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Ex Post Facto Laws in the Supreme Court of the United States

"The prohibition 'that no state shall pass any ex post facto law' necessarily requires some explanation; for, naked and without explanation, it is unintelligible, and means nothing."—*Mr. Justice Chase.*[1]

"When it is prescribed that 'No bill of attainder or ex post facto law shall be passed' . . . the precept . . . has a definite content, given analytically or historically, involving no margin of judgment or opinion in its application."—*Dean Roscoe Pound.*[2]

THE Constitution as originally adopted contained the ex post facto clauses both as restraints upon Congress and upon the state legislatures.[3] This is noteworthy in that the clauses are of the sort found in the Bill of Rights embodied in the first ten amendments. These amendments contain provisions safeguarding individual liberty rather than provisions setting up the machinery of government. The original Constitution was concerned chiefly with setting up the government, reciting its powers and insuring its proper functioning by imposing necessary restraints upon the states. The ex post facto clauses, in which may be included the prohibitions against bills of attainder, are restraints upon legislative excesses. That it was considered necessary to include them in the original Constitution is a commentary upon the importance attributed to them by the framers. Such matters as freedom of religion, freedom of speech, freedom of the press, etc., came later in the first ten amendments and then only as restraints upon the federal government.

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[1] Calder v. Bull (1798) 3 U. S. (3 Dall.) 386, 1 L. Ed. 648.

[2] Introduction, The Supreme Court and Minimum Wage Legislation, comment by the legal profession on the District of Columbia Case.

[3] U. S. Const., Art. I, § 9, par. 3. "No Bill of Attainder or ex post facto Law shall be passed." Art. I, § 10, par. 1. "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts."

The prohibitions received early and exhaustive consideration by the Supreme Court. The decision in Calder v. Bull in 1798 limited their meaning to prohibitions against retroactive criminal legislation. The historical accuracy of this holding has since been questioned. Two writers,[4] after an extensive examination of the records of the Constitutional Convention of 1787 and of the state ratifying conventions, have concluded that the phrase ex post facto was not used in the technical sense of a prohibition against criminal retroactive laws,[5] but was intended to supplement the clause prohibiting the states from impairing the obligation of contracts, as a prohibition against all retroactive legislation. The real mischief aimed at, it is pointed out, was retroactive civil legislation. Retroactive criminal laws were not contemplated by the framers. This atmosphere is in no wise reflected in the opinion of Mr. Justice Chase who shows no hesitancy in saying that "The prohibitions not to make anything but gold and silver coin a tender in payment of debts, and not to pass any laws impairing the obligation of contracts, were inserted to secure private rights; but the restriction not to pass any ex post facto law was to secure the person of the subject from injury or punishment in consequence of such law." This result is reached by construction of the language of the Constitution for he says "If the prohibition against making ex post facto laws was intended to secure personal rights . . . and the prohibition is sufficiently extensive for that object, the other restraints . . . were unnecessary . . . for both of them are retrospective." He thus rejects the argument that the phrase was intended to be supplemental to the contract clause and was inserted merely out of an abundance of caution, and adopts the view that the specification of ex post facto laws necessarily excluded the plain meaning attached to the contract clause. In passing judgment upon the historical accuracy of this decision it should be remembered that the records of the Convention were not published until 1819.[6] It is of course wholly a matter of speculation as to whether Mr. Justice Chase and the other members of the court had other sources from which to ascertain the intention of the framers on this point. The decision has, however, been consistently reaffirmed[7] and must be taken to be settled law.

[4] B. T. DeWitt, Are Our Legal-tender Laws ex post facto? (1900) 16 Political Science Quarterly, 96; O. P. Field, Ex Post Facto in the Constitution (1922) 20 Michigan Law Review, 315.

[5] Blackstone's Commentaries, Introduction * 46 (Jones' ed.) 78.

[6] The Official Journal was published in 1819; but the most valuable source of information, Madison's Debates, was not published until 1840. See Thayer, Cases on Constitutional Law, 1434.

[7] Watson v. Mercer (1834) 33 U. S. (8 Pet.) 88, 110, 8 L. Ed. 876;

Mr. Justice Chase went on to state what he considered to be ex post facto laws within the meaning of the constitutional prohibitions. They are:

> "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 offense, in order to convict the offender . . . But I do not consider any law ex post facto, within the prohibition, that mollifies the rigor of the criminal law; but only those that create or aggravate the crime; or increase the punishment, or change the rules of evidence, for the purpose of conviction."

This oft-quoted dictum is a recognition that the phrase ex post facto is a technical one, to be filled by the court with an esoteric meaning. This process was greatly simplified by Mr. Justice Washington's equally popular charge to the jury in U. S. v. Hall,[8] "an ex post facto law is one which, in its operation, makes that criminal or penal, which was not so at the time the action was performed; or which increases the punishment; or, in short, which, in relation to the offence, or its consequences, alters the situation of a party to his disadvantage." This last omnibus clause, it is submitted, states, as accurately as can be stated, the doctrine which has been applied by the Supreme Court. The difficulty lies in application. It is the purpose of this paper to analyze some of the more important and typical decisions with a view to examining the considerations which seem to have led the Supreme Court to decide that a given law does or does not fall within the constitutional prohibition, or, in other words, that the given law does or does not alter the situation of the accused to his disadvantage.

Locke v. New Orleans (1866) 71 U. S. (4 Wall.) 172, 18 L. Ed. 334; Baltimore & Susquehanna v. Nesbit (1850) 51 U. S. (10 How.) 395, 13 L. Ed. 469; Carpenter v. Commonwealth of Pennsylvania (1854) 58 U. S. (17 How.) 456, 15 L. Ed. 127; Orr v. Gilman (1902) 183 U. S. 278, 285, 46 L. Ed. 196, 22 Sup. Ct. Rep. 213; Kentucky Union Co. v. Kentucky (1911) 219 U. S. 140, 55 L. Ed. 137, 31 Sup. Ct. Rep. 171. See also Burgess v. Salmon (1878) 97 U. S. 381, 24 L. Ed. 1104; Bankers Trust Co. v. Blodgett (1923) 260 U. S. 647, 43 Sup. Ct. Rep. 223. Story, writing in 1833 about this limitation, said: "The current of opinion and authority has been so generally one way . . . that it is difficult to feel that it is now an open question." 3 Story on the Constitution, 212.

[8] (1809) 2 Wash. C. C. 366, Fed. Cas. No. 15,285.

A further general limitation may be noted at the outset. The clauses are held to prohibit retroactive legislation, and a change in decisional law, though having a similar effect in its retroactive operation, raises no constitutional question. In both cases the accused is hurt by a change in law after the act for which he stands charged. It is of little moment to him that in one case it is the legislature and in the other case the court that hurts him. In both cases it is the state that acts. In one case he is protected by the Constitution and in the other case he is not. The reasons behind the differentiation will have little appeal to him. They do, however, illumine a fundamental constitutional principle. It is the principle of hands-off which the federal courts strive to observe toward the state courts. When a cause is carried from a state court to a federal court the federal question alone may be dealt with by the latter. When a state statute is challenged as violative of the Constitution, the federal court will consider as binding the construction put upon the statute by the state court. When litigants have had an opportunity to be heard before a state court of competent jurisdiction, they cannot later complain in a federal court that they have been denied due process of law. The federal court will not examine into the wisdom of the judgment of the state court. If it makes mistakes the victims have no redress. It is only when it makes mistakes with federal questions that it may be set aright. This is a victory for the states. It is an appreciation that state law is a matter for state courts. Some political theory of state sovereignty may have contributed to this but the more practical and compelling reason is that if every unsuccessful litigant in a state court were able to carry his case to a federal court on the ground that the state court had erred in its decision and thus impaired the obligation of contract or denied due process the federal courts would be swamped. State legislation on the other hand, has always been considered fair game for the federal courts. The practical argument does not exist for legislation is more apt to be a sporadic interloper in the great body of decisional law. Furthermore the intention of the framers bears out the differentiation. The framers aimed to check the popularist state legislatures. The result finds support in the language of the Constitution which declares that "No State . . . shall pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts."[9] Courts, it may be argued, do not "pass" laws. It would seem difficult to justify a different result under the contract clause than

[9] Supra, n. 3.

under the ex post facto clause. This no doubt was generally assumed to be the case but it was not expressly enunciated by the Supreme Court until 1913 in Ross v. Oregon.[10] In that case the court was asked to hold that the decision of the state court misconstrued a pre-existing statute to the disadvantage of the defendant, that the statute was not reasonably susceptible of the construction ultimately adopted, and that the decision was an ex post facto law. This the court refused to hold. The statute was in force prior to the acts for which the accused was charged. The portent of the statute was evidently doubtful. The accused paid the penalty for his bad guess.

The question of what is a retroactive law may be raised at this point. Where a course of conduct or condition is continued after the passage of a statute declaring it to be unlawful no constitutional question is raised under the ex post facto clause. Attempts have been made to argue that the statute reaches back and punishes acts done before its passage. This argument was first used in an attempt to defeat the application of the Sherman Anti-Trust Act to agreements made prior to its passage, but in United States v. Trans-Missouri Freight Association[11] the Supreme Court disposed of it by saying that "the continuation of the agreement after it has been declared to be illegal, becomes a violation of the Act."[12] In a recent case[13] a Georgia statute made it unlawful to possess intoxicating liquor and it was argued that to apply the statute to liquor lawfully acquired prior to its passage was to violate the ex post facto clause. Chief Justice Taft said, "This law is not an ex post facto law. It does not provide a punishment for a past offense. It does not fix a penalty for the owner for having become possessed of the liquor. The penalty it imposes is for continuing to possess the liquor after the enactment of the law."[14]

In McDonald v. Massachusetts[15] the Supreme Court had before it a statute which defined habitual criminals as those who had been twice convicted of a crime, and imposed a more severe penalty for subsequent offenses. This statute was upheld in a case where the

[10] (1913) 227 U. S. 150, 57 L. Ed. 458, 33 Sup. Ct. Rep. 220; followed in Frank v. Mangum (1915) 237 U. S. 309, 59 L. Ed. 969, 35 Sup. Ct. Rep. 582.

[11] (1897) 166 U. S. 290, 342, 41 L. Ed. 1007, 17 Sup. Ct. Rep. 540.

[12] The same argument was urged against the Texas Anti-Trust Act but rejected in Waters-Pierce Oil Co. v. Texas (1909) 212 U. S. 86, 107, 53 L. Ed. 417, 29 Sup. Ct. Rep. 235.

[13] Samuels v. McCurdy (1925) 267 U. S. 188, 69 L. Ed. 568, 45 Sup. Ct. Rep. 264.

[14] See also Chicago & Alton R. Co. v. Tranbarger (1915) 238 U. S. 67, 59 L. Ed. 1204, 35 Sup. Ct. Rep. 678; Bagajewitz v. Adams (1913) 228 U. S. 585, 57 L. Ed. 978, 33 Sup. Ct. Rep. 607.

[15] (1901) 180 U. S. 311, 45 L. Ed. 542, 21 Sup. Ct. Rep. 389.

earlier offenses had been committed prior to its passage. It was argued that the statute imposed an additional punishment for the earlier crimes but Mr. Justice Gray said that "The punishment is for the new crime only, but is the heavier if he is an habitual criminal." Statutes such as these are common and there would seem to be nothing unreasonable in this legislative direction to the court to consider past conduct in fixing the punishment. In this view no constitutional question is raised, as it becomes immaterial whether the prior convictions took place before or after the passage of the statute.

I.

CHANGES IN THE CONDUCT OF THE TRIAL, AND IN RULES OF EVIDENCE

It is settled doctrine that laws which merely change the legal rules of evidence, or prescribe different modes of procedure and which leave untouched the substantial protections with which the existing law surrounds a person accused of crime do not fall within the constitutional prohibition.[16] The distinction is not between substantive and adjective law. It will appear that the retrospective operation of a law, which in its prospective operation would be labelled a law regulating "procedure" may deprive the accused of what the court terms a "substantial" right and thus be ex post facto. The distinction is between "substantial" and "unsubstantial" rights.[17] This, like the distinction between questions of law and questions of fact, defies precise statement. It supplies the doctrine, but we must look to its application in the decided cases for its content.

In the recent decision of Beazell v. Ohio[18] two defendants were jointly indicted for a felony. At the time of the commission of the

[16] "But so far as 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 he 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. The legislature may abolish courts and create new ones, and it may prescribe altogether different modes or procedure in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime." Cooley, Constitutional Limitations (7th ed.) 381.

[17] "Can any substantial right . . . be taken away . . . by ex post facto legislation, beeause, in the use of a modern phrase, it is called a law of procedure? we think it cannot." Mr. Justice Miller in Kring v. Missouri (1892) 107 U. S. 221, 232, 27 L. Ed. 506, 2 Sup. Ct. Rep. 443.

[18] (1925) 269 U. S. 167, 70 L. Ed. 45, 46 Sup. Ct. Rep. 68.

offense charged the law of Ohio enabled them to have, on application, separate trials as of right. Subsequently, but prior to the joint indictment, the law was changed and a separate trial could be had only in the discretion of the court. The defendants moved for separate trials on the ground that their defenses would be different, that each would be prejudiced by the introduction of evidence admissible against his codefendant but inadmissible as to him, and that they were entitled to separate trials as of right under the old law. The motions were denied and on the joint trial that followed they were convicted. After affirmance in the Supreme Court of Ohio they carried their case to the Supreme Court of the United States which affirmed the state court. Mr. Justice Stone said that

> "the statute of Ohio here drawn in question affects only the manner in which the trial of those jointly accused shall be conducted. It does not deprive the plaintiffs in error of any defense previously available, nor affect the criminal quality of the act charged. Nor does it change the legal definition of the offense or the punishment to be meted out. The quantum and kind of proof required to establish guilt, and all questions which may be considered by the court and jury in determining guilt or innocence remain the same."

He then reviewed earlier decisions and concluded that the statutory change here involved was not as burdensome on the defendants as changes previously upheld.

The new statute went into force after the felony charged but before the trial and before the joint indictment. It might have been argued that since the defendants had not been indicted prior to the new statute nothing was altered to their disadvantage. The fallacy in this argument was exposed in Kring v. Missouri[19] but at the cost of a five to four split. In that case at the time of the offense charged it was the law of Missouri that the acceptance by the state of the plea of not guilty of murder in the second degree operated as a bar to a trial on the charge of murder in the first degree. Subsequently the law was changed so that, notwithstanding conviction of second degree murder, the accused could still be tried for first degree murder upon the conviction of second degree murder being set aside. After the new law went into force the state accepted the defendant's plea of guilty of murder in the second degree. The defendant was sentenced to twenty-five years' imprisonment. He appealed and secured a reversal. On the new trial defendant relied upon the old law and refused to withdraw his plea of guilty of murder

[19] (1882) 107 U. S. 221, 27 L. Ed. 506, 2 Sup. Ct. Rep. 443.

in the second degree. The court, acting under the new law, directed that the plea be set aside and that a general plea of not guilty be entered. Defendant was tried and convicted of murder in the first degree and sentenced to be hanged. This was affirmed by the highest court in the state but reversed on error to the Supreme Court of the United States. The dissent, consisting of Chief Justice Waite and Justices Mathews, Bradley and Gray, argued that since the defendant's conviction of second degree murder had not taken place until after the new law went into force, no rule of evidence existing at the time of the offense charged, was altered to his disadvantage. Thus, at the time of the offense charged the defendant had no evidence (the conviction of second degree murder) of which to avail himself. The new law, it was said, deprived him of nothing. In reply, Mr. Justice Miller pointed out that "this is begging the whole question; for, if it [the new law] was as to the offense charged an ex post facto law . . . it was *not* in force . . . and the effect of that plea [guilty of second degree murder] must be decided as though no change in the law had been made." The argument of the minority went on the assumption that the court might look at the situation at the time of pleading to appraise the change. But Mr. Justice Miller pointed out that the time means the time of the offense and no other:

> "If the law complained of was passed before the commission of the act with which the prisoner is charged, it cannot, as to that offence be an ex post facto law. If passed after the commission of the offence, it is as to that ex post facto, though whether of the class forbidden by the Constitution may depend on other matters. But so far as this depends on the *time* of its enactment, it has reference solely to the date at which the offence was committed to which the new law is sought to be applied."[20] (Italics his.)

This may be taken to be settled.

Looking then at the time of the offence, the court must decide whether or not the subsequent change in the pre-existing rule of law, or of procedure, or of evidence, has altered the situation of the accused to his disadvantage within the meaning of the ex post facto clause. The inquiry might be directed toward ascertaining whether or not the change has in fact operated to the disadvantage of the particular defendant concerned. The court would then have to look at the state of the evidence or of the pleading in the trial of the particular defendant before it and deny retroactive operation to any

[20] Mr. Justice Miller in Kring v. Missouri, supra, n. 19.

law which had in fact deprived the accused of a substantial advantage. On the other hand the court might put itself in the position of the accused at the time of the offence charged and speculate as to whether or not a subsequent change of the kind before the court would operate to deprive him of a substantial advantage. The inquiry is objective in that the court does not inquire into the state of the trial of the particular defendant before it, but considers rather the effect on defendants generally. It is this latter approach which, it is submitted, the Supreme Court has adopted.

Thus, in Beazell v. Ohio,[21] Mr. Justice Stone did not examine the evidence presented at the trial to determine whether the defendants had been in fact prejudiced by the joint trial. The inquiry was as to whether the change in the law from allowing a separate trial to those jointly indicted as of right to allowing it in the discretion of the court would operate as a burden on defendants generally. As to this Mr. Justice Stone said that "The legislation here concerned restored a mode of trial deemed appropriate at common law, with discretionary power in the court to direct separate trials."[22] Mr. Justice Stone seems to have felt that ordinarily the case made against defendants jointly indicted is apt to be the same and in case it is not they are adequately protected against prejudice by the power of the court to direct separate trials.[23]

Many minor changes in the conduct of the trial and in rules of evidence have been brought before the court. Laws which, since the commission of the offence charged, changed the place of trial,[24] or changed the number of judges in the appellate court[25] have been upheld in their retroactive operation. It would seem clear that the possibility of prejudice to defendants is highly speculative. A change in the qualifications of grand jurymen from qualified electors able to read and write, to electors of good intelligence, sound judgment and fair character was held not to deprive the accused of substantial rights in Gibson v. Mississippi.[26] Likewise, laws which

[21] Supra, n. 18.

[22] Supra, n. 18.

[23] Ohio Gen. Code, § 13680, as amended April 27, 1923, in 110 Ohio Laws, 300, a defendant may file a bill of exceptions if he "feels himself aggrieved by a decision of the court." Though there has been no decision on the point as to whether the trial court's exercise of discretion in granting or denying a separate trial is subject to review, the general common law rule allows such review, see Hughes, Criminal Law and Procedure, § 2840 and cases cited.

[24] Gut v. State (1869) 76 U. S. (9 Wall.) 35, 19 L. Ed. 573; followed in Cook v. United States (1891) 138 U. S. 157, 183, 34 L. Ed. 906, 11 Sup. Ct. Rep. 268.

[25] Duncan v. Missouri (1894) 152 U. S. 377, 38 L. Ed. 485, 14 Sup. Ct. Rep. 570.

[26] (1896) 162 U. S. 565, 40 L. Ed. 1075, 16 Sup. Ct. Rep. 904.

removed the incompetence of convicted felons as witnesses,[27] or changed the rules of evidence so as to admit writing, proved to the satisfaction of the judge to be genuine, as evidence of the genuineness of disputed writing[28] have been upheld. These last two changes do not affect the quantum or degree of proof necessary to establish guilt. As has been pointed out above the court did not look at the particular state of evidence in the trial of the particular defendant before it, but looked at the change in its general application. Viewed in this light the evidential changes applied equally to the state and to the accused. The possibility that the changes might be of more benefit to the state, since it has the burden of establishing guilt, would seem hardly enough to have enabled the court to find that the new laws fell within the constitutional prohibition.

But in Thompson v. Utah[29] where the number of petit jurors was changed from twelve to eight, Mr. Justice Harlan said that "the court below substituted . . . the unanimous verdict of eight jurors in place of a unanimous verdict of twelve. It cannot therefore be said that the constitution of Utah, when applied to Thompson's case, did not deprive him of a substantial right involved in his liberty, and did not materially alter the situation to his disadvantage." Though under the new law it was easier for the state to secure a conviction, since it had to persuade only eight instead of twelve jurors, still it was harder for the accused to secure a disagreement since he had only one chance in eight instead of one in twelve. This chance the court found to be a "substantial" right. Justices Brewer and Peckham dissented but gave no reasons.

It is submitted that in the case of Mallett v. North Carolina[30] a too ready willingness to dispose of the case by terming the statute one of "procedure" rather than inquiring into the effect of its retroactive operation, led to a questionable result. By the law of North Carolina at the time of the commission of the offence charged the state was not allowed an appeal from the judgment of the superior court. The defendant here was convicted in the county court and appealed to the superior court which reversed the judgment. From this judgment of reversal the state appealed to the Supreme Court of North Carolina. This right of appeal was given by a statute which went into effect after the commission of the offence but prior to defendant's appeal to the superior court. The Supreme Court of

[27] Hopt v. Utah (1884) 110 U. S. 574, 28 L. Ed. 262, 4 Sup. Ct. Rep. 202.
[28] Thompson v. Missouri (1898) 171 U. S. 380, 43 L. Ed. 204, 18 Sup. Ct. Rep. 922.
[29] (1898) 170 U. S. 343, 42 L. Ed. 1061, 18 Sup. Ct. Rep. 620.
[30] (1901) 181 U. S. 589, 45 L. Ed. 1015, 21 Sup. Ct. Rep. 730.

North Carolina reversed the superior court and restored the sentence of the county court. The defendants carried their case to the Supreme Court of the United States contending that the new statute, giving the state the right of appeal from judgments of the superior court, was ex post facto when applied to them. But the statute was upheld in its retroactive operation. Mr. Justice Shiras contented himself with quoting from earlier opinions to the effect that changes in mere rules of procedure did not fall within the constitutional prohibition. He concluded by saying that "It must not be overlooked that, when the plaintiffs in error perfected their appeal from the Criminal Court [county court], by procuring its certification, on April 1, 1899, to the Superior Court, the new law, ratified on March 6, 1899, provided that the state could have the decision of that court reviewed by the Supreme Court."[31] The defendants were indicted in September, 1889. Mr. Justice Shiras has thus fallen into the error of the minority justices in Kring v. Missouri[32] by looking at the time of the trial rather than the time of the offence charged. Looking at the situation at the time of the offence charged the state and the accused were on an equal footing as regards appeals from the county court, but an acquittal in the Superior Court would terminate the prosecution. By the subsequent change in the law the state and the accused were put on an equal footing in the Superior Court and the accused was confronted with the possibility of the added burden of having to defend himself in an additional court in the event of acquittal in the Superior Court. To deprive him of the right to have an acquittal in the Superior Court final, might well have been found to deprive him of a "substantial" right. It seems difficult, as a matter of judgment, to distinguish this from Kring v. Missouri.

II.

Ex Post Facto Laws and the Police Power

In the celebrated "test-oath" cases[33] the Supreme Court indicated that a statute, apparently intended to fix fitness for office, might be of such a nature as to fall within the constitntional prohibition against ex post facto laws. This problem has recurred in several

[31] Idem.
[32] Supra, n. 18.
[33] Cummings v. Missouri (1866) 71 U. S. (4 Wall.) 277, 18 L. Ed. 356; the Constitution of Missouri, adopted in 1865, provided that no one should be a qualified voter, or hold any office of the state, or practice law, or hold

instances since then. In Reetz v. Michigan,[34] a Michigan statute required a certificate from the medical board set up by the statute, as a condition to the practice of medicine and made it a misdemeanor to practice without such a certificate. Defendant, who had been practicing medicine prior to the passage of the statute, presented his diploma to the board but it was rejected and a certificate denied him on the ground that the board did not approve the medical school which had issued the diploma. Defendant continued to practice and was indicted and convicted. The conviction was affirmed in the Supreme Court. Mr. Justice Brewer said that "This statute does not attempt to punish him for any past offence, and in the most extreme view can only be considered as requiring continuing evidence of his qualifications as a physician or surgeon." It may be noted that the statute here does not make criminal an act which was innocent when done, i.e., the practice of medicine prior to the statute, but only makes it criminal to continue the practice of medicine without a certificate and it was for this that defendant was indicted. This then is not a retroactive law.[35]

But where the statutory requirement disqualifies one who has been convicted of a felony, the application of the statute to felonies committed prior to its passage raises further difficulties. This was the case in Hawker v. New York.[36] Prior to the passage of the statute defendant had been convicted of a felony. After the passage of the statute defendant continued to practice medicine and for this he was indicted and convicted. He carried his case to the Supreme Court where he contended that the statute, as applied to him, was

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any religious office, or teach, without first taking an oath that he had never been in armed hostility to the United States, or had never by act or word, manifested his adherence or sympathy to the enemies of the United States. By a five to four decision the Supreme Court held this provision unconstitutional. The court found that there was no reasonable relation between the qualifications and the offices, that the oath made acts punishable which were innocent when done, that the oath increased the punishment for acts punishable when committed, and that the oath altered the rules of evidence by establishing a presumption of guilt.

Ex parte Garland (1866) 71 U. S. (4 Wall.) 333, 18 L. Ed. 366; by Act of Congress of 1865 no person was permitted to practice law before any federal court who did not first take an oath that he had never borne arms against the United States, nor given aid or counsel to persons engaged in armed hostility to the United States, nor held, nor sought, any offices under any authority in hostility to the United States. By a five to four decision the court held this act unconstitutional. Cummings v. Missouri, supra, was followed.

[34] (1903) 188 U. S. 505, 47 L. Ed. 563, 23 Sup. Ct. Rep. 390.

[35] See also Dent v. West Virginia (1889) 129 U. S. 114, 32 L. Ed. 623, 9 Sup. Ct. Rep. 231; Gray v. Connecticut (1895) 159 U. S. 74, 40 L. Ed. 80, 15 Sup. Ct. Rep. 985.

[36] (1898) 170 U. S. 189, 42 L. Ed. 1002, 18 Sup. Ct. Rep. 573.

ex post facto. The contention was rejected by a divided court. Mr. Justice Brewer, for the majority, found that the statute prescribed a proper qualification for those who engaged in the practice of medicine and from this he concluded that "such legislation is not to be regarded as a mere imposition of additional penalty, but as prescribing the qualifications for the duties to be discharged and the position to be filled." He seemed to regard the question of ex post facto as foreclosed by a finding that the qualifications were reasonable. The minority took a different view and Mr. Justice Harlan said that "It will not do to say that the New York statute does nothing more than prescribe the qualifications which, after its passage, must be possessed by those who practice medicine." He then went on to show that, though the qualification was reasonable when applied to those who committed felonies after its passage, when given retroactive operation to include felonies committed prior to its passage, it was ex post facto.

As is suggested by Mr. Justice Harlan's statement, the majority has confused two questions. In the first place the court must consider whether the qualification is reasonably related to the practice of medicine. If not, the statute is an improper exercise of the police power and must fail for all purposes, as the statutes did in Ex parte Garland and Cummings v. Missouri.[37] If on the other hand the requirement is found to be reasonable there is the second question as to whether the statute may be applied retroactively without violating the ex post facto clause. Thus, to hold that the statute imposes an unreasonable qualification is to deny the constitutional power of the state to pass it. To hold that the statute is a reasonable exercise of the police power is simply to acknowledge this constitutional power. The problem that confronts the court is to determine whether the statute shall be allowed retroactive operation for unless, as in Ex parte Garland and Cummings v. Missouri,[38] the statute can only operate retroactively, the court is not concerned with the validity of the statute for all purposes. The issue then is whether the New York statute in its retroactive operation imposed an additional punishment for the felony for which the defendant had already served his sentence.

Is this a punishment? It does not fall within the orthodox conception of fine and imprisonment. The court in Cummings v. Missouri,[39] however, found that disqualification from teaching and

[37] Supra, n. 33.
[38] Idem.
[39] Idem.

preaching was a punishment, and the same result was reached in Ex parte Garland[40] where the practice of law was in issue. Mr. Justice Field in Cummings v. Missouri[41] found authority in Blackstone: "Some [punishments] extend to confiscation, by forfeiture of lands or movables, or both, or the profits of lands for life; others induce a disability of holding offices *or employments,* being heirs, executors and the like."[42] Here is authority if the court had wanted it. We may safely conclude that the statute does impose a punishment and is brought within the purview of the ex post facto clause. On the other hand, the court has found that the statute exacts a reasonable requirement. It falls within the police power of the state. The court is confronted with the proposition that to deny the statute retroactive operation may well defeat its manifest purpose. The choice of alternatives is a problem of judgment. The court has held that the claim of the individual must yield to the interest of the state.

Cases involving the power of Congress may be considered here for convenience of treatment. In the recent case of Mahler v. Eby,[43] three aliens were convicted of violating the Selective Service Act and the Espionage Act. Pending imprisonment they were arrested under the Act of Congress of May 10, 1920, which inter alia, authorized the Secretary of Labor to deport aliens convicted of violating the Selective Service Act and the Espionage Act. The aliens contended that the Act of 1920 was ex post facto as applied to them because the convictions for which they were to be deported had taken place prior to its passage. This contention was rejected in the Supreme Court. Chief Justice Taft said that "The right to expel aliens is a sovereign power necessary to the safety of the country," and further that "Congress by the Act of 1920 was not increasing the punishment for the crimes of which petitioners had been convicted, by requiring their deportation if found undesirable residents. It was, in the exercise of its unquestioned right, only seeking to rid the country of persons who had shown by their career that their continued presence here would not make for the safety or welfare of society." Chief Justice Taft, in referring to Hawker v. New York[44] said that "the present is even a clearer case than that." The question is whether additional punishment has been imposed

[40] Idem.
[41] Idem.
[42] Blackstone, Commentaries, Book IV, * 377 (Jones' ed.) 2621. Italics added.
[43] (1924) 264 U. S. 32, 68 L. Ed. 549, 44 Sup. Ct. Rep. 283.
[44] Supra, n. 35.

for the same acts. The effect of the legislation is to secure the deportation of these aliens. This is a punishment. It is not unlike banishment from the realm or transportation to the American colonies which were well known at common law.[45] The punishment is in addition to that already imposed for violation of the Selective Service Act and the Espionage Act. This is the bare logic of the problem. But on the other hand, the considerations in favor of the retroactive operation of the legislation are of the most compelling sort. Here again is a choice of alternatives. We must conclude that the answer the court will give will depend on the view the court takes as to the importance of the legislation. If the enactment is found to be otherwise constitutional, and of the utmost importance to the people and if to deny it retroactive operation will be to defeat its effectiveness the court will override the absolute constitutional prohibition.

In the earlier case of Johannessen v. United States[46] the Supreme Court upheld the power of the United States to cancel certificates of citizenship obtained by fraud even though the certificate in question had been obtained prior to the passage of the Act of Congress giving the power to make cancellations. The court "briefly disposed of" the argument that the Act of Congress was an ex post facto law. Mr. Justice Pitney said: "The Act imposes no punishment upon an alien who has previously procured a certificate of citizenship by fraud or other illegal conduct. It simply deprives him of his ill-gotten privileges."[47] Surely this is punishment, and severe punishment. It is not in addition to anything already inflicted for the same act, however, for until these proceedings no steps had been taken against these defendants. Their conduct in procuring perjured testimony was unlawful by the law of the state which issued the certificate and they could have been punished. In this sense there is additional punishment. Again the judgment of the court has upheld the manifest interest of the United States. With this judgment we do not quarrel. It is enough to call attention to the sacrifice of consitutional doctrine under the ex post facto clause.

III.

CHANGES IN PUNISHMENT

Statutory changes in punishment and in the conditions surrounding its execution fall within the purview of the ex post facto clause

[45] Supra, n. 42.
[46] (1912) 225 U. S. 227, 242, 56 L. Ed. 1066, 32 Sup. Ct. Rep. 613.
[47] Idem, p. 242.

under Mr. Justice Chase's dictum[48] that "Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime, when committed" is ex post facto. This was followed by the qualification that "I do not consider any law ex post facto, within the prohibition, that mollifies the rigor of the criminal law." The court might have refused to consider the effect of the new statute, by declaring that any change by the legislature fell within the constitutional prohibition. But the court has followed this dictum and has taken upon itself the task of saying what change increases the punishment.

The difficulties in this problem are well stated by Cooley:[49]

> "But what does go in mitigation of the punishment? If the law makes a fine less in amount, or imprisonment shorter in point of duration, or relieves it from some oppressive incident, or if it dispenses with some severable portion of the legal penalty, no embarrassment would be experienced in reaching a conclusion that the law was favorable to the accused and therefore not ex post facto. But who shall say, when the nature of the punishment is altogether changed, and a fine is substituted for the pillory, or imprisonment for whipping, or imprisonment at hard labor for life for the death penalty, that the punishment is diminished, or at least not increased by the change made? What test of severity does the law or reason furnish in these cases? and must the judge decide upon his own view of the pain, loss, ignominy, and collateral consequences usually attending the punishment? or may he take into view the peculiar condition of the accused, and upon that determine whether in his particular case, the punishment prescribed by the new law is or is not more severe than that under the old?"

The decisions of the Supreme Court in this class of cases are few. The court has clearly indicated that its inquiry will go beyond a change in the penalty and will comprehend a change in the conditions surrounding its execution. Thus, where the penalty always was death, but where by the new law solitary confinement instead of ordinary confinement is required prior to execution, the court has said that the punishment was increased.[50] The ultimate inquiry must be to ascertain whether the situation has been altered to the disadvantage of the defendant.

That the task of deciding is a troublesome one is shown by two decisions in 1890. In the first case, Medley, Petitioner,[51] the court

[48] Calder v. Bull, supra, n. 1.
[49] Cooley, Constitutional Limitations (7th ed.) 376.
[50] Medley, Petitioner (1890) 134 U. S. 160, 171, 33 L. Ed. 835, 10 Sup. Ct. Rep. 384.
[51] Idem.

had before it a statute of Colorado which required those sentenced to death to be kept in the state penitentiary in solitary confinement, except that subject to prison regulations the convict's attendants, counsel, physician, spiritual advisor and members of his family were to be allowed access. Further, the day and hour of execution were to be fixed by the warden within a prescribed week. Under the old law the convict was held in ordinary confinement in the county jail and the hour of execution was fixed by the sheriff within a prescribed day. Mr. Justice Miller, for the majority, pounced on the requirement of solitary confinement and depicted its harshness in the 18th century. He concluded that it was "an additional punishment of the most important and painful character."[52] But Mr. Justice Brewer, with whom concurred Mr. Justice Bradley, dissented and said that "when all who ought to see the condemned have a right of access subject to the regulations of the prison, it seems a misnomer to call this 'solitary confinement' in the harsh sense in which this phrase is sometimes used."[53] The dissenters, though willing to agree that solitary confinement as practiced in the 18th century, was an additional punishment, were not willing to agree that the statute should be so construed. The division of opinion arose out of a disagreement as to the interpretation of the Colorado statute.

Ten months later when Holden v. Minnesota[54] came to be decided Mr. Justice Miller had been replaced on the bench by Mr. Justice Brown. In that case Mr. Justice Harlan found that the new statute of Minnesota relating to punishment re-enacted the old statute in many respects and simply added a few new provisions, but among the latter was a requirement that after the issue of the warrant of execution by the governor the prisoner be kept in solitary confinement and that only certain persons be allowed access. But Mr. Justice Harlan was not satisfied that the prisoner was actually being kept in solitary confinement. The sentence did not require it, for the new statute was passed after it, and the governor's warrant made no mention of that provision of the new statute, and Mr. Justice Harlan refused to indulge a presumption that the state officers would apply this section. This simplified the task of distinguishing the Medley case[55] for in that case the sentence required solitary confinement. The sentence in Holden v. Minnesota was consistent with the old statute whereas the sentence in the Medley

[52] Idem.
[53] Idem.
[54] (1890) 137 U. S. 483, 34 L. Ed. 734, 11 Sup. Ct. Rep. 143.
[55] Supra, n. 49.

case was based on the new statute and proceeded on the assumption that the old statutes were no longer in force. Any discussion of solitary confinement was thus foreclosed.

In the later case of Rooney v. North Dakota[56] the scene of the execution was shifted from the yard of the county jail to an enclosure in the state penitentiary. Under the old law the condemned was to be kept in ordinary confinement for not less than three months whereas under the new law he was to be kept in close confinement for not less than six months. In finding that the changes were favorable to the condemned and thus not within the constitutional prohibition, Mr. Justice Harlan noted that he was allowed three more months to live. The "close" confinement was differentiated from the "solitary" confinement in the Medley case.[57] The result of these cases is that the court has not been called upon to indulge in fine speculations as to what criminals would prefer to have done to them.

Where the motives behind the legislative change are humanitarian and are clearly manifested the task of decision is easy. In Malloy v. South Carolina[58] the legislature changed the method of inflicting the death penalty from hanging to electrocution. Mr. Justice McReynolds had little difficulty in upholding the retroactive operation of this change. He said, "Impressed with the serious objections to execution by hanging and hopeful that means might be found for taking life 'in a less barbarous manner' the Governor of New York brought the subject to the attention of the legislature in 1885. A commission thereafter appointed . . . reported in favor of electrocution." This evidence that the change is the result of an effort to make more humane the infliction of the death sentence appears to have been decisive. The only alternative is for the court to oppose its judgment to that of the legislature and this it has not seen fit to do. The legislative declaration must be taken to express the current opinion that electrocution is more humane than hanging. In the face of this the prisoner's argument that the new law is more onerous than the old must fail.

A digression into the state reports may be excused by the unusual interest that attaches to these cases. The New York legislature of 1860 is responsible for the situation. In that year it undertook a complete revision of the law relating to punishment for felonies. It repealed the old law and fixed a new scale of penalties.

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[56] (1905) 196 U. S. 319, 49 L. Ed. 494, 25 Sup. Ct. Rep. 264.
[57] Supra, n. 49.
[58] (1915) 237 U. S. 180, 59 L. Ed. 905, 35 Sup. Ct. Rep. 507.

In June, 1857, one James Shepherd set fire to a house. In April, 1858, one Mary Hartung poisoned her husband. Subsequently they were found guilty of arson and murder respectively. Pending Mary Hartung's appeal from her conviction, the Act of 1860, fixing the new scale of penalties, went into force. She argued that since it added one year of imprisonment to the death penalty it increased the punishment and, when applied to her offence committed prior to its passage, it was ex post facto and void. The New York Court of Appeals adopted this view. But the new Act of 1860 repealed the old law and the legislature, through carelessness or ignorance, had neglected to insert a saving clause. Consequently neither law could be applied to her case and she was set free.[59] The incendiary likewise found himself a free man. His story is the same.[60] The moral is obvious.

IV.

Conclusion

This review of the body of decisions which has given meaning to the phrase ex post facto reveals that there is little of generative force within them. It is noticeable that the greatest usefulness of the prohibition has been to check the retroactive operation of state legislation readjusting criminal law and procedure. But when the doctrine of the ex post facto clauses has clashed with the state police power, or with some recognized power of Congress, it has not been pushed to its full logical consequences but has properly succumbed to other more pressing interests. It would be better if there were a frank recognition of this, rather than a distortion of doctrine. An explanation of the result is not hard to find.

At the root of the mischief of ex post facto laws is their unfairness. The individual is entitled to a chance to know what the law is before he acts. The law must be accessible. It must not, like Caligula's, be written in small characters and hung upon high pillars. On the other hand no one can seriously contend, especially at this date, that individuals do in fact consult the law books before acting. This is particularly true in criminal law which is our sole concern. In truth it is ex post facto that the laws are consulted. This is well put by Judge Cardozo in discussing the retroactive operation of all judge-made law: "The picture of the bewildered litigant lured into

[59] Hartung v. The People (1860) 22 N. Y. 95; Same v. Same (1863) 26 N. Y. 167.

[60] Shepherd v. The People (1862) 25 N. Y. 406.

a course of action by the false light of a decision, only to meet ruin when the light is extinguished and the decision overruled, is for the most part a figment of excited brains."[61] The layman would be apt to give scant heed to the plea of the transgressor of the criminal law that he had no chance to know the law that is now sought to be applied to his case. Perhaps this instinct has crept into the chambers of the Supreme Court. Perhaps it is this inarticulated and unconscious premise which has given direction to the decisions.

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[61] Cardozo, The Growth of the Law, 122.