UNDERSTANDING *TEAGUE V. LANE*

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INTRODUCTION

In *Teague v. Lane*,[1] the United States Supreme Court held that new rules of criminal procedure do not apply retroactively to cases which had become final on direct review at the time the new rule was decided.[2] As the retroactivity of any prior decision was not a question presented for review in *Teague*, nor was it briefed nor argued by any party, it is apparent that at least a majority of the Court felt that the retroactivity of new rules of criminal procedure was an issue of prime importance. That aspect of *Teague* should not have come as a surprise to anyone who had followed the Court's retroactivity decisions. A majority of the Court had recently expressed, in several decisions, dissatisfaction with the then-existing modes of determining retroactivity.[3] In

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1. 109 S. Ct. 1060 (1989).
2. *Id.* at 1067.
3. The history of the Court's retroactivity decisions is discussed in Section I of this Article.

fact, the Court had consistently tinkered with retroactivity analysis.[4] Thus, against this backdrop, *Teague* is best seen as an attempt by the Court to greatly modify existing retroactivity analysis. This modification was needed, according to several previously dissatisfied Justices, not only to simplify retroactivity analysis, but also to give greater protection to the states' interest in the finality of criminal convictions.[5]

In this Article, we will maintain that the rule announced in *Teague* does not measurably contribute to either of the proposed goals. First, we will assert, with the benefit of the historical tapestry of the Court's retroactivity decisions, that *Teague* did not, at least in a formal context, significantly change retroactivity analysis. Second, we will establish that to the extent *Teague* did change the law relevant to the retroactivity of new rules of criminal procedure, it departed from the doctrinal purposes underlying retroactivity and made the law hopelessly complex and unworkable. Thus, due to the curious nature of the *Teague* holding, the Supreme Court has essentially guaranteed that it will have to decide the retroactivity of virtually every rule it has ever decided and will decide in the future.

I.
RETROACTIVITY BEFORE *TEAGUE V. LANE*

Ordinarily, a new rule of law announced in a legal decision will apply retroactively in all courts where the decision is binding as precedent.[6] "The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student."[7] The presumption that all decisional rules apply retroactively finds its roots in the Blackstonian idea that "the duty of the court [is] not to 'pronounce a new law, but to maintain and expound the old one.' "[8] This theory presupposes that a judge's function is not to create new law, but to discover existing law.[9] Under this conception, even a decision which overrules prior precedent would not constitute a change in the law, but a prior judicial failure to discover the law. The overruled precedent was never the law; the overruling precedent is just a correction, "an application of what is, and theretofore had been, the true law."[10]

Although the common law presumed complete retroactive application of

4. *See infra* text accompanying notes 57-97.

5. *Teague*, 109 S. Ct. at 1075 (O'Connor, J., opinion, joined by Rehnquist, C.J. & Scalia & Kennedy, JJ.).

6. *See, e.g.*, Solem v. Stumes, 465 U.S. 638, 642 (1984).

7. United States v. Security Indus. Bank, 459 U.S. 70, 79 (1982) (Rehnquist, J.).

8. Linkletter v. Walker, 381 U.S. 618, 622-23 (1965) (quoting 1 W. BLACKSTONE, COMMENTARIES *69). This idea has found favor recently in the works of several writers. *See, e.g.*, Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. PITT. L. REV. 349 (1989).

9. J. GRAY, NATURE AND SOURCES OF THE LAW 235 (2d ed. 1921).

10. *Linkletter*, 381 U.S. at 623 (citing Shulman, *Retroactive Legislation*, in 13 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 355, 356 (1934)).

judicial decisions,[11] the Constitution of the United States "has no voice upon the subject."[12] State courts, for example, can announce rules which will only act prospectively.[13] Article III of the Constitution implicitly provides that federal courts can only announce new rules when deciding "cases" or "controversies"[14] properly brought before them;[15] however, "the Constitution neither prohibits nor requires retrospective effect."[16] Thus, the Supreme Court has felt free to announce rules which apply only prospectively, or to otherwise limit the application of a new rule.[17] The Court, in defining the retroactive effect of its decisions, has declared at various times that its decision will control only cases brought in the future,[18] cases brought in the future and the case before it,[19] cases which are not yet final on direct review when the decision came down,[20] cases where tainted evidence has not yet been introduced,[21] cases where the trial has not yet commenced,[22] and all cases, including those on collateral review.[23] The different results reached in various retroactivity cases prompted Justice Harlan to comment that the course of the Supreme Court's retroactivity doctrine was "almost as difficult to follow as the tracks made by a beast of prey in search of its intended victim."[24]

This Section will attempt to clarify the doctrine of historical retroactivity by analyzing four different approaches to nonretroactivity utilized by the Supreme Court. First, we will discuss the Supreme Court's approach to nonretroactivity in civil cases. Second, we will analyze the three-prong test for nonretroactive application of criminal law precedents which grew out of *Lin-*

11. *See, e.g.*, Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910) (Holmes, J., dissenting) ("I know of no authority in this court to say that, in general, state decisions shall make law only for the future. Judicial decisions have had retrospective operation for near a thousand years."); United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801) (intervening change in decisional law compels appellate court to reverse trial court judgment, even when that judgment was compelled by old law).

12. Great N. Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 364 (1932).

13. *Id.*

14. U.S. CONST. art. III, § 2, cl. 1.

15. *See* Mackey v. United States, 401 U.S. 667 (1971).

> We cannot release criminals from jail merely because we think one case is a particularly appropriate one in which to apply what reads like a general rule of law or in order to avoid making new legal norms through promulgation of dicta. This serious interference with the corrective process is justified only by necessity, as part of our task of applying the Constitution to cases before us.

Id. at 679 (Harlan, J., concurring in part & dissenting in part).

16. Linkletter v. Walker, 381 U.S. 618, 629 (1965).

17. *See* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 422 (1964).

18. *Id.*

19. Stovall v. Denno, 388 U.S. 293, 297-301 (1967).

20. Griffith v. Kentucky, 479 U.S. 314, 326-28 (1987).

21. Fuller v. Alaska, 393 U.S. 80, 81 (1968) (per curiam).

22. Johnson v. New Jersey, 384 U.S. 719, 732-33 (1966).

23. *See* Moore v. Illinois, 408 U.S. 786, 800 (1972) (retroactive application of eighth amendment ruling in Furman v. Georgia, 408 U.S. 238 (1972) (per curiam)).

24. Mackey v. United States, 401 U.S. 667, 676 (1971) (Harlan, J., concurring in part & dissenting in part).

kletter v. Walker.[25] Third, we will discuss threshold tests that the Supreme Court found in its own precedents as explained in *United States v. Johnson*.[26] Fourth, we will consider the alternative approach to retroactivity advocated by Justice Harlan in his separate opinions in *Desist v. United States*[27] and *Mackey v. United States*.[28]

A. Nonretroactivity in Civil Cases

The Supreme Court has identified the earliest instances of the nonretroactive application of its decisions in the civil context.[29] Nonretroactivity has been recognized in cases involving constitutional rules,[30] statutory interpretation,[31] and common law rules.[32] The Court has even held that a judgment based on a proceeding brought under a jurisdictional statute which the Court subsequently found unconstitutional was not subject to collateral attack.[33] The Court stated:

> The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects, — with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in light of the nature of the statute and its previous application — all these questions demand examination.[34]

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25. 381 U.S. 618 (1965).
26. 457 U.S. 537 (1982).
27. 394 U.S. 244 (1969).
28. 401 U.S. 667 (1971).
29. *See* Chevron Oil Co. v. Huson, 404 U.S. 97, 105 (1971) (citing Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175 (1863), Havemeyer v. Iowa County, 70 U.S. (3 Wall.) 294 (1865), and Railroad Co. v. McClure, 77 U.S. (10 Wall.) 511 (1870)).
30. *See, e.g.*, Cipriano v. City of Houma, 395 U.S. 701, 706 (1969) (per curiam) (holding that an election law that limited referendum only to "property holders" violated fourteenth amendment, but that the ruling would have only prospective effect).
31. *See, e.g.*, Allen v. State Bd. of Elections, 393 U.S. 544, 572 (1969) (holding, that the state had violated section 5 of Voting Rights Act of 1965, would have only prospective effect).
32. *See, e.g.*, England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 422 (1964) (rule announced, allowing plaintiff to return to federal court after a *Pullman* abstention, *see* Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941), only when plaintiff has not voluntarily litigated her claims in state court proceedings, would apply only prospectively and would not decide the present case).
33. Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 375-78 (1940).
34. *Id.* at 374. Despite the Court's holding in *Chicot County*, it has not foreclosed the possibility of collateral relief after an intervening change in Supreme Court precedent, provided that relief is sought under the appropriate mechanism. *See* Polites v. United States, 364 U.S. 426, 433 (1960) ("[W]e need not go so far here as to decide that when an appeal has been abandoned or not taken because of a clearly applicable adverse rule of law, relief under [Rule 60(b) of the Federal Rules of Civil Procedure] is inflexibly to be withheld when there has later been a clear and authoritative change in governing law."); *see also* Griffin v. State Bd. of Educ., 296 F. Supp. 1178, 1182 (E.D. Va. 1969) ("Res judicata or estoppel cannot be pleaded successfully, for the decree of 1965 may be reopened under the permission of [Rule 60(b)(6) of the

In *Chevron Oil Co. v. Huson*,[35] the Court adopted a three-part test to determine whether a civil decision should apply retroactively. First, the court must determine whether the decision establishes a new principle of law, either by overruling a precedent or "by deciding an issue of first impression whose resolution was not clearly foreshadowed."[36] If the decision does establish a new principle of law, the court must then look to the history, purpose, and effect of the rule to see "whether retrospective operation w[ould] further or retard its operation."[37] Finally, the court must determine whether inequity would result from a retroactive application of the rule.[38]

To hold that a decision is nonretroactive, the court must determine that all three parts of the *Chevron* test weigh against retroactive application of the rule. In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*,[39] for example, the Court held its decision would have retroactive effect because it did not announce a new rule of law.[40] To qualify as a new civil rule for retroactivity purposes, the decision must create "such an abrupt and fundamental shift in doctrine as to constitute an entirely new rule which in effect replaced an older one."[41] Justice White, writing for a unanimous Court, declared that the decision was "based to a great extent on existing authorities and was an extension of doctrines which had been growing and developing over the years."[42] For a civil case to apply nonretroactively, the Court's decision must be more than an extension or outgrowth of existing doctrine; it must "constitute a sharp break in the line of earlier authority or an avulsive change which caused the current of the law thereafter to flow between new banks."[43]

Even when the Court overrules a precedent, the other two parts of the *Chevron* test can operate to require retroactive effect. Just two years ago, in *Rodriguez de Quijas v. Shearson/American Express*,[44] the Court overruled *Wilko v. Swan*,[45] which had interpreted section 14 of the Securities Act of 1933 as barring certain arbitration agreements.[46] In *Rodriguez*, the Court held that even though *Wilko* was being overruled, plaintiffs could not reasonably contend that they had entered into arbitration agreements while relying on

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Federal Rules of Civil Procedure]. The intervening and supervening edicts of the Supreme Court, just discussed, qualify under the Rule as 'reason justifying relief from the operation of the judgment.' ") (holding that state tuition grants to racially segregated private schools were unconstitutional and that plaintiffs could reopen a previous decree upholding the validity of the grants).

35. 404 U.S. 97 (1971).
36. *Id.* at 106 (citing Allen v. State Bd. of Elections, 393 U.S. 544, 572 (1969)).
37. *Id.* at 107 (citing Linkletter v. Walker, 381 U.S. 618, 629 (1965)).
38. *Id.*
39. 392 U.S. 481 (1968).
40. *Id.* at 496.
41. *Id.* at 498.
42. *Id.* at 499.
43. *Id.*
44. 109 S. Ct. 1917 (1989).
45. 346 U.S. 427 (1953).
46. *Id.* at 438.

Wilko's rendering those agreements invalid.[47] Thus, absent the petitioners' reasonable reliance on the rule in *Wilko*, the rule of *Rodriguez* was applied retroactively. The *Rodriguez* case illustrates the key concern of the Court in deciding whether to apply a civil decision only prospectively: a party must show that it had reasonably counted on the law being different from that stated in the new decision or statute.[48]

The future of the *Chevron* three-part test stands in some doubt. In *American Trucking Associations v. Smith*,[49] the Court decided that a rule announced in *American Trucking Associations v. Scheiner*[50] did not afford retroactive relief to cases on direct review at the time *Scheiner* was decided.[51] A plurality of the Court in *Smith*, in an opinion by Justice O'Connor, applied the *Chevron* test and found that: 1) the rule in *Scheiner* was new; 2) retroactive application of *Scheiner* would not further the deterrent purpose of the commerce clause; and 3) the state's reliance interest on the rule before *Scheiner* would make retroactive application of the rule inequitable.[52] Justice Stevens, joined by Justices Marshall, Brennan, and Blackmun, dissented, on the ground that *Griffith v. Kentucky*[53] requires that every case on direct review at the time of a decision should get the retroactive benefit of the decision.[54] Justice Scalia concurred, joining in the judgment on very different grounds than the plurality. He agreed strongly with the dissent that application of the *Chevron* test to determine the retroactive application of a decision was inappropriate:

> The very framing of the issue that we purport to decide today — whether our decision in *Scheiner* shall "apply" retroactively — presupposes a view of our decisions as *creating* the law, as opposed to *declaring* what the law already is. . . . Since the Constitution does not

47. 109 S. Ct. at 1922.

48. *See, e.g.*, Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 88 (1982) (holding, that portions of 1978 Bankruptcy Act were unconstitutional, was held to be nonretroactive, otherwise the Court would "visit substantial injustice and hardship upon those litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts"); Lemon v. Kurtzman, 411 U.S. 192, 199 (1973) ("statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct"); Cipriano v. City of Houma, 395 U.S. 701, 706 (1969) (per curiam) ("Where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity.") (citing Great N. Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 364 (1932)).

49. 110 S. Ct. 2323 (1990).

50. 483 U.S. 266 (1987).

51. 110 S. Ct. at 2343. *Scheiner* had held that a state's flat tax on use of its roads for trucking violated the commerce clause. 483 U.S. at 282. At the time of the *Scheiner* decision, *Smith* was held for certiorari and then remanded in light of *Scheiner*. American Trucking Ass'ns v. Gray, 483 U.S. 1014 (1987). On remand, the lower court held that the *Chevron* test would not permit retroactive relief under *Scheiner*. American Trucking Ass'ns v. Gray, 295 Ark. 43, 44-45, 746 S.W.2d 377, 378-79 (1988). The Court again granted certiorari. McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, Dep't of Business Regulation of Fla., 488 U.S. 954 (1988).

52. 110 S. Ct. at 2331-33.

53. 479 U.S. 314 (1987).

54. 110 S. Ct. at 2349-52.

> change from year to year; since it does not conform to our decisions, but our decision are supposed to conform to it; the notion that our interpretation of the Constitution in a particular decision could take prospective form does not make sense.[55]

There would, therefore, seem to be five votes for overruling or changing the *Chevron* test. However, Justice Scalia concurred in the judgment on the novel theory that stare decisis requires a Justice who dissented in a prior decision to limit the constitutional damage caused by the decision by voting against its retroactive application. In other words, stare decisis requires a Justice to avoid applying precedent with which she disagrees to another case on direct review, or not even filed, at the time the precedent was decided. Since Justice Scalia dissented in *Scheiner*, he therefore voted against applying it to the present case.[56]

B. Criminal Nonretroactivity: The Linkletter *Balancing Test*

In *Linkletter v. Walker*,[57] the first of a series of decisions concerning the retroactivity of "new" constitutional rules of criminal procedure, the Court held that retroactivity determinations should be made on the basis of "the prior history" of the constitutional rule involved, "its purpose and effect, and whether retrospective application will further or retard its operation."[58] *Linkletter* specifically held that the exclusionary rule, made applicable to the states by *Mapp v. Ohio*,[59] should not apply to state convictions that had become final before *Mapp* was decided.[60] Nevertheless, it directed courts, in making future retroactivity determinations, to "weigh the merits and demerits in each case."[61] *Linkletter*, therefore, pronounced a case-by-case approach to retroactivity determinations which looks to the rule of law in question, rather than to the procedural posture of the case.[62]

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55. *Id.* at 2343 (Scalia, J., concurring in the judgment) (emphasis in original).

56. *Compare Scheiner*, 483 U.S. at 303 (Scalia, J., dissenting), *with Smith*, 110 S. Ct. at 2343 (Scalia, J., concurring in the judgment).

57. 381 U.S. 618 (1965).

58. *Id.* at 629. The Court relied on this language from *Linkletter* for its second test in the civil retroactivity context. Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971). *Linkletter* ignored, however, what *Chevron* specifically acknowledged: that before the *Linkletter* test can apply, a court must determine that the rule in question is new. *See* United States v. Johnson, 457 U.S. 537, 549 (1982); *Chevron*, 404 U.S. at 106.

59. 367 U.S. 643 (1961), *overruling* Wolf v. Colorado, 338 U.S. 25 (1949).

60. A conviction is considered final if "the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision." *Linkletter*, 381 U.S. at 622 n.5. *Linkletter* did not address the question of the standard for determining retroactive effect of cases on direct review, noting that it had already applied *Mapp* to those cases. *See id.* at 622 n.4 (citing Ker v. California, 374 U.S. 23 (1963), Fahy v. Connecticut, 375 U.S. 85 (1963), and Stoner v. California, 376 U.S. 483 (1964)).

61. *Id.* at 629.

62. This approach is consistent with that adopted by the Court in the context of civil cases. Availability of collateral relief in civil cases is limited by the narrow scope of relief from judgment granted in Rule 60(b) of the Federal Rules of Civil Procedure, *see supra* note 34, and by the strong policy of finality expressed in the Court's res judicata doctrines. In civil cases, the

In *Stovall v. Denno*[63] the Court crystalized the *Linkletter* approach into a three-part balancing test which weighed: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."[64] The balancing of these factors shifted in each case, compelling the Court to conclude that there was no justification for drawing a hard line between cases which were final when the new rule was announced and those cases still at trial or on direct review.[65] The Court applied this test to draw the prospectivity/retrospectivity line at varying points in criminal proceedings,[66] for both constitutional[67] and nonconstitutional[68] criminal rules.

The purpose of the new rule was the foremost factor in the *Stovall* test.[69] When looking at the purpose of a new rule, the Court ordinarily focused on what the rule tried to accomplish. Thus, in *Linkletter*, the Court found that the purpose of the exclusionary rule was to provide "an effective deterrent to illegal police action."[70] Because retrospective application of the rule in *Mapp* would not correct the police misconduct that had occurred, nor restore "the ruptured privacy of the victims' homes and effects," it was not applied retroactively.[71] The Court concluded that the purpose underlying the exclusionary rule was easily outweighed by the reliance of both police and courts on the old rule. The Court acknowledged, however, that at the other end of the spectrum, when a rule purports to place certain conduct beyond a trial court's authority to try or punish, the weight of this type of rule will completely overbalance the other two factors of the *Stovall* test.[72]

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retroactivity of the rule is a separate question from the availability of collateral relief. *See* Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374-75 (1940) ("Without attempting to review the different classes of cases in which the consequences of a ruling against validity have been determined in relation to the particular circumstances of past transactions, we *appropriately confine our consideration to the question of res judicata as it now comes before us.*") (emphasis added).

63. 388 U.S. 293 (1967).

64. *Id.* at 297.

65. *Id.* at 300; *see, e.g.*, Johnson v. New Jersey, 384 U.S. 719, 732-33 (1966); *see also* Gosa v. Mayden, 413 U.S. 665, 679 (1973); Williams v. United States, 401 U.S. 646, 652 n.5 (1971) (plurality opinion); DeStefano v. Woods, 392 U.S. 631, 633 (1968); Roberts v. Russell, 392 U.S. 293, 294 (1968); Witherspoon v. Illinois, 391 U.S. 510, 523 n.22 (1968).

66. *See supra* text accompanying notes 17-23.

67. *See, e.g.*, Solem v. Stumes, 465 U.S. 638, 643 (1983) (holding that interpretation of the fifth and sixth amendments in Edwards v. Arizona, 451 U.S. 477, 486-87 (1981), should not have retroactive application).

68. *See, e.g.*, Fuller v. Alaska, 393 U.S. 80, 81 (1968) (per curiam) (holding that interpretation of section 605 of the Federal Communications Act, 47 U.S.C. § 21 (1934), announced in Lee v. Florida, 392 U.S. 378, 385-87 (1967), *overruling* Schwartz v. Texas, 344 U.S. 199 (1952), should be given only prospective application).

69. *See* Desist v. United States, 394 U.S. 244, 249 (1969).

70. Linkletter v. Walker, 381 U.S. 618, 636-37 (1965).

71. *Id.* at 637.

72. *See, e.g.*, Moore v. Illinois, 408 U.S. 786, 800 (1972) (retroactive application of eighth amendment ruling in Furman v. Georgia, 408 U.S. 238 (1972) (per curiam)); United States v.

The Court "relied heavily on the factors of the extent of reliance and consequent burden on the administration of justice only when the purpose of the rule in question did not clearly favor either retroactivity or prospectivity."[73] These other two factors entered into close cases to determine the extent of officials' reasonable reliance under the old rule. This reliance manifested itself through police conduct under the old rule[74] and through the number of convictions reached under the old rule, which, if the new rule were given retrospective effect, would have to be overturned and re-tried.[75] In *Desist v. United States*, the Court merged the two factors into a single reliance factor, stating: "[o]ur periodic restatements of [the old] tests confirmed the interpretation that police and courts alike had placed on the controlling precedents and fully justified reliance on their continuing validity."[76] In this way, the *Stovall* test balanced the purpose animating the new rule against the extent of justified reliance by officials on the old rule to determine whether or not to give retroactive effect to a particular decision.[77]

C. *The Threshold Tests:* United States v. Johnson

In *United States v. Johnson*[78] the Court reviewed its retroactivity prece-

United States Coin & Currency, 401 U.S. 715, 724 (1971) (assertion of fifth amendment privilege retroactively applied in tax forfeiture proceeding).

73. *Desist*, 394 U.S. at 251.

74. *See, e.g., id.* at 254 n.23 ("The law enforcement officers could certainly be said to have been acting 'reasonably' in measuring their conduct by the relevant Fourth Amendment decisions of this Court.") (citing Katz v. United States, 389 U.S. 347, 356 (1967), and James v. United States, 366 U.S. 213, 221-22, 245 (1961)).

75. *See, e.g., Linkletter*, 381 U.S. at 637 ("On the other hand, the States relied on *Wolf* and followed its command. Final judgments of conviction were entered prior to *Mapp*. Again and again this Court refused to reconsider *Wolf* and gave its implicit approval to hundreds of cases in their application of its rule."). In light of the states' justified reliance on *Wolf*, the Court found intolerable the burdens which a retrospective application of *Mapp* would place on the judicial system.

76. *Desist*, 394 U.S. at 250-51.

77. A series of Justices expressed dissatisfaction with the case-by-case balancing required by *Stovall*. As the Court explained in Williams v. United States, 401 U.S. 646 (1971), new constitutional doctrine designed to overcome defects in the truth-seeking process in criminal trials is invariably given complete retroactive effect, and "[n]either good faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances." *Id.* at 653 (plurality opinion). On the other hand, the Court declined in some cases to apply the rule even to the parties before it, *see, e.g.*, Morrisey v. Brewer, 408 U.S. 471 (1972), and in other cases limited the rule only to the parties in the case, *see* Stovall v. Denno, 388 U.S. 293 (1967). The varying and inconsistent results of these cases prompted a number of Justices to argue against selective grants of retroactivity. *See, e.g.*, Brown v. Louisiana, 447 U.S. 323, 337 (1980) (Powell, J., concurring in the judgment, joined by Stevens, J.); Hankerson v. North Carolina, 432 U.S. 233, 245 (1977) (Marshall, J., concurring in the judgment); United States v. Peletier, 422 U.S. 531, 543 (1975) (Douglas, J., dissenting); Coleman v. Alabama, 399 U.S. 1, 19 (1970) (Harlan, J., concurring in part and dissenting in part); *Desist*, 394 U.S. at 269 (Fortas, J., dissenting); *Stovall*, 388 U.S. at 303 (Black, J., dissenting).

78. 457 U.S. 537 (1982). Secret service agents conducted a search and interrogation without a warrant. The suspect moved to suppress the information obtained on the ground that it was the product of a search conducted without just cause. *Johnson* held that a decision constru-

dents and concluded that the *Stovall v. Denno* balancing test does not apply if a rule announced in a particular case meets certain thresholds.[79] The Court identified three threshold tests which a decision must meet before it may be analyzed under anything other than *Stovall*. "First, when a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively."[80] Second, a decision which makes "a clear break with the past" will almost invariably not be applied retroactively.[81] Third, full retroactivity is "a necessary adjunct to a ruling that a trial court lacked authority to convict or punish a criminal defendant in the first place."[82] In addition to these threshold tests, the Court identified an area where it regularly gave complete retroactive effect upon applying the *Stovall* test:[83] new rules whose purpose " 'is to overcome an aspect of the criminal trial which substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials.' "[84] Thus the Court determined that the *Stovall* test only shifted from case to case if the case did not fall into one of the above areas.[85]

A decision meets the first threshold requirement when it follows the rule of stare decisis. This type of decision applies retrospectively because it does not materially change the rule on which it is based.[86] Thus it does not create a new rule.[87] This is hardly a surprising doctrine. As the Court implicitly realized, no system of jurisprudence which respects stare decisis and views judicial decision making as bounded by rules of law could rationally hold that a court is creating a "new rule" whenever it applies a precedent to a slightly different set of facts which fall within the plain logical implications of the principle established by the precedent. By applying precedent to slightly different fact patterns, precedents accrete, growing and developing over the course of

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ing the fourth amendment should apply retroactively to all cases not yet final when the decision was rendered. *Id.* at 562.

79. *Id.* at 548.

80. *Id.* at 549.

81. *Id.* (quoting *Desist*, 394 U.S. at 248).

82. *Id.* at 550.

83. *Id.* at 548 n.11.

84. *Id.* at 544 (quoting Williams v. United States, 401 U.S. 646, 653 (1971) (plurality opinion)).

85. Justice White dissented, joined by Chief Justice Burger and Justices Rehnquist and O'Connor, condemning the threshold requirements as "exceedingly formal," 457 U.S. at 567, and as "an exercise in line-drawing." *Id.* at 568.

86. *Id.* at 549 (citing Dunaway v. New York, 442 U.S. 200, 206 (1979), Spinelli v. United States, 393 U.S. 410, 412 (1969), and Desist v. United States, 394 U.S. 244, 263 (1969) (Harlan, J., dissenting)).

87. *See* Yates v. Aiken, 484 U.S. 211, 216-17 (1988) (holding that Francis v. Franklin, 471 U.S. 307 (1985), was not new law but merely an extension of Sandstrom v Montana, 442 U.S. 510 (1979)); Truesdale v. Aiken, 480 U.S. 527 (1987) (implicitly holding that Skipper v. South Carolina, 476 U.S. 1 (1986), did not create a new rule of law but was merely an extension of Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982)).

time.[88] This process lies at the heart of any common law system.

The second threshold test recognizes the converse of the first test: certain decisions constitute such an abrupt shift in doctrine that they practically mandate nonretroactive application. The Court recognized only three types of "clear break[s]": 1) decisions which overrule precedent;[89] 2) decisions which disapprove a practice that the Court had arguably approved in other cases;[90] and 3) decisions which overturn a long-standing practice that has been nearly unanimously approved by lower courts.[91] It is clear that the Court felt that only a narrow class of decisions would fall into one of these three categories.[92]

In *Johnson*, the Court discussed the relationship between a recent decision and past doctrine as though it constituted a spectrum. At one end of the spectrum were the decisions which were dictated by precedent and routinely would have retroactive effect. At the other end was the narrow class of cases which established clear breaks with past doctrine. In the center of the spectrum, the *Stovall* test[93] would apply. The threshold tests did not and were not intended to define the entire spectrum.[94]

Johnson identified two types of cases to which the Court had routinely given full retroactive effect without regard for the case's relationship to past doctrine. No matter how sharp a break with the past, a decision which declares that a criminal law-making authority does not have the power to try or punish a person for certain types of behavior has full retroactive effect.[95] A decision satisfies this test if it holds that a trial court is incompetent to render a conviction or a sentence, or if it immunizes conduct from punishment.[96] The Court also found that, applying the *Stovall* test, it would regularly give retroactive effect to procedural decisions whose purpose was to enhance the truth-finding function at trial.[97] Under the *Johnson* scheme, these two categories of cases had retrospective effect regardless of where they fell on the spectrum, and therefore operated as exceptions to the spectrum analysis. The content of

88. *See Desist*, 394 U.S. at 263 (Harlan, J., dissenting) ("One need not be a rigid partisan of Blackstone to recognize that many, though not all, of this Court's constitutional decisions are grounded upon fundamental principles whose content does not change dramatically from year to year, but whose meanings are altered slowly and subtly as generation succeeds generation."); Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 498-99 (1968).

89. *Johnson*, 457 U.S. at 551 (citing *Desist*, 394 U.S. 244, and Williams v. United States, 401 U.S. 646 (1971) (plurality opinion)).

90. *Id.* (citing Gosa v. Mayden, 413 U.S. 665, 673 (1973) (plurality opinion), and Adams v. Illinois, 405 U.S. 278, 283 (1972)).

91. *Id.* (citing *Gosa*, 413 U.S. at 673, and Stovall v. Denno, 388 U.S. 293, 299-300 (1967)).

92. *Id.* at 553-54.

93. *See supra* text accompanying note 64.

94. In the *Johnson* case, the Court found that Payton v. New York, 445 U.S. 573 (1980), fell between those cases that were dictated by precedent and those that established a clear break from past doctrine. 475 U.S. at 551. *Johnson* did not go on to apply the *Stovall* test. Instead, it created, for fourth amendment decisions, a per se rule of retroactivity to cases pending direct review at the time of the new decision. *Id.* at 562.

95. 475 U.S. at 550.

96. *Id.* at 554.

97. *Id.*

the rule, rather than its relationship to past doctrine, determined the outcome of these exceptional cases.

D. An Alternate Approach: The Harlan Opinions

In separate opinions in *Desist v. United States*[98] and *Mackey v. United States*,[99] Justice Harlan proposed a comprehensive approach to the retroactivity of new rules of criminal procedure. He found the course of the case-by-case approach adopted in *Linkletter v. Walker*[100] "almost as difficult to follow as the tracks made by a beast of prey in search of its intended victim."[101] As a result, he believed that " '[r]etroactivity' must be rethought."[102]

In place of the balancing test of *Stovall v. Denno*,[103] which looked principally to the purpose underlying the new rule,[104] Justice Harlan recommended that determinations of retroactivity turn on the nature of the proceedings before the Court. For example, decisions should apply retroactively to all cases that were not yet final on direct review when the decision was rendered.[105] In 1987, the Supreme Court fully adopted Justice Harlan's approach for cases on direct review.[106]

For cases in collateral proceedings, such as federal habeas corpus, Justice Harlan argued that there should be a general rule of nonretroactivity for new constitutional rules of criminal procedure, subject to certain exceptions.[107]

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98. 394 U.S. 244, 256 (1969) (Harlan, J., dissenting).

99. 401 U.S. 667, 675 (1971) (Harlan, J., concurring in part & dissenting in part).

100. *See supra* text accompanying notes 58 & 61.

101. *Mackey*, 401 U.S. at 676.

102. *Desist*, 394 U.S. at 258.

103. *See supra* text accompanying note 64.

104. *See supra* text accompanying note 69.

105. *Desist*, 394 U.S. at 258. Justice Harlan came to this conclusion in light of three overriding concerns. First, he considered the "incompatible rules and inconsistent principles" generated by the *Stovall* test contrary to the norm of principled adjudication. *Id.* Second, he found the practice of selecting a single person for relief on direct review and denying relief to all others similarly situated "an indefensible departure from the model of judicial review." *Mackey*, 401 U.S. at 679. Third, he found the selective application of new rules violated the principle that similarly situated defendants should be treated similarly. *Desist*, 394 U.S. at 258-59.

106. Griffith v. Kentucky, 479 U.S. 314, 322 (1987) (Blackmun, J., joined by Brennan, Marshall, Powell, Stevens, & Scalia, JJ.). In United States v. Johnson, the Court had adopted Justice Harlan's views "[to] the extent necessary to decide today's case." 457 U.S. 537, 562 (1982) (Blackmun, J., joined by Marshall, Powell, & Stevens, JJ.).

In *Mackey*, Justice Harlan said, "the precise distinction I have urged between direct review and collateral attack, based not on the nature of the act of changing the law or of the new law thus pronounced but, instead, on the nature of the adjudicatory context in which the claim of legal error was presented has consistently been the model for the judicial process." 401 U.S. at 696-97. Yet new civil rules can still be held nonretroactive to cases which were on trial or on direct review at the time the new rule was decided.

Neither *Griffith* nor *Johnson* nor Justice Harlan tries to explain why, if criminal retroactivity should depend upon the nature of the proceedings, determinations of civil retroactivity should look to the purpose of the new rule. *See* Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971); *see also supra* text accompanying note 37.

107. *Mackey*, 401 U.S. at 681-95; *Desist*, 394 U.S. at 260-69. Justice Harlan viewed the retroactivity problem in the habeas context as a creature spawned by Fay v. Noia, 372 U.S. 391

Justice Harlan rooted his analysis in his perception of the purpose of habeas corpus.[108] In Harlan's view, the primary purpose of habeas is to serve as a threat and an incentive for "trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards."[109] Thus, in order to serve this deterrence function, "the habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place."[110]

Justice Harlan advocated several exceptions to his deterrence-based rule of nonretroactivity. In *Desist*, he saw another principal function of the Great Writ as "seek[ing] to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted."[111] Accordingly, any new rule which enhances the reliability of the fact-finding process should be excepted from the general rule of nonretroactivity. In *Mackey*, Justice Harlan no longer perceived the reliability-enhancing function as the principal purpose of habeas corpus,[112] but he did see the need to expand the number of exceptions to his rule. He concluded that rules which place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" should apply retroactively,[113] because "[t]here is little societal interest in permitting the criminal

(1963). In that case, the Court permitted a habeas petitioner to attack his conviction collaterally where he had failed to exhaust state remedies no longer available to him. Harlan believed the expansion of the writ which *Noia* allowed was "an indefensible departure both from the historical principles which defined the scope of the 'Great Writ' and from the principles of federalism which have formed the bedrock of our constitutional development." *Desist*, 394 U.S. at 262. Harlan's general hostility to the expansion of habeas relief comports with his view that a petitioner for habeas corpus should not receive retroactive benefit from new law.

108. *Mackey*, 401 U.S. at 682 ("The relevant frame of reference, in other words, is not the purpose of the new rule whose benefit the petitioner seeks, but instead the purposes for which the weight of habeas corpus is made available.").

109. *Desist*, 394 U.S. at 262-63. Some argue that the primary function of federal habeas corpus is not deterrence. Instead, federal habeas serves the interconnected purposes of giving a person a federal hearing on her federal constitutional claims, and of allowing federal courts to develop federal constitutional criminal law in more cases than the limited number available on certiorari to the Supreme Court. *See* Stone v. Powell, 428 U.S. 465, 525 (1976) (Brennan, J., dissenting) ("Enforcement of *federal* constitutional rights that redress constitutional violations directed against the 'guilty' is a particular function of *federal* habeas review . . . .") (emphasis in original); Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247 (1988); *see also* Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990).

110. *Desist*, 394 U.S. at 263.

111. *Id.* at 262.

112. Justice Harlan rejected this view, finding it contrary to precedent, and unable to explain other retroactive decisions which enhanced the fairness of trials without substantially affecting the reliability of their outcomes. *Mackey*, 401 U.S. at 694-95.

113. *Id.* at 692. Justice Harlan gave as examples rules immunizing from prosecution expressive conduct protected by the first amendment, *id.* at n.7 (citing Street v. New York, 394 U.S. 576 (1969)), rules immunizing silence protected by the fifth amendment, *id.* (citing Marchetti v. United States, 390 U.S. 39 (1968), Grosso v. United States, 390 U.S. 62 (1968)), rules immunizing personal behavior protected by penumbral rights, *id.* (citing Loving v. Virginia, 388 U.S. 1 (1967), Griswold v. Connecticut, 381 U.S. 479 (1965)), and rules protecting conduct carried on in the privacy of the home, *id.* (citing Stanley v. Georgia, 394 U.S. 557 (1969)).

process to rest at a point where it ought never to repose."[114]

Justice Harlan also proposed full retroactive application to procedures which "are implicit in the concept of ordered liberty."[115] He based this exception on the notion that, over time, changes in both social capacity and the expectations held of the judicial system can "alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction."[116] His only example of a new rule which reflected a change in a "bedrock procedural element" was the rule announced in *Gideon v. Wainwright* requiring counsel at all criminal trials.[117]

Justice Harlan acknowledged that his retroactivity analysis would be relevant only to cases which announced "new rules." A decision would not require a retroactivity analysis if it "simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law."[118] This is so for the obvious reason that lower courts should not be subject to rebuke for following the doctrine of stare decisis in applying Supreme Court precedent.[119] But stare decisis alone would not determine retroactivity, according to Justice Harlan, since the Supreme Court at times sends signals to lawyers and lower courts to not "rely with confidence on the continuing vitality of [a] rule."[120] When the Court overrules a precedent which it had previously called into question, Harlan argued, the time of the earlier, disfavoring opinion should draw the retrospective/prospective line, and not the overruling decision. These considerations led Justice Harlan to conclude that few cases should in fact be characterized as new rules, and that the burden should fall on the party arguing against retroactivity of the rule in question to establish "with assurance that there was a time in which th[e] Court would have ruled differently."[121]

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114. *Id.* at 693.

115. *Id.* (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

116. *Id.*

117. *Id.* at 694 (citing *Gideon*, 372 U.S. 335, 349 (1963), where Justice Harlan, in a concurring opinion, found relief to be required by *Palko v. Connecticut*). In *Mackey*, Justice Harlan gave no other example of changes in bedrock procedure, leaving that to a case-by-case disposition. *Mackey*, 401 U.S. at 694.

118. Desist v. United States, 394 U.S. 244, 263 (1969).

119. *Id.* at 264.

120. *Id.* at 265.

121. *Id.* at 264. This test contemplates an even narrower scope of nonretroactivity than the "clear break" test articulated in United States v. Johnson, 457 U.S. 537, 548-50 (1982). There, decisions of the Court were held not to apply non-retroactively when: 1) they overruled precedent; 2) they overturned a practice the Court had countenanced in dicta; or 3) they overturned a practice which the Court had not addressed but which received near unanimous approval from lower courts. *See supra* text accompanying notes 80-82. Of these, only the first two are cases where one can say with assurance that the Court would have ruled differently. In the third instance, it is impossible to know whether the Court previously would have ruled differently or the same as they ruled in the instant case.

II.
TEAGUE V. LANE: A NEW APPROACH TO NEW RULES

In *Teague v. Lane*,[122] a plurality of the Supreme Court[123] concluded, without the benefit of briefing or oral argument on the question,[124] that "the question 'of whether a decision [announcing a new rule should] be given prospective or retroactive effect should be faced at the time of [that] decision.' "[125] The Court stated that the retroactivity of any decision is "properly treated as a threshold question."[126] Retroactivity should be treated as a threshold issue, the plurality reasoned, because "once a new rule is applied to the defendant in the case announcing the rule, even-handed justice requires that it be applied retroactively to all who are similarly situated."[127] Therefore, the plurality concluded that the principled approach to retroactivity required the Court to announce a new rule in a given case only when the rule would be applied retroactively to the defendant in that case and to all others similarly situated.[128] In sum, the plurality stated: "[u]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced."[129] In *Penry v. Lynaugh*[130] a majority of the Court extended the *Teague* retroactivity doctrine to capital proceedings.[131]

A. New Rules

In adopting a version of Justice Harlan's approach,[132] the Court in

122. 109 S. Ct. 1060 (1989).

123. Justice O'Connor wrote the plurality opinion, in which Chief Justice Rehnquist and Justices Scalia and Kennedy joined.

124. *See* 109 S. Ct. at 1069 (plurality opinion) ("The question of retroactivity with regard to petitioner's fair cross section claim has been raised only in an *amicus* brief.") (citing Amicus Curiae Brief for the Criminal Justice Legal Foundation at 22-24, *Teague*, 109 S. Ct. 1060 (No. 87-5259)); *id.* at 1080 (Stevens, J., concurring in part & in the judgment, joined in part by Blackmun, J.) ("I question the propriety of making such an important change in the law without briefing or argument"); *id.* at 1084, 1086 (Brennan, J., dissenting, joined by Marshall, J.) (criticizing the plurality's rushing to decide an issue not presented).

125. 109 S. Ct. at 1069 (plurality opinion) (alterations in original) (quoting Mishkin, *Foreword: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 64 (1965)).

126. *Id.*

127. *Id.*

128. *Id.* at 1071.

129. *Id.* at 1075 (footnote omitted).

130. 109 S. Ct. 2934 (1989).

131. The five-person majority in *Penry*, again "without the benefit of briefing or oral argument," applied the *Teague* retroactivity approach to capital cases, an issue which the Court had explicitly reserved in *Teague*, 109 S. Ct. at 1077 n.3. *Penry*, 109 S. Ct. at 2959 (Brennan, J., concurring in part and dissenting in part). No member of the Court, however, addressed the question of whether *Teague* itself should have retroactive application to proceedings pending when the rule in *Teague* was announced.

132. *See* 109 S. Ct. at 1071-76 (discussing Justice Harlan's separate opinions in Desist v. United States, 394 U.S. 244 (1969), and Mackey v. United States, 401 U.S. 667 (1971)). Griffith v. Kentucky, 479 U.S. 314 (1987), adopted Justice Harlan's view that all cases on direct review

Teague v. Lane rejected the balancing test of *Stovall v. Denno*[133] and articulated a bright-line rule giving nonretroactive effect to new rules of criminal procedure, subject to two exceptions.[134] Finding the placement of the line "difficult to determine," the Court did "not attempt to define the spectrum of what may or may not constitute a new rule for retroactivity purposes."[135] However, the Court did describe a "new rule" in two ways:

> In general, . . . a case announces a new rule when [1] it breaks new ground or imposes a new obligation on the States or the Federal government. See *e.g.*, *Rock v. Arkansas*, 483 U.S. 44 . . . (1987) (*per se* rule excluding all hypnotically refreshed testimony infringes impermissibly on a criminal defendant's right to testify on his behalf); *Ford v. Wainwright*, 477 U.S. 399, 410 . . . (1986) (Eighth Amendment prohibits the execution of prisoners who are insane). To put it differently, a case announces a new rule if [2] the result was not *dictated* by precedent existing at the time the defendant's conviction became final. See generally *Truesdale v. Aiken*, 480 U.S. 527, 528-529 . . . (1987) (Powell, J., dissenting).[136]

The Court did not acknowledge how different these two definitions are. The first definition — a rule is new if it "breaks new ground or imposes a new obligation" — harks back to the "clear break with the past" standard set forth in *United States v. Johnson*.[137] At this end of the spectrum are the rare overrulings and innovative handlings of procedural questions of first impression.[138] On the other hand, the second definition — a rule is new if it was "not *dictated* by precedent" — falls on the opposite end of the spectrum. Given the bright-line approach taken by the *Teague* plurality, this definition implies that a rule which is dictated by precedent is not new. Thus logically, this definition is, or should be, the same as the first threshold test in *Johnson*.[139] The Court has always given retroactive effect to decisions which merely follow precedent.

The two definitions of new rules offered by the *Teague* plurality, then, fall on the two ends of the spectrum defined by the threshold tests announced in *United States v. Johnson*. While, in *Johnson*, the Court found that the case before it fell in the middle ground, an area where the *Stovall* test would still

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at the time a decision is announced should receive retroactive benefit of the decision. *Id.* at 322. Although *Teague* purported to adopt Harlan's analysis for cases on collateral review, only Justice Scalia joined both the majority opinion of *Griffith* and the *Teague* plurality.

133. 388 U.S. 293, 297 (1967); *see supra* text accompanying notes 63-64.

134. *See infra* notes 142-51 and accompanying text.

135. 109 S. Ct. at 1070.

136. *Id.* at 1070 (citations in original) (emphasis in original); *see also* Penry v. Lynaugh, 109 S. Ct. at 2944, 2952.

137. 457 U.S. 537 (1982); *see supra* text accompanying notes 81, 89-92.

138. Both Ford v. Wainwright, 477 U.S. 399 (1986), and Rock v. Arkansas, 483 U.S. 44 (1987), cited by the *Teague* plurality, fall on this end of the spectrum. *Ford* overruled Solesbee v. Balkom, 339 U.S. 9 (1950). *Rock* presented to the Court, for the first time, a state court's reaction to recent advances in hypnosis. *Rock*, 483 U.S. at 56-61.

139. *See supra* text accompanying notes 80, 86-88.

apply,[140] *Teague* does not acknowledge this area of the spectrum. It requires lower courts to abandon the *Stovall* test in favor of a bright-line rule, but does not give any guidance to lower courts in determining where that bright line might be. In this regard, the plurality opinion in *Teague* did not adopt a new approach so much as it announced that the Court was going to adopt a new approach at some future point.

Teague itself held that if a case would require the Court to overrule a prior decision, then the rule allowing the decision would be new for retroactivity purposes. The *Teague* plurality noted that petitioner's fair cross-section claim implicates a new rule because "the very standard that petitioner urges us to adopt includes, and indeed requires, the sort of proportionality analysis we declined to endorse in *Akins v. Texas*, 325 U.S. 398, 403 . . . (1945), and *Taylor v. Louisiana*, 419 U.S. 522, 538 . . . (1975)."[141] Since granting relief to Teague required overruling precedent, the Court rejected Teague's petition.

B. The Two Exceptions

A majority of the Court in *Teague* identified two exceptions to the general rule of nonretroactivity of new rules in habeas corpus proceedings. "First, a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe.' "[142] *Penry* later extended this exception to "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense."[143] Second, a new rule should apply retroactively if it requires observance of "those procedures that . . . are 'implicit in the concept of ordered liberty.' "[144] The *Teague* plurality, finding the *Palko* test unhelpful, recast Harlan's exception combining the "accuracy element of the *Desist* version of the second exception with the *Mackey* requirement that the procedure at issue must implicate the fundamental fairness of the trial."[145] This formulation would apply only to bedrock procedural elements and "those new procedures without which the likelihood of an accurate conviction is seriously diminished."[146]

The first *Teague* exception, as extended in *Penry*, mirrors the third

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140. *Johnson*, 457 U.S. at 562-63; *see supra* text accompanying notes 83-85.

141. Teague v. Lane, 109 S. Ct. 1060, 1070 n.1 (1989) (citations in original). *Teague* does not then require a holding of nonretroactivity for a case that lies closer to the middle of the spectrum than cases calling for clear overruling.

142. *Id.* at 1073 (plurality opinion) (quoting Mackey v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in part & dissenting in part)); *see also id.* at 1080 (Stevens, J., concurring in part & in the judgment).

143. Penry v. Lynaugh, 109 S. Ct. 2934, 2952-53 (1989).

144. *Id.* at 1073 (quoting *Mackey*, 401 U.S. at 693 (Harlan, J., concurring in part & dissenting in part) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937) (Cardozo, J.))).

145. 109 S. Ct. at 1076.

146. *Id.* at 1076-77. The Court stated that this type of new procedure was "so central to an accurate determination of innocence or guilt [that] . . . it [is] unlikely that many such components of basic due process have yet to emerge." *Id.* at 1077.

threshold test the Court announced in *United States v. Johnson*:[147] "a ruling that a trial court lacked authority to convict or punish a criminal defendant in the first place"[148] will have full retroactive effect. The second exception, as modified by the *Teague* plurality, also mirrors a class of cases which *Johnson* acknowledged had always been given full retroactive effect: cases announcing "new constitutional rules whose major purpose 'is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function . . . .' "[149] A procedure which "substantially impairs" the "truth-finding function" of a trial court also seriously diminishes the "likelihood of an accurate conviction."[150] Thus, the Court had already specifically acknowledged the two "exceptional" instances where a decision will always apply retroactively.[151]

The Court, in *Sawyer v. Smith*,[152] sharply limited the scope of the second *Teague* exception, by deciding that habeas petitioners could not bring claims based on *Caldwell v. Mississippi*.[153] *Caldwell* had held that a jury cannot be led to the false belief that the responsibility for imposing the death sentence lies elsewhere, and that undermining the jurors' sense of responsibility renders the sentence of death unconstitutionally unreliable under the eighth amendment.[154]

In *Sawyer*, the Court first held that *Caldwell*, under the *Butler v. McKellar* "reasonable jurist" standard,[155] constituted a new rule for retroactivity purposes.[156] Turning to the *Teague* exceptions, the Court acknowledged that "[a]ll of our Eighth Amendment jurisprudence concerning capital sentencing is directed toward the enhancement of reliability and accuracy in some

147. *See supra* text accompanying note 82.

148. United States v. Johnson, 457 U.S. 537, 550 (1982).

149. *Id.* at 544 (quoting Williams v. United States, 401 U.S. 646, 653 (1971) (plurality opinion)).

150. *Teague*, 109 S. Ct. at 1076-77.

151. Though the Court extended *Teague* to capital cases, it apparently did not notice that there is a difference between capital proceedings and eighth amendment proceedings. Any decision based on the eighth amendment prohibition of cruel and unusual punishment should fall into one of the two *Teague* exceptions. Such a decision either immunizes a certain class of individuals, placing them beyond the state's power to punish by death, *see* Penry v. Lynaugh, 109 S. Ct. 2934, 2952-53 (1989), and thus within the first exception, or serves to enhance the *reliability* of the jury's determination of whether a defendant should live or die. *See* Booth v. Maryland, 482 U.S. 496 (1987); Caldwell v. Mississippi, 472 U.S. 320 (1985). The latter type of cases seek to uphold the "truth-finding function" of the jury; without them the "likelihood of an accurate [sentence] is seriously diminished." *Teague*, 109 S. Ct. at 1076-77.

Moreover, finding all eighth amendment decisions within the scope of the *Teague* exceptions comports with "evolving standards of decency" that do not allow a society to execute someone who, according to later standards, was sentenced through unreliable procedures. Furman v. Georgia, 408 U.S. 238, 242 (1972) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)). Nor do those standards allow a society to execute classes of people who, after sentencing, were deemed immune from execution.

152. 110 S. Ct. 2822 (1990).

153. 472 U.S. 320 (1985).

154. *Id.* at 328-30.

155. Butler v. McKellar, 110 S. Ct. 1212, 1219 (1990); *see infra* notes 194-95 and accompanying text.

156. *Sawyer*, 110 S. Ct. at 2824-25, 2827.

sense."[157] But the Court did not conclude that the second *Teague* exception applies to eighth amendment cases whose purpose is to enhance reliability. Instead, the Court held that, to fall under the second exception, the rule must both enhance accuracy and alter a "bedrock procedural element."[158] Because *Caldwell* did not create a "bedrock" rule of procedure in the Court's view, the Court refused to reach the merits of the petition. To do otherwise, the Court reasoned, would require the Court "to overrule our decision in *Penry* that *Teague* applies to new rules of capital sentencing. This we decline to do."[159]

This reasoning turned the *Teague* analysis on its head. In *Teague*, the Court focused on reliability under the second exception because it concluded that the *Palko v. Connecticut* exception Justice Harlan had proposed in *Mackey v. United States* did little more than revive "the terms of the debate over incorporation."[160] Justice Harlan's proposed *Palko* exception would achieve a broad scope that *Teague* chose to avoid. In *Sawyer*, the Court used the "bedrock procedural rule" test again to create an additional hurdle for habeas petitioners. In so doing, the Court managed to escape the conclusion that reliability-enhancing rules in death sentencing merit habeas review. *Teague* had already incorporated this principle into a single applicable rule "by limiting the scope of the second exception to those new procedures without which the likelihood of an accurate conviction [or sentence] is seriously diminished."[161] Therefore, the treatment of the "bedrock procedural element" language as a separate and distinct test has no foundation in *Teague*.

Creating this new limitation on the second exception, the Court in *Sawyer* decided to allow an execution where the petitioner was sentenced to death under improper procedures. The result gives the state added incentive to ignore constitutional precedent by effectively allowing it to choose which law it will apply against a petitioner. If a state does not like the existing rule of constitutional law at the time it convicts, it can ignore that rule and hope that a more favorable one will be announced before the case reaches habeas corpus review, or even — as in *Collins*[162] — while the case is still on direct review.[163] In this way, *Sawyer* undermines the deterrent aspect of habeas corpus on which *Teague* purported to rest.

III.
TEAGUE'S INFANT PROGENY: PLACING THE BRIGHT LINE

United States v. Johnson anticipated the two *Teague* exceptions, in saying that cases dictated by precedent would have full retroactive effect, and cases

157. *Id.* at 2831.

158. *Id.* (quoting Teague v. Lane, 109 S. Ct. 1060, 1076 (1989) (quoting Mackey v. United States, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in part & dissenting in part))).

159. *Id.* at 2832.

160. *Teague*, 109 S. Ct. at 1076; *see supra* text accompanying note 144.

161. 109 S. Ct. at 1076-77.

162. Collins v. Youngblood, 110 S. Ct. 2715 (1990).

163. *Id.* at 2718.

which broke with the past would have no retroactive effect. The only change that *Teague* offered, then, was to establish a "bright line" test in the middle of the spectrum where the *Johnson* and *Stovall v. Denno* balancing test would apply.[164] *Teague*, however, merely announced that the test from *Stovall* was dead and that a bright-line rule would take its place; it did not draw that line.

A. Understanding Penry v. Lynaugh

In *Penry v. Lynaugh*,[165] a majority of the Court[166] found that the rule relied on by petitioner for relief was *not* new under *Teague*, and it proceeded to consider the merits of petitioner's case. At Penry's 1980 trial, evidence was presented that he was mentally retarded, had organic brain damage, and had been the victim of serious and sustained physical and sexual abuse as a child. Penry maintained in his federal habeas petition that the Texas capital sentencing scheme as applied in his case violated the eighth amendment because "the jury was not instructed that it could consider and give effect to his mitigating evidence in imposing its sentence."[167] The majority stated: "Penry thus seeks a rule that when such mitigating evidence is presented, Texas juries must, upon request, be given jury instructions that make it possible for them to give effect to that mitigating evidence in determining whether a defendant should be sentenced to death."[168]

The difficulty with Penry's argument was that, in 1976, the Court had upheld the Texas sentencing statute[169] finding that the statute's failure to explicitly mention mitigating circumstances did not render it unconstitutional.[170] Given that Penry's conviction became final on January 13, 1986, when the United States Supreme Court denied his petition for certiorari on direct appeal,[171] and after *Jurek v. Texas*,[172] *Lockett v. Ohio*,[173] and *Eddings v.*

164. It is ironic that Justice O'Connor, who authored the *Teague* plurality opinion, and Chief Justice Rehnquist, who joined in the opinion, both joined the dissent in *Johnson*, condemning the majority's approach because it replaced an approach that looked to the substantive purpose of a particular rule with "an exceedingly formal set of three categories," United States v. Johnson, 457 U.S. 537, 567 (1982) (White, J., dissenting, joined by Rehnquist & O'Connor, JJ.), which the dissent found "an exercise in line-drawing." *Id.* at 568.

165. 109 S. Ct. 2934 (1989).

166. Justice O'Connor's majority opinion in *Penry* was joined only by Justices who had refused to sign on to her opinion in *Teague*. *Compare id.* (O'Connor, J., joined by Brennan, Marshall, Blackmun & Stevens, JJ.) *with Teague*, 109 S. Ct. 1060 (1989) (O'Connor, J., plurality opinion, joined by Rehnquist, C.J., & Scalia & Kennedy, JJ.). Chief Justice Rehnquist, and Justices Scalia and Kennedy vigorously dissented in *Penry*, joined by Justice White. 109 S. Ct. at 2964-65 (Scalia, J., concurring in part & dissenting in part, joined by Rehnquist, C.J., & White & Kennedy, JJ.).

167. 109 S. Ct. at 2941.

168. *Id.* at 2945.

169. Jurek v. Texas, 428 U.S. 262 (1976).

170. *Id.* at 272-73 (plurality opinion); *id.* at 277 (White, J., concurring).

171. Penry v. Texas, 474 U.S. 1073 (1986).

172. 428 U.S. 262 (1976).

173. 438 U.S. 586 (1978).

Oklahoma[174] had already been decided, the Court concluded that Penry's claim did not require it to fashion a new rule of law.[175] The majority reasoned that:

> [A]t the time Penry's conviction became final, it was clear from *Lockett* and *Eddings* that a State could not, consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the circumstances of the offense that mitigates against imposing the death penalty.[176]

Because of these precedents, the Court determined that Penry's case did not seek a new rule:

> The rule Penry seeks — that when such mitigating evidence is presented, Texas juries must, upon request, be given jury instructions that make it possible for them to give effect to that mitigating evidence in determining whether the death penalty should be imposed — is not a "new rule" under *Teague* because it is dictated by *Eddings* and *Lockett*. Moreover, in light of the assurances upon which *Jurek* was based, we conclude that the relief that *Penry* seeks does not "impos[e] a new obligation" on the State of Texas.[177]

On this issue, Justice Scalia dissented, arguing bitterly that the rule requested by Penry was in fact a "new rule" under *Teague* since it was not dictated by the Court's prior decisions.[178] He believed that if the Court's past decisions did compel a particular result, then the logical conclusion was that the petitioner's claim was considered and rejected in *Jurek v. Texas*.[179] Justice Scalia concluded:

> In a system based on precedent and *stare decisis*, it is the tradition to find each decision "inherent" in earlier cases (however well concealed its presence might have been), and rarely to replace a pre-

174. 455 U.S. 104 (1982).

175. The Court construed Penry's claim as follows: "Penry argues that, on the facts of this case, the jury was unable to fully consider and give effect to the mitigating evidence of his mental retardation and abused background in answering the three special issues." 109 S. Ct. at 2945.

176. *Id.* at 2946; *see Eddings*, 455 U.S. at 110-13; *Lockett*, 438 U.S. at 602-06.

177. *Penry*, 109 S. Ct. at 2947 (quoting *Teague v. Lane*, 109 S. Ct. 1060, 1070 (1989) (plurality opinion)) (alteration in original). The Court then considered the merits of Penry's claim that the eighth amendment prohibits the execution of mentally retarded persons, and concluded that, although it would be a "new rule" under *Teague*, it would apply retroactively under the first *Teague* exception. *Id.* at 2952-53. The Court held that the eighth amendment does not create a categorical ban against executing persons with mental retardation. *Id.* at 2953-54. Although common law and Ford v. Wainwright, 477 U.S. 399 (1986), prohibit the execution of those unaware of their punishment, the Court found this not to be the case with petitioner. *Penry*, 109 S. Ct. at 2954-55.

178. *Id.* at 2964-65 (Scalia, J., concurring in part & dissenting in part, joined by Rehnquist, C.J., & White & Kennedy, JJ.).

179. *Id.* at 2965 (citing *Jurek*, 428 U.S. 262 (1976)).

> viously announced rule with a new one. If *Teague* does not apply to a claimed "inherency" as vague and debatable as that in the present case, then it applies only to habeas requests for plain overruling — which means that it adds little if anything to the principles already in place concerning the retroactivity of new rules in criminal cases, which provide that "a decision announcing a new standard 'is almost automatically nonretroactive' where the decision 'has explicitly overruled past precedent.' "[180]

Justice Scalia also stressed that, in his view, the historic role of habeas corpus was to provide a deterrent or a threat which served as an incentive for trial and appellate courts in this country to "conduct their proceedings in a manner consistent with established constitutional standards."[181] Justice Scalia argued that deterrents and threats were meaningless if applied in situations in which the law was so uncertain that a judge, acting in good faith and with the greatest of care, could reasonably have understood the Court's prior rulings as permitting the result reached by the *Penry* majority. Thus, a new rule for the purposes of *Teague* must include not only a new rule that replaces an old one, but "a new rule that replaces palpable uncertainty as to what the rule might be."[182] Justice Scalia concluded that Justice O'Connor's majority opinion in *Penry* had "gutted" the principle of law she had proposed only a few months before in *Teague*, and that nonretroactivity was reserved for instances of "plain overruling."[183]

B. Understanding Butler v. McKellar

In *Butler v. McKellar*,[184] the Supreme Court held, with four Justices dissenting,[185] that its decision in *Arizona v. Roberson*[186] created a new rule of law for retroactivity purposes.[187] *Roberson* had applied the rule of *Edwards v. Arizona*[188] to a slightly different factual situation. *Edwards* had held, based on

180. *Id.* (quoting Allen v. Hardy, 478 U.S. 255, 258 (1986) (quoting Solem v. Stumes, 465 U.S. 638, 646, 647 (1984))) (emphasis in original).

181. *Id.* at 2964.

182. *Id.*

183. *Id.* at 2965. Justice Scalia, in another case, found himself in favor of prompt overruling of Booth v. Maryland, 482 U.S. 496 (1987). *See* South Carolina v. Gathers, 109 S. Ct. 2207, 2217 (1989) (Scalia, J., dissenting). In *Penry*, though, the Court did not go so far as to overrule *Teague*. Rather, it construed the *Teague* principle in accordance with Justice Harlan, its original advocate.

184. 110 S. Ct. 1212 (1990).

185. Justices Brennan dissented, joined by Justice Marshall and joined in part by Justices Blackmun and Stevens. Justice O'Connor, in this case, signed on to the majority opinion, which was written by Chief Justice Rehnquist and joined by Justices White, Scalia and Kennedy, the four dissenters in *Penry*.

186. 486 U.S. 675 (1988).

187. *Butler*, 110 S. Ct. at 1217-18. In *Roberson*, the Court held that, following a suspect's request for counsel, the fifth amendment prohibits police-initiated interrogation regarding a separate investigation. 486 U.S. at 682-84.

188. 451 U.S. 477 (1981).

the fifth amendment right to counsel at custodial interrogations, that "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated interrogation even if he has been advised of his rights."[189] Officers could further interrogate in the absence of counsel only if "the accused himself initiates further communication, exchanges, or conversations with the police."[190] After *Edwards*, the Court consistently reaffirmed its bright-line rule.[191] In *Roberson*, the accused was arrested and advised of his rights pursuant to *Miranda v. Arizona*. Roberson indicated that he wanted to speak with an attorney before answering any questions. While he was still in custody, another officer questioned him about a different offense. After again being advised of his *Miranda* rights, Roberson waived his rights and gave an incriminating statement to the police as to the second offense. The statement was suppressed by the trial court and the suppression order was affirmed on appeal.[192] The Supreme Court granted certiorari and affirmed. The Court held that *Edwards* directly controlled Roberson's case and, therefore, the fact that he requested counsel in the context of a separate investigation was without constitutional significance.[193]

While the majority of the Court in *Butler* relied on the *Teague v. Lane* decision of the previous Term, its reasoning was quite surprising. The majority admitted that *Edwards* directly controlled the Court's decision in *Roberson*;[194] nevertheless, it concluded that a decision could present a new rule for retroactivity purposes, even if prior decisions determined its result:

> [T]he fact that a court says that its decision is within the "logical compass" of an earlier decision, or indeed that it is "controlled," by a prior decision, is not conclusive for purposes of deciding whether the current decision is a "new rule" under *Teague*. Courts frequently view their decisions as being "controlled" or "governed" by prior opinions even when aware of reasonable contrary conclusions

189. *Id.* at 482, 484 (footnote omitted).

190. *Id.* at 484-85; *see also* Solem v. Stumes, 465 U.S. 638, 646 (1984).

191. *See, e.g.*, Michigan v. Jackson, 475 U.S. 625, 636 (1986) (applying *Edwards* rule to sixth amendment right to counsel at arraignment); Smith v. Illinois, 469 U.S. 91, 98 (1984) (per curiam) (applying *Edwards* rule to invocation of sixth amendment right to counsel); *see also* Moran v. Burbine, 475 U.S. 412 (1986). In *Moran*, the majority, relying on *Edwards* and Miranda v. Arizona, 384 U.S. 436 (1966), acknowledged that police may not initiate further interrogation of an accused if she "indicates in any manner, at any time, prior to or during questioning" that she desires the assistance of counsel. 475 U.S. at 420.

192. State v. Roberson, No. 2 CA-CR 4474-5 (Ariz. Ct. App. Mar. 19, 1987).

193. Arizona v. Roberson, 486 U.S. 675, 683 (1988). The Court stated: "[t]hat a suspect's request for counsel should apply to any questions the police wish to pose follows, we think, not only from *Edwards* and *Miranda*, but also from . . . [Colorado v. Spring, 479 U.S. 564 (1987)]." 486 U.S. at 684. Colorado v. Spring held that "a suspect's awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived this Fifth Amendment privilege." 479 U.S. at 577.

194. Butler v. McKellar, 110 S. Ct. 1212, 1216 (1990).

> reached by other courts. In *Roberson*, for instance, the Court found *Edwards* controlling but acknowledged a significant difference of opinion on the part of several lower courts that had considered the question previously. That the outcome in *Roberson* was susceptible to debate among reasonable minds is evidenced further by the differing positions taken by the judges of the Courts of Appeals for the Fourth and Seventh Circuits noted previously. It would not have been an illogical or even a grudging application of *Edwards* to decide that it did not extend to the facts of *Roberson*. We hold, therefore, that *Roberson* announced a "new rule."[195]

Four Justices dissented in *Butler* in an opinion authored by Justice Brennan.[196] Justice Brennan first noted that the majority's reasoning was not faithful to the principles established by Justice Harlan, whose logic the Court purported to adopt in *Teague*,[197] *Penry*,[198] and *Butler*[199]:

> Indeed, even Justice Harlan, the chief proponent of the view that federal habeas is designed merely to deter erroneous state-court rejections of constitutional claims, believed that federal review is appropriate when a state court fails to presage reasonably foreseeable applications of established constitutional principles *beyond* the precise factual settings of prior precedent. Justice Harlan would have held state courts responsible for "appl[ying] a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law." In the context of this case, Justice Harlan would not have held the rule in *Roberson* to be "new" today unless he could "say with . . . *assurance* that this Court would have ruled differently" (i.e., in the State's favor) at the time Butler's conviction became final. In contrast, the majority embraces the opposite presumption; it holds *Roberson*'s rule to be "new" because it cannot say with assurance that the Court could *not* have ruled in favor of the State at that time. Thus the Court's holding today is unfaithful even to the purported progenitor of its position.[200]

The dissent concluded that the decision reached by the majority was not

195. *Id.* at 1217-18 (citation omitted). The majority also held that the rule announced in *Roberson* did not fall within either of the two *Teague* exceptions. *Id.* at 1218; *see supra* text accompanying notes 142-51.

196. *Butler*, 110 S. Ct. at 1218 (Brennan, J., dissenting, joined by Marshall, J., & joined in part by Blackmun & Stevens, JJ.).

197. Teague v. Lane, 109 S. Ct. 1060, 1072-74 (1989) (plurality opinion); *see supra* note 132 and accompanying text.

198. Penry v. Lynaugh, 109 S. Ct. 2934, 2944 (1989).

199. *Butler*, 110 S. Ct. at 1216, 1218.

200. *Id.* at 1223-24 (Brennan, J., dissenting) (emphasis in original) (quoting Desist v. United States, 394 U.S. 244, 263, 264 (1969) (Harlan, J., dissenting)) (footnote omitted) (citations omitted).

based upon legitimate legal reasoning but rather upon a desire to reach a certain result: to limit the scope of federal habeas corpus review available to persons convicted in state criminal proceedings.[201] Thus the dissent believed that the new rule test employed in *Butler* was intended to be one which would apply to virtually every case.

> Because constitutional interpretation is an evolutionary process, the analytical distinction between legal rules "prevailing" at the time of conviction and "new" legal rules is far from sharp. This distinction must be drawn carefully, with reference to the nature of adjudication in general and the purposes served by habeas corpus in particular. But while the Court purports to draw guidance from the retroactivity analysis advanced by Justice Harlan [in *Mackey v. United States*], the Court simply ignores Justice Harlan's admonition that "[t]he theory that the habeas petitioner is entitled to the law prevailing at the time of his conviction is . . . more complex than the Court has seemingly recognized." Instead, the Court embraces a virtually all-encompassing definition of "new rule" without pausing to articulate any justification therefor. Result, not reason, propels the Court today.[202]

C. Difficulties with Applying the "New Rule" Concept

The Court in *Butler v. McKellar* engaged in a markedly revisionist history of its decision the previous Term in *Penry v. Lynaugh*.[203] First, the Court stated that the "not dictated" aspect of the new rule inquiry articulated in *Teague v. Lane*[204] was to receive primacy over the "new obligation" formulation relied upon in *Penry*.[205] The *Butler* majority noted: "more meaningfully for the majority of cases, the decision announces the new rule 'if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.' "[206] The majority conceded that in the vast majority of cases, where the Court's decision is reached by an extension of the reasoning of previous cases, the retroactivity inquiry may be difficult.[207] Thus, after reviewing what it perceived as the traditional purpose of federal habeas corpus — to provide incentive for courts to conduct their proceedings in a manner consistent with established constitutional standards[208] — the majority concluded

201. *Id.* at 1226-27.

202. *Id.* at 1219 (quoting *Desist*, 394 U.S. at 263) (citations omitted).

203. 109 S. Ct. 2934 (1989).

204. *See supra* text accompanying note 139.

205. *See supra* text accompanying notes 176-77.

206. 110 S. Ct. at 1216 (quoting Teague v. Lane, 109 S. Ct. 1060, 1070 (1989)) (emphasis in original).

207. *Id.* at 1217-18.

208. *Id.* at 1216-17. *See also* Saffle v. Parks, 110 S. Ct. 1257 (1990):

> In *Teague*, we defined a new rule as a rule that "breaks new ground," "imposes a new obligation on the States or the Federal Government," or was not "*dictated* by

that "the 'new rule' principle therefore validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions."[209]

This reasoning cannot, of course, be squared with *Penry*. If any decisions of lower courts rested upon reasonable good-faith interpretations of Supreme Court precedents, such were the decisions of the Texas Court of Criminal Appeals[210] and the Court of Appeals for the Fifth Circuit[211] upholding the Texas capital sentencing statute against the very type of attack which proved successful in *Penry*.[212] The Supreme Court itself had rejected similar claims in two previous cases.[213] Thus, *Penry*, while not directly overruling a prior Supreme Court decision, came very close to doing so. Yet the *Penry* majority, in applying *Teague*, held that *Penry* did not involve a "new rule."[214]

Butler, on the other hand, involved the retroactivity of *Arizona v. Roberson*. In *Roberson*, the Court explicitly acknowledged that its decision was controlled by *Edwards v. Arizona*, and rejected all of the state's proffered distinctions.[215] Thus, under *Penry* and *Butler*, some decisions controlled by precedent will create new rules for retroactivity purposes, while other decisions, such as *Penry*, will break with past understanding of the law and yet not create a "new rule."

1. Butler*'s Problematic Definition of a New Rule*

Teague, like the retroactivity cases that preceded it, is aimed at protecting the justifiable reliance interests of the States. It seeks to avoid the situation in

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> precedent existing at the time the defendant's conviction became final." The explicit overruling of an earlier holding no doubt creates a new rule; it is more difficult, however, to determine whether we announce a new rule when a decision extends the reasoning of our prior cases. As we recognized in *Butler v. McKellar*, the question must be answered by reference to the underlying purposes of the habeas writ. Foremost among these is ensuring that state courts conduct criminal proceedings in accordance with the Constitution as interpreted at the time of the proceedings.

Saffle, 110 S. Ct. at 1260 (citations omitted) (emphasis in original).

209. *Butler*, 110 S. Ct. at 1217. In *Saffle v. Parks*, decided the same day as *Butler*, the Court held that petitioner's eighth amendment challenge to an anti-sympathy instruction given at the penalty phase of a capital trial would not be given retroactive effect even if adopted. 110 S. Ct. at 1259-64. The Court stated: "Under [*Butler*'s] functional view of what constitutes a new rule, our task is to determine whether a state court considering Parks' claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule Parks seeks was required by the Constitution." *Id.* at 1257.

210. Penry v. State, 691 S.W.2d 636 (Tex. Crim. App. 1985), *cert. denied sub nom.* Penry v. Texas, 474 U.S. 1073 (1986).

211. Penry v. Lynaugh, 832 F.2d 915 (5th Cir. 1987), *aff'd in part & rev'd in part*, 109 S. Ct. 2934 (1989).

212. *See* Penry v. Lynaugh, 109 S. Ct. 2934, 2965 (1989) (Scalia, J., concurring in part & dissenting in part).

213. *See* Franklin v. Lynaugh, 487 U.S. 164, 182-83 (1988); Jurek v. Texas, 428 U.S. 262, 273-74 (1976).

214. *See supra* text accompanying note 177.

215. Arizona v. Roberson, 486 U.S. 675, 682 (1988); *see supra* text accompanying note 193.

which " '[s]tate courts are . . . frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands.' "[216] As the Court had previously noted in *Solem v. Stumes*:[217]

> In considering the reliance factor, this Court's cases have looked primarily to whether law enforcement authorities and state courts have justifiably relied on a prior rule of law said to be different from that announced by the decision whose retroactivity is at issue. Unjustified "reliance" is no bar to retroactivity. This inquiry is often phrased in terms of whether the new decision was foreshadowed by earlier cases or was a "clear break with the past." When the Court has explicitly overruled past precedent, disapproved a practice it has sanctioned in prior cases, or overturned a long-standing practice approved by nearly unanimous lower court authority, the reliance and effect factors in themselves "have virtually compelled a finding of nonretroactivity." *United States v. Johnson*, 457 U.S. 537, 549-550 . . . (1982). *See also id.*, at 551-552 . . . . We have been less inclined to limit the effect of a decision that has been "distinctly foreshadowed." *Brown v. Louisiana*, 447 U.S. 323, 336 . . . (1980).[218]

However, the majority in *Butler v. McKellar* failed to acknowledge that when a decision simply applies a precedent to a new factual situation that is logically governed by the reasoning of the precedent, making no "break with the past" at all, a state can claim no legitimate reliance interest in not giving the benefit of that decision to any person who was entitled to the benefit of the precedent itself.[219]

Such a decision cannot be treated as a "new rule" under *Teague* without subverting *Teague*'s own premise: " 'the threat of habeas serves as a necessary incentive for trial and appellate judges throughout the land to conduct their proceedings in a manner consistent with established constitutional standards.' "[220] Like all other constitutional principles regulating the conduct of state authorities, those established by the Supreme Court to protect the rights of criminal defendants are heavily dependent upon voluntary compliance by state police officers and prosecutors as well as enforcement by the state courts. Investigating officers, for example, are expected to obey the rule of *Edwards v.*

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216. Teague v. Lane, 109 S. Ct. 1060, 1075 (1989) (plurality opinion) (quoting Engle v. Isaac, 456 U.S. 107, 128 n.33 (1982)).

217. 465 U.S. 638 (1984).

218. *Id.* at 646 (footnote omitted).

219. *Contra Teague*, 109 S. Ct. at 1070 n.1 (plurality opinion) (where the constitutional ruling that Teague sought — the application of the fair cross-section requirement of the sixth amendment to the petit jury panel — had been previously rejected by the Court in Taylor v. Louisiana, 419 U.S. 522, 538 (1975)), and Akins v. Texas, 325 U.S. 398, 403, 407 (1945).

220. 109 S. Ct. at 1073 (quoting Desist v. United States, 394 U.S. 244, 262-63 (1969) (Harlan, J., dissenting)).

Arizona:[221] if they do not, state prosecutors are expected not to offer the resulting confessions in evidence. If they offer them in evidence, the state courts are expected to exclude them. To paraphrase Justice Harlan in *Mackey v. United States*, "[n]o one, not criminal defendants, not the judicial system, not society as a whole is benefited" by undermining these expectations.[222] Yet, if the straightforward application of the Court's decisions to other fact situations within the decisions' logical parameters is treated as creating a "new rule" for retroactivity purposes, then police, prosecutors, and state judges will have a powerful incentive to disobey the Court's rulings and to justify their actions later by inventing a variety of grounds for distinguishing the case at issue from previously decided cases. These arguments might succeed or they might fail in persuading federal judges that a decision of the Supreme Court is not controlling; but the state wins either way, since the rejection of any such argument may itself constitute a "new rule," thereby depriving the defendant and others similarly situated of the benefit of the rule enunciated by the Court.

Thus, the *Butler* majority's reasoning is baffling. It is difficult to imagine how *Arizona v. Roberson* could have created a new rule of criminal procedure, since on its face *Roberson* was merely a straightforward application of the Court's prior decision in *Edwards*.[223] The Court in *Roberson* framed the question presented as whether the Court should "craft an exception to [the rule of *Edwards v. Arizona*] . . . for cases in which the police want to interrogate a suspect about an offense that is unrelated to the subject of their initial interrogation."[224] The majority ultimately concluded that Arizona's "attempts at distinguishing the factual setting here from that in *Edwards* are . . . unavailing" and affirmed the judgment of the Arizona Court of Appeals.[225] Thus, *Roberson* made no break with the past and imposed no new obligation on law enforcement personnel. The result reached by the Court in *Roberson* was clearly directly controlled by *Edwards*. Thus there appears to be no principled basis for a determination that *Roberson* originated a new rule of constitutional law under virtually any definition of a "new rule." Indeed, prior Court decisions addressed this issue quite explicitly:

> "[W]hen a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively. In such cases, it has been a foregone conclusion that the rule of the

221. 451 U.S. 477, 484-85 (1981); *see supra* text accompanying notes 189-90.

222. 401 U.S. 667, 691 (1971) (Harlan, J., concurring in part & dissenting in part).

223. *See supra* text accompanying note 193.

224. Arizona v. Roberson, 486 U.S. 675, 677 (1988).

225. *Id.* at 685. The *Roberson* opinion quoted from a prior decision of the Arizona Supreme Court that rejected a similar "factual distinction" argument: "The only difference between Edwards and the appellant is that Edwards was questioned about the same offense after a request for counsel while the appellant was reinterrogated about a similar offense. We do not believe that this factual distinction holds any legal significance for fifth amendment purposes." *Id.* at 677-78 (quoting State v. Routhier, 137 Ariz. 90, 97, 669 P.2d 68, 75 (1983)). The Court stated: "We agree with the Arizona Supreme Court's conclusion." *Id.* at 678.

later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way."[226]

In summary, the rule adopted in *Butler* skewed the constitutional balance inherent in our system of federalism. Anytime there is an arguable distinction between the case at bar and a previously decided case, the Court seems to be saying, the rejection of that argument creates a new rule. This reasoning places a premium on adopting the most grudging interpretation of all the Court's prior holdings. This view of what constitutes a "new rule" both distorts the way constitutional adjudication takes place and circumvents the analytical basis of *Teague*. Underlying *Teague* — and the retroactivity doctrine espoused by Justice Harlan upon which *Teague* is based — is the notion that the states should be invited to engage in creative federalism. This belief necessarily assumes that the state courts will make their best efforts to interpret and apply constitutional principles and decisions enunciated by the Supreme Court, rather than be bribed, in effect, to take the most parsimonious view possible of Supreme Court decisions.

2. *The Added Complexity of the Retroactivity Doctrine*

There are additional ways in which the *Teague* rule, as further developed in its recent progeny, has made retroactivity law more complex. First, it is not a simple task to discern the state of the law as of a particular time in history, a fact evidenced by numerous Supreme Court decisions.[227] While some areas of the law may be well settled over time, many are constantly in flux. Yet, lower federal court judges throughout the country now are required to study and analyze numerous decisions to determine whether a particular ruling requested by a habeas corpus petitioner would constitute a "new rule," which would not apply retroactively, or a result dictated by prior precedent.[228]

Furthermore, the historical date in question may require a court to delve quite far into the past. In many cases the district court will have to convene a threshold hearing on retroactivity. At this hearing, each party attempts to demonstrate, through briefing and possibly even evidence, the state of the law

226. Yates v. Aiken, 484 U.S. 211, 216 n.3 (1988) (quoting United States v. Johnson, 457 U.S. 537, 549 (1982)). *See generally* Lee v. Missouri, 439 U.S. 461, 462 (1979) (holding that Duren v. Missouri, 439 U.S. 357 (1979), did not establish a new rule of law because it "did not announce any new standards of constitutional law not evident from the decision in [Taylor v. Louisiana, 419 U.S. 522 (1975)]").

227. *See, e.g.*, Mackey v. United States, 401 U.S. 667, 675 (1971) (Harlan, J., concurring in part & dissenting in part).

228. *Teague* says nothing about the availability of retroactive benefit of new rules of constitutional criminal procedure in state post-conviction proceedings. *Cf.* Truesdale v. Aiken, 480 U.S. 527, 529-30 (1987) (per curiam) (Powell, J., dissenting). *Teague*'s holding is based on the purpose of federal habeas corpus and on the principle of deference to the state courts. State courts, presumably, are free to give retrospective relief under their state habeas statutes — which presumably have other purposes than deterrence which the Court finds in the federal writ — for new federal constitutional rules of criminal procedure. Teague v. Lane, 109 S. Ct. 1060, 1073-75 (1989) (plurality opinion).

at the time the petitioner's conviction became final on direct review. Only after this initial matter is determined as to each claim raised by the petitioner may resolution of the issues on the merits take place.

It should also be noted that determining the state of the law as of any particular time is not a purely objective task. Because the law is rarely in repose, such a determination by a judge will necessarily be influenced by her own subjective views. Those judges who are predisposed to view habeas petitions more favorably will, in all likelihood, interpret more broadly the state of the law at a given time in history. By contrast, judges who are more hostile to federal review of state court convictions are likely to adopt a narrow interpretation of whether a particular decision constituted a "new rule" of criminal procedure. The drastic nature of the consequences of this determination cannot be overstated; people's lives will virtually be won or lost on the basis of this subjective value judgment.

3. *The Effect of* Teague *on Certiorari Practice*

Teague and its progeny have also changed direct review certiorari practice. Prior to *Teague* and its rigid retroactivity doctrine, appellate attorneys would seek certiorari only for those claims which they felt had the best chance of having certiorari granted. Furthermore, if there were no issues worthy of certiorari, then a petition for writ of certiorari might not even be filed in the Supreme Court. However, in light of *Teague* and its progeny, appellate counsel now has little choice but to raise every conceivable constitutional claim in the petition for writ of certiorari. If counsel does not raise an issue, and another party subsequently obtains a favorable ruling from the Supreme Court on the same constitutional claim, that issue may well not be applied retroactively to her client's case. In essence, appellate counsel cannot in good faith fail to raise any possible issue as to which the Court may grant certiorari.

In addition, the *Teague* rule encourages the filing of a petition for writ of certiorari in every case. While certiorari may or may not be granted, the time required for filing and disposition of the petition will delay the point at which the conviction becomes final for, at the very least, a number of months. Since the curtain closes, for many purposes, on a case when certiorari is granted or denied, those months may be critical for determining whether the individual is entitled to collateral relief. Thus, *Teague* has assured that the Court will have to rule upon increasing numbers of ever more detailed petitions for writ of certiorari in the future.

4. *Is* Teague *Retroactive?*

Finally, another question which necessarily arises from review of *Teague* and its progeny is whether the rule announced in *Teague* itself applies retroactively. One of the central principles underlying the plurality's concern in *Teague* was the inequities caused by the failure to treat similarly situated de-

fendants alike.[229] The Court supposedly adopted the *Teague* retroactivity doctrine to cure these inequities. However, under this analysis, *Teague* itself should not apply retroactively. For example, many defendants obtained state post-conviction or federal habeas corpus relief on the basis of arguably "new rules" of criminal procedure which were developed after their convictions became final on direct review. At the time their cases were decided by the state or federal courts on collateral review, no rigid retroactivity doctrine such as that utilized by the Court in *Teague* and *Butler v. McKellar* existed. However, individuals whose cases are currently pending in federal habeas proceedings, and whose cases were already final on direct review at the time the Court decided *Teague*, now may be denied relief on the basis of the same rules which previously had afforded other persons new trials or sentencing hearings. Thus, while the *Teague* plurality was responding to the "unfortunate disparity in the treatment of similarly situated defendants on collateral review,"[230] the decision itself perpetuates such disparate treatment.[231]

Even more disturbing examples of disparate treatment are possible. For example, there are probably individuals whose cases became final on direct review in the last few years, but who were fortunate enough to obtain relief before *Teague* was decided from federal district judges who acted rapidly on their petitions. Yet other persons whose cases may have become final the same day, but are currently pending on collateral review, will be denied relief on *Teague* nonretroactivity grounds. Because one of the primary policies underlying *Teague* is ensuring similar treatment of similarly situated persons, *Teague* itself should not be given retroactive effect. Rather, it should only apply to persons whose convictions became final on direct review after the *Teague* decision was announced. Judge King, of the United States Court of Appeals for the Fifth Circuit, made this observation:

> It is indeed ironic that the majority invokes *Teague*, undoubtedly a new rule, to prevent us from applying [*Caldwell v. Mississippi*, 472 U.S. 320 (1985)], which is at most an extension of settled doctrine. If any case should be considered as having established a new

229. Teague v. Lane, 109 S. Ct. 1060, 1071-72 (1989).

230. *Id.* at 1072.

231. Another discrepancy arises from the Court's failure to explain why the decision regarding retroactivity should turn on the relief sought. A decision's relationship to past doctrine is not affected by whether the case was civil or criminal. Nevertheless, *Teague* raises the possibility that while a federal habeas petitioner could not have the merits of her claim considered because she requested relief under a new rule, another similarly situated prisoner could raise the same claim under 42 U.S.C. § 1983 (1988) and be granted a hearing on the merits and possibly relief as well. For example, the *Chevron Oil Co. v. Huson* analysis, *see supra* text accompanying notes 35-38, might allow for retroactive civil application of a rule which was deemed nonretroactive in a federal habeas context. Under this remedy-based approach to retroactivity, rather than the rule-based approach of *Linkletter v. Walker*, *see supra* text accompanying notes 57-62, a constitutional right has different degrees of retroactive force depending on the remedy sought. Indeed, *Teague*'s remedy-based approach allows for the absurd possibility that a petitioner who might be forced to remain incarcerated or sentenced to die, could nevertheless be financially compensated for the value of his prison time or his life.

> rule not retroactively applicable to habeas petitioners whose convictions have become final, it is *Teague* itself. Had the majority decided Sawyer's case on the basis of the Supreme Court decisions in existence when Sawyer's case was argued and submitted to this court, the majority opinion would have granted him a new sentencing hearing. The majority instead reaches out to an opinion rendered by the Supreme Court 16 months after submission of Sawyer's case and 8 1/2 years after Sawyer's trial to find a reason to deny him constitutional protection. That to us is a finality of sorts, a final and irretrievable absurdity.[232]

CONCLUSION

A cynic might quip that *Teague* and its progeny illustrate no more than the idea that a "new rule" for retroactivity purposes depends on which way Justice O'Connor blows. Clearly, though, the Court has yet to adopt a principled approach to retroactivity that will reconcile its precedents. *Butler* is inconsistent with the underlying vision of *Teague* and cannot be applied to achieve the result the Court reached in *Penry*. If, as the Court insists, these cases are still good law, then the Court has yet to announce a standard governing "new rules," consistent with the current state of the law, which lower courts can follow. Absent such a standard, Congress or the Court, both of which have the power to shape the habeas remedy, should draw the retrospectivity/prospectivity line where Justice Harlan drew it: a rule is new only if "one can say with assurance that there was a time at which th[e] court would have ruled differently."[233]

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232. Sawyer v. Butler, 881 F.2d 1273, 1305 (5th Cir. 1989) (en banc) (King, J., dissenting), *aff'd sub nom.* Sawyer v. Smith, 110 S. Ct. 2822 (1990) (footnote omitted); *see supra* text accompanying notes 152-61.

233. Desist v. United States, 394 U.S. 244, 264 (1969) (Harlan, J., dissenting).