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Notes

THE RELUCTANCE TOWARDS RETROACTIVITY: THE RETROACTIVE APPLICATION OF LAWS IN DEATH PENALTY COLLATERAL REVIEW CASES

I. INTRODUCTION

Laws evolve with the views of society, or more cynically, with the vote of a new Supreme Court justice. Old laws are changed, followed, or overruled by every new judicial opinion and with each new bill that is signed into law. The retroactivity doctrine asks what to do when the law changes.¹ For example, suppose a mentally retarded individual is

¹ Retroactivity is a word frequently used by courts but rarely defined. "Retroactive" or "retrospective" relates to a statute or ruling that extends "in scope or effect to matters that have occurred in the past." BLACK'S LAW DICTIONARY 1318 (7th ed. 1999). According to some authorities, retrospective laws apply only to civil laws that impair rights or create new obligations, and ex post facto laws apply to criminal laws that make illegal something that was legal when the act occurred. See *Saint Vincent Hosp. & Health Center, Inc. v. Blue Cross & Blue Shield of Mont.*, 862 P.2d 6 (Mont. 1993) (recognizing the distinction between the two definitions). The difference between the two concepts is usually muddled. Compare *Murphy v. State*, 721 S.W.2d 436, 437 (Tex. App. 1986) (describing a "retrospective criminal law"), and *Glover v. State*, 474 So.2d 886, 889 (Fla. Dist. Ct. App. 1985) (same), with *In re Rogers' Estate*, 22 N.W.2d 297, 301 (Neb. 1946) (noting that the constitutional prohibition against passage of ex post facto laws applies only to criminal matters, and thus, laws that affect civil rights are not within the scope of constitutional prohibition). Modern courts have basically eliminated all distinctions between the words so that they are now often used interchangeably.

One contemporary observer noted a further distinction:

On analysis it soon becomes apparent . . . that [retroactivity] is used to cover at least two distinct concepts. The first, which may be called 'true retroactivity' consists in the application of a new rule of law to an act or transaction which was completed before the rule was promulgated. The second concept, which will be referred to as "quasi-retroactivity," occurs when a new rule of law is applied to an act or transaction in the process of completion . . . [T]he foundation of these concepts is the distinction between completed and pending transactions.

T.C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 129 (3d ed. 1994). The Latin phrase "ex post facto," which means "after the fact" or "from a thing done afterward," is occasionally used as a synonym for retroactivity as well. BLACK'S LAW DICTIONARY 601 (7th ed. 1999). Two separate Constitutional provisions relate to the prohibition of ex post facto laws: "No . . . ex post facto Law shall be passed," U.S. CONST. art. I § 9, cl. 1; and "No State shall . . . pass any . . . ex post facto Law," U.S. CONST. art. I, § 10, cl. 1. The classic definition of an ex post facto law can be found in Justice Chase's opinion of *Calder v. Bull*:

sentenced to death in 1997. Five years later the Supreme Court rules in *Atkins v. Virginia*,² that executing mentally retarded individuals is unconstitutional. Assuming the mentally retarded individual has not already been executed, the courts must now decide whether the change in law should be applied retroactively.³

This Note argues that when the penalty is death a different standard of retroactivity should apply. If one can accept the premise that the penalty of death is different from all other penological remedies, it follows that the way retroactivity is used in capital cases must also be different.⁴ However, this currently is not the case. Under current retroactivity jurisprudence, a new Supreme Court case is rarely applied retroactively on collateral review, and no distinction is made for individuals on death row. A few hypothetical scenarios will demonstrate the problem, and further explain the hairsplitting distinctions that are currently made.⁵

Suppose a criminal defendant is convicted at trial and during the defendant's direct appeal, a new Supreme Court opinion is issued that enhances the protection afforded to criminal defendants. The defendant now argues that the "change" in law should be available retroactively on direct appellate review. Under this scenario, the Supreme Court has consistently stated, since 1987, that the defendant will receive the benefit

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

Calder v. Bull, 3 U.S. 386, 390 (1798).

² 536 U.S. 304 (2002).

³ While the Supreme Court has not ruled on the issue, the change in law would be applied retroactively. See *In re Holladay*, 331 F.3d 1169, 1173 (11th Cir. 2003) (holding that there is no question that the new constitutional rule in *Atkins* is retroactively applicable to cases on collateral review and citing to many other courts in agreement); *infra* Part II.A.4.

⁴ As Justice Brennan eloquently pointed out, "the way in which we choose those who will die reveals the depth of moral commitment among the living." *McClesky v. Kemp*, 481 U.S. 279, 344 (1987) (Brennan, J., dissenting).

⁵ All hypothetical scenarios are purely imaginary and not based on any specific case or fact pattern. Furthermore, the male pronoun "he" is used throughout this Note to represent both genders and is not meant to have a discriminatory connotation. This Note also refers to "justice system" or "system of justice" to include the entire spectrum of political branches: executive, legislative, and judicial.

of the change in law retroactively.⁶ The Court has reasoned that since the conviction is not yet final, the defendant should receive the benefit of the change in law.⁷

Now suppose the defendant's conviction is final, the direct appellate process has been exhausted, and the defendant is incarcerated.⁸ Again, a new Supreme Court opinion changes the law to announce greater constitutional rights. The defendant attempts to attack his conviction through an initial collateral review of the case, such as a petition for writ of habeas corpus under 28 U.S.C. § 2254.⁹ Under current Supreme Court analysis, the use of retroactivity has been severely limited under these circumstances. While one may think the defendant should be afforded the benefits of the new law, there are many policy implications that are present on collateral attacks of a decision that are not present on the direct review of a decision.¹⁰ Thus, the Supreme Court has severely limited the use of retroactivity in an initial application for collateral review.¹¹

One final hypothetical is needed to understand the thesis of this Note. Suppose now a defendant has been convicted of a *capital* crime and has exhausted all direct appeals. The defendant has previously filed

⁶ See *infra* Part II.A.3. In *Griffith v. Kentucky*, the Court adopted the standard that cases on direct review will receive the benefit of a change in law to all cases federal or state that are not yet final. 479 U.S. 314, 328 (1987).

⁷ *Griffith*, 479 U.S. at 323-24.

⁸ The elimination of the direct appellate review means that attempts to have a decision reconsidered by bringing the case on appeal to a higher court have been relinquished, thus making the decision final. BLACK'S LAW DICTIONARY, *supra* note 1, at 1318; see *Griffith*, 479 U.S. at 328.

⁹ Collateral review in the criminal context refers to an attack on the correctness of a decision through either a petition for a federal writ of habeas corpus relief under 28 U.S.C. § 2255 if a federal conviction or 28 U.S.C. § 2254 if a state conviction, or possibly under some other form of a state post-conviction remedy. See Andrew Hammel, *Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas*, 39 AM. CRIM. L. REV. 1, 83-99 (2002) (setting forth proposals for habeas reform and providing a complete fifty state analysis of state laws governing the right to counsel in state post-conviction proceedings). All fifty states have some form of post-conviction remedy. *Id.* While they may be titled differently in different states, a form of post-conviction relief is generally first sought in state court, and after all state court remedies have been exhausted, a writ of habeas corpus is sought in federal court. *Id.* at 3-5. No matter what phraseology is used or what court the petitioner is in, the convicted inmate is attempting to be released from prison or given a lower sentence after all direct review appeals have been completed.

¹⁰ See *infra* Part III.A.

¹¹ See *infra* Part II.A.4.

for habeas relief to no avail.¹² Again, the Supreme Court changes preexisting law and now allows for greater protection for defendants facing execution. In a second application for habeas relief the defendant now argues that the change in law should be applied retroactively. Unfortunately for the defendant, it is very likely that the change in law will not be applied retroactively.¹³ The Supreme Court and Congress have placed many limitations on second or successive habeas petitions in order to expedite the execution process. In effect, the government can now deliberately execute the defendant knowing that the death sentence was arrived at in a manner that violated his constitutional rights.¹⁴ By a mere accident of timing, the defendant whose conviction is already final is denied the retroactive application of law, whereas the individual who was sentenced more recently and is still on direct review is given the retroactive application of law.

Surprisingly, the Supreme Court and Congress have never recognized a distinction in applying retroactivity to capital cases. However, the Supreme Court has consistently noted that “death is different.”¹⁵ The finality and the severity of the penalty of death forces the criminal justice system to give the death row inmate extra procedural safeguards to avoid wrongful executions.¹⁶ This Note proposes such an

¹² This is the distinction between the previous hypothetical and this hypothetical. Filing a second or successive habeas petition forces the applicant to overcome one of the many difficult procedural hurdles that were created by AEDPA in an attempt to limit frivolous habeas appeals. See *infra* Part II.A.3.

¹³ See *infra* Part II.A.4.

¹⁴ As Judge Reinhardt rhetorically stated:

Is it possible that prisoners will now be executed by the state solely because of the happenstance that the Supreme Court recognized the correctness of their constitutional arguments too late—on a wholly arbitrary date, rather than when it should have? Will we add to all of the other arbitrariness infecting our administration of the death penalty the pure fortuity of when the Supreme Court recognized its own critical error with respect to the meaning of the Constitution? Can we justify executing those whose legal efforts had reached a certain point in our imperfect legal process on the day the Supreme Court changed its mind, while invalidating the death sentences of those whose cases were waiting slightly further down the line? . . . A state’s decision to take the life of a human being, if it can be justified at all, must rest on a far less arbitrary foundation.

Summerlin v. Stewart, 341 F.3d 1082, 1124-25 (9th Cir. 2003) (Reinhardt, J., concurring).

¹⁵ See *infra* note 133 and accompanying text.

¹⁶ As Justice Harlan has warned, “it is far worse to convict an innocent man than to let a guilty man go free.” *In re Winship*, 397 U.S. 358, 372 (1970). However, some prosecutors would disagree with this proposition. As evidence of this, the following dialogue was taken from a discussion between an Assistant Attorney General of Missouri and Justice

exception to the otherwise restrictive use of retroactivity that would afford an inmate facing death the benefit of a change in the law.¹⁷ If death truly is different, retroactivity in death penalty cases should also be different.

This Note focuses on the problem of retroactivity in death penalty cases. Beginning with the common law approach, Part II.A describes the history of retroactivity from the universal application of retroactivity to all cases, to the complexities and limitations of retroactivity that have emerged over the last forty years.¹⁸ Part II.B briefly discusses the history of retroactivity in capital punishment cases.¹⁹ With a history of retroactivity and death penalty jurisprudence in mind, Part III will examine and evaluate the difficulties with retroactivity by looking at the many policy implications that a ruling of retroactivity has on the criminal justice system.²⁰ Part IV will propose ways to circumvent the general restrictive use of retroactivity in the death penalty context, including a death penalty exception to the habeas statutes.²¹ This Note will attempt to show that the retroactivity doctrine, in its current state, is inefficient and unjust for inmates facing the penalty of death.

II. BACKGROUND

Retroactivity, through its early beginnings to its modern complexity and use in the capital punishment realm, will be the focus of this section. Part A of this section will trace the history of the retroactivity doctrine in collateral review cases.²² It describes how, with the increased use of federal habeas review of state court decisions, the Supreme Court began to differentiate between direct and collateral review cases.²³ It then discusses how the *Teague* line of cases and the Antiterrorism and Effective Death Penalty Act ("AEDPA") have further

Stith of the Missouri Supreme Court during oral argument of a death penalty retroactivity case: "I, therefore, asked the Assistant Attorney General arguing the case, 'Are you suggesting, . . . even if we find that Mr. Amrine is actually innocent, he should be executed?' The Assistant Attorney General answered: 'That's correct, your honor.'" Hon. Laura Denvir Stith, *A Contrast of State and Federal Court Authority to Grant Federal Habeas Relief*, 38 VAL. U. L. REV. 421 (2004) (citations omitted).

¹⁷ See *infra* Part IV.

¹⁸ See *infra* Part II.A.

¹⁹ See *infra* Part II.B.

²⁰ See *infra* Part III.

²¹ See *infra* Part IV.

²² See *infra* Part II.A.

²³ See *infra* Part II.A.1.

450 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 39]

restricted the use of retroactivity.²⁴ Finally, Part A summarizes how retroactivity is applied today.²⁵ Part B then narrows the focus to the issue of retroactivity in the capital punishment realm.²⁶

A. *The Evolution of the Retroactivity Doctrine – From Simplicity to Intellectual Incoherency*

The Supreme Court and Congress have significantly narrowed the scope of the retroactivity doctrine in collateral review cases due in large part to the compelling policy concerns that the question of retroactivity creates.²⁷ These competing policies have muddled the consistent use of retroactivity that was present at common law when all changes were to be applied retroactively.²⁸ Instead of a coherent doctrine for courts to follow, the Supreme Court has created a retroactivity jurisprudence that “has become somewhat chaotic in recent years.”²⁹ All of these factors combined have resulted in a complex process for determining whether a law should be applied retroactively.³⁰ This Part discusses the evolution of retroactivity from its common law roots to its current complexity.

1. Common Law Simplicity

Under English common law, all new rules were applied retroactively to individuals on both direct and collateral review.³¹ According to Blackstone, the court’s duty was not to “pronounce a new law, but to maintain and expound the old one.”³² The rationale behind this view was that a judge did not “create” new law; he merely “discovered” a pre-

²⁴ See *infra* Parts II.A.2 & II.A.3.

²⁵ See *infra* Part II.A.4.

²⁶ See *infra* Part II.B.

²⁷ See *infra* Part III.

²⁸ See *infra* Part II.A.1.

²⁹ See *Harper v. Va. Dep’t of Taxation*, 509 U.S. 86, 113 (1993) (O’Connor, J., dissenting); see also Christopher S. Strauss, Note, *Collateral Damage: How the Supreme Court’s Retroactivity Doctrine Affects Federal Drug Prisoners’ Apprendi Claims on Collateral Review*, 81 N.C. L. REV. 1220, 1222 (2003) (stating that the courts current retroactivity doctrine is an “unsatisfactory method for adjudicating whether new constitutional sentencing rules will apply retroactively to federal cases on collateral review”).

³⁰ See *Collateral Damage*, *supra* note 29, at 1222. “Over the course of the past thirty-six years, the Court has grappled with the issue of retroactivity and has crafted a theoretically incoherent doctrine that has proven difficult to apply.” *Id.* (footnotes omitted).

³¹ See Marshall J. Hartman & Jeanette Nyden, *Habeas Corpus and the New Federalism After the Anti-terrorism and Effective Death Penalty Act of 1996*, 30 J. MARSHALL L. REV. 337, 347 (1997) (presenting a general overview of the history of habeas corpus and noting that at English common law all court decisions applied retroactively).

³² *Linkletter v. Walker*, 381 U.S. 618, 622-23 (1965) (citing 1 BLACKSTONE, COMMENTARIES 69 (15th ed. 1809)).

existing law.³³ From 1801 until 1965, the Supreme Court applied this general presumption of retroactivity.³⁴ As the Supreme Court had later noted, “[b]oth the common law and our own decisions have recognized a general rule of retrospective effect for the constitutional decisions of this Court.”³⁵ This approach offered the courts the benefits of a simple and consistent application of retroactivity. There was no question of which laws should be retroactive, or whom they would be retroactive to, because the law was always applied retroactively.

However, with the rise of the legal realist movement, judges became more comfortable with the fact that they were “creating law” and not

³³ This is commonly referred to as the “declaratory theory.” JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 93 (William S. Hein & Co., 2d ed. 1983). In discussing the numerous definitions of the Law, Gray recognized three general theories of definitions. The first theory of the nature of Law is that “Law is made up of the commands of the sovereign.” *Id.* at 85. The second general theory “is that the courts, in deciding cases, are, in truth, applying what has previously existed in the common consciousness of the people.” *Id.* at 89. The third general definition gives context to the meaning of the cited quote that judges are discoverers of the Law:

The rules followed by the courts in deciding questions are not the expression of the State’s commands, nor are they the expression of the common consciousness of the people, but, although what the judges rule is the Law, it is putting the cart before the horse to say that the Law is what the judges rule. The Law, indeed, is identical with the rule laid down by the judges, but those rules are laid down by the judges because they are the law, they are not the Law because they are laid down by the judges; . . . *the judges are the discoverers, not the creators, of the Law.*

Id. at 93 (emphasis added).

³⁴ See *United States v. Schooner Peggy*, 5 U.S. 103 (1801) (mem).

It is in the general truth that the province of an appellate court is only to inquire whether a judgment, when rendered, was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional . . . I know of no court which can contest its obligation.

Id. at 110.

However, *United States v. Schooner Peggy* is a civil case and the retroactivity doctrine has been applied differently in civil and criminal cases. This Note does not attempt to discuss those differences nor does it discuss retroactivity in civil cases. For further reading on retroactivity in the civil realm, see generally Debra Lyn Bassett, *In the Wake of Schooner Peggy: Deconstructing Legislative Retroactivity Analysis*, 69 U. CIN. L. REV. 453, 501 (2001); Bradley Scott Shannon, *The Retroactive and Prospective Application of Judicial Decisions*, 26 HARV. J.L. PUB. POL’Y 811, 815-16 (2003); Kermit Roosevelt, III, *A Little Theory Is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 CONN. L. REV. 1075 (1999).

³⁵ *Harper v. Va. Dep’t of Taxation*, 509 U.S. 86, 94 (1993) (citing *Robinson v. Neil*, 409 U.S. 505, 507 (1973)) (internal citations omitted).

merely discovering law.³⁶ As such, the difficult problem of how to retroactively apply a judicial change in law became an increasing problem in the courts.

The Supreme Court eventually deviated from the common law approach in 1965 with the decision of *Linkletter v. Walker*.³⁷ In deciding whether *Mapp v. Ohio*³⁸ should be given retroactive effect, the Supreme Court first noted that the Constitution neither required nor prohibited the retrospective application of a judicial decision.³⁹ Under this premise, the Court decided to deviate from the common law approach of universal retroactivity and instead promulgated a three-pronged

³⁶ As one scholar noted, “[i]n America today, ‘the law means whatever the judges say it means,’ because of their political power, because of *stare decisis*, because of judicial review, and above all because it can not mean anything else according to Legal Realism and its contemporary heirs.” Richard Stith, *Can Practice Do Without Theory? Differing Answers in Western Legal Education*, 4 IND. INT’L & COMP. L. REV. 1, 10 (1993). For a well-documented and informative discussion on the rise of Legal Realism in America see EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY* 74-94 (U. Press of Ken. 1973).

³⁷ 381 U.S. 618 (1965). In *Linkletter*, the defendant was convicted of burglary based on evidence that was obtained during a warrantless search. *Id.* at 621. After his arrest, the police took Linkletter to the police station and searched him. *Id.* In addition, police officers entered and searched his home and his place of business, and they seized property and papers without a search warrant. *Id.* The district court found probable cause incident to the arrest and held the seizures were valid because the officers had reasonable cause for the arrest. *Id.* A year after Linkletter had exhausted his state appeals, the Supreme Court decided *Mapp v. Ohio*, 367 U.S. 643 (1961), which held that the Due Process Clause of the Fourteenth Amendment required that State prosecutors could not use evidence that was seized in violation of the search and seizure provisions of the Fourth Amendment. *Id.* Subsequently, Linkletter filed a habeas petition arguing that the retroactive application of *Mapp* required a reversal of his conviction. *Id.* at 621.

³⁸ 367 U.S. 643 (1961) (extending the scope of the exclusionary rule to state courts through selective incorporation of the Fourteenth Amendment). For a discussion on the numerous controversies of the exclusionary rule and the incorporation of *Mapp* to state courts see JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL PROCEDURE* 319-50 (1997); Donald Dripps, *The Case for the Contingent Exclusionary Rule*, 38 AM. CRIM. L. REV. 1 (2001); William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 HARV. J. L. & PUB. POL’Y 443 (1997).

³⁹ *Linkletter*, 381 U.S. at 629. Although in certain situations, the Constitution does prohibit the retroactive application of a legislative decision. See, e.g., *Collins v. Youngblood*, 497 U.S. 37, 42 (1990) (holding that the ex post facto clause of the Constitution is violated in the following situations: if a law is applied retroactively that punishes an act previously committed, which was innocent when done; if a law makes more burdensome the punishment for crime after its commission; or if a law deprives an individual of any defense available under the law in effect when the crime was committed); see *supra* note 1 for a discussion on ex post facto laws.

balancing test that would weigh the merits and demerits of each case and ultimately decide whether a law should be given retroactive effect.⁴⁰

Under the balancing test, the reviewing court would first consider “the prior history of the rule in question.”⁴¹ Next, the reviewing court would look at the “purpose and effect” of the law.⁴² Finally, the reviewing court would determine “whether retroactive operation will further or retard its operation.”⁴³ The *Linkletter* test made no distinction between final convictions attacked collaterally and convictions challenged on direct appellate review.⁴⁴ The *Linkletter* test applied equally to both direct and collateral attacks.⁴⁵

The tripartite *Linkletter* test survived for twenty-four years,⁴⁶ but it was subjected to extensive criticism by courts,⁴⁷ most notably by Justice

⁴⁰ *Linkletter*, 381 U.S. at 629; see also *Tehan v. United States ex rel. Shott*, 382 U.S. 406 (1965) (reaffirming the *Linkletter* balancing test).

⁴¹ *Linkletter*, 381 U.S. at 629. The Court set forth the balancing test as follows:

Once the premise is accepted that we are neither required to apply, nor prohibited from applying, a decision retrospectively, we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.

Id.

⁴² *Id.*

⁴³ *Id.* Justice Clark went on to state the policy reasons behind *Linkletter*:

Finally, there are interests in the administration of justice and the integrity of the judicial process to consider. To make the rule of *Mapp* retrospective would tax the administration of justice to the utmost. Hearings would have to be held on the excludability of evidence long since destroyed, misplaced or deteriorated. If it is excluded, the witnesses available at the time of the original trial will not be available or if located their memory will be dimmed. To thus legitimate such an extraordinary procedural weapon that has no bearing on guilt would seriously disrupt the administration of justice.

Id. at 637-38.

⁴⁴ *Id.*; see *supra* notes 6-7 and accompanying text.

⁴⁵ See *Johnson v. New Jersey*, 384 U.S. 719, 730 (1966) (holding that *Miranda v. Arizona*, 384 U.S. 436 (1966), does not apply retroactively on collateral review, and not making a distinction between direct and collateral review cases).

⁴⁶ The Supreme Court eventually adopted the standard for retroactivity supported by Justice Harlan in the seminal case of *Teague v. Lane*, 489 U.S. 288 (1989). See *infra* Part II.A.2.

⁴⁷ See, e.g., *United States v. Johnson*, 457 U.S. 537, 544 (1982) (citing *Mackey v. United States*, 401 U.S. 667, 676 (1971), and noting that “the subsequent course of *Linkletter* became almost as difficult to follow as the tracks made by a beast of prey in search of its intended victim”); *Robinson v. Neil*, 409 U.S. 505, 509-11 (1973) (arguing that the *Linkletter* analysis was inappropriate, at least when the state had not justifiably relied on prior precedents).

Harlan in many of his dissenting opinions.⁴⁸ Justice Harlan, upset that the *Linkletter* test created inconsistent results that allowed the court to pick and choose which cases should receive retroactive effect, advocated the need for federal courts to have more control over habeas corpus review and stricter standards for applying new rules retroactively on collateral review.⁴⁹ He pointed out that the *Linkletter* test led to different treatment for similarly situated defendants.⁵⁰ He famously proclaimed that “[r]etroactivity must be rethought.”⁵¹

Within the following years Justice Harlan would have his wish.⁵² In “rethinking” retroactivity, Justice Harlan differentiated between direct review and collateral review cases.⁵³ He argued that new *procedural due process* rules ought not to apply retroactively on collateral review.⁵⁴

⁴⁸ See, e.g., *Mackey*, 401 U.S. at 675-702 (Harlan, J., concurring in part and dissenting in part). In *Mackey*, Justice Harlan argued that new constitutional rules should not apply retroactively to cases on collateral review. *Id.* at 691-92. However, Justice Harlan recognized two exceptions in which new rules should have retroactive effect. *Id.* at 692-93. The first exception for when new rules could apply retroactively on collateral review is when new substantive due process rules place “certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.” *Id.* at 692. The second exception for when new rules apply retroactively on collateral review is for claims of nonobservance of procedures that are “implicit in the concept of ordered liberty.” *Id.* at 693; *Desist v. United States*, 394 U.S. 244, 256-69 (1969) (Harlan, J., dissenting) (identifying two functions of habeas corpus: to protect innocent people from wrongful convictions and to deter state courts from ignoring or otherwise not vindicating federal constitutional rights). Harlan argued that courts should only release criminals from jail if the government has offended constitutional principles. *Desist*, 394 U.S. at 258. Harlan was concerned that our judicial system offer an egalitarian approach to retroactivity so that similarly situated defendants would be granted the same relief, unless there is a principled reason for acting differently. *Id.* He argued that picking and choosing what “new” rules of constitutional law should be applied retroactively would circumvent the function of the Court to do justice to each litigant on the merits of his own case. *Id.* at 259. Only if decisions are based in terms of this egalitarian premise will the decisions properly be considered the legitimate products of a court of law, rather than the commands of a super-legislature. *Id.* at 259.

⁴⁹ *Id.* at 260-65.

⁵⁰ *Id.* at 256-57. Justice Harlan stated that he had joined the Court’s inconsistent retroactivity opinions in the past only to limit the impact of what he thought were unsound constitutional decisions according to his understanding of the Constitution. *Id.* at 258.

⁵¹ *Id.* “I can no longer, however, remain content with the doctrinal confusion that has characterized our efforts to apply the basic *Linkletter* principle.” *Id.*

⁵² See *infra* notes 56-60 and accompanying text.

⁵³ *Desist*, 394 U.S. at 256-62.

⁵⁴ *Id.* Harlan noted that:

[A] habeas court encounters difficult and complex problems if it is required to chart out the proper implications of the governing precedents at the time of a petitioner’s conviction. One may well argue that it is of paramount importance to make the ‘choice of law’ problem

However, Justice Harlan did note a few exceptions to this rule if the procedures are “implicit in the concept of ordered liberty” or addressed rules that “alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction.”⁵⁵ Justice Harlan’s dissents in *Mackey* and *Desist* became the framework by which the Supreme Court would eventually apply the current version of the retroactivity doctrine.⁵⁶

In a series of cases starting with *United States v. Johnson*⁵⁷ and *Shea v. Louisiana*,⁵⁸ the Supreme Court slowly adopted parts of Justice Harlan’s views that new rules should apply retroactively on direct review.⁵⁹ The Court adopted Harlan’s view that “unless the rule is so clearly a break with the past that prior precedents mandate nonretroactivity, a new . . . rule is to be applied to cases pending on direct review.”⁶⁰

However, the Court quickly rejected the “clear break” exception for direct review cases two years later in *Griffith v. Kentucky*.⁶¹ The Court stated that “a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct

on habeas as simple as possible, applying each ‘new’ rule only to those cases pending at the time it is announced. While this would obviously be simpler, simplicity would be purchased at the cost of compromising the principle that a habeas petitioner is to have his case judged by the constitutional standards dominant at the time of his conviction.

Id. at 268.

⁵⁵ *Mackey v. United States*, 401 U.S. 667, 693-98 (1971) (Harlan, J., concurring in part and dissenting in part). A substantive change in the law was still to be given retroactive affect.

Id.

⁵⁶ For a more complete analysis of Justice Harlan’s role in shaping the current retroactivity doctrine, see A. Christopher Bryant, *Retroactive Application of “New Rules” and the Antiterrorism and Effective Death Penalty Act*, 70 GEO. WASH. L. REV. 1, 29-41 (2002).

⁵⁷ 457 U.S. 537, 538-39, 562 (1982) (holding that the decision in *Payton v. New York*, 445 U.S. 573 (1980), which held that the Fourth Amendment prohibits the police from making a warrantless and nonconsensual entry into a suspect’s home to make a routine felony arrest, should be applied to cases that were not yet final at the time the decision was rendered, i.e., direct review, except in situations that would be clearly controlled by existing retroactivity precedent).

⁵⁸ 470 U.S. 51, 52 (1985) (holding that requirements of *Edwards v. Arizona*, 451 U.S. 477 (1981), denying the use of a confession obtained by a police interrogation after a request for an attorney, should be retroactively applied to a case on direct review).

⁵⁹ See *Griffith v. Kentucky*, 479 U.S. 314 (1987).

⁶⁰ *Shea*, 470 U.S. at 57.

⁶¹ 479 U.S. at 328 (holding that *Batson v. Kentucky*, 476 U.S. 79 (1986), which held that a state criminal defendant could establish a prima facie case of racial discrimination based on the prosecution’s use of peremptory challenges to strike members of the defendant’s race from the jury venire and that the burden shifted to the prosecution to come forward with a neutral explanation for those challenges, applied retroactively on direct review).

review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past."⁶² The *Griffith* Court had set forth a clear-cut answer to deciding cases on direct review, but it left open the question of how to determine cases on collateral review.⁶³ This difficult question would be addressed two years later in the seminal case of *Teague v. Lane*.⁶⁴

2. The *Teague* Analysis

In *Teague*, an all-white jury convicted a black man after the prosecutor used all of his peremptory challenges to exclude blacks from the jury pool.⁶⁵ Previously in *Taylor v. Louisiana*,⁶⁶ the Supreme Court held that selection of a petit jury from a representative cross-section of the community was an essential component of the Sixth Amendment right to a jury trial.⁶⁷ Instead of reaching the merits of Mr. Teague's claim, the Court decided *sue sponte* to revamp the current retroactivity analysis.⁶⁸ In a plurality opinion, Justice O'Connor reasoned that it was unnecessary to decide whether *Taylor* should be adopted in this case

⁶² *Id.* at 328. Justice Blackmun stated that "the nature of judicial review requires that we adjudicate specific cases, and each case usually becomes the vehicle for announcement of a new rule. But after we have decided a new rule in the case selected, the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review." *Id.* at 322-24.

⁶³ *Id.*

⁶⁴ 489 U.S. 288 (1989).

⁶⁵ *Id.* at 292-93. Teague was convicted by an all-white Illinois jury on three counts of attempted murder, two counts of armed robbery, and one count of aggravated battery. *Id.* at 292. During the voir dire, the prosecutor used all of his peremptory challenges to exclude blacks. *Id.* Teague twice moved for a mistrial, arguing that he was entitled to a jury of his peers. *Id.* The trial court denied the motions, reasoning that the jury appeared to be fair. *Id.* at 293. On appeal, Teague argued that "the prosecutor's use of peremptory challenges denied him the right to be tried by a jury that was representative of the community." *Id.*

⁶⁶ 419 U.S. 522, 530 (1975) (holding that the right to a jury trial guaranteed by the Sixth Amendment requires that a fair cross section of the community is chosen, because the "purpose of a jury is to guard against the exercise of arbitrary power to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge").

⁶⁷ *Id.* at 525. The question presented to the *Teague* Court was whether the Sixth Amendment fair cross-section requirement should be extended to the petit jury so that petit juries must actually mirror the community and reflect the various distinctive groups in the population. *Teague*, 489 U.S. at 292. A "petit jury" refers to a jury summoned and empanelled in the trial of a specific case. BLACK'S LAW DICTIONARY, *supra* note 1, at 861.

⁶⁸ *Teague*, 489 U.S. at 300. Justice O'Connor noted that the "question of retroactivity with regard to petitioner's fair cross section claim has been raised only in an amicus brief." *Id.*

because even if it were adopted it would not be applied retroactively.⁶⁹ In so holding, the Court abandoned the *Linkletter* test and applied a new version of retroactivity analysis.⁷⁰

Justice O'Connor first changed the retroactivity doctrine by stating that, "[r]etroactivity is properly treated as a threshold question, for, once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated."⁷¹ This order of deciding issues was necessary to avoid advisory opinions and to avoid treating similarly situated habeas petitioners differently.⁷² In previous cases, the Court usually reached the question of retroactivity only when a new rule had been announced.⁷³ Now, according to *Teague*, the question of retroactivity would be addressed first.

Next, the Court attempted to articulate a standard for when a Supreme Court decision would be construed as a "new" rule.⁷⁴ The

⁶⁹ *Id.* at 299. Justices White and Blackmun filed opinions concurring in part and concurring in the judgment. Justice Stevens filed an opinion concurring in part and concurring in judgment, in which Justice Blackmun joined in part. Justice Brennan filed a dissenting opinion in which Justice Marshall joined.

⁷⁰ *Id.* at 301. Justice O'Connor noted that the "approach to retroactivity for cases on collateral review requires modification." *Id.*

⁷¹ *Id.* at 300.

⁷² *Id.* at 315-16. In *Bowen v. United States*, the Court noted a general reluctance to address the scope of a decision that established a new constitutional doctrine. 422 U.S. 916, 920 (1975). This practice is grounded on the constitutional role of the federal courts. *See* *United States v. Raines*, 362 U.S. 17, 21 (1960) (observing that in the exercise of federal jurisdiction the court should never attempt to anticipate a question of constitutional law in advance of the necessity of deciding it and never formulate a rule of constitutional law broader than is required by the precise facts). For a further discussion on advisory opinions in federal courts see Phillip M. Kannan, *Advisory Opinions by Federal Courts*, 32 U. RICH. L. REV. 769 (1998).

⁷³ *Teague*, 489 U.S. at 300. The Court usually confronted the question of retroactivity later when a different defendant sought the benefit of that new rule. *See, e.g.,* *Brown v. Louisiana*, 447 U.S. 323 (1980); *Robinson v. Neil*, 409 U.S. 505 (1973); *Stovall v. Denno*, 388 U.S. 293 (1967). In a few cases, however, the Court addressed the retroactivity question in the very case announcing the new rule. *See, e.g.,* *Morrissey v. Brewer*, 408 U.S. 471, 490 (1972); *Witherspoon v. Illinois*, 391 U.S. 510, 523 n.22 (1968). In *Teague*, the Court attempted to rectify the differing approaches and to clarify how the question of retroactivity should be resolved for cases on collateral review. *Teague*, 489 U.S. at 300.

⁷⁴ *Teague*, 489 U.S. at 300-11; Marshal J. Hartman, *To Be or Not To Be a "New Rule": The Non-Retroactivity of Newly Recognized Constitutional Rights After Conviction*, 29 CAL. W. L. REV. 53, 82 (1992) (criticizing the courts use of "new rule" language for retroactivity purposes and concluding that "capital cases . . . should not be sacrificed upon the altar of the god of finality for finality's sake. The evolving standards of decency that mark the progress of a maturing society demand no less") (citations omitted).

Court first recognized that defining a “new” rule is not an easy process, but then stated “in general . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government [or] . . . if the result was not dictated by precedent existing at the time the defendant’s conviction became final.”⁷⁵

Finally, and most importantly, the plurality held that new constitutional rules of criminal procedure will not be applicable to cases on collateral review.⁷⁶ In so holding, the plurality imported Justice Harlan’s analysis from his dissents in *Desist* and *Mackey* nearly verbatim.⁷⁷ The Court also recognized Justice Harlan’s two exceptions to the general bar against retroactivity in collateral review cases.⁷⁸ The first was that a new rule should be applied retroactively if it places “certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.”⁷⁹ The second exception stated that “a new rule should be applied retroactively if it requires the observance of those procedures that . . . are implicit in the concept of ordered liberty.”⁸⁰ The Court modified Harlan’s view of the second exception slightly by limiting it to “watershed rules of criminal procedure” that both “alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction” and that “without which the likelihood of an accurate conviction is seriously diminished.”⁸¹

⁷⁵ *Teague*, 489 U.S. at 301.

⁷⁶ *Id.* at 310. This is commonly referred to as the general bar against retroactivity in collateral review cases. See *Mackey v. United States*, 401 U.S. 667, 675 (1971); Ethan Isaac Jacobs, Note, *Is Ring Retroactive?*, 103 COLUM. L. REV. 1805, 1820-21 (2003).

⁷⁷ *Teague*, 489 U.S. at 310. “[W]e now adopt Justice Harlan’s view of retroactivity for cases on collateral review.” *Id.*; see *supra* Part II.A.1.

⁷⁸ *Teague*, 489 U.S. at 311; see also *supra* text accompanying note 55.

⁷⁹ *Teague*, 489 U.S. at 311 (citing *Mackey v. United States*, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in part and dissenting in part)).

⁸⁰ *Id.* (internal citations omitted).

⁸¹ *Id.* at 311, 313. The *Teague* Court quoted Harlan’s dissent in *Mackey*:

Typically, it should be the case that any conviction free from federal constitutional error at the time it became final, will be found, upon reflection, to have been fundamentally fair and conducted under those procedures essential to the substance of a full hearing. However, in some situations it might be that time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will properly alter our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction. For example, such, in my view, is the case with the right to counsel at trial now held a necessary condition precedent to any conviction for a serious crime.

Teague significantly changed the structure of how retroactivity would be applied in habeas proceedings and added amorphous language to an already slippery doctrine.⁸² Not surprisingly, the criminal defense bar and the academic community disfavored *Teague*.⁸³ The opinion also left several important retroactivity questions unanswered; specifically, how courts should approach substantive changes in the law, and how the “new” exceptions are to be applied.

3. Post-*Teague* Confusion

Several Supreme Court opinions have added judicial gloss to the *Teague* analysis, slightly altering *Teague*'s core holdings.⁸⁴ In *Bousley v. United States*,⁸⁵ the Court concluded that *Teague* only applies to

Id. at 311-12 (emphasis added in *Teague*) (quoting *Mackey v. United States*, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in part and dissenting in part)).

⁸² Charles J. Ogletree, Jr., *The Rehnquist Revolution in Criminal Procedure*, in THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT 66 (Herman Schwartz ed. 2002) (noting that the Rehnquist Court has read the retroactive application exception very narrowly and that many constitutional rights were first recognized on habeas review).

⁸³ For a pointed critique of *Teague* see Susan Bandes, *Taking Justice to Its Logical Extreme: A Comment on Teague v. Lane*, 66 S. CAL. L. REV. 2453 (1993). Professor Bandes correctly notes that “*Teague*'s self-described goals are to remedy the perceived unfairness inherent in the former retroactivity test, to do so without thwarting the goal of deterring unreasonable state court interpretations of federal constitutional law, and to preserve finality of judgments without unduly burdening fairness and accuracy to the litigant.” *Id.* at 2454. She concludes, along with the majority of academic writers, that “*Teague* fails on all three counts.” *Id.*

⁸⁴ See 2 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 25.2 at 1042 (4th ed. 2001).

Subject to evident and perplexing shifts in the Court's definition of new rules and in its application of the ‘new rule’ concept in particular cases, and subject to Congress' codification of a version of the *Teague* rule in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the Court's nonretroactivity doctrine as it applies to habeas corpus cases has remained at about this point since 1989.

Id. (footnotes omitted).

⁸⁵ 523 U.S. 614 (1998). In *Bousley*, the Petitioner plead guilty to drug possession with intent to distribute, 21 U.S.C. § 841(a)(1), and to “using” a firearm “during and in relation to a drug trafficking crime,” 18 U.S.C. § 924(c)(1), but reserved the right to challenge the quantity of drugs used in calculating his sentence. *Id.* at 616. He appealed his sentence and while his appeal was pending, the Supreme Court decided *Bailey v. United States*, 516 U.S. 137 (1995), which held that a conviction for using a firearm under § 924(c)(1) requires the Government to show “active employment of the firearm,” not its mere possession. *Id.* The Eighth Circuit rejected petitioner's argument that *Bailey* should be applied retroactively and that his conviction should therefore be vacated. *Id.* at 617. However, the Supreme Court held that *Teague*, by its terms, applies only to procedural rules and is thus “inapplicable to the situation in which this Court decides the meaning of a criminal statute enacted by Congress.” *Id.* at 620.

460 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 39]

procedural rules and not to substantive statutory changes in the law.⁸⁶ The importance of the distinction between substance and procedure in the habeas context is rooted in concern for the principal function of habeas corpus relief, which is to assure that an innocent person will not stay convicted or incarcerated under a law that is no longer criminal.⁸⁷ Thus, under this reasoning, determining whether a law is a substantive or procedural change is a critical point, if not outcome determinative.

Justice Harlan's two exceptions for a procedural change in constitutional law could be read as "opening the flood gates" to retroactivity. However, subsequent Supreme Court decisions decided a year after *Teague* quickly tightened the exceptions and significantly narrowed the use of retroactivity.⁸⁸

Congress has had arguably the most significant role in restricting the use of retroactivity, and habeas corpus in general, by passing the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").⁸⁹ The

⁸⁶ *Id.*

⁸⁷ *Id.* Thus, *Bousley* stands for the proposition that a change in substantive law must be given retroactive affect. *Id.*

⁸⁸ See *Sawyer v. Smith*, 497 U.S. 227, 229, 244-45 (1990) (holding that to fall under the second *Teague* exception (the watershed exception), the new rule must meet the following two requirements: infringement of the rule must seriously diminish the likelihood of obtaining an accurate conviction, and the rule must alter the bedrock procedural elements necessary for the fairness of a proceeding); *Saffle v. Parks*, 494 U.S. 484, 487-88 (1990) (holding that a habeas petition would be deemed to rely on a "new rule" under *Teague* unless a state court considering the petitioner's claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule was required by the Constitution); *Butler v. McKellar*, 494 U.S. 407, 415 (1990) (holding that a post-conviction case was not applicable retroactively where the legal proposition to be applied "was susceptible to debate among reasonable minds" at the time the state court made its determination).

⁸⁹ Pub. L. No. 104-32, 110 Stat. 1220 (1996) (codified at 28 U.S.C. § 2255 (2000) & 28 U.S.C. § 2254 (2000)). For a further analysis on the AEDPA see BRYANT, *supra* note 56; Randal S. Jeffrey, *Successive Habeas Corpus Petitions and Section 2255 Motions after the Antiterrorism and Effective Death Penalty Act of 1996*, 84 MARQ. L. REV. 43 (2000); James S. Liebman, *An "Effective Death Penalty"? AEDPA and Error Detection in Capital Cases*, 67 BROOK. L. REV. 411 (2001); Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1 (1997); Craig Iannini, Note, *Circuit Court Interpretations of What Constitutes a Successive Habeas Corpus Motion Under the Antiterrorism and Effective Death Penalty Act of 1996*, 7 SUFFOLK J. TRIAL & APP. ADVOC. 55 (2002); Andrea A. Kochan, Note, *The Antiterrorism and Effective Death Penalty Act of 1996: Habeas Corpus Reform?*, 52 WASH. U. J. URB. & CONTEMP. L. 399 (1997); Benjamin Robert Ogletree, Comment, *The Antiterrorism and Effective Death Penalty Act of 1996, Chapter 154: The Key to the Courthouse Door or Slaughterhouse Justice?*, 47 CATH. U. L. REV. 603 (1998); Benjamin R. Orye, III, Note, *The Failure of Words: Habeas Corpus*

AEDPA was passed in response to the Oklahoma City bombings⁹⁰ and in response to a growing concern of widespread abuses with the habeas corpus statutes.⁹¹ Prior to the adoption of the AEDPA, a habeas petitioner was without the restriction of a statute of limitations and without restrictions on the number of habeas petitions an inmate could bring. Single inmates were known to bring fifty or more separate habeas petitions, which ultimately put a significant strain on the judiciary.⁹² However, under the AEDPA there is a one-year statute of limitations for bringing claims on collateral review.⁹³ There are also significant

Reform, the Antiterrorism and Effective Death Penalty Act, and When a Judgment of Conviction Becomes Final for the Purposes of 28 U.S.C. § 2255(1), 44 WM. & MARY L. REV. 441 (2002).

⁹⁰ See 142 CONG. REC. 6, 7550 (1996) (statement of Sen. Hatch) (“Habeas corpus reform is the only substantive provision in this bill that will directly affect the Oklahoma bombing situation. If those being tried for the bombing are convicted, our habeas corpus reform language will prevent them from delaying the imposition of their penalties on frivolous grounds.”); see also Michael B. Slade, Note, *Democracy in the Details: A Plea for Substance over Form in Statutory Interpretation*, 37 HARV. J. ON LEGIS. 187, 229-31 (2000) (discussing the relationship between Oklahoma City bombing and the passage of the AEDPA).

⁹¹ See H.R. CONF. REP. NO. 104-518, at 111 (1996), reprinted in 1996 U.S.C.C.A.N. 924, 944. (“This title incorporates reforms to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases.”); see also Tushnet & Yackle, *supra* note 89, at 10-20 (discussing political pressures that led to AEDPA’s passage).

⁹² See *Dorsey v. Gill*, 148 F.2d 857, 862 (D.C. Cir. 1945). The court in *Dorsey*, in discussing the widespread abuse of the “Great Writ,” noted that petitions for the writ were used not only to protect unfortunate persons against miscarriages of justice, but also as a device for harassing the court. *Id.* According to the court, “[t]he most extreme example is that of a person who, between July 1939 and April 1944, presented in the District Court 50 petitions for writs of habeas corpus; another person has presented 27 petitions, a third 24, a fourth 22, a fifth 20.” *Id.*

⁹³ 28 U.S.C. § 2244 (d)(1) (2003) determines the finality of case and is related to §§ 2254 & 2255. The final determination of case determines when the following statute of limitations runs out.

- (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
 - (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
 - (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
 - (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

restrictions on duplicative claims in second or successive habeas petitions.⁹⁴ In essence, the AEDPA was an attempt to expedite the habeas process so that death row inmates would be executed sooner.⁹⁵

Under the AEDPA, any duplicate habeas corpus claim presented in a second or successive application is subject to dismissal.⁹⁶ Further, any claim that was *not* presented in a prior application is also subject to dismissal barring a few exceptions.⁹⁷ A case will not be dismissed if the applicant can show either of the following: (1) the claim is based on a new Supreme Court opinion that was previously unavailable,⁹⁸ or (2) the claim is based on new evidence.⁹⁹ The AEDPA also includes specific procedural steps requiring an appellate court to certify an application before the applicant can proceed in district court.¹⁰⁰ Combined, these

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Id.

Most notably for the purposes of this Note is § 2244(d)(1)(C), which allows a new statute of limitations to begin when the Supreme Court recognizes a new right that is explicitly made retroactive on collateral review. *See infra* Part IV.B.

⁹⁴ 28 U.S.C. § 2244 (b); *see infra* notes 96-100 and accompanying text.

⁹⁵ *See supra* notes 88-91 and accompanying text.

⁹⁶ 28 U.S.C. § 2244 (b)(1). "A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." *Id.*

⁹⁷ *Id.* § 2244 (b)(2).

⁹⁸ *Id.* § 2244 (b)(2)(A). "The applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." *Id.* However, this provision was construed narrowly by *Tyler v. Cain*, so that a new rule is not made retroactive for purposes of a second or successive petitions unless the Court specifically holds that a case is retroactive. 533 U.S. 656, 663 (2001).

⁹⁹ 28 U.S.C. § 2244 (b)(2)(B).

(B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Id.

¹⁰⁰ *Id.* § 2244 (b)(3).

(3) (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

Congressional limitations on habeas petitions have made the habeas process much more difficult for potential applicants.¹⁰¹

To make matters worse for a habeas petitioner, the Supreme Court has construed the retroactivity section of AEDPA very narrowly, making it even more difficult for second or successive applicants to have a case reheard.¹⁰² In 2001, the Supreme Court attempted to resolve the meaning of the statutory phrase “made retroactive to cases on collateral review by the Supreme Court” in 28 U.S.C. § 2244(b)(2)(A).¹⁰³ In *Tyler v. Cain*,¹⁰⁴ the defendant argued that the jury instructions used in his case were unconstitutional pursuant to the Supreme Court’s ruling in *Cage v. Louisiana*.¹⁰⁵ Some circuits and district court cases had ruled that they

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

Id.

¹⁰¹ Orye, *supra* note 89, at 15-26 (discussing the difficulty of arguing a retroactivity claim); Jordan Steiker, *Restructuring Post-Conviction Review of Federal Constitutional Claims Raised by State Prisoners: Confronting the New Face of Excessive Proceduralism*, 1998 U. CHI. LEGAL F. 315, 324-25 ; Kenneth Williams, *The Antiterrorism and Effective Death Penalty Act: What’s Wrong with It and How to Fix It*, 33 CONN. L. REV. 919, 923 (2001).

¹⁰² See *infra* notes 103-10 and accompanying text.

¹⁰³ *Tyler*, 533 U.S. at 663 (interpreting the language of 28 U.S.C. § 2244(b)(2)(A), which has language identical in part to 28 U.S.C. §§ 2244 & 2255, and holding that a new rule is not made retroactive for purposes of a second or successive petition unless the Court specifically holds that it is retroactive).

¹⁰⁴ *Id.* at 663.

¹⁰⁵ 498 U.S. 39 (1990). In *Tyler v. Cain*, Tyler was convicted of second-degree murder for killing his 20-day-old daughter, and his conviction was affirmed on appeal. 533 U.S. at 659. After sentencing, Tyler sought five separate unsuccessful attempts at state post-conviction relief. *Id.* He next filed a federal habeas petition, which was unsuccessful as well. *Id.* In the interim, the Supreme Court decided *Cage v. Louisiana*, 498 U.S. 39 (1990), holding that a jury instruction is unconstitutional if there is a reasonable likelihood that the jury understood it to allow conviction without proof beyond a reasonable doubt. *Id.* Tyler again attempted

could infer retroactivity on the basis of the holding in *Cage*.¹⁰⁶ However, the Supreme Court disagreed.¹⁰⁷

The Court held that only the Supreme Court, through an explicit holding to that point, can make a rule retroactive for cases that are brought on a second or successive habeas petition.¹⁰⁸ No combination of lower court decisions could ever make a second or successive habeas petition retroactive because the Supreme Court is the only entity that can make a rule retroactive.¹⁰⁹ Thus, according to *Tyler*, the Supreme Court must specifically hold a new rule to be retroactive in order for a second or successive claim to be brought pursuant to the limitations of the AEDPA.¹¹⁰

While Congress may have changed the limits of retroactivity through the AEDPA, the Supreme Court in *Horn v. Banks*¹¹¹ clarified that the *Teague* analysis is still a pertinent question.¹¹² The Court stated that the AEDPA may have changed the relevant legal principles regarding the applicability of *Teague*, but that none of the post-AEDPA cases have suggested that a writ of habeas corpus should automatically be issued if a prisoner satisfies the AEDPA standard.¹¹³ The Court reasoned that the AEDPA does not relieve courts from the responsibility of addressing properly raised *Teague* arguments.¹¹⁴ Thus, in addition to performing

his post-conviction efforts arguing that the jury instructions in *Cage* were substantively identical to the instructions in his case. *Id.* Ultimately both the district and appellate courts denied his motion pursuant to AEDPA, and Tyler appealed. *Id.* at 559-60.

¹⁰⁶ *Tyler*, 533 U.S. at 661. Prior to *Tyler*, "Courts of Appeals were divided on the question of whether *Cage* was 'made retroactive to cases on collateral review by the Supreme Court,' as required by 28 U.S.C. § 2244(b)(2)(A)." *Id.* Compare *Brown v. Lensing*, 171 F.3d 1031 (5th Cir. 1999) (holding that *Cage* has not been made retroactive by the Supreme Court), *Rodriguez v. Superintendent*, 139 F.3d 270 (1st Cir. 1998) (same), and *In re Hill*, 113 F.3d 181 (11th Cir. 1997) (same), with *West v. Vaughn*, 204 F.3d 53 (3d Cir. 2000) (holding that *Cage* had been made retroactive to cases on collateral review).

¹⁰⁷ *Tyler*, 533 U.S. at 662.

¹⁰⁸ *Id.* A case is not made retroactive by the Supreme Court if the Supreme Court merely establishes principles of retroactivity and leaves the determination of retroactivity up to the lower courts. *Id.* at 663.

¹⁰⁹ *Id.* at 663. Thus, even Supreme Court dictum does not make a rule retroactive. *Id.* at 663 n.4.

¹¹⁰ *Id.* at 663.

¹¹¹ 536 U.S. 266 (2002) (per curiam).

¹¹² *Horn*, 536 U.S. at 266 (per curiam) (summarily reversing a lower court's ruling in post-AEDPA case that *Teague* analysis was unnecessary and rejecting any possible implication by a lower court that in a post-AEDPA case a *Teague* analysis was unnecessary).

¹¹³ *Id.* at 272.

¹¹⁴ *Id.* "To the contrary, if our post-AEDPA cases suggest anything about AEDPA's relationship to *Teague*, it is that the AEDPA and *Teague* inquiries are distinct." *Id.*

any analysis required by AEDPA, a federal court considering a habeas petition must also conduct a threshold *Teague* analysis when the issue is properly raised.¹¹⁵ Therefore, the *Teague* analysis remains a seminal inquiry in analyzing retroactivity.

The Court has still left several important questions unanswered for retroactivity analysis. First, the Court has yet to resolve the retroactive effect on a new statutory change of criminal procedure.¹¹⁶ Also, the Court has not explained how to handle a new constitutional substantive change in criminal law or what a change in constitutional substantive law exactly is.¹¹⁷ Finally, the Court has not set forth a coherent standard for the relationship of *Teague* and new criminal rulings that are brought collaterally under the AEDPA habeas statutes.

4. The Current Retroactivity Doctrine as Applied Today

There is a strong presumption against retroactivity in collateral review cases.¹¹⁸ The benefit of a new Supreme Court decision should always be applied retroactively on direct review.¹¹⁹ If there is a question of retroactivity, it should be addressed as a threshold matter before a decision on the merits of a case is given.¹²⁰ Whether a decision is a substantive or procedural change of the law is a critical inquiry.¹²¹ If there is a substantive change in a statutory law, the change will be applied retroactively even on collateral review.¹²² If the law is merely a change in criminal procedure, it will not be given retroactive effect on collateral review unless it satisfies one of two nebulous exceptions.¹²³

The new rule of procedure must either “place certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe” or be a rule that both “alter[s] our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction” and that “without which the likelihood of an accurate conviction is seriously diminished.”¹²⁴

¹¹⁵ *Id.* at 272.

¹¹⁶ See HERTZ & LIEBMAN, *supra* note 84, at 1031-32.

¹¹⁷ *Id.*

¹¹⁸ See *supra* note 76 and accompanying text.

¹¹⁹ See *supra* note 62 and accompanying text.

¹²⁰ See *supra* note 71 and accompanying text.

¹²¹ See *supra* notes 86-88 and accompanying text.

¹²² See *supra* note 55 and accompanying text.

¹²³ See *supra* note 76 and accompanying text.

¹²⁴ See *supra* notes 79-81 and accompanying text.

Subsequent Supreme Court decisions have generally construed these two exceptions narrowly.¹²⁵

Congress has had an instrumental role in reshaping the retroactivity doctrine through the AEDPA.¹²⁶ If an applicant has filed duplicative claims for habeas relief in federal court the application will be dismissed unless the claim is based on newly discovered evidence or a specific holding that a case is to be applied retroactively by the Supreme Court.¹²⁷ The *Teague* analysis is still to be treated as a threshold matter on initial applications and the requirements of AEDPA and *Teague* are distinct.¹²⁸

B. *Retroactivity in Capital Punishment*¹²⁹

With a general background of the problems and pitfalls that have plagued the retroactivity doctrine, this Note will now focus on retroactivity for capital punishment. The Supreme Court tinkering with death can be traced back at least as far as 1972, with the decision in *Furman v. Georgia*.¹³⁰ In a per curiam decision, the *Furman* court effectively placed a moratorium on death sentences by holding capital punishment, as then practiced, unconstitutional.¹³¹ However, the Court

¹²⁵ See *supra* note 88 and accompanying text.

¹²⁶ See *supra* Part II.A.3.

¹²⁷ See *supra* notes 96-101 and accompanying text.

¹²⁸ See *supra* notes 112-15 and accompanying text.

¹²⁹ This Note does not attempt to make an exhaustive look at the history or policy issues behind capital sentencing. For a discussion of the myriad issues that are a part of capital sentencing see Carol S. Steiker, *Things Fall Apart, but the Center Holds: The Supreme Court and the Death Penalty*, 77 N.Y.U. L. REV. 1475 (2002); Bryan A. Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing*, 54 ALA. L. REV. 1091, 1096-104 (2003); Welsh S. White, *Fact-Finding and the Death Penalty: The Scope of a Capital Defendant's Right to Jury Trial*, 65 NOTRE DAME L. REV. 1, 10-11 (1989); Kenneth Williams, *Should Judges Who Oppose Capital Punishment Resign? A Reply to Justice Scalia*, 10 VA. J. SOC. POL'Y & L. 317 (2003); Simón Cantarero, Note, *Who Makes the Call on Capital Punishment? How Ring v. Arizona Clarifies the Apprendi Rule and the Implications on Capital Sentencing*, 17 BYU J. PUB. L. 323, 323-27 (2003); John M. Challis, Note, *I'm Sorry Your Honor: You Will Not Decide My Fate Today: The Role of Judges in the Imposition of the Death Penalty: A Note on Ring v. Arizona*, 22 ST. LOUIS U. PUB. L. REV. 521, 522-26 (2003).

¹³⁰ 408 U.S. 238 (1972) (per curiam). Obviously, the problem of crime, punishment, and just sentencing can be traced back much further than twentieth century America. For a witty critique of a recent book on this theme see Jeffrey Brauch & Robert Woods, *Faith, Learning and Justice in Alan Dershowitz's the Genesis of Justice: Toward a Proper Understanding of the Relationship Between the Bible and Modern Justice*, 36 VAL. U. L. REV. 1 (2001).

¹³¹ *Furman*, 408 U.S. at 256-57. In *Gregg v. Georgia*, the Court explained:

The basic concern of *Furman* centered on those defendants who were being condemned to death capriciously and arbitrarily. Under the procedures before the Court in that case, sentencing authorities were not directed to give attention to the nature or circumstances of the

quickly changed its view only a few years later and upheld the constitutionality of a reformed capital punishment statute in *Gregg v. Georgia*.¹³²

Since *Gregg* upheld the constitutionality of capital punishment, the Supreme Court has struggled to determine the extent and role that both judge and jury play pursuant to the constitutional guarantees of the Sixth Amendment, Eighth Amendment, and the Fourteenth Amendment's Due Process clause. This struggle has been further amplified due to the emotional and philosophical concerns that the death penalty produces. As the Supreme Court has often noted "death is different."¹³³

crime committed or to the character or record of the defendant. Left unguided, juries imposed the death sentence in a way that could only be called freakish.

428 U.S. 153, 206 (1976).

¹³² *Gregg*, 428 U.S. at 153. In *Gregg*, the Court held that "the punishment of death does not invariably violate the Constitution." *Id.* at 169. The Court reasoned that "retribution and deterrence of capital crimes by prospective offenders" coupled with "the incapacitation of dangerous criminals and the consequent prevention of crimes that they may otherwise commit in the future" were sufficient reasons to allow the imposition of death as a penalty. *Id.* at 183 n.28. Under Georgia's revised sentencing scheme, a prerequisite for imposing the death penalty required specific jury findings of aggravating and mitigating factors such as the circumstances of the crime or the character of the defendant. *Id.* at 165-66. The revised sentencing procedures in *Gregg* focused the jury's attention on the particularized characteristics and nature of the crime and the individual defendant. *Id.* at 206. The jury was still permitted to consider any aggravating or mitigating circumstances, but the new statute required the jury to identify at least one statutory aggravating factor before it could impose the penalty of death. *Id.* This greatly channeled the jury's discretion. *Id.* at 206-07. The statute also provided that the Georgia Supreme Court, in addition to considering the legal issues on appeal, would also compare each capital sentence with the sentences imposed on defendants similarly situated in order to assure that a jury would avoid a "wanton and freakish imposition of the penalty." *Id.* at 223-24.

¹³³ The "death is different" theme pervades Supreme Court death penalty jurisprudence. See *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (Marshall, J., plurality opinion) ("In capital proceedings generally, this Court has demanded that fact-finding procedures aspire to a heightened standard of reliability. . . . This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different."); *Ake v. Oklahoma*, 470 U.S. 68, 87 (1985) ("In capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases."); *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977) ("From the point of view of the defendant, it is different in both its severity and its finality. From the point of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) ("This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its

However, the Supreme Court has failed to recognize a distinction in applying the retroactivity doctrine in death penalty cases. In 2004, the Supreme Court was once again faced with an opportunity to apply a different standard of retroactivity for capital cases with *Schriro v. Summerlin*.¹³⁴

The issue presented in *Schriro* was whether *Ring v. Arizona* should be applied retroactively.¹³⁵ Previously, the Ninth Circuit held that *Ring*

finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.”)

Because of the long-standing theme that “death is different” many scholars have argued for a different burden of proof for death penalty decisions. See Craig M. Bradley, *A (Genuinely) Modest Proposal Concerning the Death Penalty*, 72 IND. L.J. 25, 27 (1996) (requiring the jury “to unanimously conclude that there is no lingering doubt before even proceeding to the death penalty phase”); Margery Malkin Koosed, *Averting Mistaken Executions by Adopting the Model Penal Code’s Exclusion of Death in the Presence of Lingering Doubt*, 21 N. ILL. U. L. REV. 41, 111-24 (2001) (urging the adoption of a modified version of Model Penal Code § 210.6(1)(f) “although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant’s guilt” and proposing that the jury certify that it has found the defendant guilty beyond all doubt at the trial phase); Erik Lillquist, *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability*, 36 U.C. DAVIS L. REV. 85 (2002) (proposing a variable reasonable doubt standard that correlates the burden of proof to the severity of the penalty associated with an alleged crime); Judge Leonard B. Sand & Danielle L. Rose, Symposium, *Proof Beyond All Possible Doubt: Is There a Need for a Higher Burden of Proof When the Sentence May Be Death?*, 78 CHI.-KENT L. REV. 1359 (2003).

¹³⁴ 124 S.Ct. 2519 (2004). The following are several good student notes discussing the circuit split leading up to the *Schriro* decision: Derek S. Bentsen, Note, *Beyond Statutory Elements: The Substantive Effects of the Right to a Jury Trial on Constitutionally Significant Facts*, 90 VA. L. REV. 645 (2004); Ethan Isaac Jacobs, Note, *Is Ring Retroactive?*, 103 COLUM. L. REV. 1805 (2003); Daren S. Koudele, Note, *Unraveling Ring v. Arizona: Balancing Judicial Sentencing Enhancements with the Sixth Amendment in Capital Punishment Schemes*, 106 W. VA. L. REV. 843 (2004); Sarah C.S. McLaren, Note, *Was Death Different Than It Is Now? The Opportunity Presented to the Supreme Court by Summerlin v. Stewart*, 88 MINN. L. REV. 1731 (2004); Tonya G. Newman, Note, *Summerlin v. Stewart and Ring Retroactivity*, 79 CHI.-KENT. L. REV. 755 (2004). Interestingly enough, all Notes discerned that *Ring* should be considered a substantive change in the law and/or should be applied retroactively. This author agrees with his colleagues despite the Supreme Court ruling to the contrary.

¹³⁵ *Ring v. Arizona*, 536 U.S. 584 (2002). In *Ring*, a jury convicted the defendant, Timothy Ring, of first-degree felony murder for his role in a killing committed during the course of an armed robbery. *Id.* at 591. Pursuant to the Arizona sentencing statute, a sentencing hearing was to be heard before the court alone and the judge was to determine the presence or absence of any enumerated aggravating or mitigating circumstances. *Id.* at 592. The same sentencing statute at issue was previously declared constitutional in *Walton* twelve years earlier. *Walton v. Arizona*, 497 U.S. 639 (1990). The judge was thus authorized to sentence the defendant to death only if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. *Ring*, 536 U.S. at 593. The trial judge concluded that there were no mitigating factors sufficient to call for a

should be applied retroactively.¹³⁶ However, in a 5-4 opinion reversing the Ninth Circuit, the Supreme Court held that *Ring v. Arizona* was properly classified as a procedural, rather than a substantive change in the law, and thus it should not be applied retroactively.¹³⁷ Again, a majority of the court failed to recognize a distinction in applying the retroactivity doctrine in capital cases.

Justice Breyer's dissent hinted at applying a different standard for capital punishment and noted that the law's commitment to uniformity is undermined by this decision.¹³⁸

Is treatment "uniform" when two offenders each have been sentenced to death through the use of procedures that we now know violate the Constitution—but one is allowed to go to his death while the other receives a new, constitutionally proper sentencing proceeding? Outside the capital sentencing context, one might understand the nature of the difference that the word "finality" implies: One prisoner is already serving a final sentence, the other's has not yet begun. But a death sentence is different in that it seems to be, and it is, an entirely future event—an event not yet undergone by either prisoner. And in respect to that event, both prisoners are, in every important respect, in the same position. I understand there is a "finality-based"

reduction in sentencing, but that there were aggravating factors that would allow for a sentencing enhancement. *Id.* at 594-95. Ultimately, the Supreme Court overruled this decision and held that capital defendants are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. *Id.* at 609. The Court held that based on the reasoning of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), a violation of the Sixth Amendment exists when a trial judge, sitting alone, enhances the maximum sentence of life in prison by imposing the death penalty because of "aggravating factors" that are not part of the elements proven for the jury's guilty verdict. *Id.* In so holding, the Court explicitly overruled a significant portion of *Walton* that was decided only twelve years earlier. *Id.*

¹³⁶ *Summerlin v. Stewart*, 341 F.3d 1082, 1084 (9th Cir. 2003). The court begins its discussion of *Summerlin* with a detailed summary of the unusual circumstances behind this case: "It is the raw material from which legal fiction is forged: A vicious murder, an anonymous psychic tip, a romantic encounter that jeopardized a plea agreement, an allegedly incompetent defense, and a death sentence imposed by a purportedly drug-addled judge." *Id.*

¹³⁷ *Schriro*, 124 S. Ct. at 2523-27.

¹³⁸ *Id.* at 2529.

difference. But given the dramatically different nature of death, that difference diminishes in importance.¹³⁹

However, the majority's opinion did not find this reasoning persuasive enough to apply a different standard of retroactivity in capital cases. Thus, retroactivity continues to be treated the same in both capital cases and noncapital cases.

III. ANALYZING THE CURRENT RETROACTIVITY DOCTRINE

Part III of this Note looks at the various reasons why retroactivity has been such a difficult problem for courts. In determining the proper scope of retroactivity, courts must weigh the rights of the individual defendant to have his case reheard with the effect the decision will have on subsequent cases, the finality of a decision, and special problems with federalism.¹⁴⁰ After considering the policy questions, this Part then goes on to discuss the difficulties with creating a coherent retroactivity doctrine.¹⁴¹

A. Policy Concerns Underlying the General Bar Against Retroactivity in Collateral Review Cases

Ultimately, the underlying policy concerns are what have made the question of retroactivity so difficult for the courts. When a closer look is taken, the problem of retroactivity really becomes the problem of habeas review.¹⁴² Habeas review, while guaranteed by the Constitution, is often viewed with disfavor by courts.¹⁴³ Multiple reviews of the same case

¹³⁹ *Id.* Justice Breyer continues by stating that an ordinary citizen would not comprehend the difference: "That citizen will simply witness two individuals, both sentenced through the use of unconstitutional procedures, one individual going to his death, the other saved, all through an accident of timing." *Id.*

¹⁴⁰ *See supra* Part II. As seen in Part II, the Supreme Court and Congress have tipped the scales in favor of preserving the finality of judgments and effectively limited the universal use of retroactivity that was present at common law.

¹⁴¹ *See infra* Part III.B.

¹⁴² *See Mackey v. United States*, 401 U.S. 667, 701-02 (1971). Justice Harlan noted that "the problem of retroactivity is in truth none other than one of resettling the limits of the reach of the Great Writ, which under the recent decisions of this Court has been given almost boundless sweep." *Id.*; *see also* Roosevelt, *supra* note 34, at 1113. Professor Roosevelt argues that "[t]he AEDPA is a clear example of the shortcomings of trying to fix a retroactivity problem by modifying habeas." Roosevelt, *supra* note 34, at 1113.

¹⁴³ Justice Powell was vocal in his disapproval of the abuse of the Great Writ. He stated that "[f]ederal courts should not continue to tolerate—even in capital cases—this type of abuse of the writ of habeas corpus." *Woodard v. Hutchins*, 464 U.S. 377, 380 (1984) (Powell, J., concurring). He called for legislation, pre-AEDPA, to limit successive petitions because the availability "of unlimited federal collateral review to guilty defendants

becomes an inefficient use of scarce judicial resources.¹⁴⁴ It is one thing to use the “Great Writ” for the vindication of an innocent defendant; it is quite another to have an inmate file fifty or more frivolous *pro se* petitions on the hope that one petition will stick.¹⁴⁵ This was one of the main reasons why Congress attempted to limit the number of habeas petitions that inmates could bring and why there is such a short statute of limitations for those claims.¹⁴⁶ Several other interrelated policy questions underlie the Supreme Court’s restrictive use of retroactivity including: concerns over erroneous execution, maintaining the finality of judgments, judicial efficiency and the cost of change, and comity and federalism concerns.¹⁴⁷ This Note argues that although these policy concerns are important, when the penalty is death, greater flexibility should be given to the incarcerated individual so that he should have the opportunity to apply a new law retroactively on collateral review.

1. Finality v. Increasing Procedural Safeguards

The value of finality is arguably the most significant and legitimate policy behind the restrictions on applying new constitutional rules to collateral review.¹⁴⁸ The Court has consistently noted that “the past cannot always be erased by a new judicial declaration.”¹⁴⁹ “Finality serves society’s interest in the certainty that once a conviction of guilt has been rendered under constitutionally fair procedures, that verdict will be

frustrates the State’s legitimate interest in deterring crime.” *Kuhlmann v. Wilson*, 477 U.S. 436, 452 (1986) (plurality opinion) (Powell, J., joined by Burger, C.J., and Rehnquist & O’Connor, JJ).

¹⁴⁴ Not only are multiple reviews of the same case a waste of economic resources, but it wastes “all of the intellectual, moral, and political resources involved in the legal system.” Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 451 (1963).

¹⁴⁵ *Dorsey v. Gill*, 148 F.2d 857, 862 (D.C. Cir. 1945); see *supra* notes 91-92 and accompanying text.

¹⁴⁶ See *supra* Part II.A.3.

¹⁴⁷ See *Williams v. Taylor*, 529 U.S. 420, 436 (2000) (stating that there is no doubt that Congress intended AEDPA to advance the principles of comity, finality, and federalism); *Stringer v. Black*, 503 U.S. 222, 228 (1992) (noting that interests in finality, predictability, and comity underlie the retroactivity jurisprudence).

¹⁴⁸ *Mackey v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in the judgment in part and dissenting in part) (“No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation.”).

¹⁴⁹ *Teague v. Lane*, 489 U.S. 288, 308 (1989); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374 (1940).

472 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 39]

left untouched.”¹⁵⁰ The *Linkletter* Court argued that finality insures integrity in the judicial process.¹⁵¹ By maintaining the finality of decisions, courts also preserve judicial resources.¹⁵² However, the societal goal of maintaining the finality of a decision will forever be in constant tension with the goal of an appropriate sentence for the individual defendant and avoiding erroneous executions.

In capital cases, finality concerns must give way to the risk of an erroneous execution.¹⁵³ According to one study, over the past ten years there has been an average of five wrongfully convicted innocent inmates released per year.¹⁵⁴ The Supreme Court has often recognized that fact-finding procedures must aspire to a heightened standard of reliability when the penalty is death.¹⁵⁵ It seems only logical that our justice system should also extend these heightened standards of reliability to the habeas context and allow for numerous petitions for death row inmates when a

¹⁵⁰ Strauss, *supra* note 29, at 1253. Justice Clark went on to state the policy reasons behind *Linkletter*:

Finally, there are interests in the administration of justice and the integrity of the judicial process to consider. To make the rule of *Mapp* retrospective would tax the administration of justice to the utmost. Hearings would have to be held on the excludability of evidence long since destroyed, misplaced or deteriorated. If it is excluded, the witnesses available at the time of the original trial will not be available or if located their memory will be dimmed.

Linkletter, 381 U.S. at 637-38.

¹⁵¹ See *supra* notes 36-47 and accompanying text. Referring to the retroactivity doctrine, the Court argued that to “legitimate such an extraordinary procedural weapon that has no bearing on guilt would seriously disrupt the administration of justice.” *Linkletter*, 381 U.S. at 638.

¹⁵² See *infra* Part III.A.2. The Arizona Supreme court noted:

Arizona has approximately ninety prisoners on death row whose cases have become final and who received a sentence based upon the aggravating circumstances found by the trial judge and affirmed on appeal. Conducting new sentencing hearings, many requiring witnesses no longer available, would impose a substantial and unjustified burden on Arizona’s administration of justice.

State v. Towery, 64 P.3d 828, 840 (Ariz. 2003).

¹⁵³ The Supreme Court has recognized that “[t]he need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases.” *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

¹⁵⁴ See Death Penalty Info. Ctr., *Innocence and the Death Penalty*, at <http://www.deathpenaltyinfo.org/innoc.html> (last visited Oct. 10, 2004).

¹⁵⁵ *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (plurality opinion). The Court reasoned that these heightened standards are “a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different.” *Id.*

claim is based on a retroactive change in the law. This would inevitably secure greater protection against wrongful convictions and executions.

As a simple addition to the procedural safeguards already in place, courts, by using a less restrictive standard for collateral attacks when the penalty is death, could easily add another procedural safeguard to avoid the risk of an erroneous execution.¹⁵⁶ This increased safeguard would heighten the standard of reliability, and could change the outcome of whether an individual is sentenced to death or not.¹⁵⁷

Unfortunately, because of the distrust for and abuses of the “Great Writ” in the judicial branch, and Congress succumbing to the political pressures following the Oklahoma City bombing under which the AEDPA was enacted, finality in sentencing has so far trumped increasing procedural safeguards that the consistent use of retroactivity could bring.¹⁵⁸ It must be conceded that maintaining the finality of a decision is a necessary component to a functioning criminal justice system. However, death is the ultimate finality and thus more procedural safeguards are needed. In essence, “death is different.”¹⁵⁹

2. Judicial Economics and the Costs of Change

Another significant reason behind the very selective and restrictive use of retroactivity has been the potential strain on judicial resources.¹⁶⁰ Critics argue that the retroactivity doctrine creates an unnecessary strain on society. The economic strain includes judicial and prosecutorial resources spent on a retrial of the case, and the societal costs may include “the miscarriage of justice that occurs when a guilty offender is set free

¹⁵⁶ In fact, some scholars have argued that there is a professional obligation to raise what would normally be frivolous collateral attacks when the penalty is death. See Monroe H. Freedman, *The Professional Obligation to Raise Frivolous Issues in Death Penalty Cases*, 31 HOFSTRA L. REV. 1167, 1180 n.88 (2003) (discussing the frequency of precedent being overturned through the zealous advocacy of persistent attorneys and concluding that there is a professional obligation to raise frivolous issues in death penalty cases).

¹⁵⁷ *Ford*, 477 U.S. at 411. Justice Kennedy has observed that “[a]ll of our Eighth Amendment jurisprudence concerning capital sentencing is directed toward the enhancement of reliability and accuracy in some sense.” *Sawyer v. Smith*, 497 U.S. 227, 243 (1990).

¹⁵⁸ See *supra* notes 90-91 and accompanying text.

¹⁵⁹ See *supra* note 133 and accompanying text.

¹⁶⁰ *But see Ashe v. Swenson*, 397 U.S. 436, 464 (1970) (noting that in criminal cases, finality and conservation of private, public and judicial resources are of lesser value than in civil litigation).

474 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 39]

only because effective retrial is impossible years after the offense.”¹⁶¹ Each time a new law is given retroactive effect, courts are flooded with habeas petitions by inmates trying to take advantage of the newly announced rule.¹⁶² Justice O’Connor noted in her *Ring* dissent that there was a seventy-seven percent increase in the number of second or successive habeas corpus petitions filed in federal courts in 2001, largely due to the *Apprendi* decision.¹⁶³

The limited use of retroactivity is also necessary for the development of constitutional law.¹⁶⁴ The Supreme Court is obviously reluctant to announce decisions that provide for greater protection of criminal procedure, which would create a substantial strain on the judiciary.¹⁶⁵ By allowing the retroactive application of all decisions, the cost of change would be very significant.

*Miranda v. Arizona*¹⁶⁶ provides an excellent example.¹⁶⁷ Presumably, the Supreme Court would not have required *Miranda* warnings if doing so meant that every confessed criminal then in custody had to be set free or given an opportunity to attack his conviction on collateral review.¹⁶⁸ *Miranda* depended on the limited use of retroactivity, thus allowing the

¹⁶¹ *Hankerson v. North Carolina*, 432 U.S. 233, 247 (1977). It is arguable whether a retrial would always be necessary; perhaps a jury hearing on re-sentencing could be completed as an alternative for a complete retrial.

¹⁶² *Ring*, 536 U.S. at 619 (O’Connor, J., dissenting). Justice O’Connor noted that *Apprendi* created a drastic increase in the workload of an already overworked judiciary. *Id.* at 620; see also Paul J. Heald, *Retroactivity, Capital Sentencing, and the Jurisdictional Contours of Habeas Corpus*, 42 ALA. L. REV. 1273 (1991).

¹⁶³ *Ring*, 536 U.S. at 620 (O’Connor, J., dissenting).

¹⁶⁴ Arguably the Warren Court purposely restricted retroactivity in order to increase the number of constitutional protections. See Roosevelt, *supra* note 33, at 1114-26.

¹⁶⁵ *Id.*

¹⁶⁶ 384 U.S. 436 (1966).

¹⁶⁷ Nearly every individual has heard of the *Miranda* warning and perhaps has it memorized. Here is an example of a *Miranda* warning used by the FBI:

Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions and to have a lawyer with you during questioning. If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish. If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

Duckworth v. Eagan, 492 U.S. 195, 202 n.4 (1989).

¹⁶⁸ John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 98 (1999).

Court to give effect to new requirements only in future applications.¹⁶⁹ Justice Harlan recognized that limited retroactivity facilitated “long overdue reforms, which otherwise could not be practicably effectuated.”¹⁷⁰ Without changes in constitutional law, there would be little need for the retroactivity doctrine, and without the restrictive use of the retroactivity doctrine, there would be much fewer changes in constitutional law.

However, the number of individuals on death row is minimal compared to the total number of incarcerated individuals.¹⁷¹ The retroactivity of *Ring v. Arizona* provides a good microcosm of the issue. Justice O’Connor noted in her *Ring* dissent that a retroactive ruling of *Ring* would only have the possibility of affecting approximately 168 prisoners nationwide on death row.¹⁷² With such a small number of inmates affected compared to the total prisoner population, it is difficult to argue that the costs of re-sentencing would outweigh the possible harm caused by improperly executing a defendant. Thus, although the limited use of retroactivity is necessary for an expansion of constitutional liberties, when the resulting harm has the possibility of being so great and the cost so little, there should be an exception for the expansion of retroactivity in capital cases.

3. Federalism and Judicial Comity Concerns

Also lying in the background of the recent restrictions on the retroactivity doctrine are the political underpinnings of a rise in federalism and the general notion of judicial comity.¹⁷³ The nature of habeas review often requires a federal court to review a state court decision for perceived constitutional violations.¹⁷⁴ This initially may

¹⁶⁹ *Id.* at 98-99.

¹⁷⁰ *Mackey v. United States*, 401 U.S. 667, 676 (1971) (Harlan, J., concurring in part and dissenting in part) (quoting *Jenkins v. Delaware*, 395 U.S. 213, 218 (1969)).

¹⁷¹ As of October 1, 2003, there are currently 3,504 individuals on death row. See Death Penalty Info. Ctr., *Innocence and the Death Penalty*, at <http://www.deathpenaltyinfo.org> (last visited Oct. 10, 2004). In the last twenty-five years, the death row population has increased six-fold. *Id.* Conversely, the overall prison population is much higher. At the beginning of 2004, the overall state and federal prisoner population was estimated to be at 1.4 million, which is an increase from 400,000 inmates in 1984. See Marcia G. Shein & Matthew Doherty, *The Federal Sentencing Guidelines: A Troubling Historical Prospective*, 51 FED. LAWYER 30 (2004).

¹⁷² *Ring v. Arizona*, 536 U.S. 584, 620 (2002) (O’Connor, J., dissenting).

¹⁷³ Judicial comity refers to the “respect a court of one state or jurisdiction shows to another state or jurisdiction in giving effect to the other’s laws and judicial decisions.” BLACK’S LAW DICTIONARY, *supra* note 1, at 262.

¹⁷⁴ See 28 U.S.C. § 2254 (2003); *supra* note 9 and accompanying text.

raise questions of federalism and judicial comity; however, the concerns are amplified when there is a retroactivity question involved.

State courts cannot always anticipate or comply with the Supreme Court's changing due process requirements.¹⁷⁵ Thus, when a new rule is announced that is to be applied retroactively, federal courts would have to overrule an otherwise correct state court decision and force the state court to retry the case or allow the individual to go free.¹⁷⁶

The Rehnquist Court has adopted a restrictive use of retroactivity based on these federalism concerns.¹⁷⁷ *Teague* seemed to suggest this interest in federalism noting that "[s]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands."¹⁷⁸ Justice O'Connor, a former state legislator and state supreme court Judge, has expressed a strong belief in the need for judicial protection of state governments.¹⁷⁹ O'Connor noted that "[t]here is no reason to assume that state court judges cannot and will not provide a 'hospitable forum' in litigating federal constitutional questions."¹⁸⁰ However, it is somewhat naive to think that all states will want to place the extra burden on their judiciary to review cases that are already final.¹⁸¹

¹⁷⁵ *Brown v. Allen*, 344 U.S. 443, 534 (1953) (Jackson, J., concurring).

¹⁷⁶ *Solem v. Stumes*, 465 U.S. 638, 654 (1984) (Powell, J., concurring) ("The costs imposed upon the State by retroactive application of new rules of constitutional law on habeas corpus . . . generally far outweigh the benefits of this application.").

¹⁷⁷ While one can debate this policy, it seems obvious from all contemporary observers that it has been the courts primary policy concern. See Richard Brust, *Reviewing Rehnquist*, 89 A.B.A. J. 42 (2003). But see *Nev. Dept. of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (Rehnquist, J.) (holding that Congress may abrogate states Eleventh Amendment immunity in federal court and hinting that the Court is not completely blinded by a federalism agenda); David L. Hudson Jr., *Court Surprises with Family Leave Act Ruling: Rehnquist Opinion Marks Exception in Trend Toward Empowering States*, 2 No. 21 A.B.A. J. E-REPORT 2 (2003).

¹⁷⁸ *Teague v. Lane*, 489 U.S. 288, 310 (1989) (citing *Engle v. Issac*, 456 U.S. 107, 128 (1982)).

¹⁷⁹ Erwin Chemerinsky, *Justice O'Connor and Federalism*, 32 MCGEORGE L. REV. 877, 877-79 (2001); Sandra Day O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801 (1981).

¹⁸⁰ O'Connor, *supra* note 179, at 813. Little imagination is needed to show that this conclusion could indeed be faulty. One needs only to look back fifty years ago when southern states were reluctant to force integration of schools after *Brown v. Board of Education*, 349 U.S. 294 (1955).

¹⁸¹ *State v. Towery*, 64 P.3d 828, 835 (Ariz. 2003). "Conducting new sentencing hearings, many requiring witnesses no longer available, would impose a substantial and unjustified burden on Arizona's administration of justice." *Id.*

Even if state supreme courts allow for an expanding version of *Teague* so that more collateral review cases receive the benefit of a retroactive application of the law, this analysis does not mean every state will retroactively apply a new Supreme Court decision; thus, inmates will be forced to rely on the whim of a state court decision.¹⁸² There are many disincentives for state courts to retroactively apply a new decision, such as the costs in re-litigating old cases, budget shortfalls, and the possibility of an elected judiciary receiving negative political consequences for retrying a well-publicized case or issue.¹⁸³ Some may also argue that state courts may be biased to certain individuals. However, with federal intervention, a consistent application of a changing due process clause will ensure every state case has an appropriate forum in which to be heard. Furthermore, by limiting the use of retroactivity solely to capital cases, the important concerns of expanding civil liberties and ensuring proper respect for states' rights will be maintained.

B. The Problem of a Coherent Capital Punishment Retroactivity Doctrine

Since *Linkletter* first started the Supreme Court's tinkering with the common law version of retroactivity, courts have been struggling with articulating a coherent retroactivity doctrine.¹⁸⁴ An easy but impractical solution would be to return to the common law and apply all new decisions retroactively. This solution would alleviate the uncertainty that results when a "new rule" is handed down by the Supreme Court

¹⁸² For an excellent discussion of why state courts should provide for greater constitutional protection in retroactivity cases, see Stith, *supra* note 16, at 421; *Tomorrow's Issues in State Constitutional Law*, 38 VAL. U. L. REV. 577, 618 (2004) (transcript of panel discussion) [hereinafter *Tomorrow's News*]. In discussing the reason behind state courts reluctance toward applying a different standard of retroactivity, Judge Stith stated at a symposium on state constitutional law:

[T]he reason that the federal courts are not offering more review is they want to defer to state courts, . . . people say the federal courts just interfere too much with state courts and they should back off. So [federal courts] are backing off, and the state courts are following them backwards. So this is the state courts' opportunity to step forward. They can step forward in many different ways. There's no right way or wrong way to step forward, but I think the first step is to recognize that in many of these areas, they can act.

Tomorrow's News, supra, at 618.

¹⁸³ This is one of the traditional arguments why an unelected judiciary is perhaps superior to a judiciary that is appointed.

¹⁸⁴ See *Linkletter v. Walker*, 381 U.S. 618 (1965); see also *supra* Part II.A.

and would treat all similarly situated defendants equally.¹⁸⁵ However, this solution is simply impossible for the courts to implement.¹⁸⁶ The problems of habeas review again resurface.¹⁸⁷ If the courts were to apply a “new rule” retroactively in every case, federal courts would be overwhelmed with irrelevant lawsuits that taxpayers would have to pay to defend. States would be disgruntled to have to re-litigate a decision that is overturned by a federal court based on a previously unknown “new” constitutional violation.¹⁸⁸ Thus, the Supreme Court and Congress have created a general bar against retroactivity in order to effectuate a greater expansion of constitutional rights, while at the same time limiting the policy problems discussed above.

Unfortunately, by limiting the use of retroactivity, the courts have eliminated a necessary procedural safeguard that would help ensure accurate convictions. While there are no easy answers to this difficult problem, this Note proposes a few solutions that would expand the use of retroactivity in death penalty cases.

¹⁸⁵ See *supra* Part II.A. Thus, the new rule distinctions would be eliminated and all cases would be granted the retroactivity application of a new law.

¹⁸⁶ See *supra* Part II.A.1 & 2.

¹⁸⁷ See *supra* Part III.A.

¹⁸⁸ *Teague v. Lane*, 489 U.S. 288, 310 (1989) (citing *Engle v. Isacc*, 456 U.S. 107, 128 (1982)). “State courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands.” *Id.*

IV. PROPOSED SOLUTIONS¹⁸⁹

If one accepts the premise that death really is different, courts and legislatures should then afford death row inmates the maximum amount of constitutional protection. Thus, all new Supreme Court decisions that modify our understanding of the Constitution and, in effect, change the law should be applied retroactively to death row inmates. This Part will first propose judicial action that could curtail erroneous executions.¹⁹⁰ Next, this Part will propose an amendment to the AEDPA statutes.¹⁹¹ The amendment would allow an exception for habeas petitions arguing a claim based on the retroactivity of a new Supreme Court decision for death row inmates. The amendment to the statute will allow defendants convicted of capital offenses to bypass the procedural hurdles of the AEDPA so that death row inmates do not have to wait for the Supreme Court to specifically hold a decision to be retroactive on a second or successive habeas application.

¹⁸⁹ As one famous jurist has recently noted, “[t]he theoretical uplands, where democratic and judicial ideals are debated, tend to be arid and overgrazed; the empirical lowlands are fertile but rarely cultivated.” RICHARD POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 3-4 (2003). Such is the nature of academic writing, and true to form, this article has stayed mainly in the land of the overgrazed. Several comprehensive articles on the retroactivity doctrine have already been written and different proposals to retroactivity in the death penalty context have been proposed. See generally Marc M. Arkin, *The Prisoner’s Dilemma: Life in the Lower Federal Courts After Teague v. Lane*, 69 N.C. L. REV. 371 (1991); John Blume & William Pratt, *Understanding Teague v. Lane*, 18 N.Y.U. REV. L. & SOC. CHANGE 325 (1990-91); Roger D. Branigin III, *Sixth Amendment—The Evolution of the Supreme Court’s Retroactivity Doctrine: A Futile Search for Theoretical Clarity*, 80 J. CRIM. L. & CRIMINOLOGY 1128 (1989); David R. Dow, *Teague and Death: The Impact of Current Retroactivity Doctrine on Capital Defendants*, 19 HASTINGS CONST. L.Q. 23 (1991); Markus Dirk Dubber, *Prudence and Substance: How the Supreme Court’s New Habeas Retroactivity Doctrine Mirrors and Affects Substantive Constitutional Law*, 30 AM. CRIM. L. REV. 1 (1992); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733 (1991); Patrick E. Higginbotham, *Notes on Teague*, 66 S. CAL. L. REV. 2433 (1993); Joseph L. Hoffman, *Retroactivity and the Great Writ: How Congress Should Respond to Teague v. Lane*, 1990 BYU L. REV. 183 (1990); Eliot F. Krieger, *Recent Development, The Court Declines in Fairness—Teague v. Lane*, 25 HARV. C.R.-C.L. L. REV. 164 (1990); Daniel J. Meltzer, *Habeas Corpus Jurisdiction: The Limits of Models*, 66 S. CAL. L. REV. 2507 (1993); Linda Meyer, *“Nothing We Say Matters”: Teague and New Rules*, 61 U. CHI. L. REV. 423 (1994); Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699 (2002); Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331 (1993).

Perhaps the best solution would be to eliminate the death penalty. However, until the government, and ultimately the public, agrees with this view there will be no way to eliminate the possibility of a wrongful execution.

¹⁹⁰ See *infra* Part IV.A.

¹⁹¹ See *infra* Part IV.B.

A. *Judicial Remedies Available*

As long as federal courts review state court decisions for constitutional infirmities, the policy concerns of federalism and comity will still act as an obstruction to retroactivity. One solution would be to have each state supreme court adopt a policy of reviewing cases on collateral review first when an inmate makes a retroactivity challenge.¹⁹² The federalism and comity concerns that invade federal court decisions are not present when a state reviews its own case.¹⁹³ However, not all states will want to place the extra burden on their judiciary to review cases that are already final.¹⁹⁴ Thus, a change in how federal courts review habeas petitions based on retroactivity is necessary.

If the Supreme Court wants to maintain the substance-procedure dichotomy in determining whether a change in law should be retroactive, the Court should add a presumption that a change in the law is substantive, and thus retroactive, when the penalty is death. It seems simply illogical to allow a mere accident of timing to determine the retroactive application of law. Justice is not done by making the arbitrary distinction between applying a change in law consistently on direct review and limiting the retroactive use of laws on collateral review. In effect, an inmate is punished because the Supreme Court recognized its error in constitutional thinking too late. Furthermore, many grounds for reversal, such as ineffective assistance of counsel and improper sentencing, are more properly brought on collateral review than on direct review.¹⁹⁵

¹⁹² Several state supreme courts have recognized that the requirements of *Teague* provide for only the minimal constitutional requirements and have thus provided greater protections than the Federal Constitution requires. See *Ex parte Coker*, 575 So.2d 43 (Ala. 1990); *Saylor v. State*, 808 N.E.2d 646 (Ind. 2004); *State v. Whitfield*, 107 S.W.3d 253 (Mo. 2003); *Colwell v. State*, 59 P.3d 463 (Nev. 2002); *State v. Lark*, 567 A.2d 197 (N.J. 1989); *Cowell v. Leapley*, 458 N.W.2d 514 (S.D. 1990).

¹⁹³ There are obviously no federalism or comity problems when a state reviews its own case.

¹⁹⁴ *State v. Towery*, 64 P.3d 828, 835 (Ariz. 2003) ("Conducting new sentencing hearings, many requiring witnesses no longer available, would impose a substantial and unjustified burden on Arizona's administration of justice.").

¹⁹⁵ Generally, failure to raise a claim at trial or on direct appeal will result in waiver of the claim. *United States v. Frady*, 456 U.S. 152, 162-66 (1982). However there are certain constitutional claims that may only be adequately addressed on collateral attack. See *United States v. Casel*, 995 F.2d 1299, 1307 (5th Cir. 1993) (holding ineffective assistance of counsel claim cannot be raised on direct appeal unless it has been raised in the district court and collateral review is the proper route for the claim); *United States v. Booker*, 981 F.2d 289, 292 (7th Cir. 1992) (holding that ineffective assistance of counsel claim is best

The Supreme Court should also consider answering the retroactivity question of a change in the law when it issues an opinion. By simply stating that this change in law does or does not apply retroactively, the Court would save resources and confusion for the judiciary and for the prisoner population. Currently, the only way an inmate can challenge his sentence based on the retroactive effect of a change in law (Post-AEDPA and *Tyler v. Cain*) is to wait for the Supreme Court to specifically hold that the change in the law should apply retroactively. This requires approximately two years of wasteful litigation before the issue ultimately winds back up on the Supreme Court docket. To avoid this waste and delay the Supreme Court should simply determine the retroactive effect of a change in law when it issues an opinion.¹⁹⁶

Ultimately, the best judicial solution would be to abandon the *Teague* analysis completely. Instead of maintaining the archaic and restricting *Teague* analysis, the Court should adopt a new policy of retroactivity for death penalty cases. For capital cases, retroactivity must again be “rethought.”¹⁹⁷ Instead of asking the often times unanswerable question of whether a change in the law is substantive or procedural, the court should look at what effect the change in law will have on the habeas petitioner. The court should ask the question: “Will the new decision, as applied to the individual defendant, make a difference beyond a harmless error in the overall merits of the case?” If so, that applicant should have the opportunity to have his case reheard regarding the appropriateness of the sentence. The finality of the decision will be maintained as to the guilt of the accused, but a new sentencing hearing will be given to the inmate. This way finality is only partly disrupted because the individual may only have his sentence reevaluated under the changing demands of Due Process. This would avoid the risk of granting the “formerly guilty” a free ticket out of jail based on a mere technicality.

In effect, this analysis would reinstate a modified version of the *Linkletter* balancing test.¹⁹⁸ A trial judge should determine whether to

brought under § 2255, not direct appeal); *United States v. Tabares*, 951 F.2d 405, 409 (1st Cir. 1991) (holding ineffective assistance of counsel claim inappropriate on direct review when issue required information beyond trial record).

¹⁹⁶ Unfortunately, this policy is unlikely to be adopted by the Supreme Court based on the Court’s reluctance to issue advisory opinions.

¹⁹⁷ See *supra* note 51 and accompanying text.

¹⁹⁸ To avoid the apparent inconsistent results that *Linkletter* produced, our notion that the Supreme Court is bound by its own precedent would have to be altered. Most judges on

rehear the case in light of the new change in the law or to dismiss the case at the outset. The proposed remedy will remove the confusing and unworkable substance-procedure distinction in a *Teague* analysis.

B. Proposed Amendment to the AEDPA

Perhaps the best long-term solution would be to include a death penalty exception in the federal AEDPA statute. This exception would remove the possibility of a death row inmate being executed before he has the opportunity to have his decision reheard and would allow for the uniform application of retroactivity in federal courts for death row inmates.

The exception should be included in parts (b)(1) and (b)(2) of section 2244.¹⁹⁹ Recall that § 2244 is the statute that determines the finality of the decision. The two habeas statutes have almost identical language and would also have to be altered; § 2255 is used when appealing a conviction while in federal custody and § 2254 is used for appealing a conviction while in state custody. The revised statute would read as follows with the portions that are italicized being the new additions:

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed *unless the applicant was sentenced to death and is relying on a new rule of constitutional law and further meets the procedural requirements of part (b)(3) of this statute.*

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) (i) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

the Supreme Court already seem to have accepted this view including one of the most conservative Justices, Justice Thomas. See KEN FOSKETT, *JUDGING THOMAS: THE LIFE AND TIMES OF CLARENCE THOMAS* 281 (1st ed. 2004). Foskett notes that Thomas is one of the most willing current Supreme Court members to overrule precedent. *Id.* Quoting Justice Scalia, "He [Justice Thomas] does not believe in stare decisis, period." *Id.*

¹⁹⁹ See *supra* note 8 and accompanying text.

(ii) *the applicant was sentenced to death and is relying on a new rule of constitutional law and further meets the procedural requirements of part (b)(3) of this statute; or*

(B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)

(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari, *unless the denial is based on a new rule of constitutional law, in which case the decision is appealable.*

Commentary:

A “new rule of constitutional law” means that the decision was not final at the time the initial application was made. The statute would be construed to afford previously convicted death penalty inmates the same amount of protection as inmates that will eventually be convicted. This is necessary in order to treat defendants equally. This statutory change also recognizes that the death penalty is different from all other criminal penalties. However, the change must be limited to those convicted of a capital crime in order to ensure the continued expansion of civil liberties. Due to the limited number of individuals on death row, the costs of applying a case retroactively on collateral review will be minimal. Thus expansions in the liberties of death row inmates should not be curtailed.

Unfortunately, the ideal solution of an amendment to the habeas statutes is most likely the least attainable. Congress has a vested interest in appearing to be “tough on crime.” It is unlikely, given the political atmosphere in a post-9/11 world, that Congress would ever implement a policy of reforming habeas to expand the right of inmates to challenge the constitutionality of a sentence. Furthermore, there is also a strong economic incentive in effectively eliminating habeas petitions from federal courts. By limiting habeas petitions, Congress has loosened the strain on an already overworked, underpaid federal judiciary. It is safe to say that unless a habeas lobbying group reaches Congress, the only real reform will be through the judiciary.

V. CONCLUSION

This Note has argued that when the penalty is death a different standard of retroactivity should apply. Regrettably, there are no easy answers in deciphering the problem of retroactivity. The common law affords the easiest answer, but is admittedly unworkable as a solution due to the great costs involved with applying every new law retroactively. However, as this Note has shown, the costs are different when faced with the possibility of an unconstitutional, or perhaps even wrongful, execution. Congress and the Supreme Court have effectively narrowed the scope of the retroactivity doctrine in collateral review cases but have not accounted for the fact that death is fundamentally different from all other penalties. This Note has proposed several judicial remedies for applying a new case retroactively in death penalty cases and has also proposed an amendment to the AEDPA statutes allowing for a death penalty exception to the otherwise restrictive AEDPA requirements. However, a death penalty exception to the AEDPA will

2004] *Reluctance Towards Retroactivity* 485

be hard to come by and, cynically or not, we may just have to wait for the vote of a new Supreme Court Justice.

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