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Ex Post Facto Limitations of Changes in Evidentiary Law: Repeal of Accomplice Corroboration Requirements

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EX POST FACTO LIMITATIONS ON CHANGES IN EVIDENTIARY LAW: REPEAL OF ACCOMPLICE CORROBORATION REQUIREMENTS

INTRODUCTION

The ex post facto clauses[1] in the Constitution prohibit the passage of retroactive penal laws. Although this prohibition always has been held to apply to retroactive changes in the substantive elements of criminal offenses and the punishments prescribed for them,[2] courts have had trouble deciding the extent to which legislative changes in the law of criminal procedure can be applied retroactively, that is, in trials for crimes committed before such changes were enacted. The Supreme Court recently clarified its approach to this issue in *Dobbert v. Florida*[3] and *Weaver v. Graham*,[4] stating simply that the ex post facto clauses do not apply to matters of procedure.[5] In *Weaver*, however, the Court restated its long-standing dictum that certain procedural changes may act in such a way as to bring them within the ambit of the constitutional prohibition.[6]

Among the procedural changes that recently have come under attack on ex post facto grounds is the repeal of statutes prohibiting a conviction based on an accomplice's testimony unless the testimony was corroborated by other evidence.[7] This evidentiary requirement has fallen into disfavor over the last decade, and many of the state statutes that had imposed it have been repealed.[8] Several courts have held that the retroactive application of the repeal of an accomplice corroboration requirement runs afoul of the constitutional prohibition of ex post facto laws.[9]

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1. U.S. Const. art. I, § 9, cl. 3 & U.S. Const. art. I, § 10, cl. 1; *see infra* notes 12-17 for the text of these provisions and discussion of the meaning of the term ex post facto laws.

2. *See* Hopt v. Utah, 110 U.S. 574, 590 (1884); *see also infra* notes 38-39 and accompanying text (discussing the two fundamental types of ex post facto law).

3. 432 U.S. 282 (1977).

4. 450 U.S. 24 (1981).

5. *See* Weaver v. Graham, 450 U.S. 24, 29 n.12 (1981); Dobbert v. Florida, 432 U.S. 282, 292-94 (1977).

6. *See* Weaver v. Graham, 450 U.S. 24, 29 n.12 (1981) ("Alteration of a substantial right . . . is not merely procedural, even if the statute takes a seemingly procedural form."); *see also* Gibson v. Mississippi, 162 U.S. 565, 590 (1896) ("[L]egislature[s] may not under the guise of establishing modes of procedure and prescribing remedies violate the . . . ex post facto [clauses]."); Hopt v. Utah, 110 U.S. 574, 590 (1884) (certain changes to the rules of evidence may violate the ex post facto prohibition).

7. *See, e.g.*, Murphy v. Sowders, 801 F.2d 205, 207 (6th Cir. 1986) (repeal of Ky. R. Crim. P. § 9.62), *cert. denied*, 107 S. Ct. 1593 (1987); Government of the Virgin Islands v. Civil, 591 F.2d 255, 257-58 (3d Cir. 1979) (repeal of V.I. Code Ann. tit. 14, § 17); State v. Schreuder, 726 P.2d 1215, 1217-18 (Utah 1986) (repeal of Utah Code Ann. § 77-31-18). For a discussion of accomplice corroboration requirements, *see infra* notes 62-83 and accompanying text.

8. *See infra* notes 81-82 and accompanying text.

9. *See, e.g.*, Government of the Virgin Islands v. Civil, 591 F.2d 255, 259 (3d Cir. 1979); Hart v. State, 40 Ala. 32, 35 (1866); State v. Schreuder, 726 P.2d 1215, 1218 (Utah 1986).

They base their holdings on an ancient but oft-quoted Supreme Court dictum suggesting that any law retroactively altering the "amount or degree of proof" necessary to convict violates the ex post facto clauses.[10] Other courts disregard this dictum and hold that the opposite result is consistent with the Supreme Court's ex post facto decisions.[11]

This Note proposes that retroactive application of an evidentiary change does not violate the ex post facto prohibition unless it acts in such a way as to change the substantive elements of a crime. Judged by this standard, the repeal of an accomplice corroboration requirement does not violate the ex post facto clauses. Part I of this Note traces the history of the ex post facto clauses and the Supreme Court's approach to ex post facto challenges to changes in procedural law. Part II examines the history and nature of accomplice corroboration requirements. Part III discusses the lower courts' treatment of whether the retroactive application of the repeal of accomplice corroboration requirements violates the ex post facto prohibition and concludes that such application does not constitute an ex post facto violation.

I. THE EX POST FACTO CLAUSES

The ex post facto clauses in the Constitution prohibit the passage of ex post facto laws by the federal and state legislatures.[12] The term "ex post facto law" would literally refer to any law, criminal or civil, which gives legal consequences to actions or events that took place before the date of its passage.[13] The clauses, however, have been interpreted to prohibit

10. *See* Hopt v. Utah, 110 U.S. 574, 589-90 (1884).

11. *See* Murphy v. Sowders, 801 F.2d 205, 209-10 (6th Cir. 1986), *cert. denied*, 107 S. Ct. 1593 (1987); Murphy v. Commonwealth, 652 S.W.2d 69, 72-73 (Ky. 1983).

12. Article I, § 9 of the Constitution applies to the federal government and provides that "No Bill of Attainder or ex post facto Law shall be passed." U.S. Const. art I, § 9, cl. 3. Article I, § 10 applies to the states and provides that: "No State shall . . . pass any Bill of Attainder, [or] ex post facto Law . . . ." U.S. Const. art. I, § 10 cl. 1.

The term "ex post facto laws" in these two provisions has been construed to have the same meaning, and cases interpreting one are cited freely as authority in opinions involving the other. *See* Annotation, *Supreme Court's Views as to What Constitutes an Ex Post Facto Law Prohibited by Federal Constitution*, 53 L. Ed. 2d 1146, 1150 (1978). *Compare, e.g.*, Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 322-28 (1867) (invalidating state law on ex post facto and bill of attainder grounds) *with Ex parte* Garland, 71 U.S. (4 Wall.) 333, 377-78 (1867) (invalidating analogous federal law on same grounds: "the argument presented in [Cummings] is equally applicable to the act of Congress under consideration in this case").

For general commentary on the ex post facto clauses, see J. Nowak, R. Rotunda, & J. Young, Constitutional Law § 11.9(b) (3d ed. 1986) [hereinafter Nowak, Rotunda & Young]; L. Tribe, American Constitutional Law §§ 10-2, 10-3 (1978); Crosskey, *The True Meaning of the Constitutional Prohibition of Ex-Post-Facto Laws*, 14 U. Chi. L. Rev. 539 (1947); Field, *Ex Post Facto in the Constitution*, 20 Mich. L. Rev. 315 (1922); McAllister, *Ex Post Facto Laws in the Supreme Court of the United States*, 15 Calif. L. Rev. 269 (1927).

13. *See* Fletcher v. Peck, 10 U.S. 48, 77, 6 Cranch 87, 138 (1810); Calder v. Bull, 3 U.S. 305, 308, 3 Dall. 386, 390 (1798) (opinion of Chase, J.); Crosskey, *supra* note 12, at 539.

only legislative acts[14] that operate to the detriment[15] of a criminal defendant[16] whose alleged crime was committed before the date of enactment.[17]

The Framers' aversion to ex post facto laws was based on their notion of the inherent limits of legislative power.[18] Some of the delegates to the constitutional convention perceived such legislation as so contrary to the basic principles of republican government that they doubted whether it was necessary to include an explicit prohibition.[19] But the generation

14. The ex post facto clauses only apply to acts of the Congress and the state legislatures. *See, e.g.*, Marks v. United States, 430 U.S. 188, 191 (1977), Frank v. Mangum, 237 U.S. 309, 344 (1915); Ross v. Oregon, 227 U.S. 150, 161 (1913); Fletcher v. Peck, 10 U.S. 48, 77, 6 Cranch 87, 138 (1810); Calder v. Bull, 3 U.S. 305, 308, 3 Dall. 386, 389-90 (1798) (opinion of Chase, J.). They apply to every form in which legislative power may be exerted, including constitutions, constitutional amendments, municipal ordinances, and any act of any instrumentality of the state exercising delegated legislative authority. Ross v. Oregon, 227 U.S. 150, 162-63 (1913). Retroactive acts of the judiciary that unforseeably enlarge the meaning of a criminal statute may be void under the due process clause. *See* Bouie v. City of Columbia, 378 U.S. 347, 353-55 (1964).

15. In order for an act to violate the ex post facto prohibition, it must operate to the disadvantage of the defendant. *See* Weaver v. Graham, 450 U.S. 24, 29 (1981); Dobbert v. Florida, 432 U.S. 282, 294 (1977); Lindsey v. Washington, 301 U.S. 397, 401 (1937); Rooney v. North Dakota, 196 U.S. 319, 325 (1905); Calder v. Bull, 3 U.S. 305, 309, 3 Dall. 386, 390 (1798) (opinion of Chase, J.).

The Supreme Court does not look at the impact that a change has on a particular defendant, but at the overall effect of the challenged law. *See* Weaver v. Graham, 450 U.S. 24, 33 (1981) ("[Ex post facto] inquiry looks to the challenged provision, and not to . . . its effect on the particular individual."); Dobbert v. Florida, 432 U.S. 282, 294 (1977) (Court looks at the new procedure *in toto*, rather than to any effect that it may have had on the defendant challenging it).

16. It is well settled that the ex post facto prohibition applies only to acts of criminal or penal legislation. *See* Galvan v. Press, 347 U.S. 522, 531 n.4 (1954); Baltimore & S.R.R. v. Nesbit, 51 U.S. 416, 423, 10 How. 395, 402 (1850); Calder v. Bull, 3 U.S. 305, 313-14, 3 Dall. 386, 396-97 (1798) (opinion of Paterson, J.). *But see* Harisiades v. Shaughnessy, 342 U.S. 580, 594-95 (1952) (questioning this rule); Satterlee v. Matthewson, 27 U.S. 242, 264 & n.(a), 2 Peters 380, 416 & n.(a) at 415-16e (1829) (Johnson, J., concurring) (arguing that the ex post facto clauses should also be applied to civil legislation); Crosskey, *supra* note 12, *passim* (arguing that at the time of the adoption of the Constitution, the clauses generally were understood also to refer to civil legislation); Note, *Ex Post Facto Limitations on Legislative Power*, 73 Mich. L. Rev. 1491, 1505 (1975) [hereinafter *Ex Post Facto Limitations*] (arguing that any law that attempts to influence behavior through the threat of some detriment should be subject to the ex post facto prohibition). A law that is civil in form, but punitive in effect, also will violate the ex post facto prohibition. *See* Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 327 (1867).

17. *See* Weaver v. Graham, 450 U.S. 24, 29 (1981).

18. *See* Dobbert v. Florida, 432 U.S. 282, 307 & n.8 (1977) (Stevens, J., dissenting); J. Madison, Journal of the Federal Convention 586 (E. Scott ed. 1970); The Federalist No. 44, at 297 (J. Madison) (P. Ford ed. 1898).

19. The inclusion of the ex post facto clauses in the Constitution was not extensively debated at the federal convention, nor were the reasons for the prohibition discussed. The delegates seem to have taken it for granted that it would be inherently beyond the power of the legislatures to pass ex post facto laws. In fact, some of the delegates argued that the provisions were superfluous. *See* Madison, *supra* note 18, at 586. "Mr. Ellsworth contended that there was no lawyer, no[r] civilian, who would not say that *ex post facto* laws were void of themselves. It cannot, then, be necessary to prohibit them." *Id.* Another delegate felt that the inclusion of the clauses would "bring reflections on the

that saw the ratification of the Constitution wanted to prevent the political abuses to which ex post facto laws could be put. In a number of well-known historical incidents, the British Parliament had passed bills of attainder[20] or ex post facto laws to ensure the conviction of political opponents.[21] These incidents were referred to by the pamphleteers who argued for ratification of the Constitution,[22] and by the Supreme Court in its first ex post facto case.[23] Thus, the inclusion of the prohibition on ex post facto laws and bills of attainder was meant to uphold the separation of powers by preventing improper legislative interference in the judicial process.[24]

Constitution, and proclaim that we are ignorant of the first principles of legislation, or are constituting a government that will be so." *Id. But see* Crosskey, *The Ex-Post-Facto and the Contracts Clauses in the Federal Convention: A Note on the Editorial Ingenuity of James Madison*, 35 U. Chi. L. Rev. 248, 250-51 (1968) (arguing that Madison's notes do not accurately reflect the controversy over the meaning of the ex post facto prohibition).

20. Bills of attainder are legislative acts that summarily convict a person or class of persons without the procedural safeguards of a formal judicial proceeding. *See* Nowak, Rotunda & Young, *supra* note 12, § 11.9(c), at 394. The constitutional prohibition of bills of attainder proscribes any legislative act "no matter what [its] form, that appl[ies] either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial." United States v. Lovett, 328 U.S. 303, 315 (1946). The constitutional ban encompasses what had been called bills of attainder, where the punishment imposed was capital, and bills of pains and penalties, where lesser penalties were imposed. *See* Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 323 (1867); Nowak, Rotunda & Young, *supra* note 12, § 11.9(c), at 394; L. Tribe, *supra* note 12, § 10-4, at 484-85; Comment, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 Yale L.J. 330, 331 & n.5, 334 (1962) [hereinafter *The Bounds of Legislative Specification*].

In Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867), and *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1867), the Supreme Court held that laws imposing severe professional disabilities on those who could not swear an oath that they had not participated in the confederate cause in the Civil War violated the constitutional prohibition of bills of attainder and ex post facto laws. *Cummings*, 71 U.S. (4 Wall.) 277, 323-28, *Garland*, 71 U.S. (4 Wall.) 333, 377-78. Modern bill of attainder cases have concerned legislative persecution of members of the communist party. *Compare* United States v. Brown, 381 U.S. 437 (1965) (law that made it illegal for a member of the communist party to hold office in a labor union invalidated as a bill of attainder) *with* Garner v. Board of Pub. Works, 341 U.S. 716 (1951) (law that required employees to take an oath that they had never been members of the communist party upheld as establishing legitimate eligibility requirements for public employment). For general discussion of bills of attainder, see Z. Chafee, Three Human Rights in the Constitution 90-161 (1956); Nowak, Rotunda & Young, *supra* note 12, § 11.9(c); *The Bounds of Legislative Specification*, *supra*.

21. *See* Calder v. Bull, 3 U.S. 305, 308, 3 Dall. 386, 389 (1798) (opinion of Chase, J.). The legislatures of several of the newly independent states also had passed ex post facto laws. *See id.* 3 Dall. at 389; Crosskey, *supra* note 12, at 540-41.

22. *See* The Federalist No. 44, at 296-97 (J. Madison) (P. Ford ed. 1898); The Federalist No. 84, at 571 (A. Hamilton) (P. Ford ed. 1898); Coxe, *An Examination of the Constitution*, in Pamphlets on the Constitution of the United States; Published During its Discussion by the People 1787-1788 133, 147 (P. Ford ed. 1968).

23. *See* Calder v. Bull, 3 U.S. 305, 307-08, 3 Dall. 386, 389 (1798) (opinion of Chase, J.); *id.* at 316, 3 Dall. at 399-400 (opinion of Iredell, J.).

24. *See* Weaver v. Graham, 450 U.S. 24, 29 n.10 (1981) (ex post facto prohibition "upholds the separation of powers by confining the legislature to penal decisions with prospective effect and the judiciary and executive to applications of existing penal law" (citing Ogden v. Blackledge, 6 U.S. (2 Cranch) 272, 277 (1804))); Cummings v. Missouri,

Although the historical purpose of the ex post facto prohibition to restrain the legislatures has long been acknowledged,[25] only recently has the Supreme Court begun to elucidate its more theoretical underpinnings.[26] The Court decided its earliest ex post facto cases without providing a rationale for its holdings. In *Calder v. Bull*,[27] the first Supreme Court case to construe the clauses, Justice Chase stated simply that ex post facto laws were contrary to the first principles of government and susceptible to abuse for improper purposes.[28] His opinion then enumerated several historical incidents in which the British Parliament had used ex post facto legislation to convict people for political reasons[29] and listed corresponding[30] types of laws that would be prohibited as ex post facto.[31] Later, the Court referred to this list as a kind of catalogue of possible ex post facto violations, without developing a strong theoretical ground-

71 U.S. (4 Wall.) 277, 323 (1867) (bill of attainder is a legislative act that inflicts punishment without a judicial trial); Calder v. Bull, 3 U.S. 305, 307, 3 Dall. 386, 388 (1798) (legislatures prohibited from passing ex post facto laws because these were thought to be an "exercise of judicial power") (opinion of Chase, J.); Prater v. United States Parole Comm'n, 802 F.2d 948, 952 (7th Cir. 1986) (en banc) (rule against ex post facto laws is based on desire "to keep legislatures out of the business—which is judicial business—of punishing people"); The Federalist No. 78 at 530 (A. Hamilton) (P. Ford ed. 1898); L. Tribe, *supra* note 12 § 10-5, at 491.

25. *See, e.g.*, Fletcher v. Peck, 10 U.S. 48, 77, 6 Cranch 87, 138 (1810); Calder v. Bull, 3 U.S. 305, 306-07, 3 Dall. 386, 388-90 (1798) (opinion of Chase, J.).

26. In Weaver v. Graham, 450 U.S. 24 (1981), the Court stated that the ex post facto prohibition was meant to ensure that individuals would have fair warning of legislative enactments so that they may act in reliance thereon, and to restrain the legislatures from arbitrary and vindictive acts. *See id.* at 28-29; *see also* Dobbert v. Florida, 432 U.S. 282, 297 (1977) (statute did not violate the ex post facto prohibition because defendant had fair warning that the act he committed was criminal and what punishment would be imposed for it). The authorities cited in *Weaver* for the factors of fair warning and reliance are *Dobbert*, 432 U.S. at 298, and two older cases, Kring v. Missouri, 107 U.S. 221, 229 (1883), and Calder v. Bull, 3 U.S. 305, 306, 3 Dall. 386, 387 (1798). Explicit reference to fair warning and reliance, however, did not enter the Supreme Court's ex post facto jurisprudence until *Dobbert* and *Weaver*. The Court's citation to *Kring* and *Calder* can only be described as creative.

27. 3 U.S. 305, 3 Dall. 386 (1798) (Justices Chase, Paterson and Iredell delivered opinions *seriatim*).

28. *See* 3 U.S. 305, 307, 3 Dall. 386, 388-89 (1798) (opinion of Chase, J.).

29. 3 U.S. 305, 307-08, 3 Dall. 386, 389 (1798) (opinion of Chase, J.).

30. Justice Chase discussed the circumstances of four historical incidents in which the British Parliament had passed ex post facto laws, *see id.* at 307-08, 3 Dall. at 389, and several paragraphs later listed four types of laws that would violate the ex post facto prohibition. *See id.* at 309, 3 Dall. at 390-91. This list corresponds closely to the types of action Parliament had taken in the historical incidents enumerated.

31. In *Calder*, Justice Chase stated what he considered to be ex post facto laws:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

Id. at 309, 3 Dall. at 390.

work for the constitutional prohibition.[32] As a result, the Supreme Court's case law on the ex post facto clauses developed as a series of fact-specific precedents that often addressed arcane legislative changes unlikely to recur.[33]

In a recent case, *Weaver v. Graham*,[34] the Court noted three reasons for the ban on ex post facto laws. First, it ensures that citizens are given fair warning of what acts will be penalized and to what extent.[35] Second,

32. *See, e.g.*, Malloy v. South Carolina, 237 U.S. 180, 183-84 (1915) (quoting list in its entirety); Mallett v. North Carolina, 181 U.S. 589, 593-94 (1901) (same); Gibson v. Mississippi, 162 U.S. 565, 589-90 (1896) (paraphrasing list); Duncan v. Missouri, 152 U.S. 377, 382 (1894) (paraphrasing list without citing *Calder*); Kring v. Missouri, 107 U.S. 221, 228 (1883) (quoting list in its entirety); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 325-26 (1867) (paraphrasing list without citing to *Calder*).

33. *See, e.g.*, Thompson v. Missouri, 171 U.S. 380 (1898) (change in method of proving handwriting evidence); Thompson v. Utah, 170 U.S. 343 (1898) (change in number of jurors and degree of unanimity required, occurring when Utah went from territorial status to statehood); Kring v. Missouri, 107 U.S. 221 (1883) (new law changed provision that had barred prosecution for first-degree murder on retrial after reversal of earlier conviction on plea of guilty to second-degree murder); Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867) (sanctions imposed against participants in the Confederate war effort).

Kring is the principal Supreme Court precedent for the defeat of a procedural change on ex post facto grounds. The rationale for the holding, however, was unclear, and later courts, including the Supreme Court itself, had trouble making analogies to the *Kring* facts. For example, in Hopt v. Utah, 110 U.S. 574 (1884), the Court dismissed the complicated facts of the *Kring* case by saying simply that there were "no such features in the case before us," without giving any indication what features it was referring to. *Id.* at 588.

34. 450 U.S. 24 (1981).

35. *See id.* at 28-29. The ban on ex post facto legislation reflects the pluralistic nature of our society. In a population with a heterogeneous religious and ethical background, people cannot be assumed to share notions of right and wrong. *See* Warren v. United States Parole Comm'n, 659 F.2d 183, 188 n.22 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 950 (1982); *Ex Post Facto Limitations*, *supra* note 16, at 1500 n.34. In such a society, it would be unfair to subject someone to criminal liability for an action unless she has been put on notice, at least constructively, *see infra* note 154, that such action will be regarded as culpable. *See* Warren v. United States Parole Comm'n, 659 F.2d 183, 188 n.22 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 950 (1982); *Ex Post Facto Limitations*, *supra* note 16, at 1501 n.34. The ex post facto prohibition would thus seem to foreclose any possibility that penal sanctions could be imposed as a matter of common law.

Ironically, although the ex post facto prohibition may reflect the Framers' recognition that ideas of criminality are neither inherent nor universal, their arguments in favor of the ex post facto clauses were grounded almost entirely in notions of natural law. *See* Lewis, Anti-Federalists Versus Federalists: Selected Documents 50-51 (1967) (pointing out that although the authors of The Federalist made most of their arguments on the basis of practical principles, their arguments in favor of the ex post facto clauses were based on natural law (citing to The Federalist No. 44 (J. Madison))).

There may be acts so universally regarded as heinous that it is fair to punish them even though they were not proscribed by any positive law in effect at the time they were committed. Such would seem to be the case with regard to certain acts of international belligerence and so-called war crimes. *See* Warren v. United States Parole Comm'n, 659 F.2d 183, 188 n.22 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 950 (1982); *Ex Post Facto Limitations*, *supra* note 16, at 1500 n.34. The convictions at Nuremburg were based primarily on the application of universal law. In Warren v. United States Parole Comm'n, 659 F.2d 183 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 950 (1982), the court stated:

> To assert that it is unjust to punish those who in defiance of treaties and assur-

it protects the right of citizens to choose their actions in reasonable reliance on existing laws, without fear that the laws will be changed capriciously or maliciously.[36] Third, the ban prevents arbitrary or vindictive acts on the part of the legislature.[37]

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ances have attacked neighbouring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.

659 F.2d at 188 n.22 (quoting *In re* Goering, 1946 Ann. Dig. (13 Int'l Rep.) 203, 208 (Int'l Milit. Trib.)); *see also Ex Post Facto Limitations*, *supra* note 16, at 1497 n.19 (same quotation); Hentoff, *Profiles (Cardinal O'Connor Part I)*, The New Yorker, March 23, 1987 at 59, 72-73 (discussing natural or universal law and stating that the judgments at Nuremberg were based on this type of unwritten law). The attempt of the Confederate States to secede from the Union, it would seem, did not reach this level. The Supreme Court used the constitutional prohibition on bills of attainder and ex post facto laws to restrain the Congress and state legislatures from penalizing those who had supported the rebel cause. *See* Cummings v. Missouri, 71 U.S. (4 Wall.) 277, *passim* (1867); *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 377-78 (1867).

36. *See* Weaver v. Graham, 450 U.S. 24, 28-29 (1981).

37. *See id.* at 29; Malloy v. South Carolina, 237 U.S. 180, 183 (1915). The relatively recent addition of the factors of fair warning and reliance to the Supreme Court's ex post facto jurisprudence suggests that these factors were not prominent in the minds of the Framers, who seemed concerned almost exclusively with preventing improperly motivated legislation. In Warren v. United States Parole Comm'n, 659 F.2d 183 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 950 (1982), the court wrote: "From the outset . . . the ex post facto clauses have been understood to have been principally aimed at curtailing legislative abuses." *Id.* at 187. *See* Note, *Ex Post Facto Limitations*, *supra* note 16, at 1501.

By requiring that criminal laws apply only prospectively, the Framers limited the legislatures to the use of penal legislation as a so-called specific, or special, deterrent. *See* Warren v. United States Parole Comm'n, 659 F.2d 183, 188 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 950 (1982); *Ex Post Facto Limitations*, *supra* note 16, at 1498-1500. The Massachusetts Supreme Judicial Court observed:

> The reason why [ex post facto] laws are so universally condemned is, that they overlook the great object of all criminal law, which is, to hold up the fear and certainty of punishment as a counteracting motive, to the minds of persons tempted to crime, to prevent them from committing it. But a punishment prescribed after an act is done, cannot, of course, present any such motive. It is contrary to the fundamental principle of criminal justice, which is, that the person who violates a law deserves punishment, because he wilfully breaks a law, which, in theory, he knows or may know to exist. But he cannot know of the existence of a law which does not, in fact, exist at the time, but is enacted afterwards.

Jacquins v. Commonwealth, 63 Mass. (9 Cush.) 279, 281 (1852). Retroactive legislation might well serve the other purposes of the penal law: retribution, rehabilitation, incapacitation, and general deterrence. *See* Warren v. United States Parole Comm'n, 659 F.2d 183, 188 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 950 (1982); *Ex Post Facto Limitations*, *supra* note 16, at 1498-1500. In *Warren*, the Court stated:

> The constitutional ban on ex post facto laws . . . suggests that the framers considered the possibility of special deterrence a prerequisite to the imposition of specifically criminal penalties. The framers' position may have been based on the idea that, because special deterrence is so central to the criminal law, enactment of a criminal statute that cannot serve this function raises a strong presumption that the legislature's motives are impermissible. Since judicial inquiry into the motives of the legislature is difficult and unseemly, the framers may have considered it the better course to ban such legislation from the start.

Id. at 188-89.

There are two kinds of retroactive laws that the ex post facto clauses clearly prohibit: those that change the elements of a crime or create a new one,[38] and those that increase the amount of punishment meted out for an existing violation.[39] Retroactive changes to rules of criminal procedure generally fall outside these two categories.[40] Although the Supreme Court has stressed that a defendant does not have a right to be tried in all respects by the procedures in effect at the time she committed her crime,[41] the Court often has acknowledged that a procedural or evidentiary change can rise to the level of an ex post facto violation.[42]

38. *See* Beazell v. Ohio, 269 U.S. 167, 169-70, (1925); Gibson v. Mississippi, 162 U.S. 565, 589 (1896); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 325-26, 329 (1867); Calder v. Bull, 3 U.S. 305, 309, 3 Dall. 386, 390-91 (1798).

39. *See* Weaver v. Graham, 450 U.S. 24, 28 (1981); Dobbert v. Florida, 432 U.S. 282, 292 (1977); Lindsey v. Washington, 301 U.S. 397, 401 (1937); Beazell v. Ohio, 269 U.S. 167, 169-70 (1925); Gibson v. Mississippi, 162 U.S. 565, 589-90 (1896). The Court is much less strict about changes in the nature of punishment. It upheld a change in the method of administering capital punishment from hanging to electrocution, finding that this did not increase the punishment, and that for all the Court could tell might actually mitigate it. *See* Malloy v. South Carolina, 237 U.S. 180, 183 (1915); *see also* Rooney v. North Dakota, 196 U.S. 319, 324-26 (1905) (retroactive change in the circumstances of confinement in the period before prisoner was to be executed held not to violate the ex post facto prohibition). The Court's ex post facto analysis does not look at the impact of a change on a particular defendant, but at the overall effect of the challenged law on all defendants. *See* Weaver v. Graham, 450 U.S. 24, 33 (1981) ("[Ex post facto] inquiry looks to challenged provision, and not to . . . its effect on the particular individual."); Dobbert v. Florida, 432 U.S. 282, 294 (1977) (Court looks at the new procedure *in toto*, rather than to any effect that it may have had on the defendant challenging it). Thus, retroactive application of a law making the former maximum sentence mandatory was found invalid despite that it may have caused no increase in the punishment given to the particular defendant who challenged it. *See* Lindsey v. Washington, 301 U.S. 397, 401-02 (1937).

40. *See* Weaver v. Graham, 450 U.S. 24, 29 n.12 (1981); Dobbert v. Florida, 432 U.S. 282, 293-94 (1977); Hopt v. Utah, 110 U.S. 574, 590 (1884); *see also Ex Post Facto Limitations*, *supra* note 16, at 1492-94 (discussing uncertainty of application of the ex post facto prohibition to legislative changes that neither increase punishment or change the elements of a crime). For discussion of the application of the ex post facto prohibition to changes in procedural law, see *Ex Post Facto Limitations*, *supra* note 16; Note, *Changes in Procedural Law as Ex Post Facto Legislation*, 74 U. Pa. L. Rev. 400 (1925) [hereinafter *Changes in Procedural Law*].

41. In Gibson v. Mississippi, 162 U.S. 565 (1896), the Court wrote:

> The inhibition upon the passage of *ex post facto* laws does not give a criminal a right to be tried, in all respects, by the law in force when the crime charged was committed. The mode of trial is always under legislative control, subject only to the condition that the legislature may not, under the guise of establishing modes of procedure and prescribing remedies, violate the accepted principles that protect an accused person against *ex post facto* enactments.

Id. at 590; *see also* Hopt v. Utah, 110 U.S. 574, 590 (1884) (legislation in question "relate[d] to modes of procedure only, in which no one can be said to have a vested right, and which the State, upon grounds of public policy, may regulate at pleasure").

42. *See* Beazell v. Ohio, 269 U.S. 167, 171 (1925); Thompson v. Missouri, 171 U.S. 380, 388 (1898); Kring v. Missouri, 107 U.S. 221, 228, 232 (1883); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 326 (1867); Calder v. Bull, 3 U.S. 305, 309, 3 Dall. 386, 390-91 (1798).

Nonetheless, the Court rarely has held such changes to be invalid[43] and has offered limited guidance as to what type of procedural change may run afoul of the constitutional prohibition.[44]

In 1883 the Supreme Court introduced the substantial rights test for ex post facto challenges to changes in criminal procedure.[45] Under this test, a procedural change cannot be applied retroactively if it infringes on a substantial right that the defendant enjoyed at the time she commited her crime. This has left lower courts without guidance on whether to emphasize the amount of detriment caused to the defendant or the nature of

43. Kring v. Missouri, 107 U.S. 221 (1883), and Thompson v. Utah, 170 U.S. 343 (1898), appear to be the only two cases in which the Court has invalidated procedural changes on ex post facto grounds. *See Ex Post Facto Limitations*, *supra* note 16 at 1507-11; *infra* notes 50-55.

44. *See infra* notes 45-46 and accompanying text (discussing the ambiguity of the "substantial rights" test); *see also* Beazell v. Ohio, 269 U.S. 167, 171 (1925) ("Just what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibition cannot be embraced within a formula or stated in a general proposition.").

45. *See* Kring v. Missouri, 107 U.S. 221, 232 (1883) (5-4 decision). Kring pleaded guilty to second-degree murder and was sentenced to twenty-five years imprisonment. He appealed on the ground that his plea agreement with the prosecutor had called for a sentence not to exceed ten years. The state supreme court reversed the conviction and remanded the case. At the time of Kring's alleged crime, his plea and subsequent conviction of second-degree murder would have functioned as an absolute bar to prosecution for first-degree murder in his trial on remand. By the time of Kring's retrial, this law had been changed. On remand, he was convicted of first-degree murder and sentenced to death. This was affirmed by the state supreme court. *See id.* at 221-22. The Supreme Court, split five to four, held that this did violate the ex post facto prohibition. *See id.* at 235-36.

Although the *Kring* majority was certain that the new law was ex post facto, it had difficulty expressing exactly why. At first, the majority tried to fit the *Kring* facts into the *Calder* categories of ex post facto laws. *See id.* at 227-28. It suggested that the legislative change effectively increased the punishment for the crime, and that it changed the rules of evidence, in the sense that the previous conviction of second-degree murder had been "conclusive evidence of innocence of the higher grade of murder." *Id.* at 228. The latter assertion was not quite true, since under the prior statute a subsequent prosecution for first-degree murder simply had been barred. Perhaps sensing that these arguments were weak, the majority stated that the *Calder* categories were not meant to be exclusive and sought other grounds for its decision. *See id.* The Court found that the legislative change had deprived Kring of a defense to which the law at the time he committed his crime had entitled him, and suggested that any retroactive legislation, procedural or otherwise, would violate the ex post facto prohibition if it altered the situation of the defendant to his disadvantage. *See id.* at 228-29 (citing United States v. Hall, 26 F. Cas. 84, 86 (C.C.D. Pa. 1809) (No. 15,285)).

Kring seemed to stand for the proposition that any retroactive change in procedural law that operated to the detriment of a defendant would violate the ex post facto clause. Although there must be detriment in order for there to be an ex post facto violation, *see supra* note 15 and accompanying text, to hold that any retroactively applied detrimental change was an ex post facto violation would have given a very liberal construction to the constitutional prohibition. The Court unanimously rejected such a construction in Hopt v. Utah, 110 U.S. 574, 590 (1884), decided just one year later. *Kring* became something of an anomaly, coming to stand for the proposition that any retroactive procedural change that deprives the defendant of a defense will violate the ex post facto prohibition. *See* Thompson v. Missouri, 171 U.S. 380, 383-84 (1898); *Ex Post Facto Limitations*, *supra* note 16, at 1507-09.

the right thwarted.[46]

Although an early Supreme Court dictum had suggested that retroactively applied evidentiary changes not only could, but might necessarily be ex post facto,[47] the Court has never invalidated a simple evidentiary change under this constitutional provision.[48] In two cases, *Hopt v. Utah*[49] and *Thompson v. Missouri*,[50] the Court held that such changes did not infringe upon any substantial rights of a defendant. In *Hopt*, the Court held that the retroactive application of the repeal of a law rendering convicted felons incompetent to testify in court did not violate the ex post facto prohibition,[51] although the change allowed the defendant to be

46. In *Kring*, the Court said that "any law passed after the commission of an offence which . . . 'in relation to that offence, or its consequences, alters the situation of a party to his disadvantage,' is an *ex post facto* law," 107 U.S. at 235 (quoting United States v. Hall, 26 F. Cas. 84, 86 (C.C.D. Pa. 1809) (No. 15,285)), which suggested that any retroactive procedural change that disadvantaged a defendant would thereby infringe on a "substantial right." *See id.* A year later, however, the Court declined to invalidate a retroactive procedural change that clearly caused great detriment to the defendant who challenged it. *See* Hopt v. Utah, 110 U.S. 574, 589-90 (1884) (retroactive application of the repeal of a law which had imposed an absolute testimonial incompetency on convicted felons). In *Hopt*, the Court offered no explanation for its holding that the legislative change did not deprive the defendant of a "substantial right." In Gibson v. Mississippi, 162 U.S. 565, 589 (1896), and Duncan v. Missouri, 152 U.S. 377, 382 (1894), the Court again stated perfunctorily that the challenged procedural changes did not infringe on any "substantial rights." Then in Thompson v. Utah, 170 U.S. 343 (1898), the Court identified substantial rights as those that were regarded as important at the time of the adoption of the Constitution. *See id.* at 352. This might have provided a workable standard but was not followed. *See, e.g.*, Mallett v. North Carolina, 181 U.S. 589, 593-97 (1901) (surveying the Supreme Court's ex post facto case law without any mention of Thompson v. Utah).

47. *See* Calder v. Bull, 3 U.S. 305, 309, 3 Dall. 386, 390-91 (1798).

48. In Kring v. Missouri, 107 U.S. 221 (1883), and Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867), among the grounds for the Supreme Court's invalidation of retroactive laws was that they altered the rules of evidence. *See Kring*, 107 U.S. at 228; *Cummings*, 71 U.S. (4 Wall.) at 328. The evidentiary changes in these cases, however, were collateral to the main effect of the legislation challenged. In *Kring*, the Court argued that the removal of a bar to reprosecution for first-degree murder was an evidentiary change. *See supra* note 45. In *Cummings*, the Court found that a law that penalized those who could not swear an oath that they had not participated in the Confederate war effort introduced a new rule of evidence to prove the crime it created. *See Cummings*, 71 U.S. (4 Wall.) at 327-29. In both cases, the reference to evidentiary changes can be seen as an attempt to fit unique legislation into the categories enumerated in *Calder*. *See Kring*, 107 U.S. at 227-28; *Cummings*, 71 U.S. (4 Wall.) at 325-26. Both were decided before Hopt v. Utah, 110 U.S. 574 (1884), which discredited the *Calder* dictum that retroactive evidentiary changes would violate the ex post facto clause. *See infra* note 134; *see also* Beazell v. Ohio, 269 U.S. 167, 170 (1925) ("statutory changes in the mode of trial or the rules of evidence, which do not deprive the accused of a defense and which operate only in a limited and unsubstantial manner to his disadvantage," are not ex post facto).

49. 110 U.S. 574 (1884) (repeal of statute that had made convicted felons incompetent to testify in court).

50. 171 U.S. 380 (1898) (retroactive change in the evidence that was admissible to prove handwriting not ex post facto); *see also* Splawn v. California, 431 U.S. 595 (1977) (upholding statutory change that allowed jury to infer elements of obscenity violation from evidence of circumstances that had not been admissible previously, but not deciding ex post facto question).

51. *See* Hopt v. Utah, 110 U.S. 574, 589-90 (1884).

convicted of murder and sentenced to death.[52] According to the Court, a change that merely enlarged the class of persons competent to testify would not be found ex post facto,[53] but an evidentiary change might run afoul of the ex post facto clauses if it changed the "quantity or the degree of proof necessary to establish [the defendant's] guilt."[54] In *Thompson*, the Court upheld a retroactively applied change that admitted previously inadmissable evidence to demonstrate the genuineness of disputed writings.[55]

The Supreme Court recently clarified its approach to the ex post facto limitations on procedural changes. In *Dobbert v. Florida*,[56] the Court simply stated that changes to the rules of criminal procedure cannot be ex post facto laws within the meaning of the constitutional prohibition.[57] Although this holding is consistent with the Court's past decisions, which rarely had found such changes to be ex post facto,[58] *Dobbert* represents a distinct change in tone from prior dicta suggesting that procedural changes might violate the ex post facto clauses.[59] The *Dobbert* opinion, however, did not create a standard for distinguishing procedural from substantive changes. Lower courts have taken up this question, recognizing that the mere denomination of a change as "procedural" is not dispositive.[60] A seemingly procedural change may be substantive in nature or have substantive consequences.[61]

II. ACCOMPLICE CORROBORATION REQUIREMENTS

At common law, there was no formal barrier to the conviction of a

52. *See id.* at 575.

53. *See id.* at 589.

54. *Id.*

55. *See* Thompson v. Missouri, 171 U.S. 380, 381 (1898).

56. 432 U.S. 282 (1977).

57. *See id.* at 292-94; *accord* Weaver v. Graham, 450 U.S. 24, 29 n.12 (1981).

58. *See supra* notes 41-44 and accompanying text.

59. *See supra* note 42 and accompanying text. At first glance, the Court's blunt statement that procedural changes do not violate the ex post facto prohibition, *see* 432 U.S. at 292 ("We conclude that the [challenged] changes in the law are procedural, and on the whole ameliorative, and that there is no *ex posto* [sic] *facto* violation." (footnote omitted)); *id.* at 292 n.6 ("These are independent bases for our decision. For example, in Beazell v. Ohio, 269 U. S. 167 (1925), we found a procedural change not *ex post facto* even though the change was by no means ameliorative."), would seem to overrule Kring v. Missouri, 107 U.S. 221 (1883), and Thompson v. Utah, 170 U.S. 343 (1898), which had held that procedural changes can violate the constitutional prohibition. In Weaver v. Graham, 450 U.S. 24 (1981), the Court attempted to reconcile these two approaches by stating that while a change that is "merely" procedural will not violate the ex post facto clauses, a procedural change that alters a substantial right is not "merely" procedural. *Id.* at 29 n.12.

60. *See* United States v. Molt, 758 F.2d 1198, 1201 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1458 (1986).

61. *See* Raimondo v. Belletire, 789 F.2d 492, 494 (7th Cir. 1986); United States v. McCahill, 765 F.2d 849, 850 (9th Cir. 1985); United States v. Molt, 758 F.2d 1198, 1201 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1458 (1986).

defendant based solely on the testimony of an accomplice.[62] This type of testimony, however, has always been viewed with suspicion[63] because it is thought that accomplices will try to implicate their codefendants in order to exculpate themselves.[64] In the days when the role of a state court judge included advising the jury as to the quality and sufficiency of the evidence,[65] judges would warn the jury to examine an accomplice's testimony carefully, giving special attention to whether there was other evidence tending to corroborate the accomplice's assertions.[66] With the decline of this role,[67] many United States jurisdictions instituted a formal rule requiring corroboration of an accomplice's testimony to sustain a conviction.[68] Eventually, almost half of United States jurisdictions enacted statutes requiring such corroboration.[69] The most common form of these statutes mandates that a defendant cannot be convicted on the testimony of an accomplice unless it is corroborated by other evidence tending to connect the defendant to the commission of the crime

62. *See* Murphy v. Sowders, 801 F.2d 205, 208 (6th Cir. 1986), *cert. denied*, 107 S. Ct. 1593 (1987); Cunningham v. State, 54 Ala. App. 656, 658, 312 So. 2d 62, 63-64 (Crim. App. 1975); Alldredge v. State, 45 Ala. App. 171, 173, 227 So. 2d 803, 805 (Crim. App. 1969); People v. Dixon, 231 N.Y. 111, 116, 131 N.E. 752, 753-54 (1921); *In re* Jones, 43 Misc. 2d 390, 395, 251 N.Y.S.2d 242, 247 (N.Y. Fam. Ct. 1964); State v. Douglas, 70 S.D. 203, 224, 16 N.W.2d 489, 499 (1944); Thompson v. State, 691 S.W.2d 627, 631, (Tex. Crim. App. 1984), *cert. denied*, 106 S. Ct. 184 (1985); 7 J. Wigmore, Evidence, § 2056, at 405 (J. Chadbourn rev. 1978); Wigmore, *Required Numbers of Witnesses; A Brief History of the Numerical System in England*, 15 Harv. L. Rev. 83, 99 (1901).

63. *See* New York Guar. and Indem. Co. v. Gleason, 78 N.Y. 503, 512 (1879); *In re* Jones, 43 Misc. 2d 390, 395, 251 N.Y.S.2d 242, 247 (N.Y. Fam. Ct. 1964); 7 J. Wigmore, *supra* note 62, § 2056.

64. *See* Oxenberg v. State, 362 P.2d 893, 896, (Alaska 1961); People v. Belton, 23 Cal. 3d 516, 525, 591 P.2d 485, 491, 153 Cal. Rptr. 195, 202 (1979); State v. Pierce, 107 Idaho 96, 101, 685 P.2d 837, 842 (Ct. App. 1984); State v. Johnson, 237 N.W.2d 819, 822 (Iowa 1976); Glaze v. State, 565 P.2d 710, 712 (Okla. Crim. App. 1977); Eckert v. State, 623 S.W.2d 359, 361 (Tex. Crim. App. 1981); 3 B. Jones, Evidence, § 20:60, at 736 (S. Gard rev. 6th ed. 1972); 7 J. Wigmore, *supra* note 62, § 2057, at 417.

65. *See* 7 J. Wigmore, *supra* note 62, § 2056, at 416; *infra* note 67.

66. *See* People v. Dixon, 231 N.Y. 111, 116, 131 N.E. 752, 753 (1921); Maine v. People, 9 Hun. 113, 120 (N.Y. 1876); 3 B. Jones, *supra* note 64, § 20:60, at 736-37; 7 J. Wigmore, *supra* note 62, § 2056, at 416.

67. Wigmore attributed the spread of these rules to the decline in the informal role of the judge as an advisor to the jury. Once judges were no longer allowed to comment on the evidence, 7 J. Wigmore, *supra* note 62, § 2056, at 416, it was felt that there should be a formal rule protecting defendants from conviction by juries who might not realize that the credibility of accomplices was suspect. *See id.* § 2056, at 416-17.

68. *See, e.g.*, Cal. Penal Code § 1111 (West 1985); Minn. Stat. Ann. § 634.04 (West 1983); N.Y. Crim. Proc. Law § 60.22 (McKinney 1981). For general discussion of accomplice corroboration requirements, see Annotation, *Question as to Who are Accomplices Within the Rule Requiring Corroboration of Their Testimony, as One of Law or Fact*, 19 A.L.R.2d 1352 (1951).

69. In 1975, 24 United States jurisdictions had accomplice corroboration requirements. *See* 7 J. Wigmore, *supra* note 62, § 2056, at 414 n.10 (listing 23); *see also* Mont. Code Ann. § 46-16-213 (1985) (also in effect in 1975). The majority of these were passed between 1850 and 1900. *See infra* note 70 for dates of enactment of the extant accomplice corroboration statutes.

charged.[70]

An accomplice is generally defined as a person who is or could have been indicted for the same crime, arising out of the same events, as the defendant.[71] The status of a witness as an accomplice generally is a question of fact, but may be decided as a matter of law if it is undisputed or

70. The Alaska Accomplice Corroboration Statute, Alaska Stat. § 12.45.020 (1984) (originally enacted 1962), is representative of the texts of these statutes:

> A conviction shall not be had on the testimony of an accomplice unless it is corroborated by other evidence which tends to connect the defendant with the commission of the crime; and the corroboration is not sufficient if it merely shows the commission of the crime or the circumstances of the commission.

See also Ala. Code § 12-21-222 (1986) (originally enacted 1852); Ark. Stat. Ann. § 43-2116 (1977) (originally enacted 1883) (limited to use in trials for felonies); Cal. Penal Code § 1111 (West 1985) (originally enacted 1851) (expressly defines accomplice as "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given"); Ga. Code Ann. § 24-4-8 (1982) (originally enacted 1863); Idaho Code § 19-2117 (1979) (originally enacted 1864) (includes an explicit provision that the corroborative evidence must "in itself, and without the aid of the testimony of the accomplice, ten[d] to connect the defendant with the commission of the offense"); Iowa Code Ann. § 813.2 (R. 20 (3)) (West 1979 & Supp. 1986) (originally enacted 1866) (also applies to "solicited person[s]"); Minn. Stat. Ann. § 634.04 (1983) (originally enacted 1858); Mont. Code Ann. § 46-16-213 (1985) (originally enacted 1947) (prohibits conviction based on the uncorroborated testimony of "one responsible or legally accountable for the same offense"); Nev. Rev. Stat. § 175.291 (1985) (includes provision that corroborating evidence must "in itself, and without the aid of the testimony of the accomplice, ten[d] to connect the defendant with the commission of the offense;" also explicitly defines accomplice as "one who is liable to prosecution, for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given"); N.Y. Crim. Proc. Law § 60.22 (McKinney 1981) (originally enacted 1881) (includes the following provisions:

> 2. An "accomplice" means a witness in a criminal action who, according to evidence adduced in such action, may reasonably be considered to have participated in:
>
> (a) The offense charged; or
>
> (b) An offense based upon the same or some of the same facts or conduct which constitute the offense charged.
>
> 3. A witness who is an accomplice as defined in subdivision two is no less such because a prosecution or conviction of himself would be barred or precluded by some defense or exemption, such as infancy, immunity or previous prosecution, amounting to a collateral impediment to such prosecution or conviction, not affecting the conclusion that such witness engaged in the conduct constituting the offense with the mental state required for the commission thereof.);

N.D. Cent. Code § 29-21-14 (1974) (originally enacted 1877); Okla. Stat. Ann. tit. 22, § 742 (West 1969) (originally enacted 1887); Or. Rev. Stat. § 136.440 (1984) (includes definition of accomplice as one who is criminally liable, under the state statutes governing vicarious liability, for the conduct of the defendant; juvenile witnesses are to be considered accomplices if their conduct would have rendered them such under the law applying to adults); P.R. Laws Ann. tit. 34, App. II, R. 156 (Supp. 1986) (originally enacted 1935) (1974 amendment changed "accomplice" to "coauthor"); S.D. Codified Laws Ann. § 23A-22-8 (1979) (originally enacted 1877); Tex. Crim. Proc. Code Ann. art. 38.14 (Vernon 1979) (originally enacted 1925).

71. *See* Leonard v. State, 43 Ala. App. 454, 463, 192 So. 2d 461, 469 (1966); McClure v. State, 214 Ark. 159, 167, 215 S.W.2d 524, 529 (1948); State v. Wiese, 182 N.W.2d 918, 920 (Iowa 1971); State v. Jones, 347 N.W.2d 796, 800 (Minn. 1984); People v. Beaudet, 32 N.Y.2d 371, 374-75, 298 N.E.2d 647, 649, 345 N.Y.S.2d 495, 498 (1973); People v. Mills, 96 P.R.R. 623, 625-26 (1968); Carrillo v. State, 591 S.W.2d 876, 882 (Tex. Crim.

indisputable.[72] Corroborative evidence generally is defined as evidence that, viewed independently from the testimony of the accomplice, would tend to connect the defendant to the commission of the crime charged.[73] It need not support the particular facts attested to, but should enhance the credibility of the accomplice's assertions by connecting the defendant to the criminal act.[74] The testimony of an accomplice can not be corroborated by that of another accomplice,[75] or by any real evidence that relies on an accomplice for authentication.[76]

Accomplice testimony is technically both competent and admissible, but where it is the sole testimony offered against the accused, the submission of the prosecution's case to the jury is conditioned on the introduction of potentially corroborative evidence.[77] The existence in the record of evidence that may corroborate the accomplice's testimony is a thresh-

App. 1979); *see also* N.Y. Crim. Proc. Law § 60.22 (McKinney 1981) (explicitly incorporating this provision).

72. *See* Leonard v. State, 43 Ala. App. 454, 464, 192 So. 2d 461, 470-71 (1966); DuBois v. State, 258 Ark. 459, 468-70, 527 S.W.2d 595, 600-01 (1975); People v. Ahern, 113 Cal. App. 2d 746, 749, 249 P.2d 63, 70 (1952); People v. Hoover, 12 Cal. 3d 875, 882, 528 P.2d 760, 763, 117 Cal. Rptr. 672, 675 (1974); People v. Beaudet, 32 N.Y.2d 371, 376, 298 N.E.2d 647, 650, 345 N.Y.S.2d 495, 499-500 (1973); State v. Thorson, 264 N.W.2d 441, 442 (N.D. 1978); Carrillo v. State, 591 S.W.2d 876, 882 (Tex. Crim. App. 1979).

73. *See* Christy v. United States, 261 F.2d 357, 359 (9th Cir. 1958), *cert. denied*, 360 U.S. 919 (1959); Cunningham v. State, 54 Ala. App. 656, 658, 312 So. 2d 62, 63-64 (Crim. App. 1975); State v. Pierce, 107 Idaho 96, 100, 685 P.2d 837, 841 (1984); Thompson v. State, 691 S.W.2d 629, 631 (Tex. Crim. App. 1984); Eckert v. State, 623 S.W.2d 359, 361 (Tex. Crim. App. 1981); 3 B. Jones, *supra* note 64, § 20:60, at 738. *But see* Oxenberg v. State, 362 P.2d 893, 896-97 (Alaska 1961) (finding it impractical and unnecessary to attempt to view allegedly corroborative evidence separately from the testimony of the accomplice).

74. *See* Christy v. United States, 261 F.2d 357, 359-60 (9th Cir. 1958), *cert. denied*, 360 U.S. 919 (1959); Dimmick v. State, 473 P.2d 616, 617 (Alaska 1970); Oxenberg v. State, 362 P.2d 893, 896-97 (Alaska 1961); State v. Edwards, 136 Ariz. 177, 185, 665 P.2d 59, 67 (1983); State v. Vesey, 241 N.W.2d 888, 890 (Iowa 1976); Eckert v. State, 623 S.W.2d 359, 361 (Tex. Crim. App. 1981); 3 B. Jones, *supra* note 64, § 20:60, at 738; 7 J. Wigmore, *supra* note 62, § 2059, at 423.

Such evidence need not be sufficient to sustain a guilty verdict by itself, *see* Cunningham v. State, 54 Ala. App. 656, 658, 312 So. 2d 62, 63-64 (Crim. App. 1975); State v. Thorson, 264 N.W.2d 441, 446 (N.D. 1978); Thompson v. State, 691 S.W.2d 627, 631 (Tex. Crim. App. 1984); Eckert v. State, 623 S.W.2d 359, 361 (Tex. Crim. App. 1981), and may be merely circumstantial. *See* Christy v. United States, 261 F.2d 357, 359 (9th Cir. 1958), *cert. denied*, 360 U.S. 919 (1959); State v. Edwards, 136 Ariz. 177, 185, 665 P.2d 59, 67 (1983); People v. Henderson, 34 Cal. 2d 340, 343, 209 P.2d 785, 786 (1949); State v. Rosser, 162 Or. 293, 341-42, 91 P.2d 295, 299 (1939); Eckert v. State, 623 S.W.2d 359, 361 (Tex. Crim. App. 1981).

75. *See* People v. Marshall, 273 Cal. App. 2d 423, 426, 78 Cal. Rptr. 16, 18 (1969); People v. Malone, 205 A.D. 257, 262, 199 N.Y.S. 646, 649 (1923); Rutledge v. State, 507 P.2d 551, 552 (Okla. Crim. App. 1973); Brown v. State, 167 Tex. Crim. 352, 355, 320 S.W.2d 845, 847 (1959); 7 J. Wigmore, *supra* note 62, § 2059, at 421.

76. *See* Ing v. United States, 278 F.2d 362, 366-67 (9th Cir. 1960); People v. Bowley, 59 Cal. 2d 855, 861-62, 382 P.2d 591, 595-96, 31 Cal. Rptr. 471, 475-76 (1963); People v. Siegel, 282 A.D. 747, 748, 122 N.Y.S.2d 638, 639 (1953); Annotation, *Corroboration of Accomplice Witness by Objective Evidence Authenticated by Same Accomplice*, 96 A.L.R.2d 1185 (1964).

77. *See* Leonard v. State, 43 Ala. App. 454, 464-65, 192 So. 2d 461, 470-71 (1966);

old question decided by the judge, who will not submit the issue of guilt to the trier of fact unless it is present.[78] Once potentially corroborative evidence is determined to have been introduced, the question of the weight given to such evidence in regard to the ultimate issue of the guilt of the accused is solely for the trier of fact to decide.[79] The jury is instructed that it must first find whether the witness in question was an accomplice. If it finds that she was, the jury is told that it may not convict the defendant unless it finds that the accomplice's testimony was corroborated by other evidence in the record.[80]

Accomplice corroboration requirements have recently fallen into disfavor. In the last decade, a quarter of the jurisdictions that had statutes requiring the corroboration of an accomplice's testimony repealed them.[81] This reflects a modern trend towards removing evidentiary disabilities and permitting the jury to weigh all of the available evidence.[82] Upon the repeal of these statutes, the question arose whether a defendant

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State v. Johnson, 237 N.W.2d 819, 822 (Iowa 1976); 7 J. Wigmore, *supra* note 62, § 2059, at 421-22 & n.3.

78. *See* Christy v. United States, 261 F.2d 357, 359 (9th Cir. 1958), *cert. denied*, 360 U.S. 919 (1959); Leonard v. State, 43 Ala. App. 454, 464-65, 192 So. 2d 461, 470-71 (1966); Oxenberg v. State, 362 P.2d 893, 897 (Alaska 1961); State v. Vesey, 241 N.W.2d 888, 890-91 (Iowa 1976); State v. Thorson, 264 N.W.2d 441, 445 (N.D. 1978); 7 J. Wigmore, *supra* note 62, § 2059, at 438.

79. *See* Christy v. United States, 261 F.2d 357, 359 (9th Cir. 1958), *cert. denied*, 360 U.S. 919 (1959); Cunningham v. State, 54 Ala. App. 656, 658-59, 312 So. 2d 62, 64 (Crim. App. 1975); Oxenberg v. State, 362 P.2d 893, 897 (Alaska 1961).

80. *See* Christy v. United States, 261 F.2d 357, 359 (9th Cir. 1958), *cert. denied*, 360 U.S. 919 (1959); Cunningham v. State, 54 Ala. App. 656, 658-59, 312 So. 2d 62, 63-64 (Crim. App. 1975); Leonard v. State, 43 Ala. App. 454, 464-65, 192 So. 2d 461, 471 (1966); Oxenberg v. State, 362 P.2d 893, 897 (Alaska 1961).

81. Between 1973 and 1980, six United States jurisdictions withdrew their accomplice corroboration requirements. *See* Ariz. Rev. Stat. Ann. § 13-136 (repealed 1976); Ky. R. Crim. Proc. 9.62 (abolished 1980); N.H. Rev. Stat. Ann. § 579:4 (repealed 1973); Utah Code Ann. § 77-31-18 (superceded 1979); V.I. Code Ann. tit. 14 § 17 (repealed 1978); Wyo. Stat. § 7-6-262 (repealed 1975).

82. In Rosen v. United States, 245 U.S. 467 (1918), the Supreme Court wrote:

> [It is] the disposition of courts and of legislative bodies to remove disabilities from witnesses . . . under dominance of the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court, rather than by rejecting witnesses as incompetent, with the result that this principle has come to be widely, almost universally, accepted in this country and in Great Britain.

Id. at 471; *see also* Washington v. Texas, 388 U.S. 14, 20-22 (1967) (discussing the trend away from the disqualification of witnesses for their supposed inclination to perjure themselves); McCormick on Evidence § 65, at 159-61 (E. Cleary, ed. 3d ed. 1984) (describing the demise of the testimonial disqualification of interested parties); 3 J. Weinstein, Evidence, ¶ 601[05] at 601-37 ("[T]he modern trend . . . has converted questions of competency into questions of credibility while 'steadily moving towards a realization that judicial determination of the question of whether a witness should be heard at all should be abrogated in favor of hearing the testimony for what it is worth.' " (quoting Comment, *Witnesses Under Article IV of the Proposed Federal Rules of Evidence*, 15 Wayne L. Rev. 1236, 1250 (1969))).

whose alleged crime was committed before the date of repeal could be convicted on the uncorroborated testimony of an accomplice. Courts that have addressed whether retroactive application of the repeal of the accomplice corroboration requirement would be an ex post facto law within the meaning of the constitutional prohibition have reached inconsistent results.[83]

III. Ex Post Facto Limitations on the Repeal of Accomplice Corroboration Requirements

A. *The Lower Courts*

Two federal courts of appeals have heard cases in which the retroactive application of the repeal of an accomplice corroboration requirement was challenged on ex post facto grounds. These courts reached conflicting results, although they both relied principally on the same precedent.

In *Government of the Virgin Islands v. Civil*,[84] the Court of Appeals for the Third Circuit found that conviction on the basis of uncorroborated accomplice testimony for a crime that was committed before the repeal of the accomplice corroboration requirement violates the ex post facto clause.[85] The court based its holding on a Supreme Court dictum[86] that is often cited, but rarely followed.[87] This dictum, from the *Hopt* decision, states that a retroactive law may violate the ex post facto prohibi-

83. *Compare* Government of the Virgin Islands v. Civil, 591 F.2d 255, 259 (3d Cir. 1979) (holding that the retroactive application of the repeal of an accomplice corroboration requirement violates the ex post facto prohibition) *and* State v. Schreuder, 726 P.2d 1215, 1218 (Utah 1986) (same) *with* Murphy v. Sowders, 801 F.2d 205, 209 (6th Cir. 1986) (holding that the retroactive application of the repeal of an accomplice corroboration requirement does not violate the ex post facto prohibition), *cert. denied*, 107 S. Ct. 1593 (1987) *and* Murphy v. Commonwealth, 652 S.W.2d 69, 72-73 (Ky. 1983) (same).

84. 591 F.2d 255 (3d Cir. 1979).

85. *See id.* at 259.

86. *See id.* at 259 (citing Hopt v. Utah, 110 U.S. 574, 589-90 (1884)).

87. *See, e.g.*, Isaac v. Engle, 646 F.2d 1122, 1127 n.6 (6th Cir. 1980), *rev'd on other grounds*, 456 U.S. 107 (1982); United States v. Henson, 486 F.2d 1292, 1306 n.15 (D.C. Cir. 1973) (en banc); Landay v. United States, 108 F.2d 698, 705 (6th Cir. 1939), *cert. denied*, 309 U.S. 681 (1940); *Ex parte* Alabama, 433 So. 2d 469, 472 (Ala. 1983); State v. Steelman, 120 Ariz. 301, 318, 585 P.2d 1213, 1230 (1978), *cert. denied*, 449 U.S. 913 (1980); People v. Bradford, 70 Cal. 2d 333, 343 n.5, 450 P.2d 46, 51 n.5, 74 Cal. Rptr. 726, 731 n.5 (Cal. 1969); State v. Moyer, 387 A.2d 194, 197 (Del. 1978); State *ex rel.* Dorton v. Circuit Ct., 274 Ind. 373, 376, 412 N.E.2d 72, 74 (Ind. 1980); Warner v. State, 265 Ind. 262, 271, 354 N.E.2d 178, 184 (1976); State v. Jones, 67 Ohio St. 2d 244, 248, 423 N.E.2d 447, 449 (1981); State v. Norton, 675 P.2d 577, 587 (Utah 1983), *cert. denied*, 466 U.S. 942 (1984); State v. Edwards, 104 Wash. 2d 63, 71, 701 P.2d 508, 512-13 (1985); State v. Pope, 73 Wash. 2d 919, 924-25, 442 P.2d 994, 997-98 (1968); State v. Clevenger, 69 Wash. 2d 136, 141-42, 417 P.2d 626, 630 (1966). *But see* DeWoody v. Superior Ct., 8 Cal. App. 3d 52, 56-57, 87 Cal. Rptr. 210, 212 (1970) (new statute that created presumption of intoxication based on a certain level of blood alcohol was found to violate the ex post facto clauses because it permitted conviction on "less proof, in amount or degree"); State v. Byers, 102 Idaho 159, 166, 627 P.2d 788, 795-96 (1981) (holding that the overuling of a requirement of corroboration of rape victims' testimony cannot be retroactively applied).

tion if it "alter[s] the degree, or lessen[s] the amount or measure, of the proof which was made necessary to conviction when the crime was committed."[88] The *Civil* court read this as referring to alterations in the quantity of evidence required for a guilty verdict.[89] Therefore, to allow a conviction on the testimony of one witness, where the law previously had required corroborating evidence in addition to the testimony of one witness, seemed to reduce the "amount of proof" needed to convict.[90]

In *Murphy v. Sowders*,[91] the Court of Appeals for the Sixth Circuit faced the same issue and held that retroactive application of the repealed statute did not violate the ex post facto clause.[92] Although the majority in *Murphy* agreed that *Hopt v. Utah* was the relevant precedent,[93] it found the facts of the *Hopt* case more apposite than its dictum.[94]

The *Hopt* case concerned the repeal of a statute that made convicted felons incompetent to testify in a court of law.[95] The Supreme Court held that the retroactive application of this repeal did not violate the ex post facto prohibition[96] and upheld Hopt's conviction and sentence of death.[97] To the *Murphy* majority, the repeal of an accomplice corroboration requirement was analogous to the repeal of a law imposing an absolute testimonial disability on felons: both "simply enlarged the class of persons to be considered competent to testify."[98] The *Murphy* majority viewed the reference in the *Hopt* dictum to alterations in the "amount or degree of proof" as referring solely to the standard of proof in a criminal trial—that guilt must be proven beyond a reasonable doubt.[99]

The dissent in the *Murphy* case opined that the majority was making an unconvincing attempt to get around the plain meaning of the *Hopt* dictum.[100] The dissenting opinion agreed with the *Civil* court that the statutory change obviously altered the amount of proof necessary to con-

88. Hopt v. Utah, 110 U.S. 574, 589 (1884).
89. *See* Government of the Virgin Islands v. Civil, 591 F.2d 255, 259 (3d Cir. 1979).
90. *See id.*
91. 801 F.2d 205 (6th Cir. 1986), *cert. denied*, 107 S. Ct. 1593 (1987).
92. *See id.* at 211.
93. *See id.* at 206.
94. *See id.* at 206-07.
95. *See* Hopt v. Utah, 110 U.S. 574, 587-89 (1884).
96. *See id.* at 589-90.
97. *See id.* at 575, 590.
98. Murphy v. Sowders, 801 F.2d 205, 208 (6th Cir. 1986). The *Murphy* majority noted that in both cases the repeal removed an impediment to the testimony of a certain type of witness whose testimony had been deemed incredible as a matter of law. *See id.*
99. *See id.* at 209-10. The *Murphy* majority based its holding on a detailed textual analysis of the *Hopt* opinion, finding that Justice Harlan meant to contrast changes in the elements of a crime, and the burden of proving those elements beyond a reasonable doubt, with mere alterations in trial procedure. " '[Procedural] regulations of the mode in which the *facts* constituting guilt may be placed before the jury can be made applicable . . . without reference to the date of the commission of the offense charged.' " *Id.* at 209 (quoting Hopt v. Utah, 110 U.S. 574, 590 (1884) (emphasis in *Murphy*)).
100. *See id.* at 215 (Brown, J., dissenting). The *Murphy* dissent urged a distinction between the law repealed in *Hopt*, which had deemed felons absolutely incompetent to testify, i.e., incredible as a matter of law, and the repeal of an accomplice corroboration

vict.[101] More significantly, it pointed out that any law altering the standard of proof would be invalid on due process grounds without need to refer to the ex post facto prohibition.[102] Under this view, the *Hopt* dictum would make little sense as referring to the standard of proof and therefore must refer to quantitative rules of evidence.

B. *The* Dobbert *Standard*

In *Dobbert v. Florida*,[103] the Supreme Court made it clear that changes in procedural law are immune to attack on ex post facto grounds unless they can be shown to effect a substantive change.[104] Neither the Supreme Court nor any lower court has enunciated a clear standard for deciding when a seemingly procedural change will be considered substantive for ex post facto purposes.[105] The case law suggests, however, that in order

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requirement, under which accomplices had been competent to testify, but whose credibility was conditioned upon the introduction of corroborative evidence. *Id.*

101. *See id.* at 215.

102. *See id.* at 216.

103. 432 U.S. 282 (1977).

104. *See Dobbert*, 432 U.S. at 292-97; *see also* United States v. McCahill, 765 F.2d 849, 850 (9th Cir. 1985) ("Even if a retroactive change in the law is a disadvantage to the criminal defendant, it does not violate the ex post facto clause if the change is procedural rather than substantive."); United States v. Molt, 758 F.2d 1198, 1201 (7th Cir.) (to violate the the ex post facto prohibition, a procedural change must "alter a substantial right"), *cert. denied*, 106 S. Ct. 1458 (1985); *supra* notes 58-59 and accompanying text (discussing the *Dobbert* holding in the context of the Court's overall ex post facto jurisprudence).

105. In an early case in which the Supreme Court held that a retroactive procedural change could violate the ex post facto prohibition, the Court noted that rules of evidence generally are considered to be in the realm of procedural law. *See* Kring v. Missouri, 107 U.S. 221, 231-32 (1883) (quoting Bishop on Criminal Procedure). However, the question of what will be considered substantive and what procedural "implies different variables depending upon the particular problem for which it is used." Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945). Substance versus procedure for the purpose of ex post facto analysis is recognized as a particular area of inquiry. *See id.* The Supreme Court has not offered any theoretical distinction between matters of procedure and substance under the ex post facto clauses, but has suggested parameters through an "accretion of case law." Dobbert v. Florida, 432 U.S. 282, 292 (1977). In the several cases in which the Court faced ex post facto challenges to evidentiary rules, it has found them to be procedural, *see supra* notes 47-55 and accompanying text, even though one of them concerned the competency of witnesses, *see* Hopt v. Utah, 110 U.S. 574 (1884) (convicted felons), a matter that would be considered substantive under the Federal Rules of Evidence. *See* Fed. R. Evid. 601; Note, *Admissibility of Subsequent Remedial Measures Evidence in Diversity Actions Based on Strict Products Liability*, 53 Fordham L. Rev. 1485, 1491-93 (1985) (discussing the distinctions between substance and procedure incorporated into the Federal Rules of Evidence). Statutes of limitations are substantive for *Erie* purposes, *see* Guaranty Trust Co. v. York, 326 U.S. 99, 110 (1945), but for ex post facto purposes their nature varies. The extension of an unexpired statute of limitations does not violate the ex post facto prohibition, but once the time period expires, it may not be revived retroactively. *See* Black, *Statutes of Limitation and the Ex Post Facto Clauses*, 26 Ky. L.J. 41, 49 (1937). *Compare* Guaranty Trust Co. v. York, 326 U.S. 99, 110 (1945) (statutes of limitations substantive for *Erie* purposes) *with* Clements v. United States, 266 F.2d 397, 399 (9th Cir.) (extension of unexpired statute of limitations does not violate the ex post facto prohibition), *cert. denied*, 359 U.S. 985 (1959) *and* State v. Sneed, 25 (Supp.)

for a procedural change to violate the ex post facto clauses, it must effectively alter the substantive elements of a crime[106] or cause an increase in the punishment meted out for an existing violation.[107] In other words, a

Tex. 66, 67 (1860) (revival of an expired statute of limitations violates the ex post facto prohibition).

106. In Splawn v. California, 431 U.S. 595 (1977), the Court upheld a statutory change that allowed the jury to infer the elements of an obscenity violation from evidence of circumstances that previously had not been admissible. Although the Court did not reach the ex post facto question, *id.* at 601, it seemed to imply that an evidentiary change of this type could allow such different evidence to form the basis of proof, or could create a permissable inference from such different circumstances, as effectively to deny a defendant of notice of what activity would be regarded as culpable. *Id.* at 600. In other words, an evidentiary change could effectively change the substantive elements of a crime. Other commentators agree with this interpretation of *Splawn*. *See* 1 J. Wigmore, Evidence § 7, at 469 n.4 (P. Tillers rev. 1983); *see also* Hopt v. Utah, 110 U.S. 574, 590 (1884) (retroactive evidentiary change which altered "the mode in which the facts constituting guilt may be placed before the jury" but did not "change the ingredients of the offence or the ultimate facts necessary to establish guilt" held not to violate the ex post facto prohibition); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 327-29 (1867) (imposing punishment upon those unable to take oath that they had not taken arms against the Union creates a new crime through a new method of proof, in effect, making it a crime not to be able to manifest one's innocence through the prescribed method of proof); *Ex Post Facto Limitations*, *supra* note 16, at 1515-16 & n.90 (proposing a method of ex post facto analysis that "uphold[s] the long-standing conclusion that the clauses prohibit the retroactive application of evidentiary changes that, in effect, alter the elements of an offense").

107. Among the federal courts of appeals that have construed the ex post facto clauses in light of Weaver v. Graham, 450 U.S. 24 (1981), and Dobbert v. Florida, 432 U.S. 282 (1977), there is a strong consensus that in order for a retroactive procedural change to be substantive for ex post facto purposes, it must cause an increase in punishment. *See* United States v. Alexander, 805 F.2d 1458, 1461 (11th Cir. 1986) (procedural change not ex post facto if it does not increase punishment or change the ingredients of an offense); United States v. Mest, 789 F.2d 1069, 1071 (4th Cir.) (same), *cert. denied*, 107 S. Ct. 163 (1986); United States v. McCahill, 765 F.2d 849, 850 (9th Cir. 1985); ("The law [challenged] is procedural because it does not alter the quantum of punishment."); United States v. Molt, 758 F.2d 1198, 1201 (7th Cir.) ("The presumption is against construing a procedural change as an ex post facto law, and must carry the day [unless] the change works an increase in punishment."), *cert. denied*, 106 S. Ct. 1458 (1985); United States v. Miller, 753 F.2d 19, 21 (3d Cir. 1985) (ex post facto clauses "apply only to laws which impose 'punishment' " (quoting Weaver v. Graham, 450 U.S. 24, 28 (1981))); Dufresne v. Baer, 744 F.2d 1543, 1546 (11th Cir. 1984) (one of the characteristics of an ex post facto law is that it is "disadvantageous to the offender because it may impose greater punishment"), *cert. denied*, 106 S. Ct. 61 (1985); Paschal v. Wainwright, 738 F.2d 1173, 1176 (11th Cir. 1984) (in order to be ex post facto, a law must be "disadvantageous to the [defendant] because it may impose greater punishment. . . . A law which is merely procedural and does not add to the quantum of punishment, however, cannot violate the ex post facto clause even if it is applied retrospectively."). But a procedural change does not cause an increase in punishment by increasing the statistical likelihood of conviction. *See* United States v. McCahill, 765 F.2d 849, 850 (9th Cir. 1985).

Although "statutory changes that merely shift the balance of procedural advantages a little against the defendant can be applied retroactively without becoming ex post facto laws," Prater v. United States Parole Comm'n, 802 F.2d 948, 953 (7th Cir. 1986) (en banc), a procedural change that lightens the prosecutor's burden too greatly might constitute the type of legislative interference in the judicial process that the Framers sought to prevent. *Cf. id.* ("[One] purpose of forbidding ex post facto laws [is] that of keeping the legislature from getting involved in the executive and judicial functions of prosecuting and punishing past acts."). The question is "one of degree." *See* Beazell v. Ohio, 269

retroactive procedural change will not be considered ex post facto unless it acts in such a way as to bring it within one of the two fundamental categories of ex post facto law.[108]

It seems impossible that the alteration of an evidentiary rule could have any impact on the amount of punishment prescribed or given for a criminal act. Rules of evidence relate solely to the establishment of a defendant's criminal liability and do not apply in the process by which actual sanctions are imposed.[109]

An evidentiary change, however, could act in such a way as to change the substantive nature of an offense. It could do so by admitting as proof of the elements of an existing crime acts or circumstances that were beyond the scope of the pre-alteration definition of the crime.[110] The repeal of an accomplice corroboration statute does not have this effect. The rule does not apply to any particular substantive crime, but relates to the procedure in all trials where the sole witness is an accomplice. The corrobo-

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U.S. 167, 171 (1925). The repeal of an accomplice corroboration requirement is a return to the common law and majority rule, and since it actually increases the discretion of the trial court, *see infra* note 160 and accompanying text, and does not single out any one party or group, *see* Dufresne v. Baer, 744 F.2d 1543, 1549 (11th Cir. 1984), *cert. denied*, 106 S. Ct. 61 (1985), it merely is a procedural change and is immune to challenge on ex post facto grounds.

108. *See* United States v. Crozier, 777 F.2d 1376, 1383 (9th Cir. 1985) ("If the change is merely procedural and does not increase the punishment or change the elements of a crime, it is not an *ex post facto* law."); *supra* notes 38-40 and accompanying text. Interpretation of the ex post facto prohibition as prohibiting only those retroactive procedural laws that act in such a way as to bring them into one of the two fundamental categories of ex post facto law gives meaning to the Supreme Court's dictum that "the legislature may not, under the guise of establishing modes of procedure and prescribing remedies, violate the accepted principles that protect an accused person against *ex post facto* enactments." Gibson v. Mississippi, 162 U.S. 565, 590 (1896).

109. In Williams v. New York, 337 U.S. 241 (1949), the Supreme Court wrote:

> Tribunals passing on the guilt of a defendant always have been hedged in by strict evidentiary procedural limitations. But both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.

Id. at 246 (footnote omitted). Accomplice corroboration requirements come into play solely during the process by which guilt or innocence is determined. *See supra* notes 71-80 and accompanying text (discussing operation of accomplice corrobortion requirements).

110. *See* 1 J. Wigmore, *supra* note 106, § 7, at 469 n.4; *supra* note 106; *cf.* Splawn v. California, 431 U.S. 595, 599-601 (1977) (upholding a statutory change that allowed the jury to infer the elements of obscenity violation from evidence of circumstances not previously admissible, but not reaching the ex post facto question); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 327-29 (1867) (imposing punishment upon those unable to take oath that they had not taken arms against the Union violates the ex post facto prohibition by creating a new crime through a new method of proof, in effect, making it a crime not to be able to manifest ones innocence through the prescribed method of proof'); DeWoody v. Superior Ct., 8 Cal. App. 3d 52, 56-57, 87 Cal. Rptr. 210, 212-13 (1970) (new law that created a presumption of intoxication on the finding of a certain level of blood alcohol held invalid as retroactively applied).

ration requirement is not an element of any crime,[111] and its repeal does not change the conduct considered culpable under the definition of the substantive offense with which a defendant is charged.[112]

An evidentiary change also may run afoul of the ex post facto prohibition if it increases the likelihood of conviction to such an extent as virtually to guarantee it. This seems to have been the Supreme Court's concern in an early dictum that stated that retroactive evidentiary changes made *for the purpose of conviction* would violate the ex post facto clause.[113] But such a change more likely would be invalidated as a bill of attainder than as an ex post facto law.[114] Repealing the corroboration requirement increases the likelihood that a defendant will be convicted, but does not do so with the degree of certainty or specificity as to raise it to the level of a bill of attainder.[115]

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111. *See* People v. Spiegel, 60 A.D.2d 210, 212, 400 N.Y.S.2d 73, 75 (1977) (requirement of accomplice corroboration is not an element of the crime charged, but is merely an added procedural device), *aff'd*, 48 N.Y.2d 647, 396 N.E.2d 472, 421 N.Y.S.2d 190 (1979); People v. Johnson, 46 A.D.2d 55, 58, 361 N.Y.S.2d 161, 163 (1974) (same), *aff'd*, 38 N.Y.2d 956, 348 N.E.2d 608, 384 N.Y.S.2d 151 (1976); People v. Luongo, 86 Misc. 2d 120, 125, 382 N.Y.S.2d 266, 269 (Suffolk County Ct. 1976) (same), *modified on other grounds*, 58 A.D.2d 895, 397 N.Y.S.2d 97 (1977), *aff'd*, 47 N.Y.2d 418, 391 N.E.2d 1341, 418 N.Y.S.2d 365 (1979).

112. The prohibition of ex post facto laws is concerned with preventing the retroactive criminalization of activities that were viewed as innocent at the time they were committed. *See supra* note 38. The presence or absence of a corroboration requirement does not come into play until a defendant already has been indicted for the commission of a substantive offense of which she was on constructive notice. The conduct considered culpable and the facts from which such conduct may be inferred are the same whether the corroboration requirement applies or not. It is absurd to assert that the removal of the corroboration requirement criminalizes the commission of a crime when there is no evidence other than the testimony of an accomplice.

113. *See* Calder v. Bull, 3 U.S. 305, 309, 3 Dall. 386, 390 (1798) ("[e]very law that alters the legal rules of evidence . . . *in order to convict* the offender" violates the ex post facto prohibition (emphasis added)) (opinion of Chase, J.); *id.*, 3 Dall. at 391 (law considered ex post facto within the meaning of the constitutional prohibition if it "changes the rules of evidence, *for the purpose of conviction*." (emphasis added) (opinion of Chase, J.)).

This dictum seems to have been based on a faulty historical analogy. The Court discussed the case of Sir John Fenwick (1696) as an example of a time when the Parliament had passed an ex post facto law altering the rules of evidence in order to convict. Actually the Parliament had passed a bill of attainder convicting Fenwick without a judicial trial because it lacked sufficient evidence to convict him in a court of law. A conviction for treason then, as now, required the testimony of two witnesses, but the crown only had one, Fenwick having effected the absence of another. *See* Z. Chafee, *supra* note 20, at 133-35; IV T. Macaulay, History of England 740-68 (1855). Thus, the concern over evidentiary changes expressed in *Calder* seems to be related more to bills of attainder than ex post facto laws.

114. The line between a bill of attainder and an ex post facto law can be a fine one. A legislative act that so alters the substantive elements of a crime or the methods of proving them as to guarantee conviction of a specific person or group of persons may run afoul of both provisions. *See* Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 324-32 (1867) (finding legislation invalid on both ex post facto and bill of attainder grounds); *see also Ex Post Facto Limitations*, *supra* note 16, at 1514 & n.84; *see generally supra* note 20 (discussion of bills of attainder).

115. The repeal of the accomplice corroboration requirement solely disadvantages those defendants against whom the only evidence is the testimony of an accomplice.

The retroactive repeal of an accomplice corroboration requirement does not fall into any of the categories of legislative changes that clearly would be considered substantive for ex post facto purposes: it does not criminalize an action that was innocent when done,[116] nor change the elements of a crime,[117] nor increase the punishment assigned to an existing offense,[118] and does not deprive the defendant of a defense to which she would have been entitled at the time she committed her crime.[119] In

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Whereas the guilt of such a defendant probably would not have been submitted to the jury, *see supra* notes 77-78, after repeal, the jury must examine the evidence to decide whether it can find the defendant guilty beyond a reasonable doubt.

The constitutional prohibition of bills of attainder is meant to preserve the sanctity of the judicial process. *See supra* note 20. In order to be considered a bill of attainder, a law must operate as a legislative decree of the guilt of a specific person or group of persons. *See* Nowak, Rotunda & Young, *supra* note 12, § 11.9(c), at 394. The repeal of an accomplice corroboration requirement does not guarantee the conviction of the defendants affected, since the prosecution still bears the burden of proving guilt beyond a reasonable doubt. The repeal does not apply to any specified person or group of persons. *See The Bounds of Legislative Specification*, *supra* note 20, at 330 (bill of attainder applies to a specific person or group).

116. *See* Hopt v. Utah, 110 U.S. 574, 589 (1884); *supra* note 38.

117. *See* Hopt v. Utah, 110 U.S. 574, 590 (1884); *supra* note 38.

118. *See* Hopt v. Utah, 110 U.S. 574, 589-90 (1884); *supra* note 39.

119. *See* Beazell v. Ohio, 269 U.S. 167, 169-70 (1925) (retroactive procedural change that deprives a defendant of a defense violates the ex post facto prohibition); Thompson v. Missouri, 171 U.S. 380, 384 (1898) (same); Kring v. Missouri, 107 U.S. 221, 229 (1883) (same).

The term defense can refer, in its broadest sense, to any means by which a defendant fights a guilty verdict. *See* Black's Law Dictionary 377-78 (5th ed. 1979). The argument that a witness is an accomplice, whose uncorroborated testimony alone cannot sustain a guilty verdict, might thus be considered a defense. The four dissenting justices in *Kring* argued that a defense should be considered substantive for ex post facto purposes only if it relates to the substantive elements of culpability for the criminal act itself and the circumstances that attended the defendant's conduct. *See Kring*, 107 U.S. at 250-51 (Matthews, J., dissenting). According to the *Kring* dissenters, "defenses" that accrue as a matter of mere procedure may be altered retroactively. *See id.* It appears that the Court has since adopted this view, because it has upheld the withdrawal of other procedural privileges that might have been classified under the broadest definition of defenses. *See, e.g.*, Beazell v. Ohio, 269 U.S. 167, 169-71 (1925) (upholding the retroactive repeal of a law which allowed co-felons to demand separate trials); Thompson v. Missouri, 171 U.S. 380, 386-87 (1898) (upholding a retroactive change in the methods by which handwriting evidence may be proved or disproved); Hopt v. Utah, 110 U.S. 574, 590 (1884) (upholding the retroactive repeal of law which had imposed absolute testimonial incompetency on convicted felons). Deprivation of a substantive defense would effectively change the elements of a crime. The dictum that the ex post facto clauses do not allow the retroactive deprivation of a defense, *see, e.g.*, Beazell v. Ohio, 269 U.S. 167, 169-70 (1925); Thompson v. Missouri, 171 U.S. 380, 384 (1898), thus relates to one of the fundamental categories of ex post facto violation—changes in the substantive nature of an offense. *See supra* note 38 and accompanying text.

According to the *Kring* dissent's definition, an accomplice corroboration requirement would be considered a matter of procedure because it does not change, affect, or in any way relate to the circumstances or elements of an alleged criminal act. *See Kring*, 107 U.S. 221, at 250-51 (1883) (Matthews, J., dissenting). The similarity between the repeal of an accomplice corroboration requirement and the repeal of a statute barring the testimony of convicted felons approved in *Hopt*, *see* Murphy v. Sowders, 801 F.2d 205, 208 (6th Cir. 1986), also suggests that it does not fall within the *Kring* definition of a defense,

sum, the repeal of an accomplice corroboration requirement does not affect any of the ultimate facts that must be proven to obtain a verdict of guilty,[120] nor does it alter the consequences of such a verdict.[121] Returning to the common law rule[122] merely changes the evidence that may be considered by the jury in order to decide the relevant issues of fact.[123] In *Hopt v. Utah*[124] and *Thompson v. Missouri*,[125] the Supreme Court upheld similar retroactive evidentiary changes against ex post facto challenge.[126]

The only attack that can be made on retroactive application of the

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especially since the *Hopt* case was decided only one year after *Kring*. If the right to exclude a felon's testimony was considered a defense, so should the right not to be convicted on the uncorroborated testimony of an accomplice.

It also may be argued that the repeal of the accomplice corroboration requirement does not deprive a defendant of the right to challenge the credibility of an accomplice witness but merely changes the method by which she can do it. *Cf.* United States v. Alexander, 805 F.2d 1458, 1462 (11th Cir. 1986) (holding that a retroactive change in the method of asserting the insanity defense does not deprive defendant of a defense in violation of the ex post facto prohibition).

120. *See* Hopt v. Utah, 110 U.S. 574, 590 (1884).

121. Repeal of the accomplice corroboration requirement relates solely to the process by which actual criminal liability is determined and has no impact on the sanctions that may be imposed once a guilty verdict is reached. *See supra* note 109 and accompanying text.

122. In undertaking its ex post facto analysis, the Court sometimes has considered the nature and fairness of the challenged legislation without regard to its retrospective effect. *See, e.g.*, Thompson v. Missouri, 171 U.S. 380, 387 (1898) ("[n]or can the new rule . . . be characterized as unreasonable"). The fact that the repeal of an accomplice corroboration requirement returns to the common law and majority method of handling accomplice testimony suggests that it is not unjust or oppressive if applied retroactively. *Cf.* Beazell v. Ohio, 269 U.S. 167, 171 (1925) ("The legislation here concerned restored a mode of trial deemed appropriate at common law, with discretionary power in the court. . . . We do not regard it as harsh or oppressive . . . .").

123. The words of the Supreme Court in *Thompson* are applicable here: "The statute did nothing more than remove an obstacle arising out of a rule of evidence that withdrew from the consideration of the jury testimony which, in the opinion of the legislature, tended to elucidate the ultimate, essential fact to be established, namely, the guilt of the accused." 171 U.S. at 387; *see also* Splawn v. California, 431 U.S. 595, 599-601 (1977) (upholding a statutory change that allowed the jury to infer the elements of obscenity violation from evidence of circumstances which previously had not been admissible; the court did not reach the ex post facto question); *Changes in Procedural Law*, *supra* note 40, at 402 (retroactive changes which "affect only the manner of proving a fact which is already an element of the crime charged" do not violate the ex post facto prohibition).

124. 110 U.S. 574 (1884).

125. 171 U.S. 380 (1898).

126. *See supra* notes 47-54 and accompanying text. The lower courts have upheld a variety of evidentiary changes since the *Dobbert* decision. *See, e.g.*, Turley v. State, 356 So. 2d 1238, 1243-44 (Ala. Crim. App. 1978) (upholding the retroactive application of a statute which made evidence of prior sexual relations between accused rapist and victim inadmissible); People v. Dorff, 77 Ill. App. 3d 882, 886-87, 396 N.E.2d 827, 828-30 (1979) (upholding retroactive application of law preventing introduction of evidence of rape victim's past sexual history); People v. Smith, 56 A.D.2d 686, 688, 391 N.Y.S.2d 734, 737 (1977) (same); State v. Slider, 38 Wash. App. 689, 694-95, 688 P.2d 538, 542-43 (1984) (upholding retroactive application of law that made child abuse victim's testimony admissible).

repeal of an accomplice corroboration requirement is that it disadvantages certain defendants.[127] The Supreme Court has made clear that this, in itself, does not mean that a retroactive procedural change violates the ex post facto prohibition.[128] There is little else that may be offered to rebut the presumption that the effect of the repeal of an accomplice corroboration requirement is merely procedural, and thus, under *Dobbert*, immune to attack on ex post facto grounds.[129]

C. *The* Hopt *Dictum*

Although the *Dobbert* decision would seem to be controlling authority for whether the repeal of an accomplice corroboration requirement violates the ex post facto clauses, neither the *Civil* nor the *Murphy* court relied on it. Instead, both found *Hopt* controlling, though for different reasons.[130] The *Murphy* court's analogy to the facts of *Hopt* seems apt,[131] and in relying on them, the *Murphy* majority reached a result that

127. The class of defendants affected by the change may be quite small. The accomplice corroboration requirement, because it changes the common law rule, is strictly construed, *see* Cunningham v. State, 54 Ala. App. 656, 658, 312 So. 2d 62, 65 (Crim. App. 1975); Alldredge v. State, 45 Ala. App. 171, 175, 227 So. 2d 803, 805 (Crim. App. 1969), and even very little additional evidence may satisfy the requirement. *See* Harris v. State, 420 So. 2d 812, 817 (Ala. Crim. App. 1982); Mathis v. State, 414 So. 2d 151, 153 (Ala. Crim. App. 1982). Therefore, only defendants against whom the prosecution has no evidence other than an accomplice's testimony are affected. It may be questioned whether such a case would be prosecuted, even in the absence of the corroboration requirement, or whether a jury would be likely to convict.

128. It is well settled that mere detriment to a defendant is insufficient to support an ex post facto challenge to a procedural change. *See* Dobbert v. Florida, 432 U.S. 282, 293 (1977) ("Even though it may work to the disadvantage of a defendant, a procedural change is not *ex post facto*."); United States v. Crabtree, 754 F.2d 1200, 1202 (5th Cir.) (paraphrasing same), *cert. denied*, 105 S. Ct. 3528 (1985); Chilcott v. Orr, 747 F.2d 29, 34 (1st Cir. 1984) ("[P]rocedural changes in the law are not violative of the Ex Post Facto Clause of the Constitution, even when the change affects such weighty matters as the application of the death penalty." (citing Dobbert v. Florida, 432 U.S. 282 (1977)). A procedural change that increases the statistical likelihood that defendants will be convicted does not violate the ex post facto prohibition. *See* United States v. McCahill, 765 F.2d 849, 850 (9th Cir. 1985); Finney v. State, 179 Ind. App. 316, 321, 385 N.E.2d 477, 480-81 (1979).

129. *See supra* note 104.

130. *See supra* notes 86-94 and accompanying text.

131. *See* Murphy v. Sowders, 801 F.2d 205, 207 (6th Cir. 1986), *cert. denied*, 107 S. Ct. 1593 (1987). The *Hopt* decision addressed the repeal of a rule of competency, *see* Hopt v. Utah, 110 U.S. 574, 588-90 (1884), but the accomplice corroboration requirement is not such a rule. Hence the *Murphy* court's analogy to the *Hopt* facts may not literally be accurate, but if the two repeals are compared in light of the purposes the Supreme Court has enunciated for the ex post facto prohibition, the analogy appears apt. The Supreme Court has identified three purposes for the ex post facto ban: ensuring fair warning, reliance, and preventing legislative abuses. *See supra* notes 35-37 and accompanying text. The extent to which either legislation impacts on these three factors would appear to be exactly the same. In neither case does the alteration of the rule of evidence in any way change the fact that a defendant was on constructive notice of the culpability of the crime when she committed it. The interest that the defendant in either *Hopt* or *Murphy* reasonably might have had in relying on the repealed statute would seem to be identical. Finally, the extent that either repeal might have resulted from improperly motivated

is in accord with the Supreme Court's ex post facto precedents, including the *Dobbert* decision.[132] The *Civil* court's reliance on the dictum from *Hopt* is semantically appealing,[133] but there is little else to support the result reached in that case.

The *Hopt* Court stated in dictum that "[a]ny statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offence was committed, might, in respect of that offence, be obnoxious to the constitutional inhibition upon *ex post facto* laws."[134] Whether this language refers to the standard of proof or quantitative rules of evidence is a matter of dispute.[135]

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legislation or been meant to harm a particular defendant or class of defendants, would also seem to be the same.

132. Under *Dobbert*, there is a presumption that retroactive procedural changes are not ex post facto. *See* Weaver v. Graham, 450 U.S. 24, 29 n.12 (1981); Dobbert v. Florida, 432 U.S. 282, 293 (1977); Hopt v. Utah, 110 U.S. 574, 590 (1884); United States v. Molt, 758 F.2d 1198, 1201 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1458 (1986). The Supreme Court's ex post facto cases rarely have invalidated retroactive procedural changes, *supra* notes 43-44, and seem never to have invalidated a retroactive evidentiary change. *See supra* notes 47-54. This suggests that the retroactive application of the repeal of an accomplice corroboration requirement would not violate the ex post facto clause.

133. In a literal sense, the repeal of accomplice corroboration requirements does seem to reduce the "amount" of evidence necessary to convict: conviction on the testimony of one witness is allowed where one witness plus corroborating evidence would previously have been required. *See* Murphy v. Sowders, 801 F.2d 205, 215 (6th Cir. 1986) (Brown, J., dissenting), *cert. denied*, 107 S. Ct. 1593 (1987); Government of the Virgin Islands v. Civil, 591 F.2d 255, 259 (3d Cir. 1979). It is questionable, however, whether the rule really can be said to relate to the "quantity" of evidence necessary to convict. The notion that one witness's testimony, be she accomplice or otherwise, is somehow a fixed unit of evidence is absurd. Even if one witness's testimony could somehow be considered a fixed quantity of evidence, under the accomplice corroboration requirement a defendant might still have been convicted on the basis of this "quantity" of evidence, as long as the testimony in question was not that of an accomplice in the crime charged.

134. Hopt v. Utah, 110 U.S. 574, 590 (1884). The dictum appears in several places in the opinion in slightly different wordings. *See id.* at 589-90. The words "quantity" and "amount" are interchanged. *Id.*

In finding that a retroactive change in a rule of evidence did not violate the ex post facto clause, the Supreme Court in *Hopt* contradicted its own earlier dictum. In Calder v. Bull, 3 U.S. 305, 3 Dall. 386 (1798), the Court had stated that retroactive evidentiary changes not only could but might necessarily be violative of the ex post facto clauses. *See id.* at 309, 3 Dall. at 390. Although the *Hopt* Court did not cite to the *Calder* opinion, it doubtless was aware of the inconsistency of the result it was reaching. Thus, the problematic *Hopt* dictum may be seen as an attempt to redefine the earlier *Calder* dictum. In *Calder*, Justice Chase had stated that "[e]very law that alters the legal rules of evidence, and receives less, or different, testimony than the law required at the time of the commission of the offence, in order to convict the offender" is an ex post facto law. *Id.*

The *Hopt* decision effectively brought the *Calder* dictum into line with modern ex post facto jurisprudence. *See* Thompson v. Missouri, 171 U.S. 380, 387 (1898) (reciting the Calder categories but leaving out the fourth, relating to rules of evidence); Smith v. State, 291 Ark. 163, 166, 722 S.W.2d 853, 856 (1987) (Supreme Court has departed from the standard enunciated in *Calder*); 1 J. Wigmore, *supra* note 106, § 7, at 465 & nn.2, 3 & 4 (discussing modern status of the *Calder* dictum).

135. *Compare* Murphy v. Sowders, 801 F.2d 205, 209-10 (6th Cir. 1986) (language

Although it is true that a statute decreasing the standard of proof in a criminal case would be invalid on due process grounds whether it was applied retrospectively or prospectively,[136] a statute can run afoul of more than one constitutional provision.[137] The operative question is not whether the *Hopt* Court meant to refer to alterations in the standard of proof. It surely did. The term "degree of proof" generally refers to the standard of certainty to which guilt must be found—the standard of proof.[138] An examination of Supreme Court opinions during the *Hopt* era reveals that this was the meaning the Court ascribed to the phrase,[139] and the Supreme Court and lower courts have invalidated laws that retroactively changed the burden or standard of proof.[140] Rather, the question is whether the Court meant the phrase "amount [elsewhere quantity] or degree of proof" to refer to something more than the mere standard of

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refers to standard of proof), *cert. denied*, 107 S. Ct. 1593 (1987) *with id.* at 214-16 (Brown, J., dissenting) (language refers literally to quantity of evidence).

136. *See In re* Winship, 397 U.S. 358, 362 (1970); Murphy v. Sowders, 801 F.2d 205, 216 (6th Cir. 1986) (Brown, J., dissenting), *cert. denied*, 107 S. Ct. 1593 (1987).

137. *See* Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867) (in which a law was found to violate the bill of attainder *and* ex post facto prohibitions). Indeed, the four justices who dissented in Kring v. Missouri, 107 U.S. 221 (1883), suggested that application of the ex post facto laws to procedural matters was unnecessary in light of the many explicit procedural protections elsewhere in the Constitution. *See id.* at 248-49 (Mathews, J., dissenting). Similarly, in Thompson v. Utah, 170 U.S. 343 (1898), the Court suggested that a retroactive procedural change would violate the ex post facto prohibition if it infringed on any of the procedural protections that were considered important at the time of the ratification of the Constitution, such as the right to a jury trial. *See id.* at 352. Indeed, three of the early cases in which the ex post facto prohibition was used to invalidate legislation might well be decided on other constitutional grounds were they to be heard today. *See* Thompson v. Utah, 170 U.S. 343 (1898) (number of jurors); Kring v. Missouri, 107 U.S. 221 (1883) (double jeopardy); Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867) (due process).

138. *See, e.g.*, United States v. One Assortment of 89 Firearms, 465 U.S. 354, 360 (1984) (using the term in this sense); Adams v. South Carolina, 464 U.S. 1023, 1024 (1983) (same); Steadman v. SEC, 450 U.S. 91, 95 (1981) (same); *see also* Black's Law Dictionary 381 (5th ed. 1979) (degree of proof defined as "that measure of cogency required to prove a case depending upon the nature of the case. In a criminal case such proof must be beyond a reasonable doubt, whereas in most civil cases such proof is by a fair preponderance of the evidence.").

139. *See, e.g.*, Beavers v. Haubert, 198 U.S. 77, 90 (1905); Humes v. United States, 170 U.S. 210, 212 (1898); Stone v. United States, 167 U.S. 178, 188 (1897); White v. Van Horn, 159 U.S. 3, 19 (1895).

140. *See, e.g.*, Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 328 (1867) (penalty imposed on those who could not swear an oath that they had not participated in the Confederate cause was ex post facto because, among other things, it subverted the presumption of innocence and the burden of proof by compelling people to prove their own innocence); DeWoody v. Superior Ct., 8 Cal. App. 3d 52, 56-57, 87 Cal. Rptr. 210, 212-13 (1970) (new law that allowed a presumption of intoxication upon finding of a certain blood-alcohol level could not be applied retroactively because it allowed conviction on "less proof, in amount or degree," and reduced the prosecution's burden of proving every element of the offense beyond a reasonable doubt); State v. Moyer, 387 A.2d 194, 197 (Del. 1978) (new statute that placed burden of proving extreme emotional distress, in mitigation of a homicide charge, on the defendant was found to be invalid as retroactively applied).

proof; whether it meant to indicate that a retroactive change in a quantitative rule of evidence violates the ex post facto prohibition.

True rules of quantity are very rare in the modern Anglo-American system of evidentiary law.[141] Our method for overcoming the presumption of innocence does not depend on the literal "amount" of evidence presented, but rather requires that whatever quantity is presented be sufficient for the jury to find guilt beyond a reasonable doubt.[142] In contrast, early civil law systems literally weighed the amounts of admissible evidence presented for each side of a controversy.[143] The oath of a witness carried a certain inherent value and was worth the same amount whether it was sworn in favor of one side or the other. No examination would be made of the plausibility of a particular witness's testimony or whether one witness was better situated to know the truth than another. Verdicts were reached by counting the number of witnesses for each side.[144]

The few quantitative rules that exist in the American evidentiary systems, such as the several types of corroboration requirements[145] and the constitutional requirement of two witnesses for a treason conviction,[146] are not based on the notion of a literal weighing of the evidence, but are minimum safeguards set up when the credibility of a certain type of evidence is considered particularly suspect.[147] Such rules are anachronistic and, to the extent that they still exist, on the wane.[148] It would be strange

141. *See* Wigmore, *Required Number of Witnesses; A Brief History of the Numerical System in England*, 15 Harv. L. Rev. 83, 83 (1901).

142. *See In re* Winship, 397 U.S. 358, 361-64 (1970); Weiler v. United States, 323 U.S. 606, 608 (1945); Murphy v. Sowders, 801 F.2d 205, 210-11 (6th Cir. 1986); Brown v. Davis, 752 F.2d 1142, 1144-45 (6th Cir. 1985); 7 J. Wigmore, *supra* note 62, § 2034; *see also* 7 J. Wigmore, *supra* note 62, § 2032, at 333 (noting that English common law rejected the quantitative rules of evidence which were prevalent in the ecclesiastical law).

143. Evidentiary rules of quantity can be traced to the Bible. *See Numbers* 35:30 (New King James) (Murder is a capital offense, but the death penalty may not be imposed where only one witness has testified to the defendant's guilt); *Deuteronomy* 17:6 (New King James) (testimony of two or three witnesses required for imposition of the death penalty); *John* 8:17 (New King James) (" 'It is also written in your law that the testimony of two men is true' " (quoting Jesus)); I *Timothy* 5:19 (New King James) (accusations against elders inadmissable unless from two or three witnesses); *Hebrews* 10:28 (New King James) (prescribing death without mercy for those who, on the testimony of two or three witnesses, have rejected the Mosaic Law). The primitive notion that the oath of a witness has a certain weight, regardless of by whom sworn, is formalistic, and belongs to the era of legal thought dominated by our barbarian and ecclesiastical ancestors. *See* Wigmore, *supra* note 141, at 85-90 (describing the evolution of evidentary thought from formalism to intellectualism).

144. *See* 7 J. Wigmore, *supra* note 62, §§ 2030-32. The weight of a witness's oath could vary, as with the rule that a minimum of twelve or forty-four laymen's oaths were required to outweigh that of a cardinal. *See* Wigmore, *supra* note 141, at 84.

145. *See generally* 7 J. Wigmore, *supra* note 62, §§ 2056-75 (describing the various corroboration requirements).

146. *See* Cramer v. United States, 325 U.S. 1, 30 (1945); U.S. Const. art. III, § 3.

147. *See* Murphy v. Sowders, 801 F.2d 205, 208 (6th Cir. 1986), *cert. denied*, 107 S. Ct. 1593 (1987); *supra* note 64 (discussing reasons for the suspicion of accomplice testimony).

148. *See supra* note 82 and accompanying text (modern evidentiary trend is away from imposing testimonial barriers).

for the *Hopt* Court, and all of the courts that have quoted its dictum since,[149] to have been particularly concerned with the effects of changes to such an obscure class of statutes.[150]

D. *Purposes of the Ex Post Facto Prohibition*

Finding that the retroactive application of the repeal of an accomplice corroboration requirement does not violate the ex post facto clauses is consistent with the goals and purposes of the constitutional prohibition. The ex post facto ban assures the citizen fair warning and reasonable reliance, and restrains the legislature from improperly interfering in the judicial process.[151]

The retroactive repeal of an accomplice corroboration requirement does not violate the interest that all citizens have in receiving fair warning as to what acts society regards as criminal, and the extent to which it will punish these acts,[152] so that they may choose their actions in reliance

149. *See* Dobbert v. Florida, 432 U.S. 282, 294 (1977); *supra* note 87.

150. The Supreme Court has, on the other hand, expressed strong concern about retroactive legislative changes that might alter the burden or standard of proof. *See* Thompson v. Missouri, 171 U.S. 380, 388 (1898) (in finding that a retroactive evidentiary change did not violate the ex post facto prohibition, the Court stated: "If, for instance, the statute had taken from the jury the right to determine the sufficiency or effect of the evidence which [the new statute] made admissible, a different question would have been presented."); Hopt v. Utah, 110 U.S. 574, 589-90 (1884) (retroactive alteration of the degree of proof necessary to convict would violate the ex post facto prohibition); *see also* Isaac v. Engle, 646 F.2d 1129, 1135-36 (6th Cir. 1980) (retroactive application of new rule that affirmative defenses must be proven by a preponderance of the evidence held invalid on due process grounds), *rev'd on other grounds*, 456 U.S. 107 (1982); United States v. Williams, 475 F.2d 355, 356-57 (D.C. Cir. 1973) (shift in burden of proof in insanity defense may not be applied retroactively).

Interpreting the *Hopt* dictum to prohibit the retroactive repeal of an accomplice corroboration requirement would also be inconsistent with the tone of the *Hopt* opinion, and with *Dobbert*, in which the dictum was most recently quoted. *See* Dobbert v. Florida, 232 U.S. 282, 294 (1977). In *Dobbert*, as in *Hopt*, the Supreme Court imposed a restrictive standard for the application of the ex post facto prohibition to procedural changes.

The following passage from Thompson v. Missouri, 171 U.S. 380 (1898) adds weight to the interpretation of the *Hopt* dictum as referring to the burden and standard of proof:

> The [challenged] statute did not require 'less proof, in amount or degree,' than was required at the time of the commission of the crime charged upon [the defendant]. It left unimpaired the right of the jury to determine the sufficiency or effect of the evidence declared to be admissible, and did not disturb the fundamental rule that the State, as a condition of its right to take the life of an accused, must overcome the presumption of his innocence and establish his guilt beyond a reasonable doubt. . . . [T]he duty of the jury . . . was the same after as before the passage of the statute.

Id. at 387.

151. *See* Weaver v. Graham, 450 U.S. 24, 28-29 (1981); *Ex Post Facto Limitations*, *supra* note 16, at 1496-98, 1500-01; *supra* notes 20-25 and accompanying text.

152. *See* Inglese v. United States Parole Comm'n, 768 F.2d 932, 934 (7th Cir. 1985); United States v. Miller, 753 F.2d 19, 21 (3d Cir. 1985); Dufresne v. Baer, 744 F.2d 1543, 1546 (11th Cir. 1984), *cert. denied*, 106 S. Ct. 61 (1985); Warren v. United States Parole Comm'n, 659 F.2d 183, 188 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 950 (1982).

thereon.[153] Trial of a defendant without the evidentiary protection of an accomplice corroboration statute does not change the fact that she was on constructive notice[154] of the criminal nature of her action and the degree to which society would seek to punish it. The repeal of the rule does not act to deprive a defendant of notice of any of the essential elements in the system of criminal deterrence.[155] Although there are certain evidentiary rules that are meant to induce reliance on the part of the general public, such as the privileges accorded to certain types of communication,[156] the corroboration requirement is not such a rule.[157]

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153. In his dissent in *Splawn v. California*, Justice Stevens wrote:

> The *Ex Post Facto* Clause 'reflect[s] the strong belief of the Framers of the Constitution that men should not have to act at their peril, fearing always that the State might change its mind and alter the legal consequences of their past acts so as to take away their lives, their liberty or their property.'

Splawn v. California, 431 U.S. 595, 605 n.4 (1977) (Stevens, J., dissenting) (quoting El Paso v. Simmons, 379 U.S. 497, 522 (1965) (Black, J., dissenting)). *See* Prater v. United States Parole Comm'n, 802 F.2d 948, 952 (7th Cir. 1986) (en banc); United States v. Affleck, 765 F.2d 944, 951 (10th Cir. 1985), *cert. denied*, 107 S. Ct. 877 (1987); Dufresne v. Baer, 744 F.2d 1543, 1548 (11th Cir. 1984), *cert. denied*, 106 S. Ct. 61 (1985); Warren v. United States Parole Comm'n, 659 F.2d 183, 188 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 950 (1982); *supra* note 36.

154. In Dobbert v. Florida, 432 U.S. 282 (1977), the Supreme Court upheld the sentence of capital punishment on a defendant whose crimes were committed under a death penalty statute that was later found unconstitutional. *See id.* at 288-91. By the time of the defendant's trial, the invalid statute had been replaced by one that met constitutional standards. *See id.* The Court upheld the defendant's conviction and sentencing under this later statute, holding that, because there was a law in effect at the time of the crime that defined the offense and prescribed the penalty for it, he was on constructive notice of the consequences of his action. *See id.* at 297-98, 303 (Burger, C.J., concurring).

155. *See supra* note 154. Defendants generally do not act in reliance on obscure procedural rules. *See* Prater v. United States Parole Comm'n, 802 F.2d 948, 953 (7th Cir. 1986) (en banc); Prater v. United States Parole Comm'n, 764 F.2d 1230, 1233-34, *vacated and rehearing en banc granted*, 775 F.2d 1157 (7th Cir. 1985); United States v. Molt, 758 F.2d 1198, 1200 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1458 (1986); *see also* Smith v. State, 291 Ark. 163, 168, 722 S.W.2d 853, 858 (1987) (no right to rely on a rule of evidence; changes in evidentiary rules are to be judged only on "whether they are fairly designed to get at the truth"). It is hard to imagine how a criminal could tailor her actions in reliance on the accomplice corroboration requirement (because a criminal naturally would attempt to minimize the amount of evidence), and even if a criminal could do so, such reliance would not be reasonable. *See Ex Post Facto Limitations*, *supra* note 16 at 1508. The Supreme Court has stated in other constitutional contexts that the "desire to escape criminal prosecution . . . while understandable, is hardly deserving of constitutional protection." *See* Branzburg v. Hayes, 408 U.S. 665, 691 (1972) (first amendment). The rule that procedural changes are not subject to the ex post facto prohibition itself puts citizens on notice that they may be altered retroactively and thus should not be relied on. *See* Mallett v. North Carolina, 181 U.S. 589, 593 (1901); *see also* Prater v. United States Parole Comm'n, 802 F.2d 948, 953 (7th Cir. 1986) (en banc) (commenting on the circularity of reliance analysis in relation to the ex post facto clauses: "[t]he more narrowly the principle is defined, the fewer expectations are reasonable; the more broadly it is defined, the more are reasonable").

156. *See* McCormick on Evidence § 72, at 171-72 (3d ed. E. Cleary ed. 1984); 8 J. Wigmore, Evidence § 2285, at 527 (J. McNaughton rev. 1961); *Ex Post Facto Limitations*, *supra* note 16, at 1513.

157. *See* Washington v. Texas, 388 U.S. 14, 23 n.21 (1967) ("[T]estimonial privileges

The retroactive repeal of an accomplice corroboration requirement is not the type of capricious or vindictive legislative action that is repugnant to the ex post facto prohibition. The change merely represents a return to the majority and common law rule[158] and is applied equally in all criminal trials. It does not "single out" any particular person or group, and as such, it is not subject to abuse as a means of political oppression or retribution.[159] Return to the common law rule actually diminishes the participation of the legislature in the process of adjudication. The treatment of accomplice testimony is returned to the discretion of the judge and jury,[160] who are granted broader power to decide the outcome of a case on the basis of all available evidence.

CONCLUSION

The retroactive application of the repeal of accomplice corroboration statutes is simply a procedural change and as such does not constitute ex post facto legislation within the meaning of the constitutional prohibition. Although dicta in Supreme Court opinions have led to a contrary finding in some lower courts, analysis of the Court's cases reveals that the retroactive deprivation of the corroboration requirement does not rise to the level of a constitutional violation. This finding is consistent with the policies and rights protected by the ex post facto ban.

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. . . are based on entirely different considerations from those underlying the common-law disqualifications for interest.").

158. *See supra* note 62 (no accomplice corroboration requirement at common law) & 410 (only 18 United States jurisdictions have accomplice corroboration statutes). The fact that the repeal causes reversion to the common law and majority rule suggests that the legislature is not improperly motivated in repealing the accomplice corroboration requirement. *See* Beazell v. Ohio, 269 U.S. 167, 171 (1925) (return to common law rule is not oppressive).

159. *See* Dufresne v. Baer, 744 F.2d 1543, 1549 (11th Cir. 1984), *cert. denied*, 106 S. Ct. 61 (1985).

160. *See supra* note 24 and accompanying text (ex post facto clauses prevent improper interference of the legislatures in the judicial process). The accomplice corroboration requirement leaves no discretion to the trial court, and can prevent the conviction of an accused person even if the jury is convinced to a moral certainty of her guilt. *See* People v. Bowley, 59 Cal. 2d 855, 857-58, 382 P.2d 591, 593, 31 Cal. Rptr. 471, 473 (1963); *see also* Prater v. United States Parole Comm'n, 764 F.2d 1230, 1234 (new parole guidelines do not "preclude or severely limit the exercise of discretion and therefore do not operate as *ex post facto* laws"), *vacated and rehearing en banc granted*, 775 F.2d 1157 (7th Cir. 1985) (en banc).