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

Ex post facto laws have been declared inherently unjust because they do not provide notice to those whose legal relations are affected. Finding no such injustice, the United States Supreme Court in Dobbert v. Florida held that the ex post facto clause of the United States Constitution 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, 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. Before petitioner was tried, however, that legislation was declared unconstitutional by the Florida Supreme Court. Shortly thereafter, in late 1972, the

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).
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.
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. Under this new procedure, the judge, after taking the jury's advisory opinion into consideration, would render the final sentence. By operation of this procedure, Dobbert was sentenced to death. After Dobbert was convicted of first degree murder, the jury recommended life imprisonment. The trial court, however, found that aggravating circumstances and the absence of mitigating circumstances justified the imposition of the death penalty. The Florida Supreme Court affirmed Dobbert's conviction and sentence.

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 4-3 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 \textit{Dobbert} will be discussed and analyzed. Finally, the argument will be made that, although \textit{Dobbert} was a poorly written decision, it created a more objective means of scrutinizing alleged ex post facto laws.

\textbf{THE TRADITIONAL APPROACH: A HISTORY OF SUBJECTIVITY}

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

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. \textit{Id.} at 437. It concluded that such aggravating circumstances sufficiently justified the imposition of the death penalty. \textit{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:

\begin{quote}
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.
\end{quote}

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).


19. \textit{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. The traditional ex post facto approaches toward retroactive procedural and substantive changes were subjective and often resulted in substantial judicial incongruity.

Prior to Dobbert, the Court utilized a two-step test to scrutinize retrospective changes. First, the change was identified as being either substantive or procedural. Second, if the change was procedural, 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" or "non-substantial".

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20. See text accompanying notes 22-38 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, 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." 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. It summarily concluded that a jury of twelve was "vital for the protection of life and liberty." Similar superficial determinations were made by state and lower federal courts.

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. Similar discrepancies have arisen with regard to retroactive legislative changes which grant

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.

29. Id. at 589.
31. Id. at 352.
32. It has been argued that these determinations have been largely influenced by history and tradition rather than reason. H. ROTTSCHEIFER, 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 jurisdictions 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, impose more stringent appeal requirements upon the defendant, replace indictment with information, and eliminate the defendant’s right to choose venue. Additionally, parole and good behavior allowances have been held to be both substantial and non-substantial rights.

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. Later, this


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. 257, 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).


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{48} Mr. Justice Rehnquist, who delivered the majority opinion,\textsuperscript{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."\textsuperscript{50}

\textsuperscript{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. \textit{Id.} at 2302-03.
\textsuperscript{45} \textit{Id.} at 2297.
\textsuperscript{46} \textit{Id.} at 2300.
\textsuperscript{47} \textit{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. \textit{Id.} at 2301-02.
\textsuperscript{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.
\textsuperscript{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.
\textsuperscript{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. 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.

The Court's second reason for rejecting the petitioner's first ex post facto argument was that the new statute was an "ameliorative" change. 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. However, the Court's prior conclusion that the procedural change was not ex post facto made this analysis unnecessary. The comparative analysis was also superfluous because such an examination had been made in Proffitt v. Florida, the case finding the 1972 sentencing procedure constitutional. The Dobbert Court virtually repeated the Proffitt analysis and findings, 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 occurred, 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.
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

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.\textsuperscript{66} The dissenters also contended that the Court should have adhered to the traditional \textit{Lindsey v. Washington} test\textsuperscript{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.\textsuperscript{68} They correctly recognized that the majority gave no compelling reason to depart from this approach.\textsuperscript{69}

Despite the flaws in the majority's reasoning, however, the use of the fair warning test in \textit{Dobbert} is justified because it is more objective than the \textit{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.\textsuperscript{70} This standard is far less subjective than the \textit{Lindsey} test which requires courts to determine whether a statutory change is to the substantial disadvantage of the accused.

Although the subjective \textit{Lindsey} test remains valid, other aspects of ex post facto scrutiny were significantly altered by \textit{Dobbert}. Two new tests were promulgated. First, instead of the traditional two-step procedural test, the \textit{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 \textit{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

\textsuperscript{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. \textit{Id.} at 992.

\textsuperscript{67} 301 U.S. 397 (1937). In \textit{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. \textit{Id.} at 401-02.

\textsuperscript{68} 97 S. Ct. at 2304, citing \textit{Lindsey v. Washington}, 301 U.S. at 401.

\textsuperscript{69} See notes 65 & 66 and accompanying text supra.

\textsuperscript{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. \textit{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.

_Thomas E. McClure_

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.