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State v. Hubbard 2021-Ohio-3710

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**State v. Hubbard
2021-Ohio-3710**

I. INTRODUCTION

According to the social contract theory of philosophy, all people were originally as free as the laws of nature will allow, and society only forms by people trading that inherent freedom in favor of forming a society with rules.¹ As time has gone on, societies have continued to develop in which these base rules have transmuted into written law that permeates through all parts of life. As the law continues to progress and more and more of everyday life is bounded by the words written on pages, it becomes supremely necessary for people to know what conduct is allowable and what is disallowed in an interconnected society. This foundational principle is encapsulated by the pervasive belief that a person is only bound by the laws that are in effect when they act.²

One of the main ways that governments protect their citizenry from being subjected to unknowable law is by prohibiting law to apply retroactively.³ Both the United States Constitution and the Ohio Constitution protect citizens from being subjected to retroactive laws.⁴ While protecting against retroactivity, the purpose is not to ensure that a person's every prior act is immunized from future law but rather it is to ensure that a person's substantive rights are not affected by a new law being applied to past conduct.⁵

Hubbard is a case in which a new registration scheme for violent offenders is established in Ohio and that new registration scheme is being applied to an offender whose offense and pleading took place before the new registration scheme became effective.⁶ The regulatory scheme is enacted under a grouping of laws that is collectively referred to as Sierah's Law.⁷ This scheme requires a certain group of offenders, described as "violent offenders", to register in a law enforcement database upon either pleading guilty or being found guilty of a certain group of violent offenses.⁸

1. *Social contract*, *BRITANNICA*, <https://www.britannica.com/topic/social-contract> (last accessed Jan. 28, 2022).

2. *State v. Hubbard*, Slip Opinion No. 2021-Ohio-3710, 2021 WL 4898587 at *3 (2021).

3. *Hubbard*, 2021 WL 4898587 at *3.

4. OH CONST. art. II, §28; U.S. CONST art. I, §9, cl. 2.

5. *Hubbard*, 2021 WL 4898587 at *3.

6. *Id.* at *2.

7. *Id.* at *1.

8. *Id.* at *4.

The framework for this case is that Ohio has been struggling to determine whether registration laws are such a burden on an individual as to affect their substantive rights or if they are merely a regulatory process that is a minor hassle the likes of renewing a driver's license.⁹ The early cases in this sphere dealt with sex offender registration laws in Ohio like Megan's Law or the Adam Walsh Act, where the supreme court had to wrestle with the applicability of the registration law to people already convicted of sex crimes.¹⁰ One of the major reasons that *Hubbard* made its way to being reviewed by the Supreme Court of Ohio is that there was no definitive answer or test provided when dealing with the sex offender registration cases.¹¹

The issue to be determined in this case is whether the Retroactivity Clause of the Ohio Constitution is violated by applying the requirements of Sierah's Law to conduct that occurred prior to the law becoming effective.¹² In determining this issue the Court attempts to determine whether the registration law as applied to Appellant would be changing his substantive rights and thus would run afoul of the retroactivity clause or if this is simply a case in which he now has to abide by some small new regulatory procedure.¹³ The way that the Court is able to determine if the law affects a substantive right in a criminal situation is by determining if the statute is punitive or remedial.¹⁴ In this case the Court determines that the statute is not punitive in nature, and thus, it is not affecting Appellant's substantive rights by applying the requirements of Sierah's Law to him.¹⁵ Thus, the Court finds that applying Sierah's Law to conduct prior to its effective date does not run afoul of the Retroactivity Clause of the Ohio Constitution.¹⁶

II. FACTUAL AND PROCEDURAL BACKGROUND

Sierah's Law was enacted in 2018 and the law was to be put into effect on March 20, 2019.¹⁷ "Appellant, Miquan D. Hubbard" entered a plea of guilty to murder with a firearm specification for the killing of Jarius Gilbert Jr. in 2018.¹⁸ Hubbard entered his guilty plea on March 7, 2019, before

9. *Id.*

10. *See generally Hubbard*, 2021 WL 4898587; *State v. Cook*, 83 Ohio St.3d 404 (1998); *State v. Ferguson*, 120 Ohio St.3d 7 (2008); *State v. Williams*, 129 Ohio St.3d 344 (2011).

11. *See generally Hubbard*, 2021 WL 4898587; *State v. Cook*, 83 Ohio St.3d 404 (1998); *State v. Ferguson*, 120 Ohio St.3d 7 (2008); *State v. Williams*, 129 Ohio St.3d 344 (2011).

12. *Hubbard*, 2021 WL 4898587 at *2.

13. *Id.* at *3.

14. *Id.* at **7-8.

15. *Id.* at **7-9.

16. *Id.* at *10.

17. *Hubbard*, 2021 WL 4898587 at *2.

18. *Id.* at *2.

Sierah’s Law went into effect.¹⁹ Hubbard was sentenced on April 30, 2019, after Sierah’s Law went into effect.²⁰ The court notified Hubbard at sentencing of the requirement for him to register as a “violent offender”.²¹ Hubbard objected to this application of Sierah’s Law by stating that it went against the Retroactivity Clause of the Ohio Constitution.²² The court overruled the objection and continued to provide the notification to Hubbard.²³

Hubbard appealed the decision to the Twelfth District Court of Appeals.²⁴ The appellate court affirmed the trial court’s decision in applying Sierah’s Law stating that it did not run afoul of the Retroactivity Clause.²⁵ The Twelfth District Court determined that Sierah’s Law did not affect a substantive right and thus it would not be invalidated under the Retroactivity Clause based upon how the Retroactivity Clause has been applied to Ohio law.²⁶ The Twelfth District Court then certified a conflict of judgement with the Fifth District Court of Appeals.²⁷ There was a certified conflict because faced with the same issue the Fifth District Court held that the application of Sierah’s Law to conduct that occurred prior to the effective date of the statute would be violative of the Retroactivity Clause of the Ohio Constitution and thus it would not be allowed.²⁸ With a proper certified conflict, the Supreme Court of Ohio took up the appeal in order to quell the discord between the lower courts.²⁹

III. COURT’S DECISION

A. *Majority Opinion by Justice Kennedy*

The Court begins its discussion of the law in this case with the general proposition that people are distrustful of law that is applied retroactively.³⁰ The general belief of people is that they should be able to rely on the law how it is not how it will be in some future.³¹ The Court finds that the way that this belief was implemented into law in Ohio was through the language

19. *Id.* at *2.
 20. *Id.* at *2.
 21. *Id.* at *2.
 22. *Hubbard*, 2021 WL 4898587 at *2.
 23. *Id.* at *2.
 24. *Id.* at *2.
 25. *Id.* at *2.
 26. *Id.* at *2.
 27. *Hubbard*, 2021 WL 4898587 at *2.
 28. *Id.* at *2.
 29. *Id.* at *2.
 30. *Id.* at *3.
 31. *Id.* at *3.

of the Retroactivity Clause of the Ohio Constitution.³² The Retroactivity Clause states plainly that “The general assembly shall have no power to pass retroactive laws. . . .”³³ The Court goes on to show that this plain statement has been more nuanced in application and that not every law that has retroactive implications is immediately barred.³⁴

The Court has put into effect a two-part test to determine if the law that is being retroactively applied is and unconstitutionally retroactive law.³⁵ The two-part test is “(1) whether the General Assembly expressly made the statute retroactive and, if so, (2) whether the statute is substantive or remedial.”³⁶ The Court has no problem finding the first part of the test satisfied due to the fact that both parties ceded the issue on appeal.³⁷

The second part of the two-part test is where the difficulty arises and the Court looks to the *Williams* case in order to find definitions to guide what is “substantive” and what is “remedial.”³⁸ “Substantive” statutes are those which “impairs or takes away vested rights, affects an accrued substantive right, imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction, or creates a new right.”³⁹ A “remedial” statute is one that affect “only the remedy provided, and include laws that merely substitute a new or more appropriate remedy for the enforcement of an existing right.”⁴⁰ The Court used these definitions to guide their inquiry on whether or not *Sierah’s Law* is in effect a substantive or remedial law.⁴¹

The Court ensures to point out that this inquiry is distinct to Ohio law and is not part in parcel with federal *Ex Post Facto* jurisprudence.⁴² The court determines that the caselaw bears out different treatment for the Retroactivity Clause than the *Ex Post Facto* provision in the United States Constitution.⁴³

To begin to apply the definitions of substantive and remedial statutes, the Court discusses the major points of *Sierah’s Law*. The Court boils down the important points of the law to be that if a person is convicted of a certain crime, they must register in a law enforcement database for violent offenders.⁴⁴ That database contains the information about the crime,

32. *Hubbard*, 2021 WL 4898587 at *3.

33. OH CONST. art. II, § 28.

34. *Hubbard*, 2021 WL 4898587 at *3.

35. *Id.* at *3.

36. *Id.* at *3.

37. *Id.* at *4.

38. *Id.* at *3.

39. *Hubbard*, 2021 WL 4898587 at *3 (quoting *Williams*, 129 Ohio St.3d 344 at ¶8).

40. *Id.* at *3 (quoting *Williams*, 129 Ohio St.3d 344 at ¶8).

41. *Id.* at *3.

42. *Id.* at *3.

43. *Id.* at *3.

44. *Hubbard*, 2021 WL 4898587 at *4.

identifying information about the perpetrator, and the residence information of the offender.⁴⁵ The Court discusses that while the information is not generally public it is accessible by a public records request.⁴⁶ The law requires that the offender register for ten years, they re-enroll annually, and that they report any change in residency within three days of moving to the sheriff of the county they moved to.⁴⁷

The Court also discusses the potential penalty of a fifth-degree felony charge if the offender is reckless in their non-compliance with the statutory mandates.⁴⁸ The statutes also provide a mechanism by which the person may be alleviated of the requirement to register, which applies if the offender was not the principal offender of the charged offense.⁴⁹ To cap its discussion of the statutes requirements, the Court states that the enrollment period can be extended if the person is convicted “of another felony or any misdemeanor offense of violence during the enrollment period or has violated a term or condition of a sanction imposed under the offender’s sentence.”⁵⁰

Upon laying out the requirements of Sierah’s Law upon offenders the Court then turns to a discussion of the Court’s treatment of the Retroactivity Clause in conjunction with sex offender registration laws.⁵¹ The Court points out that it has previously held that felons do not have a rightful expectation that their felonious conduct will never be subject to future regulation.⁵² Applying that idea the Court then looks to the *Cook* case in which they held that retroactively applying Megan’s Law sex offender registration to people already convicted of sex offenses did not run afoul of the Retroactivity Clause.⁵³ The *Cook* case found that the registration law as applied to these individuals did nothing more than add small regulatory requirements and did not rise to the level of “infringing on a substantive right.”⁵⁴

The legislature came back and updated Megan’s law after *Cook* was decided which prompted the *Ferguson* case to be brought under the same challenge with the Retroactivity Clause as the vehicle.⁵⁵ The changed law required the sex offender to register in multiple places, made the

45. *Id.* at *4.

46. *Id.* at *4.

47. *Id.* at *5.

48. *Id.* at *5.

49. *Hubbard*, 2021 WL 4898587 at *5.

50. *Id.* at *5 (citing R.C. 2903.43(D)(2)).

51. *Id.* at *5.

52. *Id.* at *5 (citing *State ex rel. Matz v. Brown*, 37 Ohio St.3d 279, 281 (1988)).

53. *Id.* at *5 (citing *Cook*, 83 Ohio St.3d at 414).

54. *Hubbard*, 2021 WL 4898587 at *5 (citing *Cook*, 83 Ohio St.3d at 412).

55. *Id.* at *5 (citing *Ferguson*, 120 Ohio St.3d 7 at ¶¶ 4,9).

designation of sexual-predator permanent, and created a “publicly available internet database” of registrants.⁵⁶ Even with these more strenuous requirements on the sex offenders, the court still found that the changes in the law did not affect the substantive rights of the registrants and thus the law could be retroactively applied.⁵⁷

The Court finally reached its breaking point with sex offender registration when the Adam Walsh Act replaced Megan’s Law for sexual offender registration.⁵⁸ The Court decided in *Williams* that the new automatic tier system, the much more frequent registration requirements, the reduced leniency in registering after a life change, and the new community notification system created a registration scheme that was sufficiently overbearing as to affect a registrant’s substantive rights.⁵⁹ In finding that the new scheme impacted a registrant’s substantive rights, the Court found that any retroactive application of the Adam Walsh Act would violate the Retroactivity Clause of the Ohio Constitution and thus it was impermissible.⁶⁰

In determining whether Sierah’s Law is substantive or remedial the court then analogizes Sierah’s Law to being more or less like either Megan’s Law or the Adam Walsh Act.⁶¹ The court ends up finding that Sierah’s Law looks a lot more like Megan’s Law than the Adam Walsh Act.⁶² Salient differences that the court points out between Sierah’s Law and the Adam Walsh Act is that the registration information is not publicly available, the registration is yearly not every 180 or 90 days, the enrollment is only for ten (10) years rather than a minimum of fifteen (15) for Adam Walsh, and that for Sierah’s Law you only have to register in one place rather than multiple.⁶³

The Court then looks to see if on whole the implementation of Sierah’s Law has the effect of increasing punishment, which is another way by which it could be violative of the Retroactivity Clause.⁶⁴ The Court finds that there is no indication that Sierah’s Law was intended to increase punishment for registrants.⁶⁵ The Court divines that it was not the intention of the legislature to increase punishment from the fact that registration laws are generally tools for law enforcement not punishment, the database is not

56. *Id.* at *5 (citing *Ferguson*, 120 Ohio St.3d 7 at ¶¶ 4,9).

57. *Id.* at *5 (citing *Ferguson*, 120 Ohio St.3d 7 at ¶39).

58. *Id.* at *6.

59. *Hubbard*, 2021 WL 4898587 at *3 (citing *Williams*, 129 Ohio St.3d 344 at ¶ 20).

60. *Id.* at *3 (citing *Williams*, 129 Ohio St.3d 344 at ¶ 21).

61. *Id.* at *6.

62. *Id.* at *6.

63. *Id.* at *6.

64. *Hubbard*, 2021 WL 4898587 at **6-7.

65. *Id.* at *7.

public, the statutes were not codified in the section for penalties and sentencing, and that these requirements are not imposed as a part of sentencing.⁶⁶

Recognizing that it is possible for the effect of the law to be punitive even when the intent is not there the Court then performs an analysis to determine if such a punitive effect is put forth by the law.⁶⁷ The Court then borrows from the United States Supreme Court case of *Mendoza-Martinez* which provides a seven factor test to determine if the effect is punitive.⁶⁸ The test is:

“Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may point in differing directions.”⁶⁹

The Court finds that Sierah’s Law does not put in place any “affirmative disability or restraint” because registering once a year is insufficient to find this factor to be met.⁷⁰ The Court also finds that the registration law is not tied to the scienter of the crime as it is invoked automatically based on the conviction alone, not based on any acknowledgement of wrongdoing.⁷¹ The Court also dismisses the idea that a registration law promotes traditional punishment by relying upon the *Smith* decision by the United States Supreme Court where registration schemes, in that case a sex offender registration scheme, was determined to not be promoting traditional punishment.⁷²

The Court finds that Sierah’s Law is not attempting to be retributive or deterrent but rather just provide more protection to the community by keeping track of potentially dangerous individuals.⁷³ The Court ends off the factor test by finding that the requirement of registering once annually in

66. *Id.* at **7-8.

67. *Id.* at *7.

68. *Id.* at *7 (quoting *State v. Casalicchio*, 58 Ohio St.3d 178, 182 (1991), quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)).

69. *Mendoza-Martinez*, 372 U.S. at 168-69.

70. *Hubbard*, 2021 WL 4898587 at *7 (citing *Mendoza-Martinez*, 372 U.S. at 168-69).

71. *Id.* at *8.

72. *Id.* at *7 (citing *Smith v. Doe*, 538 U.S. 84 (2003)).

73. *Id.* at *9.

person is not excessive in the face of the remedial purpose of protecting the health and safety of the general public.⁷⁴

The Court ends its analysis with a refrain that keeping with Ohio precedent is important and foundational for a just legal system to continue, that the precedent supports the conclusion that the law is indeed not impacting a substantive right of the Appellant, and that there is no violation of the Retroactivity Clause of the Ohio Constitution.⁷⁵

B. Dissent by Justice Stewart

The dissent begins by stating that the law in this area is impermissibly unclear and finding that the opinion issued by the Court only works to fuel that fire.⁷⁶ The dissent would do two things in order to clarify the law in the application of the Retroactivity Clause of the Ohio Constitution.⁷⁷ First, the dissent would find that the Retroactivity Clause of the Ohio Constitution is fully inclusive of the federal prohibition against Ex Post Facto laws, outlawing retroactive application of law if the law either expressly or in effect increases a punishment for prior criminal conduct.⁷⁸ Secondly, the dissent would instruct all lower courts to do a proper and full Ex Post Facto analysis using the “intents-effects test” promulgated by the United States Supreme Court.⁷⁹ Under the “intents-effects test”, the Court would determine whether the intention behind the statute was to be remedial and civil or if it was to be criminal and if it was determined that it was intended to be remedial, if that intention was properly put into effect or if it had a punitive effect.⁸⁰

The dissent determined that in contrast with the majority opinion the precedent has been varied and unclear, in large part, due to the continued insistence that the Retroactivity Clause is not interpreted the same as the federal Ex Post Facto analysis.⁸¹ The dissent finds the problem further muddled because the Court does apply the Ex Post Facto analysis when the challenge is raised under the federal constitution but still refuses if the challenge is only brought under the Ohio Retroactivity Clause.⁸²

The dissent found the continued indigence of the Court in not applying the Ex Post Facto analysis to be unfounded in the history behind the

74. *Id.* at *9.

75. *Hubbard*, 2021 WL 4898587 at **9-10 (Stewart J., dissenting).

76. *Id.* at *10.

77. *Id.* at *10.

78. *Id.* at *10.

79. *Id.* at *10 (citing *Smith*, 538 U.S. at 92-93).

80. *Hubbard*, 2021 WL 4898587 at *10.

81. *Id.* at *11.

82. *Id.* at *11.

ratification of the Retroactivity Clause.⁸³ The dissent highlights legislative history that supports the idea that the drafter of the Retroactivity Clause intended it cover Ex Post Facto laws completely and only wrote the language differently because the drafters wanted to cover some civil law as well as criminal.⁸⁴ Thus, the dissent concludes that it is non-sensical to continue to treat the tests and standards for the Ohio Constitution and the United States Constitution as being alien to one another.

The dissent then dissects the caselaw that the majority uses to support its opinion, analyzing both the treatment under the Ohio Retroactivity Clause claims and any federal Ex Post Facto Claims.⁸⁵ Under *Cook* the Ohio Retroactivity Clause challenge was quickly found to be unfounded as the changes to the registration scheme were said to be “de minimis procedural requirements” and that the notification provisions were not punitive either because they were just disseminating truthful information.⁸⁶ Then the *Cook* court moved on to the analysis under the federal Ex Post Facto challenge, where it determined that the law was not intended to be punitive and the effect was not punitive by performing the factor test laid out by *Mendoza-Martinez*.⁸⁷ The dissent then performed a very similar analysis of the decision that was made in the *Ferguson* case.⁸⁸ The dissent yet again talked about how the court did not find issue under the Ohio Retroactivity Clause nor did it find the factors weighed differently in the federal Ex Post Facto laws.⁸⁹

The dissent then moves to discuss *Williams* where the dissent asserts that the court did not say that it was doing the “intents-effects” test but that was essentially what was done.⁹⁰ The dissent essentially asserts that the *Williams* decision should have signified a shift in Ohio law away from the separate analyses for Retroactivity Clause versus Ex Post Facto law into a situation where the two work harmoniously together.⁹¹

After providing the framework that the dissent believes the law should operate under it then performs an analysis of Sierah’s Law under that framework.⁹² The first step of this analytical framework is the determination of whether the intent of the legislature was to promulgate a punitive statute

83. *Id.* at **11-12.

84. *Id.* at *12.

85. *Hubbard*, 2021 WL 4898587 at **12-16.

86. *Id.* at *13 (quoting *Cook*, 83 Ohio St.3d at 412-14).

87. *Id.* at *14 (citing *Cook*, 83 Ohio St.3d at 416-17).

88. *Id.* at *14 (citing *Ferguson*, 120 Ohio St.3d 7).

89. *Id.* at *14 (citing *Ferguson*, 120 Ohio St.3d 7).

90. *Hubbard*, 2021 WL 4898587 at *17.

91. *Id.* at *17.

92. *Id.* at **19-28.

or if the intent is to create a civil, remedial statute.⁹³ The dissent finds that at best the legislative intent could be construed as mixed.⁹⁴ The dissent finds the factors weighing in favor of finding punitive intent was that there was no language on the face of the statute saying non-punitive, previous registration laws have been explicit in stating they were non-punitive, the legislature still placed Sierah's Law in the title for the criminal code, the possibility of indefinite or lifetime registration, the ease to extend the registration period as opposed to the ability to end the registration period, ending the registration period is tied to paying all imposed financial sanctions, and that the information is still readily available via public record request.⁹⁵ The dissent finds that there is some evidence pointing against punitive intent which is as follows, the court must look to public safety factors when analyzing whether to relieve a non-principal offender of their registration requirements like analysis of "risk of recidivism and continued threat to community."⁹⁶ This leads the dissent to implicate that the legislature did have punitive intent in drafting, however the dissent continues beyond the intent analysis stating that it is mixed.⁹⁷

The next step of the dissent's analysis is if the intent is inconclusive then the effect of the statute must be analyzed to see if it is punitive.⁹⁸ The dissent finds that Sierah's Law is unequivocally punitive in effect and finds this using the same *Mendoza-Martinez* factor test that the majority applied. The dissent finds that there is no question that Sierah's Law concerns is already criminalized as the registration doesn't come into effect unless someone is admitting to or proven to have committed a certain class of crime.⁹⁹ A similar discussion is given by the dissent as to the requirement of scienter, because without an admission or finding of the scienter of one of these heinous crimes, there would be no trigger of the statute.¹⁰⁰ Thirdly, the dissent says that it clearly furthers "traditional aims of punishment" by having a person be presumptively a violent offender rather than a previously convicted individual and the possibility of lifetime reporting with a mechanism that is both easily met and also mandatory.¹⁰¹

The first factor that the dissent spends time explicitly refuting the majority is whether Sierah's Law constitutes an "affirmative disability or

93. *Id.* at *20.

94. *Id.* at *20.

95. *Hubbard*, 2021 WL 4898587 at **20-21.

96. *Id.* at *21.

97. *Id.* at *21.

98. *Id.* at *21.

99. *Id.* at *22.

100. *Hubbard*, 2021 WL 4898587 at *22.

101. *Id.* at *22.

restraint.”¹⁰² In contrast to the majority the dissent finds a system where the registrant has to report in person annually, to the sheriff, report upon moving within three days, and is subject to a felony charge if found to have not complied to be a significant restraint on the registrants freedom of movement.¹⁰³

The next factor in major contention for the dissent is “Whether the type of sanction imposed has been historically regarded as punishment.”¹⁰⁴ As an introduction the dissent dispels with the belief that the *Smith* precedent is dispositive of the factor by showing that when *Smith* was decided registration laws were still very new, the requirements of that registration law were not the same, and the recidivism analysis was based on, at best, suspect data.¹⁰⁵ In showing that the *Smith* precedent is not dispositive of the factor, the dissent then goes on to say that if confronted with modern data, the requirements in Sierah’s Law, and the effects of public registration in such a category on a person, it is hard to say if the holding in *Smith* would have been the same.¹⁰⁶

The last factor the dissent deals with is a combination of two of the *Mendoza-Martinez* factors into the singular summation of “Whether the law is excessive in relation to its remedial purpose.”¹⁰⁷ The dissent states that often this factor is considered to be the most influential of all the factors, and while it is not dispositive, if the determination is that the law is excessive, then it is quite likely that the law is punitive in effect.¹⁰⁸ The dissent finds that the law is indeed “excessive in relation to its remedial purpose” for a multitude of reasons. One such reason is that there is not discretion left to the judge to determine either if the person is not a threat anymore to be removed from the requirements or that a person can’t argue their low risk in the first place.¹⁰⁹ Another such reason is that the extension of the reporting period is also mandated, there is no discretion for the trial judge to make an assessment of the true risk the individual poses.¹¹⁰ A subsequent reason is that the offense that extends the reporting period need not indicate further violent tendencies, it can yet again be automatic based upon the categorization of the crime.¹¹¹ On top of those factors pointing toward excessiveness, the dissent finds there is also the underlying lack of

102. *Id.* at *23.

103. *Id.* at *23.

104. *Id.* at *22 (quoting *Mendoza-Martinez*, 372 U.S. at 168-69).

105. *Hubbard*, 2021 WL 4898587 at *7 (citing *Smith*, 538 U.S. at 92-3, 97-8, 102-03).

106. *Id.* at **24-27.

107. *Id.* at *27 (quoting *Mendoza-Martinez*, 372 U.S. at 168-69).

108. *Id.* at *27.

109. *Id.* at *28.

110. *Hubbard*, 2021 WL 4898587 at *28.

111. *Id.* at *28.

proof that these individuals are a higher public safety risk to begin with.¹¹² Finally, the dissent points out that if the purpose was truly to stop violent recidivism, it is excessive to extend reporting for non-violent offenses, and if to stop all recidivism then extension to indefinite or lifetime reporting for something like a simple possession offense would be excessive as well.¹¹³

In summation, the dissent finds that the majority is flawed not only in its application of the law but also in the analytical framework that the majority uses to analyze the law.¹¹⁴ The dissent propounds that the Court recognize that the test of the Retroactivity Clause as applied to a criminal statute is the same as a federal Ex Post Facto analysis, with there being no indication that the analysis should have been different in the first place.¹¹⁵

IV. ANALYSIS

The predicate facts of this case seem to be narrow in scope and applicability, but the fundamental debate is one of huge import. The determination on whether the legislature is permitted to subject a person to a change in their way of life, based on something that could have happened years if not decades ago, has widespread import for all Ohioans.

Not only are the ramifications of the decision issued by the court impactful for the people affected by this retroactive application of Sierah's Law but there is also widespread impact for all people by the perpetuation of the current analytical framework for analyzing if a law should be invalidated under the Retroactivity Clause.¹¹⁶ The dissent is persuasive when it points out that under the Court's opinion there is no solid precedent or singular methodology by which to approach a Retroactivity Clause case.¹¹⁷ Under the Court's opinion there is an amalgamation of somewhat conflicting caselaw that is woven together, seemingly for the sake of continuing the precedent of the court, without any new guidance on what is truly dispositive of these sorts of cases.

The main flaw with the Court's opinion announced in this case would seem to be less about the analysis that was done on whether Sierah's Law is actually affecting substantive rights and much more to do with the analytical framework that the Court utilized. The dissent provides a compelling argument using the legislative history of the ratification of the Retroactivity Clause to show that the original drafters and the original adopters envisioned the Clause to act at a minimum as the Ex Post Facto clause of

112. *Id.* at *28.

113. *Id.* at *28.

114. *See generally Hubbard*, 2021 WL 4898587 at **10-28.

115. *Id.*

116. *Id.*

117. *Id.* at **10-11 (Stewart J., dissenting).

the United States Constitution does with the change in language to allow for more protection against retroacting laws.¹¹⁸ The dissent sets a stage by which it is hard to argue that the analysis for the Ohio Retroactivity Clause should not be the same as the federal Ex Post Facto when the changes were only to expand upon the minimum that the federal system set.

Not only does the dissent put forth a compelling argument based upon the legislative history, but it also supplies a system that has cut and dry tests for application of the rule. There is likely never a perfect test and with both the dissent and the majority applying the *Mendoza-Martinez* test and coming out completely differently, it is safe to say that the implementation of this proposed framework would not solve all debates.¹¹⁹ However, the proposed framework is still much better than what is ostentatiously applied by the majority opinion. The framework is better not because the result is assured but rather because both sides are on equal footing. Under the dissent's framework, there is a set of tests that would be applied in every case that deals with retroactive application of a criminally related law. This would mean that the guesswork about which precedent is more persuasive at the time or comparing shades of case analogy would be thrown out in favor of a system in which at least begins with the same underpinnings.

There is likely to never be a silver bullet, bright line solution to any problem in the legal world, however that does not imply that every problem need start in the most middling of gray areas. In the area of criminal law, a person's very freedom and ability to live is being put in contest. There should be some measure of security or finality when it comes to a determination relating to such an important area of law. In this case the retroactive application of Sierah's Law to past criminal conduct, throws that finality back into flux without the Appellant ever having the ability to have know whether the provision would apply to his case.¹²⁰ In such an instance the least protection that an individual should receive is a stable test that will be applied for the determination to be made. In this case that stable test and finality is much better protected by the dissent's espoused solution than the judgement that is provided by the majority.

V. CONCLUSION

A person may very well sign a social contract when entering society, but that does not mean they have given up the right to know the terms of the deal. Every individual is governed by the laws of the area that they live in, whether they choose to know those rules or remain ignorant. The issue does

118. *Id.* at **11-12.

119. *Hubbard*, 2021 WL 4898587.

120. *Id.* at *2.

not arise in life or law when an individual has simply chosen to be ignorant of the rules that bind them, but an issue becomes readily apparent when the rule that is applied was not the rule when the action was taken. *Hubbard* is a clear case of a person acknowledging that they did something horrendous and not challenging the punishment as it was written when the offense was committed, but rather is challenging the fact that the rule was changed in the pendency between the commission of the crime and the sentencing.¹²¹ The rule of law in Ohio was indisputably such that Hubbard would not have had to perform any sort of violent offender registration upon a plea of guilty and sentencing but two months prior.¹²²

Therefore, this case is not one about whether Hubbard deserves what Sierah's Law requires of him, or whether the law is wise, valid, or imbecilic. This case is one about whether the expectation of society is met when a law can be changed after something has happened and have the consequences of the change bear on that prior action. Not only is such an application granted in this instance, but the test that was used to determine if this would be the case is nigh on indecipherable to try and replicate. In a situation where the Court is attempting to set precedent on when a law is allowed to act in a behavior that most people, according to the Court itself, find "distasteful" there is no rule set or guiding principle given, there is just a web of half overturned precedent.

The dissent is able to provide at least a principle to approach every question of this type with, and able to find a reasoned explanation for why the principle is well founded in the history of the constitutional provision itself. There may be a lot of room for debate in the application of the tests that the dissent puts forward to be the universal standard, however that at least puts litigants in the same arena to be able to properly advocate for their clients. The Appellant may be a career criminal that would do the same crime if given another opportunity, or may be a person that happened to be in the wrong place at the wrong time, but either way they deserved to know what was coming to them when that incident occurred in 2018. If not for the Appellant then for the rest of Ohio, this is not a debate that can be shelved upon such uncertainty and the framework advocated for by the dissent should not be put to rest so easily.

MORGAN FISH

121. *Id.* at *2.

122. *Id.* at *2.