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Some Realism About Retroactive Criminal Lawmaking

Dan M. Kahan*

I.

The prohibition on retroactive criminal-lawmaking is said to reflect the “central values of liberal societies.”¹ By restricting punishment to the violation of existing legal rules, it promotes fair notice, which in turn facilitates individual autonomy.² By denying officials the discretion to punish conduct that the officials but not any existing law deem criminal, it assures that society is governed by the rule of law rather than the will of men.³ The commitment of American criminal law to these precepts is reflected (it is claimed⁴) in the Ex Post Facto Clause of the Constitution,⁵ which creates an impenetrable barrier to retroactive criminal legislation.

I will call this the “liberal conception of nonretroactivity”; my purpose in this essay is to offer a critical appraisal of this idea.

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1. Francis A. Allen, *The Habits of Legality: Criminal Justice and the Rule of Law* 15 (1996).

2. See *id.* at 14-15; see also Robert S. Summers, *The Ideal Socio-Legal Order: Its “Rule of Law” Dimension*, 1 *Ratio Juris* 154, 160 (1988) (arguing that retroactive criminal lawmaking “undermines the preconditions of informed choice and planning . . . [and thus] disregards the limits of human responsibility and is . . . an affront to human dignity”).

3. See, e.g., Jerome Hall, *General Principles of Criminal Law* 63-64 (2d ed. 1960); Herbert L. Packer, *The Limits of the Criminal Sanction* 85 (1968).

4. See, e.g., Hall, *supra* note 3, at 60; Packer, *supra* note 3, at 72.

5. In fact, there are two Ex Post Facto Clauses, one applicable to Congress, see U.S. Const. art. I, § 9, cl. 3, and another applicable to state legislatures, see *id.* § 10, cl. 10. For simplicity, I use “Ex Post Facto Clause” to refer to them collectively.

The liberal conception, I will argue, makes no sense, either descriptively or normatively. To be sure, American constitutional law contains a strict prohibition on the enactment of retroactive criminal statutes, but the rationale for this prohibition—if there is one—must be something other than the one supplied by the liberal conception of nonretroactivity.

My position boils down to two claims and a puzzle, the elaboration of which comprises the next three parts of this essay. The first claim is that the liberal conception of nonretroactivity lacks moral force. The judicious use of retroactivity is perfectly consistent with notice and autonomy; indeed, an absolute prohibition on retroactive criminal laws would invariably contract, rather than enlarge, the domain in which individuals can determine their fate by choice. Nor can it be argued that an absolute prohibition on retroactivity is necessary to contain official discretion, since the enforcement of such a prohibition presupposes no less good faith on the part of government officials than does the judicious exercise of retroactive criminal-lawmaking power.

The second claim is that American criminal law does in fact tolerate in substance exactly the kind of retroactive criminal-lawmaking that the liberal conception says is intolerable. The source of this lawmaking is not the legislative power, which is indeed constrained by the Ex Post Facto Clause, but rather the judiciary, which is not constrained by anything except judges' own situation sense. Exercising what amounts to de facto common-lawmaking authority in the guise of statutory interpretation, courts have long been the primary architects of American criminal law. Their common-lawmaking is invariably retroactive, and secures in practice all the benefits associated with retroactivity in theory.

The puzzle is this: why the Ex Post Facto Clause? If there is no compelling objection to retroactive criminal-lawmaking in principle, and if courts are permitted to engage in vast amounts of it in practice, then why are state legislatures and Congress constitutionally prohibited from enacting retroactive criminal statutes? The answer is that *legislative* retroactivity risks infecting criminal law with political pathologies that disfigure the law relative to the political community's own values. The way to avoid the distorting influence of these pathologies isn't to prohibit retroactive criminal-lawmaking, but to track that power to an institution that is modestly insulated from popular will and, even more important, seeped

in the every-day exigencies of administering the criminal law. That institution is the judiciary.

II.

The liberal conception of nonretroactivity is unconvincing. Retroactive criminal-lawmaking, if judiciously exercised, poses no threat to liberal values. Indeed, it enhances citizens' autonomy at the same time that it makes the law more effective and more just.

To make this argument more concrete, consider a hypothetical case.⁶ Jones owns a small convenience store in East Dakota. One of his employees, Smith, is a single mother of five and a recovering substance abuser who is currently on probation for drug distribution. Jones tells Smith that unless she engages in sexual relations with him he will fire her and will file a complaint accusing her—falsely—of stealing merchandise from the store. Because she is desperately dependent on her meager income from the store to support her children, is otherwise virtually unemployable because of her criminal record and faces revocation of her parole if she is found to have engaged in any criminal wrongdoing—facts that Jones understands perfectly well—Smith relents. Nevertheless, several months later, steeled in her resolve by the support of a new friend, Smith reports Jones to the police.

The problem is that Jones has not committed any crime under then existing East Dakota law. Because he has not physically harmed or threatened Jones, he has not engaged in rape as defined by state statute. He also has not engaged in "extortion" as that offense has until now been conceived, since his threats did not deprive Jones of money or any asset she could lawfully exchange for money.⁷

What is the argument for allowing East Dakota to enact a new, retroactively applicable crime of "sextortion" applicable to Jones's conduct? The most obvious answer is that Jones *deserves* to be criminally punished.⁸ By deliberately exploiting Smith's des-

6. For this example, I am indebted to the discussion in Stephen J. Schulhofer, *The Missing Entitlement: Law's Continuing Failure to Prevent Sexual Abuse* (forthcoming 1998) (manuscript at ch. 8, on file with the *Roger Williams University Law Review*).

7. *See id.*

8. *See* Harold J. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking*, 84 *Geo. L.J.* 2143, 2155 (1996) (observing that, "[f]or re-

perate circumstances, Jones has inflicted a serious harm on her. Punishing Jones is the appropriate way to signify that he has wronged Smith, that he has treated her as having less value than she objectively does.⁹ It is true that Smith's conduct did not violate any existing law, but this does not make his conduct any less culpable and deserving—morally speaking—of punishment than that of many persons who have committed rape or extortion. Indeed, allowing retroactive punishment of Jones is therefore necessary to satisfy another basic norm of justice, namely, that like cases be treated alike.

Less obvious but just as important, retroactive punishment, were it allowed, might have deterred Jones from engaging in such misconduct to begin with. Imagine Jones had formulated his plan after consulting the statute books and concluding that threatening Smith in this way would constitute neither rape nor extortion under existing law. In a regime that forbade retroactivity, Jones would realize at that point that he could carry out his threat without any legal risk. But in a regime that did permit retroactivity, he could not assume that his conduct would go unpunished in the event that Smith decided to disclose it to the authorities. Assuming—as the law reasonably does all the time—that potential offenders are at least somewhat responsive to the risk of punishment, the toleration of retroactive criminal-lawmaking generally would have made Jones less inclined to carry through.¹⁰

The features of this hypothetical that justify retroactivity, at least *prima facie*, generalize in real life. From the perspectives of both desert and deterrence, an ideal criminal code would prohibit every conceivable form of wrongdoing and assign each one the appropriate degree of punishment in relation to all the rest. But that degree of advance specification is impossible; the means by which bad people can harm others are far too numerous and diverse, and the vocabulary we have for describing those forms of wrongdoing

tributivist reasons, legislators might want to punish conduct that, while blameworthy, was not illegal when committed").

9. The conception of desert that I rely on here is grounded in the "expressive theory" of punishment. See Jean Hampton, *The retributive idea*, in *Forgiveness and Mercy* 111 (Jeffrie G. Murphy & Jean Hampton eds., 1988); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 *Colum. L. Rev.* 269, 351-52 (1996).

10. See generally Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 *Sup. Ct. Rev.* 345, 409-10 (discussing the loopholing problem).

far too inexact. Accordingly, a regime that tolerates only prospectively applicable laws is bound to be riddled with unintended and embarrassing gaps. If the law prohibits altering or counterfeiting vehicle titles, for example, then offenders will attempt to achieve the same effect by inducing state agencies to issue genuine titles containing false information;¹¹ if it prohibits the interstate transportation of forged checks, then they will wait until they cross state lines before signing them;¹² if it prohibits an hallucinogenic drug defined by its chemical composition, then designer-drug manufacturers will minutely alter the composition of that substance in a way that does not change its pharmacological effects.¹³ The only way to avoid the injustice of treating these morally irrelevant distinctions as excuses—indeed, the only way to discourage wrongdoers from self-consciously seeking out and exploiting loopholes such as these—is to tolerate a certain amount of retroactive lawmaking.

What is the argument *against* permitting East Dakota to deal with Jones through the retroactively applicable offense of sextortion? The conception of nonretroactivity that I am interested in critiquing does not necessarily deny that retroactivity might inflict deserved punishment in some cases or deter some undesirable conduct. The problem, it asserts, is that retroactivity promotes these ends by trampling on liberal values such as fair notice, individual autonomy and the rule of law. Securing these values, however, does not justify the kind of *per se* prohibition on retroactivity that the liberal conception defends.

Start with fair notice. As even most defenders of the liberal position concede, the idea that the criminal law must be purely prospective in order to give “notice” is, in most instances, a fiction.¹⁴ The average citizen never consults the statute books to confirm that murder, theft and sexual assault are illegal; he knows not to do these things because of his immersion in community

11. Cf. *Moskal v. United States*, 498 U.S. 103 (1990) (construing the statute to close off such a loophole).

12. Cf. *McElroy v. United States*, 455 U.S. 642, 655 (1982) (same).

13. Cf. *Touby v. United States*, 500 U.S. 160, 163 (1991) (discussing this problem and Congress's solution).

14. See Hall, *supra* note 3, at 63; Packer, *supra* note 3, at 85. See generally *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.) (“[I]t is not likely that a criminal will carefully consider the text of the law before he murders or steals . . .”).

moral norms.¹⁵ If he does them, then his knowledge that they are immoral is enough to justify punishing him whether or not he realized they were illegal, an insight reflected in the principle that ignorance of the law is no excuse.¹⁶

Of course, it is not true that wrongdoers *never* look up the law. Sometimes they do for the very purpose of exploiting the persistent gaps between what morality condemns but the law, through inadequate foresight, condones. It was possible, for example, to imagine that Jones, in my hypothetical, was engaged in this form of loopholing. Would retroactivity deny loopholers fair warning?

It seems odd to think so. To start, loopholers are still "on notice" that their conduct violates community moral norms; if they weren't—if they supposed that their objectives were perfectly commonplace and unproblematic—then the necessity of searching out means of evading punishment for engaging in such behavior would never occur to them. Moreover, in a regime that tolerates retroactive criminal-lawmaking, individuals would be "on notice" that loopholing is a risky undertaking. The question, then, is not really so much one of notice, but one of reliance: should the law be structured in a way that permits individuals to bank on the persistence of such gaps?

The claim that it should cannot be persuasively grounded in the core liberal value of autonomy. Liberalism is not anarchy; it maximizes the opportunity of individuals to pursue their own purposes and ends not by thoughtlessly opposing law, but by authorizing those restrictions of individual liberty necessary to guarantee a like degree of liberty for others.¹⁷ Loopholers, by hypothesis, are searching out means of violating the moral rights of others with impunity. Jones, for example, clearly diminished the autonomy of Smith by depriving her of control of her sexuality, a critical facet of the identity that anyone constructs for him- or herself.¹⁸ If the

15. See Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 Harv. L. Rev. 469, 484 (1996); Krent, *supra* note 8, at 2161.

16. See Dan M. Kahan, *Ignorance of Law Is an Excuse—But Only for the Virtuous*, 96 Mich. L. Rev. 127, 143-44 (1997).

17. The classic statement, of course, is John Stuart Mill's: "The only freedom which deserves the name is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs or impede their efforts to obtain it." John Stuart Mill, *On Liberty* 16-17 (Currin V. Shields ed., The Liberal Arts Press 1956) (1859).

18. See Schulhofer, *supra* note 6, *passim*.

prospect of retroactivity deters someone from engaging in such behavior, then that individual suffers no cognizable abridgment of autonomy in liberalism's eyes.¹⁹

The one context in which fair notice does counsel against retroactivity is where the conduct being regulated does not violate any community moral norms independent of the law itself. This is likely to be so for *malum prohibitum* offenses, such as tax evasion, securities fraud, antitrust and the like; these laws regulate common forms of conduct that enhance social welfare and that individuals are expected and encouraged to engage in subject only to what the law prohibits. Moreover, notice here is not a fiction; in these settings individuals do in fact make substantial investments to discover their legal obligations so that they may conform their behavior to the law. Because these laws—unlike sexual assault, homicide, theft and other *malum in se* crimes—are understood to invite reliance, the retroactive extension of them would be systematically autonomy limiting, not to mention just plain unfair.

The autonomy-maximizing solution, however, is not to prohibit retroactive criminal-lawmaking across the board but rather to exercise it judiciously. Where the conduct in question violates clear moral norms, retroactivity should be permitted in order to deter loopholing. Where the conduct in question does not violate such norms, criminal lawmaking should be prospective only so as to avoid unfair surprise and to facilitate legitimate reliance.

It is at this point that the defender of the liberal conception of nonretroactivity is likely to play the rule of law card. Even assuming that the judicious exercise of retroactive lawmaking power would not undermine but actually promote autonomy, someone—some official—must be trusted to exercise that power judiciously.

Who is to decide that the conduct in issue was immoral or grossly immoral, so as to justify retroactive penal law on that ground? Merely to raise this question reveals the function of non-retroactivity as an essential implication of the principle of legality. For it is precisely the extra-legal determination of

19. See generally Robert Nozick, *Philosophical Explanations* 391-92 (1981) (stating that parties who knowingly attempt to exploit loopholes in laws that punish immoral acts are not deprived of fair notice when punished by retroactive laws); Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 Harv. L. Rev. 625, 671-72 (1984) (stating that respect for autonomy requires accommodating behavior motivated by moral duty, not behavior motivated by calculating assessment of consequences).

vitaly important questions—who is a criminal? and what may his punishment be?—that the principle bars.²⁰

The argument from the rule of law can be understood in three ways, none of which is compelling. The first makes the conflict between retroactivity and the rule of law analytic: the discretion to say, after the fact, whether some species of conduct is sufficiently immoral to be criminal just *is* “the lawless infliction of suffering” because the “extra-legal determination” of what is criminal just *is* what the rule of law “principle bars.”²¹ This argument (like all definitional ones) is question-begging. *Why* should we understand the rule of law to bar *ex post* determinations of what is criminal, and why should we believe in the rule of law so defined?²² What is the substantive value that should make us see the use of retroactive lawmaking power against Jones and persons who deliberately violate the moral rights of others as arbitrary or unprincipled? If it is that even those intent on harming others are entitled to “notice” so that they can rely on extant law when planning their actions, then the rule of law argument—far from being the “more sophisticated rationale of the principle of legality”²³—in fact adds nothing to the naive argument from autonomy.

The second version of the argument roots the rule of law objection in moral skepticism. *Any* answer we give to the question of “who is to decide?” is necessarily arbitrary, on this view, because there is no objective or principled way for *anyone* to say what’s moral. This argument is conceptually incoherent. If we doubt our powers of moral perception to this degree, then how do we know that punishing someone retroactively is ever morally wrong? Alternatively, if we have enough confidence in our faculty of moral discernment to trust our perception that it *is* sometimes morally problematic to punish retroactively, then why can’t we trust our perception that it sometimes *is not*?

The third and final version of the argument is prudential. Judicious retroactivity is not a contradiction in terms, and is not something that lies beyond our capacity to identify, but trusting

20. Hall, *supra* note 3, at 63-64.

21. *Id.*

22. See generally Richard H. Fallon, Jr., “The Rule of Law” as a Concept in *Constitutional Discourse*, 97 *Colum. L. Rev.* 1 (1997) (arguing that “rule of law” is an essentially contested concept, any definition of which must be normatively defended against its rivals).

23. Packer, *supra* note 3, at 85; Hall, *supra* note 3, at 63.

anyone to exercise that power is too dangerous. For once we say that our lawmakers can retroactively criminalize sexual coercion or some other species of immoral conduct, "what is to safeguard people from being punished for conduct that is neither criminal when engaged in nor universally recognized to be wrongful?"²⁴ Better to err on the side of too little retroactivity than too much.

This version of the argument, although by far the strongest, still fails. For one thing, it is dogmatically one-sided. Prohibiting retroactivity inevitably diminishes the law's power to deter loopholing; and what loopholers do—from the wrongful taking of property, to the exercise of sexual coercion, to the outright infliction of physical violence—interferes with *their victims'* autonomy. Why assume that the possibility of injudicious retroactivity creates a larger threat to autonomy than does the certain loss of it associated with barring even the judicious use of that power?

In addition, the position that the prudential argument defends—an absolute prohibition on retroactive criminal-lawmaking—is in fact a nonsolution to the problem of discretion. An absolute prohibition on retroactivity, no less than a more moderate prohibition on the injudicious use of it, depends on the good faith of the officials called upon to enforce it; if those officials are sufficiently malevolent and sufficiently unchecked by political and institutional constraints to abuse limits on the power to make law retroactively, then what is the safeguard against those officials simply refusing to honor an absolute prohibition on the exercise of it? We can, in short, never fully escape the necessity of trusting our officials; the question with respect to any given power is only *which* officials we feel we can trust with it the most.

III.

The institution we trust the most when it comes to retroactive criminal-lawmaking is the judiciary. The liberal conception of non-retroactivity is not only un compelling as a normative matter; it is also patently fictional as a descriptive one. We *do* have plenty of retroactive criminal-lawmaking—not in the form of statutory crimes but rather in the form of de facto common law ones.

Reconsider the hypothetical case of Jones and Smith. The East Dakota legislature will not be able to punish Jones by enact-

24. Packer, *supra* note 3, at 85.

ing a new, retroactively applicable "sextortion" statute; this is the unmistakable teaching of *Calder v. Bull*,²⁵ which construed the Ex Post Facto Clause to prohibit legislatures from enacting criminal "laws, after a fact done by a subject, or citizen, which shall have relation to such fact, and shall punish him for having done it."²⁶ But so long as the state has some vaguely worded statute dealing generally with deceitful or coercive conduct, the enactment of such a statute almost certainly will not be necessary to plug the loop-hole in the state's sexual assault laws. In that case, an East Dakota court can "construe" the statute to cover Jones's conduct, even if the statute has never before been so "construed."

Indeed, an East Dakota court could, if it were so inclined, achieve this end by updating its interpretation of the state's "extortion" statute. This is what has happened in several real-life "sextortion" cases involving conduct akin to Jones's.²⁷ Extortion is typically worded in very abstract terms; the standard formulation prohibits wrongful threats aimed at depriving someone of a "thing of value." One's sexual autonomy is a "thing of value," both to one's self and to anyone who tries to take it away.²⁸ The defendants in these "sextortion" cases have plausibly objected that interpreting "extortion" to cover nonviolent coerced sex amounted in substance to retroactive lawmaking, insofar as extortion up until then had been limited to threats aimed at divesting persons of money or assets that could legitimately be exchanged for money. But their objections have fallen on deaf judicial ears.²⁹

This feature of my hypothetical also generalizes. A state's statutory criminal code never tells more than a small fraction of the story of that jurisdiction's criminal law. Whether from inattention or prudent modesty, legislatures inevitably limit themselves to describing what is criminal in only broad outline form; the highly general terms that inhabit the statute books—from "extortion," to "fraud," to "property," to "enterprise"—are brought into

25. 3 U.S. 386 (1798).

26. *Id.* at 390.

27. See *Lovely v. Cunningham*, 796 F.2d 1 (1st Cir. 1986); *State v. Felton*, 339 So. 2d 797 (La. 1976).

28. See *Lovely*, 796 F.2d at 4-6; *Felton*, 339 So. 2d at 799-800; see also *Knutson v. Brewer*, 619 F.2d 747, 748-50 (8th Cir. 1980) (treating a demand for sex as a demand for a "thing of value" for purposes of a kidnapping for ransom statute).

29. See *Lovely*, 796 F.2d at 4-5; *Knutson*, 619 F.2d at 749-50. There is, however, contrary authority. See *Schulhofer*, *supra* note 6.

contact with the real world only through the mediation of intricate judge-made doctrines that tell us what the criminal law actually proscribes. Because the content of these doctrines reflects normative judgments made by courts, what passes for judicial "interpretation" of criminal statutes is more accurately described as *delegated common lawmaking*.³⁰ What is more, because the normative judgments behind these doctrines are invariably made at the moment of application and not before, the resulting body of de facto common law crimes is necessarily retroactive.

The retroactive character of delegated common-lawmaking enables judges to close the persistent gap between morality and law. The concept of "fraud," for example, was left deliberately undefined at common law to preserve its adaptability to unforeseen or innovative forms of wrongdoing.³¹ Thus, by incorporating "fraud" (or its cognates) into criminal statutes, legislatures have not so much made law as licensed courts to make it through a common-lawmaking process. That is exactly what they have done, treating such statutes as a "first line of defense" against "new" crimes as yet unaddressed by "particularized legislation."³² The same concern to punish and deter loopholing has informed the interpretation of various other vaguely worded statutory terms, including "enterprise," "stolen" and "thing of value."³³

30. See Kahan, *supra* note 9, at 367-89; Kahan, *supra* note 15, at 488. This characterization of what courts do when they construe incompletely specified statutes is accepted as unproblematic in domains such as federal antitrust and labor law. See generally Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. Chi. L. Rev. 1 (1985) (discussing various types of federal common law).

31. See, e.g., Joseph Story, 1 Equity Jurisprudence § 187, at 190 (10th ed. 1870); Clyce v. Anderson, 39 Mo. 37, 40 (1871); McAleer v. Horsey, 35 Md. 439, 451-52 (1872).

32. United States v. Maze, 414 U.S. 395, 405-06 (1974) (Burger, C.J., dissenting); see also McNally v. United States, 483 U.S. 350, 372-73 (1987) (Stevens, J., dissenting) (noting that mail fraud and wire fraud statutes have been "interpreted as implicit delegations of authority to the courts to fill in the gaps in the common-law tradition of case-by-case adjudication").

33. See, e.g., Moskal v. United States, 498 U.S. 103, 111-12 (1990) (recognizing that the language of 18 U.S.C. § 2314 should be read to apply to a general "class of fraud" and not only to the specific "instances of fraud" that were associated with these terms at common law or that inspired Congress's enactment of this provision of the act); H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 248-49 (1989) (stating that confining RICO to specified types of enterprises would be "counter-productive" and contrary to Congress's intent that RICO "encompass a wide range of criminal activity, taking many different forms and [attracting] a broad array of perpetrators operating in many different ways"); United States v. Turley, 352 U.S.

The existence of de facto common-lawmaking is a major embarrassment to the liberal conception of retroactivity. That position draws no distinction between legislatures and courts; the kind of retroactive criminal-lawmaking that legislatures are forbidden to engage in is supposed to be forbidden to courts as well by the prohibition on common-law crimes.³⁴ Formally speaking, this prohibition is supposed to be enforced through the Due Process Clause,³⁵ which prevents courts from accomplishing through innovative interpretation what the Ex Post Facto Clause prevents legislatures from doing by statute.³⁶ But substantively speaking, matters are otherwise: the due process limit on judicial retroactive lawmaking has been fictionalized every bit as much as the "rule of strict construction," the "void for vagueness doctrine" and other devices aimed at preventing common law crimes.³⁷

As Professor Harold Krent masterfully demonstrates, the softness of the due process constraint on retroactivity can be traced to the refusal of courts to treat innovative interpretations of incompletely specified statutes as "unforeseeable."³⁸ In the classic decision of *Bouie v. City of Columbia*,³⁹ the United States Supreme Court held that it violates due process to give retroactive effect to a broad reading of a statute that is "on its face . . . narrow and precise," for such a provision "lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction."⁴⁰ The occasion for criminal common-lawmaking, however, is not a

407, 416-17 (1957) (reading the National Motor Vehicle Theft Act broadly because "[p]rofessional thieves resort to innumerable forms of theft and Congress presumably sought to meet the need for federal action effectively rather than to leave loopholes for wholesale evasion"). See generally Kahan, *supra* note 15, at 482-83 (discussing the use of innovative interpretive techniques in criminal law aimed at closing loopholes).

34. See *United States v Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812).

35. Here and throughout, I use "Due Process Clause" to refer, collectively, to the Fifth Amendment and section one of the Fourteenth Amendment, which are applicable to the federal government and to state governments, respectively.

36. See *Bouie v. City of Columbia*, 378 U.S. 347, 353-54 (1964).

37. John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va. L. Rev. 189 (1985); Kahan, *supra* note 9.

38. See Harold J. Krent, *Should Bouie Be Buoyed?: Judicial Retroactive Lawmaking and the Ex Post Facto Clause*, 3 Roger Wms. U. L. Rev. 35 (1997).

39. 378 U.S. 347 (1964).

40. *Id.* at 352.

statute that uses narrow and precise terms; it is one that uses broad and imprecise concepts such as "fraud," "thing of value," "enterprise" or "extortion," which necessarily defer critical policy-making choices to the point of judicial application. The *ex post* adaptation of *that* kind of statute to numerous and diverse forms of misconduct does *not* violate the Constitution, courts reason, because open-textured language "gives a potential defendant some notice, by virtue of this very characteristic, that a question may arise as to its coverage, and that it may be held to cover his contemplated conduct."⁴¹ This is equivalent to saying that retroactive delegated common-lawmaking is consistent with fair notice because citizens subject to such a regime are on notice that courts may make law retroactively.⁴²

Of course, it would be an overstatement to say that due process *never* supports finding an innovative interpretation of a vague statute to be tantamount to unconstitutional retroactive lawmaking. A more accurate assessment is that due process prohibits retroactive judicial lawmaking whenever courts perceive, against the background of community norms, that the exercise of such power would be injudicious.

41. *Id.*; see, e.g., *McDonald v. Champion*, 962 F.2d 1455, 1459 (10th Cir. 1992) ("While a technical and rational argument can be made that the Oklahoma legislature did not intend to cover attempts, Oklahoma's first-degree felony murder statute is not 'narrow and precise'"); *Lovely v. Cunningham*, 796 F.2d 1, 5 (1st Cir. 1986) ("The instant case did not involve 'narrow and precise statutory language'. The term in question—'extortion'—is itself not precise."); *Knutson v. Brewer*, 619 F.2d 747, 751 (8th Cir. 1980) (rejecting a due process challenge to the term "thing of value" in kidnapping statute to sexual gratification on ground that "thing of value" is not "narrow and precise"); *Rose v. Locke*, 423 U.S. 48, 53 (1975) ("[G]iven the Tennessee court's clear pronouncements that its statute [prohibiting 'crimes against nature'] was intended to effect broad coverage, there was nothing to indicate, clearly or otherwise, that respondent's acts [namely, cunnilingus] were outside the scope of [the statute].").

42. Compare *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340 (1952):

[M]ost statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.

Consider *United States v. Insko*.⁴³ That case reversed the conviction of an unsuccessful Republican candidate for Congress who had disseminated anonymous campaign bumper stickers. As the court acknowledged, the defendant's conduct was plainly covered at the time he engaged in it by a statute that prohibited "publish[ing] or distribut[ing] . . . any card, pamphlet, circular, poster, dodger, advertisement, writing, or other statement relating to or concerning" a candidate for federal office unless that statement "contain[s] the names of the persons . . . responsible for the publication or distribution of the same."⁴⁴ In finding the application of the statute to the defendant at hand impermissibly retroactive, however, the court pointed to "a universal practice . . . among federal candidates," including presidential ones, "not [to] affix[] attribution clauses to bumper stickers employed in their campaigns."⁴⁵ Because the defendant's conduct was consistent with this norm—indeed, because the court itself was shocked to discover that such common-place behavior was in fact criminal—the court was unwilling to treat even the plain meaning of the statutory language as sufficient license to treat such behavior as having been a crime at the time it was committed.⁴⁶

Where defendants violate uncontested community norms, in contrast, courts view even admittedly vague language as sufficient to warrant retroactive fitting of the law to the defendants' conduct. In that context, "common sense" ought to put offenders on notice that courts are likely to condemn their conduct as criminal.⁴⁷ "[L]oitering about school grounds," for example, may "on its face [be] vague and ambiguous";⁴⁸ nevertheless, given the interest such a statute evinces in "safeguard[ing] the well-being of school chil-

43. 496 F.2d 204 (5th Cir. 1974).

44. *Id.* at 205-06 (quoting 18 U.S.C.A. § 612 (repealed 1976)). A statute such as 18 U.S.C.A. § 612, which was repealed shortly after the decision in *Insko*, would almost certainly be deemed unconstitutional in light of *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995).

45. *Insko*, 496 F.2d at 208 (emphasis omitted).

46. *See id.* at 209. The court did uphold this construction of the statute prospectively, however. *See id.* ("Anonymous bumper stickers conveying political statements, as the district court found the 'McGovern-Gunter' bumper stickers to be, are henceforth published and distributed at the peril of the materials' sponsors.").

47. *See, e.g.,* *McSherry v. Block*, 880 F.2d 1049, 1052 (9th Cir. 1989); *Knutson v. Brewer*, 619 F.2d 747, 751 (8th Cir. 1980).

48. *McSherry*, 880 F.2d at 1052.

dren," it "was not only foreseeable, [but] inevitable" that a state court would construe it to cover the behavior of a man who appeared to be stalking elementary school students during recess (and who, the court pointed out, had previously been convicted of abducting and molesting school children).⁴⁹ Likewise, "[w]hile a technical . . . argument c[ould] [have been] made"⁵⁰ that a state court retroactively expanded the state's felony murder statute by extending it to attempted as well as completed robberies, it would have been "simply . . . irrational" to expect it "to distinguish between homicides . . . where the robber gets the money, and those where the robber does not" (particularly when the defendant urging the distinction has killed a cashier at a fast-food restaurant by striking her seventeen times in the head with a pipe wrench).⁵¹ "Indiana ha[d] never adopted a legal definition of 'death,' either by statute or judicial decree," but that "definitional void" did not stop the Indiana Supreme Court (in a case involving a man convicted of murder for shooting another in the head) from retroactively enlarging the term to cover "brain dead" persons on respirators.⁵² A man convicted of abducting a woman and forcing her to engage in oral sex had no legitimate "right to expect that he would be convicted for kidnapping only, rather than for kidnapping for ransom," even though "ransom" had previously been understood as a demand for money, not sex.⁵³ And so forth and so on.⁵⁴

Bouie can be understood as an example of judicial lawmaking at the intersection of contested community norms. In that case, the United States Supreme Court reversed a decision construing South Carolina's trespass law to cover African-Americans who refused to leave a segregated lunch counter. Against the background

49. *Id.* at 1058.

50. *McDonald v. Champion*, 962 F.2d 1455, 1459 (10th Cir. 1992).

51. *Id.* at 1460.

52. *Swafford v. State*, 421 N.E.2d 596, 598 (Ind. 1981).

53. *Knutson*, 619 F.2d at 750.

54. *See, e.g., Maney v. Zenon*, No. 91-36040, 1992 WL 322060, at *2 (9th Cir. Nov. 6, 1992) (finding no due process violation in the retroactive extension of a witness intimidation statute to intimidation of potential witness that "it cannot be said that someone in Maney's position would be 'surprised to learn that his [conduct] in this case constituted a crime'"); *Darnell v. Swinney*, 823 F.2d 299, 301 (9th Cir. 1987) (stating that a police officer ensnared in an undercover operation had no ground to complain about the retroactive overruling of a state precedent on "legal impossibility" because he "clearly had fair warning that his contemplated conduct—attempting to possess stolen property—was criminal").

of competing regional norms on racial equality, it is not hard to understand why the United States Supreme Court found this exercise of retroactive lawmaking unacceptable, or why the South Carolina Supreme Court did not. Indeed, Professor Krent observes that there really was not any judicial nonretroactivity doctrine to speak of before the civil rights movement,⁵⁵ a point that suggests that judges are most likely to see a particular statutory reading as impermissibly retroactive precisely when they do not see eye-to-eye with other judges (or with prosecutors) on the nature of societal norms.

In sum, for constitutional purposes, courts measure the permissible degree of retroactivity against the perceived "moral quality of the [defendant's] conduct"⁵⁶ rather than against some abstract legal yardstick. Which is to say that courts do exactly what the proponents of the liberal conception of nonretroactivity say no official should ever be trusted to do—namely, make *ex post* decisions about what forms of conduct are sufficiently immoral to be treated as criminal. How they carry out this function is hardly beyond criticism. Yet it would be hysterical to describe what courts do so routinely as involving "the lawless infliction of suffering"⁵⁷ that proponents of the liberal conception of nonretroactivity warn of.

What exactly has prevented judicial retroactive common-law-making from degenerating into such a regime? No *rule* constrains judges in the exercise of that power. I have characterized due process as prohibiting injudicious retroactive criminal-lawmaking, but there is no algorithm for identifying what is judicious and what is not, and even if there were, it would still be within the discretion of individual judges to abide by it.

Rather, what guides and constrains courts in this setting is situation sense, reinforced by a modest degree of institutional

55. See Krent, *supra* note 38.

56. *Knutson*, 619 F.2d at 750 n.3 (citations omitted); see also *Maney*, No. 91-36040, at *2 ("The level of culpability of defendant's conduct is also relevant to the determination of whether defendant was deprived of fair notice."); *McSherry v. Block*, 880 F.2d 1049, 1055 (9th Cir. 1989) ("We find it significant in this case that appellant's conduct was culpable, irrespective of his proffered interpretation of the statute."). The same approach informs exercise of courts' de facto common-lawmaking power generally. See *Kahan*, *supra* note 15, at 484; *Kahan*, *supra* note 9, at 402-04.

57. *Hall*, *supra* note 3, at 63.

checks and balances. *Situation sense* was Llewellyn's phrase to describe the intuitive capacity that enables judges to derive consistent and generally accepted results from otherwise hopelessly indeterminate formal doctrines.⁵⁸ This sense is born of judges' immersion in community and professional norms and sharpened through their exposure to a massive number of cases.⁵⁹ These influences breed intuitions that make it possible for judges to agree among themselves about what does and does not count as impermissibly "retroactive" interpretations of law, and to avoid—for the most part—blundering into results that shock the rest of us. The same sense explains why judges for the most part do not willfully abuse their discretion. Most judges, like most properly socialized members of society, simply have no appetite to punish individuals who engage in "conduct that is neither criminal when engaged in nor universally recognized to be wrongful."⁶⁰ Judges who do have this aberrant taste are prevented from causing too much harm by the necessity of gaining the assent of other participants in the criminal justice system, including prosecutors, who generally do not file charges against persons who have not violated serious moral norms;⁶¹ juries, who generally will not convict such individuals;⁶² and other judges, who are constantly on the lookout for those of their number who lack situation sense or the disposition to submit to it.

The bottom line is that there just is not an absolute prohibition on retroactive criminal-lawmaking. Judges exercise that power routinely. They also tend to exercise that power judiciously, because judges are, by and large, sensible people. Indeed, given how much sense the judicious exercise of retroactive criminal-lawmaking makes, it is hard to see how judges confronted with the

58. See Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* 59-61, 121-57, 206-08 (1960).

59. See Karl N. Llewellyn, *The Case Law System in America* § 56, at 78-80 (Paul Gewirtz ed. & Michael Ansaldi trans., 1989).

60. Packer, *supra* note 3, at 85.

61. See generally Joan E. Jacoby et al., U.S. Dep't of Justice, *Prosecutorial Decisionmaking: A National Study* (1982) (documenting prosecutors' shared apprehension of appropriate charging decisions, including shared sense of moral restraint).

62. See generally Norman J. Finkel, *Commonsense Justice: Jurors' Notions of the Law* (1995) (discussing how the relationship between community sentiment and black letter law affects the jury system).

liberal conception of nonretroactivity could help do anything but subvert it.

IV.

There remains a puzzle. If judicious nonretroactivity is so valuable, and if courts are in fact free to engage in retroactive criminal-lawmaking subject only to their own situation sense, then why shouldn't legislatures be free to enact retroactive criminal statutes subject only to theirs? That power, of course, is denied them by the Ex Post Facto Clause, which, unlike the due process bar on retroactive judicial lawmaking, *is* vigorously enforced. Does my argument imply that the Ex Post Facto Clause is ill-founded? The answer is no; it implies only that we need a better explanation of what the Ex Post Facto Clause is all about than the one supplied by the liberal conception of nonretroactivity.

The counter-explanation that I want to suggest is rooted in a distinctive legislative pathology first described by Bentham. Criminal legislation, he argued, is systematically biased toward severity because "[w]hat is *too little* is more clearly observed than what is *too much*."⁶³

The greatest danger lies in an error on the minimum side, because in this case the punishment is inefficacious; but this error is least likely to occur, a slight degree of attention sufficing for its escape; and when it does exist, it is at the same time clear and manifest, and easy to be remedied. An error on the maximum side, on the contrary, is that to which legislators and men in general are naturally inclined: antipathy, or a want of compassion for individuals who are represented as dangerous and vile, pushes them onward to an undue severity. It is on this side, therefore that we should take the most precautions, as on this side there has been shown the greatest disposition to err.⁶⁴

The Ex Post Facto Clause, I want to argue, is one such "precaution." It helps to counteract the legislative bias toward severity not by barring retroactive criminal-lawmaking outright—a solution that would impale the law on the "too little" horn of the dilemma—but by guaranteeing that power is exercised exclusively

63. Jeremy Bentham, *Principles of Penal Law*, in 1 J. Bentham's Works 365, 401 (J. Bowring ed., 1843).

64. *Id.*

by judges, who have a much more reliable perception of "what is too much."

Cashing out this claim requires saying a little more about Llewellyn's idea of "situation sense," which I take to be the perceptive faculty that both legislators and judges must rely on to avoid "too much" retroactivity. The capacity of judges to intuit what's right even when they cannot exactly say why is an instance of what cognitive psychologists call "pattern recognition."⁶⁵ According to this theory, what goes on in the brain when human beings recognize faces, construct grammatical sentences, play chess, or discern anger, fear or other emotional responses in others is not a form of algorithmic computation but rather a rapid, pre-verbal cycling process whereby the case at hand is compared, contrasted and ultimately conformed to a wide range of mentally inventoried prototypes.⁶⁶ What goes on when they apply moral and legal concepts is no different.⁶⁷

The theory of pattern recognition tells us not only why individuals share intuitions about so many important matters, but also why they at least sometimes do not, particularly on judgments of ethics and public policy. The prototypes that inform judgments in these areas (as in others) are a product of experience. The experiences on which such prototypes are founded, however, can vary across cultures and even across communities within a culture. When they do, individuals will hold sharply conflicting moral perceptions that are largely impervious to logical refutation.⁶⁸

Howard Margolis, for example, uses this account to show why experts and lay persons have such wildly divergent attitudes about environmental risks.⁶⁹ Members of the public, Margolis argues, perceive risk against the background of a relatively small set of prototypes formed by sensational news accounts of disasters like

65. See Howard Margolis, *Patterns, Thinking, and Cognition* (1987).

66. See *id.* at 1-6; Paul M. Churchland, *The Engine of Reason, the Seat of the Soul: A Philosophical Journey into the Brain* (1995).

67. See Churchland, *supra* note 66, at 144-50; Gerald Dworkin, *Unprincipled Ethics*, 20 *Midwest Stud. Phil.* 224 (1995); Norman J. Finkel & Jennifer L. Groscup, *Crime Prototypes, Objective Versus Subjective Culpability, and a Common-sense Balance*, 21 *J.L. & Human Behavior* 209 (1997); Vicki L. Smith, *Prototypes in the Courtroom: Lay Representations of Legal Concepts*, 61 *J. Personality & Soc. Psychol.* 857 (1991).

68. See Howard Margolis, *Dealing with Risk* 11-12 (1996).

69. See *id. passim*.

Three Mile Island, Bhopal, Love Canal and Chernobyl. Experts, in contrast, consult a much richer inventory, formed by their exposure to a much greater volume of information from a much greater variety of sources. Against this background, the benefits of risky technologies are much more salient. Because pattern recognition determines what logical appeals a person is likely to find persuasive, there is little in the way of argument, according to Margolis, that can be used to bridge the gulf between expert and lay judgments in this setting. We simply have to make a judgment about whose perceptions ought to govern policy, and structure institutions accordingly. Margolis comes down on the side of the experts and recommends greater reliance on expert judgment in administrative and environmental policymaking.

Professor Sara Sun Beale tells the same story about criminal law.⁷⁰ Just as media accounts of disasters exaggerate the public's perception of environmental risks, so sensationalistic accounts of violent lawbreaking—from the murder of Polly Klass to the O.J. Simpson case—distort the public's perception of the extent of crime. Electoral politics transmit these distorted perceptions into the legislative process. As a result, legislatures enact draconian mandatory minima for drug offenses, "three strike" sentencing laws, indefinite civil confinement for sexual predators and other policies that criminal-law experts denounce as excessively severe for purposes of deterrence and expressive condemnation. Margolis's and Beale's accounts thus furnish a sophisticated psychological explanation for the bias toward severity that Bentham observed.

In my view, they also supply a justification for delegated criminal common-lawmaking. Judges perform a moderating role in criminal law akin to the one that Margolis sees experts playing in environmental and administrative law. Like experts on risk, judges are exposed to a much greater volume of information from a much greater variety of sources than are members of the public. They see not only the gruesome cases that dominate the headlines, but also the humdrum, everyday ones that do not even make it onto the back page. They also see the destructive effects of severe policies that do not work as intended. Because they thus appraise

70. See Sara Sun Beale, *What's Law Got To Do With It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 *Buff. Crim. L. Rev.* 23 (1997).

the need for penal severity against a much richer and more balanced stock of crime prototypes, and because they are at least modestly insulated from politics,⁷¹ we should expect judges to suffer much less from the distorted perception that biases legislators toward severity. Indeed, there is a wealth of evidence—from the public stand that judges have taken against mandatory-minimum sentences,⁷² to the rate at which legislatures overturn “narrow” and “broad” judicial readings of criminal statutes,⁷³ to social-science opinion data⁷⁴—confirming that judges do indeed hold much more moderate views about criminal law than do either legislators or members of the public.

To describe delegated common-lawmaking as a “solution,” of course, is to beg the question whether the legislature’s inclination toward severity is really a “problem.” Reliance on the criminal-lawmaking sensibilities of judges over that of legislators requires a normative justification, just as reliance on expert over lay assessments of environmental risks does. The argument for going with judges over legislators is not that judges have better values than legislators or the members of the public whom they represent; in-

71. Of course, state judges, many of whom are popularly elected, are less insulated than are life-tenured federal judges. Nevertheless, political scientists generally believe that there is little difference in the performance of elected and appointed judges. See generally Stuart S. Nagel, *Comparing Elected and Appointed Judicial Systems* 36 (1973) (comparing how elected and appointed judicial systems affect judicial decisionmaking and selection); Victor Eugene Flango & Craig R. Ducat, *What Difference Does Method of Judicial Selection Make? Selection Procedures in State Courts of Last Resort*, 5 *Just. Sys. J.* 25, 35 (1979) (discussing the influence of politics on judicial selection).

72. See Henry J. Reske, *Judges Irked by Tough-on-Crime Laws: Support for mandatory minimums, sentencing guidelines is low, survey shows*, 80 *A.B.A. J.*, Oct. 1994, at 18.

73. See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *Yale L.J.* 331, 413-14 (1991) (showing that Congress frequently overrules lenient interpretations of criminal statutes but rarely, if ever, overrules severe ones).

74. For a survey of the literature, see Loretta J. Stalans & Shari Seidman Diamond, *Formation and Change in Lay Evaluations of Criminal Sentencing: Misperception and Discontent*, 14 *L. & Human Behavior* 199, 199-201 (1990). Significantly, in their own study, Professors Stalans and Diamond found that the public perceives judicial sentences to be too lenient in general, but that members of the public do not prefer more severe sentences when they are supplied with the facts of particular cases. This finding reinforces the conclusion that members of the public are biased toward severity only because of their relative lack of exposure to the details of criminal justice, and not because their values diverge systematically from those of judges. See *id.* at 211-13.

deed, because they are socialized to essentially the same moral norms, judges are likely to value things in pretty much the same way as members of the public do. Rather, the claim is that judges—like experts on risk—have a more refined perception of what the law should be made to look like in order to realize those shared values. In particular, they understand how excessive severity in punishment can waste the resources needed for deterrence, and do violence to the expressive norms that inform the public's sense of desert. A criminal law that is made at least in part by judges is thus more likely to secure the ends that the public itself values than is one made entirely by the legislature. The very pervasiveness and stability of delegated common-lawmaking confirm that this is so.

All of this goes double for retroactivity. It is precisely in the aftermath of a high profile crime that "antipathy, or a want of compassion for individuals who are represented as dangerous and vile" is most likely to "push[] [legislators and members of the public] onward to an undue severity"; it is exactly then that legislators are most likely to perceive that the only gesture they can make to reaffirm the values that the wrongdoer's conduct denies is to enact a new, retroactively applicable law, condemning that behavior all the more. Judges are much less likely to succumb to these pressures and frustrations. Their assessment of the case at hand is tempered by their exposure to a vast catalogue of past misdeeds; their temptation to lash out against any one wrongdoer is disciplined by their (sad) awareness that future opportunities to vindicate good values through punishment are likely to be inexhaustible. They take—and are generally expected to take—a longer view of the task of criminal lawmaking.

This account supports a distinctive explanation of the Ex Post Facto Clause. Unlike that one associated with the liberal conception of nonretroactivity, this explanation does not pretend that retroactivity is forbidden in American criminal law; indeed, it does not even see pure prospectivity as a goal worth aspiring to, given the value of judicious retroactivity in closing the persistent gap between law and morality. At the same time, this account comprehends the risk that a community that indulges in retroactive criminal-lawmaking might exercise that power injudiciously because of the limits of its own perception of what just and effective punishment entails in particular cases. The way to secure the ben-

efits of retroactive lawmaking while minimizing the risks associated with it is to confine the exercise of that power to the institution most likely to exercise it wisely. The Ex Post Facto Clause helps to achieve that objective by denying retroactive law-making powers to the legislature, which as a result has all the more incentive to delegate this vital power to courts.

