Ex Post Facto Limitations on Legislative Power

Michigan Law Review
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The Constitution forbids the enactment of ex post facto laws by either Congress\(^1\) or the various state legislatures.\(^2\) Although there is some historical support for construing the ex post facto clauses as prohibiting the passage of all retroactive laws, both civil and

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1. U.S. Const. art. I, § 9, cl. 3.
criminal, courts have eschewed such an interpretation and have applied the clauses to criminal laws only. Courts have failed to define "ex post facto law" with any precision, often stating only that it is a law that "renders an act punishable in a manner in which it was not punishable when committed." Employing such vague definitions, they have held that the clauses prohibit legislatures from retroactively redefining statutory crimes.


In Calder the Connecticut legislature, apparently sitting as a court of last resort, was allowed to grant a new hearing to a petitioner from a probate proceeding despite the fact that the time for appeal to ordinary courts had lapsed. The decision's limitation of the ex post facto clauses to criminal laws has been criticized since, on the facts of Calder, the legislature was sitting in a judicial capacity, as allowed by the state constitution, rather than in its legislative capacity. See Croskey, 14 U. CHI. L. REv. 539, supra note 3, at 559. This Note argues that any law that, if applied prospectively, would be viewed as attempting to influence behavior through the threat of punishment should be subject to ex post facto challenge. See text at notes 44-53 infra.


6. Courts have been reluctant to conclude that an express ex post facto prohibition applies to judicial decisions. See Frank v. Mangum, 237 U.S. 209, 344 (1915); Ross v. Oregon, 227 U.S. 150, 161 (1912); McAllister, *Ex Post Facto Laws in the Supreme Court of the United States*, 15 CALIF. L. REv. 269, 272 (1927). The common-law doctrine that requires the strict construction of penal statutes, however, ordinarily provides sufficient protection for the individual, compare United States v. Kehoe, 365 F. Supp. 232 (S.D. Tex. 1973) (refusing to extend embezzlement to include the misappropriation of land), with United States v. Irick, 369 F. Supp. 234 (S.D. Tex. 1973) (refusing to extend embezzlement to include the misappropriation of land), with United States v. Irick, 369 F. Supp. 234 (S.D. Tex. 1973) (refusing to extend embezzlement to include the misappropriation of land), and People v. Sobiek, 30 Cal. App. 3d 458, 106 Cal. Rptr. 519, cert. denied, 414 U.S. 855 (1973) (extending embezzlement to partnership funds), and courts have often acknowledged that ex post facto problems would arise if penal statutes were not strictly construed. See United States v. Irick, 369 F. Supp. 354, 597 n.1 (S.D. Tex. 1973); Keeler v. Superior Court, 2 Cal. 3d 619, 634, 470 P.2d 617, 626, 87 Cal. Rptr. 481, 490 (1970). The strict application of this doctrine, which results as much from deference to the legislature as from consideration of the affected individual's position, has at times led to results counter to the expectations of both the legislature and the criminal defendant. See, e.g., Pierce v. United States, 314 U.S. 306 (1941) (officer of government corporation not within the definition of government officer for purposes of fraudulent impersonation statute); McBoyle v. United States, 283 U.S. 25 (1931) (airplane not within the definition of motor vehicle for purposes of theft statute); United States v. Irick, 369 F. Supp. 354 (S.D. Tex. 1973) (statute prohibiting obstruction of an officer of the Bureau of Narcotics and Dangerous Drugs does not protect officers of its admitted successor, the Drug Enforcement Agency).

The reluctance of the courts to apply a strict ex post facto limitation to their decisions results from an awareness of their necessary role. James v. United States, 356 U.S. 213, 247 n.3 (1961) (Harlan, J., concurring and dissenting). Legislatures rarely are willing or able to formulate statutes that clearly anticipate every situation to which they might
to include acts not previously included and from increasing the punishment for past acts already considered criminal. Because of


7. Statutes that impose a penalty for a continuing situation resulting from prior unpunished acts should not be considered ex post facto, however. Thus a law making unlawful the possession of certain goods lawfully acquired should not be considered ex post facto. Samuels v. McCurdy, 267 U.S. 188 (1925); Chicago & Alton R.R. v. Trumburger, 228 U.S. 67 (1915). But not all statutes the violation of which conceivably can be avoided by some prospective action should be considered permissible. For example, a statute imposing a penalty on all those who have done a particular act unless they register within a week should be recognized as an ex post facto law. But cf. Cong. GLOBE, 38th Cong., 2d Sess. 642-43, 1155-56 (1865) (discussing a Civil War statute that essentially required deserters to turn themselves in or lose their citizenship).


Laws expanding the definitions of crimes or imposing additional penalties for acts already proscribed by criminal statutes are invalid as applied to acts committed before their passage, but will remain valid as applied prospectively. When the application of a statute is found violative of the ex post facto prohibition, the law as it existed at the time of the crime may be applied in the case (assuming no bar to retrial exists) unless it has been expressly or impliedly repealed without a saving clause. Jaehne v. New York, 128 U.S. 189 (1888). If no saving clause exists, prosecution may be barred completely, see, e.g., Hartung v. People, 22 N.Y. 95 (1860), because of the common-law doctrine of abrogation, which prohibits the prosecution from proceeding under a repealed statute. See generally United States v. Powers, 307 U.S. 214 (1939); Comment, Today's Law and Yesterday's Crime: Retrospective Application of Ameliorative Criminal Legislation, 121 U. Pa. L. Rev. 120 (1972); 18 WAYNE L. REV. 1157 (1972). Because of this, courts have at times hesitated to find statutes invalid on ex post facto grounds. See, e.g., Holden v. Minnesota, 137 U.S. 483 (1890).
the absence of a clear definition of the ex post facto prohibition and the inadequacy of the judicial inquiry into its rationale and scope, uncertainty remains concerning its application to legislative acts that do not clearly fit within either of these two categories.

This Note explores the rationale underlying the prohibition of ex post facto laws and formulates an analytic framework for a more principled application of the prohibition. This analytic framework is then used, first, to critique the present strict application of the prohibition to changes in criminal “punishments” and determine whether the prohibition should be applied to sanctions imposed outside the criminal context, and, second, to determine the degree to which the prohibition should be applied to procedural changes.

Justice Chase’s opinion in *Calder v. Bull* was the first Supreme


Nevertheless, the prohibition has stood as a considerable obstacle to prosecution under statutes enacted or amended after the occurrence of an alleged wrongful act. Most legislatures are aware of this limitation on their power and thus refrain from wholly redefining crimes with the intent to have these new definitions applied retroactively. It has been held, however, that an enactment clarifying the language of a statute or making other minor changes may amount to an ex post facto law if it results in the statute being susceptible to a different interpretation. This is true even when the change merely corrects an error in wording or encompasses more expressly activity that clearly was intended to be proscribed by the statute being amended. See, e.g., *State v. Bell*, 8 Wash. App. 670, 508 P.2d 1398 (1973) (statute that allowed sales of narcotics “for therapeutic purposes only” could not be applied when the law at the time of the act allowed such sales for only “legitimate medical purposes”), *But cf.* *People v. Rozell*, 212 Cal. App. 2d 875, 28 Cal. Rptr. 478 (1963) (incorporation of valid administrative regulation into statutory scheme defining theft by welfare fraud found valid as a “clarification” rather than a change in the law).

Changes in language unsusceptible to expansive interpretations probably do not invalidate the retroactive application of a statute. See *Commonwealth v. Benjamin*, 358 Mass. 672, 266 N.E.2d 662 (1971) (statute changing language regarding denomination as accessory or principal not ex post facto). But it is unclear whether a defendant protesting a retroactive change susceptible to expansive interpretation must show that the change in fact affects the characterization and consequences of his act. See *State v. Bunn*, 50 Hawai‘i 351, 440 P.2d 528 (1968) (answering no). Cf. *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866) (no discussion of particular effect on the defendant was found necessary). This issue rarely arises, however, for when jury instructions are phrased according to the new, broad definition of the crime, the reviewing court, absent a special verdict, can tell only that the defendant’s act was within this new broad definition. A new trial will always be necessary to determine if the defendant’s act was within the old definition. *But cf.* *Wainwright v. Stone*, 441 U.S. 21 (1973) (per curiam) (rejecting defendants’ claim that their convictions should be reversed because of a later state ruling that the statute was impermissibly vague, since the statute was not vague as to those actions for which defendants were convicted).

The prohibition also precludes an overzealous prosecutor from applying retroactively a statute designed for prospective application only when the alleged act was also proscribed by an existing statute. For instance, the court in *United States v. Bell*, 371 F. Supp. 220 (E.D. Tex. 1975), held that the false declarations statute, which made criminal the making of “irreconcilably contradictory declarations material to the point in question,” could not be applied without ex post facto results in instances where the first declaration was made before the passage of the statute, even though the second declaration doubtless constituted perjury and even though the new crime could have been construed to consist solely of the second declaration.

9. 3 U.S. (3 Dall.) 386 (1798). Justice Chase’s opinion is the most often quoted, but should probably not be treated as the opinion of the Court.
Court discussion of the ex post facto prohibition. Since no people would with "reason and justice" entrust their government with the power to pass ex post facto laws, he reasoned, courts should assume that all legislatures lacked this power. Congress and the state legislatures were thus powerless to enact such laws, even without express constitutional prohibitions:10 Recalling the past excesses of Parliament, the framers had included the ex post facto clauses simply "for greater caution."11 Justice Chase concluded that the clauses proscribe the following laws:

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.12

He failed to identify the evil underlying these laws, however, except to say that "no man should be compelled to do what the laws do not require; nor to refrain from acts which the laws permit."13 Unfortunately, courts enforcing the Calder list of prohibited laws have been equally vague and have invalidated on ex post facto grounds statutes that made only trivial changes in crimes and their

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10. 3 U.S. (3 Dall.) at 388-89. See also Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 266 (1827) (Washington, J., dissenting). Many later writers have found ex post facto criminal statutes inherently invalid: "Laws of this kind are so at variance with the general idea of legislative power, that, even in the absence of a constitutional prohibition, it may be fairly doubted whether they would be tolerated by the courts in this country." W. WADE, A TREATISE ON THE OPERATION AND CONSTRUCTION OF RETROACTIVE LAWS § 270, at 315 (1880). See also Smead, The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence, 20 MINN. L. REV. 775, 791 (1936). Article 11 of the Universal Declaration of Human Rights reflects this viewpoint: "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed." G.A. Res. 217 (III), art. 11, § 2, 3 U.N. GAOR, pt. 1, at 73, U.N. Doc. A/810 (1948). Others have disagreed as to the universal nature of the prohibition. See Green, The Maxim Nulla Crimen Sine Lege and the Eichmann Trial, 38 BTR. Y.B. INTL. L. 427, 471 (1962); In re Rauter, [1949] Ann. Dig. 526, 543 (No. 193) (Special Court of Cassation, Neth.).

11. 3 U.S. (3 Dall.) at 390. Justice Chase went on to give several examples of acts of Parliament that he viewed as particularly notorious, including the incidents involving the Earl of Strafford (1601), Sir John Fenwick (1696), Lord Clarendon (1669), and the Bishop of Atterbury (1729). Significantly, this list included not only cases involving punishments for acts that had not been criminal, but also acts increasing punishments (the Coventry Act, 22 & 23 Car. 2, c. 1 (1670)), and changing rules regarding the admissibility of evidence. See text at notes 37-43 infra.

12. 3 U.S. (3 Dall.) at 390 (emphasis deleted).

13. 3 U.S. (3 Dall.) at 388.
punishments\textsuperscript{14} without discussing the theoretical justifications for the prohibition. More importantly, because the prohibition has lacked a principled content, courts have been unduly reluctant to go beyond the \textit{Calder} list and examine the application of the prohibition to punitive sanctions imposed retroactively in noncriminal contexts and to criminal procedural changes that, in a manner similar to substantive law changes, increase the government's ability to punish individuals for past acts.\textsuperscript{15}

A more principled and consistent application of the ex post facto clause must begin with an inquiry into the undesirable characteristics of retroactive laws, in particular those that affect adversely individuals who have committed particular past acts. One objection to such laws is that they fail to provide fair warning. An individual should be warned that his contemplated acts are punishable and of the extent to which they can be punished,\textsuperscript{16} since only if he is warned of these consequences can society expect him to refrain from acting. A related objection to retroactive legislation is that it frustrates reliance upon existing laws. An individual who acted in reliance upon existing definitions of crimes cannot fairly be punished and cannot be punished without detracting from the ability of the criminal law to provide guidance for conduct.

These interrelated objections do not, however, as some decisions suggest,\textsuperscript{17} justify the proscription of all retroactive punishment. For

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\item \textsuperscript{14} See text at notes 37-43 infra.
\item \textsuperscript{15} See text at notes 45-53 infra.
\item \textsuperscript{16} This idea of fair warning has been most clearly articulated in discussions of vagueness challenges outside the context of first amendment rights: “That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement consonant alike with ordinary notions of fair play and the settled rules of law,” Connally v. General Constr. Co., 269 U.S. 385, 391 (1926). See \textit{United States v. Harris}, 347 U.S. 612, 617 (1954); \textit{Lanzetta v. New Jersey}, 306 U.S. 451 (1938). But the warning necessary to withstand a vagueness challenge need not be found in the language of the statute itself. \textit{Wainwright v. Stone}, 414 U.S. 21, 23 (1973) (per curiam); \textit{Minnesota ex rel. Pearson v. Probate Court}}, 309 U.S. 270, 273 (1940). See \textit{Note, The Void-for-Vagueness Doctrine in the Supreme Court}, 123 U. PA. L. Rev. 67, 73-74 (1966). Indeed, it has been suggested that “[t]he criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct.” \textit{Nash v. United States}}, 229 U.S. 373 (1913), quoting 1 E. Easr, \textit{PLEAS OF THE CROWN} 262 (1806).
\item \textsuperscript{17} See \textit{Bouie v. City of Columbia}, 378 U.S. 347 (1964); \textit{Harisiades v. Shaughnessy}, 342 U.S. 580, 593 (1952) (dictum). See \textit{also McAllister, supra} note 6, at 287. Although his discussion of ex post facto laws was far from comprehensive, Blackstone mentioned the lack of warning and frustration of reliance as being among their objectionable features:
\begin{quote}
[Legislatures should let their laws be known, not like Caligula.] There is still a more unreasonable method than this, which is called making of laws \textit{ex post facto} (after the fact): when after an action, indifferent in itself, 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. Here it is impossible that the party could foresee that an action, innocent when it was done, should be after-
\end{quote}
\end{itemize}
example, the fair warning rationale seems inapplicable to situations in which an individual commits an act in the mistaken belief that it is criminal only to find that, perhaps because of a legislative oversight, it was not criminal. The rationale is equally inapplicable when an individual commits an act that is criminal when committed, but is mistakenly prosecuted under a subsequently enacted statute. Moreover, the rationale is at best marginally applicable in situations where society, through its legislative body, determines that an individual should have known at the time he acted that his clearly immoral act deserved punishment. In short, while ex post facto laws are undesirable, society may at times determine that they are less undesirable than leaving reprehensible acts unpunished.

The reliance rationale, while significant, also fails to support a blanket prohibition of retroactive punishments. First, few alleged criminals know the law, much less rely on it. Second, it would seem that reliance should be honored only if it is reasonable. In many instances, however, reliance on existing criminal laws is reasonable only because changes are proscribed by the ex post facto prohibition. For example, the reliance rationale would not seem to mandate a refusal to allow conviction under a statute newly amended to clarify its application in view of technological progress, such as a statute prohibiting theft of a motor vehicle that is amended to include theft of an aircraft. Third, emphasis on reliance alone does not explain wards converted to guilt by a subsequent law; he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust.

1 W. Blackstone, Commentaries *46.

18. Cf. United States v. Bell, 371 F. Supp. 220 (E.D. Tex. 1973). Even if the statute existing at the time the act was committed has not been repealed, the double jeopardy clause may prohibit reprosecution.

19. See Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593, 619 (1958). Cf. In re Goering [1946] Ann. Dig. 203, 208 (No. 92) (International Military Tribunal, Nuremberg) ("To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished").

20. The ability of society as a whole to rely on existing laws has been offered as a basis for the ex post facto prohibition since without such a limitation no legal system is possible:

[F]oral laws should not be retroactive to the disadvantage of those to whom they apply. [T]his is implicit in the notion of regulating behavior by public rules . . . . A tyrant might change laws without notice, and punish (if that is the right word) his subjects accordingly, because he takes pleasure in seeing how long it takes them to figure out what the new rules are from observing the penalties he inflicts. But these rules would not be a legal system, since they would not serve to organize social behavior by providing a basis for legitimate expectations.

J. Rawls, A Theory of Justice 238 (1971). Such a statement does not explain, however, why the prohibition must be absolute.

why reliance on criminal laws should be absolutely protected while reliance on laws in other areas is only one factor used in considering whether an amended law can be applied retroactively.\(^2\) Finally, it is an established principle of criminal law that a defendant cannot escape punishment by pleading that he was unaware of existing law. Since punishment is not conditioned upon actual knowledge of the law, distinctions based on whether the law was actually in existence at the time the act was committed seem arbitrary.\(^2\)

A second undesirable characteristic of retroactively applied laws is implicit in the Calder decision—that they fail to serve their primary, if not sole, function. By proscribing all retroactive criminal legislation, Calder limits the ends for which the legislature may use the criminal law. The legislature may not punish when no law has been violated, despite the moral indignation an act may have created. Although the legislature may take into account the need for retribution and rehabilitation when prescribing prospective punishments, it cannot reassess the sufficiency of the punishment after an act is committed, even if it determines that the punishment does not correspond with the harm that resulted from the act, with the outrage provoked by the individual's behavior, or with the incorrigibility of the actor. Thus, the ex post facto clause as interpreted in Calder severely limits the legislature's ability to use the criminal laws solely in a retributive or rehabilitative manner.

To the extent that the decision in Calder reflects the intent of the framers of the Constitution it suggests that they had in mind a particular model for the legitimate operation of the criminal law: Criminal laws should primarily influence behavior through the threat

22. See generally Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692 (1962). Several explanations in terms of reliance have been offered for this distinction. First, the consequences of penal statutes, especially the deprivation of liberty, are far more severe. Cj. O'Connor v. Donaldson, 42 U.S.L.W. 4929, 4937 (U.S. June 26, 1975) (Burger, C.J., concurring). But the doctrine is applied as vigorously in cases involving only monetary fines. Second, the moral condemnation of the community usually accompanies the invocation of the criminal law. Hart, supra note 6, at 404. But see Morissette v. United States, 342 U.S. 246, 256 (1952) (assuming the existence of crimes the conviction for which has no moral content in suggesting that such crimes need have no mens rea). Third, historically the power of the state over individuals has been most dramatically displayed in the exercise of the criminal law. This factor is at least as important as the others. Cf. F. ALLEN, THE CRIMES OF POLITICS 4 (1974).

23. See J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 65 (1960); W. LAFAYE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 90 (1972). Cf. United States v. Casson, 434 F.2d 415 (D.C. Cir. 1970). The court in Casson, applying a statute increasing the punishment for burglary that was signed eight hours before, but only announced simultaneously with, the commission of a burglary, said: "Assuming arguendo that legislation must pass a notice test to escape an ex post facto condemnation, we decide that the public are charged with knowledge of all the published Information concerning a congressional bill that is available during the entire legislative process . . . . Actual notice to a particular individual is not a prerequisite." 434 F.2d at 422.
of punishment. Under this model, an individual presumably will refrain from acting when the punitive consequences of his contemplated act outweigh any personal interests served by that act. The severity of the punishment for an act should therefore reflect the degree to which the legislature desires to deter individuals from committing that act and should establish the "price" the individual must "pay" to commit the act. Only when an individual chooses to act in violation of the law should he be subjected to punishment and then only to the punishment set forth in the law at the time of his choice. Thus the framers found retroactively applied punishments objectionable because they could not serve the recognized purposes of punishment.

The reach of this objection to retroactive legislation is clearly limited. Laws that have regulation, retribution, and rehabilitation as significant goals can satisfy these goals when applied to acts occurring before their enactment. Deterrence, however, is still central to the operation of the criminal law, notwithstanding that theories of human action have become more complicated since the Constitution was written and the formulas used to calculate punishment.

24. Perhaps the best statement of this approach can be found in an early Massachusetts case: The reason why these laws are so universally condemned is, that they overlook the great object of all criminal law, which is, to hold up the fear and certainty of punishment as a counteracting motive, to the minds of persons tempted to crime, to prevent them from committing it. But a punishment prescribed after an act is done, cannot, of course, present any such motive. It is contrary to the fundamental principle of criminal justice, which is, that the person who violates a law deserves punishment, because he willfully breaks a law, which, in theory, he knows or may know to exist.


26. Thus, Slawson has stated: [O]ur legal system condemns a man only because he has acted in a certain manner. This limitation of the criminal sanction seems to rest, ultimately, on a belief in free will. A man is criminal only if he chooses to do that which society calls criminal. The absolute ban on ex-post-facto criminal laws is explicable as a ban on condemning a man when the element of choice which society has chosen as its basis of condemnation, i.e., knowledge that an act is criminally wrong, could not have been present.

Slawson, Constitutional and Legislative Considerations in Retroactive Lawmaking, 48 CALIF. L. REV. 216, 222 (1960).

27. See J. SALMOND, JURISPRUDENCE 115 (11th ed. G. Williams 1957). This same deterrence principle would also invalidate any criminal laws with which it is impossible to comply. Perhaps such laws, even more clearly than ex post facto laws, should be invalid because of the extraordinary power and potential for abuse given to enforcement officials. The Supreme Court has not found it necessary to articulate such a doctrine. See Lambert v. California, 355 U.S. 225 (1957) (relying on due process generally to find unconstitutional a local ordinance requiring registration of felons); Robinson v. California, 370 U.S. 660 (1962) (relying on cruel and unusual punishment to find unconstitutional the "crime" of drug addiction).
levels have become more sophisticated. Thus, most criminal laws today would fail to serve their principal purpose when applied retroactively. Outside the criminal context, however, laws arguably imposing disabilities frequently serve purposes other than deterrence. Such laws may well be immune from criticism based on this objection.

The third objectionable characteristic of retroactive legislation is its potential for legislative abuse. The framers of the Constitution commonly regarded ex post facto laws and bills of attainder as weapons of tyrants and despot used to achieve politically motivated results. In denying legislatures the power to use these weapons the framers may have been less concerned with the subtleties of criminal law theories than with the recent abuses of governmental power directed at political enemies. While some members of the convention considered ex post facto laws so obviously unjust that a constitutional provision was unnecessary, a general distrust of legislatures and the grave possibility of legislative abuse resulted in the inclusion of the prohibition. By disallowing retroactive retributive measures completely, the framers prevented legislatures from using them against any particular group. Their fears were not unfounded,
for ex post facto laws and bills of attainder have most often been the product of times of great political turmoil like the post-Civil War and post-World War II periods. Whether the ex post facto clauses were included in the Constitution because all such laws were considered inherently unjust, or because an absolute prohibition was considered necessary to exclude the possibility of vindictive legislative action, is a question that is difficult to answer authoritatively. Its resolution would require an historical exploration into whether the framers of the Constitution accepted the legitimacy of any of the purposes for retroactively imposed sanctions. By including an apparently absolute prohibition in the Constitution, the framers did not end the debate, however, since they failed to define the term “ex post facto law” with any degree of certainty.

These objectionable characteristics of retroactive laws are instructive in applying the ex post facto clauses in a more principled manner. Thus, in deciding whether a law is proscribed by the ex post facto prohibition, a court should consider three factors: first, does the law penalize activities in the absence of fair warning and frustrate reasonable reliance on existing laws; second, can the law serve its ostensible purpose—for instance, does the law attempt to regulate behavior through threats of unpleasant consequences where deterrence is no longer possible; and, finally, could the law have been a consequence of legislative vindictiveness. Clearly, no precise test can be formulated from these factors, but courts examining laws for possible ex post facto violations should be alert for the presence of any of the three. In rare instances, the clear presence of one of these

abuse, but rather in the impossibility of consensus in a pluralistic society as to whether an individual should have known his act was immoral. There are, however, legal systems that continue to allow such determinations to be made by courts, if not by legislatures. See Shaw v. Director of Pub. Prosecutions, [1962] A.C. 220, noted in 75 Harv. L. Rev. 1652 (1962); Gordon, Crimes Without Law?, 11 JURID. REV. (n.s.) 214 (1966). Similarly, many discussions of crimes against humanity have justified the punishment of war crimes by assuming that certain behavior would be universally condemned. See Green, supra note 10, at 459. Yet such a truly universal moral standard may not be possible, even as to homicide. Compare In re Ohlendorf, [1948] Ann. Dig. 656 (No. 217) (United States Military Tribunal at Nuremberg) (“Certainly no one can claim with the slightest pretense at reasoning that there is any taint of ex post factoism in the law of murder”), with Shepherd v. People, 25 N.Y. 406 (1862) (finding the change from life imprisonment to the death penalty significant enough to preclude punishment for murder entirely). Perhaps the strictness with which an ex post facto limitation should be applied in a society should vary inversely with the extent to which that society's needs are recognized and goals are shared by its members. Thus, disciplinary systems within such institutions as military organizations, schools, and professional associations need not describe conduct for which sanctions will be imposed with the same precision as those people by more diffuse groups. Cf. Goss v. Lopez, 419 U.S. 565 (1975) (schools); Parker v. Levy, 417 U.S. 733 (1974) (military).


objectionable factors may warrant invalidation of a statute. More often, a court must engage in a delicate balancing of governmental interests in legislative and administrative flexibility against societal interests in having laws that can be relied on and laws that do not stem from improperly motivated legislative acts.

Traditionally, however, courts have not balanced these interests and consequently have rigidly interpreted the prohibition. In the criminal context courts without much apparent thought have uniformly invalidated any retroactively applied increases in the punishment that a trial court can impose for an offense. Because of the uniform precedent for applying the prohibition to punishment increases since Justice Chase's opinion in Calder v. Bull, it is difficult to contest such decisions. Arguably, changes in punishment level made for the purpose of rehabilitation should not be proscribed as ex post facto since rehabilitation is an important function of criminal law that can be served by retroactive punishment increases. The rationales of the prohibition, however, detract from this contention. First, the ability to impose punishment increases is a power that can easily be abused. Second, significant punishment increases may upset the calculations of an individual who violated a law when the punishment was at a certain level and who perhaps would have refrained from acting had the punishment been higher. Finally, setting punishment levels with individualized rehabilitation as a goal can be accomplished without violating the prohibition by granting courts broad discretion in sentencing.

In applying the ex post facto prohibition, courts have struck down

37. See notes 4-8 supra and accompanying text.

38. See, e.g., Lindsey v. Washington, 301 U.S. 397 (1937) (statute making maximum sentences mandatory, while also making parole available, found to be an increase in punishment in violation of the ex post facto clause).

Changes that lessen the punishment for crimes will not violate the clause. Calder v. Bull, 3 U.S. (3 Dall.) 386, 391 (1798) (Chase, J.) (dictum). In applying the prohibition, courts have thus been forced to decide whether hanging is less humane than electrocution, Malloy v. South Carolina, 237 U.S. 180 (1915) (answering yes), and whether extending the time before a death sentence can be executed is a mitigation in punishment, Rooney v. North Dakota, 196 U.S. 319 (1905)—not easy determinations, Shepherd v. People, 25 N.Y. 406 (1862).

39. But it has been argued that imprecision in the standards for prescription of punishments results in either “insecurity of the general community” or “injustice to the morally innocent . . . deprived of knowledge of how they are to act to avoid the threatened sanction of the law” in a way that compels precision in standards for substantive crimes. Kadish, Legal Norm and Discretion in the Police and Sentencing Process, 75 Harv. L. Rev. 904, 923 (1962). The strictness with which the prohibition is applied to punishment increases does appear anomalous in view of broad judicial discretion in sentencing if the prohibition is aimed at honoring calculations of the defendant. See M. Fraseek, Criminal Sentences 3-11 (1973).

40. The effect on an individual’s calculations resulting from changes in definitions of crimes is obviously qualitatively different from the effect resulting from changes in penalties. In the former case the defendant could not have known his act was wrong; in the latter he simply was unaware of the severity of the punishment. If the duty to obey the law is absolute, its breach could serve as justification for any punishment. See F. Zimring & G. Hawkins, Deterrence 46 (1978).
as unlawful increases in punishment many retroactive changes in
the post-conviction treatment of individuals, including such punish­
ment "increases" as providing solitary rather than ordinary confine­
ment before execution,41 changing the availability of parole and
good-time benefits,42 and restricting the availability of bail on
appeal.49 It is difficult to discern why, in many of these instances,
the prohibition has been so automatically applied, for the arguments
against granting legislatures the power to impose measurable punish­
ment increases are at most marginally applicable to minor changes
in the handling of prisoners. Reliance on such procedures is rare.
Moreover, most such changes are meant simply to regulate the han­
dling of imprisoned or paroled convicts—a purpose they can fulfill
—rather than to punish them further for their past acts that can no
longer be deterred.

The uniform invalidation of such minor changes can only be
justified as a prophylactic rule to preclude improper legislative
manipulation of the adjudicatory and rehabilitative processes. The
resulting cost, however, is that the legislature's hands are tied: any
new information that it may acquire regarding the effectiveness of
certain rehabilitative techniques may not be applied to rectify past
errors. For example, should it come to light that the goal of rehabili­
tation would be furthered by decreasing certain parole benefits pre­
viously granted, the legislature could not use this information to

41. See In re Medley, 134 U.S. 160 (1890). But see Holden v. Minnesota, 137 U.S.
483 (1890), in which the Supreme Court struggled to interpret a similar change as
prospective only, thereby avoiding an ex post facto result.

42. See In re Griffin, 63 Cal. 2d 757, 408 P.2d 959, 48 Cal. Rptr. 183 (1965); State
ex rel. Woodward v. Board of Parole, 155 La. 699, 99 S. 534 (1925); State ex rel. Nelson
v. Ellsworth, 142 Mont. 14, 80 P.2d 886 (1938); Goldsworthy v. Hammill, 85 Nev. 292,
468 P.2d 350 (1970); Ex parte Alegria, 464 S.W.2d 868 (Tex. Civ. App. 1971). See also
Love v. Fitzharris, 311 F. Supp. 702 (N.D. Cal. 1970), aff'd, 460 F.2d 362 (9th Cir. 1972),
vacated as moot, 469 U.S. 1100 (1985) (administrative change in the interpretation of
the parole statute made after the petitioner had been sentenced under the old inter­
pretation found to be ex post facto). But see Singleton v. Shafer, 315 F. Supp. 1694 (E.D.
Kleinger v. Wilson, 5 N.Y.S.2d 934, 254 App. Div. 405 (1938) (a statutory change held
not ex post facto that made parole available earlier, but subjected the parolee to
recommitment beyond the running of the original sentence).

Often these cases have distinguished between those benefits that are technically
available as a matter of grace and those that are actually incorporated into the
sentence. See, e.g., Love v. Fitzharris, 460 F.2d 382, 384 n.1 (9th Cir. 1972). However,
statutes enacted after the original crime that increase the punishment for additional
offenses committed while on parole have not been held ex post facto, see, e.g., Lincoln
v. California Adult Authority, 455 F.2d 133 (9th Cir. 1972), unless they affect the
aff'd, 390 U.S. 713 (1968) (per curiam). Changes in the administration of parole and
probation have been held not to be ex post facto even though subtle changes in the
standards for revocation may be involved. See, e.g., Voorhees v. Cox, 140 F.2d 132 (6th Cir.),
cert. denied, 322 U.S. 753 (1944). These holdings seem consistent with the treat­
ment of statutes that enhance a former convict's susceptibility to punishment, see
text at note 49 infra, and of changes in trial proceedings generally. See text at notes
54-92 infra.

rehabilitate more effectively individuals who committed their criminal acts before this information became available. Moreover, the invalidation of all minor changes places a great burden on judicial and administrative agencies effectuating these changes by requiring them to apply each change only to those individuals who committed their criminal acts after the statute's effective date. There is little reason why sufficient protection cannot be provided the defendant by a less stringent application of the prohibition. For example, courts could invalidate all laws that measurably increase punishment or that, because of their selective application, indicate possible legislative ill motive, and require, before upholding any other changes arguably increasing punishments, that the government demonstrate that legitimate regulatory interests are furthered by the change.

Although the Supreme Court has acknowledged that the ex post facto clause cannot be avoided by giving a civil form to an essentially penal statute, the ex post facto prohibition has been infrequently applied to sanctions and disabilities imposed outside the criminal context. Disabilities arguably of a penal nature are often imposed through both direct legislative enactments and noncriminal adjudications. For example, legislatures have excluded individuals from participating in specified present and future activities only because these individuals committed certain acts in the past. Statutory disabilities, such as disenfranchisement, disqualification from certain offices or professions, the inability to own firearms or appear at

44. Burgess v. Salmon, 97 U.S. 381, 385 (1878). In Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866), the Court struck down as bills of attainder and ex post facto laws state and federal legislation requiring that attorneys, clergymen, teachers, and those seeking public or corporate offices take oaths denying that they had engaged in any act of sympathy with the Confederacy. These laws were found to be penal in nature, rather than regulatory, because such laws were historically regarded as penal, because they were aimed at past, not future, acts, and because the past acts had no relation to fitness for the office involved. 71 U.S. (4 Wall.) at 319-21, 327. See also Hiss v. Hampton, 338 F. Supp. 1141 (D.D.C. 1972); United States v. Brown, 381 U.S. 437 (1965) (statute providing that anyone who had belonged to the Communist Party during the preceding five years could not serve as a labor organization official invalidated as a bill of attainder on the ground that it was a punishment imposed by a legislative act; Court concluded that no valid regulation could be based on the assumption that Communists were more likely to cause political strikes). But see DeVeau v. Braisted, 363 U.S. 144, 160 (1960) (upholding a similar disability imposed on any person convicted of a felony as a legitimate regulation).


47. See, e.g., Cases v. United States, 131 F.2d 916 (1st Cir. 1942), cert. denied, 319 U.S. 770 (1943); People v. Camperlingo, 69 Cal. App. 466, 231 P. 691 (1924).
racetracks, and the susceptibility to higher punishment for future criminal convictions, are commonly imposed on those convicted of felonies, including those convicted prior to the statutory imposition of the disabilities. Adjudicatory proceedings involving, for example, deportation, disbarment and similar sanctions within other professions, or the administration of economic regulations, also impose severe sanctions on individuals because of specific prior acts, often without precise warning to the individual at the time of his act of the possible imposition of such sanctions. In dismissing ex post facto challenges to the imposition of such disabilities and sanctions, courts have all too often failed to consider the possibility that retroactive punishments imposed outside the criminal process are as unjust and as potentially abusive as those imposed within the criminal process.

There is no clear distinction between these noncriminal laws and criminal laws from the individual’s point of view. Both often are relied on, deter the commission of proscribed actions, impose undesirable consequences, and result at times from legislative vindictiveness. To be sure, the government’s need for administrative and regulatory flexibility outside the criminal process is greater than its need for flexibility in establishing criminal sentences. But this interest is insufficient to support a general conclusion that no law outside the criminal context is prohibited by the ex post facto clauses. While no exact test can be derived for identifying those laws that are sufficiently objectionable to warrant invalidation, there is little reason why courts cannot engage in a balancing of interests that is more sensitive to interests of the individual. In particular, courts should scrutinize laws that, if applied prospectively, would be viewed as controlling behavior or that sufficiently penalize certain acts to deter individuals from committing those acts. The retroactive application of such laws should be upheld only if the laws serve significant regulatory interests unrelated to the deterrence of behavior.

49. See, e.g., McDonald v Massachusetts, 180 U.S. 311 (1901); Ex parte Gutierrez, 45 Cal. 429 (1873); Myers v. District Court, — Colo. —, 518 P.2d 836 (1974).
53. Such an examination is not entirely unfamiliar to the courts: The mark of an ex post facto law is the imposition of what can fairly be designated punishment for past acts. The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation...
addition, courts should be sensitive to claims of reliance and should carefully balance the individual's reliance interest against the regulatory interests of the state.

On several occasions courts have employed the ex post facto prohibition to invalidate changes in criminal procedure, perhaps in recognition of the fact that such changes can adversely affect an individual as significantly as changes in substantive law. However, no clear test for applying the prohibition to procedural changes has emerged from these cases. If the prohibition is to be a useful protection for criminal defendants without unduly disrupting the administration of justice, it must be applied only after a principled analysis that recognizes the functions of the prohibition in protecting individual expectations and curbing legislative abuses.

Justice Chase's list of ex post facto laws excluded changes in the procedures used to determine guilt and affix penalties, with the exception of changes in the rules of evidence. Before the Supreme Court first considered the applicability of the ex post facto prohibition to procedural changes, treatise writers like Judge Cooley had reached firm conclusions on the issue:

[S]o far as the mere modes of procedure are concerned, a party has no more right, in a criminal than in a civil action, to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts, in existence when its facts arose.65


55. T. COOLEY, supra note 29, at 272. Bishop seems to have come to similar conclusions. In the 1858 edition of his Criminal Law he stated that "a statute creating a new court, or giving jurisdiction to an existing one, to try offenses previously committed, is not ex post facto." J. BISHOP, CRIMINAL LAW 148 (2d ed. 1858). In the 1872 edition of Criminal Procedure, this point was elaborated:

[R]emedy may be changed from time to time by statutes, and they are to be sought in the courts according to the forms existing when the suit is carried on, though the right may have originated when the law of the remedy was different. But where a private right has vested in an individual, the change of the remedy cannot be carried so far as to take away the right. Now, within this principle, the various absolute rights of prisoners, especially the constitutional ones, in respect of their defence cannot be taken away. But they can be modified as to time and place, and manner of their enforcement—only the substance of them must be preserved.
Judge Cooley admitted, however, that while legislatures “may pre­scribe altogether different modes of procedure in [their] discretion . . . in so doing, they must not dispense with any of those substantial protections with which the existing law surrounds the person accused of crime.” Unfortunately, he failed to explain which procedural protections were sufficiently “substantial” to come within this limited protection. Cooley's language, often quoted in subsequent ex post facto procedural cases, triggered the search for a “substantial right” “vested” in the defendant that was unlawfully “taken away” by a legislative change. Under such a vague standard, however, courts rarely invalidated procedural changes not infringing express constitutional rights. Indeed, many judges found abhorrent the idea that nonconstitutional rights could “vest” upon commission of a wrong.

On two occasions the Supreme Court found that changes in criminal procedures amounted to ex post facto laws. In Kring v. Missouri, the defendant pleaded guilty and was sentenced for second degree murder after several trials for first degree murder failed to reach a valid verdict. The conviction was overturned when it was shown that the prosecutor had promised a lesser sentence than that imposed. At the time the crime was committed, a conviction for second degree murder served as an acquittal of first degree murder. A state constitutional change after the crime abrogated .

J. Bishop, Criminal Procedure § 115, at 70 (2d ed. 1872). Both Bishop and Cooley seem to have viewed the imposition of criminal punishments for wrongs against the state as directly analogous to the award of civil remedies for wrongs against an individual.

56. T. Cooley, supra note 29, at 272.

57. Cooley did question the decision in State v. Arlin, 39 N.H. 179 (1859). In that case, the punishment for robbery was reduced to such an extent that the defendant was no longer entitled to counsel, to process to compel witnesses, to a copy of his indictment, or to a list of his jurors, since all of these rights were incident only to more severe penalties. He described these protections, not then thought to be constitutionally required, as “securities against unjust convictions,” the removal of which “was directly calculated to increase the party's peril” and therefore ought to fit “within the reason of the rule which holds a law ex post facto which changes the rules of evidence after the fact . . . .” T. Cooley, supra note 29, at 258 n.1.


60. 107 U.S. 221 (1883).

61. This case might well have been decided on double jeopardy grounds today. See Green v. United States, 355 U.S. 184 (1957); United States v. Wilkins, 548 F.2d 844 (2d Cir. 1976).

62. The opinion made no mention of the significance of the fact that this was a constitutional rather than a statutory change. Many later cases have also ignored the distinction. See, e.g., State v. Kavanaugh, 32 N.M. 404, 258 P. 209 (1927). It might be
this rule, however, and the defendant was subsequently retried and convicted of first degree murder. The Missouri courts concluded that the change was procedural and therefore not subject to ex post facto attack. In reversing, the Supreme Court invalidated the retroactive application of the change by stretching the categories in *Calder:* The new rule “so change[d] the rules of evidence that what was conclusive evidence of innocence of the higher grade of murder when the crime was committed, namely: a judicial conviction for a lower grade of homicide, is not received as evidence at all, or if received is given no weight in behalf of the offender. [It also] change[d] the punishment,” since under the old rule the defendant “could never be tried or punished by death.” Dissatisfied with the narrow categories in *Calder,* the Court went on to conclude that a change in procedure “alter[ing] the situation of a party to his disadvantage” could not be applied to crimes committed prior to the change without violating the ex post facto prohibition. In so holding, the Court repudiated the sharp distinction between substantive and procedural law relied upon by the Missouri courts:

But it cannot be sustained without destroying the value of the constitutional provision, that a law, however it may invade or modify the rights of a party charged with crime, is not an *ex post facto* law, if it comes within either of these comprehensive branches of the law designated as Pleading, Practice and Evidence.

Can the law with regard to bail, to indictments, to grand juries, to the trial jury, all be changed to the disadvantage of the prisoner by State legislation after the offense was committed, and such legislation not held to be *ex post facto* because it relates to procedure . . . ?

And can any substantial right which the law gave the defendant at the time to which his guilt relates be taken away from him by *ex post facto* legislation, because, in the use of a modern phrase, it is called a law of procedure? We think it cannot.

The Court clearly viewed as within the ex post facto prohibition many changes involving aspects of the criminal process that few
would contend anyone had relied on, and still fewer would suggest
were designed to deter criminal behavior. But because of the poten­
tial power of the state and the vulnerability of the accused, the
Court concluded, the prohibition should be applied not only to
changes in laws that are meant to guide conduct, but to all changes
that enhance the position of the state in criminal trials at the ex­
pense of the defendant. Off the Court, the author of the Kring
opinion later defined ex post facto laws as those laws that affect “the
individual by increasing his liability to criminal prosecution.”

In a series of later cases, however, the Supreme Court sustained
the application of procedural statutes in trials for crimes allegedly
committed before the statutes were enacted. In all of these cases,
the Court stated simply that the defendant had not been deprived
of a substantial or vested right and did not examine the resulting
disadvantage to the defendant. Nevertheless, the Court was not quite
ready to abandon the logic of Kring and deny that procedural rights
unprotected by express constitutional provisions could be sufficiently
substantial to fall within the ex post facto prohibition. Thus, in
Thompson v. Utah, the Court for a second time applied the pro­
hibition to a procedural change that, in the Court’s view, infringed
upon such a right.

In Thompson, the alleged offense was committed and the defen­
dant first tried while Utah was a territory governed by federal law
guaranteeing a trial by a jury of twelve. After Utah was admitted
to the Union, the defendant was retried and convicted under state
law requiring only eight jurors. Reversing the conviction, the Court
held that the constitutional right to trial by jury applied in criminal
prosecutions in the territories, that only a twelve-member jury could

67. S. MILLER, LECTURES ON THE CONSTITUTION OF THE UNITED STATES 537 (1891).
68. See Gut v. Minnesota, 79 U.S. (9 Wall.) 35 (1870) (change in the boundaries of
the districts within a state in which a criminal trial could be held); Hopt v. Utah, 110
U.S. 574 (1884) (change in the rules of evidence that allowed convicted felons to
testify); Cook v. United States, 158 U.S. 157 (1891) (change in venue rules in federal
territories); Duncan v. Missouri, 152 U.S. 377 (1894) (restructuring of the Missouri
supreme court that affected the number of judges hearing the defendant’s case);
Gibson v. Mississippi, 162 U.S. 565 (1896) (legislative change that restricted jury mem­
bership to registered voters of “good intelligence, sound judgment and fair character”).
All but the decision in Duncan were perfunctory statements by Justice Harlan.
In Hopt, the evidentiary change was found not to be ex post facto despite the fourth
category relating to evidence in the Calder list. The change in that case was found to
“relate to modes of procedure only, in which no one can be said to have a vested
right . . . .” Only those changes in evidence that changed “the amount or degree of
proof essential to conviction” or “the ingredients of the offense or the ultimate facts
necessary to establish guilt” were thought to be ex post facto. 110 U.S. at 590. Justice
Chase had not made this distinction in his Calder opinion, for he included in his
examples of undesirable precedents the removal of the requirement of the second
witness in treason cases and the removal of a wife’s incompetency. See Calder v. Bull,
3 U.S. (3 Dall.) 366, 389 (1798) (Chase, J).
69. 170 U.S. 343 (1898).
satisfy the requirement,\(^7^0\) and that, since the defendant had this right when he allegedly committed the offense, the right could not be taken from him in his second trial. Justice Harlan, writing for the Court, was apparently untroubled by the logical implication of the decision—that rights vested in the defendant upon commission of a wrong.\(^7^1\) The kind of disadvantage to the defendant that renders a procedural change ex post facto, the Court generalized, is limited to those "materially impair[ing] the right of the accused to have the question of his guilt determined according to the law as it was when the offense was committed."\(^7^2\) Citing *Kring* for the limited conclusion that procedural changes could be ex post facto, rather than for the broad proposition that the clauses prohibit all changes altering the situation of a party to his disadvantage, the Court concluded that the jury-trial right the defendant had been denied was the kind of substantial right that had been sought in earlier cases:

> The difficulty is not so much as to the soundness of the general rule that an accused has no vested right in particular modes of procedure, as in determining whether particular statutes by their operation take from an accused any right that was regarded, at the time of the adoption of the Constitution, as vital for the protection of life and liberty, and which he enjoyed at the time of the commission of the offense charged against him.\(^7^3\)

While *Thompson* limited the scope of the ex post facto prohibition as set forth in *Kring*, Justice Harlan's language in *Thompson* was nevertheless susceptible of constructions that placed significant limitations on the power of legislatures to apply procedural changes to past crimes. Later Supreme Court cases apparently ignored *Kring*, however, and eschewed construing *Thompson* as establishing any significant restraint on legislatures. The *ratio decidendi* in *Thompson*, these later cases suggested, was that the defendant had been *constitutionally* guaranteed a jury trial of twelve at the time of his offense: *Thompson* did not limit the power of legislatures to make changes in nonconstitutional procedural rights.\(^7^4\) Several decisions

\(^7^0\) In *Williams v. Florida*, 399 U.S. 78 (1970), the Court overruled this aspect of *Thompson* and held that a 12-member jury is not constitutionally required.

\(^7^1\) This decision was probably largely influenced by Justice Harlan's personal opinion regarding the desirability of jury trials. For a survey of his persistent attempts to find them required whenever possible, see Coudert, *The Evolution of the Doctrine of Territorial Incorporation*, 26 COLUM. L. REV. 823 (1926).

\(^7^2\) 170 U.S. at 351.

\(^7^3\) 170 U.S. at 352.

\(^7^4\) In *Thompson v. Missouri*, 171 U.S. 380 (1898), the defendant was tried and convicted of murder, but the conviction was reversed because of the improper admission of comparative handwriting samples. Before his second trial, the state legislature loosened the evidentiary restrictions to allow such comparative samples. Justice Harlan could not find that "the accused had any vested right in the rule of evidence which obtained prior to the passage of the Missouri statute, nor that the rule established by that statute entrenched upon any of the essential rights belonging to one put on trial
sustaining procedural changes distinguished Kring and Thompson by stating that a defendant is disadvantaged only when a right is taken away, not when a change facilitates the prosecution's task.\textsuperscript{75}

The ultimate question, whether any right that had never been constitutionally protected could be a "substantial right," was left unanswered:

Just what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibition cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree. But the constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation, and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance.\textsuperscript{76}

Courts employing the "substantial right" test have held that the ex post facto clauses will not be violated by the retroactive application of most procedural changes,\textsuperscript{77} including changes that arguably for a public offence." 171 U.S. at 388. See Mallett v. North Carolina, 181 U.S. 589 (1901) (upholding statute allowing state to appeal the grant of a new trial); Beazell v. Ohio, 269 U.S. 167 (1925) (upholding change according trial judge's discretion in granting separate trials). In neither Mallett nor Thompson v. Missouri did the Court make note of the particularized effect of the new rule in the case before it.

\textsuperscript{75.} See, e.g., Thompson v. Missouri, 171 U.S. 380, 387-88 (1898).

\textsuperscript{76.} Beazell v. Ohio, 269 U.S. 167, 171 (1925).

\textsuperscript{77.} Thus, the ex post facto clauses have been held not to prohibit the retroactive application of changes in the location, jurisdiction, or composition of a trial or appellate court, e.g., Gut v. Minnesota, 70 U.S. (9 Wall.) 35 (1866), in the nature of the accusatorial body and its members, People v. Schmidt, 33 Cal. App. 426, 165 P. 555 (1917) (abolishment of right to challenge grand jury for prejudice); State v. Pell, 140 Iowa 655, 119 N.W. 154 (1909) (temporary procedure for selection of grand jurors when no other procedure provided); Jones v. Commonwealth, 86 Va. 661, 10 S.E. 1005 (1898) (writ of capias replacing examination before a justice of the peace in misdemeanor cases), in the requirements for a valid indictment, e.g., Commissioner v. Kelley, 184 Mass. 320, 68 N.E. 346 (1900) (statute allowing indictment for larceny to encompass crime of embezzlement), in the methods of jury selection, e.g., Gibson v. Mississippi, 162 U.S. 656 (1896), in the availability of separate trials, despite the resulting adverse effects on the number of peremptory challenges and the admissibility of evidence, e.g., Sinclair v. State, 150 Tex. Crim. 35, 261 S.W.2d 167 (1953), cert. denied, 346 U.S. 830 (1953), in the reallocation of sentencing duties between judge and jury, e.g., Donald v. Decker, 318 F. Supp. 563 (N.D. Tex. 1970) (but see Camp v. State, 187 Ga. 76, 200 S.E. 126 (1939); Winston v. State, 186 Ga. 573, 198 S.E. 667 (1938)), in the availability of separate trials, despite the resulting adverse effects on the number of peremptory challenges and the admissibility of evidence, e.g., Sinclair v. State, 150 Tex. Crim. 35, 261 S.W.2d 167 (1953), cert. denied, 346 U.S. 830 (1953), in the reallocation of sentencing duties between judge and jury, e.g., Donald v. Decker, 318 F. Supp. 563 (N.D. Tex. 1970) (but see Camp v. State, 187 Ga. 76, 200 S.E. 126 (1939); Winston v. State, 186 Ga. 573, 198 S.E. 667 (1938)), in the separation of the jury determination of guilt from the jury determination of the sentence, e.g., Todd v. Stynchcombe, 466 F.2d 1030 (5th Cir. 1973), and in the state's right to appeal. E.g., People v. O'Bryan, 165 Cal. 55, 130 P. 1042 (1915). But see State v. Witte, 243 Wis. 223, 10 N.W.2d 117 (1943); In re Jones, 500 P.2d 690 (Wyo. 1972).

Significantly, the courts have found the "substantial right" test more useful in cases involving the abrogation of the right to indictment by grand jury. In cases arising before Thompson v. Utah, 170 U.S. 343 (1898), the ex post facto issue was either avoided entirely by giving changes prospective interpretation only, see, e.g., People v. Tisdale, 57 Cal. 104 (1890), or by not finding an ex post facto change. See, e.g., People v. Campbell, 89 Cal. 243 (1891); But see State v. Kingly, 10 Mont. 537, 26 P. 1066 (1891). After the decision in Thompson preserving the right to a petit jury, however, other courts found that a constitutionally guaranteed grand jury indictment should
have deterrent content such as extensions of statutes of limitation. 78
Significantly, in considering whether procedural changes could be
ex post facto laws, the Supreme Court has made no mention of fair
warning, reliance, or the possibility of legislative vindictiveness: 79
The Court has used vague phrases and simplified categories instead of
formulating an underlying theory for the clauses.
For the most part, the reliance rationale for the ex post facto
also be preserved. See Garnsey v. State, 4 Okla. Crim. 547, 112 P. 24 (1910); State v.
Rock, 29 Utah 38, 57 P. 532 (1899). Contrary, State v. Kyle, 166 Mo. 287, 65 S.W. 765
(1901). Like Thompson, these decisions only considered whether the procedural right
was sufficiently "substantial" to warrant protection by the ex post facto provision; they did not consider why these rights vested and remained only with those whose
alleged crimes were committed while such rights were constitutionally guaranteed. A
later federal court found that the grand jury right was substantial enough to be pro-
tected by the ex post facto clause even though it had been only statutorily guaranteed.
See Mafnas v. Guam, 228 F.2d 283 (9th Cir. 1955). See also Putty v. United States, 220
Several federal cases have indicated that changes in the required number of grand
jurors present ex post facto problems. See United States v. Haskell, 169 F. 449 (E.D.
Okla. 1909) (invalidating changes in requirement for indictment from 12 out of 16 grand
jurors to 12 out of 21); United States v. London, 176 F. 976 (E.D. Okla. 1909) (same).
But see Hallock v. United States, 185 F. 417 (9th Cir.), cert. denied, 220 U.S. 613 (1911)
(upholding similar change); State v. Kavanaugh, 32 N.M. 404, 258 P. 209 (1927). In
Hallock the court implied that only constitutional rights were sufficiently substantial
to warrant ex post facto protection, and unlike the situation in Thompson v. Utah,
the precise number of jurors was not part of the constitutional guarantee.

78. The "substantial" and "vested" right language has produced arbitrary results in
the context of statutes of limitations. An extension of a statute of limitations is
allowed, e.g., Roberts v. United States, 229 F.2d 467 (9th Cir. 1956), but the revival
of a statute after its running is not. State v. Sneed, 25 Tex. Supp. 66 (1880). See Black,
Statutes of Limitation and the Ex Post Facto Clauses, 26 Ky. L.J. 41 (1927). The logic
offered in support of this distinction is that only when the statute has fully run
does a defendant acquire a right. The right acquired is that of not being prosecuted,
because his full right to liberty has been restored in a way analogous to the acquisition
of property through adverse possession. But until this right has vested, the defendant
has no interest protected under the statute. Moore v. State, 43 N.J.L. 203 (1881); State
v. Ferris, 243 La. 416, 44 S.2d 380 (1952). It is possible to articulate a justification
for the distinction between the revival and the extension of a right to prosecute in
terms of the ex post facto doctrine: Only when a right to prosecute is revived does
an act that could not have been punished without the statute become punishable.
Such a justification, however, only tortures an initially weak definition of the prohi-
bition and explains little. If the statute of limitations is part of the statutory scheme
of deterrence, the distinction between those that have run and those that have not is
meaningless. For an unconvincing rationale for the distinction, couched in terms of
"our instinctive feelings of justice and fair play," see Judge Learned Hand's opinion in
Falter v. United States, 23 F.2d 420, 425 (2d Cir. 1928).

79. The arguments made to the Supreme Court have, however, included these
notions. The state court decision in State v. Mallett, 125 N.C. 718, 34 S.E. 651 (1899),
affd. sub nom. Mallett v. North Carolina, 181 U.S. 589 (1901), had related the concept of
reliance to that of vested rights:
[The defendants had no "vested rights" in the remedies and methods of
procedure in trials for crime. They cannot be said to have committed this crime,
relying upon the fact that there was no appeal given the State in such cases.
If they had considered that matter they must have known that the State had as
much power to amend [the section] as it had to pass it, and they committed the
crime subject to the probability that appeals in rulings upon matters of law
would be given to the State.
125 N.C. at 725, 34 S.E. at 653.
prohibition is considerably less applicable to procedural changes than it is to substantive changes. First, procedural rules are rarely enacted to provoke reliance outside the courtroom. Second, while many defendants rely on substantive definitions of proscribed conduct, few rely on many of the numerous laws regulating the enforcement processes, such as laws governing the availability of bail on appeal60 or regulating parole eligibility requirements.81 Few defendants can make even a colorable showing that they contemplated at the time of their alleged crimes such procedural subtleties as where and by whom they would be tried and what evidence could be used against them. It would thus be unreasonable for a court, in an effort to protect the few defendants who do rely on procedural rules, to assume that all defendants so rely. Third, even if reliance could be proved, it is doubtful that it deserves constitutional protection. In effect, a defendant claiming reliance is alleging that he acted on the premise that the prosecution would face certain obstacles at trial that were subsequently removed. The interest he wants elevated to the level of a constitutional right is a rather dubious interest in being acquitted at trial after having committed a criminal offense—an interest hardly worthy of preservation. Finally, a defendant challenging recently enacted procedures will often be claiming that he did not commit the alleged act rather than, as in the instance of a defendant challenging a substantive-law change, that his act was legal when committed. Reliance would be inapplicable in this instance.

Some procedural rules, however, provoke reasonable reliance outside the courtroom, and, indeed, may have been enacted at least partially to influence behavior. The inadmissibility of pleadings as evidence in subsequent cases may be designed to encourage frank and full pleadings;82 the incompetence of one spouse to testify against the other may be designed to promote marital harmony by allowing open communication.83 The abrogation of such rules would seem unfair to those who had relied on them. Where reliance on an established procedure is reasonable, and the application of a new procedure to acts committed prior to its enactment would unfairly frustrate that reliance, courts should require that the state demonstrate a legitimate need to employ the new procedure in cases involving prior acts. At the trial and appeal stages, a legitimate state interest in applying the new procedure to all criminal proceedings, instead

63. For cases rejecting this argument, see for example People v. Bradford, 70 Cal. 2d 383, 450 P.2d 46, 74 Cal. Rptr. 728 (1969); State v. Pope, 73 Wash. 2d 919, 442 P.2d 994 (1968); State v. Cleverger, 69 Wash. 2d 135, 417 P.2d 626 (1966).
of just to those in which the alleged act occurred after the change was enacted, may be rare since it is easy to determine whether the defendant's acts were committed prior to the enactment of the procedure. Depending on the trial backlog, most new procedures can be fully operational within one or two years.

Changes in criminal procedures are rarely objectionable on the ground that they cannot serve their purported purpose. Many procedural laws merely regulate the apprehension and conviction of individuals. Others, while effecting some slight punishment changes, are enacted to further the rehabilitation of those convicted (for example, laws regulating the structure and operation of parole boards or the administration of prisons) and not to implement a decision to deter certain conduct to a greater or lesser extent. In short, procedural rules direct prospectively the activities involved in bringing an individual to trial, determining guilt, and imposing punishment; they generally do not change the legal significance of any past act. Thus, rarely will this factor override the desirability of giving legislatures full power to reform criminal procedures and the inconvenience of maintaining many different sets of procedural rules to be applied according to the date of the alleged offense.

Changes in procedures, however, may well result from improper legislative attempts to affect pending or imminent prosecutions or from other vindictive motives of legislatures; courts faced with ex post facto challenges to changes in criminal procedure should be alert to this possibility. While cases of improper legislative motivation may be rare, they are not difficult to envision. Procedural changes tailored to a particular case can greatly and unfairly affect the outcome of that case even when the changes do not deny due process to other defendants generally. Certain changes in evidence admissibility rules, in evidentiary safeguards (such as the two-witness or corroborative-evidence requirements), or in courtroom strategies (such as allowing the prosecution both opening and closing arguments), could compound to overwhelm a defendant at trial. Such legislative control over the outcome of a trial seems no less objectionable than a direct legislative imposition of punishment through a bill of attainder.

A procedure that denies due process or violates a constitutional provision meant to assure a fair trial should be invalidated on those

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84. Legislative attempts to correct a jurisdictional or procedural flaw after the trial is finished have on occasion been invalidated as ex post facto laws or bills of attainder. See Putty v. United States, 500 F.2d 473 (9th Cir.), cert. denied, 420 U.S. 821 (1955); In re Murphy, 1 Woolw. 141 (8th Cir. 1867) (S. Miller, J., presiding).

85. Cf. Ex parte McCardle, 74 U.S. (7 Wall.) 206 (1869), where the Court, without reference to the ex post facto limitation, upheld a congressional act politically motivated that removed the Supreme Court's jurisdiction to review a denial of a writ of habeas corpus. The dissent in Kring v. Missouri, 107 U.S. 221 (1883), relied on this case as clear precedent for the proposition that no procedural statute could be ex post facto, 107 U.S. at 242.
grounds rather than on ex post facto grounds since the ex post facto provision does not prohibit the prospective application of a law.\textsuperscript{86} The ex post facto prohibition is still of importance in the fair trial context, however, not only as an additional protection for the defendant from legislative attempts (short of a denial of due process) to influence his trial, but as a means for courts somewhat disingenuously to invalidate laws, meant to affect certain trials, that decrease the accuracy and effectiveness of the judicial process.

Courts understandably have been reluctant to investigate legislative motive. However, such an investigation may be necessary to implement the function of the ex post facto prohibition as a curb on legislative power.\textsuperscript{87} Reviewing courts should make such an inquiry in the obvious case where the procedural change is of limited application or is in clear conflict with the consensus as to reasonable trial procedures. In less egregious cases, courts should examine the relative advantage given the prosecution, and, if the disadvantage to the defendant could have affected the outcome of the trial, should consider the possibility of purposeful legislative interference. To deal with such cases, courts must choose between an absolute rule that forbids such suspect procedural changes and a rule that requires an examination of legislative intent to manipulate the trial. While a policy of examining legislative motive would result in fewer invalidations and provide greater flexibility for the legislature, the difficulty of the task may tip the balance in favor of an absolute, prophylactic rule.

An analysis of the ex post facto prohibition that stresses its purposes rather than focuses on set categories avoids the need to make the artificial distinction between substance and procedure\textsuperscript{88} often relied upon by courts in dealing with ex post facto challenges. Such an analysis would be useful to courts in considering changes in evidentiary rules—an area where rigid substance-procedure distinctions have been made for a variety of purposes.\textsuperscript{89} The analysis outlined

\textsuperscript{86} The ex post facto prohibition may have been used in lieu of the due process clause in United States v. Henson, 486 F.2d 1292 (D.C. Cir. 1973), where the court ruled that a statute mandating the admission of an accused's prior criminal record if the accused testified could not be applied in a case where the alleged crime was committed before the passage of the statute: The statute affected the defendant 'by altering his situation to his disadvantage, taking away or impairing his defense, and lessening the government's burden of proof because of the effect of the introduction of such evidence on the jury. Contra, Dixon v. United States, 287 A.2d 89 (D.C. App.), cert. denied, 407 U.S. 926 (1972).

\textsuperscript{87} See Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 137-38 (1810). The Supreme Court has been willing to take part in such inquiries in cases of bills of attainder. See United States v. Lovett, 328 U.S. 302 (1946) (holding that although Congress did have full power over salary appropriations, this power could not be used against specific individuals without violating the prohibition against bills of attainder). See also Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).

\textsuperscript{88} It has been suggested that for this purpose the line is clearer than it is for many others. See Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 Yale L.J. 333, 342 (1933).

\textsuperscript{89} Compare People v. Sniep, 25 Cal. App. 3d 742, 102 Cal. Rptr. 6 (1972) (year-
above would uphold the long-standing conclusion that the clauses prohibit the retroactive application of evidentiary changes that, in effect, alter the elements of an offense. A change that makes additional evidence admissible, on the other hand, even though it may allow the admission of the only evidence available to the prosecution to prove an essential element of the alleged crime, would not be proscribed since such a change does not create criminal liability without warning or frustrate reasonable reliance. Changes in corroborative-evidence requirements, which similarly are meant to ensure the reliability of testimony, should be allowed. The fact that the prosecution's task is facilitated is alone insufficient to invalidate such changes. To the extent such evidentiary changes are made in good faith with the intent of improving the criminal process, they should not be considered violations of the ex post facto clause.

90. See Hop v. Utah, 110 U.S. 574, 589 (1884) (dictum) (ex post facto clause applies to those changes that “alter the degree or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed”). Although the Supreme Court has never had occasion to apply this rule, other courts have done so on occasion. See DeWoo v. Superior Court, 33 Cal. App. 3d 52, 87 Cal. Rptr. 210 (1970) (refusing to allow new presumptions regarding the results of blood tests); State v. Johnson, 12 Minn. 476 (1866) (invalidating the state’s retroactive use of a presumption of second marriage on a mere showing of cohabitation in a polygamy prosecution). Cf. United States v. Williams, 475 F.2d 355 (D.C. Cir. 1973) (invalidating retroactive application of shift in the burden of proof in presenting the insanity defense); People v. Dawson, 210 Cal. 366, 292 P. 267 (1930) (new statute that eliminated the state’s need to prove that the defendant had in fact served his time before he could be sentenced under a habitual offenders act violated the ex post facto prohibition).

91. In other cases, however, evidence admitted regarding the past behavior of the defendant, other than that defined in the indictment itself, may in effect create criminal liability even though such behavior when engaged in was not proscribed. Such liability can be created either because the crime itself involves a pattern of conduct or because such evidence establishes a presumption of continued criminal conduct. For example, in Caldwell v. State, 17 Conn. 467 (1840), evidence of past activities at an establishment alleged to be a brothel was admitted to prove the “reputation” of the house despite the fact that brothels had not been prohibited when such activity took place. Similarly, in conspiracy prosecutions, evidence as to conduct occurring before the enactment of the substantive statute has been found admissible to show the existence and purpose of the conspiracy as well as the intent and purpose of post-enactment behavior. See, e.g., United States v. Fino, 475 F.2d 35, 36 (2d Cir. 1973); United States v. Marchesani, 457 F.2d 1291, 1294 (6th Cir. 1972). These courts refused to apply the ex post facto prohibition in this context because questions of admissibility of evidence were viewed as procedural. Once the substantive-procedural distinction is abandoned, it becomes clear that to the extent that proof of conduct before the statute making the conduct criminal is the only proof upon which criminal liability rests, the ex post facto clause has been violated.

92. See, e.g., Thompson v. Missouri, 171 U.S. 380 (1899) (admissibility of handwriting samples); Hop v. Utah, 110 U.S. 574 (1884) (competency of felons to testify).