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THE DECLINE OF THE GREAT WRIT: AN ANALYSIS OF TEAGUE V. LANE

I. INTRODUCTION

In recent times, habeas corpus\(^1\) has undergone severe attack. The attack takes the form of a new retroactivity doctrine. Generally speaking, when a judicial decision is used retroactively, it is applied to those cases that arose prior to the announcement of the decision. By prohibiting the retroactive treatment of constitutional rules of criminal procedure, the Supreme Court has effectuated what may prove to be a complete reformation of the "Great Writ."\(^2\)

The term "habeas corpus" refers to the writ of habeas

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\(\text{* The author wishes to thank Professor Russell Galloway for his inspiration.}\)
\(\text{1. Habeas corpus ad subjiciendum is the most common form of habeas writ.}\)
\(\text{39 AM. JUR. 2d Habeas Corpus \textsection 2 (1968). It is described as a writ of inquiry.}\)
\(\text{Porter v. Porter, 60 Fla. 407, 53 So. 546 (1910); Addis v. Applegate, 171 Iowa}\)
\(\text{150, 154 N.W. 168 (1915); Smith v. Henson, 298 Ky. 182, 182 S.W.2d 666 (1944).}\)
\(\text{The writ of habeas corpus is given explicit recognition in the Federal Constitution.}\)
\(\text{Under statutory authorization, the power to issue a writ of habeas corpus belongs}\)
\(\text{to the Supreme Court and its justices, circuit judges and district courts. 28}\)
\(\text{is a procedural device for subjecting executive, judicial, or private restraints on}\)
\(\text{liberty to judicial scrutiny. Where it is available, it assures among other things that}\)
\(\text{a prisoner may require his jailer to justify the detention under law." Peyton v.}\)
\(\text{Rowe, 391 U.S. 54, 58 (1968). The writ of habeas corpus is a civil remedy, \textit{Ex parte}\)
\(\text{Tom Tong, 108 U.S. 556, 559 (1883); "[it] is not a proceeding in the original}\)
\(\text{criminal prosecution but an independent civil suit." Riddle v. Dyche, 262 U.S.}\)
\(\text{33 (1923).}\)
\(\text{2. The term "Great Writ" refers to a writ of habeas corpus ad subjiciendum.}\)
\(\text{Fay v. Noia, 372 U.S. 391, 399 (1963); Carbo v. United States, 364 U.S. 611}\)
\(\text{(1961); Price v. Johnston, 334 U.S. 266 (1948).}\)
\(\text{Although in form the Great Writ is simply a mode of procedure, its}\)
\(\text{history is inextricably intertwined with the growth of fundamental}\)
\(\text{rights and liberty. For its function has been to provide a prompt and}\)
\(\text{efficacious remedy for whatever society deems to be intolerable restraints. Its root}\)
\(\text{principle is that in a civilized society, government must always be accountable to the}\)
\(\text{judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the}\)
\(\text{fundamental requirements of law, the individual is entitled to his}\)
\(\text{immediate release.}\)
\(\text{Fay v. Noia, 372 U.S. 392, 401-02 (1963).}\)
corpus ad subjiciendum, which requires that a person detaining a prisoner produce the prisoner. The writ serves as a remedy for those illegally deprived of their liberty, and its importance is given explicit recognition in the United States Constitution: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Public Safety may require it." In 1830, Chief Justice Marshall wrote that the writ of habeas corpus "is a high prerogative writ known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause." "The writ of habeas corpus has played a great role in the history of human freedom. It has been the judicial method of lifting undue restraints upon personal liberty." Blackstone called the writ "the most celebrated writ in the English law." It is to this long and extolled history that the current state of the law must be compared.

In Teague v. Lane, the Supreme Court asserted that it was adopting the retroactivity doctrine developed by Justice John M. Harlan. Since an understanding of Justice Harlan's philosophy on retroactivity is necessary to a thorough and correct understanding of Teague, Harlan's approach and the state of the law which prompted his opinions will be outlined in this comment. The Teague decision and its implications will be explored, as will be subsequent Supreme Court decisions which clarify and comment on Teague. Finally, this comment will offer a critical perspective on Teague and its progeny, as well as several proposals intended to sort out the current state of the law of habeas corpus.

5. U.S. CONST. art. 1, § 9, cl. 2.
8. 3 W. BLACKSTONE COMMENTARIES *129.
10. See infra notes 23-65 and accompanying text.
11. See infra notes 67-111 and accompanying text.
12. See infra notes 112-48 and accompanying text.
13. See infra note 176 and accompanying text.
II. BACKGROUND

Teague v. Lane\textsuperscript{14} presented a new approach to retroactivity as applied to habeas corpus review. Prior to Teague, the standard for determining whether rulings should be applied retroactively was governed by Linkletter v. Walker.\textsuperscript{15} Linkletter called for a case-by-case balancing of various factors, the central issue being whether to allow the habeas petitioner the benefit of the current law or, contrarily, to allow him only that body of law available at the time his conviction became final.\textsuperscript{16} Teague abandoned the Linkletter balancing test in favor of a rigid, threshold inquiry.

Teague held that the question of retroactivity is a threshold matter to be addressed before reaching the merits of any habeas petition.\textsuperscript{17} If a court concludes that the petitioner seeks a "new rule" applied to his claim, then the petitioner receives no further review regardless of the merits of his claim. The Court allows two exceptions to this general proscription. The first exception concerns conduct which is outside the scope of any criminal law-making authority.\textsuperscript{18} Presumably, if a petitioner seeks the benefit of a rule which places his conduct beyond law-making authority, he will not be barred from further judicial review.

The second exception distinguishes the rules of criminal procedure generally from those rules which form the very foundation of criminal procedure and without which a defendant would be denied a fair trial. If a petitioner's claim is based on the latter, he is entitled the benefit of the rule and will not be procedurally barred from review.\textsuperscript{19} It is important to note that the Teague Court thought it unlikely that such rules have yet to be announced, and thus, to fall under the auspices of "new." It is more likely, according to the Court, that those rules are already firmly established in our procedural structure.\textsuperscript{20}

\textsuperscript{14} 489 U.S. 288 (1989).
\textsuperscript{15} 381 U.S. 618 (1965).
\textsuperscript{16} See infra note 29 and accompanying text.
\textsuperscript{17} See infra note 76 and accompanying text.
\textsuperscript{18} See infra text accompanying note 92.
\textsuperscript{19} See infra notes 94-95 and accompanying text.
\textsuperscript{20} See infra text accompanying notes 97-99.
The idea of denying a new rule retroactive application unless it meets defined criteria, thus qualifying it as an exception, originated with Justice Harlan. The Teague Court made clear that it was, in fact, deriving its holding from Harlan's approach. Generally speaking, the Teague decision represents the second element of Harlan's retroactivity doctrine. The first element concerned direct review, in which Harlan favored full retroactive application of subsequently announced decisions to all cases not yet final or, in other words, to all cases still within the appellate process. This has since become the accepted practice.2¹

As for habeas review, Harlan believed that retroactivity had never presented a substantial problem when habeas review was of a narrower scope. However, the scope of federal habeas review was expanded by Fay v. Noia,2² which explicitly recognized federal habeas jurisdiction over state court decisions and provided a lenient standard by which federal courts could grant review of habeas petitions. The contemporaneous expansion of the scope of habeas corpus, and what Harlan perceived as abuses of the flexible Linkletter balance, prompted him to create and set forth an alternative standard for retroactivity.

The question that remains is whether the Court's approach set forth in Teague is a modern adaptation of Harlan's approach or simply a flat ban on retroactive application of criminal procedure law except in the rarest of cases. Should the Court abandon its very restrictive version of Harlan's test in favor of a general prohibition of retroactivity in the criminal procedure context? Or is there some advantage in clothing the test in Harlan's perceived sense of equity?

A. Retroactivity Prior to Teague v. Lane

Prior to Linkletter v. Walker,2³ new constitutional rulings were applied to all cases arising thereafter and to all previously decided cases still subject to judicial review. This practice is known as retroactive application of judicial decisions.2⁴ In

2³ 381 U.S. 618 (1965).
2⁴ "Judicial decisions have had retrospective operation for near a thousand years." Id. at 622 n.6 (quoting Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910) (Holmes, J., dissenting)).
1809, Blackstone commented on the practice by noting that the court's duty was not "to pronounce a new law, but to maintain and expound the old one." In 1965, the Linkletter Court discarded the traditional practice, declaring that "the Constitution neither prohibits nor requires retrospective effect." Borrowing language from Chicot Drainage District v. Baxter State Bank, the Court formulated a balancing approach to determine whether to apply a decision retroactively. The factors employed in the balancing included: 1) the purpose of the rule and the extent to which its purpose was furthered by retroactive application; 2) the reliance placed upon the past precedent by law enforcement entities; and 3) the effect of retroactive application on the administration of justice. In Linkletter, the Court concluded that it would not apply the exclusionary rule set forth in Mapp v. Ohio to Linkletter's state court conviction which had become final on direct review before the announcement of Mapp.

25. Blackstone, as a legal writer, attempted to simplify the law so it could be understood by the layperson. Blackstone considered himself an "academic expounder of the laws" and his commentaries may be described as "a general map of the law." 1 W. BLACKSTONE, COMMENTARIES *35. See generally S.F.C. Milsom, The Nature of Blackstone's Achievement, Lecture Delivered at Oxford to the Seldon Society (May 31, 1980) (unpublished manuscript).

26. 1 W. BLACKSTONE, COMMENTARIES *69.

27. Linkletter, 381 U.S. at 629. In Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 364 (1932), Justice Cardozo stated, "We think the federal constitution has no voice upon the subject."

28. 308 U.S. 371, 374 (1940),reh'g denied, 309 U.S. 695 (1940). In Chicot, bondholders who were parties in a former proceeding which was brought under an act which was later declared unconstitutional were estopped from raising the question of constitutionality in a subsequent action. Id.

29. Linkletter, 381 U.S. at 636. The Court made the following comment: [T]he effect of the subsequent ruling of invalidity on prior final judgments when collaterally attacked is subject to no set 'principle of absolute retroactivity invalidity' but depends upon a consideration of 'particular relations . . . and particular conduct . . . of rights claimed to have become vested of status, of prior determinations deemed to have finality'; and of 'public policy in the light of the nature both of the statute and of its previous application.' Id. at 627 (quoting Chicot, 308 U.S. at 374 ).


31. It should be noted that Linkletter v. Walker, 318 U.S. 618 (1965), was decided prior to Stone v. Powell, 428 U.S. 465 (1976), when fourth amendment challenges were still allowed on habeas review.
The Linkletter Court took care to limit its holding to the issue of retroactive application on habeas review. However, the distinction between those seeking retroactive application of a new rule on petition for habeas corpus and those on direct review was later found inconsequential in Stovall v. Denno. Subsequent decisions applying Linkletter varied considerably in their purposes and results.

32. "[W]e are concerned only with whether the exclusionary principle enunciated in Mapp applies to state court convictions which had become final before rendition of our opinion." Linkletter, 381 U.S. at 622. The implication is that the Linkletter Court accepted the practice of retroactive application of new decisions to cases that were still subject to direct review. Habeas corpus provides a remedy for criminal cases even after direct review has been exhausted and therefore, may be distinguished on this point.

33. 388 U.S. 293, 300 (1967). "We . . . conclude that . . . no distinction is justified between convictions now final as in the instant case, and convictions at various stages of trial and direct review." However, it must be noted that the distinction is fundamental to Harlan's beliefs and can account largely for whether Harlan expressed those beliefs in a concurring or dissenting opinion.

34. In Desist v. United States, 394 U.S. 244 (1969), the Court held that Katz v. United States, 389 U.S. 347 (1967), which concluded that evidence obtained by electronic listening device was excluded because the government's activities violated the petitioner's reasonable expectation of privacy, should be applied prospectively only. In Williams v. United States, 401 U.S. 646 (1971), the Court held that Chimel v. California, 395 U.S. 752 (1969), which narrowed the scope of permissible searches incident to lawful arrest, was not to be retroactively applied to searches which occurred before Chimel was decided. Tehan v. United States ex rel. Shott, 382 U.S. 406 (1966), held that the doctrine of Griffin v. California, 389 U.S. 609 (1965), which held that a state prosecutor may not comment on a defendant's failure to testify, would not be applied retroactively. Stovall, 388 U.S. at 293, addressed the decisions put forth in United States v. Wade, 388 U.S. 218 (1967), and Gilbert v. California, 388 U.S. 263 (1967), which held that a post-indictment lineup is a critical stage to which the sixth amendment right to counsel applies and that testimony relating to prior identification at lineups in violation of the right to counsel is always excluded, respectively. Stovall concluded these decisions were to be given effect only in cases where the activities in error took place after the decisions were announced. Johnston v. New Jersey, 384 U.S. 719 (1966), held that Miranda v. Arizona, 384 U.S. 436 (1966),reh'g denied, 385 U.S. 436 (1966), and Escobedo v. Illinois, 378 U.S. 478 (1964), should apply only to those cases where trials had begun after the decisions were handed down. But see McConnell v. Rhay, 393 U.S. 2 (1968) (retroactive application of Mempa v. Rhay, 389 U.S. 128 (1967), requiring counsel to be provided during revocation of probation and imposition of deferred sentence). United States v. Johnston, 457 U.S. 537 (1982), called for retroactive application of Payton v. New York, 445 U.S. 573 (1980) (prohibiting warrantless and nonconsensual entries in connection with felony arrests), to all convictions not yet final.
B. Justice Harlan’s Approach to Retroactivity

Four years after *Linkletter v. Walker,* Justice Harlan began expressing his disenchantment with the developing course of retroactivity. According to Harlan, giving new constitutional rules whole or partial retroactive treatment or only prospective treatment was simply a way by which the Court furthered its own judicial policies. Admitting that he too had played a part in this thwarting of the law, Justice Harlan renounced his former position and proposed a scheme for retroactivity which turned on whether a claim was before the Court on direct or collateral review.

1. Retroactivity on Direct Review

Harlan asserted that when a case reaches the United States Supreme Court on direct review, the basic duty of the

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35. 381 U.S. 618 (1965).
36. See generally The Evolution of Judicial Philosophy: Selected Opinions and Papers of Justice John M. Harlan (D. Shapiro ed. 1969); 6 The Supreme Court of the United States: Hearings and Reports on Successful and Unsuccessful Nominations of the Supreme Court Justices by the Senate Judiciary Committee 1-182 (R. Merskey & J. Jacobstein eds. 1975); Ballantine, John M. Harlan for the Supreme Court, 40 Iowa L. Rev. 391 (1955); Friedman, Mr. Justice Harlan, 30 Notre Dame L. Rev. 349 (1955).

Justice Harlan was noted for his firmly held convictions concerning federal respect for legitimate state interests, deference to the principles of separation of powers between the three branches of government, and the doctrine of fundamental fairness. In addition, he believed in fidelity to judicial precedent. See Bourguignon, The Second Mr. Justice Harlan: His Principles of Judicial Decision Making, 1979 Sup. Ct. Rev. 251, 277. He believed the Court should respect precedent and avoid interjecting “uncertainties into a field already plagued by excessive refinements.” Detroit v. Murrau Corp., 355 U.S. 489, 510 (1958) (Harlan, J., concurring and dissenting).

38. Mackey v. United States, 401 U.S. 667, 677 (1971). Harlan noted that “the Court is free to act, in effect, like a legislature, making new constitutional rules wholly or partially retroactive or only prospective as it deems wise.” Id.

39. Direct review can be said to encompass all opportunities available for appellate review. Collateral remedies, as recognized today, consist of writs of coram nobis and habeas corpus. A writ of coram nobis is a method of relief for errors of fact which, if known at the time of trial, would have produced a different outcome. “Habeas corpus always has been a collateral remedy, providing an avenue for upsetting judgments that have become otherwise final.” Mackey, 401 U.S. at 683.

40. Very few cases reach the Supreme Court as a matter of right; the majority of cases the Supreme Court hears on appeal come under the discretionary writ
Court is adjudication of the case according to the law of the land and application of the Federal Constitution as needed. The announcement of a new constitutional rule was correlative to the Court's primary function. In Harlan's belief, "simply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected" was contrary to the Court's duty. He concluded that the retroactive application of "new rules" of constitutional law was appropriate in all cases before the court on direct review.

2. Retroactivity on Collateral Review

In addressing retroactivity on collateral review, Harlan began by describing the "nature, function, and scope of the adjudicatory process." Harlan contended that habeas review was not a substitute for direct review: "While the entire theoretical underpinning of judicial review and constitutional supremacy dictate that federal courts having jurisdiction on direct review adjudicate every issue of law... federal courts have never had a similar obligation on habeas corpus."


41. Mackey, 401 U.S. at 678-79 (citing Marbury v. Madison, 1 Cranch 137, 177-78 (1803)).

42. Id.

43. Id. at 679. In addition, Harlan expressed concern for the inferences drawn by the lower courts from the Supreme Court's retroactivity holdings. If a lower court arrived at the same conclusion as did the Supreme Court but before the Supreme Court's decision could be given effect, the lower court was in error and was reversed. Similarly, a lower court deciding consistently with outdated precedent was subsequently upheld. Harlan believed this process served as a disincentive for lower courts to develop and interpret constitutional law. Id. at 680.

44. The definition of a "new rule" for purposes of retroactivity is far from settled, as will be shown in this comment.

45. It is important to note that this portion of Harlan's proposal was not contrary to Linkletter. In fact, Linkletter relied on the distinction between direct and collateral review. See supra note 32.

46. Mackey v. United States, 401 U.S. 667, 682 (1971). In 1976, the scope of habeas corpus was significantly limited by Stone v. Powell, 428 U.S. 465 (1976). "Where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas relief on the ground that evidence obtained in an unconstitutional search and seizure was introduced at his trial." Stone, 428 U.S. at 494.

47. Mackey, 401 U.S. at 695. Justice Harlan contended that the United States
Justice Harlan noted that retroactivity had not presented a substantial problem when habeas review was of a narrower scope—that is, when arguments raised for the first time were excluded if the petitioner had been given fair opportunity to raise the argument at the original trial. Yet, Harlan acquiesced to the expansion of the “Great Writ” and attempted to determine the scope of habeas corpus under the current framework of the law.

Supreme Court had no power to release a prisoner whose conviction rested “upon an adequate and independent state ground which the federal courts are required to respect.” Fay v. Noia, 372 U.S. 391, 448 (1963) (Harlan, J., dissenting).

48. Harlan was referring to the state of the law prior to Brown v. Allen, 344 U.S. 443 (1953), which held that a court considering a habeas petition was entitled to consider the merits of a petitioner’s claim and rule on the merits, notwithstanding prior state adjudication. For an interesting discussion on legislative proposals regarding the expanding and contracting availability of federal habeas corpus for litigating state prisoner’s claims, see Sallet & Goodman, Closing the Door to Federal Habeas Corpus: A Comment on the Legislative Proposals to Restrict Access in State Procedural Default Cases, 20 AM. CRIM. L. REV. 465 (1983).

49. Harlan believed the expansion of habeas corpus to be an “unfortunate display of insensitivity to the principles of federalism which underlie the American legal system.” Mackey, 401 U.S. at 685. To a great extent, the expansion can be attributed to Fay, 372 U.S. at 391 (1963), overruling recognized in United States ex rel. Falconer v. Lane, 720 F. Supp. 631 (N.D. Ill. 1989); Clark v. Ricketts, 886 F.2d 1152 (9th Cir. 1989).

In Fay, 372 U.S. at 430, Justice Brennan, writing for the majority, explicitly recognized federal habeas jurisdiction. The “jurisdictional prerequisite” for a writ of habeas corpus “[was] not the judgment of the state court, but detention simpliciter.” In other words, habeas jurisdiction extends to “the body of the petitioner” not the state court’s judgment. Id. at 431. Fay held that the Court has no obligation to deny a petition in response to procedural defaults occurring during state proceedings. However, the Court has the ability to limit review in instances where “the suitor’s conduct in relation to the matter at hand may disentitle him to relief,” specifically, where the petitioner’s conduct takes the form of “deliberately by-pass[ing] the orderly procedure of the state court.” Id. at 438.

Justice Harlan stated, “[i]t is clear that a State may not preclude Supreme Court review . . . [however,] . . . determination of the adequacy and independence of that state ground . . . marks the constitutional limit of our power in this sphere.” Id. at 465-66 (Harlan, J., dissenting).

The “deliberate by-pass” standard introduced by Fay was severely criticized and eventually abandoned. In Wainwright v. Sykes, 433 U.S. 72 (1977), Justice Rehnquist characterized the deliberate by-pass standard as an interference to the proper function of a trial. The “failure of the federal habeas courts generally to require compliance with a contemporaneous-objection rule tends to detract from the perception of the trial in a criminal case . . . as a decisive and portentous event.” Id. at 90. The Court opted for a stricter cause and prejudice standard for determining when a procedural default bars habeas review. Although the deliberate by-pass rule was overruled, Fay's jurisdictional holding is still valid. Falconer, 720 F. Supp. at 637.
First, Harlan proposed that a writ of habeas corpus permits an examination of any possible constitutional defect in any criminal trial where the habeas petitioner remained imprisoned because of such defect.\(^5\) Second, habeas "provides a quasi-appellate review function, forcing . . . courts . . . to toe the constitutional mark."\(^5\) Nevertheless, Harlan believed the deterrent effect of habeas review could be achieved simply by allowing the court to apply the constitutional law in existence at the time of the original trial.\(^5\)

Harlan acknowledged the interest in uniform treatment of prisoners as well as the interest in correcting past abuses of justice in light of changing social norms.\(^5\) At the same time, he suggested that those interests were overstated and possessed more emotional than analytical strength.\(^4\) He believed the countervailing interest in finality went largely unnoticed.\(^5\)

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50. Harlan's original statement is contained in his dissenting opinion in Desist v. United States, 394 U.S. 244 (1969). In Desist, he suggested that the first purpose of habeas corpus was to impel the prevention of a petitioner remaining incarcerated because of a procedure which instilled an "impermissibly large risk that the innocent will be convicted." *Id.* at 262. In Mackey, 401 U.S. at 685-86, he expanded this statement to incorporate Kaufman v. United States, 394 U.S. 217 (1969) (extending 28 U.S.C. § 2255 (Supp. V 1964), the collateral remedy for federal prisoners, to all constitutional claims). Justice Harlan willingly accepted the proposition that a new constitutional rule greatly improving fact-finding procedure should be given retroactive application. *See Kaufman*, 394 U.S. at 235-36 (Black, J., dissenting). However, even in light of its expanded purpose, a habeas court did not need to give every new constitutional rule retroactive application. Desist, 394 U.S. at 263.


52. Desist, 394 U.S. at 263.

53. These interests are what Justice Harlan characterized as countervailing interests and were asserted by those in support of extending habeas to any alleged constitutional error. Mackey, 401 U.S. at 687-89.

54. *Id.* at 689-90.

55. Harlan stated that "[i]t is . . . a matter of fundamental import that there be a visible end to litigatable aspects of the criminal process." *Id.* at 690. In Sanders v. United States, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting), Harlan wrote the following:

> Both the individual criminal defendant and society have an interest in insuring there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community.

*Id.*

The concept of finality as it applies to the availability of habeas review has been an increasingly popular issue since Harlan's commentaries on the subject. *See Engle v. Isaac*, 456 U.S. 107, 127 (1982); United States v. Addonizio, 442 U.S.
Accordingly, Harlan concluded that the limited scope, nature, and function of habeas review, when combined with the interest in finality, necessitated the application of the law in effect at the time of a criminal defendant’s final conviction. Whether a defendant could benefit from a constitutional rule announced subsequent to the conviction involved a determination as to whether the subsequent decision announced a “new rule.”

The determination of when a decision announces a new rule is difficult. The decision may have “simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in prior case law.” Unfortunately, Harlan provided little commentary as to what he believed was a new rule. However, he did suggest that a decision resulted in a new rule when one could refer to a point in time when the court clearly would have decided differently. If it was determined that a decision constituted a new rule, Harlan provided two exceptions to his general proposal that habeas petitioners should be precluded from obtaining retroactive application of a new rule. First, a rule which interprets the Constitution as protecting “certain kinds of primary, private individual conduct” should be given full retroactive effect. Harlan qualified his discussion of the retroactivity doctrine by emphasizing that only new rules dealing with procedural due process were at issue. A “new ‘substantive due process’ rule” was simply another way to describe a rule falling within the first exception.


57. Id.

58. Harlan contrasted gradual development of fundamental principles of law with those decisions when, at a specific point in time, the Court clearly would have decided differently. As an example, he referred to the state of the law surrounding the fourth amendment prior to Silverman v. United States, 365 U.S. 505 (1961) (concluding an illegal search occurred when a listening device was inserted into a party wall, abrogating the mere words doctrine), and then thereafter. Desist, 394 U.S. at 264.


60. Id.

61. Id.
Second, Harlan reasoned that a rule requiring the observance of procedures "implicit in the concept of ordered liberty" would deserve retroactive application. However, a court's decision which did not violate a criminal procedural rule mandated by the Constitution should be presumed to reflect a fundamentally fair adjudication. Justice Harlan recognized that a society can change its "perceptions of what [it] can rightly demand of the adjudicatory process" and, as a result, these perceptions "will properly alter our understanding of bedrock procedural elements." A rule reflecting these changes must be given retroactive application.

In summary, Harlan believed that certain rules of criminal procedure could be characterized as "new." A new rule, by its very definition, marked a point in time when the courts would have clearly decided a relevant issue differently. A habeas petitioner whose conviction becomes final prior to the decision creating the new rule may not subsequently benefit from that

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62. Id. (employing language from Justice Cardozo's opinion in Palko v. Connecticut, 302 U.S. 319, 325 (1937)). The concept of "ordered liberty" arose from the historical debate centered around the fourteenth amendment and the extension of the Bill of Rights to the states. Ordered liberty is inextricably tied to the fundamental fairness doctrine which prevailed from the early 1930's through the early 1960's. See Powell v. Alabama, 287 U.S. 45 (1932) (the first case to adopt the fundamental fairness doctrine). Justice Frankfurter articulated the fundamental fairness doctrine in Adamson v. California, 332 U.S. 46 (1947). He maintained that the fourteenth amendment "neither comprehends the specific provisions by which the founders deemed it appropriate to restrict the federal government nor is it confined to them. The Due Process Clause of the Fourteenth Amendment has an independent potency." Id. at 66. See generally G. FETNER, ORDERED LIBERTY: LEGAL REFORM IN THE TWENTIETH CENTURY (1988). The ordered liberty/fundamental fairness doctrine was eventually abandoned in favor of selective incorporation. See Mapp v. Ohio, 367 U.S. 643 (1961); Robinson v. California, 370 U.S. 660 (1962); Ker v. California, 374 U.S. 23 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963). In 1964, selective incorporation became the majority view. See Malloy v. Hogan, 378 U.S. 1 (1964) (holding the privilege against self-incrimination to be a fundamental right protected by the fifth amendment and rejecting the contention that the protection afforded by the due process clause was less stringent than that afforded under the fifth amendment).

63. The term "fundamental fairness" is often equated with the fundamental fairness doctrine. The doctrine interprets the due process clause as protecting an individual's "fundamental" rights, and thus, the due process clause prohibits state action which effects a violation of those rights. Those who advocate the fundamental fairness doctrine take the position that the Bill of Rights is not necessarily incorporated into the due process clause of the fourteenth amendment. W. LAFAVE, J. ISRAEL, CRIMINAL PROCEDURE 41 (1985).


65. Id.
holding. The two exceptions to the general denial of retroactive application ensure the petitioner substantive due process and a fundamentally fair trial by allowing retroactive application of rules dictated by these concepts. Despite Harlan’s efforts to reform the retroactivity doctrine, the Linkletter balancing approach remained the standard until *Teague v. Lane*.66

III. *Teague v. Lane* - Overruling Linkletter

A. Facts and Procedure

In *Teague*, the petitioner was a black man who was convicted of attempted murder, armed robbery, and aggravated battery.67 During jury selection,68 the state prosecutor exercised each of his ten peremptory challenges to excuse blacks.69 The result was an all-white jury. Petitioner’s lawyer moved for a mistrial on two separate occasions, but both motions were denied. Petitioner appealed to the Illinois Appellate Court on the grounds that the prosecutor’s use of peremptory challenges effectively denied him the right to a jury representing a fair cross-section of the community.70 This appeal was unsuccess-

67. Id. at 292-93.
69. The peremptory challenge is used in both civil and criminal settings to challenge a juror. BLACK'S LAW DICTIONARY 1186 (6th ed. 1990). The peremptory challenge is “frequently exercised on the grounds thought irrelevant to legal proceedings or official actions, namely the race, religion, nationality, occupation or affiliation of people summoned for jury duty.” Swain v. Alabama, 380 U.S. 202, 220 (1965). It is presumed that peremptory challenges are based on legitimate concerns. People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978). The equal protection clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors, as a group, will be unable to consider impartially the State’s case against a black defendant. Batson v. Kentucky, 476 U.S. 79 (1986). The requirements set forth to establish a prima facie case of purposeful discrimination are as follows: 1) defendant must show that he is a member of a cognizable racial group; 2) that the group’s members have been excluded from the defendant’s jury by peremptory challenges made by the prosecutor; and 3) there are circumstances which indicate that the exclusion was based on race. Batson, 476 U.S. at 96. The prosecutor then must justify the exclusion. Id. See generally FED. R. CRIM. P. 24(b), (c).
70. A fair cross section requires that juries “must be drawn from a source fairly representative of the community.” Taylor v. Louisiana, 419 U.S. 522, 538
ful and the petitioner was convicted.\textsuperscript{71} The district court reviewed the case on a petition for a writ of habeas corpus and dismissed it. Petitioner appealed. The court of appeals decided to rehear the case for reasons not relevant to this discussion, but ultimately dismissed all three claims raised by the petitioner, holding that the fair cross-section requirement applied only in the context of jury venire\textsuperscript{72} and did not extend to the jury itself.\textsuperscript{73}

B. The Supreme Court Decision

Teague presented three claims to the Supreme Court, two of which were resolved by majority rulings.\textsuperscript{74} Teague's third claim asserted that the sixth amendment right to a fair cross-section of jury venire should apply to the petit jury.\textsuperscript{75} The ruling on this issue was by plurality opinion and is the focus of this discussion.

Writing for the plurality, Justice O'Connor first emphasized that the issue of retroactivity is a threshold inquiry.\textsuperscript{76} Second, Justice O'Connor characterized petitioner's fair cross-section claim as a "new rule."\textsuperscript{77} She noted that whether a rule should be characterized as "new" for retroactivity purposes was a difficult determination.\textsuperscript{78} Notably, she declined to

\textsuperscript{71} The Illinois Supreme Court denied leave to appeal and the United States Supreme Court denied certiorari. \textit{Teague v. Lane}, 489 U.S. 288, 293 (1989).

\textsuperscript{72} Jury venire refers to the group of jurors summoned as compared to those actually selected to serve. \textit{BLACK'S LAW DICTIONARY} 1556 (6th ed. 1979).

\textsuperscript{73} Teague v. Lane, 489 U.S. 288, 294 (1989).

\textsuperscript{74} Petitioner's first claim was that he was entitled to retroactive application of \textit{Batson v. Kentucky}, 476 U.S. 79 (1986). \textit{See supra} note 69. The majority held that Teague could not benefit from \textit{Batson} because of \textit{Allen v. Hardy}, 478 U.S. 255 (1986), which held \textit{Batson} could not be applied retroactively on collateral review. Petitioner's second claim asserted that he had met the requirements needed to establish that the prosecutor's use of peremptory challenges constituted a violation of the equal protection clause. \textit{See Swain v. Alabama}, 380 U.S. 202, 208 (1965). The majority concluded that Teague was procedurally barred from raising the claim on habeas review. \textit{Teague}, 489 U.S. at 298.

\textsuperscript{75} A petit jury refers to an ordinary jury used for a criminal or civil case; it is referred to as such in order to distinguish it from a grand jury. \textit{BLACK'S LAW DICTIONARY} 856 (6th ed. 1990).


\textsuperscript{77} \textit{Teague}, 489 U.S. 288, 301.

\textsuperscript{78} \textit{Id}.
specify a "spectrum" of what could be treated as a new rule, but generally held that a case announces a new rule when it "breaks new ground" or creates a new burden which is imposed upon the states or federal government.\(^7\)

The Court further held that a case announces a new rule "if the result was not \textit{dictated} by precedent existing at the time the defendant's conviction became final."\(^8\)

Finding that the petitioner's claim constituted a new rule, the Court returned to the \textit{Linkletter} retroactivity doctrine and proceeded to overrule it. O'Connor noted that the first half of Harlan's retroactivity scheme, retroactivity on direct review, had become the definitive approach.\(^8\) Moving toward an adoption of the second half of Harlan's scheme (retroactivity on collateral review), the Court began by expressing its dissatisfaction with \textit{Linkletter}. Of \textit{Linkletter}'s noted failings, the Court believed the worst was the disparity of treatment among defendants seeking collateral review.\(^8\) The Court set forth Harlan's alternative for retroactivity on habeas review, including Harlan's evaluation of the nature, function, and scope of habeas.\(^8\) Justice O'Connor placed special emphasis on Harlan's response to the argument that retroactive application provides an incentive to "toe the constitutional mark."\(^8\)

The plurality opinion then broadly discussed habeas review and related current policies and interests. Justice O'Connor contended that the Supreme Court has never based

\(^7\) Id.

\(^8\) Id. See generally Truesdale v. Aiken, 480 U.S. 527, 528-29 (1987) (Powell, J., dissenting).

\(^8\) Harlan's approach to retroactivity on direct review became the majority view in Griffin v. Kentucky, 479 U.S. 314 (1987). "Failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." Id. at 322.

\(^8\) Teague v. Lane, 489 U.S. 288, 305 (1989). The Court cited Edwards v. Arizona, 451 U.S. 477 (1981) (ruling that when a suspect asserted his right to counsel, he could not waive that right until counsel had been made available, unless the suspect initiated further communications), as an example of the disparity of treatment that existed.

\(^8\) Teague, 489 U.S. at 306. See supra notes 49-51 and accompanying text.

\(^8\) Teague, 489 U.S. at 307 (quoting Solem v. Stumes, 465 U.S. 638, 653 (1984) (Powell, J., concurring)). Harlan's response to this argument was "[i]n order to perform this deterrence function, the habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place." Desist v. United States, 394 U.S. 244, 263 (1969). See supra text accompanying note 52.
the scope of habeas review singularly on the need to ensure that criminal trials were free from constitutional errors.\(^8\) Furthermore, the plurality believed the interest of finality must be given its proper weight\(^6\) and noted the monetary costs states incur in permitting retroactive application on habeas review.\(^7\) Finally, the opinion recognized the frustration experienced by state courts whose decisions are overturned on habeas review despite correct application of existing law.\(^8\) For these reasons, the plurality adopted Harlan's approach to retroactivity for new rules established under the jurisdiction of habeas corpus review.\(^9\)

The Court went on to apply its holding to Teague's fair cross-section claim. It had already been determined that Teague's claim was within the definition of a new rule;\(^9\) what remained was a determination as to whether the rule fell within either of Harlan's two exceptions.\(^9\) The plurality quickly dispensed with the first exception: it reasoned that the a new rule which places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" had no relevance to Teague's fair cross-section claim.\(^9\)

Harlan's second exception was given lengthier consideration.\(^9\) As a preliminary matter, the plurality found the sec-

\(^{86}\) Teague, 489 U.S. at 308. "[I]f a criminal judgment is ever to become final, the notion of legality must at some point include the assignment of final competence to determine legality." Id. (quoting Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 HARV. L. REV. 441, 450-51 (1963)).

\(^{87}\) According to the Court, permitting retroactive application of decisions announced after habeas petitioners' own convictions are final "continually forces the State to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." Teague, 489 U.S. at 310. It is interesting to note the above complaint in the context of arguments for and against the death penalty. Opponents of capital punishment often argue the expense involved in carrying out death sentences. It is probably fair to say that proponents of the death penalty would like to see the elimination of this argument.

\(^{88}\) Id.
\(^{89}\) Id.
\(^{90}\) See supra text accompanying note 77.
\(^{92}\) Id. (quoting Mackey v. United States, 401 U.S. 667, 692 (1971)).
\(^{93}\) Id.

\(^{94}\) Harlan's second exception provided for a rule which calls for the observance of "those procedures that . . . are 'implicit in the concept of ordered
ond exception in need of modification. O'Connor traced the development of the second exception, noting that in Harlan's concurrence in *Mackey v. United States*, he was compelled to broaden the exception under *Palko v. Connecticut*. Reasoning that conformance to *Palko* today "would be unnecessarily anachronistic," O'Connor concluded that the second exception should be limited to "those new procedures without which the likelihood of an accurate conviction is seriously diminished." Significantly, the plurality opinion added that it was "unlikely that many such components of basic due process have yet to emerge."

The Court concluded that a new procedural rule calling for petit juries to represent a fair cross-section of the community was a "far cry from the kind of absolute prerequisite to fundamental fairness" which the modified second exception would require. Stated alternatively, the rule did not constitute the type of "bedrock procedural element" which would qualify it for retroactive application on collateral review. Because the retroactivity analysis was a threshold inquiry, the Court declared itself unable to reach the fair cross-section claim on its merits. Justice Brennan was joined by Justice Marshall in a vigorous dissent.

C. Justice Brennan's Dissenting Opinion: Concern for the Great Writ

Justice Brennan severely criticized the adoption of a new standard for retroactivity. He found no precedential support

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98. *Id.* at 313.
99. *Id.*
102. At this point in the decision, the Court speaks of equitable treatment of similarly situated defendants. Due to its concern for equitable treatment, the Court refuses to allow advisory opinions based on the merits of an asserted new rule. According to the Court, there is a "more principled way of dealing with the problem [of inequitable treatment. The Court] can simply refuse to announce a new rule in a given case unless the rule would be applied retroactively to the defendant in the case and to all others similarly situated." *Id.* at 316.
for the decision in the Federal Habeas Corpus Statute. Furthermore, he noted that Congress had made no attempt to narrow the scope of habeas corpus since the enactment of the Habeas Corpus Act of 1867. Justice Brennan objected to the plurality's adoption of a new approach to habeas review without receiving significant briefing on the subject and without the benefit of oral arguments.

Justice Brennan saw the action by the court as a radical change in the scope and strength of the "Great Writ." The broad definition of a new rule and the narrow definitions of the two exceptions effectively limited the Court's power of adjudication through the means of habeas review. To illustrate this point, he cited a number of cases which never would have been adjudicated under the plurality's holding.

103. A district court "shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a) (1982).
105. Brief for Criminal Justice Legal Foundation as Amicus Curiae, Teague, 489 U.S. at 288.
106. In support of his complaint, Justice Brennan quoted the following statement made by Justice Harlan: The Supreme Court's "obligation of orderly adherence to [its] own processes would demand that [it] seek that aid which adequate briefing and argument lends to the determination of an important issue." Mapp v. Ohio, 367 U.S. 643, 677 (1961) (Harlan, J., dissenting). "The question of scope of collateral attack upon criminal sentences is an important one . . . We think that we should have the benefit of a full argument before dealing with the question." Ladner v. United States, 358 U.S. 169, 173 (1958).
107. Teague, 489 U.S. at 327 (Brennan, J., dissenting).
108. Among the cases that Brennan cited were the following: Nix v. Whiteside, 475 U.S. 157 (1986) (holding a breach of an ethical standard does not necessarily constitute ineffective assistance of counsel, however, compliance with ethical standards is automatically reasonable conduct within the reasonableness inquiry of effective assistance of counsel); Moran v. Burbine, 475 U.S. 412 (1986) (holding that a knowing waiver of the right to counsel does not require informing the defendant that a lawyer has been retained for him); McKaskle v. Wiggins, 465 U.S. 168 (1984) (providing a two-pronged test for establishing whether participation of standby counsel in trial proceedings violates a defendant's right to self representation); Morris v. Slappy, 461 U.S. 1 (1983) (rejecting an appellate court's holding that a defendant has a right to a meaningful attorney-client relationship); Wainwright v. Torna, 455 U.S. 586 (1982) (no right to effective assistance of counsel on discretionary appeal); Ross v. Moffitt, 417 U.S. 600 (1974) (under the right to counsel, equal protection only goes as far as providing meaningful access to appellate review); Tehan v. United States ex rel. Shott, 382 U.S. 406 (1966) (evidence used to establish defendant's guilt must be independently and freely secured); Estelle v. Smith, 451 U.S. 454 (1981) (psychiatric testimony used to establish competence to stand trial and future dangerousness during the sentenc-
Brennan contrasted the plurality's interest in uniform treatment of habeas petitioners against the practical reality that collateral review may be the only vehicle by which an issue can reach the Court. He concluded that the "uniform treatment of habeas petitioners is not worth the price the plurality is willing to pay."¹⁰⁹

Finally, Justice Brennan criticized what he saw as the plurality's inaccurate account of the substance of the petitioner's claim,¹¹⁰ suggesting that a slight rephrasing of an issue can have drastic effects on the proposed threshold inquiry. In addition to Justice Brennan's concerns, Justice Stevens expressed his own concerns regarding the application of Teague v. Lane to subsequent capital cases.¹¹¹ His concerns were addressed in Penry v. Lynaugh.¹¹² Two circuit courts

¹⁰⁹. Teague, 489 U.S. at 339.

¹¹⁰. Justice Brennan compared the plurality's version of Teague's contention, "that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population," with what was alleged in petitioner's brief: "the Sixth Amendment guarantees the accused a jury selected in accordance with the procedures that allow a fair possibility for the jury to reflect a cross section of the community." Id. at 341. He made this comparison for the sake of illustrating the dangers of a threshold inquiry which dictates whether the Court can proceed on the merits. If the claim is initially characterized improperly, the claim may be wrongly denied.

¹¹¹. Teague v. Lane, 489 U.S. 288, 321 n.3 (1989) (Stevens, J., concurring). Justice Stevens' concurrence in Teague raised the issue of whether Teague's principles should be applied in the context of capital sentencing. Id.

¹¹². Penry v. Lynaugh, 492 U.S. 302, --- (1989) (the question was summarily answered in the affirmative: the concerns of finality which prompted Teague were equally present in capital cases).

In Penry, two questions were presented to the Supreme Court. The first involved the jury instructions provided during the sentencing phase of Penry's trial. Penry asserted his sentence violated the eighth amendment because the jury was not instructed effectively to enable full consideration of the weight of Penry's mitigating circumstances submitted as evidence. Id. at --. The Supreme Court determined that the rule sought by Penry on this issue was not a new rule for the purposes of Teague, and thus, the Court was able to adjudicate the issue on
have addressed *Teague* in another procedural context: unfair prosecutorial remarks.\(^{113}\)

IV. FURTHER "REFINING" OF THE "NEW RULE": WHERE REASONABLE MINDS CAN DIFFER

After *Teague* was announced and subsequently clarified in *Penry v. Lynaugh*, discord developed among lower courts concerning the proper application of *Teague*.\(^{114}\) Particularly trou-

the merits. The second issue in *Penry* posed the question of whether it was cruel and unusual punishment, explicitly prohibited by the eighth amendment, to execute a person of Penry's mental capacity (at trial Penry was proven moderately retarded with a mental age of approximately six-and-a-half years old). *Id.* at ___. Petitioner argued that the eighth amendment prohibited the execution of a person inflicted with his level of mental retardation. The Court found this to be a new rule under *Teague*'s definition because it was not "dictated" by existing precedent and because it would "brea[k] new ground [and] impos[e] a new obligation on the States or the Federal Government." *Teague*, 489 U.S. at 301.

The Court held that the new rule in question fell within the first exception to the general rule. Justice O'Connor found a new rule "placing a certain class of individuals beyond the State's power to punish by death" sufficiently analogous to "[certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe]." *Penry*, 492 U.S. at ___ (quoting *Teague*, 489 U.S. at 307). Thus, Penry was entitled to a Supreme Court ruling on the issue. *Id.* at ___.

113. See infra note 114.

114. The Fifth Circuit in *Sawyer v. Butler*, 881 F.2d 1273 (5th Cir. 1989), and the Tenth Circuit in *Hopkinson v. Shillinger*, 888 F.2d 1286 (10th Cir. 1989), analyzed and applied *Teague* in two very similar situations. Each case involved remarks made by the prosecutors. Both petitioners, before the court on writ of habeas corpus, alleged that remarks made during his sentencing proceeding amounted to a violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985). (*Caldwell* held that "[i]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell*, 472 U.S. at 329.) The petitioners' convictions became final before *Caldwell* was announced, and, thus, the question of whether the petitioners could benefit from *Caldwell*'s holding involved retroactive application and the holding of *Teague v. Lane*. (Sawyer was denied certiorari in 1984. See *Sawyer v. Louisiana*, 466 U.S. 931 (1984). Hopkinson was denied certiorari in 1983. See *Hopkinson v. State*, 464 U.S. 908 (1983)).

The two circuit courts varied in their treatment of *Teague* as they applied it to the question before them. The Fifth Circuit found fault with the threshold inquiry required by the *Teague* plurality. Both courts recognized the ambiguity of a "new rule," but differed in their methods for determining whether *Caldwell* was a new rule. Finally, the two courts arrived at opposite conclusions as to whether *Caldwell* qualified as an exception to *Teague*. 
blesome was the definition of a new rule.\textsuperscript{115} In \textit{Butler v.}

The facts of \textit{Sawyer} are as follows: on September 19, 1980, Robert Sawyer was sentenced to death for the brutal killing of Frances Arwood. \textit{Sawyer}, 881 F.2d at 1275. He petitioned the district court for a writ of habeas corpus and was denied. \textit{Id.} He came before the Fifth Circuit on appeal. The argument raised by Sawyer, that is relevant to this discussion, is that the prosecutor misled the jury in his closing arguments during the sentencing phase of the trial and, in doing so, the prosecutor diminished the jury's role in sentencing petitioner to death.

The factual background of \textit{Hopkinson v. Shillinger} is as follows: Mark A. Hopkinson was convicted on four counts of first degree murder and two counts of conspiracy to commit murder. \textit{Hopkinson}, 888 F.2d at 1287. He was sentenced to death. \textit{Id.} The death sentence was vacated by the Wyoming Supreme Court. In a second sentencing proceeding he was again sentenced to death, and the sentence was affirmed by the supreme court. \textit{Id.} Hopkinson sought federal habeas relief after challenges to the state court proved unsuccessful. His petition for writ of habeas corpus was denied by the district court. The Tenth Circuit affirmed on practically every issue, however it agreed to consider the issues concerning remarks made by the prosecutor in the second sentencing proceeding. \textit{Id.}

In \textit{Sawyer}, the Fifth Circuit did not agree with the Supreme Court in that retroactivity should be a threshold inquiry. Of course, the Fifth Circuit did not explicitly disregard the plurality's requirement that retroactivity be a threshold matter. The court simply stated that it "remains unclear... whether \textit{Teague} necessarily operates as a threshold barrier preempting full analysis of the constitutional claim asserted." \textit{Sawyer}, 881 F.2d at 1280. The court's concern was based on the question of whether a petitioner correctly formulated the rule of which he sought the benefit.

In applying the \textit{Teague} analysis, the court believed that it was possible to employ a rule as alleged by petitioner without first assessing its correctness. However, the court felt that following this approach would "do nothing to clarify the substantive law, and defeat rather than serve judicial economy." \textit{Sawyer}, 881 F.2d at 1281. The Fifth Circuit noted that "a court may have to reach the constitutional questions even to define what the petitioner complains of." \textit{Id.} To strengthen its position on the subject, the Fifth Circuit cited \textit{Penry}, 492 U.S. at \textit{____}, where Justice O'Connor determined the precise substantive question in order to determine whether the decision was dictated by precedent. \textit{Sawyer}, 881 F.2d at 1281. Accordingly, the Fifth Circuit chose to evaluate the correctness of the petitioner's statement of \textit{Caldwell} before addressing retroactivity. \textit{Sawyer}, 881 F.2d at 1281.

Both \textit{Sawyer} and \textit{Hopkinson} referred to the language of \textit{Teague} to clarify the meaning of a new rule. "[A] 'case 'announces a new rule when it breaks new ground or imposes a new obligation on the State or Federal Government, [or,] to put it differently... if the result was not dictated by precedent.'" \textit{Sawyer}, 881 F.2d at 1287 (quoting \textit{Teague v. Lane}, 489 U.S. 288, 301 (1989)). Virtually, the same language is quoted in \textit{Hopkinson}, 888 F.2d at 1288.

The courts also looked elsewhere, beyond \textit{Teague}'s language, to determine whether \textit{Caldwell} should be characterized as a new rule. The Tenth Circuit had recently identified \textit{Caldwell} as a new rule in a procedural default case. \textit{Dutton v. Brown}, 812 F.2d 503 (10th Cir. 1987). The Tenth Circuit had concluded in \textit{Dutton v. Brown} that there was cause for a procedural default in 1979, because the defaulting party could not have known the holding in \textit{Caldwell} until it was announced. "The law petitioner relies on did not become established until the \textit{Caldwell} decision in 1985." \textit{Hopkinson}, 888 F.2d at 1289 (quoting \textit{Dutton}, 812 F.2d.
at 596). The Hopkinson court found this holding sufficiently analogous to the context of retroactivity and, therefore, concluded that Caldwell was a new rule.

The Fifth Circuit used a different route to arrive at the same conclusion, i.e., that Caldwell constituted a new rule. The Fifth Circuit first distinguished a post-Caldwell decision (Busby v. Butler, 538 So. 2d 164 (La. 1988)) which held that Caldwell had not altered previous case law. It dismissed the statement made in Busby v. Butler that Caldwell “did not change . . . previous case law” as being coincidental. Sawyer, 881 F.2d at 1291 (quoting Busby v. Butler, 538 So. 2d 164, 175 (La. 1988)). The Sawyer court further distinguished a decision which held that a Caldwell argument was not "new" for purposes of writ abuse. Moore v. Blackburn, 774 F.2d 97 (5th Cir. 1985), cert. denied, 476 U.S. 1176 (1986). The Fifth Circuit believed that the meaning of "newness" differs in writ abuse from that of retroactivity. Sawyer, 881 F.2d at 1291. (If an abuse of a writ of habeas corpus can be established, the petition may be dismissed. Price v. Johnston, 334 U.S. 266 (1948). It is the burden of the government to establish an abuse. Id. at 291-92. If the allegation is valid, then the petitioner bears the burden of establishing that he has not abused the writ. Id.)

The Fifth Circuit held that Caldwell was a new rule because it broke new ground. The "new ground" was the "heightened intolerance" of jury deception that Caldwell provided. Sawyer, 881 F.2d at 1291.

Once established by both circuit courts that a Caldwell claim was a new rule, the courts needed to ascertain if the claim fell within one of the two exceptions provided by Teague. Both courts were in agreement that the petitioners' claims did not qualify under the first exception, because constitutionally protected conduct was not involved. "Sawyer . . . cannot contend that the sentence imposed upon him was unlawful because the conduct for which he was charged was constitutionally privileged, or that he is among a class of persons protected against execution." Sawyer, 881 F.2d at 1291. "The first exception in Teague relates to rules forbidding criminal punishment of certain primary conduct and rules prohibiting a certain category of punishment for a class of defendants because of their status or offense . . . . That exception does not apply." Hopkinson, 888 F.2d at 1291. However, as to the second exception, the opinions of the two courts differed. The Tenth Circuit chose to depart from the direction it felt Teague profferred and characterize petitioner's Caldwell claim as the type of bedrock procedure inherent in fundamental fairness. Id. at 1292. The Tenth Circuit stated, "while we acknowledge Teague's severe constraints on the scope of collateral review, we conclude that Caldwell claims fall within the second exception in Teague, regardless of how the exception may finally be defined." Id. The claim, therefore, qualified as an exception and was entitled to review based upon the merits.

In contrast, the Fifth Circuit concluded that petitioner's Caldwell claim did not fall within the second exception. Sawyer, 881 F.2d at 1293. The court saw Caldwell's "heightened intolerance" of jury deception as being beyond bedrock procedure. The Sawyer court noted that those who are forced to seek the benefit of Caldwell, rather than relying on the state of the law before Caldwell, "are those who must concede that the prosecutorial argument in their case was not so harmful as to render their sentencing trial "fundamentally unfair."" Id. In other words, if petitioner could establish that his sentencing trial was fundamentally unfair he would not need to seek retroactive application of Caldwell, but could use the law prior to Caldwell. See generally Donnelly v. DeChristoforo, 416 U.S. 637 (1974) (holding that a prejudicial prosecutorial argument will constitute a constitutional violation only if the argument is so unfair as to amount to a violation of due process). The Fifth Circuit held that since petitioner's Caldwell claim was a
McKellar, the issue came before the Supreme Court.

Horace Butler was sentenced to death after a jury convicted him of murder. In his petition for federal habeas corpus, Butler argued that it was impermissible for the police to question the petitioner about the murder knowing that he had retained an attorney for unrelated charges. His petition was dismissed by the district court, and Butler appealed. Butler contended that Edwards v. Arizona, as interpreted by Espinoza v. Fairman, mandated preclusion of his statements. The Fourth Circuit did not agree and affirmed the dismissal of the habeas petition. The court believed that an interrogation based upon a completely different charge did not constitute a violation of any constitutional right guaranteed by the fifth amendment.

Butler filed petitions for rehearing; on the same day that they were denied, the Supreme Court announced Arizona v. Roberson. Roberson held "that the Fifth Amendment bars police-initiated interrogation following a suspect's request for counsel in the context of a separate investigation." Butler requested reconsideration in light of Roberson. A panel for the

new rule not qualifying under either exception, the court, under Teague, was obligated to deny the writ. Sawyer. 881 F.2d at 1295.

115. Supra note 110.
117. Id. at 1214.
118. Id. Butler had invoked his right to an attorney pursuant to the fifth amendment after being arrested for an unrelated assault and battery. Id. After his bond hearing, Butler was returned to jail. Later, he was taken from jail and informed that he was a murder suspect. Id. Butler submitted to interrogation about the murder after receiving Miranda warnings and signing two waivers. Id. At trial, the statements Butler made during this interrogation were submitted into evidence, despite Butler's attempted motion to suppress. Id.
120. 451 U.S. 477 (1981). Edwards v. Arizona held "that an accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." Id. at 484-85.
121. 813 F.2d 117 (7th Cir. 1987). The court held that when Espinoza invoked his right to counsel under the fifth amendment, the right extended to "any interrogation, concerning any crime, that the police or prosecutors conducted while he remained in continuous physical custody." Id. at 126.
122. Butler, 846 F.2d at 258.
Fourth Circuit found that the Roberson holding clarified the "prophylactic protections" provided by the fifth amendment and also revised the "guidelines" for the police interrogation. However, the panel did not see the decision as necessitating a reversal of Butler's conviction, given that the procedures used in questioning Butler were in line with the proper procedure of the day.

Butler appealed to the Supreme Court arguing that Roberson was not a new rule because Roberson had been controlled by Edwards v. Arizona. Butler's argument was supported by evidence that the Roberson Court believed that Roberson's situation was "directly controlled by" and within the "logical compass" of Edwards.

In writing the opinion, Chief Justice Rehnquist clarified the definition of a new rule. He began by stating the general proscription as set forth in both Penry v. Lynaugh and Teague v. Lane as applied to capital and noncapital cases, new rules should not be applied or announced in cases on habeas review unless they fall under one of two exceptions. Again citing Penry and Teague, Rehnquist stated that a new rule is announced "when it breaks new ground or imposes a new obligation on the states or the Federal Government." Restated, a new rule is announced "if the result was not dictated by precedent existing at the time the defendant's conviction became final." He suggested that where a case has expressly overruled prior case law, the determination is a simple one. However, in the vast majority of cases the determination will not be as simple.

125. 451 U.S. 477 (1981), which "requires the police, during continuous custody, to refrain from all further questioning once an accused invokes his right to counsel on any offense." It should be noted that Butler's conviction became final in 1982 (when the Supreme Court denied certiorari). Id., cert. denied, 459 U.S. 992 (1982). Therefore, Butler was entitled to the benefit of Edwards which was decided in 1981.

126. Butler, 110 S. Ct. at 1217. Evidence consisted of briefs and oral arguments with which the Court apparently agreed. Id.


129. Butler, 110 S. Ct. at 1216.

130. Id. (citing Penry v. Lynaugh, 492 U.S. at ___).

131. Id. (citing Teague, 489 U.S. at 301).

132. Id. It must be noted that this language signals an expansion of what constitutes a new rule. In Teague v. Lane, Justice O'Connor defined a new rule as
Immediately following his statement of the definition of a new rule, Rehnquist shifted to a policy discussion; he asserted that "the relevant frame of reference" was the underlying purpose of habeas corpus and not the particular purpose of the rule defendant seeks to apply. "Given the 'broad scope of constitutional issues cognizable on habeas' . . . it is 'sounder . . . to apply the law prevailing at the time a conviction became final than . . . on the basis of intervening changes in constitutional interpretation.'" Justice Rehnquist then commented on the intrusive nature of applying new rules retroactively, referring to the frustrations of state courts when reversed after correctly applying then-existing constitutional law. Rehnquist concluded that "[t]he '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."
Addressing Butler's specific arguments, Justice Rehnquist concluded that a court's statement that a case is "controlled" by or within the "logical compass" of an earlier decision "is not conclusive for purposes of deciding whether the current decision is a 'new rule' under Teague." Justice Rehnquist reasoned that because a court could conclude that the Edwards rule should not extend to the particular circumstances of Roberson and that in so finding the court would not be applying Edwards "illogically" or "grudgingly," Roberson announced a new rule. His conclusion was further supported by the fact that Roberson "was susceptible to debate among reasonable minds." Rehnquist quickly dispensed with the two exceptions to the new rule doctrine, holding that neither one was applicable.

Justice Brennan dissented. He directed his most disparaging remarks at the majority's "thinly veiled crusade to eviscerate Congress' habeas corpus regime." Additionally, he criticized individual aspects of the majority opinion. Brennan pointed out that in Roberson the prosecution sought an exception to the general rule in Edwards. The exception would have involved interrogation on a subject unrelated to previously interrogated subject-matter. The Court rejected the proposed exception. According to Brennan, Roberson "simply applied the legal principle established in Miranda and reconfirmed in Edwards to a set of facts that was not dissimilar in any salient way."

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(4) "the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion," Id. at 922.

137. Id. at 1217.
138. Id. at 1218.
139. Id. at 1218-27.
140. Butler, 110 S. Ct. at 1219. "Today, under the guise of fine-tuning the definition of a 'new rule,' the Court strips state prisoners of virtually any meaningful federal review of the constitutionality of their incarceration."
141. Id. at 1220 (referring to Arizona v. Roberson, 486 U.S. 675 (1988)).
142. Id. Brennan's statement alludes to the somewhat complicated issue of whether the issue of retroactivity has even arisen. "When a decision of this Court merely has applied settle precedents to new and different factual situations, no real question [of retroactivity] has arisen . . . . In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way." Id. at 1223 (quoting United States v. Johnson, 457 U.S. 537, 549 (1982)). What Justice
Justice Brennan further asserted that even Justice Harlan would not conclude that Roberson constituted a new rule "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."\(^\text{143}\) Brennan concluded that the Court currently "embraces the opposite presumption; [a rule is 'new' when the Court] cannot say with assurance that Court could not have ruled in favor of the State at that time."\(^\text{144}\)

Justice Brennan refered to the established principle that Congress defines the scope of federal habeas review.\(^\text{145}\) Doubting that state courts could be fully responsive and sympathetic to federal constitutional claims, Congress established federal habeas corpus review.\(^\text{146}\) The threat of habeas corpus, in the words of Justice Harlan, encourages courts to "toe the constitutional mark."\(^\text{147}\) Justice Brennan contended that a system which establishes extreme deference to state court rulings severely undermines the intent of Congress.\(^\text{148}\)

V. ANALYSIS

Much of this comment has focused on the historical background of Teague. As mentioned above, Justice Harlan's retroactivity scheme, as enunciated in Mackey and Desist, constitutes the entire theoretical foundation of the Teague decision. His

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Brennan may be suggesting that an overly broad characterization of what is a "new rule," artificially implicates the retroactivity issue altogether and, thus, extends Teague's application even further.


\(^\text{144. Id. at 1223-24. In regard to Justice Harlan's role as "chief proponent" of the majority's approach, Justice Brennan commented that the Court has failed to adhere to Harlan's views.}\)

\(^\text{145. Butler, 110 S. Ct. at 1226. "It is Congress and not this Court who is 'responsible for defining the scope of the writ.'" Id. "Congress could have left the enforcement of federal constitutional rights . . . exclusively to the State courts." Id. at 1226 n.13 (quoting Brown v. Allen, 344 U.S. 443, 499 (1953)). "[But congress] has seen fit to give . . . to the lower federal courts power to inquire into federal claims, by way of habeas corpus . . . ." Id. (quoting Brown v. Allen, 344 U.S. 443, 508-10 (1953)).}\)

\(^\text{146. Id. at 1224.}\)

\(^\text{147. Mackey v. United States, 401 U.S. 667, 687 (1971).}\)

\(^\text{148. Butler, 110 S. Ct. at 1224. "The congressional requirement is [that the] State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right." Id. (quoting Brown, 344 U.S. at 508).}\)
analysis and, to some extent, his reputation are used to justify the Teague decision. Thus, in order to determine if the present Court has effectively implemented Harlan's views on retroactivity, the Teague holding must be compared to Harlan's rule. Such a comparison is necessitated by the fact that the Teague Court adopted a new approach to retroactivity with little original analysis.

Justice Harlan's opinions, in many ways, represented the voice of caution during the reign of the Warren Court. He repeatedly protested the expansion of the scope of habeas corpus review. He disagreed with the majority opinion in Fay v. Noia. He saw the breadth of Fay v. Noia as a danger, and it was the resulting expanded scope of habeas corpus which prompted his retroactivity theory. However, little of Fay v. Noia remains today. The jurisdictional holding of Fay v. Noia still stands, but it was not this portion of the decision which Harlan disputed. Justice Harlan particularly objected to the "deliberate by-pass" standard which allowed federal courts great freedom in issuing habeas petitions. The "deliberate by-pass" standard was rejected in 1977. It follows that the danger present during the period of judicial history when Harlan developed his approach no longer exists. Today, therefore, that approach is inappropriate.

Harlan believed his treatment of retroactivity was the result of an honest and realistic balance of the competing interests involved: the interest in assuring a forum where a petitioner could test the constitutional validity of his imprisonment and where procedural abuses could be corrected was balanced against the need for finality in the criminal trial process. Necessary to this delicate balance were two exceptions, carefully designed to provide for the countervailing interests. Yet, the plurality in Teague severely narrowed the second exception, claiming adherence to it as presented by Justice

150. See supra note 48.
Harlan would be "unnecessarily anachronistic."\textsuperscript{156} Harlan's second exception embraced those procedures "implicit in the concept of ordered liberty."\textsuperscript{157} It is true that the term "ordered liberty" is taken from \textit{Palko v. Connecticut}\textsuperscript{158} and that \textit{Palko} was overruled. However, \textit{Palko} had been brought into question long before Harlan began writing his retroactivity opinions.\textsuperscript{159} The significance of the language was not that it was borrowed from a case that is no longer good law. Rather, Harlan used the \textit{Palko} language in order to express his belief that an exception should lie for those procedures society recognizes as fundamental. Harlan believed that society's perceptions are subject to change and the exception should remain sensitive to that change. In contrast, Justice O'Connor wrote that the second exception stood for "those new procedures without which the likelihood of an accurate conviction is seriously diminished"\textsuperscript{160} and added, it is "unlikely that many such components of basic due process have yet to emerge."\textsuperscript{161} Thus, the second exception proscribed by \textit{Teague} does not allow for changing societal views on what constitutes a fundamentally fair criminal trial.

\textbf{A. The Teague Threshold Inquiry Requirement}

The \textit{Teague} plurality held that the issue of retroactivity is to be determined as a threshold matter. A problem arises when the rule which the habeas petitioner proposes is unclear or poorly defined. If a habeas petitioner seeks the benefit of a decision after his final conviction and frames his claim exactly as the decision was announced, then the threshold inquiry is not difficult. More likely, however, is the situation where a petitioner seeks a subtle variation of what he perceives as the current law. Thus, a threshold application of \textit{Teague} may be impracticable.

Furthermore, without any discussion as to what a petition-

\begin{itemize}
  \item \textsuperscript{156} Id. at 312.
  \item \textsuperscript{157} \textit{Mackey}, 401 U.S. at 693 (quoting \textit{Palko v. Connecticut}, 302 U.S. 319, 325 (1937)).
  \item \textsuperscript{158} 302 U.S. 319 (1937).
  \item \textsuperscript{159} \textit{See Malloy v. Hogan}, 378 U.S. 1 (1964). \textit{See supra} note 62.
  \item \textsuperscript{160} \textit{Teague v. Lane}, 489 U.S. 288, 313 (1989).
  \item \textsuperscript{161} Id.
er is actually claiming, the court may mislabel his claim.\textsuperscript{162} This danger materialized in Sawyer v. Butler\textsuperscript{163} and prompted the Fifth Circuit to sidestep the threshold barrier long enough to discuss the correctness of the petitioner’s interpretation of the rule of which he sought the benefit.\textsuperscript{164}

B. The Definition of a New Rule

Justice O’Connor declined to specify what constituted a “new rule” for purposes of retroactivity. As a result much confusion surrounded the term. It should be noted that both the Tenth and Fifth Circuits expressed confusion as to the definition of a new rule. Seemingly armed only with the belief that the Supreme Court meant the definition to be a broad one, the circuit courts concluded that the petitioners’ Caldwell claims were in fact “new.” However, the courts’ reasoning varied widely and sometimes appeared strained.\textsuperscript{165}

Butler v. McKellar provided subsequent clarification.\textsuperscript{166} Butler held that a decision will be considered a new rule if the correctness of the rule was “susceptible to debate among reasonable minds” at the time the habeas petitioner’s conviction became final.\textsuperscript{167} A new rule that is so defined serves two purposes: first, by declaring a rule “new” as a threshold matter, the Court precludes any further review of a petitioner’s claim; and second, by broadly defining what constitutes a new rule, the Court triggers the retroactivity doctrine where it might not be otherwise implicated. Thus, many might believe that the application of a particular, well-settled rule to a slightly varied fact pattern does not, in and of itself, create a new rule. However, if that conclusion is “susceptible to debate among reasonable minds,” the rule will be characterized as “new” and a petitioner seeking to benefit from such rule would be likely precluded from federal habeas review. Conceivably, the mere existence of majority and dissenting opinions would constitute debate among reasonable minds and, therefore, any non-unanimous decision would be “new.”

\begin{itemize}
\item \textsuperscript{162} See supra note 90 and accompanying text.
\item \textsuperscript{163} 881 F.2d 1273 (5th Cir. 1989).
\item \textsuperscript{164} See supra note 114.
\item \textsuperscript{165} See supra note 114.
\item \textsuperscript{166} 110 S. Ct. 1212 (1990).
\item \textsuperscript{167} Id. at 1217.
\end{itemize}
Under the *Teague* framework, a petitioner may safely cite only those cases decided before his conviction became final. If he cites any case decided after his final conviction, his claim may be summarily dismissed. Assuming these propositions to be correct, the Court has effectuated a general ban on retroactive treatment of case law under habeas review.

C. Limiting the Writ of Habeas Corpus

Only Justice Brennan in his dissent alluded to the effect of reducing the number of cases in which the Supreme Court might develop, redefine, and expand its rulings on the Constitution.\(^{168}\) He described that expansion as creating missed opportunities, referring to important cases which never would have been adjudicated under *Teague*.

In the face of a suggestion that the Court at least be allowed to write advisory opinions, the Court responded with the term "equitable treatment of similarly situated defendants."\(^{169}\) It is interesting that the Court raised this argument, because it is the same argument used by those in favor of complete retroactive treatment on habeas corpus review.\(^{170}\) The Court stated that the "principled way of dealing with the problem . . . [is to] refuse to announce a new rule in a given case unless the rule would be applied retroactively to the defendant in the case and all others similarly situated."\(^{171}\) The only reason a rule will not be applied retroactively is that it was so held earlier in the same decision. This line of reasoning amounts to nothing more than boot-strapping.

*Teague* contains the Court's primary rationale for refusing to issue advisory opinions: "the principle [is] that habeas corpus cannot be used as vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to all defendants on collateral review through one of the two exceptions . . . articulated."\(^{172}\) This statement suggests that habeas corpus is not to be used to develop any rules of criminal procedure. The design of the *Teague*


\(^{169}\) Teague, 489 U.S. at 316. See supra note 102.

\(^{170}\) See supra notes 53-55 and accompanying text.

\(^{171}\) Teague, 489 U.S. at 316.

\(^{172}\) Id.
holding ensures this meaning. First, a broad definition of “new rule” is employed so as to implicate the greatest possible number of decisions that might be raised on habeas review. Second, the exceptions which receive retroactive application, and therefore adjudication, are defined in the narrowest of terms. Any petition asserting a rule falling within the general prohibition against retroactive treatment is dismissed and no advisory opinion may be written. The end result, with minor exceptions, is no development of procedural law on habeas corpus review.

The question still remains as to why the majority insists on clothing its pronouncements as reiterations of Harlan’s position on retroactivity. One possible motive relates to the fact that Harlan’s approach was less severe in its overall effect on habeas review. Under Harlan’s approach, there was a great chance that a rule would not be characterized as “new,” or if found to be “new,” there was a fair chance that the rule would fall under one of the two exceptions. In either event, the Court would be free to review a petitioner’s claim. Thus, an alleged adherence to Harlan’s test provides the appearance of a Court willing to review writs of habeas corpus; a general rule that criminal procedure cases will no longer receive habeas review does not.

The Court may want to maintain an appearance of receptiveness to habeas review in order to forestall legislative action, because “[i]t is Congress and not this Court who is responsible for defining the scope of the writ.” An explicit narrowing of the scope of habeas review might provoke reformative legislative action. A veiled crusade, on the other hand, might not. Yet, as Justice Brennan said, the Court’s crusade is a “thinly veiled” one, and if it is agreed that the Court is actively pursuing policies better left to Congress, then Congress must now step in and re-establish what it believes to be the proper scope of the writ of habeas corpus.

175. Butler, 110 S. Ct. at 1226 (Brennan, J., dissenting). Supra note 145 and accompanying text.
VI. PROPOSALS

A. Judicial Treatment

The Supreme Court has intentionally limited the scope of habeas review. Thus, in proposing methods to counteract the effects of Teague v. Lane and its progeny, it must be assumed that the current Supreme Court will not likely reverse itself. Yet, there are steps that a willing Court could take to better apply a retroactivity doctrine under the current Teague framework.

The Supreme Court should abandon the threshold-inquiry requirement for the Teague retroactivity approach. Essential to an effective application of the principles of Teague is a clear and correct statement of the rule in question. Accepting a habeas petitioner's asserted claim with no inquiry as to its meaning or its merits will do little to further the interests of Teague. Therefore, courts applying Teague must be allowed an opportunity to arrive at a common understanding of the challenged rule. The small amount of law created by such clarifications is a small price to pay for the increased clarity which will result.

It is further proposed that the Supreme Court, in the interest of effectuating its own doctrine, provide a precise definition of what constitutes a "new" rule. In Harlan's original analysis, he contrasted the gradual development of law with those decisions which one could refer to a point when the Court clearly would have decided differently.176 Although somewhat ambiguous, this standard is less ambiguous than the reasonable-minds-can-differ standard currently dictated by Butler v. McKellar. Under the proposed standard, prior case law would be of greater help because the Court could point to specific instances when, in fact, it did decide differently.

An important inquiry which has not been made is whether a rule is "new" as to a particular defendant. A provision should be made for the petitioner who raises an issue prior to that issue's embodiment in a subsequently announced rule. In this instance, it can be said that the rule is not new to the petitioner because he has alleged the rule's existence and correctness all along. This proposed exception to Teague rewards the peti-

176. See supra note 58 and accompanying text.
tioner who believed he had a valid complaint before subsequent law proved him right. In addition, if a rule is termed "new" under another legal doctrine such as writ abuse or procedural default, the Court should indicate if these definitions carry over for the purpose of retroactivity analysis.

B. Legislative Treatment

Congress, if not satisfied with the expressions of the Supreme Court as dictated in Teague, should speak on the matter itself. As amended, the Habeas Court Act of 1867 should read as follows:

[T]he several courts of the United States . . . within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States regardless of the state of the law at any point up to and including the time of the person's final conviction. A person whose liberty may be restrained in violation of the Constitution and who comes before the several courts within their respective jurisdictions under a writ of habeas corpus is entitled to retroactive application of all laws unless specifically precluded by Act of Congress (amended portion italicized).

This amendment would unmistakably convey to the Supreme Court that the course taken in Teague is inconsistent with the proper scope of habeas corpus review. The amendment represents a return to full retroactive application of the law on habeas review. A similar amendment could be enacted to reinstate the Linkletter balancing test.

VII. CONCLUSION

Prior to Teague, the approach to retroactivity centered around an unstructured balancing of the interests unique to the particular rule in question. Justice Harlan offered repeated criticism of this methodology and carefully set forth an alternative. The Supreme Court embraced this alternative proposition

178. See supra note 114.
in its modification of retroactivity in *Teague v. Lane*. Two circuit courts have subsequently applied the Supreme Court decision with varied results.

*Teague v. Lane* represents a roundabout way of reducing the amount of habeas litigation. The decision was designed specifically to cease the creation and use of new constitutional rules of criminal procedure under habeas corpus jurisdiction. This comment has provided the historical backdrop to the decision, articulated the decision itself, and introduced examples of its application. This comment further pointed to discrepancies in Harlan’s original retroactivity doctrine and the one adopted by *Teague* and identified additional problem areas. The proposals provided by this comment focused on solving some of the difficulties of the *Teague* doctrine and provided a legislative means for rejecting the doctrine.

There will never be a “right” time to dismantle habeas corpus. However, in light of the many procedural reforms the Rehnquist court has made, it seems especially inappropriate to do so now. The dangers of the Supreme Court over-extending its scope of habeas review, which Harlan saw as imminent, have long since ceased to exist. What is left is simply an unwillingness to allow any meaningful adjudication of procedural violations on habeas review, and this, standing alone, is cause for concern.

By limiting its own ability to review habeas claims, the Supreme Court has reduced the number of petitions that it can adjudicate on the merits. Perhaps more importantly, the Court has greatly reduced its ability to develop rules of criminal procedure on habeas review. The typical rule, which the Court refuses to consider under *Teague v. Lane*, is the rule which has refined and modernized the criminal procedure process. The result is a stunted procedural system which does not respond to changing societal concepts of fairness. The Court has expressed the view that it no longer wishes to develop procedural law through habeas review. Moreover, the Court is beginning to see its role in upholding constitutional stan-

dards as no longer necessary. Thus, a habeas petitioner asserting a valid constitutional violation may knock, but he will receive no answer. Has the price of silence ever been so high?

Sharon K. Alexander