

Retroactive Criminalization: A Judicial Paradox?

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ABSTRACT

This paper examines the impact of judicial discretion on the legal concept of notice. Most modern legal systems agree that an effective legal system must provide notice of the law. Further, such notice is essential for intentional criminal action. However, laws cannot foresee all possible circumstances, and some form of authoritative discretion must be available to decide the meaning of the law. In the United States, judicial discretion has taken over this role and become a new law-maker. Some critics argue that interpretation is not the same as creation of law. Regardless, judicial discretion does have the power to effectively criminalize intentionally innocent behavior. For example, as civil liberties grow via judicial interpretation, police officers can become retroactive criminals. Ultimately, Effective legal systems must balance the fairness of legal notice and bans on retroactive criminalization for the function of a system which can grow with society.

Most modern legal systems place a high value on the importance of notice of law. Providing the people with the opportunity to know the law before prosecuting criminal offenses is essential to a fair legal system. Further, most systems provide a valid defense for defendants who did not intend to break the law. However, laws cannot foresee all possible circumstances and some form of authoritative discretion must be available to decide the meaning of the law. In the American legal system this authority is in the hands of the judiciary. As the courts decide cases which could not be easily interpreted by average citizens they are, in effect, creating new laws. Further, for the parties subject to the courts' decisions, the new laws are retroactive in their application. Despite systemic opposition to retroactive law-making through the enforcement of the right to notice of the law, it is a necessary possibility that defendants will be prosecuted for a retroactive crime. The paradox created by judicial discretion is a necessary component of the modern legal system for although it means the deprivation of the rights of a few, its ability to prevent the decay of the legal system is invaluable.

I. An effective legal system must provide notice of the law

The concept of notice is inextricably linked to the American idea of due process of law. The U.S. legal system and many others hold that advance specification of what the law requires is necessary before people can be held accountable for breaches. The constitution, by way of the 14th Amendment due process requirement, prohibits *ex post facto* law making. This requirement has been interpreted by the Supreme Court in the following language. "Legislation may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused."¹ In other words, laws must be written such that the people have the opportunity to know the law and that the law be articulated in a sufficiently clear fashion so that a person of reasonable intelligence will be able to determine the meaning. A legal system cannot be expected to function effectively if those bound by the law are left to guess at their obligation.

In another key case on this topic the Supreme Court indicated the importance of laws being clearly written and available to the public. "Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community."² Ordering a society by means of a legal system will be ineffective if members of the society are unaware of, and, therefore, unable to follow the designated laws. A legal system without some provision of notice to those under the law becomes a means used by totalitarian rulers to unjustly capture discontents by creating retroactive crimes. For, if a leader seeks to bring order to society by outlawing some action, society must know it is not to engage in that action.

II. Notice of the law is required for intentional criminal action

Legal theorist, H.L.A. Hart points out that "all civilized penal systems make liability to punishment for at any rate serious crime dependent not merely on the fact that the person to be punished has done the outward act of a crime, but on his having done it in a certain state or frame of mind or will."³ The accused must be cognizant of what they are doing; the crime must not be an accident. Further, there exists a distinction between the types of punishment given to an intentional versus unintentional actor. As Hart explains, "no calculations of the efficacy of deterrence or reforming measures, and nothing that would ordinarily be called retribution, seems to justify this distinction."⁴ The distinction arises from the issue of intention.

The question of whether the accused intended to break the law can become nearly as important to the court as whether the accused actually did break the law. In fact, the U.S. Supreme Court in *Ratzlaf v. United States*⁵ decided "that the government must prove that the defendant acted with knowledge that his conduct was unlawful."⁶ Intent to commit a crime cannot be present if one does not know that one's action is illegal and, therefore, notice of the law is critical to a determination of intention. Take the example of the following Florida law, "it is illegal to sing in a public place while attired in a swimsuit."⁷ Due to the bizarre nature of this law, most people would likely be surprised to learn that this activity is illegal. Now, suppose a tourist visits a water park in Florida and proceeds to sing a song to her young son who has just scraped his knee. This woman had no intention of committing a criminal act and yet she did. Had she known that her singing was illegal she most likely would have refrained. The fact that her intentions were innocent would likely weigh heavily in her favor should she be prosecuted for her behavior.

III. Full notice of the law is impossible

The complexities of human society and thought make the task of writing comprehensive laws which take into account the full spectrum of possible applications unfeasible. As societies grow in size and develop intellectually, so too does the group of possible circumstances to which a particular law may apply. The crafting of a law which can, without question, capture all the intricacies and variations of these evolving circumstances is nearly impossible. Therefore, decision making authority must be assigned somewhere within the society to ensure that the question of how, where, and when to apply the law can be answered.

IV. When notice falls short judicial discretion becomes the law-maker

In the framework of Hart's *The Concept of Law*, the discretionary authority lays in the handling of specific cases by the judiciary. Courts are the seat of the ultimate authority of rule making. "Whatever courts decide, both on matters lying within that part of the rule which seems plain to all, and those lying on its debatable border, stands till

altered by legislation; and over the interpretation of that, courts will again have the same last authoritative voice."⁸ The courts are often presented with situations which are closely, but not exactly, analogous to the language of the law. The prevailing parties are then determined at the discretion of the court. As Hart describes the process, "in the vast majority of cases that trouble the courts, neither statutes nor precedents in which the rules are allegedly contained allow of only one result. In most important cases there is always a choice."⁹ The question of whether Hart's assessment of the "vast majority" of cases is accurate is a topic for another discussion. What is important to note here is that these cases do exist in some degree.

Judicial discretion is a multi-faceted authoritative power. According to Hart, the courts are charged not only with interpreting the law, but also deciding questions which may not have a single answer in the body of the law. Despite the presence of authoritative standards, "nonetheless there will be points where the existing law fails to dictate any decision as the correct one."¹⁰ So, there will be cases in which a judge will, by virtue of his position of authority, need to employ his discretionary powers to *apply* the law to a situation which is not addressed by the law. By engaging in this application of the law, the judge is, in essence, adding to the law or writing *new* case law.

In his discussion of judicial discretion, Hart uses, and many subsequent thinkers have continued to use, the example of a city ordinance prohibiting the use of vehicles in the park. The hypothetical question raised is whether this ordinance applies to bicycles. Are bicycles vehicles for the purposes of this rule? For Hart, the court, in addressing this question, must consider several factors. What was the original purpose of this rule? Does prohibiting bicycles from this rule adhere to the original purpose? Is this purpose still the main interest of this rule? For example, if the original purpose of the rule was to prevent disruptive noise, a bicycle may be acceptable. If, however, the original purpose was to prevent pedestrian casualties, a bicycle may be considered a vehicle. Finally, if the original purpose was to prevent noise, but in so doing the benefit of pedestrian safety has become a more powerful motive, a bicycle may be ruled unacceptable. So, the court must decide what the purpose of the law is, whether by knowledge of the framer's intentions, the precedents set by earlier courts, or *opinion* on the current state of affairs.

V. Critics of Hart do not equate interpretation to creation of law

Hart's interpretation of the meaning and origin of case law has been disputed by more recent legal theorists. For example, David Lyons has suggested that "Legal freedom is the default condition [and] the indeterminacy of the law cannot be inferred from the indeterminacy of its ordinary rules."¹¹ In other words, when the rules of a legal system create three categories of action, that which is not permitted, that which is permitted, and that which is not clearly addressed by the law, these categories do not refer back to the law itself as Hart suggests. Rather, the law sees only two categories, that which is not permitted and that which is (including those items not specifically addressed by the first category). If an action is not prohibited, it is allowed. Lyons explains, "My claim is that the law is generally asymmetrical with respect to banning and

permitting. If bicycles are not banned from the park by any legal rule, then bicycles are permitted in the park by the law."¹²

It is the task of the judge to determine if the action in question is, in fact, not permitted (i.e., prohibited) by the existing law. Hart would identify this decision as the creation of new law. "[The judge] chooses to add to a line of cases a new case because of resemblances which can reasonably be defended as both legally relevant and sufficiently close."¹³ Lyons argues that judges are not creating new law, but interpreting the law before them. "[Judges] interpret the rules that they are called on to apply."¹⁴ However, when one considers the implications of this decision on society this difference in interpretation is moot. From the perspective of the individual with the bicycle, the judge, rather by creating a Hartian new law or a Lyonsian interpretation has the power to retroactively criminalize their actions.

VI. Judicial discretion can effectively criminalize intentionally innocent behavior

Both Hart and his critic, Lyons, agree that judicial discretion is part and parcel of a legal system. There is little dispute of this point. The debate over the form this discretionary authority takes is irrelevant to the question of the impact on the ordinary citizen. The purpose of the court is to deal with the inevitable lack of clarity in the law. As discussed above, the evolution of society precludes the possibility of all encompassing language in law. Brian Leiter explains the meaning of the Hartian discretion as follows, "in those cases where judges have discretion, neither party has a pre-existing legal right to prevail."¹⁵ Conversely, neither party committed a pre-existing legal wrong. Thus, upon entering the court, both parties can be reasonably assured that they have not broken the law as it stood prior to their appearance. How can the due process necessity of reasonable notice of the law coexist in a system which regularly determines legal right after the fact?

Consider again the case of the bicyclist in the park. In this hypothetical, the bicyclist, Larry, may be enjoying a quiet afternoon ride in the park when he is approached by an officer on horseback, given a ticket, and ordered out of the park. Feeling he has been wronged, Larry sets a court date to dispute his ticket. According to the tenets of Hart's judicial discretion, neither Larry nor the police officer can be confident of their right to win the case. They each are given the opportunity to present their case for why the bicycle should or should not be considered a vehicle. However, the authority to decide the question is solely that of the judge.

Suppose the judge rules that Larry has, indeed, committed a violation of the rule and affirms the fine owed. The core question in this situation is this: could Larry, as a reasonable member of the society, have prevented his criminal act? The answer is no. When parties entering court have no "pre-existing legal right to prevail" they are also without adequate notice of the law. The judge's decision interprets the law in a *new* way and uses that interpretation to punish an act pre-dating the interpretation. In other words, the judge's decision is retroactive and members of the society *could not have* prevented becoming criminals regardless of their intentions.

VII. Police officers become retroactive criminals as civil liberties grow

Real world examples of the retroactive effect of judicial discretion abound. In criminal law, for example, the effective changing of the rules often impacts the police officer, rather than the accused. An honest police officer trying to work within the letter of the law may be found guilty of misconduct following a case of this nature. Take for example the well known U.S. Supreme Court case of *Miranda v. Arizona*.¹⁶ The suspects in this case were held incommunicado during a short interrogation by police resulting in self-incriminating statements. The court held that accused persons have a right to be warned of their constitutional rights prior to custodial interrogations and established the well-known Miranda Warnings as a guideline. As a result of this trial, all *subsequent* custodial interrogations by police must follow an adequate warning to the suspect of his rights under the constitution. This is now the law.

However, for the purpose of this discussion, what is interesting about the Miranda case is that the evidence obtained in the course of the interrogation was not only deemed inadmissible at trial, the convictions were overturned based on the newly defined violations the defendants suffered. In other words, the police officers were effectively punished as guilty of misconduct.¹⁷ However, from the perspective of the officers, their actions in the Miranda case did not, in any way, diverge from the norms of conduct established at the time.

Consider another exemplary case. In *Katz v. US*, the U.S. Supreme Court held that a person using a phone booth has an expectation of privacy and, therefore, a wiretap on a phone booth is a violation of the suspect's 4th A. rights. This case changed the standard from "physical penetration of a constitutionally protected area" to an area where there exists an "expectation of privacy."¹⁸ As in the Miranda case, the law enforcement agents involved in this investigation are found to be guilty of misconduct retroactively.

VIII. Conclusion – Effective legal systems must balance fairness for function

The above cases are but two among a myriad of possible examples of the retroactive impact of case law upon the parties to the case. Any case law creates a retroactive law for the losing party. All members of the society are at risk of being found guilty of a law that doesn't yet exist. The weight that the American legal system gives to the intentions of the actor is extremely relevant to this question. If the actor did not *intend* to commit a crime, either because he acted recklessly without criminal intent, or because he was not aware of a law prohibiting his action, the state, generally, considers this to lessen his guilt. In the case of retroactive case law, though, the state does not take this into account as they interpret the law. The fairness of notice of law and intention are removed from the equation.

However, a bar on the possibility for interpretation by courts would create a system in which the law quickly stales. The remaining system would leave either the state authority unchecked to broadly reinterpret (as in the example of authoritarian rule) or the people to operate in a state of near lawlessness. In either of these scenarios,

injustice can become a much greater threat to justice than that experienced under the retroactivity of case law by affecting all of society.

Similarly, a rule melding both interpretation by courts and a full ban on retroactive case law would riddle the legal system with too many questions on its authority to prosecute at all. Such a rule may allow interpretation by courts, but disallow retroactivity by providing the parties to the case with immunity from prosecution. In this situation, only those brought before the court for an offense which is clearly and literally outline in either case law or statute would be susceptible to prosecution. Obviously such a system would be overwhelmed with appeals on the basis of retroactivity and, in fact, most would likely win. For the American legal system is certainly not one in which the majority of cases are without need of interpretation as our healthy defense attorney's associations can attest to.

It is, therefore, important to recognize that the modern legal framework as seen in America is imperfect in its attempt to create a fair, just legal system. However, every legal system must weigh the need for fairness with the need for functionality. A stagnant legal system offering no sanctioned interpretation of the letter of the law will certainly fail in the test of function. Therefore, despite the inability of the innocent to protect themselves from the unlikely possibility of retroactive criminalization, the need for judicial discretion in a modern legal system is vital.

¹ *Musser v. Utah*, 333 U.S. 95, 97 (1948).

² *Lambert v. California*, 355 U.S. 225 (1957).

³ Hart, H.L.A. *Punishment and Responsibility: Essays in the Philosophy of Law*. Oxford: Clarendon, 1968, p. 114.

⁴ Hart, *Punishment and Responsibility*, p. 127.

⁵ *Ratzlaf v. United States*, 000 U.S. U10444 (1994).

⁶ Simonoff, Rachael, *Ratzlaf v. United States: The Meaning of "Willful" and the Demands of Due Process*, *Columbia Journal of Law and Social Problems*, 28, no. 3, (Spring 1995): p. 399.

⁷ Lawguru.com, <http://www.lawguru.com/weird/part01.html> (accessed November 6, 2004).

⁸ Hart, H.L.A. *The Concept of Law*, 1st ed. Oxford, Clarendon, 1961, p.141.

⁹ Hart, *The Concept of Law*, 1st ed., p. 12.

¹⁰ Hart, H.L.A. *The Concept of Law*, 2nd ed. Oxford, Clarendon, p. 237.

¹¹ Lyons, David. 1999. Open Texture and the Possibility of Legal Interpretation. Working Paper Series, Public Law and Legal Theory No. 99-9, Boston University School of Law, p. 4.

¹² Lyons, p. 3.

¹³ Hart, *The Concept of Law*, 1st ed., p. 124

¹⁴ Lyons, p. 4.

¹⁵ Leiter, Brian. 2002. Beyond the Hart/Dworkin Debate. Public Law and Legal Theory Working Paper No. 034, The University of Texas School of Law, p. 3.

¹⁶ *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹⁷ The punishment for the officers involved in the Miranda case is actually greater than that imposed upon violators of the new Miranda rule. Not only was the evidence deemed inadmissible, the conviction was overturned.

¹⁸ *Katz v. United States*, 386 U.S. 954 (1967).