rucker* case stands out as perhaps one of the most glaring overt abuses of power against the poor in recent years.

Commentators like Arianna Huffington were quick to chastise the Court for its perverse reading of a law that was designed to help the very destitute that the Court, Congress, and the Executive put out on the street. [65] Huffington wrote:

The high court's opinion, written by Chief Justice William Rehnquist tried to buttress its cold-hearted argument by claiming that so-called "no fault" evictions are justified because drug use leads to "murders, muggings, and other forms of violence." But he failed to point out how locking up innocent people solves that. Or what social ills will be avoided by ... cast[ing] out [impoverished tenants] on their innocent rear ends.

...In adopting such one-sided reasoning and hyperbolic "Reefer Madness" rhetoric the Supreme Court is following in the fear-mongering footsteps of the [G. W. Bush] administration, whose latest whacko anti-drug ad campaign tried to draw a link between teenage drug use and violent acts of terrorism. In reality, two of the four [*Rucker*] plaintiffs ... were elderly women whose grandchildren were caught smoking pot in a housing project parking lot.

...The ruling is not only a galling example of drug war lunacy, but also a gut-wrenching reminder of just how differently America treats its rich and its poor. The multi-million dollar homes of Beverly Hills or the Upper East Side of Manhattan have more than their share of kids struggling with drug problems. But ... you can bet that their problems are not compounded by the additional worry that the entire family will be tossed out onto the street because their kid is seen smoking a joint three blocks away. Why should we hold poor people to a standard of accountability most of us could never meet? ... "A tenant who cannot control drug crime," wrote Justice Rehnquist in the majority opinion, "is a threat to other residents and the project." I wonder if the Chief Justice would apply the same condemnatory logic to Gov. Jeb Bush, who also lives in public housing and was also unable to control his troubled daughter.

As Huffington alludes, property owners, like Justice Kennedy, [66] were the real winners in *Rucker*. The case showed such a class bias that we are forced to recall that in English and American Colonial history, the imposition of bills of attainder were worked against the enemies of the Crown for the enrichment of the Crown. Who are the poor, property-less, non-Anglo, and vilified "drug-classes," but modern-day enemies of the state? Often Black, undereducated and Latino, they are also politically weak enemies at that. As it occurred hundreds of years ago, we see the same today – via legal fiat – a Return of the King or at least his weapon of mass destruction. In *Federalist #84*, Hamilton writes: The observations of the Blackstone, are worthy of recital: "To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, that must convey the alarm of tyranny. [67] This essay hence, is an effort to convey such an alarm.

[1] John Calvin Jones, PhD, JD (spring 2005), Brownsville, TX.

[2] In *Federalist No. 10*, future American President, James Madison, decries the *ills of democracy* and notes that the Constitution will create a republican form of government that will repel democratic impulses for an equal division of property (land), abolition of debts, printing paper money or any other wicked project. Such fear was part of the motivation for the Constitution. For more discussion see Michael Parenti, *Democracy for the Few* (2002)

[3] Art. I § 9, cl. 3 read "No bill of attainder or *ex post facto* Law shall be passed." Art. I § 10, cl. 1 adds "No state shall ... pass any bill of attainder..."

[4] William H Rehnquist, *The Supreme Court: How It Was, How It Is*. New York: William Morrow & Co. (1987)

[5] Congress has many powers. In terms of legislation, it can make law, ratify treaties, declare war and pass resolutions. Dicta in *Padilla v. Rumsfeld*, 352 F3d 695 (CA2 2003) notwithstanding, a Joint Resolution (JR) is probably not an Act. When they are want to do so, courts reference the infamous War Powers Resolution of 1973 to declare that JRs are Acts. See *Campbell v. Clinton*, 52 FSupp2d 34 (DDC 1999). However examples of courts finding JRs as Acts, with rights and remedies, are far and few between. Typically JRs merely announce wishes and preferences of Congress to make declarations or recognitions of things like National Head Injury Week, Grandparents Day, Flag Day and the like.

[6] If the punishment is less than death, the act is called a "bill of pains and penalties." *Cummings v. Missouri*, 71 US 332. The phrase "bill of attainder," as used in the Constitution, includes bills of pains and penalties. See *In re Yung Sing Hee*, 36 F 437, 441-442 (Circuit Court, D. Oregon 1888).

[7] Even though a bill of attainder is not a retroactive punishment, i.e. an *ex post facto* law, in their treatise, *Constitutional Law*, Nowak and Rotunda cover bill of attainder in a subsection of § 11.9 on "forms of restrictions on retroactive

legislation.” For further reading on the meaning of the Bill of Attainder Clause see *Ex Parte Garland*, 71 US 333 (1866); *Selective Service Administration v. Minnesota PIRG*, 468 US 841 (1984); and “The Supreme Court’s Bill of Attainder Doctrine: A Need for Clarification,” 54 *Calif. L. Rev.* 212, 234-236 (1966).

[8] The U.S. Supreme Court struck a similar federal law that required an Arkansas lawyer take such an oath. *Ex Parte Garland*, *supra*.

[9] See *United States v. Brown* 381 US at 447. The cases of *Cummings* and *Ex parte Garland* might not be decided similarly today. In one sense, Cummings and Garland committed an act – or at least failed to resist their State governments which seceded from the union. So arguably the federal law only punished wrongdoers. On the other hand, Cummings and Garland could posit that they were being punished for their mere association.

[10] As a modern case, the Missouri law would be struck for a number of reasons. On its face such a loyalty oath is violative of a person’s (1) First Amendment freedom of religion and association, (2) free speech; and (3) liberty, i.e. the law would violate due process as to be unrelated to any legitimate governmental objective. See *Elfbrandt v. Russell*, 384 US 11 (1996).

[11] Source: <http://www.isc-durant.com/tom/billofattainder>

[12] In *Federalist No. 84*, Alexander Hamilton remarks that there is no need for a “bill of rights” because, among other things, “the Constitution adopts the common law of Great Britain, by which rights, are not expressed, yet equally secured. As proposed the Constitution contains a number of such provisions. ... Art. I § 9, cl. 3 -- No bill of attainder or *ex post facto* law shall be passed.”

[13] Recall, the first ten amendments with their supposed protections for civil liberties and the rights of criminal defendants were added in 1791 two years after the Constitution was ratified by the states.

[14] See James Madison, *Federalist No. 51: The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments*. *Independent Journal*, Wednesday, February 6, 1788.

[15] Hannis Taylor, Attainder, transcribed by Janet Grayson. *The Catholic Encyclopedia*, Volume II (1907).

[16] Source: <http://www.independent.org/tii/news/991100McElroy.html>.

[17] See Van Tyne, *The Loyalists in the American Revolution*, appendices B & C (1902); Thompson, Anti-Loyalist Legislation During the American Revolution, 3 *Ill. L. Rev.* 81, 147; and Reppy, The Spectre of Attainder in New York, 23 *St. John’s L. Rev.* 1.

[18] Source: <http://www.independent.org/tii/news/991100McElroy.html>

[19] Rationale for the forfeiture grew from an idea that the “felon” or outlaw, breached the peace. Hence felons forfeited their chattels to the Crown and lands were lost in escheat to the lord; the convicted traitor forfeited all of his real and personal property to the Crown. See 3 W. Holdsworth, *History of English Law* 68-71 (3d ed. 1927); 1 F. Pollock & F. Maitland, *History of English Law* 351 (2d ed. 1909). To see the principle in action in read *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 US 663, 682 (1974).

[20] Source: <http://www.independent.org/tii/news/991100McElroy.html>

[21] For a discussion of the meaning of republican government and the influence of John Locke on the American founders and drafters of the U.S. Constitution see John Calvin Jones, *Drugs and Crime: a comparison between the United States and the Netherlands*, PhD dissertation, University of Iowa (2003).

[22] This paper will not focus on the separation of powers question. For one, many scholars see judges as mere ministers of the law, not a separate and equal branch. Further, too often, as noted in the cases and instances here, judges omit any Bill of Attainder analysis and, in a *de facto* manner, do not hold themselves as a separate and independent branch.

[23] Though the federal law of 1924, the Indian Citizenship Act (8 USC § 1401(a)(2)) purported to give full citizenship to all Native Americans, many states, especially those in the former confederacy refused to lift laws like prohibitions on miscegenation and jury service by Indian peoples for years.

[24] See *Minor v. Happersett*, 88 US 162 (1875)

[25] West Virginia only approved of female jury service via state referendum in 1956.

[26] Of course the foundational case on the topic is *Brown v. Board of Education*, 347 US 483 (1954).

[27] *Lawrence and Gardner v. Texas*, 123 SCt 2472 (2003). Despite the Supreme Court ruling, however, on March 16, 2004, in what the county commissioners claimed was only an effort to make a statement against gay marriage, the leaders of Rhea County, Tennessee, passed a resolution (8-0) to request an amendment to Tennessee’s criminal code so that homosexuals could be charged with crimes against nature. Two days later, they overturned their own resolution – without comment. Christopher Curtis, “Tennessee county overturns gay ban.” *PlanetOut.com Network*, Friday, March 19, 2004.

[28] See the database of the Lambda Legal Defense Fund at <http://www.lambdalegal.org/cgi-bin/iowa/search.html> (visited March 2005). While other states do not have statutory bars preventing homosexuals from adopting children, many of the former Confederate states have a series of hostile court rulings against homosexual parents and prospective parents.

[29] *Nixon* at 468-484.

[30] “Takings” analysis has undergone a radical shift starting in 1954, *Berman v. Parker*, 348 US 26, through *Hawaii Housing Authority v. Midkiff*, 467 US 229 (1984) and with *Kelo v. New London, Connecticut*, 125 SCt 2655 (2005). These cases allowed the taking of private housing for private use in the name of government provision of public good and welfare. In *Nixon*, Congress was making no effort to distribute presidential papers and artifacts to and for public use or the public

welfare, *qua* a bridge, highway, or dam.

[31] See *United States v. Doremus*, 249 US 86 (1919).

[32] *Harper v. Virginia State Board of Elections*, 383 US 663 (1966).

[33] *Roe v. Wade*, 410 US 113 (1973).

[34] *Printz v. United States*, 521 US 898 (1997).

[35] Gerald Wetlauffer (1999) explains this as the “legal process” school. Followers of legal process school support the idea of institutional competence and would leave so-called political questions to the other two branches of government. See Wetlauffer, “Systems Of Belief In Modern American Law: A View From Century’s End.” 49 *Am. U.L. Rev.* 1 (October, 1999).

[36] The Oregon law, like the federal law on controlled substances, i.e. drug prohibition, did not outlaw drug use. Though Scalia, writing for the Court repeatedly claimed that Oregon law banned drug use, *Smith* at 875, 877-878, nowhere is the word use or synonyms like ingestion, taking, etc., noted. While some might claim the distinction between use and possession is immaterial, the legal difference is immense. Among other things it means that one cannot be arrested and convicted for post-ingestion drug possession.

[37] Blackmun referenced a law review article showing the systematic and complete intolerance of religious and cultural practices of American Indians by officials in Oregon dating back to the early 1900s. *Smith* at 921 n10. See Barsh, *The Illusion of Religious Freedom for Indigenous Americans*, 65 *Ore. L. Rev.* 363 (1986).

[38] See Richard Evans Schultes and Albert Hoffman, Plants of the Gods - Their Sacred, Healing and Hallucinogenic Powers, Healing Arts Press, Vermont (1992). The dissent of Blackmun, 484 US at 913-915, cited numerous books, articles, and law reviews to argue that peyote use was perhaps solely limited to religious rituals. See The Peyote Way, in Teachings from the American Earth, D. Tedlock & B. Tedlock editors (1975).

[39] See Edward Brecher, Licit and Illicit Drugs: the Consumers Union Report on Narcotics, Stimulants, Depressants, Inhalants, Hallucinogens, and Marijuana – including Caffeine, Nicotine, and Alcohol. Boston: Little, Brown (1972); John Calvin Jones, Drugs and Crime: a comparison between the United States and the Netherlands, doctoral dissertation, University of Iowa (2003).

[40] Jones, *ibid*. When he testified before Congress and in his many speeches and writings, Harry J. Anslinger, head of the Federal Bureau of Narcotics and Dangerous Drugs for 30 years, claimed that marijuana use in the U.S. was spread by Blacks, Greeks, Mexicans, Filipinos, Spaniards and others including Jazz musicians.

[41] Richard Glen Boire, Accommodating Religious Users Of Controlled Substances: Revising the Controlled Substances Act to Permit the Religious Use of Entheogenic Substances (1994).

[42] The idea of collateral affects and punishments imposed through convictions for acts that should not be a crime was discussed at length in *Lawrence and Gardner v. Texas*, 123 SCt 2472 (2003).

[43] A statute burdens the free exercise of religion if it “puts substantial pressure on an adherent to modify his behavior.” *Thomas v. Review Board of Indiana Employment Securities Division*, 450 US 707, 718 (1981). Such a burden includes those instances where the individual must choose between “abandoning his religious principle or facing criminal prosecution.” *Braunfeld v. Brown*, 366 US 599, 605 (1961).

[44] Again the modern courts have largely failed to see this simple formula and have invoked the language of due process or “substantive due process.” Such was the challenge offered by the dissent of Jackson in *Korematsu v. United States*, 323 US 214 (1944), where he claimed:

A citizen’s presence in the locality, however, was made a crime only if his parents were of Japanese birth. Had Korematsu been one of four -- the others being, say, a German alien enemy, an Italian alien enemy, and a citizen of American-born ancestors, convicted of treason but out on parole -- only Korematsu’s presence would have violated the order. The difference between their innocence and his crime would result, not from anything he did, said, or thought, different than they, but only in that he was born of different racial stock.

[45] see *United States v. Brown*, 381 US 437 (1965).

[46] According to Mike Gray, Drug Crazy (1998) the federal Omnibus Crime Bill of 1984 that first allowed local, State and federal officials to confiscate anything suspected of being related to, much less obtained from, ill-gotten gains via the black market drug trade (Gray 101). Further under the 1984 law local police could share in the loot with federal authorities with whom they often cooperated through so-called Drug Task Forces. In addition to cash, and bank accounts, typically seized items are sold at auction and local police forces get a share of the haul (Gray 101).

[47] With the adoption of the USA PATRIOT Act in September 2001, the Congress added and amended a series of provisions in the U.S. Code. For example, under 18 USC § 981(a)(1)(G) federal agents may seize any and all assets of persons and organizations alleged to support foreign terrorist organizations. Under G. W. Bush’s Executive Order 13,224, authorized through 50 USC § 1701 anyone named by the president as a “specially designated global terrorist” is subject to having all assets seized and the Secretary of the Treasury may designate any person who assists, sponsors, or supports said persons or group as a terrorist. See David Cole, Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism. New York, New Press, (2003), 77

[48] See *Padilla v. Rumsfeld*, 352 F3d 695 (CA2 2003). The appeals court did not address the topic of a bill of attainder, but

stated definitively that the executive did not have the authority to define the term enemy combatant, e.g. a category of outlawry, and then detain someone like Padilla at its pleasure, free from judicial review. See also James P. Fantetti, "John Walker Lindh, Terrorist? Or Merely A Citizen Exercising His Constitutional Freedom: The Limits Of The Freedom Of Association In The Aftermath Of September Eleventh." 71 *U. Cin. L. Rev.* 1373 (2003). Though Fantetti does not explore the issue of a bill of attainder, clearly part of the quandary faced by Lindh was that his mere association with a legal entity, supported and recognized by the administration of G. W. Bush, the Taliban, was criminalized. See Paul, Ron. 2001. "U.S. Taxpayers send Billions to our Enemies in Afghanistan." 5 November, *Texas Straight Talk*, a weekly column. Online at: www.house.gov/paul/tst/tst2001/tst110501.htm.

[49] See statement of Stephen Komie, before the House Judiciary committee, in support of H.R.1916, 22 July 1996. Available on-line: www.house.gov/judiciary/163.htm

[50] *Washington Post*, 12 April 2000; Gray 1998, 102.

[51] See e.g., *United States v. \$506,231*, 125 F3d 442 (7th Cir 1997). Consider also *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 US 663 (1974) was another particularly egregious case of property seizure. There a boat owner leased a ship to someone later arrested for marijuana possession – a single marijuana cigarette was found on the boat. 416 US at 693. The lease agreement demanded that the lessee avow not to engage in any criminal activity. *Id.* Nonetheless, the boat was seized by Puerto Rican authorities, who never gave notice to the rightful owner. Further though the boat owner failed to appear at the seizure "hearing" there was no defense he could have offered as an innocent owner. 416 US at 694. Lastly the Commonwealth of Puerto Rico was not required to compensate the owner of the boat for the loss of his property and the economic loss due to failure to be able to rent the boat. 416 at 695.

[52] See the Bill of Attainder Project at <http://frontpage.brightok.net/~sempai/billofattainder>. First uploaded in 1993, last updated 1999.

[53] *Ibid.*

[54] *Lovett*, 328 US 308, 324 (1946).

[55] *Nixon v. Administrator of General Services*, 433 US 425, 471, footnote 32 (1977); citing *Lovett*.

[56] In this context the references are to property and or the liberty to engage in an otherwise legal profession.

[57] This line is completely contradicted by its citation. The Court in *Lovett* at 324 cited *Hawker v. New York*, 170 US 189 (1898) ("A man may be forbidden to practice medicine because he has been convicted of a felony"). In *Hawker*, a medical doctor was indeed being punished, beyond fine and incarceration and indeed lost his ability to earn a living in a given trade. That extra punishment, loss of medical license, could not have been administered to other non-doctors who committed the same criminal offense. Hence the only thing the State of New York did by removing Hawker of his property, a medical license, was to impose a punishment. In more modern cases, like *Calero-Toledo*, the government of Puerto Rico could claim that it sought to prevent more criminal drug trafficking and or inure the public treasury – in *Hawker* the State gained no material benefit.

[58] Exceptions to the Fourth Amendment prohibition on seizure without issuance of a warrant include, seizure subsequent to arrest, inevitable discovery, and exigent circumstances.

[59] *Chicago v. Morales*, 527 US 41, 58-59 (1999) (the purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes"). Citing *Lanzetta v. New Jersey*, 306 US 451, 453 (1939).

[60] See *Chicago v. Morales*, 527 at 60-65, where the court invalidated a city ordinance that "violate[d] the requirement that a legislature establish minimal guidelines to govern law enforcement." Citing *Kolender v. Lawson*, 461 US 352, 358 (1983).

[61] Under the federal law at question in *Rucker*, if the landlord accused one of violating the DRCA provision of the lease, the landlord could order the tenant to vacate immediately. If one would not leave, the landlord would have to start a civil process to get an ejectment for unlawful detainer. That is, the landlord would accuse the tenant of trespassing and ask the court to order the sheriff to remove the tenants, physically.

[62] Recall from *Scales* 367 US at 224-25 (1961), guilt is personal and cannot be inferred through mere, harmless and lawful association.

[63] Note that DRCA activity can range from possession of cocaine – in the form of residue on U.S. currency, and at least 95% of all bills have cocaine residue – to possession of a cigarette lighter (drug paraphernalia). Worse still for the tenant is the fact that the landlord, or in these particular cases a government agency, need only meet a preponderance of the evidence standard – not beyond a reasonable doubt.

[64] Worse still, there is no reason to think that the tenant would have had notice of the guest's charge and or sought to bring a probable cause hearing on behalf of their dependant/guest during the latter's arraignment.

[65] See "What Has the Supreme Court Been Smoking?" Arianna Huffington, *AlterNet*, April 1, 2002

[66] During oral argument, apparently unaware of the concept of an adhesion contract or the idea of duress and unequal bargaining power, Justice Kennedy a landlord himself asked attorney Paul Renne, who represented Rucker and the co-petitioner, "I guess I'm still puzzled why a tenant can sign a lease and then challenge it. You think this is irrelevant, that the tenants signed a lease?" See Lisa Friedman, "Court Caustic In Drug Evictions Case: Justices Criticize Argument Favoring Oakland Tenants." *Oakland Tribune*, 20 February 2002.

[67] Blackstone's "Commentaries" volume iv, 438.