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CASE NOTE

Constitutional Law—FAIR WARNING OF RETROACTIVE LAW IS SUFFICIENT COMPLIANCE WITH THE EX POST FACTO CLAUSE—*Dobbert v. Florida*, 432 U.S. 282 (1977).

Ernest Dobbert murdered two of his children between December 31, 1971, and April 8, 1972. On July 17, 1972, the Supreme Court of Florida, pursuant to *Furman v. Georgia*,¹ invalidated the death penalty provision of the murder statute² in effect at the time of Dobbert's crimes.³ Five months later, the Florida Legislature enacted a revised death penalty statute for murder in the first degree.⁴ In accordance with the provisions of the 1972 revised statute, Dobbert was convicted in 1974 of first degree murder in the Fourth Circuit Court of Florida and sentenced to die notwithstanding a jury recommendation of life imprisonment.

The conviction was appealed to the Supreme Court of Florida on several grounds, including an argument that the imposition of the death sentence was a violation of the ex post facto clause of the United States Constitution. The Supreme Court of Florida affirmed the conviction without ruling on the ex post facto argument.⁵ In a 6-3 decision, the United States Supreme Court also affirmed, holding that the retroactive application of the death penalty statute was not a violation of the constitutional prohibition of ex post facto laws because Dobbert had received "fair warning" of Florida's intention to seek the death penalty for his crimes.⁶

I. BACKGROUND

A. *The Prohibition Against Ex Post Facto Laws*

The bias against retroactive legislation is by no means peculiar to the United States. It is a principle of free government and

1. 408 U.S. 238 (1972).

2. FLA. STAT. §§ 775.082, 921.141 (1971)(amended 1972).

3. *Donaldson v. Sack*, 265 So. 2d 499 (Fla. 1972).

4. 1973 Fla. Laws ch. 72-724 (amending FLA. STAT. §§ 775.082, 921.141 (1971) (current version at FLA. STAT. ANN. §§ 775.082, 921.141 (West 1976))).

5. *Dobbert v. State*, 328 So. 2d 433 (Fla. 1976), *aff'd*, 432 U.S. 282 (1977). The Supreme Court of Florida affirmed after considering issues involving jury instructions for attempted homicide, the denial of a motion for change of venue, and the discretionary imposition of the death penalty notwithstanding a jury recommendation of life imprisonment.

6. *Dobbert v. Florida*, 432 U.S. 282 (1977).

jurisprudence with deep historical roots. There is evidence that Demosthenes of ancient Greece argued effectively against a law because it was retroactive.⁷ Roman law, as incorporated in the *Corpus Juris Civilis*, prohibited retroactive laws except where expressly allowed by the statutory language.⁸ English common law adopted this aspect of the Roman Code "as a guide to the construction of statutes,"⁹ and the United States later followed the English example by prohibiting ex post facto laws in its Constitution.

1. *Constitutional origin*

The United States Constitution declares without qualification that "no state shall . . . pass . . . any ex post facto Law."¹⁰ Although the historical record is somewhat vague, it is generally believed that most of the Framers of the Constitution intended the ex post facto clause to be interpreted literally; that is, "a law made after the doing of the thing to which it relates, and retroacting upon it" was to be prohibited.¹¹ This is evidenced to some degree by Madison's notes which reveal that most of the delegates in discussing whether to include such a clause spoke of retroactive laws in the most general of terms without any qualifying or limiting language.¹² For example, a proposal to limit the clause to criminal laws was rejected by the Convention.¹³ In addition, feelings against retroactive legislation were strong at this particular time because several of the delegates had recently witnessed unjust retroactive legislation in some of the states,¹⁴ and an unqualified prohibition of all retroactive laws was probably seen as the only sure way of preventing any further such injustices.¹⁵

7. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775, 775 (1936).

8. *Id.*

9. *Id.* at 776.

10. U.S. CONST. art. I, § 10, cl. 1. U.S. CONST. art. I, § 9, cl. 3 similarly prohibits enactment of federal ex post facto laws.

11. Crosskey, *The True Meaning of the Constitutional Prohibition of Ex-Post-Facto Laws*, 14 U. CHI. L. REV. 539, 539 (1947).

12. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 375-76 (M. Farrand ed. 1966).

13. *Id.* at 617. Governor Edmund Randolph was a chief supporter of this proposal. 3 *id.* at 328.

14. Two examples of such laws were the "pine-barren law" of South Carolina and the paper money acts of Rhode Island. Crosskey, *supra* note 11, at 540.

15. Ironically, many of the delegates were against the inclusion of the ex post facto clause not because they favored retroactive laws but because they felt such laws were so obviously unjust they were void in and of themselves. *Id.*

However, a small minority of delegates were opposed to an all-inclusive prohibition. One of the most notable of these was George Mason, who wrote about the potential necessity of retroactive laws: "[T]here never was nor can be a legislature but must and will make such laws, when necessity and the public safety require them"¹⁶

2. *Judicial interpretation of the ex post facto clause*

Despite the apparent majority intent of the Framers to ban all retroactive laws, the Supreme Court refused to interpret the prohibition literally when in 1798 it was first called upon to adjudicate an ex post facto issue in *Calder v. Bull*.¹⁷ Justice Chase, in his opinion,¹⁸ recognized that the clause was designed to prevent unjust legislation, but narrowed the thrust of the clause to prohibit only retroactive criminal legislation disadvantageous to an accused. Emerging from the opinion is a fairly definitive guideline describing the characteristics of an unconstitutional ex post facto law:

1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates a crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal rules of evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*.¹⁹

In limiting the ex post facto clause to criminal laws, Justice Chase reasoned that constitutional prohibitions such as the one against the impairing of contracts were inserted to govern retroactive legislation affecting private rights.²⁰ Justice Chase added that the above delineation illustrated the types of retroactive changes in the law that are "manifestly *unjust* and *oppressive*."²¹

Since *Calder* the Supreme Court has relied extensively on

16. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 640 (M. Farrand ed. 1966).

17. 3 U.S. (3 Dall.) 386 (1798).

18. Individual Supreme Court justices during this period wrote separate opinions for each case. Thus Justice Chase's language technically cannot be considered to be the majority view of the Court, although it has reached that status in subsequent cases.

19. 3 U.S. (3 Dall.) at 390 (emphasis added).

20. *Id.*

21. *Id.* at 391 (emphasis added).

Justice Chase's categories as a description of the types of retroactive changes that are to be declared unconstitutional. In addition, the Court has articulated a more general standard, first adopted in *Kring v. Missouri*,²² that a retroactive law altering the situation of a party to his disadvantage is unconstitutional.²³ By implementing these standards, the Court has adopted a categorical approach to the determination of ex post facto laws. A significant outgrowth of this approach is the Court's fairly consistent holding that the ex post facto clause applies only to changes affecting an accused's substantive rights.²⁴ Hence, even when a retroactive procedural change works to the particular disadvantage of an accused the Supreme Court has held the change constitutional because it does not involve a substantive interest in which the accused has a vested right.²⁵

An example of the Court's refusal to invalidate a retroactive procedural change is *Hopt v. Utah*,²⁶ where the defendant was implicated in a crime by the testimony of a convicted felon.²⁷ Such testimony was inadmissible when the defendant committed the crime but was statutorily declared admissible before his trial.²⁸ The Supreme Court held that the change was procedural and its retroactive application was not prohibited by the ex post facto clause because the nature of the crime and the amount of proof necessary for conviction remained unaltered.²⁹ The Court concluded that to "remove existing restrictions upon the competency of certain classes of persons as witnesses, relates to modes of procedure only, in which no one can be said to have a vested right, and which the State, upon grounds of public policy, may regulate at pleasure."³⁰

In the area most closely related to the instant case, the Court reaffirmed *Calder* by holding in *Lindsey v. Washington*³¹ that an increase in punishment is a substantive change that will be held unconstitutional if applied retroactively to a defendant's disad-

22. 107 U.S. 221, 235 (1882).

23. See *Lindsey v. Washington*, 301 U.S. 397 (1937); *Beazell v. Ohio*, 269 U.S. 167 (1925); *Thompson v. Utah*, 170 U.S. 343 (1898); *Gibson v. Mississippi*, 162 U.S. 565 (1896); *Hopt v. Utah*, 110 U.S. 574 (1884); *Cummings v. Missouri*, 71 U.S. 277 (1866).

24. E.g., *Beazell v. Ohio*, 269 U.S. 167 (1925); *Thompson v. Utah*, 170 U.S. 343 (1898); *Gibson v. Mississippi*, 162 U.S. 565 (1896); *Kring v. Missouri*, 107 U.S. 221 (1882).

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

26. *Id.*

27. *Id.* at 587.

28. *Id.* at 587-88.

29. *Id.* at 590.

30. *Id.*

31. 301 U.S. 397, 401-02 (1937).

vantage.³² In that case, the Court indicated that in determining the constitutionality of a retroactive law it compares the practical operation of the new statute with the practical operation of the old statute under which the accused would have been prosecuted.³³ If the new statute works to the "material disadvantage of the wrongdoer" then its retroactive application will be declared unconstitutional.³⁴ Thus, in *Lindsey*, a statute making a fifteen-year sentence mandatory where previously the judge had discretion to impose a lesser sentence was held unconstitutional when applied retroactively.

3. *Present status of the ex post facto clause*

Since the 1937 *Lindsey* case, the Supreme Court of the United States has not decided another case involving the issue of increased punishment. This lack of controversy can probably be attributed to the well-delineated *Calder* and *Lindsey*³⁵ rules for ex post facto violations. This is revealed to some extent in recent state court decisions involving ex post facto issues.³⁶ In most of these decisions, the courts quote some variation of the *Calder* categories in an almost mechanical fashion. Only when the distinction between substantive and procedural changes in the law is unclear do the courts go much beyond an unexamined application of Justice Chase's delineation.³⁷

As a general rule, then, the status of the ex post facto clause has remained essentially unchanged since it was first interpreted over 170 years ago. It is viewed by the courts as a prohibition against certain disadvantageous retroactive laws and its primary purpose is broadly stated as the deterrence of "unjust and oppressive" legislation.

B. Setting for the Ex Post Facto Determination in the Instant Case

Following the United States Supreme Court's declaration in

32. *Id.* at 401.

33. *Id.* at 400.

34. *Id.* at 401.

35. The *Lindsey* rule actually incorporates both the *Calder* and *Kring* standards.

36. *E.g.*, *Myers v. District Court*, 184 Colo. 81, 518 P.2d 836 (1974); *State v. Bunn*, 50 Haw. 351, 440 P.2d 528 (1968); *People v. Myers*, 44 Ill. App. 3d 860, 359 N.E.2d 197 (1977); *State v. Howard*, 182 Neb. 411, 155 N.W.2d 339 (1967); *People v. Warren*, 79 Misc. 2d 777, 360 N.Y.S.2d 961 (Sup. Ct. 1974).

37. *E.g.*, *People v. Ward*, 50 Cal. 2d 702, 328 P.2d 777 (1958); *People v. Martinez*, 82 Misc. 2d 56, 368 N.Y.S.2d 699 (Sup. Ct. 1975).

*Furman v. Georgia*³⁸ that Georgia's death penalty statute was unconstitutional, the Supreme Court of Florida in *Donaldson v. Sack* invalidated its own state death penalty provision, indicating that future "capital" offenders should be given life imprisonment.³⁹ In addition, the Florida Code provided that in the event of such an invalidation the sentences of persons previously condemned to death were to be commuted to life imprisonment.⁴⁰ By December 1972, however, less than five months after the invalidation, the Florida Legislature had enacted a new death penalty statute⁴¹ that eventually passed constitutional muster in 1976.⁴²

Against this backdrop, the Supreme Court of Florida upheld the retroactive application of the new death penalty in the instant case. In reaching its conclusion, however, the Florida court ignored the ex post facto considerations.⁴³ Only when the case reached the United States Supreme Court did these considerations emerge as significant issues.

II. INSTANT CASE

In holding that the sentencing of *Dobbert* according to the provisions of the 1972 Florida statute was constitutional, the United States Supreme Court rejected three separate ex post facto arguments. Two of the three arguments were rejected after

38. 408 U.S. 238 (1972).

39. 265 So. 2d 499, 503 (Fla. 1972).

40. FLA. STAT. § 775.082(3) (1971), as amended by 1972 Fla. Laws, ch. 72-118 (current version at FLA. STAT. ANN. § 775.082 (West 1976)).

41. 1973 Fla. Laws ch. 72-724 (amending FLA. STAT. §§ 775.082, 921.141 (1971))(current version at FLA. STAT. ANN. §§ 775.082, 921.141 (West 1976)).

42. *Proffitt v. Florida*, 428 U.S. 242 (1976).

This rapid change of penalties produced at least one other case where the Florida court had to decide the applicability of the new statute to a capital crime committed before it was enacted. *Lee v. State*, 340 So. 2d 474 (Fla. 1976). In that case the defendant, Lee, who had been sentenced to death a week prior to the *Furman* decision, filed a motion which was granted by the trial court to reduce his sentence to life imprisonment. The state appealed, and while the appeal was pending, the Supreme Court of Florida came down with its decision in *Donaldson* and shortly thereafter commuted the death sentences of other Florida defendants to life imprisonment. *In re Baker*, 267 So. 2d 331 (Fla. 1972); *Anderson v. State*, 267 So. 2d 8 (Fla. 1972). By the time Lee's case was decided by the Supreme Court of Florida, Florida had enacted the new death penalty statute. Consequently, the case was remanded for sentencing according to the new procedure. Upon remand, Lee was again sentenced to death and again appealed, whereupon the Supreme Court of Florida reduced the sentence to life imprisonment without addressing any ex post facto issues. Surprisingly, this opinion, which came down shortly after *Dobbert v. State*, 328 So. 2d 433 (Fla. 1976), did not reconcile or even mention *Dobbert* despite the opposite holdings in the two cases.

43. The court also rejected equal protection and fair trial arguments. 432 U.S. at 301-03.

comparing the standards of punishment contained in the 1972 statute with those in the prior statute without reference to the intervening Florida Supreme Court decision in *Donaldson v. Sack*. The third argument was rejected because the invalidated statute gave "fair warning" of the punishment imposed by the revised statute.

The first argument was that the procedure under the new death penalty statute, which allowed the trial judge to overrule a jury's recommendation of life imprisonment, violated the ex post facto clause because it worked to Dobbert's disadvantage in that such a recommendation could not have been overruled under the old statute.⁴⁴ Relying on *Hopt v. Utah*,⁴⁵ the Court rejected this argument by concluding that even if the change ultimately worked to the defendant's particular disadvantage it was generally an ameliorative procedural change and hence did not constitute an ex post facto law.⁴⁶

A second argument was that the lengthening of the minimum parole eligibility time for life imprisonment under the new statute made the whole statute more onerous than the old one and therefore unconstitutional in its application to Dobbert.⁴⁷ The Court dismissed this argument by holding that, since Dobbert was not sentenced to life imprisonment, the increase in parole eligibility time had no bearing on his particular punishment and thus did not work to his disadvantage.⁴⁸

The third of the ex post facto arguments required the Court to determine what effect should be given to the fact that the old death penalty provision was invalidated and a new one enacted during the interim between Dobbert's criminal acts and the date of his trial.⁴⁹ The argument was that, inasmuch as the old death penalty provision was later declared unconstitutional, there was technically no valid death penalty in effect when the crimes were committed, and hence the new death penalty statute created an unconstitutionally retroactive increase in punishment.⁵⁰ The Court rejected this argument also, relying on *Chicot County Drainage District v. Baxter State Bank*⁵¹ for the proposition that a court does not necessarily have to give full retroactive effect to

44. *Id.* at 292.

45. 110 U.S. 574 (1884).

46. 432 U.S. at 292-97.

47. *Id.* at 298.

48. *Id.* at 300-01.

49. *Id.* at 297-98.

50. *Id.* at 297.

51. 308 U.S. 371 (1940).

a judicial declaration of a statute's unconstitutionality.⁵² The Court added that the existence of the earlier statute "provided fair warning as to the degree of culpability which the State ascribed to the act of murder"⁵³ and therefore provided "sufficient compliance with the *ex post facto* provision of the United States Constitution."⁵⁴

Justice Stevens in a dissenting opinion tersely criticized the "fair warning" rationale, claiming it would "defeat the very purpose of the [ex post facto] Clause."⁵⁵ He advocated instead strict adherence to the test in *Lindsey v. Washington*, which, in his opinion, better protects against "improperly motivated or capricious legislation."⁵⁶

III. ANALYSIS

The crucial issue in the instant case, and the only one the dissent addressed, was whether the presence of the old death penalty provision, in effect at the time of Dobbert's crimes but subsequently invalidated, justified the retroactive application of the new death penalty provision to those crimes in light of the *ex post facto* clause. In holding that the new statute may be applied retroactively, the Court reached the right result. In reaching that result, however, the Court relied on an unpersuasive and inadequate rationale. This Note will focus on that rationale and suggest a more persuasive approach as well as discuss the implications of the holding.

A. *The Court's Rationale*

In holding that the presence of the old statute justified the retroactive application of the new statute, the Court's reasoning was brief and conclusory. Basically the majority relied on two contentions: (1) Dobbert's argument "mock[ed] the substance of the *Ex Post Facto* Clause,"⁵⁷ and (2) Dobbert's argument was "at odds" with *Chicot County Drainage District v. Baxter State Bank*.⁵⁸ Both of these contentions need to be examined in light of Supreme Court precedent and the points raised in Justice Stevens' dissent.

52. 432 U.S. at 297-98.

53. *Id.* at 297.

54. *Id.* at 298.

55. *Id.* at 308 (Stevens, J., dissenting).

56. *Id.* at 307.

57. *Id.* at 297 (majority opinion).

58. 308 U.S. 371 (1940).

1. *Failure to adequately identify the substance of the ex post facto clause*

By not adequately explaining what it considered to be the substance of the ex post facto clause, the majority failed to persuasively support its conclusion that Dobbert's "sophistic argument mock[ed] the substance" of the clause.⁵⁹ The Court went no further in identifying the "substance" of the clause than to quote from an earlier opinion that the clause was "intended to secure substantial personal rights against arbitrary and oppressive legislation."⁶⁰ If the Court meant this to be a complete statement of the substance of the ex post facto clause then it is difficult to understand how a refusal to retroactively apply the death penalty to Dobbert's crime would "mock" such a purpose. There seems to be no better way to insure against the possibility of "arbitrary and oppressive" retroactive legislation than by totally prohibiting retroactivity in circumstances such as those of the instant case where an accused is disadvantaged.

The Court attempted to justify its position on the ground that Dobbert's argument ran counter to the warning he received of the penalty Florida would seek for his crime.⁶¹ While it may be true that the old statute constituted such a warning, this does not explain why a refusal to retroactively impose the new statute would, as the Court stated it, mock the substance of the ex post facto clause. Therefore, it must be inferred that the Court was actually relying upon a new view of the substance of the ex post facto clause: that the ex post facto clause is primarily designed to protect a defendant's "fair warning" rights and if a retroactive law does not jeopardize these rights then the ex post facto clause does not apply. By leaving such a significant interpretation to inference without further justification or explanation, however, the opinion only generates confusion.

Certainly, Justice Stevens was not persuaded by the majority's rationale and the inferences to be drawn from it. In fact, he argued in his dissent that the Court's holding would actually defeat what he sees as one of the primary purposes of the clause—the promoting of impartial legislation.⁶² If this were indeed a major purpose of the clause, then Justice Stevens' contention is somewhat persuasive. In view of the atrociousness of Dob-

59. 432 U.S. at 297.

60. *Id.* at 293 (quoting *Beazell v. Ohio*, 269 U.S. 167, 171 (1925)).

61. *Id.* at 297.

62. *Id.* at 307-08 (Stevens, J., dissenting).

bert's crimes and the extensive publicity they received,⁶³ it is not difficult to imagine that the Florida legislature might have had Dobbert specifically in mind in enacting the new death penalty statute.

The Court could have much more effectively supported this part of its opinion by explicitly stating that the ex post facto clause is ultimately a vindication of the fair warning principle that an accused must have been apprised of what constitutes a criminal act and what penalty is attached to that act.⁶⁴ It can be argued that the ex post facto clause is only aimed at one particular evil: the arbitrariness and oppressiveness of retroactive legislation that redefines the criminality of and punishment attached to conduct where there is no fair warning of the elements of the crime or its punishment.⁶⁵ Other arbitrary and oppressive aspects of retroactive legislation, as well as of legislation in general, are to be circumscribed by other provisions of the Constitution such as the due process and equal protection clauses and the prohibition of bills of attainder.⁶⁶

Had the Court explicitly followed this sort of rationale instead of only implying it, it could have clearly established a more reasonable view of the operation of the ex post facto clause.⁶⁷ Since there is nothing *inherently* arbitrary or oppressive about retroactivity, the Court could have expressly rejected a categori-

63. *Id.* at 303 (majority opinion).

64. Fair warning of what constitutes a criminal act would also include changes in the rules of evidence, as noted in the *Calder* opinion. However, not all changes in evidentiary standards would raise fair warning concerns. See Note, *Ex Post Facto Limitations on Legislative Power*, 73 MICH. L. REV. 1491, 1515-16 (1975).

65. This position is given support in the dicta of at least two Supreme Court decisions. See *Marks v. United States*, 430 U.S. 188, 191 (1977); *Bouie v. City of Columbia*, 378 U.S. 347, 353-55 (1964).

In his dissent to the instant case, Justice Stevens stated that fair warning "does not provide a workable test for deciding particular cases" because the presumption that a person is aware of a law on the statute books is "inadequate." 432 U.S. at 307-09 (Stevens, J., dissenting). While there admittedly would be problems in proving *actual* fair warning in a particular case, a presumption of fair warning arising from the mere existence of a prior statute on the statute books should be no more difficult to apply than the common presumption, often applied to prospective laws, that all men know the law.

66. Thus, Justice Stevens' concern about partial legislation could be remedied by equal protection or bill of attainder arguments.

67. A more explicit and clearer statement of the Court's rationale would have satisfied the concerns of some commentators who claim that the Supreme Court has given little guidance in defining a workable test for unconstitutional retroactive laws. Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 CALIF. L. REV. 216, 235 (1960); Note, *Ex Post Facto Limitations on Legislative Power*, 73 MICH. L. REV. 1491, 1492-94 (1975).

cal approach, thereby opening the way for courts to examine in each case the underlying purpose of the ex post facto clause to determine if it was violated by the legislation in question.

2. *Failure to reconcile Lindsey v. Washington*⁶⁸

By not fully reconciling *Lindsey v. Washington* with the instant case, the Court also failed to persuasively support its conclusion that Dobbert's argument was "at odds" with *Chicot County Drainage District v. Baxter State Bank*.⁶⁹ Citing *Chicot* for the proposition that a judicially invalidated law can have some limited prospective effect, the Court held that the old law had the "prospective effect" of justifying the retroactive application of the new death penalty because the old law provided sufficient fair warning to comply with the ex post facto clause.⁷⁰ While *Chicot* gives some support for this holding, it by no means directly refutes the holding in *Lindsey* quoted by the dissent that a retroactive law working "to the detriment or material disadvantage of the wrongdoer"⁷¹ is unconstitutional. Even conceding that under *Chicot* the invalidated statute could serve as a warning to Dobbert of the penalty which Florida would seek to impose, the inquiry is not ended, for if the express language of *Lindsey* is followed it would appear that regardless of the notice Dobbert received the retroactive application of the new death penalty would be unconstitutional because it worked to his "detriment" in that he received a greater penalty than he would have received had the new statute not been passed.

The Court could have strengthened its reliance on *Chicot* and distinguished *Lindsey* by pointing out an obvious but important difference between the instant case and *Lindsey*. In *Lindsey* no argument could be made that the defendant received fair warning of the retroactive new law because it was substantially different than the law in existence when the defendant committed his crime.⁷² Dobbert, on the other hand, arguably received fair warning of the penalty retroactively imposed because it was sub-

68. 301 U.S. 397 (1937).

69. 308 U.S. 371 (1940).

70. 432 U.S. at 297-98.

71. *Lindsey v. Washington*, 301 U.S. 397, 401 (1937), quoted in *Dobbert v. Florida*, 432 U.S. at 305 (Stevens, J., dissenting).

72. The law in effect at the time of defendant's crime allowed the judge to fix a prison term at less than the maximum 15 years. The challenged retroactive law provided for a mandatory 15-year prison term with certain changes in the parole procedure. *Lindsey v. Washington*, 301 U.S. at 398.

stantially the same as the penalty in existence at the time his crime was committed.

Because of this difference in facts, *Lindsey* does not directly control the outcome of the instant case as Justice Stevens maintained in his dissent. To give the *Lindsey* language literal effect without any consideration of the fact that Dobbert had fair warning would be to ignore what is arguably the essence of the ex post facto clause—protection against fair warning deprivations. The more reasonable approach is to hold that the *Lindsey* “test”⁷³ applies only when fair warning is absent. By thus requiring a fair warning determination before a retroactive law can be declared unconstitutional, the rather inflexible *Lindsey* test is clarified so that it can accommodate unusual circumstances like those of the instant case.

The equity of this rationale when applied to the instant case is further borne out by examining the judicial invalidation of the original death penalty provision. In reality, the Florida Supreme Court was not invalidating the death penalty per se but rather the procedure for imposing it. This is evidenced by the fact that once the procedure was modified by the legislature in the 1972 revision the Supreme Court of Florida and the United States Supreme Court both upheld it.⁷⁴ Thus, the five-month period between invalidation of the old law and the passing of the new law was a technical aberration that reflected neither the Florida Supreme Court’s nor the legislature’s view on the death penalty. To allow Dobbert to take advantage of this technicality would indeed be a mockery not only of the Florida law but also of the intent of the ex post facto clause.

B. *Implications of the Holding*

In holding the retroactive application of the Florida death penalty statute constitutional, the Supreme Court effectively rejected a mechanical application of the *Calder* categories so often relied on by previous opinions. Although this decision can probably be attributed more to the unique factual circumstances of the instant case than to any conscious effort on the part of the Court to reinterpret the clause, it may signal the beginning of a significant doctrinal turn toward a more reasonable standard for determining the constitutionality of retroactive laws. It also sets a

73. The *Lindsey* “test” holds unconstitutional those retroactive statutes which work to the “material disadvantage of the wrongdoer.” 301 U.S. at 401-02.

74. *Proffitt v. Florida*, 428 U.S. 242 (1976).

precedent, although not a clearly stated one, for looking beyond the technical consequences of a retroactive law to the presence of actual injustice in deciding *ex post facto* questions. At the same time, the holding identifies the specific injustice to be prohibited by suggesting that no retroactive law will be held unconstitutional unless it violates an accused's right to a fair warning of the elements and penalty of the crime he is charged with.

However, the impact of the above advantages may be more theoretical than practical. It is likely that most cases involving *ex post facto* questions will parallel the facts of *Lindsey* more closely than those of the instant case, thereby eliminating any persuasive argument that an accused received fair warning of the retroactive law. Consequently, the traditional categorical tests will still play an important role in resolving most future *ex post facto* issues.

Gene S. Martin, Jr.