2007

A Retroactivity Retrospective, With Thoughts for the Future: What the Supreme Court Learned from Paul Mishkin, and What It Might

Kermit Roosevelt III
University of Pennsylvania Carey Law School

A Retroactivity Retrospective, With Thoughts for the Future: What the Supreme Court Learned from Paul Mishkin, and What it Might

Kermit Roosevelt III†

INTRODUCTION

On June 7, 1965, the Supreme Court decided *Linkletter v. Walker*,[1] in which it asserted a general power to specify the "retroactive" scope of its decisions. In November of that same year, Paul Mishkin published his Harvard Law Review Foreword *The High Court, the Great Writ, and the Due Process of Time and Law*.[2] Mishkin identified *Linkletter* as a case that, "though less likely to attract immediate attention" than coevals such as *Griswold v. Connecticut*,[3] "may well prove as significant over the years."[4] The forecast was prescient; *Linkletter* has had serious consequences in a wide range of fields. In the specific area of retroactivity, it set the Court upon an odyssey that continues to this day.

Mishkin also characterized the decision as "basically unwise,"[5] an assessment that proved equally accurate. *Linkletter* was a serious mistake, and most of the Court's struggles with retroactivity over the years have been an attempt to resolve the puzzles it created. In this article, I will first discuss *Linkletter* and Mishkin's critique. I will then look at the Court's struggle with *Linkletter*'s legacy, attempting to offer some insight as to

† Professor of Law, University of Pennsylvania Law School. Thanks to the participants at the Mishkin Symposium for their comments and insight, to John Yoo and Jesse Choper for their organizational skills, and to Paul Mishkin for education and inspiration in equal parts.

1. 381 U.S. 618 (1965).
2. 79 HARV. L. REV. 56 (1965).
3. 381 U.S. 479 (1965).
4. Mishkin, *supra* note 2, at 56.
5. *Id.* at 58.

how the deficiencies of the current approach derive from *Linkletter* and could be ameliorated by a fuller acceptance of Mishkin's views. Last, I will offer specific thoughts on the retroactivity problem currently before the Court.

That problem is what retroactive effect should be given the line of cases beginning with *Apprendi v. New Jersey*[6] and culminating in *United States v. Booker*,[7] which invalidated the mandatory aspect of the Federal Sentencing Guidelines. *Booker* suggests that a vast number of federal sentences have been imposed in an unconstitutional fashion, and full retroactive application threatens tremendous disruption. We can achieve a proper balance between systemic disruption and justice to individuals, I will suggest, by heeding Paul Mishkin's basic insights. We ought not to think in terms of retroactivity at all. Instead, we need only ask, according to our best current understanding of the law, whether the pre-*Booker* imposition of sentences violated the constitutional rights of individual defendants, and if so, whether those wrongs merit a remedy.[8]

I

LINKLETTER

Linkletter dealt with the aftermath of *Mapp v. Ohio*,[9] which had held the Fourth Amendment exclusionary rule applicable to the states via the Fourteenth Amendment. *Mapp* overturned *Wolff v. Colorado*,[10] which had allowed the use of unconstitutionally seized evidence in state court. It thus called into question the many convictions of state court defendants obtained in proceedings involving the introduction of such evidence.

By the time the Court decided *Linkletter*, it had already applied the *Mapp* rule to cases that reached it via direct review.[11] It was clear, then, that *Mapp* would upset state convictions at least to that extent: defendants whose convictions had not become final at the time *Mapp* was decided were entitled to its benefits. The question confronting the *Linkletter* Court was how to deal with a different class of litigants: those (like Linketter) whose convictions had become final by the time of *Mapp* and who now sought to challenge those convictions via petitions for writs of habeas corpus.

---

6. 530 U.S. 466 (2000).

7. 543 U.S. 220 (2005).

8. In an earlier article, I argued that we would be better off without the concept of retroactivity at all. *See* Kermit Roosevelt III, *A Little Theory is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 CONN. L. REV. 1075 (1999) [hereinafter Roosevelt, *Retroactivity*]. This Article refines that analysis by incorporating new work in constitutional theory and applies it to the *Booker* problem.

9. 367 U.S. 643 (1961).

10. 338 U.S. 25 (1949).

11. *See, e.g.*, Ker v. California, 374 U.S 23 (1964).

It was to answer this question that *Linkletter* introduced the concept of nonretroactivity. A new rule of law such as that produced by the overruling of *Wolf*, the Court announced, should be given effect in cases on direct review. But as far as collateral attacks on final decisions were concerned, no "set principle" governed, and "in appropriate cases the Court may in the interest of justice make the rule prospective."[12] The assertion of what Mishkin called "a broad judicial power of prospective limitation"[13] was plain enough, but the font of this power remained somewhat turbid. Though *Linkletter* cites several prior cases, it acknowledges that they are distinguishable[14] and investigation suggests that these cases feature what I have called "spurious nonretroactivity."[15] They are examples of federal courts refusing to apply law-changing state-court state-law decisions to pre-decision events—an outcome resembling *Linkletter*'s idea of prospectivity. But these cases rest less on the idea that judicial decisions may be given only prospective effect than on the principle that federal courts are not bound by "unsettled" state-court readings of state law. That is, they are concerned not with retroactivity but primarily with the allocation of interpretive authority between state and federal courts on questions of state law under the regime of *Swift v. Tyson*.[16]

So the concept of nonretroactivity on which *Linkletter* relied did not lie already in the judicial arsenal. It was crafted to solve a particular problem—to prevent habeas petitioners from claiming the benefits of new rules of constitutional criminal procedure. To assess the wisdom of this innovation, we need to examine several subsidiary issues.

The first is the gravity of the problem. The *Linkletter* dissenters, Douglas and Black, denied that any distinction between direct and collateral review needed to be made. They would have allowed Linkletter a new trial at which the unconstitutionally seized evidence would be excluded.[17]

That approach might have been tolerable in *Linkletter* itself. As Justice Black's dissent pointed out, a state's reliance on the ability of its prosecutors to use evidence its police had obtained in knowing violation of the Fourth Amendment is not the purest innocence.[18] And as Black also argued, some of the Court's statements about the nature of the exclusionary rule had made it sound like a remedy mandated by the Constitution and

12. *Linkletter*, 381 U.S. 479, 627, 628 (1965).

13. Mishkin, *supra* note 2, at 59.

14. As Mishkin points out, *see id.*

15. Roosevelt, *Retroactivity*, *supra* note 8, at 1084, n.44.

16. 41 U.S. (16 Pet.) 1 (1842) (holding that federal courts are not bound by state court interpretations of general common law). *See* Roosevelt, *Retroactivity*, *supra* note 8, at 1084-87 (discussing pre-*Linkletter* "spurious nonretroactivity" cases).

17. *Linkletter*, 381 U.S. at 653 (Black, J., dissenting).

18. *Id.* at 652 (Black, J., dissenting).

thus beyond the power of judges to withhold, even on collateral review.[19] But in subsequent cases, such as *Miranda v. Arizona*,[20] the Court created rules that states could not have anticipated and whose precise specifications were plainly not drawn directly from the Constitution. No state, regardless of its good faith, could have been expected to have its police officers administer the *Miranda* warning before the Court created it. Invalidating final convictions on the basis of such new rules would indeed have had unacceptable consequences; it would have punished states for constitutional violations they had no way to avoid.[21]

So some solution was needed.[22] To evaluate the one *Linkletter* offered, we need to consider its costs and benefits, and how they compare to those of alternative approaches. I will argue, as Mishkin did, that *Linketter*'s creation of nonretroactivity was an unwise choice, one which both failed to achieve its goals and carried significant costs. In fact, *Linkletter*'s innovation was worse than useless. The problem of collateral claimants became a problem only because of the changes *Linkletter* made, and could have been resolved quite comfortably within existing law.

II
MISHKIN'S RESPONSE

A. Costs

Mishkin identified one main cost of the *Linkletter* innovation: the erosion of what the opinion termed the "declaratory theory" of law.[23] Conventionally associated with Blackstone, the declaratory theory holds that courts "simply 'find' or declare a preexisting law and do not exercise any creative function."[24] In its place, *Linkletter* offered a vision, which it attributed to Austin, of judges who "do something more than discover law; they make it interstitially by filling in with judicial interpretation the vague, indefinite, or generic statutory or common-law terms that alone are but the empty crevices of the law."[25]

The relevance of the Austinian view to retroactivity might not be immediately clear. The reasoning is as follows. On the declaratory theory, the Court has no power to make law; law's source is never the Court. An overruled decision is thus simply mistaken, and once the overruling court

19. *Id.* at 649 (Black, J., dissenting).

20. 384 U.S. 436 (1966).

21. *See* Mishkin, *supra* note 2, at 100 (discussing balance between justice and administrability).

22. Assuming, that is, that results such as *Miranda* were to be reached. A "solution" that I do not consider would be for the Court simply never to decide cases in such a way that granting relief on collateral review would be unacceptably disruptive. This has been suggested. *See* sources cited *infra* note 74.

23. *Linkletter*, 381 U.S. at 623 n.7.

24. Mishkin, *supra* note 2, at 59.

25. *Linkletter*, 381 U.S. at 623-24.

recognizes the mistake, it must also conclude that the law has always been what it is now declared to be. (This is, notably, the approach the Court has maintained with respect to retroactivity on questions of statutory interpretation, where its lawmaking power is minimal.[26]) On the Austinian theory, however, the source of much of the law—the interstitial parts—is nothing more than the Court. An overruled decision may be considered unwise or misguided, but it comes from a body with lawmaking authority, and so it cannot be simply mistaken. It is, as *Linkletter* put, "an existing juridical fact until overruled."[27]

The Austinian view of law does not suffice, by itself, to generate the nonretroactive results that *Linkletter* sought. One needs, in addition, the premise that a reviewing court should not disturb decisions which were correct when rendered. In other words, the reversal of such decisions based on new law should occur not as a matter of course but only when "retroactive" application of the new law creates an error justifying reversal.[28] What the Austinian view can do by itself is to produce the costs that Mishkin identified.

On the declaratory theory, a court that demands obedience to its decisions is demanding obedience to the law, and in constitutional cases to the Constitution—an obedience our political and legal culture overwhelmingly accepts as duty. But if the source of a decision is only the court, then the demand is for obedience to the court, at best as an institution, at worst as a collection of individuals.[29] That obedience is a duty less recognized, and indeed frequently denied.[30] By asserting that the authority behind many rules of law is nothing more than the Court, *Linkletter* sapped "the moral force that gives substance not only to the felt obligation to obey, but to other pervasive attitudes toward the Court that are essential to the Court's effective operation."[31]

Mishkin wrote at a time when, as he put it, the symbolism of the declaratory theory and "the loyalties it commands . . . seem to have

---

26. *See* Bousley v. United States, 523 U.S. 614, 620 (1998) (noting that *Teague* analysis does not apply to statutory interpretation); Roosevelt, *Retroactivity*, *supra* note 8, at 1076.

27. *Linkletter*, 381 U.S. at 624.

28. In fact, even this premise will not produce the *Linkletter* result, because it does not distinguish between direct and collateral review, a fact the Court later realized. *See infra* Section I.B. The alternative is that courts should generally decide cases according to their best current understanding of the law, what I have termed the "decision-time" as opposed to the "transaction-time" model. *See* Roosevelt, *Retroactivity*, *supra* note 8, at 1078-79.

29. *See* Mishkin, *supra* note 2, at 63 (noting "the loss involved if judges could not appeal to the idea that it is 'the law' or 'the Constitution'—and not they personally—who command a given result").

30. *See, e.g.*, LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

31. Mishkin, *supra* note 2, at 67. The other pervasive attitudes are those that attend the belief that the Court is a passive interpreter of the law rather than an active producer, e.g., that the social or political views of the Justices have no effect on their decisions.

diminished."[32] The present is another such time. Denunciations of judicial activism issue from the executive and legislative branches; in book form, they ride the New York Times bestseller list.[33] Political science scholarship frequently models judicial decisionmaking as liberal or conservative in narrowly partisan terms, as though law and precedent placed no constraints on the decisions of even lower-court judges.[34] And the most recent Harvard Law Review Foreword, forty years after Mishkin, is titled *A Political Court*.[35]

The costs of widespread acceptance of the crude political view of judicial decisionmaking are substantial. If judges are simply political actors, then there is little reason not to demand that they advance the policies we prefer, and little reason to heed them when they do not.[36] These consequences might not be considered costs, of course, if the crude political view were true—if the idea that law is more than politics were nothing more than a myth designed to lull the credulous while sophisticates went about their business.

But Blackstone is not just the opiate of the masses. The declaratory theory, while certainly not true in its most extreme form, captures a crucial element of the judicial process.[37] Moreover, it is something of a self-fulfilling prophecy. The belief that law is more than politics is one of the things that stops law from becoming merely politics. Values of the legal culture, such as the need for reasoned justification of judicial decisions,

---

32. *Id.* at 68.

33. *See* KERMIT ROOSEVELT III, THE MYTH OF JUDICIAL ACTIVISM 2, 12 (2006) [hereinafter, ROOSEVELT, MYTH] (discussing charges of activism).

34. *See, e.g.*, JEFFREY A. SEGAL & HAROLD SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (Cambridge 2002); Richard J. Pierce, Jr., *Two Problems in Administrative Law: Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300. For a rebuttal to some attitudinal studies, see, for example, Michael C. Dorf, *Whose Ox is Being Gored? When Attitudinalism Meets Federalism*, 21 ST. JOHN'S J. LEGAL COMMENT 497 (2007); Ernest Young, *Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival After* Gonzales v. Raich, 2005 SUP. CT. REV. 1; Harry T. Edwards, *Collegiality and Decisionmaking on the D.C. Circuit*, 84 VA. L. REV. 1335 (1998).

35. Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31 (2005).

36. Justice Scalia has made this point eloquently in several places. *See, e.g.*, Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 999-1000 (1992) (Scalia, J., concurring/dissenting).

37. The key question is what sort of considerations judges may legitimately take into account when deciding cases that do not have clear answers. Faithful judges understand that they may not rely on a preference for one litigant or the other; presumably they also understand that they may not rely on a preference for a particular policy outcome. The permissible considerations are what Jack Balkin and Sandy Levinson call "high politics," things such as general beliefs about the competencies of courts versus legislatures, or the circumstances under which the outcome of a democratic process can or cannot be trusted as a reliable guide to the public interest. *See* Jack M. Balkin & Sandy Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001); ROOSEVELT, MYTH, *supra* note 33.

operate as a constraint on judicial decisionmaking.[38] Perhaps more important, the idea of a distinction between law and politics is inculcated in future judges during their legal education. If law professors teach that judges are simply politicians, they can make it true, for they teach the next generation of judges. And if the Supreme Court rules in ways that suggest that it enjoys the discretion, of a legislature, future generations, and future Justices, will believe it. That is the danger that *Linkletter* courted.

B. Benefits

When we turn to the question of what benefits the *Linkletter* Court reaped from its Faustian bargain, the answer is somewhat surprising. Whatever the merits or demerits of its approach as a general matter, *Linkletter* astonishingly failed to achieve its primary purpose: to distinguish between direct and collateral review. In place of the conventional rule that courts should generally decide cases according to their best current understanding of the law, *Linkletter* announced that "retroactivity" would be governed by a three-factor test: (1) whether retroactive application serves the purpose of the new rule, (2) whether the parties relied on the old rule, and (3) what the effect of retroactive application would be.[39]

Applying these factors to Linkletter's case, the Court concluded that prospectivity was the appropriate result. The exclusionary rule was meant to deter unconstitutional searches, a purpose which would not be served by applying the rule to searches conducted under *Wolff*. According to the Court, states had "relied on *Wolff* and followed its command."[40] And ordering new trials in untold numbers of concluded cases would plainly create disruptive effects.

The application of the *Linkletter* test to Linkletter seems relatively straightforward, though it was not without its critics.[41] But its broader use presents a glaring problem the Court did not acknowledge: applying the *Linkletter* test to Mapp would likewise have required prospective application, on the same grounds or even *a fortiori*, since the search in *Mapp* occurred before that in *Linkletter*.[42] None of the factors the Court identified distinguished between the contexts of direct and collateral review. Consequently, though the Court announced that the rule of retroactive application on direct review was settled, the test it adopted washed that rule away.

---

38. *See* Jack M. Balkin, *The Basic Structure of Constitutional Interpretation and the Limits of Interpretive Theory* (Apr. 12, 2006), Balkinization, http://balkin.blogspot.com/2006/04/basic-structure-of-constitutional.html.

39. *Linkletter*, 381 U.S. 479, 636 (1965).

40. *Id.* at 637.

41. *See id.* at 646-49 (Black, J., dissenting).

42. *See id.* at 641-42 (Black, J., dissenting).

It is hard to imagine that the Court was wholly ignorant of that fact. Justice Black's dissent suggested it. So, later, did Mishkin.[43] And willful or not, the ignorance could not be sustained. When other cases came along on direct review, the Court had to confront the fact that its chosen test led to prospectivity in that context as well. Its reaction to that none-too-surprising revelation—and how it eventually managed to glean some benefit from Mishkin's wisdom—is the subject of the next part. The point of this one is that Mishkin's dim assessment of *Linkletter* was correct: the decision offered little in the way of benefits to offset its substantial costs. In fact, the story is sadder still: *Linkletter*, by introducing the concept of retroactivity, created the very problem (how to distinguish between direct and collateral review) that it set out to solve.[44] *Linkletter* managed only to set the Court off on its retroactivity odyssey.

III
LINKLETTER'S AFTERMATH

Linkletter created an unstable situation. The inconsistency between its test and the rule of automatic retroactivity for direct review, coupled with the Court's inability to distinguish between the two contexts, meant that either the new test or the old rule would have to give way. Pushing forward might have seemed more productive than pulling back, and rather than rethink *Linkletter*, the Court expanded it. In *Stovall v. Denno*, it decided that while new rules would continue to be applied in the case that announced them, the *Linkletter* test would henceforth govern both direct and collateral review.[45]

I am surprised that *Stovall*'s "selective prospectivity" is not more widely considered an abomination.[46] *Linkletter* generated the criticism that the treatment of individuals presenting claims to the Supreme Court should not depend upon the procedural posture of the case.[47] The complaints were valid, given that *Linkletter* had offered no reason why procedural posture should matter. But the reconciliation that *Stovall* offered was even worse. When a new rule was announced and applied but subsequently held to be prospective, only one case would be treated differently from the rest. But it would be a case absolutely indistinguishable from a large number of the

43. Mishkin, *supra* note 2, at 74-75. Mishkin did, however, predict that the Court would adhere to the rule of retroactivity on direct review, *see id.* at 76 (discussing *Griffin*), confidence that turned out to be misplaced. *See infra* text accompanying notes 46-49 (discussing selective prospectivity).

44. *See* Roosevelt, *Retroactivity*, *supra* note 8, at 1124 (stating that *Linkletter* "did not offer the best possible response to a difficult new problem. It created the problem and offered a plainly inadequate response").

45. 388 U.S. 293 (1967).

46. Among the academics who seem to endorse it, one finds persons of good faith and great intelligence. *See infra* text accompanying notes 77-80.

47. *See* Roosevelt, *Retroactivity*, *supra* note 8, at 1091 n.84 (citing sources).

others: the new rule would be applied in one case on direct review, and in that one alone. The Court's explicit refusal to treat like cases alike is perhaps the closest it has come to an open abdication of the judicial role.[48]

Indeed, the *Stovall* approach proved unsustainable. Starting in 1969, Justice Harlan offered a different approach. He argued that the nature of the judicial function required that a new rule, if once applied on direct review, be thereafter applied to all cases on direct review. "Simply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule constitute an indefensible departure from this model of judicial review."[49]

However, Harlan would have treated habeas petitions differently. Drawing heavily on Mishkin's analysis, Justice Harlan argued that the purposes of federal habeas corpus review made it generally appropriate to judge state-court convictions, by the legal standards in effect at the time those convictions became final. Habeas, Harlan pronounced, served primarily to deter constitutional violations, as "a necessary additional incentive to trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards."[50] Just as the *Linkletter* Court had concluded with respect to the exclusionary rule, Harlan reasoned that deciding habeas petitions under new rules of constitutional criminal procedure would not serve this purpose.

New substantive constitutional law—law that placed "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe"—constituted an exception, and should govern in habeas cases.[51] So, too, said Harlan, should new rules of criminal procedure that enhanced the reliability of the "fact-finding procedures."[52]

---

48. *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 33-34 (1921) ("It will not do to decide the same question one way between one set of litigants and the opposite way between another."). Another contender is the announcement that a particular ruling shall have no precedential value but be good for one case only, a description that might be applied either to *Bush v. Gore*, 531 U.S. 98 (2000), or to some circuits' practice of designating opinions as unpublished or nonprecedential and forbidding litigants to cite them. The Supreme Court's rejection of *Stovall* rests on constitutional grounds and provides a strong argument against designating opinions as nonprecedential. *See* Griffith v. Kentucky, 479 U.S. 314, 322-23 (1987) ("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."). *See also* Anastasoff v. United States, 235 F.3d 1054 (8th Cir. 2000) (striking down a no-citation rule as inconsistent with the judicial power), *vacated as moot* 235 F.3d 1054 (8th Cir. 2000) (en banc). The question of whether no-citation rules are constitutional has itself been mooted by the Supreme Court's recent promulgation of a rule requiring the circuits courts to allow citation of unpublished opinions. *See* Bennett L. Gershman, *At Last, A Citability Rule*, NAT'L L.J. 26, May 22, 2006.

49. Mackey v. United States, 401 U.S. 667, 679 (1971) (Harlan, J., dissenting).

50. Desist v. United States, 394 U.S. 244, 262-63 (1969).

51. *Mackey*, 401 U.S. at 692.

52. *Desist*, 394 U.S. at 262.

In this he precisely followed Mishkin, who had argued that courts should "assess the validity of a conviction, no matter how long past, by any current constitutional standards which have an intended effect of enhancing the reliability of the guilt-determining process."[53] Unfortunately, Harlan later amended his second category to include only procedures so fundamental to fairness as to be "implicit in the concept of ordered liberty"—a phrase that has never provided workable guidance.[54]

The first translation of Mishkin's article into judicial opinion appeared only as a dissent, but the appeal of his ideas was hard to deny. Like a popular book, they obtained wider release. In 1987, the Court began the process of bringing its doctrine into line with Justice Harlan's recommendations. *Griffith v. Kentucky*[55] accepted his recommendation for the treatment of direct review, and *Teague v. Lane*[56] extended the endorsement, pronouncing that habeas cases would generally be governed by the law in effect at the time the convictions became final.[57]

Translation shares roots with betrayal, and it carries the risk of unfortunate transformation. *Teague* proved no exception. *Teague* combined Justice Harlan's two procedural exceptions, granting retroactive effect only to new procedural rules that both contributed to the accuracy of the verdict and lurked within ordered liberty. It also adopted a different conception of the "new rule." Where Harlan saw a narrow category of cases, *Teague* included any result "not dictated by precedent."[58] As a majority of the Court stated later in *Butler v. McKeller*, the definition of "new rule" "validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions."[59] On this approach, a rule is new if it is "susceptible to debate among reasonable minds."[60]

In 1996, Congress entered the game, largely codifying *Teague* in the Anti-terrorism and Effective Death Penalty Act (AEDPA).[61] Among other things, the AEDPA restricted habeas relief for claims decided on the merits by state courts to cases in which the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[62] Though the

---

53. Mishkin, *supra* note 2, at 82.

54. For similar criticism of the "fundamental right" prong of Harlan's approach, see Note, *Rethinking Retroactivity*, 118 HARV. L. REV. 1642 (2005).

55. 479 U.S. 314 (1987).

56. 489 U.S. 288 (1989).

57. Unfortunately, by this point the palimpsest of opinion had descended over the initial article, and *Griffith* and *Teague* cite Harlan's opinions rather than Mishkin's superior original.

58. *Teague*, 489 U.S. at 301.

59. 494 U.S. 407, 414 (1990).

60. *Id.* at 415.

61. Pub. L. No. 104-132, codified at various sections of 28 U.S.C.

62. 28 U.S.C. § 2254(d)(1).

meaning of this language, like the *Teague* "new rule" standard itself, sparked considerable dispute,[63] the basic principles are clear. Federal courts in habeas cases must compare state court decisions to the law existing at the time the state decision was rendered, and only to the law announced by the Supreme Court. These basic outlines are sufficient to assess our current circumstances.

IV
WHERE WE STAND: AN ASSESSMENT

A. Direct Review

The Court's approach to cases on direct review remains the one announced in *Griffith*: the "integrity of judicial review" requires that a rule applied in one case on direct review be applied to all similar subsequent cases.[64] It is hard to see how any other approach could be consistent with the Court's obligation to decide cases correctly. Admittedly, however, such an approach may lead to disruption when the Court breaks new ground. At any moment, many cases are at some stage between first trial and final appeal. Blanket retroactivity on direct review would seem to require reversal of many trial level decisions correct under settled law at the time they were rendered.

Appearances, however, can deceive. Courts utilize several devices to withhold relief in practice even while honoring *Griffith*'s command in principle. As Toby Heytens puts it, "[f]ull retroactivity in form has degenerated into a significant amount of nonretroactivity in fact."[65]

Forfeiture rules, which bar litigants from later raising claims they have failed to assert in a timely fashion,[66] are the most widely-used device. Forfeiture has the potential to be extremely powerful in reducing the number of litigants who can take advantage of new rules. Precisely because the rules are new, litigants are unlikely to have asserted them at trial.

Most commentary is critical of such use of forfeiture, and rightly so.[67] Forfeiture rules are not designed with the circumstance of law-changing decisions in mind. Their core purpose is to promote compliance with claim-presentation rules, which in turn "further efficiency and fairness to participants by ensuring that additional proceedings will not be required

63. For a valuable and insightful analysis of the issues posed by § 2254(d)(1) and other sections of the AEDPA, and their interaction with retroactivity analysis, see A. Christopher Bryant, *Retroactive Application of "New Rules" and the Antiterrorism and Effective Death Penalty Act*, 70 GEO. WASH. L. REV. 1 (2002). For the disputes, see, e.g., Williams v. Taylor, 529 U.S. 362 (2000).

64. Griffith v. Kentucky, 479 U.S 314, 322-23 (1987).

65. Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 YALE L.J. 922, 979 (2006).

66. *See, e.g.*, Yakus v. United States, 321 U.S. 414, 444 (1944).

67. *See* Heytens, *supra* note 65; Meir Katz, Note, *Plainly Not "Error": Adjudicative Retroactivity on Direct Review*, 25 CARDOZO L. REV. 1979 (2004).

because of issues that could have been, but were not, dealt with the first time around."[68] In the paradigm case of a new rule, though—where the Supreme Court overturns its prior precedent—"timely" trial presentation of the claim is frivolous (because the prior precedent foreclosed it), and penalizing litigants for failing to raise frivolous claims serves neither fairness nor efficiency. Thus, a blanket use of forfeiture makes little sense.

However, forfeiture is not inexorable. Federal courts can correct "plain errors" even if the relevant claim was not asserted at the appropriate time.[69] A decision contrary to the new rule is plainly erroneous, assuming that the plainness of error should be assessed according to the law at the time of appeal.[70] Thus, courts can use forfeiture to prevent broad disruption while also using plain error analysis to grant relief in appropriate cases. Excusing forfeitures where doing so would further the new rule's purpose would produce sensible results in those cases, albeit in an ad hoc fashion[71] Even this refined approach proves suboptimal, however, because the predictable consequence is inefficiency in other cases. Hoping to preserve the possibility of benefiting from new rules whose purposes are not served by application in their case, litigants will raise and repeat arguments that lower courts are obliged by binding authority to reject.[72]

If forfeiture doctrine generally should not prevent litigants from the "untimely" assertion of claims based on new law,[73] how can the Court control the disruption of legal transitions? Some argue that the Court should not try to, because the costs of disruption are vital in restraining judges.[74] But unless one has a rather dark view of judges' ability to weigh

---

68. Heytens, *supra* note 65, at 958.

69. *See, e.g.*, FED. R. CRIM. PRO. 52(b).

70. One might argue instead that error should be determined by reference to law existing at the time of trial. Consistent with my belief that courts should generally decide legal issues according to their best current understanding of the law, *see* Roosevelt, *Retroactivity*, *supra* note 8, at 1117, I think that the law at the time of appeal provides the appropriate referent. *Accord* United States v. Cotton, 535 U.S. 625, 632 (2002); Heytens, *supra* note 65, at 959.

71. *See* Roosevelt, *Retroactivity*, *supra* note 8, at 1131-34 (advocating purpose-based analysis). The Supreme Court suggested something similar in its analysis of *Apprendi* error in *United States v. Cotton*, 535 U.S. 625 (2002). There it granted that the error (failing to charge and prove a specific quantity of drugs) was plain but found that because the evidence relating to quantity was overwhelming and uncontroverted, the error did not seriously affect the "fairness, integrity, or public reputation of judicial proceedings." *Id.* at 633.

72. In addition to inefficiency, other undesirable consequences include the possibility of diverting attorney resources from valid arguments, weakening those arguments by associating them with foreclosed ones, antagonizing the judge, and earning sanctions. *See* Heytens, *supra* note 65, at 961-62.

73. Heytens provides a compelling analysis of the circumstances under which forfeiture is appropriate, concluding that it should typically not bar claims when trial-time law was clearly unfavorable but should when the law was merely unclear. *See* Heytens, *supra* note 65, at 959-72. The analysis works in terms of the purpose of claim-presentation rules, but one might also say that the resolution of legal unclarity should generally not be understood to create a new rule.

74. *See, e.g.*, Harper v. Va. Dept. of Taxation, 509 U.S. 86, 105 (1993) (Scalia, J., concurring) ("Prospective decisionmaking is the handmaid of judicial activism, and the born enemy of stare decisis."); James v. United States, 366 U.S. 213, 224-25 (1961) (Black, J., concurring/dissenting) ("one

stare decisis appropriately, requiring them to impose pointless costs[75] on society in order to announce new rules seems undesirable.[76] Among those who believe that minimizing disruption is desirable two main proposals have emerged.

The most recent, put forward by Toby Heytens, suggests a return to the Warren Court's nonretroactivity jurisprudence—in particular, the selective prospectivity of *Stovall v. Denno*.[77] Heytens observes that forfeiture rules are poorly adapted to manage disruption and, moreover, are subject to the same objections as nonretroactivity.[78] He praises nonretroactivity, on a relative basis, for confronting the relevant issues candidly, and chooses selective prospectivity because it avoids the advisory opinion problem that plagues full prospectivity and, more importantly, preserves the incentives of litigants to raise novel arguments.[79]

Earlier, Richard Fallon and Daniel Meltzer argued for a similar approach, suggesting a remedial analysis that applied new rules of constitutional law but withheld remedies in appropriate cases based on *Linkletter*-type considerations of purpose and effect.[80] Like Heytens, Fallon and Meltzer intimated that the most desirable regime might end up approximating selective prospectivity.[81]

Both proposals are correct in arguing that the problem of disruption should be confronted squarely by a doctrine designed to handle it, rather than through the subterfuge or ad hocery of forfeiture. Of the two proposals, I prefer remedial analysis because it can be applied within what I have termed the decision-time framework, which directs courts to apply their best current understanding of the law to all cases. That is, it can operate within a framework that does not use the concepts of retroactivity or nonretroactivity at all—and as the concepts have brought us nothing but trouble, abandonment would be a step forward.

---

of the great inherent restraints upon this Court's departure from the field of interpretation to enter that of lawmaking has been the fact that its judgments could not be limited to prospective application"); Bradley Scott Shannon, *The Retroactive and Prospective Application of Judicial Decisions*, 26 HARV. J.L. & PUB. POL'Y 811, 856-57 (2003) (suggesting that the sort of disruption prospective application aims to avoid is in fact an indication that the new rule "should simply be rejected as bad law").

75. As by applying new rules of law to cases in which application does not serve their purpose—for instance, excluding from evidence confessions obtained voluntarily but without *Miranda* warnings prior to the *Miranda* decision.

76. A somewhat more sophisticated version of this argument suggests that reducing disruption (as through prospectivity) skews the stare decisis analysis by eliminating reliance interests the Court ought properly to weigh. *See* Shannon, *supra* note 74, at 872. It seems to me, however, that to the extent these reliance interests are not disrupted, they need not be weighed.

77. *See* Heytens, *supra* note 65, at 983-990.

78. *Id.* at 979-82.

79. *Id.* at 983-90.

80. Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991).

81. *See id.* at 1806.

Equally serious, all forms of prospectivity are fraught with serious constitutional difficulties. Pure prospectivity closely resembles an advisory opinion,[82] and, in its selective variant, it seems both unjudicial and a literal denial of the equal protection of the laws.[83] This argument against selectivity remains even if it is achieved through remedial analysis. Thus, I conclude that prospective results should be achieved through a remedial calculus, and such results must be pure and not selective.[84]

B. Collateral Review

In the direct review context, the Court has followed Mishkin's wisdom through Harlan and largely given up on the nonretroactivity experiment—which is to say, it has resumed treating cases the way it did for hundreds of years.[85] The main possible improvement to the current approach on direct review—controlling disruption through remedial analysis rather than forfeiture—is relatively minor. But collateral review presents more problems.

i. The Shock of the New

The extremely broad conception of newness embraced by *Teague* and its progeny produced two undesirable consequences. First, by refusing to allow relief based on new rules whenever the newly-resolved issue was "susceptible to debate among reasonable minds,"[86] the Court has effectively told habeas courts to defer to state court interpretations of federal law. A habeas court will not disrupt state judgments that are "good-

82. In defense of prospectivity, one might argue that it is not much different from dictum. But dictum is not binding precisely because courts have authority to say what the law is only in the context of deciding concrete disputes. Prospectivity, one could say, is an attempt to produce binding dictum: the court announces that a particular rule of law takes effect not in the case before it but in some other (future) case. But binding dictum does not exist, and neither should pure prospectivity. Admittedly, a court could achieve much the same result by foreshadowing through heavy-handed use of ordinary dictum, but that is simply one more reason why prospectivity is not needed.

83. Giving one person the benefit of a particular rule of law but denying it to another identically situated person: what could be a plainer violation? In federal court, of course, the Fifth Amendment Due Process Clause would be at issue, but even if this had not been held to include an equal protection component, deciding like cases differently also seems a straightforward due process violation.

84. *See* Roosevelt, *Retroactivity*, *supra* note 8, at 1132. The most obvious risk in such an approach is that it will discourage litigants from pressing novel arguments, but as long as the calculus is not perfectly predictable, this risk seems manageable. *See id.* Another problem is that not all contexts lend themselves to remedial analysis as well as constitutional criminal procedure—if the question is the validity of a statute, for instance, it is hard to imagine a "remedial analysis" that would hold the statute invalid but enforce it nonetheless. *See id.* at 1108.

85. *See* Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910) (Holmes, J., dissenting) ("judicial decisions have had retrospective operation for near a thousand years"). The difference is that the Court now has the concept of retroactivity, but the concept does no real mischief in the context of direct review.

86. Butler v. McKellar, 494 U.S. 407, 415 (1990).

faith interpretations of existing precedents"[87]—even if a subsequent decision reveals that the "good-faith interpretation" was wrong. This expansive concept of newness protects not only state court decisions that were clearly *correct* under settled trial-time law (such as decisions allowing the introduction of unconstitutionally seized evidence between *Wolf* and *Mapp*), but also decisions that, though reasonable, turn out to have been *incorrect* according to the best understanding of trial-time law.

Suppose that there exist two reasonable answers to an unsettled question of federal law. Two state courts diverge on the question, and the federal Supreme Court subsequently resolves it. Unless one believes that federal law exists in an indeterminate quantum flux until announced by the Supreme Court, one of those state court decisions is wrong when rendered. But neither can be disturbed on habeas, no matter what the Supreme Court says. Wrong but reasonable decisions survive collateral review.[88]

Deferential federal review of state court rulings on questions of federal law might seem obviously mistaken and improper.[89] However, the deference follows from one element of Harlan's approach to retroactivity issues on collateral review. That approach stemmed from his analysis of the purpose of habeas as a deterrent: "a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards."[90] Testing state decisions for good faith rather than correctness does deter misbehavior or disregard of federal rights.

What is lost when habeas is viewed purely as a deterrent, of course, is its error-correction function. Habeas allows state court criminal defendants to present their federal claims in a federal forum. In principle, a federal forum is available on direct review, since defendants convicted in state court can petition the Supreme Court for certiorari. But the promise of federal direct review is more apparent than real, given that the Supreme Court sensibly spends its limited institutional resources on divisive and unsettled legal issues rather than reviewing the application of established

87. *Id.* at 414.

88. More troubling, the decision that appears wrong but reasonable in light of trial-time Supreme Court decisions will survive even if it is unreasonable and squarely foreclosed in light of trial-time circuit law, pursuant to 28 U.S.C. § 2254(d)(1)'s reference to federal law "as determined by the Supreme Court of the United States." The restriction has led some to doubt the constitutionality of § 2254(d)(1). *See, e.g.*, Irons v. Carey, 479 F.3d 658 (9th Cir. 2007) (Noonan, J., concurring); James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696 (1998).

89. Bryant, *supra* note 63, argues that it is inconsistent with both the general principle of federal superiority with respect to federal law and the command of AEDPA.

90. Desist v. United States, 394 U.S. 244, 262-63 (1969). In *Desist*, Harlan followed Mishkin and identified the assurance of reliability as another purpose; however, this concern dropped away in *Mackey v. United States*, 401 U.S. 667 (1971) (Harlan, J., concurring).

law.[91] (Indeed, law clerks often recommend denial of a cert petition because a petitioner requests mere "error-correction."[92]) Thus, habeas is most defendants' only meaningful chance for federal review.[93] If that review is deferential, federal rights are substantially at the mercy of state courts. The appropriate level of alarm to accord this prospect is disputed,[94] but it seems both odd and unfortunate that habeas courts may not upset state court judgments that a subsequent Supreme Court decision has revealed to have been wrong and that may have been clearly wrong at the time of trial according to circuit law.

The second problem comes into view once we ask what vision of law and judging might justify such a restriction on habeas relief. The apparent premise of the *Teague* approach, and presumably of the AEDPA as well, is that such state court decisions are not "revealed to have been wrong," because new rules *create* the law they declare. The state court decisions represent not mistaken guesses as to what the law was, but paths not taken. The decisions are wrong only if a new decision retroactively changes what the law was at the time of trial.[95] Likewise, circuit law that correctly anticipates the Court's decision is not authentic and binding, because only the Court has the power to make law: it is accurate as a *prediction* but not as a *statement* of the law. Implicit in *Teague*'s definition of newness, then, is the idea that the Court makes new law not simply when it overrules a case or creates a clear break[96] with existing precedent, but that it does so any time it decides a question that was subject to debate among reasonable minds.[97]

This is a particularly virulent strain of the view that Mishkin identified in *Linkletter*. Not only does the Court make law, so that rules can have no

---

91. As Mishkin noted, "Reliance upon direct review by the Supreme Court as the exclusive means of enforcement would be illusory. The sheer volume of the Court's work, not to mention inadequacy of some state procedures for presenting these questions, would preclude adequate vindication of these constitutional rights." Mishkin, *supra* note 2, at 86-87.

92. *See generally* ROBERT L. STERN, ET AL., SUPREME COURT PRACTICE 219-86 (2002) (discussing factors motivating grants of certiorari).

93. *See, e.g.*, Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247, 253-54 (1988); James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997, 2009-10 (1992).

94. For a sampling of the literature, see, for example, Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981); Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 238 (1988); Daniel J. Meador, *Federal Law in State Supreme Courts*, 3 CONST. COMMENT. 347 (1986); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT. 599 (1999); Michael E. Solimine, *The Future of Parity*, 46 WM. & MARY L. REV. 1457 (2005).

95. This idea that "retroactive" decisions reach back to change what the law was is the concept that I have argued should be eliminated from our jurisprudence.

96. *See* Griffith v. Kentucky, 479 U.S. 314, 324 (1987) (discussing "clear break").

97. *Teague*'s concept of newness has been widely criticized. *See, e.g.*, Fallon & Meltzer, *supra* note 80, at 1748.

force until the Court announces them, but it does so in a great many cases. No non-unanimous decision, and presumably few unanimous ones, will qualify as the elaboration or unpacking of existing precedent, the making plain of what lay already implicit in prior decisions. Instead, most decisions are viewed as relatively unconstrained choices, and their rules are not law until the lawmaking Court has spoken.

The second problem with *Teague*'s understanding of newness, then, is that it produces all the costs Mishkin attributed to *Linkletter*: it suggests that many, if not most, judicial decisions are the product not of law and a constraining mode of analysis but of judges exercising legislative-like discretion. Harlan, like Mishkin, opposed this view. Harlan subscribed to a model of judicial decisionmaking in which "many, though not all, of this Court's constitutional decisions are grounded upon fundamental principles whose content does not change dramatically from year to year, but whose meanings are altered slowly and subtly as generation succeeds generation."[98] On this view, decisions fairly traceable to existing precedent are not new, even if they direct different results from those that obtained under prior law.[99] The Court should return to this understanding of newness to mitigate the expressive harm of *Teague*.

ii. Exceptional Problems

In addition to its concept of newness, troubling for both its practical consequences and its implicit view of the judicial process, *Teague* may be questioned for its definition of the new rules eligible for application on collateral review. Mishkin, Harlan, and *Teague* all agreed that new substantive rules—rules that in Harlan's words place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe"[100]—should govern in habeas. This makes good sense. If the state loses power to punish certain conduct in the future, it also presumably loses power to continue to punish past instances of such conduct, and continued detention violates the Constitution.[101]

The appropriate treatment of new procedural rules is more complicated. Mishkin suggested applying such new rules if they enhance "the reliability of the conviction process for establishing factual guilt."[102] Harlan, after originally accepting this formulation, replaced it with one that urged application of such new rules as were "implicit in the concept of

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

99. *See* Fallon & Meltzer, *supra* note 80, at 1748 (stating that "[t]he conception of legal newness implicit in *Teague* and its progeny is difficult to reconcile with the conception of the judicial role embraced by Justice Harlan").

100. Williams v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., concurring/dissenting).

101. For elaboration of this point, see Roosevelt, *Retroactivity*, *supra* note 8, at 1122-23.

102. Mishkin, *supra* note 2, at 81.

ordered liberty."[103] *Teague* combined the two Harlan formulations, an innovation with little obvious justification other than, perhaps, that a conjunction is harder to satisfy than either element alone.[104] If that was *Teague*'s purpose, it has been achieved: no new procedural rule has yet satisfied the *Teague* exception, and the Court has strongly intimated that none shall.[105]

The use of the "implicit in the concept of ordered liberty" criterion has been strongly criticized.[106] Although its purpose in retroactivity analysis is unclear, the point may be to limit collateral relief to cases involving violations of a sufficiently important or "real" procedural right rather than a judicially-created rule. But if that is the motivation, recent scholarship suggests a much more useful way of looking at the question.

Recent years, have seen an increase in attention to the distinction between "operative propositions"—the Constitution's actual grants of rights and powers—and "decision rules"—the rules that courts apply to determine whether a right has been violated or a power exceeded.[107] For a rough and ready example of the distinction, consider the Equal Protection Clause. The clause itself does not tell courts to apply the different tiers of scrutiny that have developed over the years. If we had to summarize its meaning, we might say that it prohibits discrimination that is unjustified, or, as the Court sometimes says, "invidious."[108] If you accept that view, "no invidious discrimination," would be the operative proposition; the tiers of scrutiny would be decision rules. This distinction may help decide which rules should be applied on collateral review.

---

103. *Compare Desist*, 394 U.S. at 262 (endorsing reliability criterion) *with Williams*, 401 U.S. at 694 (endorsing *Palko* standard).

104. *See* Teague v. Lane, 489 U.S. 288, 312-13 (1989).

105. *See* Roosevelt, *Retroactivity*, *supra* note 8, at 1096 and n.118.

106. *See generally* Note, *supra* note 54 (criticizing use of *Palko* standard, and advocating return to reliability criterion alone).

107. Significant works employing the distinction were published in the 1970s, and those wishing to trace it back farther can find antecedents in the nineteenth or even eighteenth century. *See* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFAIRS 107 (1976); Lawrence Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213-15 (1978); James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893); Fletcher v. Peck, 10 U.S. 87, 128 (1798) (suggesting that a judge should not strike a law down merely because he believes it unconstitutional, but only if "the opposition between the constitution and the law [were] such that the judge feels a clear and strong conviction of their incompatibility with each other"). In recent times, Richard Fallon has been one of the leaders in developing and analyzing the distinction. *See, e.g.*, RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION (2001); Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274 (2006). The terminology I use here is drawn from Mitchell Berman's excellent and comprehensive *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2005).

108. *See* Ferguson v. Skrupa, 372 U.S. 726, 732 (1963) (stating that "it is only invidious discrimination which offends the Constitution"). S*ee generally* Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1657 (2005) [hereinafter Roosevelt, *Calcification*] (discussing equal protection).

First, consider the easiest case: a new rule relating to the contours of a "substantive" operative proposition, one governing primary conduct. Imagine that after initially holding that expressive flag-burning does not count as "speech" for the purposes of the First Amendment, the Court reverses itself. This is a decision about an operative proposition—the scope of the Amendment's protection—and it is about substance, not procedure. It presents an example of Harlan's first exception—a determination that certain conduct cannot be punished—and it should clearly govern on collateral review. People incarcerated for expressive flag-burning should be able to win release even if their convictions became final before the law-changing decision.

The appropriate treatment of new decision rules relating to primary conduct is not quite as clear. For an example, consider the Court's decision to adopt intermediate scrutiny for sex discrimination in *Craig v. Boren*.[109] Should habeas relief be available to upset final state court convictions based on discriminatory laws upheld under the more lenient rational basis standard? To say that a state court used the wrong decision rule is not to say that a litigant's right was violated. No decision rule is perfectly accurate. Intermediate scrutiny may uphold some invidious sex discrimination, and it may strike down some that is not invidious. Nor is accuracy the sole concern. Particular decision rules may be adopted for a wide variety of reasons—not just increasing accuracy, but also skewing error-distribution or providing clear guidance to lower courts and government actors.[110]

The reasons behind a particular rule are relevant to whether it should govern on collateral review (and likewise to the remedial calculus I have suggested should play a role on direct review).[111] If a new decision rule is desirable because it minimizes adjudicatory error by providing more accurate determinations of whether a right was violated, application on collateral review makes sense because serves that purpose. Heightened scrutiny for sex-based discrimination meets that test. It is probably motivated in large part by accuracy concerns and reflects a judgment that such discrimination is highly likely to be invidious.[112] If the goal is instead to provide clear guidance for government officials, application makes less sense, since that purpose cannot be served by application to already-decided cases.[113] And if the new decision rule is desirable because

109. 429 U.S. 190 (1976).

110. For one attempt to set out particularly salient factors, *see* Roosevelt, *Calcification*, *supra* note 108, at 1658-66.

111. *See supra* text accompanying notes 80-83.

112. See generally Roosevelt, *Calcification*, *supra* note 108, at 1687-88.

113. *See* Berman, *supra* note 107, at 100 (noting relevance of distinction between "minimizing adjudicatory error" and "providing better guidance for non-judicial actors" to retroactivity analysis). Of course, more than one factor may be operating in any particular case. The *Miranda* rule, for instance,

circumstances have changed, application will typically make very little sense.[114]

Thus the proper treatment of new substantive rules may not be as clear-cut as most assume: in some cases, new decision rules relating to substantive matters may not be appropriate for application on collateral review. The same is true of procedural rules: the distinction between decision rules and operative propositions suggests a more refined analysis than *Teague* employs.

A new rule about a procedural operative proposition probably should govern on collateral review. (For examples, consider the decisions in *Gideon v. Wainwright*,[115] finding a right to state-appointed counsel for indigents in felony prosecutions under the Sixth Amendment and *In re Winship*,[116] reading the Due Process Clause to require that convictions be based on proof of guilt beyond a reasonable doubt.) This principle is to some degree consistent with *Teague*, in that it could be seen as a restatement of Harlan's "implicit in the concept of ordered liberty" criterion. That test, articulated in *Palko v. Connecticut*,[117] determined which Bill of Rights provisions warranted incorporation against the states. Its application governed whether a particular right existed (a question about operative propositions), rather than what the best rules for implementation of that right were (a question about decision rules). In that way *Teague*'s use of *Palko* resembles a first-cut rule that new operative propositions, but not most new decision rules, should govern on collateral review. Thus, *Teague* recognizes the correctness of the Supreme Court's collateral application of cases like *Gideon v. Wainwright* and *In re Winship*, results with which I agree.[118] As understood by the *Teague* Court, however, the *Palko* standard would probably not allow application of a new rule changing the scope of a previously recognized right—as, for instance, if the Court were to broaden the scope of the behavior considered testimony for the purposes of the Fifth Amendment's prohibition on compulsory self-

---

likely does aim to reduce error (because it substitutes a more tractable question for the prior totality-of-the-circumstances analysis) but it does so primarily by giving officials a clear rule to follow. Its application to pre-*Miranda* interrogations, in which officials were unaware of the rule, will not enhance accuracy but rather produce a large number of errors in favor of exclusion. *Miranda* is a prime focus of Berman's article, which includes many complexities elided here.

114. Imagine, for instance, that the Court had followed John Hart Ely's approach and employed heightened scrutiny in the equal protection context in response to a burdened group's lack of political power. As demographic shifts deprived a previously dominant group of majority status, the Court might respond by increasing the level of scrutiny it applied to discrimination against that group. But applying this decision rule to cases concluded before the shift occurred would make no sense, even though it would likely fall into the conventional understanding of Harlan's "substantive" category.

115. 372 U. S. 335 (1963) (finding right to counsel for indigents in felony prosecutions).

116. 397 U.S. 358 (1970) (requiring proof of guilt beyond a reasonable doubt for conviction).

117. 302 U.S. 319 (1937).

118. *See* Ivan V. v. New York, 407 U.S. 203 (1973) (holding *Winship* retroactive); Pickelsimer v. Wainwright, 375 U.S. 2 (1963) (holding *Gideon* retroactive).

incrimination. I would consider that new rule appropriate for collateral application, so my suggested analysis also departs from *Teague* to some degree.

A second justification for applying new rules about even procedural operative propositions on collateral review comes from the view of judicial decisionmaking endorsed by Mishkin and Harlan (though not *Teague*). A Court creating a new decision rule can candidly admit that it is changing the law. Deciding how best to implement constitutional meaning via decision rules is within the authority of the Court. Creating new constitutional meaning is not, and so a Court changing the law with respect to operative propositions stands on firmer ground if it is willing to assert that this is what the Constitution has always meant. The consequence of that assertion is that prior inconsistent decisions were mistaken, and those errors can be raised on collateral review.

This theoretical purity may carry the practical cost of disruption, but it need not. As Fallon and Meltzer have argued, flexibility in the law of remedies may allow the Court to grant that a particular operative proposition did exist at the time of trial, and hence should govern on collateral review, but still decline to overturn a state judgment in appropriate cases. This remedial calculus would be the place to consider whether the operative proposition relates to the reliability of the verdict, as well as other factors such as the state's reliance interest and the impact on the criminal justice system.

New decision rules about procedural requirements, on the other hand, generally should not govern in collateral review. (The most obvious example of such a new decision rule is probably *Miranda v. Arizona*.[119]) This is not to say that they should be "given prospective effect." I have argued elsewhere that courts should decide cases according to their best current understanding of the law, and that the question of whether a rule has "retroactive effect" should simply be excised from our doctrine.[120] But since collateral review is concerned with the question of whether a decision was correct when rendered, rather than whether the reviewing court would reach the same decision, applying current law will not lead to the overturning of judgments correct when rendered but resting on superseded law.[121] As Mishkin put it, "the doctrine that a final judgment entered under

119. 384 U.S. 436 (2000).

120. *See* Roosevelt, *Retroactivity*, *supra* note 8, at 1131. At moments the Supreme Court seems to have come close to this approach. *See, e.g.*, Fiore v. White, 528 U.S. 23 (1999).

121. *See id.* at 1120-22; Schwartz, *Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin*, 33 U. CHI. L. REV. 719, 732 n.64 (1966) ("Direct review is considered part of the original proceeding, whereas habeas corpus is independent."). The idea that some decisions can operate "retroactively" to change what the law *was*, and thereby introduce error into proceedings correct when conducted, is what creates the problem with collateral review, and the irony of *Linkletter* is that it was *Linkletter* itself that introduced this idea.

a given rule of law may withstand subsequent judicial change in that rule is long established . . ."[122]

Again, concluding that a state court applied the wrong decision rule does not imply that a litigant's rights were violated. The state court decision may be correct not merely in regard to guilt or innocence but in regard to the procedural rights at issue. Many confessions extracted without *Miranda* warnings, for instance, were perfectly voluntary. Upsetting a state judgment on collateral review based on a new decision rule relating to a procedural operative proposition should be relatively rare—it should occur only when applying the new decision rule would enhance accuracy in the determination of whether a constitutional right has been violated, and when the possible violation of the underlying procedural right demands a remedy.[123]

V
THOUGHTS FOR THE FUTURE

A. Federal Sentencing Guidelines: A Case Study

Heytens' "transitional moment" is upon us.[124] Until relatively recently, juries could play a minor role in criminal prosecutions, deciding only whether the defendant violated a broad proscription such as distributing a controlled substance. A judge decided punishment based on sentencing factors that were never submitted to the jury and needed to be found by only a preponderance of the evidence.[125] In the summer of 2000, the Court decided *Apprendi v. New Jersey*, holding that, other than prior convictions, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt."[126]

Apprendi clearly raised questions about the validity of the Federal Sentencing Guidelines, adopted in 1987, and similar state systems. Though lower courts decided that these approaches survived *Apprendi*, the Supreme Court eventually declared that it disagreed. In 2004, *Blakely v.*

---

122. Mishkin, *supra* note 2, at 77. Indeed, the Supreme Court has announced that one variant of the doctrine has constitutional force: while Congress can plainly change law and thereby change the outcome of pending cases, it cannot pass a new law and order courts to re-open final cases in order to apply the new rule. *See* Plaut v. Spendthrift Farms, 514 U.S. 211 (1995) (striking down on separation of powers grounds a law attempting to reinstate dismissed cases).

123. That is, applying a new decision rule for a procedural operative proposition on collateral review makes sense as error-correction when both a) the new decision rule does a better job (in the instant case) than the old one of determining whether the operative proposition has been violated; and b) the possible violation of the procedural right is sufficiently serious to warrant a remedy.

124. Heytens, *supra* note 65. The following exposition of recent cases draws from Heytens' account, *id.* at 934-40.

125. *See id.*

126. 530 U.S. 466, 490 (2000).

Washington[127] struck down Washington State's Sentencing Reform Act. The Sentencing Reform Act was in many respects indistinguishable from the federal system, and *Blakely* notably rejected the rationale used by many courts to shield such systems from invalidation under *Apprendi*: that there was a difference between exceeding a statutory maximum and constraining judicial discretion within a range of punishment authorized by statute. As Justice Scalia put it, "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."[128]

Without that distinction, the Federal Guidelines' chances of survival seemed slim indeed.[129] In 2005, in *United States v. Booker*,[130] a five-Justice majority confirmed the conventional wisdom that, as binding rules, the Guidelines were unconstitutional. However, a different five-Justice majority followed the invalidation with the somewhat less predictable step of deciding to solve the problem by leaving the Guidelines in force as advisory rather than mandatory.[131]

The *Apprendi-Blakely-Booker* triad obviously poses great risk of disruption. As Heytens puts it, "the Court's chosen solution meant that virtually every federal sentence handed down during the last twenty years had been imposed in an illegal fashion."[132] And so, once again, the question of who can benefit from these rules is taking center stage. Indeed, the Supreme Court granted certiorari on the *Booker* question in the 2006 Term, only to find that the petitioner's failure to obtain authorization for a second habeas petition prevented merits resolution.[133] In what follows, I will discuss how the question should be analyzed and resolved.[134]

Under conventional retroactivity analysis, the first issue is to determine which of these cases creates a new rule. *Apprendi* fairly clearly does, for it departs quite substantially from earlier cases such as *United States v. Watts*,[135] which held that conduct for which the defendant was acquitted by a jury would nonetheless create a sentencing enhancement if found by the judge, and *Almendarez-Torres v. United States*,[136] which upheld an enhancement based on the fact of prior conviction even though that fact was neither charged in the indictment nor part of the offense to

127. 542 U.S. 296 (2004).

128. *Id.* at 303.

129. Most commentators, including the Department of Justice, expected the federal guidelines to fall. *See, e.g.*, R. Craig Green, Apprendi*'s Limits*, 39 U. RICH. L. REV. 1155, 1155 n.4 (2005).

130. 125 S.Ct. 738 (2005).

131. *Id.* at 757.

132. Heytens, *supra* note 65, at 940.

133. *See* Burton v. Stewart, 127 S.Ct. 793, 796 (2007).

134. Of course, I entertain no illusions that the Court will be moved by my suggestions; after all, it took decades to adopt Mishkin's, and it still hasn't gotten them entirely right.

135. 519 U.S. 148 (1997).

136. 523 U.S. 224 (1998).

which the defendant pleaded guilty.[137] The status of *Blakely* and *Booker* is less clear. The *Teague* standard would presumably lead to the conclusion that both are new, since neither was unanimous. The Mishkin/Harlan view would almost certainly conclude that *Booker* is not new, though the correct characterization of *Blakely* is open to dispute.

Arguably, the *Teague* analysis also suggests that none of the cases meets the "implicit in ordered liberty" requirement for application on collateral review, especially given the Court's intimation that this test is essentially impossible to satisfy.[138] But the contrary argument is at least plausible. The right to have a jury find the facts that determine a sentence beyond a reasonable doubt does seem fundamental, much akin to the *In re Winship*[139] rule that first required the "beyond a reasonable doubt" standard. And indeed, the exchange between the majority and the dissent in *Schriro v. Summerlin*,[140] concerning the retroactive application of *Apprendi*'s offspring *Ring v. Arizona*[141] offers intriguing tea leaves. *Ring* applied *Apprendi* to capital sentencing, requiring a jury (rather than a judge) to find the aggravating factors that made defendants eligible for death. *Schriro* held *Ring* non-retroactive on collateral review because it failed the "substantially improving accuracy" element of the *Teague* test. The majority said very little about the "implicit in ordered liberty" criterion, and the dissent argued that this amounted to a concession.[142] If so, the only question is whether the *Apprendi* rule remedies "an impermissibly large risk that the innocent will be convicted."[143] It clearly does if one focuses on the question of whether the defendant is innocent of the crime for which he was sentenced, rather than of some lesser offence.

But how *Teague* applies is for the Supreme Court to say. My concern here is the ideal world, and I have said already that *Teague*'s analysis can be improved. One suggestion is to ask only whether the new rule substantially enhances the reliability of the verdict, and from that perspective, these rules would probably qualify for application on collateral review.[144] I prefer to start, as does *Teague*, by asking whether the rules are new and whether they are substantive or procedural. I would then analyze the matter in terms of the distinction between decision rules and operative

137. For a more detailed analysis of pre-*Apprendi* cases, see Kate Stith, *Crime and Punishment Under the Constitution*, 2004 SUP. CT. REV. 221 (2004).

138. *See* Teague v. Lane, 489 U.S. 288, 313 (1989) (stating that "we believe it unlikely that many such components of basic due process have yet to emerge"). Consistent with that hint, federal circuit courts have generally held that these cases do not apply retroactively. *See* 35 GEO. L.J. 655, 655 (2006); Anup Malani, *Habeas Settlements*, 92 VA. L. REV. 1, 51 (2006).

139. 397 U.S. 358 (1970).

140. 542 U.S. 348 (2004).

141. 536 U.S. 584 (2002).

142. *See Schriro*, 542 U.S. at 359 (Breyer, J., dissenting).

143. *Teague*, 489 U.S. at 311.

144. This is the argument of Note, *supra* note 54.

propositions. New rules that relate to operative propositions, whether substantive or procedural, should always be available on collateral review in the sense that earlier inconsistent decisions should be deemed incorrect. I would determine whether the error in those decisions justifies overturning them through a case-by-case analysis of the sort proposed by Fallon and Meltzer. The adoption of new decision rules, whether related to substance or procedure, does not contain a similar implication of error, and collateral relief should be available in more limited circumstances.[145]

From that perspective, the matter appears as follows. I grant that *Apprendi* is new, but I am less certain about *Blakely* and am quite confident that *Booker* is not. (One guide here is the performance of lower courts, which did not reach the *Blakely* result after *Apprendi* but, in the appellate decisions in *Booker* and *Fanfan*, anticipated the *Booker* decision.) All the decisions strike me as procedural, though it could be argued that they amount to a holding that enhancements are actually elements, and therefore relate to primary conduct.[146] But the rules they announce are not decision rules; they are operative propositions. Like *Winship* before them, they articulate actual constitutional rights, not rules to determine when rights have been violated.[147]

Thus, there should certainly not be a blanket rule stating that these decisions are unavailable on collateral review. According to the view of the Constitution they set out, defendants convicted under the now-invalid systems have suffered actual constitutional injury. These injuries are not trivial. Horror stories about the consequences of the Federal Guidelines are legion. Defendants have been sentenced based on facts that the jury expressly did not find, and they have received sentences prescribed for crimes other than the ones in their convictions or guilty pleas.[148] If those circumstances violate the Constitution now, it takes a hardened realist to argue that they did not violate the Constitution when they occurred.

To summarize, assuming that *Apprendi* and *Blakely* are both new procedural rules, they should nonetheless be given retroactive effect (more precisely, courts should recognize that earlier inconsistent decisions contain error) because both decisions are about operative propositions, not decision rules. But all that only gets us to the stage of raising the remedial

---

145. See *supra*, text accompanying notes 108-113, 118-122.

146. *See, e.g.*, Christopher S. Strauss, *Collateral Damage: How the Supreme Court's Retroactivity Doctrine Affects Federal Drug Prisoners'* Apprendi *Claims on Collateral Review*, 81 N.C. L. REV. 1220, 1242-45, 1260 (2003). *But see Schriro*, 542 U.S. at 354 (rejecting argument that *Ring* modified the elements of offense under Arizona law).

147. *See* Berman, *supra* note 107, at 139 n.404 (explaining that the beyond-a-reasonable-doubt rule is an operative proposition).

148. For a sampling of such criticism, see, for example, Melissa M. McGrath, *Federal Sentencing Law: Prosecutorial Discretion in Determining Departures Based on Defendant's Cooperation Violates Due Process*, 15 S. ILL. U. L.J. 321 (1990); David M. Zlotnick, *The War Within the War On Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. REV. 211 (2004).

question. In some cases, perhaps many, *Apprendi* error will be harmless. If there is no dispute over the facts underlying an enhancement, for instance, the defendant has hardly suffered an injury requiring redress.[149] But when such a dispute exists—or when the defendant was actually acquitted of the "relevant conduct" subsequently used to enhance his sentence—the resulting injustice warrants either requiring the state to undertake the proof it neglected or (in the case of acquittal) reducing the sentence. Such errors do not quite present the specter of innocents languishing in jail, for the defendants are guilty of *something*. But they may well not be guilty of the offense for which they were sentenced. That is a serious problem.

This analysis suggests that the availability of *Apprendi* relief should be determined not by a blanket rule of retroactivity or nonretroactivity, but by a case-by-case remedial analysis that considers whether an actual injustice was done. *Blakely*, if deemed a new rule, should be treated similarly. In the case of state convictions, habeas courts should ask whether the error produced a substantial injustice. For federal convictions, *Booker* offers an easier solution. By holding that the Guidelines could persist in an advisory capacity, the *Booker* Court indicated that the proper remedy is simply to allow the trial court to determine whether it would have imposed the same sentence in its discretion under an advisory regime. Allowing habeas petitioners this chance at a reduced sentence will impose some administrative burdens, for trial courts may have to reconsider a very large number of sentences. But each reconsideration is relatively trivial, and it should not outweigh the possibility of remedying substantial injustice in those cases in which courts would have imposed lesser sentences if they had the choice. This approach would strike the balance we should strive for in such cases, the one Paul Mishkin identified over forty years ago: the "balance between the sense of injustice and the needs of organized society."[150]

149. This is essentially the conclusion the Supreme Court has reached via plain error and forfeiture analysis. *See* United States v. Cotton, 535 U.S. 625 (2002).

150. Mishkin, *supra* note 2, at 100.