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Developing a More Objective Means of Ex Post Facto Law Analysis - Dobbert v. Florida

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DEVELOPING A MORE OBJECTIVE MEANS OF EX POST FACTO LAW ANALYSIS— *DOBBERT V. FLORIDA*

Ex post facto laws[1] have been declared inherently unjust because they do not provide notice to those whose legal relations are affected.[2] Finding no such injustice, the United States Supreme Court in *Dobbert v. Florida*[3] held that the ex post facto clause of the United States Constitution[4] does not preclude the states from sentencing a criminal defendant to death under a procedure instituted subsequent to the crime.

When John Ernest Dobbert, the petitioner, committed first degree murder,[5] a 1971 Florida law provided that a person convicted of a capital felony was to be punished by death unless the jury verdict included a recommendation of mercy.[6] Before petitioner was tried, however, that legislation was declared unconstitutional by the Florida Supreme Court.[7] Shortly thereafter, in late 1972, the

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1. An ex post facto law is "one making punishable what was innocent when done, or subjecting the doer to a heavier penalty or burden than was then provided." 1 J. BISHOP, NEW COMMENTARIES ON THE CRIMINAL LAW 159 (8th ed. 1892).

2. Marks v. United States, 97 S. Ct. 990, 992 (1977); United States v. Casson, 434 F.2d 415, 422 (D.C. Cir. 1970); People v. Dempster, 396 Mich. 700, 242 N.W.2d 391 (1976); Waukesha Memorial Hosp., Inc. v. Baird, 45 Wis. 629, 635-36, 173 N.W.2d 700, 703 (1970). *See also* Crosskey, *The True Meaning of the Constitutional Prohibition of Ex-Post-Facto Laws*, 14 U. CHI. L. REV. 539, 539 (1947); McAllister, *Ex Post Facto Laws in the Supreme Court of the United States*, 15 CALIF. L. REV. 269, 287 (1927).

3. 97 S. Ct. 2290 (1977).

4. U.S. CONST. art. I § 10, cl. 1 provides that "[n]o State shall . . . pass any . . . ex post facto law . . . ."

5. This murder was alleged to have occurred on December 31, 1971. Petitioner was also found guilty of second degree murder which allegedly occurred between January 1 and April 8, 1972. Brief for Petitioner at 6-7, 11, Dobbert v. Florida, 97 S. Ct. 2290 (1977).

6. The statute in effect when the petitioner committed the offenses stated:

> Recommendation of mercy.—A defendant found guilty by a jury of an offense punishable by death shall be sentenced to death unless the verdict includes a recommendation of mercy by a majority of the jury. When the verdict includes recommendation of mercy by a majority of the jury, the court shall sentence the defendant to life imprisonment. A defendant found guilty by the court of an offense punishable by death on a plea of guilty or when a jury is waived shall be sentenced by the court to death or life imprisonment.

FLA. STAT. § 921.141 (1971).

7. On June 22, 1972 the United States Supreme Court summarily held in Furman v. Georgia, 408 U.S. 238 (1972) (per curiam) that a Georgia death penalty statute violated the Eighth and Fourteenth Amendments. On July 17, 1972 the Florida Supreme Court in Donaldson v. Sack, 265 So.2d 499 (Fla. 1972) found the 1971 Florida capital punishment legislation inconsistent with *Furman*.

Florida legislature enacted a new death penalty statute.[8] Under this new procedure, the judge, after taking the jury's advisory opinion[9] into consideration, would render the final sentence.[10] By operation of this procedure, Dobbert was sentenced to death.[11] After Dobbert was convicted of first degree murder,[12] the jury recommended life imprisonment.[13] The trial court, however, found that aggravating circumstances and the absence of mitigating circumstances justified the imposition of the death penalty.[14] The Florida Supreme Court[15] affirmed Dobbert's conviction and sentence.[16]

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8. Section 921.141 of the Florida Statutes was enacted December 8, 1972. The new procedure was upheld by the Florida Supreme Court in State v. Dixon, 283 So.2d 1 (Fla. 1973), and by the United States Supreme Court in Proffitt v. Florida, 428 U.S. 242 (1976). *See* notes 56 & 57 and accompanying text *infra*.

9. The subsequently enacted statute provides:

> Separate proceedings on issue of penalty.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment . . . .

FLA. STAT. § 921.141(1) (1972).

> Advisory sentence by the jury.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court based upon the following matters:
> (a) Whether sufficient aggravating circumstances exist . . . ;
> (b) Whether sufficient mitigating circumstances exist . . . which outweigh the aggravating circumstances found to exist; and
> (c) Based on these considerations, whether the defendant should be sentenced to life [imprisonment] or death.

FLA. STAT. § 921.141(2) (1972).

10. The legislation provides in part:

> Findings in support of sentence of death.—Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death it shall set forth in writing its findings upon which the sentence of death is based as to the facts:
> (a) That sufficient aggravating circumstances exist . . . and
> (b) That there are sufficient mitigating circumstances . . . to outweigh the aggravating circumstances.

FLA. STAT. § 921.141(3) (1972).

11. 97 S. Ct. at 2295.

12. As well as being found guilty of the first degree murder of his nine-year-old daughter, Kelly Ann, petitioner was convicted of the second degree murder of his seven-year-old son, Ryder Scott. Petitioner was also found guilty of child torture of his son, Ernest John, age eleven, and of child abuse of his daughter, Honoré Elizabeth, age five. *Id.* at 2294.

13. By a ten-to-two vote, the jury returned an advisory sentence of life imprisonment finding that sufficient mitigating circumstances outweighed aggravating circumstances. *Id.* at 2295.

14. Initially, the trial court examined the nature of petitioner's participation in the offense, his intent at the time of the offense, his age, maturity, prior criminal activity and sanity. Based on this examination, the trial court concluded that no mitigating factors were present. Dobbert v. State, 328 So.2d 433, 435-37 (Fla. 1976) (per curiam 4-2 decision). Next, the trial court found that aggravating circumstances were present due to the "heinous, atrocious, and cruel nature" of

This Note will examine the traditional means by which the United States Supreme Court has analyzed ex post facto objections to retroactive changes in criminal law. New approaches promulgated in *Dobbert* will be discussed and analyzed. Finally, the argument will be made that, although *Dobbert* was a poorly written decision, it created a more objective means of scrutinizing alleged ex post facto laws.

THE TRADITIONAL APPROACH: A HISTORY OF SUBJECTIVITY

Traditionally, the ex post facto clause has been interpreted to prohibit legislative[17] changes in substantive criminal law[18] which are disadvantageous to the accused[19] and to prohibit changes in criminal

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the crime. The court noted that petitioner had tormented his daughter by beating, kicking, burning, choking, and almost drowning her; sewing up her wounds with a needle and thread; depriving her of medical care; and ultimately murdering her. *Id.* at 437. It concluded that such aggravating circumstances sufficiently justified the imposition of the death penalty. *Id.* at 438.

15. Under the 1972 Florida statute, the death penalty sentence is subject to automatic priority review by the Florida Supreme Court. The statute provides:

> Review of judgment and sentence.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with the rule promulgated by the Supreme Court.

FLA. STAT. § 921.141(4) (1972).

16. The Florida Supreme Court, after discussing the trial court's findings and conclusions, summarily affirmed the imposition of the death penalty. 328 So.2d at 441.

17. The ex post facto prohibition is a restriction on the legislature, not the judiciary. Frank v. Mangum, 237 U.S. 309 (1915); Ross v. Oregon, 227 U.S. 150 (1913). However, the Fifth and Fourteenth Amendment due process clauses prohibit similar retroactive changes made through judicial construction. Marks v. United States, 97 S. Ct. 990 (1977); Rabe v. Washington, 405 U.S. 313 (1972); Bouie v. City of Columbia, 378 U.S. 347 (1964).

18. The ex post facto clauses (state and federal) have been construed to apply only to retroactive changes in criminal law. Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798); T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 264 (1869); J. STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 220 (5th ed. 1891). However, a statute may be ex post facto though not penal in form if its sole purpose is to inflict a penalty upon persons for their past acts. Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866); Ex Parte Garland, 71 U.S. (4 Wall.) 33 (1866). *Contra,* Hawker v. New York, 170 U.S. 189 (1898). There is also authority which argues that the framers of the Constitution intended the clauses to be applicable to retroactive civil legislation. *See* Crosskey, *The Ex-Post-Facto and Contract Clauses in the Federal Convention: A Note on the Editoral Ingenuity of James Madison,* 35 U. CHI. L. REV. 248 (1968); 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).

19. *See* note 41 and accompanying text *infra.*

procedure which deny the accused a substantial right guaranteed by the law in effect when his offense was committed.[20] The traditional ex post facto approaches toward retroactive procedural and substantive changes were subjective and often resulted in substantial judicial incongruity.[21]

Prior to *Dobbert,* the Court utilized a two-step test[22] to scrutinize retrospective changes.[23] First, the change was identified as being either substantive or procedural.[24] Second, if the change was procedural,[25] the courts would determine whether the right of which the defendant was deprived was "substantial." When the Court held that the accused was deprived of such a right, the procedural change was declared to be ex post facto.

In each case in which the Supreme Court applied this test it classified procedural safeguards as "substantial"[26] or "non-substantial"[27]

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20. *See* text accompanying notes 22-38 *infra.*

21. *See* notes 26-38 & 42-43 and accompanying text *infra.*

22. The "two-step test" is the author's term for identifying the Court's means of scrutinizing such laws.

23. This test originated in a treatise by Judge Cooley which stated that while legislatures "may prescribe altogether different modes of procedure in their discretion . . . in so doing, they must not dispense with any of those substantial protections with which the existing law surrounds the person accused of crime." T. COOLEY, *supra* note 18, at 272. The United States Supreme Court first applied the test in Kring v. Missouri, 107 U.S. 221 (1883) (5-4 decision), over the vigorous objection of the dissenters. *See* note 26 *infra* for further discussion of *Kring.*

24. Similar identifications have been made under the contract clause and state constitutional prohibitions of retroactive legislation. Likewise, such determinations are inevitably made when state courts are permitted to follow their own procedural law when applying federal statutory law, when federal courts are required to follow state substantive law in "diversity of citizenship" cases, and when state courts are required to follow the substantive law of a foreign state. Cook, *"Substance" and "Procedure" in the Conflict of Laws,* 42 YALE L.J. 333, 341-42 (1933).

25. When the change was identified as substantive, the Supreme Court utilized a different set of tests. *See* notes 39-41 and accompanying text *infra.*

26. The Supreme Court has held that a criminal defendant was deprived of a substantial procedural right on only two occasions. First, in Kring v. Missouri, 107 U.S. 221 (1883), the Court held that when a conviction of second degree murder that was set aside no longer acted as an acquittal of first degree murder, the accused was denied a substantial right. Second, in Thompson v. Utah, 170 U.S. 343 (1898), the reduction of the number of jurors in a criminal trial from twelve to eight was held to be such a deprivation.

27. On numerous occasions the Court has held that procedural changes did not impair substantial rights. In Beazell v. Ohio, 269 U.S. 167 (1925), the Court upheld the retroactive application of a statute giving trial judges discretion in granting new trials. Mallet v. North Carolina, 181 U.S. 589 (1901), held that the subsequent enactment of a statute permitting the state to appeal a grant for a new trial was not ex post facto. The Court in Thompson v. Missouri, 171 U.S. 380 (1898), held that a statute which authorized the comparison of disputed handwriting with writing proven genuine did not deprive the accused of a substantial right when applied retroactively. In Gibson v. Mississippi, 162 U.S. 565 (1896), a law requiring jurors to be literate was held not to be ex post facto when applied to a black defendant who allegedly committed an offense prior to the enactment of the law. Nor was a restructuring of a state supreme court, reducing the number of justices hearing the accused's case, held to be a denial of the accused's

without stating the criteria upon which the classification was made. For example, in one case[28] the Court held that the retroactive application of a change in jury qualifications did not affect "in any degree the substantial rights of those who had committed crimes prior to [the new statute's] going into effect."[29] In another case, however, the Court held that the accused had a substantial right in being tried by a twelve person jury which could not be abolished retroactively.[30] It summarily concluded that a jury of twelve was "vital for the protection of life and liberty."[31] Similar superficial determinations were made by state and lower federal courts.[32]

This lack of standards resulted in nationwide disparity as to what was considered a substantial right. For instance, a reduction in the number of grand and petit jurors and the substitution of judge sentencing for jury sentencing were held to be deprivations of substantial rights in some jurisdictions but not in others.[33] Similar discrepancies have arisen with regard to retroactive legislative changes which grant

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substantial rights in Duncan v. Missouri, 152 U.S. 377 (1894). The Supreme Court held in Hopt v. Utah, 110 U.S. 574 (1884), that a retroactive law permitting a convicted felon to testify at a trial did not deprive a defendant convicted on the basis of that testimony of a substantial right. In Cook v. United States, 138 U.S. 157 (1891), a retroactive change in federal venue rules was held not to be ex post facto.

28. Gibson v. Mississippi, 162 U.S. 565 (1896).

29. *Id.* at 589.

30. Thompson v. Utah, 170 U.S. 343 (1898).

31. *Id.* at 352.

32. It has been argued that these determinations have been largely influenced by history and tradition rather than reason. H. ROTTSCHAEFER, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW 778 (1939). *See, e.g.*, DuPont v. Ingram, 293 A.2d 289 (Del. 1972) (holding that onerous statutes relating to penal administration did not deprive a convicted criminal of a substantial right); Eades v. State, 232 Ga. 735, 208 S.E.2d 791 (1974) (holding that the right to make an unsworn statement is not a substantial right). For examples of federal cases on this point, *see* notes 33-34 & 36-38 and accompanying text *infra*.

33. The Oklahoma federal district court has maintained that the accused has a vested right in the number of persons serving on a grand jury. United States v. London, 176 F. 976 (E.D. Okla. 1909); United States v. Haskell, 169 F. 499 (E.D. Okla. 1909). Other jurisidictions have held to the contrary. Hallock v. United States, 185 F. 417 (8th Cir. 1911), *cert. denied*, 220 U.S. 613 (1910); State v. Caldwell, 50 La. Ann. 666, 23 So. 869 (1898); State v. Carrington, 15 Utah 480, 50 P. 526 (1897).

Although the United States Supreme Court has held that the reduction of the number of jurors in a criminal trial was a deprivation of a substantial right, an Arizona appellate court has held that it no longer is, due to a recent decision which held that the Sixth Amendment does not require twelve person juries. *Compare* State v. McIntosh, 23 Ariz. App. 246, 532 P.2d 188 (1975), *citing* Williams v. Florida, 399 U.S. 78 (1970), *with* Thompson v. Utah, 170 U.S. 343 (1898).

Jury sentencing was held to have been a substantial right prior to *Dobbert* in Georgia and North Carolina while found not to have been a vested right in Florida, Illinois, and Texas. *Compare* Winston v. State, 186 Ga. 573, 198 S.E. 667 (1938) *and* State v. Waddell, 282 N.C. 431, 19 S.E.2d 19 (1973) *with* James v. Twomey, 466 F.2d 718 (7th Cir. 1972); Donald v. Jones, 445 F.2d 601 (5th Cir. 1971) *and* Miller v. State, 332 So.2d 65 (Fla. 1976) (per curiam).

the state the right to appeal,[34] impose more stringent appeal requirements upon the defendant,[35] replace indictment with information,[36] and eliminate the defendant's right to choose venue.[37] Additionally, parole and good behavior allowances have been held to be both substantial and non-substantial rights.[38]

The Court's approach to retroactive changes in substantive law manifested difficulties similar to those encountered when analyzing changes in procedural law. Originally, the Supreme Court concluded that the ex post facto clause only proscribed substantive laws which made an act a crime, aggravated a crime or increased the punishment for a crime after the act or crime had been committed.[39] Later, this

34. *Compare* Mallett v. North Carolina, 181 U.S. 589 (1901); State v. Gould, 232 Ga. 844, 209 S.E.2d 312 (1974); *and* State v. Witte, 243 Wis. 423, 10 N.W.2d 117 (1943) (non-substantial) *with In re* Jones, 500 P.2d 690 (Wyo. 1972) (substantial).

35. New Jersey law holds that a more stringent appeal requirement applied retroactively denies the accused of a substantial right while other jurisdictions hold to the contrary. *Compare* State v. Howard, 182 Neb. 411, 155 N.W.2d 339 (1967) *and* Scobie v. State, 407 P.2d 610 (Okla. Crim. 1965) (non-substantial) *with* State v. Finate, 13 N.J. Super. 302, 80 A.2d 341 (1951) (substantial).

36. There has been a national difference of opinion as to whether a change from indictment to information is a deprivation of substantial rights. *Compare* People v. Myers, 44 Ill. App.3d 860, 359 N.E.2d 197 (1977); State v. Kyle, 166 Mo. 287, 65 S.W. 763 (1901); Lybarger v. State, 2 Wash. 552, 27 P. 449 (1891); *and In re* Wright, 3 Wyo. 478, 27 P. 565 (1891) (non-substantial) *with* Putty v. United States, 220 F.2d 473 (9th Cir. 1955), *cert. denied,* 350 U.S. 821 (1955); State v. Kingsly, 10 Mont. 537, 26 P. 1066 (1891); Garnsey v. State, 4 Okla. Crim. 547, 112 P. 24 (1910); State v. Rock, 20 Utah 38, 57 P. 532 (1899) (substantial right).

37. Although the United States Supreme Court has held that the accused does not have a substantial right to choose venue, there has been opinion to the contrary. *Compare* Cook v. United States, 138 U.S. 157 (1891) *and* Gut v. Minnesota, 79 U.S. (9 Wall.) 35 (1870) *with* United States v. Strewl, 99 F.2d 474 (2d Cir. 1938), *cert. denied,* 306 U.S. 638 (1939), *cert. denied,* 332 U.S. 801 (1947).

38. Jurisdictions are divided on the issue of whether parole is a substantial right. *Compare* Lincoln v. California Adult Auth., 435 F.2d 133 (9th Cir. 1970); Voorhees v. Cox, 140 F.2d 132 (8th Cir. 1944); Still v. State, 256 A.2d 670 (Me. 1969); Berry v. Wolff, 193 Neb. 717, 228 N.W.2d 885 (1975); Commonwealth v. Maroney, 201 Pa. Super. Ct. 118, 191 A.2d 866 (1963) (non-substantial) *with In re* Griffen, 63 Cal.2d 757, 408 P.2d 959, 48 Cal. Rptr. 183 (1965); State v. Board of Parole, 155 La. 699, 99 So. 534 (1924); Goldsworthy v. Hannifin, 86 Nev. 252, 468 P.2d 350 (1970); State v. Powers, 64 Wis.2d 643, 221 N.W.2d 692 (1974) (substantial).

Jurisdictions seem to be evenly divided as to whether good behavior allowances are substantial rights. *Compare* Graham v. Thompson, 246 F.2d 805 (10th Cir. 1957), *cert. denied,* 352 U.S. 849 (1956); Singleton v. Shafer, 313 F. Supp. 1094 (E.D. Pa. 1970); Lembersky v. Parole Bd. of Dep't of Corrections, 332 Mass. 290, 124 N.E.2d 521 (1955) (non-substantial) *with Ex parte* Lee, 177 Cal. 690, 171, P. 958 (1918); Dowd v. Sims, 229 Ind. 54, 95 N.E.2d 628 (1950); State v. Ellsworth, 142 Mont. 14, 380 P.2d 886 (1963); People v. Deegan, 34 App. Div.2d 835, 312 N.Y.S. 2d 666 (1970) (substantial).

39. Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798). *Calder* first established these three substantive categories of ex post facto laws. It also stated that "every law that alters the legal rules of evidence, and receives less or different testimony" than originally required is ex post facto. *Id.* at 390. The *Calder* list has been affirmed by subsequent case law. Mallet v. North Carolina, 181 U.S. 589, 593-94 (1901). *See* Beazell v. Ohio, 269 U.S. 167, 169 (1925); Duncan v. Missouri, 152 U.S. 377, 382-83 (1894); Gut v. Minnesota, 76 U.S. (9 Wall.) 35, 38 (1869).

list was expanded to prohibit retroactive criminal legislation which rendered an act punishable in a manner in which it was not punishable when committed[40] and which altered the situation of the accused to his disadvantage.[41] However, these tests and some variations lacked objective criteria upon which difficult decisions could be based. The Supreme Court itself recognized the difficulty of determining whether changes in the law were more onerous to the accused.[42] Subjective notions of "reason and common sense" led the Court to hold, for example, that a three month extension of the period of confinement prior to the execution of a convicted felon was "clearly to his advantage," on the assumption that "every rational person desires to live as long as he may."[43]

Thus, the problems of subjectivity and incongruity inherent in the substantive as well as procedural ex post facto guidelines placed an institutional strain on the courts. The determinations of whether a procedural right was substantial and whether a substantive change was to the substantial disadvantage of the accused were made on a case by case basis. The status of the accused depended on the jurisdiction in which his case was decided and upon the judges who heard his case.

THE MODERN APPROACH: A POORLY REASONED MEANS TO AN OBJECTIVE END

Despite weak analysis, the *Dobbert* opinion is significant because it established two new ex post facto approaches. Through the application of new, more objective tests, the Supreme Court rejected the

40. Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).

41. United States v. Hall, 26 F. Cas. 84 (C.C.D. Pa. 1809) (No. 15,285), *aff'd*, 10 U.S. (6 Cranch) 171 (1810). The *Hall* category has been expressly recognized by the Supreme Court as an ex post facto test and was frequently applied prior to *Dobbert*. *See, e.g.*, Lindsey v. Washington, 301 U.S. 397, 401 (1937); Thompson v. Missouri, 171 U.S. 380, 383 (1898); Duncan v. Missouri, 152 U.S. 377, 383 (1894); Kring v. Missouri, 107 U.S. 221, 228-29 (1882).

42. In Rooney v. North Dakota, 196 U.S. 319, 325 (1905), the Court stated that "it may be sometimes difficult to say whether particular changes in the law are or are not in mitigation of the punishment for crimes previously committed."

43. *Id.*

This subjectively resulted in other seemingly contradictory Supreme Court decisions as well. For instance, in *In re* Medley, 134 U.S. 160 (1890), the Court held that the retroactive application of a statute requiring that a capital defendant be placed in solitary confinement until he is hung was ex post facto. However, in Holden v. Minnesota, 137 U.S. 483 (1890), the Court held that a similar substantive change was not ex post facto. The *Holden* Court distinguished *Medley* on the ground that there was no proof that the defendant in *Holden* was actually kept in solitary confinement. The *Medley* Court, however, presumed that the accused was kept in confinement without requiring or discussing proof.

State court decisions were based on equally subjective grounds. Judge Cooley made note of the naturally contradictory results arising from such subjective analysis. He compared State v.

petitioner's three ex post facto claims.[44] The first claim was that the changes in the death penalty statute between the time of the commission of his offense and the time of trial deprived petitioner of a substantial right.[45] Second, petitioner argued that no valid death penalty was "in effect" in Florida when the offense was committed since the earlier statute was found unconstitutional.[46] Finally, petitioner contended that the new sentencing procedure was ex post facto because it provided that persons sentenced to life imprisonment must serve at least twenty-five years before becoming eligible for parole while the prior statute contained no such provision.[47]

The petitioner's first ex post facto claim was based on the change in judge and jury roles in imposing the death penalty. The 1971 Florida statute, in effect at the time of the murder, made the jury verdict of life imprisonment final, while the 1972 statute, in effect at the time of trial, made the jury verdict advisory.[48] Mr. Justice Rehnquist, who delivered the majority opinion,[49] dismissed this claim for two reasons. First, he found that the change in the Florida death penalty scheme was procedural rather than substantive. The majority opinion stated that the newer statute "simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime."[50]

Williams, 31 S.C.L. (2 Rich.) 418, 422-23 (1846), a case in which punishment was held to have been mitigated when the death penalty was replaced by fines, whipping, and imprisonment, with Herber v. State, 7 Tex. 69, 73 (1851), a case which stated that whipping is more degrading than death itself. T. COOLEY, *supra* note 18, at 268-70.

44. Petitioner also raised equal protection and unfair pretrial publicity claims. The Court held that the state's decision to resentence to life imprisonment all defendants upon whom the death penalty had been imposed at the time *Furman* was decided did not deny petitioner equal protection notwithstanding the fact that he committed his offenses prior to *Furman*. 97 S. Ct. at 2302. The Court rejected petitioner's pretrial publicity argument because he did not demonstrate that the extensive publicity he received manifested itself in any constitutional unfairness. *Id.* at 2302-03.

45. *Id.* at 2297.

46. *Id.* at 2300.

47. *Id.* The majority opinion rejected this claim and held that the petitioner, having been sentenced to death, lacked standing to challenge burdens attached to a life sentence under the new statute. *Id.* at 2301-02.

48. Petitioner argued that the jury's recommendation of life imprisonment could not have been overruled and converted to a death sentence by the trial judge under the law in effect when the offenses were committed. Brief for Petitioner at 23, 97 S. Ct. 2290 (1977). The Supreme Court disagreed, finding petitioner's argument speculative because it could not "be said with assurance that, had his trial been conducted under the old statute, the jury would have returned a verdict of life." 97 S. Ct. at 2298.

49. The majority consisted of Chief Justice Burger and Justices Stewart, White, Blackmun, Powell, and Rehnquist. Chief Justice Burger, who joined the opinion of the Court, also wrote a short concurring opinion.

50. 97 S. Ct. at 2298.

However, Justice Rehnquist reached this conclusion through reinterpretation of cases in which the two-step test had been applied to scrutinize procedural changes. These cases held that since the laws in question were procedural, and the changes did not deprive the accused of substantial rights, the procedural changes in question did not violate the ex post facto clause.[51] Unlike these cases, however, the *Dobbert* decision did not make the second step substantial right determination. Instead, the majority opinion summarily determined that the 1972 Florida law was a procedural change and therefore not ex post facto, failing to distinguish *Dobbert* from those cases in which retroactive procedural changes were found to be ex post facto.[52]

The Court's second reason for rejecting the petitioner's first ex post facto argument was that the new statute was an "ameliorative" change.[53] After comparatively analyzing the two Florida death penalty procedures, the majority stressed that the 1972 procedure afforded the accused more constitutional safeguards than the 1971 scheme.[54] However, the Court's prior conclusion that the procedural change was not ex post facto[55] made this analysis unnecessary. The comparative analysis was also superfluous because such an examination had been made in *Proffitt v. Florida*,[56] the case finding the 1972 sentencing procedure constitutional. The *Dobbert* Court virtually repeated the *Proffitt* analysis and findings,[57] concluding that the "ulti-

51. The Court first relied on Hopt v. Utah, 110 U.S. 574 (1884). In *Hopt*, at the time the offense occured, a convicted felon could not have testified at trials. The law was changed subsequently and the defendant was convicted on the basis of a convicted felon's testimony. The *Hopt* Court examined the defendant's ex post facto claim in light of Kring v. Missouri, 107 U.S. 221 (1883), a case in which the Supreme Court used the two-step test to strike down a retrospective law. The *Hopt* Court distinguished *Kring* because there was no denial of substantial rights. 110 U.S. at 589. The *Dobbert* decision next relied on Thompson v. Missouri, 171 U.S. 380 (1898), a case in which the retroactive application of a law permitting a murder conviction to be based on circumstantial evidence resulted in the defendant's conviction. Thompson v. Missouri concluded that the defendant was not subjected to an ex post facto law by distinguishing the non-substantiality of his position from the substantiality of the rights at stake in *Kring* and Thompson v. Utah, 170 U.S. 343 (1898). 171 U.S. at 382-86.

52. *See* note 26 *supra*.

53. 97 S. Ct. at 2298-2300.

54. *Id.* at 2299.

55. The Court concluded that a procedural change is not ex post facto "[e]ven though it may work to the disadvantage of a defendant." *Id.* at 2298.

56. 428 U.S. 242 (1976).

57. The *Proffitt* and *Dobbert* Courts both indicated that the 1972 capital punishment scheme included a separate sentencing procedure and a requirement that the judge and jury balance aggravating and mitigating factors. Additional safeguards recognized by both courts included the mandatory requirement of a written finding when the death penalty was imposed and a compulsory state supreme court review of cases in which the death penalty was the sentence. *Compare* Dobbert v. Florida, 97 S. Ct. at 2298-2300 *with* Proffitt v. Florida, 428 U.S. at 249-53.

mate proof" that the 1971 procedure was more onerous than the new procedure was that the 1971 statute was declared unconstitutional while the 1972 scheme was upheld in *Proffitt*.[58]

The petitioner's second argument was that there was no valid death penalty "in effect" in Florida when the offense was committed. This substantive ex post facto claim was rejected through the application of the fair warning principle.[59] This principle is premised on the notion that an individual has been given notice of the criminality of his contemplated acts and the extent of applicable punishment.[60] Thus, the accused would not have a successful ex post facto defense if he had been warned of the potential criminality and punishment by the existence of a previous statutory scheme. The Court in *Dobbert* acknowledged that the 1971 Florida statute was in effect when petitioner committed the crime. Although this statute subsequently was declared unconstitutional,[61] *Dobbert* held that the statute's existence served as an "operative fact" to warn those who committed first degree murder that the state would seek to impose the death penalty.[62]

The dissenters[63] vigorously attacked the use of the "fair warning test."[64] Justice Stevens' dissent noted that the Court did not cite one ex post facto decision to support the use of the test.[65] Rather, he said the majority opinion was based on a civil case which held that a Supreme Court decision could not serve as a basis for retroactive

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58. 97 S. Ct. at 2300.

59. *Id.*

60. For a discussion of the fair warning principle, *see* Note, *Ex Post Facto Limitations on Legislative Power*, 73 MICH. L. REV. 1491, 1496 (1975).

61. *See* note 7 *supra*.

62. 97 S. Ct. at 2300.

63. Justice Stevens, joined by Justices Brennan and Marshall, filed a dissenting opinion criticizing the majority's application of the fair warning principle. 97 S. Ct. at 2303-06. Justices Brennan and Marshall also jointly filed a separate dissenting statement indicating their views that the death penalty is prohibited by the Eighth and Fourteenth Amendments in all circumstances. *Id.* at 2303.

64. Justice Stevens' dissenting opinion referred to the majority's rationale as a "test", *id.* at 2305, although the majority did not expressly recognize it as such. This dissent argued that the fair warning test disregarded an underlying value of the ex post facto prohibitions, protection against improperly motivated or capricious legislation. 97 S. Ct. at 2305-06. Although the dissent did not argue that this value should be a means of scrutinizing alleged ex post facto legislation, there is authority for this view. Note, *Ex Post Facto Limitations on Legislative Power*, 73 MICH. L. REV. 1491 (1975). It is questionable, however, whether examining legislative intent would result in more objective decisions. *Cf.* Curtis, *A Better Theory of Legal Interpretation*, 3 VAND. L. REV. 407 (1950); Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502 (1964) (intent of framers is a subjective means of constitutional interpretation).

65. 97 S. Ct. at 2304 n.4.

attack on a final judgment.[66] The dissenters also contended that the Court should have adhered to the traditional *Lindsey v. Washington* test[67] which defined an ex post facto law as "any punitive measure" applied to a consummated crime "to the detriment or material disadvantage" of the accused.[68] They correctly recognized that the majority gave no compelling reason to depart from this approach.[69]

Despite the flaws in the majority's reasoning, however, the use of the fair warning test in *Dobbert* is justified because it is more objective than the *Lindsey* test. The fair warning approach entails the determination of whether the penalty actually imposed could have been inflicted when the offense was committed. Thus, the fact finder need only determine whether the penalty for the offense differed from the time when the crime took place and the time when the accused was sentenced.[70] This standard is far less subjective than the *Lindsey* test which requires courts to determine whether a statutory change is to the substantial disadvantage of the accused.

Although the subjective *Lindsey* test remains valid, other aspects of ex post facto scrutiny were significantly altered by *Dobbert*. Two new tests were promulgated. First, instead of the traditional two-step procedural test, the *Dobbert* Court utilized a one-step approach requiring dismissal of ex post facto claims directed at retroactive procedural legislation. Second, the substantive fair warning test was established to scrutinize the unique *Dobbert* circumstances. Both of these new approaches are more objective than the traditional methods of examining ex post facto laws and, therefore, should better promote

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66. Justice Stevens' dissent noted that the Court based its decision on the civil case of Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940). 97 S. Ct. at 2304 n.4.

Had the majority opinion relied on precedent, it could have referred to the substantive ex post facto tests applied in previous cases. *See* notes 39-41 and accompanying text *supra*. The majority could then have cited Marks v. United States, 97 S. Ct. 990 (1977). This case expressly stated that the ex post facto clause is based on the principle of fair warning. *Id.* at 992.

67. 301 U.S. 397 (1937). In *Lindsey* a state statute, which changed the penalty for grand larceny from "not more than fifteen years" imprisonment to "fifteen years" imprisonment, was challenged on ex post facto grounds. The Court concluded that the statute was clearly to the "substantial disadvantage" of the accused because he was denied any opportunity to receive a sentence of less than fifteen years. *Id.* at 401-02.

68. 97 S. Ct. at 2304, *citing* Lindsey v. Washington, 301 U.S. at 401.

69. *See* notes 65 & 66 and accompanying text *supra*.

70. The Court of Appeals for the District of Columbia in United States v. Casson, 434 F.2d 415 (D.C. Cir. 1970), demonstrated the objectivity of this approach when examining a federal statute which increased the minimum and maximum punishments for burglary. It held that the statute was not ex post facto as applied to the defendant because it became effective over six hours before the commission of the crime. Hence, the defendant was put on constructive notice of the penalty which he could receive. *Id.* at 418-22.

uniform decisionmaking. Although one cannot predict at the present time whether the traditional substantive approaches will be abolished,[71] *Dobbert* is an indication that the Supreme Court is developing a more objective ex post facto analysis.

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71. A recent federal district court applied the *Dobbert* procedural approaches in Pedrosa v. Sielaf, 434 F. Supp. 493 (N.D. Ill. 1977). *Pedrosa* upheld an Illinois retroactive statute which amended the standards for transferring juveniles to adult court. The *Pedrosa* court concluded that the statute was not ex post facto because it was a procedural and ameliorative change.