NOTE

RETHINKING RETROACTIVITY

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NOTES

RETHINKING RETROACTIVITY

I. INTRODUCTION

Under the stringent test set forth in *Teague v. Lane*,[1] defendants convicted of criminal offenses are generally unable to collaterally attack their convictions by invoking constitutional rules of criminal procedure announced after their convictions become final.[2] The purported exception to this general principle is said to require that a new constitutional rule be "implicit in the concept of ordered liberty"[3] for it to be applied to criminal cases decided before its pronouncement. Once a rule of criminal procedure is characterized as "new,"[4] *Teague* prohibits the rule's invocation in habeas proceedings unless the rule *both* "assure[s] that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted"[5] *and* "alter[s] our understanding of the bedrock procedural elements that . . . vitiate the fairness of a particular conviction."[6]

Although the contemporary Court has promulgated a series of constitutional rules of criminal procedure said to represent a "sea change" from prior jurisprudence, it has simultaneously concluded that no new rule meets the terms of this exception.[7] Indeed, although Justices have variously described recent rules as "deeply ingrained in . . . the Anglo-

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[1] 489 U.S. 288 (1989).

[2] *Id.* at 305–10 (plurality opinion); *see also* Sawyer v. Smith, 497 U.S. 227, 241 (1990) (describing the narrowness of the exception for retroactive application of new rules of criminal procedure).

[3] *Teague*, 489 U.S. at 311 (1989) (quoting *Mackey v. United States*, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937))) (internal quotation marks omitted).

[4] The definition of "new" law under *Teague* has been described as encompassing "considerable breadth," and several Justices have lamented that the notion is so sweeping that "a state prisoner can secure habeas relief only by showing that the state court's rejection of the constitutional challenge was *so* clearly invalid under then-prevailing legal standards that the decision could not be defended by any reasonable jurist." RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1331 (5th ed. 2003) [hereinafter THE FEDERAL COURTS AND THE FEDERAL SYSTEM] (quoting *Butler v. McKellar*, 494 U.S. 407, 417–18 (1990) (Brennan, J., dissenting)) (internal quotation marks omitted).

[5] *Teague*, 489 U.S. at 312 (quoting *Desist v. United States*, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting)) (internal quotation mark omitted).

[6] *Id.* at 311 (emphasis omitted) (quoting *Mackey*, 401 U.S. at 693–94 (Harlan, J., concurring in the judgments in part and dissenting in part)) (internal quotation marks omitted).

[7] Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1103 (2001).

American system of jurisprudence,"[8] a "*prerequisite* to reliability,"[9] and "constitutional[ly] imperative,"[10] no rule of criminal procedure has yet survived the modern test for retroactive application in a collateral proceeding.[11] Scholars have lamented the narrowness of the *Teague* exception, arguing that "the Court's refusal to relax *Teague*'s strictures" has produced "disturbing" consequences.[12] Indeed, the *Teague* plurality itself acknowledged that the emergence of new rules that would satisfy the criteria for retroactivity was "unlikely."[13]

This Note takes up Justice Harlan's admonition that "[r]etroactivity must be rethought."[14] In Part II, the Note begins by tracing the jurisprudential font of *Teague*'s test for retroactivity — the reasoning of Justice Harlan's opinions in *Desist v. United States*[15] and *Mackey v. United States*,[16] which the *Teague* Court explicitly adopted in articulating the test for retroactive application of procedural rules.[17] The Note argues that Justice Harlan's concerns in *Mackey* did not include the normative considerations that properly govern the retroactive application of new rules on collateral review. Because *Mackey*'s concern with what is "fundamental"[18] is as analytically unavailing in the habeas context as it was during the incorporation debate, the Note argues that the Court should avoid reliance on *Mackey*'s analysis and instead focus on Justice Harlan's emphasis in *Desist* on constitutional rules of criminal procedure that substantially enhance the accuracy of judgments of conviction.

Because Justice O'Connor's opinion in *Teague* anticipated the problematic indeterminacy of *Mackey*'s analysis,[19] the Note argues that

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[8] Bullington v. Missouri, 451 U.S. 430, 445 (1981) (quoting *Green v. United States*, 355 U.S. 184, 187 (1957)).

[9] Sawyer v. Smith, 497 U.S. 227, 248 (1990) (Marshall, J., dissenting).

[10] Gilmore v. Taylor, 508 U.S. 333, 358 (1993) (Blackmun, J., dissenting).

[11] None of the twelve rules of criminal procedure that the Court has considered for retroactive application on federal habeas has ever been held retroactively available. *See, e.g.*, Schriro v. Summerlin, 124 S. Ct. 2519, 2522, 2526 (2004) (declining to apply retroactively on collateral review the rule of *Ring v. Arizona*, 536 U.S. 584 (2002), which requires that aggravating factors necessary to impose the death penalty be found by a jury); *see also* United States v. Mandanici, 205 F.3d 519, 529 (2d Cir. 2000) (describing eleven previous Supreme Court rulings that denied retroactive effect to new rules of criminal procedure).

[12] Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733, 1817 (1991).

[13] Teague v. Lane, 489 U.S. 288, 313 (1989).

[14] Desist v. United States, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting) (internal quotation marks omitted).

[15] *Id.* at 262.

[16] 401 U.S. 667, 693 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part).

[17] *Teague*, 489 U.S. at 292.

[18] *Mackey*, 401 U.S. at 689, 693 (Harlan, J., concurring in the judgments in part and dissenting in part).

[19] *Teague*, 489 U.S. at 312.

Teague should be understood to require far more emphasis on *Desist*'s test: whether an accuracy-enhancing procedural rule is among those "without which the likelihood of an accurate conviction is seriously diminished."[20] The Note examines the Court's decisions after *Teague* and concludes that it is the extent to which a rule improves accuracy, and not amorphous concerns with respect to what is "fundamental," that has motivated the Court's refusal to apply new rules retroactively on collateral review. Because no rule addressed by the Court has unambiguously improved the likelihood that a conviction is accurate, the Note argues, the Court since *Teague* has appropriately refused to apply any new rule of criminal procedure retroactively.

In Part III, the Note turns to *Apprendi v. New Jersey*,[21] which held that the Sixth Amendment requires that "any fact (other than prior conviction) that increases the maximum penalty for a crime" be proved both to a jury and beyond a reasonable doubt.[22] The Note argues that, by raising the quantum of proof necessary for the state to insulate a conviction from constitutional attack, *Apprendi*'s reasonable doubt rule by definition increases the likelihood that a particular conviction was accurate. For this reason the Note concludes, consistent with Justice Harlan's conception of habeas, that *Apprendi*'s reasonable doubt holding demands retroactive application.

Finally, the Note responds to arguments set forth by the eight federal courts of appeals that have rejected habeas claims based on the retroactive application of *Apprendi*'s reasonable doubt requirement.[23] The Note concludes that these holdings are a symptom of the doctrinal confusion that necessarily attends any jurisprudence that relies upon individual judges' conceptions of those rights that are fundamental. All of the courts of appeals to consider the issue, however, agree that *Apprendi*'s rule significantly and unambiguously improves the accuracy of each defendant's punishment.[24] If the purpose of the Great Writ is to be properly understood as ensuring "the freedom of the subject,"[25] the Note concludes, the federal courts cannot impose finality upon a punishment that does not have the benefit of such a rule.

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[20] *Id.* at 313.

[21] 530 U.S. 466 (2000).

[22] *Id.* at 476 (quoting *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999)).

[23] *See, e.g.*, Coleman v. United States, 329 F.3d 77, 90 (2d Cir. 2003); *see also id.* (collecting cases).

[24] *Cf. id.* at 88 (holding that even the improved accuracy that *Apprendi*'s rule may provide does not trigger retroactive application).

[25] Brown v. Allen, 344 U.S. 443, 509 n.20 (1953) (Frankfurter, J., concurring) (quoting *Cox v. Hakes*, 15 A.C. 506, 515 (H.L. 1890)).

II. FEDERAL HABEAS CORPUS RETROACTIVITY JURISPRUDENCE

Although *Teague* itself is of relatively recent vintage, its test for collateral retroactivity remains mired in nearly fifty years of confusion at the Court. Because *Teague* draws its two-pronged test from Justice Harlan's opinions at the outset of this debate,[26] the concerns that motivated those opinions are helpful in determining whether *Teague*'s approach is consistent with Justice Harlan's conceptualization of habeas.

A. The Genealogy of Teague v. Lane

Before 1963, prisoners were generally unable to assert collateral claims based on constitutional rules announced after their convictions — not because of the law of retroactivity, but because they were deemed to have procedurally defaulted these claims by failing to raise them on direct review. However, in *Fay v. Noia*,[27] the Court held that procedural default of constitutional claims in state court did not bar federal courts from reviewing those claims in habeas proceedings unless the default involved a "deliberate by-passing of state procedures" by the prisoner herself.[28] *Fay* therefore marked the first time that federal courts were required to determine whether a prisoner could assert federal rights set forth in a decision announced after her conviction became final.[29]

1. The Warren Court's Nonretroactivity Doctrine and Justice Harlan's Dissent in Desist v. United States. — After *Fay*, the Court struggled to balance the states' interests in the finality of their courts' judgments of conviction against prisoners' interests in vindicating their federal rights, issuing decisions in 1965 and 1966 addressing the scope of collateral retroactivity.[30] In 1967, however, in *Stovall v. Denno*[31] the Court appeared to settle on a three-pronged analysis governing questions of retroactivity on both direct and collateral review: "(a) the purpose to be served by the new standards, (b) the extent of

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[26] *See* Teague v. Lane, 489 U.S. 288, 311–12 (1989).

[27] 372 U.S. 391 (1963).

[28] *Id.* at 438–39.

[29] *See* Desist v. United States, 394 U.S. 244, 261 (1969) (Harlan, J., dissenting) (noting that *Fay* held "[f]or the first time . . . [that] a habeas petitioner could successfully attack his conviction collaterally despite the fact that the 'new' rule" did not exist at the time of the direct proceedings); *see also* THE FEDERAL COURTS AND THE FEDERAL SYSTEM, *supra* note 4, at 1312 (describing the rise of habeas claims after *Fay* was decided).

[30] *Compare* Linkletter v. Walker, 381 U.S. 618, 639–40 (1965) (holding that the rule of *Mapp v. Ohio*, 367 U.S. 643 (1961), was retroactively unavailable to prisoners whose convictions were final before *Mapp* was decided), *with* Johnson v. New Jersey, 384 U.S. 719, 732 (1966) (holding that the rule of *Miranda v. Arizona*, 384 U.S. 436 (1966), was retroactively available only to prisoners whose *trials* began after *Miranda* was decided).

[31] 388 U.S. 293 (1967).

the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."[32] Perhaps most importantly, *Stovall* declared that "no distinction is justified between convictions now final . . . and convictions at various stages of trial and direct review."[33]

Although Justice Harlan had joined — apparently reluctantly — the Court's earlier decisions limiting the retroactive availability of new procedural rules,[34] he could no longer assent to the Court's refusal to apply its own decisions on direct review. Thus, in October Term 1968, Justice Harlan issued a stinging dissent in *Desist v. United States* exposing his dissatisfaction with the *Stovall* regime.[35] In *Desist*, the Court held that a defendant could not invoke the rule of *Katz v. United States*,[36] which required that electronic surveillance be authorized by a warrant issued by a neutral magistrate, either on direct or collateral review.[37] The Court concluded that *Katz* "should be given wholly prospective application,"[38] noting that all three *Stovall* factors counseled against retrospective application of *Katz*'s rule.[39] Importantly, the *Desist* Court followed *Stovall*'s assertion that cases on direct review could not be distinguished from those in which the judgment of conviction was already final,[40] holding that the "deterrent purpose of the exclusionary rule and the reliance of law enforcement officers focus upon the time of the search, not any subsequent point in the prosecution, as the relevant date" for retroactivity purposes.[41]

Justice Harlan's dissent conveyed palpable frustration with the Court's jurisprudence. "Retroactivity," he asserted, "must be rethought."[42] Drawing on a *Harvard Law Review* article by Professor

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[32] *Id.* at 297.

[33] *Id.* at 300.

[34] Indeed, some commentators have concluded that Justice Harlan's participation in earlier decisions refusing retroactive application of new procedural rules on direct review was a product of his "short-term desire to limit the damage done by decisions that [he] thought 'fundamentally unsound.'" Fallon & Meltzer, *supra* note 12, at 1739–40 (quoting *Mackey v. United States*, 401 U.S. 667, 676 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part)).

[35] Desist v. United States, 394 U.S. 244, 256, 258 (1969) (Harlan, J., dissenting).

[36] 389 U.S. 347 (1967).

[37] *See Desist*, 394 U.S. at 246, 252–54.

[38] *Id.* at 246.

[39] *See id.* at 249–54.

[40] *See* Stovall v. Denno, 388 U.S. 293, 300–01 (1967).

[41] *Desist*, 394 U.S. at 253.

[42] *Id.* at 258 (Harlan, J., dissenting) (internal quotation marks omitted). Justice Harlan first objected that the Court's refusal to apply its new rules retroactively to cases on direct review "would belie the truism that it is the task of this Court . . . to do justice to each litigant on the merits of his own case." *Id.* at 259. This view eventually prevailed in *Griffith v. Kentucky*, 479 U.S. 314 (1987). In *Griffith*, Justice Blackmun explicitly adopted Justice Harlan's approach to retroactivity on direct review: "In Justice Harlan's view, and now in ours, failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of

Paul Mishkin, Justice Harlan concluded that the central purpose of habeas was to ensure that no person remained "incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted."[43] Professor Mishkin's *Foreword* argued that the three lines of cases in which the Court had held rules of criminal procedure retroactively available — requiring the assistance of counsel, mandating the availability of trial transcripts for the indigent, and prohibiting the extraction of confessions in violation of due process — all promoted the writ's role in "free[ing] prisoners as to whom there is greater doubt than the Constitution allows that they have in fact done the acts which constitute the crime for which they are being punished."[44]

Professor Mishkin characterized the constitutional protections of criminal procedure as mechanisms for ensuring a certain constitutionally required degree of confidence in the correctness of a conviction:

> [I]t is at times useful to view the complex of all [procedural] guarantees . . . as expressing . . . that *degree of confidence that a man has committed a crime* which the Constitution requires as a condition of the state's depriving him of liberty or life.[45]

Professor Mishkin's observations significantly influenced Justice Harlan's thinking about the problem of retroactivity.[46] Professor Mishkin's hypothesis offered a limiting principle for collateral retroactivity, providing a convincing alternative to the Blackstonian approach that demanded full retroactive application of every constitutional holding on the theory that the Court discovered the law as it had always existed.[47] Thus, Justice Harlan concluded that the purpose of habeas is to ensure "that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted."[48]

2. Justice Harlan's Abrupt Reversal: Mackey v. United States. — After *Desist*, the Court reconsidered its retroactivity doctrine in a se-

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constitutional adjudication." *Id.* at 322. This Note's principal concern, however, involves the circumstances under which new rules should be retroactively available on *collateral* review, which more squarely implicates concerns involving the finality of state court decisions.

[43] *Desist*, 394 U.S. at 262 (Harlan, J., dissenting) (citing Paul J. Mishkin, *The Supreme Court, 1964 Term—Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 77–101 (1965)).

[44] Mishkin, *supra* note 43, at 80, 82–83.

[45] *Id.* at 81–82 (emphasis added).

[46] *See* Fallon & Meltzer, *supra* note 12, at 1743 ("For Justice Harlan, the rethinking began with an article by Paul Mishkin . . . .").

[47] *See id.* (noting that Justice Harlan "disavowed the Blackstonian theory that the law should be taken to have always been what it is said to mean at a later time" (quoting *Mackey v. United States*, 401 U.S. 667, 675 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part)) (internal quotation marks omitted)).

[48] *Desist*, 394 U.S. at 262 (Harlan, J., dissenting).

ries of three cases decided in 1971. In his opinion in *Mackey v. United States*, Justice Harlan agreed with the Court that the rule of *Chimel v. California*,[49] which narrowed the scope of reasonable searches incident to arrest, should not be made retroactive on collateral review.[50] Although the majority appeared to have drawn from his reasoning in *Desist*, referring frequently to the "accuracy of the verdict of guilt returned" in its retroactivity analysis,[51] Justice Harlan changed course, noting that "reflection upon what [he] wrote in *Desist*" had persuaded him that "those new rules cognizable on habeas ought to be defined, not by the 'truth-determining' test,"[52] but by an assessment of whether the procedure was "implicit in the concept of ordered liberty."[53] Although Justice Harlan proffered three reasons explaining this shift, it is clear that his desire to limit the availability of procedural rules he thought unwise — rather than the federalism principles that motivated his concerns in *Fay* and that properly govern collateral review — prompted this unfortunate shift.[54]

First, Justice Harlan argued that "adherence to precedent," particularly *Kaufman v. United States*,[55] suggested that it was "not a principal purpose of the writ to inquire whether a criminal convict did in fact commit the deed alleged."[56] In *Kaufman*, Justice Brennan had taken the view that, because the sole purpose of post-conviction habeas was to give states incentives to abide prevailing constitutional standards, application of new rules on collateral review was unnecessary.[57] Certainly this argument supports the view that the prisoner's guilt is irrelevant to the retroactivity question. But this was never Justice Harlan's approach. Although the merits of Justice Brennan's argument have been debated at length,[58] even in *Mackey* Justice Harlan

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[49] 395 U.S. 752 (1969).

[50] *Mackey*, 401 U.S. at 699–700 (Harlan, J., concurring in the judgments in part and dissenting in part).

[51] *Mackey*, 401 U.S. at 675. It is a testament to Justice Harlan's influential jurisprudence that the court of appeals had also measured *Chimel*'s retroactivity in terms of "[t]he unreliability of the fact-finding process," Mackey v. United States, 411 F.2d 504, 509 (7th Cir. 1969), although the controlling retroactivity opinion at the time, *Stovall v. Denno*, 388 U.S. 293 (1967) (Brennan, J.), made no mention of reliability as an indicia for retroactivity. *See supra* pp. 1645–46.

[52] *Mackey*, 401 U.S. at 694 (Harlan, J., concurring in the judgments in part and dissenting in part) (internal quotation marks omitted).

[53] *Id.* at 693 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (Cardozo, J.)).

[54] *See supra* note 34.

[55] 394 U.S. 217 (1969).

[56] *Mackey*, 401 U.S. at 694 (Harlan, J., concurring in the judgments in part and dissenting in part).

[57] *Kaufman*, 394 U.S. at 225–27.

[58] Although Justice Brennan's conception of the role of habeas as providing state courts with incentives to enforce prevailing constitutional standards temporarily represented the view of the Court, that view has fallen from favor among both jurists and scholars. *See* THE FEDERAL COURTS AND THE FEDERAL SYSTEM, *supra* note 4, at 1314–17. A normative assessment of

remained convinced that the purpose of the writ was to correct constitutional error rather than to provide incentives for state courts to enforce constitutional strictures.[59]

Justice Harlan's second reason for departing from *Desist*'s analysis in *Mackey* was equally unconvincing — but, perhaps, revealing. He argued that experience had demonstrated "just how marginally effective are some new rules purportedly aimed at improving the factfinding process," and his opinion pointed to criminal procedure decisions promulgated by the Warren Court and accompanied by unpersuasive references to decisional accuracy.[60] Of course this is not a reason to depart from retroactivity jurisprudence focused on accuracy; rather, it is a reason to doubt whether the decisions in question were properly motivated by accuracy concerns in the first instance — and to seek a coherent approach for evaluating the accuracy-enhancing effect of a new rule.

Finally — and most ironically — Justice Harlan noted that the distinction between rules designed to enhance accuracy and those designed to "further other values" was "inherently intractable,"[61] perhaps revealing a concern that retroactivity might hinge on the subjective value preferences of a majority of the Justices of the Court. To stray from an emphasis on accuracy in habeas jurisprudence — an empirically demonstrable implication of a new rule — on the basis of such a fear is implausible indeed.[62]

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this approach to habeas doctrine is beyond the scope of this Note; the Note assumes that Justice Harlan's view of the purpose of the writ informed his analysis in *Desist* and *Mackey* and therefore informs the Court's standards for collateral retroactivity today. In addition, it bears noting that, whether Justice Brennan's view of the purpose of the writ was normatively or descriptively persuasive, supporters of that approach must concede that the Court's collateral retroactivity jurisprudence during that era was unsuccessful in fulfilling this purpose due to its failure to provide a functional means for disciplining state courts.

[59] *See Mackey*, 401 U.S. at 685–86 (Harlan, J., concurring in the judgments in part and dissenting in part); *see also* THE FEDERAL COURTS AND THE FEDERAL SYSTEM, *supra* note 4, at 1315 (noting that "Justice Brennan's majority opinion in *Fay v. Noia* rejected [a view of habeas based upon the accuracy of the underlying criminal procedure] . . . which Justice Harlan[] . . . for the most part embraced" (citation omitted)).

[60] *Mackey*, 401 U.S. at 694–95 (Harlan, J., concurring in the judgments in part and dissenting in part) (citing *Coleman v. Alabama*, 399 U.S. 1 (1970)); *see also Coleman*, 399 U.S. at 19 (Harlan, J., concurring in part and dissenting in part) (expressing disappointment at his inability to effect reconsideration of several of the Warren Court's criminal procedure decisions).

[61] *Mackey*, 401 U.S. at 695 (Harlan, J., concurring in the judgments in part and dissenting in part).

[62] Of course, reasonable jurists might disagree with respect to whether a particular procedure is likely to enhance the accuracy of a judgment of conviction. *Compare* Schriro v. Summerlin, 124 S. Ct. 2519, 2525 (2004) (holding that jury determination of sentencing factors is not central to the accuracy of that determination), *with id.* at 2527 (Breyer, J., dissenting) (arguing that juries *are* likely to improve accuracy). And certainly an assessment with respect to whether a particular procedure improves accuracy involves some subjective judgment regarding the value of the procedure — although the use of empirical analysis might reduce the indeterminacy of that assess-

All three reasons indicate that Justice Harlan's rejection of the analysis he set forth so forcefully in *Desist* was occasioned not only by his efforts to constrain the retroactive applicability of the Warren Court's new rules of criminal procedure, but also by his adherence to the view that habeas should lie to ensure that a conviction was consistent with the procedural protections afforded defendants by the Constitution. Seeking a more limiting construction than he had set forth in *Desist*, Justice Harlan found a more restrictive test in Justice Cardozo's opinion in *Palko v. Connecticut*.[63] In *Palko*, the Court had refused to incorporate the Double Jeopardy Clause against the states through the Fourteenth Amendment, holding that the Amendment guaranteed only those rights "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[64] *Palko*'s test for incorporation, Justice Harlan argued in *Mackey*, "more correctly mark[ed] the tipping point of finality interests . . . in terms of divining which new rules should apply on habeas."[65]

B. Teague v. Lane *and the Substantive Meaning of the* Mackey *Prong*

Notwithstanding Justice Harlan's protestations, *Stovall*'s approach remained the law of habeas retroactivity until 1989, when a four-Justice plurality finally managed to reject that approach in *Teague v. Lane*. In *Teague*, the prisoner's habeas petition asserted that the jury in his trial had been assembled in a racially discriminatory manner violative of the Court's holding in *Batson v. Kentucky*,[66] even though *Batson* was decided after his conviction became final.[67] Because the Court had previously determined that *Batson* constituted a "new" rule of criminal procedure,[68] at issue in *Teague* was whether such a new rule should apply retroactively on collateral review.

Justice O'Connor's plurality opinion began with a lengthy discussion of Justice Harlan's "general rule of nonretroactivity for cases on collateral review."[69] The plurality formally "adopt[ed] Justice Harlan's

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ment. Putting these difficult issues to one side, this Note argues that a focus on accuracy at a minimum guides jurists toward the concerns that validate the existence of habeas review in the first instance — especially when contrasted with a fully subjective inquiry regarding those jurists' conceptions of what is essential to "ordered liberty."

[63] 302 U.S. 319 (1937).

[64] *Id.* at 325 (quoting *Brown v. Mississippi*, 297 U.S. 278, 285 (1936); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934); and *Hebert v. Louisiana*, 272 U.S. 312, 316 (1926)) (internal quotation mark omitted).

[65] *Mackey*, 401 U.S. at 695 (Harlan, J., concurring in the judgments in part and dissenting in part).

[66] 476 U.S. 79 (1986) (overruling, in part, *Swain v. Alabama*, 380 U.S. 202 (1965)).

[67] Teague v. Lane, 489 U.S. 288, 293–94 (1989).

[68] *See* Allen v. Hardy, 478 U.S. 255, 258 (1986).

[69] *Teague*, 489 U.S. at 305–07.

view of retroactivity for cases on collateral review,"[70] articulating an exception to the general rule of nonretroactivity in cases where the procedural rule at issue was held to be "implicit in the concept of ordered liberty."[71] The plurality was careful, however, to note that it adopted Justice Harlan's formulation of the exception "with a modification."[72] Tracing the shift from Justice Harlan's emphasis on accuracy in *Desist* to his invocation of the incorporation test in *Palko*, Justice O'Connor determined that the test for retroactivity of new constitutional rules on collateral review would adopt accuracy as its touchstone:

> We believe it desirable to combine the accuracy element of the *Desist* version of the second exception with the *Mackey* requirement that the procedure at issue must implicate the fundamental fairness of the trial. Were we to employ the *Palko* test without more, we would be doing little more than importing into a very different context the terms of the debate over incorporation. *Reviving the* Palko *test now, in this area of law, would be unnecessarily anachronistic.*[73]

The *Teague* Court's unfortunate adoption of the *Mackey* prong makes *Teague*'s functional meaning virtually indecipherable. It is clear, for example, that the *Mackey* prong cannot function as Justice Harlan proposed — as a bar to retroactivity for any right that would not have survived Justice Cardozo's test for incorporation. Such an approach would render the *Desist* prong mere surplusage, for Justice Cardozo's test would almost certainly exclude every modern rule of criminal procedure from retroactive application without respect to its accuracy-enhancing properties.[74]

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[70] *Id.* at 307–08.

[71] *Id.* at 305–07 (quoting *Mackey v. United States*, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937))) (internal quotation marks omitted). As a matter of technical parlance, it should be noted that the exception to collateral nonretroactivity that this Note describes is generally referred to as the "second" *Teague* exception. The "first" exception concerns new rules that place "certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe." *Id.* at 307 (quoting *Mackey*, 401 U.S. at 692 (Harlan, J., concurring in the judgments in part and dissenting in part)). Because Justice Harlan's jurisprudence is far more revealing with respect to the second exception than the first, whether *Apprendi* might be held retroactive under this "first" exception to habeas nonretroactivity is beyond the scope of this Note. *See* Coleman v. United States, 329 F.3d 77, 91 (2d Cir. 2003) (Parker, J., concurring in the judgment) (arguing that *Apprendi* should apply retroactively under the first exception because it "alter[ed] the meaning of a criminal statute" by characterizing sentencing factors as elements of a crime). For an analysis as to whether substantive changes in law in fact "fall[] under an exception to *Teague*[]" or are "more accurately characterized as substantive rules not subject to the bar," see *Schriro v. Summerlin*, 124 S. Ct. 2519, 2522 n.4 (2004).

[72] *Teague*, 489 U.S. at 311.

[73] *Id.* at 312 (emphasis added) (citations omitted).

[74] *Cf. Palko*, 302 U.S. at 325 (holding that the right to a jury trial, the indictment requirement, and immunity from compulsory self-incrimination "might be lost, and justice still be done").

It is equally clear, however, that the *Mackey* prong cannot be read simply to make retroactivity coterminous with the current state of incorporation doctrine. Such a test would exclude virtually *no* right from retroactive application because the incorporation of the Amendments is virtually complete.[75] And because Justice Harlan authored *Mackey* in 1971 — having fought and lost the incorporation battle with respect to several constitutional rights[76] — it is doubtful that the *Mackey* prong would limit retroactive application of any new rule if it were understood to refer only to those rights already incorporated at the time of the *Mackey* opinion itself.

What *Teague* leaves us with, then, is a test that combines *Desist*'s well-understood assessment of accuracy and *Mackey*'s virtually indeterminate reference to "procedures that . . . are 'implicit in the concept of ordered liberty.'"[77] Crucially, however, the plurality anticipated the "anachronistic" heritage of *Palko* — and resisted a return to an indeterminate jurisprudence of unknown jurists' substantive values:

> [S]ince *Mackey* was decided, our cases have moved in the direction of reaffirming the relevance of the likely accuracy of convictions in determining the available scope of habeas review. . . . Justice Harlan's concerns about [the pliability of such a test] can be addressed by limiting the scope of the second exception to those new procedures without which the likelihood of an accurate conviction is *seriously diminished*.[78]

In view of the indeterminacy of the *Mackey* prong, courts should approach retroactivity in a manner that focuses on this critical passage in *Teague*. As the Court's jurisprudence after *Teague* makes clear, emphasizing the implications of a particular rule for the accuracy of the underlying proceedings is far more helpful in striking the difficult balance between concerns of finality and the purpose of the writ than vague reference to a particular jurist's "concept of ordered liberty."

C. *Post*-Teague *Jurisprudence*

Since deciding *Teague*, the Court has declined to apply eleven new rules of criminal procedure retroactively on collateral review.[79] The Court has variously relied on the analysis in *Desist* or *Mackey* — or, occasionally, an amalgam of both — to reject petitioners' claims.[80]

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[75] *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 148 & nn.4–12 (1968) (collecting cases).

[76] *See, e.g.*, Washington v. Texas, 388 U.S. 14, 24 (1967) (Harlan, J., concurring in the judgment); Poe v. Ullman, 367 U.S. 497, 539–45 (1961) (Harlan, J., dissenting).

[77] Mackey v. United States, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part) (quoting *Palko*, 302 U.S. at 325).

[78] *Teague*, 489 U.S. at 313 (emphasis added) (citations omitted).

[79] *See* United States v. Mandanici, 205 F.3d 519, 529 (2d Cir. 2000) (collecting ten such cases); *see also* Schriro v. Summerlin, 124 S. Ct. 2519, 2526 (2004).

[80] In one of these post-*Teague* cases, the petitioner failed to argue that the exception to *Teague*'s bar applied to his case, and the Court therefore declined to provide a detailed assessment

In *Butler v. McKellar*,[81] the Court relied explicitly and exclusively on *Desist* to reject a claim for retroactive application of a new rule on collateral review. There, the Court concluded that the rule of *Arizona v. Roberson*,[82] which held that the Fifth Amendment prohibits the police from reinitiating interrogation with respect to a separate offense after a suspect has requested counsel, was unavailable retroactively on habeas.[83] The Court explained that "a violation of *Roberson*'s added restrictions on police investigat[ions] would not seriously diminish the likelihood of obtaining an accurate determination."[84] Among the eleven collateral retroactivity cases decided since 1989, at least five, including *Butler*, rest exclusively on the Court's conclusion that the rule at issue was not "so central to an accurate determination of innocence or guilt as to fall within th[e] exception to the *Teague* bar."[85] Because these decisions adhere closely to Justice Harlan's view that the decisive factor in determining whether to apply a procedural rule retroactively is the rule's implications for the accuracy of the underlying conviction, these decisions are fully consonant with the reassessment of retroactivity counseled by this Note.

Other decisions in the post-*Teague* era appear to use a consolidated version of the *Desist* and *Mackey* tests to preclude retroactive application of rules on collateral review. In *Saffle v. Parks*,[86] for example, the Court held that a new rule prohibiting a prosecutor from arguing before capital-sentencing jurors that sympathy should not influence their judgment would not have been[87] retroactively available on collateral review because, "[w]hatever one may think of the importance of [the]

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with respect to the scope of the exception and its applicability in that case. *See* Lambrix v. Singletary, 520 U.S. 518, 539–40 (1997).

[81] 494 U.S. 407 (1990).

[82] 486 U.S. 675 (1988).

[83] *Butler*, 494 U.S. at 416.

[84] *Id.*

[85] Goeke v. Branch, 514 U.S. 115, 120 (1995) (per curiam) (citation omitted) (quoting *Graham v. Collins*, 506 U.S. 461, 478 (1993) (quoting *Teague v. Lane*, 489 U.S. 288, 313 (1989))) (internal quotation marks omitted) (holding that the Eighth Circuit could not retroactively apply a new procedural rule guaranteeing a former fugitive's right to appeal); *see also* Schriro v. Summerlin, 124 S. Ct. 2519, 2525 (2004) (refusing to apply the rule of *Ring v. Arizona*, 536 U.S. 584 (2002), retroactively); Caspari v. Bohlen, 510 U.S. 383, 396 (1994) (holding that an extension of *Bullington v. Missouri*, 451 U.S. 430 (1981), to prohibit a successive noncapital sentencing enhancement would have been retroactively unavailable on habeas review because the existing rule would "*enhance* the accuracy of the proceeding" (emphasis added)); *Graham*, 506 U.S. at 478 (refusing to apply the rule of *Penry v. Lynaugh*, 492 U.S. 302 (1989), retroactively).

[86] 494 U.S. 484 (1990).

[87] This analysis is posed in the hypothetical because *Teague* requires that the Court "refuse to announce a new rule in a given case unless the rule would be applied retroactively to the defendant in the case." *Teague*, 489 U.S. at 316. Thus, in any case that urges a new rule and arrives at the Court on collateral review, the Court will refuse to announce the rule unless it would pass *Teague*'s bar for retroactive application. *Id. But see id.* at 319 n.2 (Stevens, J., concurring in part and concurring in the judgment).

proposed rule, it has none of the primacy and centrality of the rule adopted in *Gideon*."[88] But the *Saffle* Court also indicated that the "objectives of fairness *and accuracy* [were] more likely to be threatened than promoted by" the proposed rule, and the Court therefore rejected the petitioner's claims to retroactive relief on both *Desist* and *Mackey* grounds.[89]

In another post-*Teague* case, *O'Dell v. Netherland*,[90] the Court refused to apply retroactively the rule of *Simmons v. South Carolina*,[91] which required that a capital defendant be permitted to inform a sentencing jury that he will be ineligible for parole if the prosecution refers to his future dangerousness. There, too, the majority asserted that, unlike "the sweeping rule of *Gideon*,"[92] the *Simmons* rule "has hardly 'alter[ed] our understanding of the bedrock procedural elements' essential to the fairness of a proceeding."[93] But, in a footnote at the end of its retroactivity analysis, the Court added that it was "by no means inevitable" that "miscarriage[s] of justice" would occur without retroactive application of the rule — indicating that the rule's ambiguous effect on accuracy provided an alternative basis for the Court's holding.[94] That the Court failed even to identify whether its conclusion rested on the *Desist* or the *Mackey* analysis — or both — is demonstrative of the confusion that has attended the Court's occasional invocation of *Mackey*.

Indeed, only three post-*Teague* holdings rejecting retroactive application of a new rule on collateral review can be said to rest exclusively on the *Mackey* prong. In *Sawyer v. Smith*,[95] the Court concluded that the rule of *Caldwell v. Mississippi*,[96] which held that the Eighth Amendment prohibits the imposition of a death sentence where the sentencing authority has been led to the false belief that responsibility for determining the capital sentence lay elsewhere, did not fit *Teague*'s exception for new procedural rules.[97] The Court explained that the petitioner's argument that retroactive application of *Caldwell*'s rule

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[88] *Saffle*, 494 U.S. at 495.

[89] *Id.* (emphasis added).

[90] 521 U.S. 151 (1997).

[91] 512 U.S. 154 (1994).

[92] *O'Dell*, 521 U.S. at 167.

[93] *Id.* (alteration in original) (emphasis omitted) (quoting *Sawyer v. Smith*, 497 U.S. 227, 242 (1990) (quoting *Teague v. Lane*, 489 U.S. 288, 311 (1989) (quoting *Mackey v. United States*, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part)))).

[94] *See id.* at 167 n.4 (alteration in original) (quoting Brief for Petitioner at 35, *O'Dell* (No. 96-6867)) (internal quotation marks omitted).

[95] 497 U.S. 227 (1990).

[96] 472 U.S. 320 (1985).

[97] *Sawyer*, 497 U.S. at 245.

would "preserve the accuracy and fairness of capital sentencing judgments"[98]

> looks only to half of our definition of the second exception. . . . It is . . . not enough under *Teague* to say that a new rule is aimed at improving the accuracy of trial. More is required. A rule that qualifies under this exception must not only improve accuracy, but also "'alter our understanding of the *bedrock procedural elements*'" essential to the fairness of a proceeding.[99]

It might be argued, then, that *Sawyer* stands starkly for the proposition that *Mackey*'s analysis independently excludes rules from retroactive application when the rule in question does not "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." But *Sawyer* is also amenable to a narrower reading — that the *Mackey* prong only does this work when the petitioner, by the very nature of his constitutional claim, must *concede* that the new rule is not essential to the fairness of the proceeding. The *Sawyer* majority specifically noted that "[t]he only defendants [seeking retroactive application of *Caldwell*] . . . are those who must concede that the [error] was not so harmful as to render their sentencing trial 'fundamentally unfair,'" and thus concluded that the petitioner definitionally could not meet *Mackey*'s requirement.[100]

The second post-*Teague* case suggesting that the *Mackey* prong operates independently is *Gray v. Netherland*,[101] in which the Court made no mention of accuracy while refusing to apply a proposed new rule retroactively, referring only to *Saffle*'s admonition that such a rule would have had "none of the primacy and centrality of the rule adopted in *Gideon*."[102] The *Gray* Court, however, referred neither to *Mackey* nor to *Desist*, and it is not clear whether the language of "primacy and centrality" refers to one or both prongs of the analysis.

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[98] *Id.* at 242 (quoting Brief for Petitioner at 30, *Sawyer* (No. 89-5809)) (internal quotation marks omitted).

[99] *Id.* (quoting *Teague v. Lane*, 489 U.S. 288, 311 (1989) (quoting *Mackey v. United States*, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part))).

[100] *Id.* at 243–44 (quoting *Sawyer v. Butler*, 881 F.2d 1273, 1293 (5th Cir. 1989)). The petitioner in *Sawyer* was forced to concede that he could not show that the absence of *Caldwell*'s protections rendered his trial fundamentally unfair because *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), provided relief for any petitioner able to make such a showing. The *Sawyer* Court therefore relied heavily on the fact that, "[a]t the time of [the] petitioner's trial and appeal, the rule of *Donnelly* was in place to protect any defendant who could show that [a constitutional violation at trial] had in fact made a proceeding fundamentally unfair." *Sawyer*, 497 U.S. at 243. Because Sawyer did not "contest[] the Court of Appeals' finding that he ha[d] no claim for relief under the *Donnelly* standard," *id.*, the Court concluded that he was logically precluded from making the showing required by *Mackey*. *See id.* at 244.

[101] 518 U.S. 152 (1996).

[102] *Id.* at 170 (quoting *Saffle v. Parks*, 494 U.S. 484, 495 (1990)).

Similarly, in a third case, *Gilmore v. Taylor*,[103] the Court refused to apply retroactively a proposed rule of criminal procedure requiring that juries be instructed to consider a murder defendant's mitigating mental state, concluding that the second *Teague* exception was "inapplicable."[104] As in *Gray*, however, the Court made no mention of *Mackey*; and, although Justices Blackmun and Stevens argued that the proposed rule met *Teague*'s strictures,[105] the Court responded with the vague assertion that the rule was not "so fundamental as to come within *Teague*'s second exception."[106] Although *Gilmore* appears to have relied on the Court's conception of "those procedures that . . . are implicit in the concept of ordered liberty,"[107] it is arguable that the Court relied upon *both* the *Mackey* and *Desist* prongs to reject the petitioner's claim.

This review of the eleven post-*Teague* cases suggests that the few doctrinal hurdles to discarding *Mackey*'s unhelpful reference to the incorporation debate might easily be overcome. And a recent case, *Schriro v. Summerlin*,[108] provides hope that the Court has returned to accuracy as the exclusive touchstone for collateral retroactivity.

III. *APPRENDI* AND ITS CONSEQUENCES FOR DECISIONAL ACCURACY

This Part applies the Note's proposed rethinking of collateral retroactivity to the Court's Sixth Amendment jurisprudence. The Note then explains that this approach to retroactivity would render *Apprendi v. New Jersey* retroactive, and that this result is fully consistent with the Court's decision in *Schriro v. Summerlin*.

A. Apprendi *and Its Historical Roots*

In 2000, the Court announced in *Apprendi* what has been judged by every federal court of appeals to consider the issue to be a new rule of criminal procedure:[109] "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable

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[103] 508 U.S. 333 (1993).

[104] *Id.* at 345.

[105] *Id.* at 353 (Blackmun, J., dissenting).

[106] *Gilmore*, 508 U.S. at 345 n.4.

[107] *Id.* at 345 (quoting *Graham v. Collins*, 506 U.S. 461, 478 (1993) (quoting *Teague v. Lane*, 489 U.S. 288, 311 (1989) (quoting *Mackey v. United States*, 401 U.S. 667, 693 (1971) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937))))) (internal quotation marks omitted).

[108] 124 S. Ct. 2519, 2525 (2004).

[109] *See, e.g.*, Coleman v. United States, 329 F.3d 77, 82 (2d Cir.), *cert. denied*, 124 S. Ct. 840 (2003) (collecting seven such cases and "join[ing] the chorus").

doubt."[110] In so concluding, the Court invalidated a conviction obtained by a New Jersey procedure that allowed a judge, rather than a jury, to enhance the defendant's sentence "if the trial judge [found], by a preponderance of the evidence," that the defendant acted with a purpose to intimidate an individual on the basis of race.[111]

Critically, the *Apprendi* Court made clear that the New Jersey procedure violated *two* of Apprendi's constitutional rights: the jury right enshrined in the Sixth Amendment and the right to have every fact necessary to his sentence proved beyond a reasonable doubt.[112] The Court emphasized that the reasonable doubt standard, a requirement of due process since *In re Winship*,[113] plays a critical functional role with respect to the accuracy of criminal trials.

In *Winship*, the Court considered New York's juvenile delinquency statute, which permitted a court to make a finding of delinquency by a preponderance of the evidence.[114] Striking down the statute, the Court explained that the "prime" purpose of the reasonable doubt rule is "*reducing the risk of convictions resting on factual error.*"[115] Thus, the *Winship* Court held, "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[116]

Justice Harlan joined the opinion of the Court, but he wrote separately to explicate the concerns that motivated his rare agreement with the Warren Court majority. First, his concurring opinion noted that, "in a judicial proceeding . . . the factfinder cannot acquire unassailably accurate knowledge of what happened"; and, as a consequence, the standard of proof "represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."[117] Second, Justice Harlan recognized that any trier of fact, under any procedure, will be exposed to the possibility of arriving at erroneous factual conclusions — in the criminal context, the acquittal of a guilty person or the conviction of an innocent one. "The standard of proof," Justice Harlan explained, "influences the relative frequency of these two types of erroneous outcomes," and as a consequence "the

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110 Apprendi v. New Jersey, 530 U.S. 466, 476 (2000) (quoting *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999)).

111 *Id.* at 468–69 (alteration in original) (quoting N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 1999–2000)).

112 *Id.* at 476–77, 497.

113 397 U.S. 358 (1970).

114 *See id.* at 360.

115 *Id.* at 363 (emphasis added).

116 *Id.* at 364.

117 *Id.* at 370 (Harlan, J., concurring).

choice of the standard . . . should, in a rational world, reflect an assessment of the comparative social disutility of each."[118]

B. The Effects of the Reasonable Doubt Standard on Harlanesque Accuracy

It is clear that both Justice Harlan and the contemporary Court agree that the reasonable doubt standard unambiguously and significantly improves the accuracy of the convictions to which it is applied. Indeed, a comparison of Justice Harlan's *Winship* concurrence to Professor Mishkin's analysis reveals that the Justice understood the reasonable doubt standard as among those accuracy-enhancing procedures that demand retroactive application.

Professor Mishkin described the notion of increased procedural accuracy as expressing "that *degree of confidence* that a man has committed a crime which the Constitution requires as a condition of the state's depriving him of liberty or life."[119] For this reason, Professor Mishkin intimated, "habeas corpus [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."[120] The parallels between Professor Mishkin's analysis and Justice Harlan's concurrence in *Winship* are striking but unsurprising. Justice Harlan viewed proof beyond a reasonable doubt as the Constitution's "instruct[ion to] the factfinder concerning the *degree of confidence* our society thinks he should have in the correctness of factual conclusions" supporting a guilty verdict.[121]

There can be very little doubt that Justice Harlan would have agreed that *Winship*'s command represents the quintessential accuracy-improving procedural rule. By definition, the reasonable doubt standard reflects the level of proof that the Constitution demands to "assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted."[122] For Justice Harlan — and, one hopes, for the current Justices — this is precisely the risk that the Great Writ was conceived to eliminate. Because the *Teague* plurality "agree[d] with Justice Harlan's description of *the function* of habeas corpus,"[123] fidelity to Justice Harlan's functional view demands retroactive application of *Apprendi*'s reasonable doubt requirement.

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118 *Id.* at 371.

119 Mishkin, *supra* note 43, at 81 (emphasis added).

120 *Id.* at 82.

121 *Winship*, 397 U.S. at 370 (Harlan, J., concurring) (emphasis added).

122 Desist v. United States, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting).

123 Teague v. Lane, 489 U.S. 288, 308 (1989) (emphasis added).

It could be argued that *Apprendi* need not apply retroactively because it extends *Winship*'s holding only to "sentencing factors" rather than to "elements" of the crime. But this argument forgets that *Apprendi* eliminates this distinction for constitutional purposes. Because due process requires that all "facts that expose a defendant to a punishment greater than that otherwise legally proscribed" must be proved beyond a reasonable doubt,[124] it is difficult indeed to argue that punishments imposed in violation of *Apprendi*'s requirement can stand. Because all of these sentences are shrouded by the constitutional doubt that attends a punishment imposed solely on the basis of a preponderance of the evidence, even the strongest interests in finality cannot justify continued imprisonment of these defendants.

That the Court decided unanimously, before *Teague*, to apply *Winship* retroactively further supports this conclusion.[125] The Court recognized that trials proceeding in the absence of *Winship*'s protections "so raise[] serious questions about the accuracy of guilty verdicts" that "[n]either good-faith reliance by state or federal authorities on prior constitutional law or accepted practice" is an adequate replacement for full retroactive application of the right.[126]

It might also be argued that *Apprendi*'s insistence that the reasonable doubt standard reach every fact determinative to a defendant's punishment is not the type of "fundamental" rule that qualifies for *Teague*'s exception. That these arguments have proven convincing to eight courts of appeals is not indicative of their power; rather, it is demonstrative of the confusion that currently plagues collateral retroactivity jurisprudence.

C. *The* Mackey *Prong's Consequences for Clarity in the Courts Below*

Eight circuits have concluded that, under *Teague*, the rule of *Apprendi* is not retroactively available on collateral review.[127] Every cir-

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[124] Apprendi v. New Jersey, 530 U.S. 466, 483 (2000).

[125] Ivan V. v. City of New York, 407 U.S. 203, 205 (1972) (per curiam). It should be noted, however, that *Ivan V.* applied *Winship* retroactively on *direct* review and was decided before *Teague*. Some observers have suggested that *Ivan V.* cannot survive *Teague*'s modification of retroactivity doctrine. *Compare* Charles F. Baird, *The Habeas Corpus Revolution: A New Role for State Courts*, 27 ST. MARY'S L.J. 297, 324 n.195 (1996) (suggesting that *Ivan V.* and similar cases might have been decided differently under the *Teague* rule), *with* THE FEDERAL COURTS AND THE FEDERAL SYSTEM, *supra* note 4, at 1375–76 (discussing *Teague*'s significant effect on the availability of habeas relief under new rules in view of the standard of *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977)). Nevertheless, during a period when the Court thought the tests for direct and collateral retroactivity coterminous, *see* Stovall v. Denno, 388 U.S. 293, 300 (1967), it is striking that the Court unanimously agreed that *Winship* applied retroactively.

[126] *Ivan V.*, 407 U.S. at 204 (quoting *Williams v. United States*, 401 U.S. 646, 653 (1971)) (internal quotation marks omitted).

[127] Coleman v. United States, 329 F.3d 77, 88–90 (2d Cir. 2003), *cert. denied*, 124 S. Ct. 840 (2003); United States v. Sanders, 247 F.3d 139, 147–51 (4th Cir. 2001), *cert. denied*, 534 U.S. 1032

cuit so concluding has indicated that, although *Apprendi* significantly "'improv[es] the accuracy' of criminal proceedings,"[128] its rule does not "'alter our understanding of the bedrock procedural elements essential to the fairness' of those proceedings."[129]

One circuit has interpreted *Teague* as requiring a "groundbreaking occurrence" for retroactive application of a new rule on collateral review;[130] another has asserted that only a holding by the Supreme Court "that the country's criminal justice system malfunctioned . . . fundamentally prior to [the new rule would] merit . . . retroactive application."[131] Exposing the source of the difficulty, another circuit has argued that "one can easily envision a system of 'ordered liberty' in which certain elements of a crime" need not be proved beyond a reasonable doubt.[132] On this standard, however, it is clear that *Gideon*, too, would not be retroactively applied on collateral review; surely one could envision a system of ordered liberty that did not require the assistance of counsel in every criminal case. (Indeed, several such systems existed for more than a century after the Founding.) Although the indeterminacy of the *Mackey* prong may make the courts of appeals' task in evaluating *Apprendi*'s retroactive application more difficult, these opinions offer no reasoned justification regardless of the doctrinal limits of collateral retroactivity.[133]

(2001); Goode v. United States, 305 F.3d 378, 382–85 (6th Cir. 2002), *cert. denied*, 537 U.S. 1096 (2002); Curtis v. United States, 294 F.3d 841, 843–44 (7th Cir. 2002), *cert. denied*, 537 U.S. 976 (2002); United States v. Moss, 252 F.3d 993, 997–1001 (8th Cir. 2001), *cert. denied*, 534 U.S. 1097 (2002); United States v. Sanchez-Cervantes, 282 F.3d 664, 668–71 (9th Cir. 2002), *cert. denied*, 537 U.S. 939 (2002); United States v. Mora, 293 F.3d 1213, 1218–19 (10th Cir. 2002), *cert. denied*, 537 U.S. 961 (2002); McCoy v. United States, 266 F.3d 1245, 1255–59 (11th Cir. 2001), *cert. denied*, 536 U.S. 906 (2002).

[128] *Coleman*, 329 F.3d at 88 (quoting *Sawyer v. Smith*, 497 U.S. 227, 241–42 (1990)).

[129] *Id.* (quoting *Sawyer*, 497 U.S. at 242 (quoting *Teague v. Lane*, 489 U.S. 288, 311 (1989) (quoting *Mackey v. United States*, 401 U.S. 667, 693 (1971))) (emphasis omitted)).

[130] *Id.* (quoting *United States v. Mandanici*, 205 F.3d 519, 528 (2d Cir. 2000) (quoting *Caspari v. Bohlen*, 510 U.S. 383, 396 (1994))) (internal quotation marks omitted).

[131] *Sanders*, 247 F.3d at 150.

[132] *Moss*, 252 F.3d at 999 (quoting *United States v. Shunk*, 113 F.3d 31, 37 (5th Cir. 1997)) (internal quotation marks omitted).

[133] Although this Note argues that *Apprendi* provides the Court with an important opportunity to guide lower courts by explicitly decreasing its reliance on *Mackey*'s substantively unhelpful guideposts, even those who would insist that the law of retroactivity retain *Mackey*'s test should agree that *Apprendi* must be applied retroactively. Although it is clear that *Teague*'s reference to *Palko*'s standard of "ordered liberty" cannot reasonably be understood to import the terms of the incorporation debate at the time of Cardozo or Harlan, see *supra* pp. 1651–52, it is equally clear that the *Teague* plurality thought itself borrowing directly from the "language used by Justice Harlan." *Teague*, 489 U.S. at 311. And Justice Harlan's concurrence in *Winship* reveals that he thought of the reasonable doubt standard as a protection of a defendant's "transcending value . . . [in] his liberty," *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (quoting *Speiser v. Randall*, 357 U.S. 513, 525 (1958)) (internal quotation marks omitted), and that no less than "*fundamental procedural fairness*" demanded that *Winship*'s rule be applied to every fact relevant to a defendant's punishment, *id.* (emphasis added). Thus, even assuming the continued

The courts of appeals' struggle to avoid retroactive application of *Apprendi* and its progeny might be explained by the significant costs such a holding would impose upon state governments, which would be required to relitigate thousands of prisoners' sentences if *Apprendi* were applied retroactively.[134] Although the benefits of finality are certainly a valid consideration in habeas jurisprudence as a normative matter, *Teague* — unlike the earlier test set forth in *Stovall* — made no mention of administrative cost as a factor to be considered in determining the scope of collateral retroactivity. Further, courts should remember that Congress is free to circumscribe collateral retroactivity by statute. Congress has not acted to limit collateral retroactivity on the basis of administrative cost.[135] If the costs of collateral retroactivity are motivating lower courts to dismiss habeas petitions, jurists should candidly acknowledge that fact while inviting empirical analysis of those costs, rather than accepting without more the imagined administrative catastrophe described by states seeking to avoid the reach of the writ.

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vitality of the *Mackey* prong, it is difficult to understand why *Gideon* should be thought more "implicit in the concept of ordered liberty" than *Winship* and *Apprendi*.

[134] Observers have also argued that the Court's narrow approach to collateral retroactivity enables judges seeking to expand constitutional rights to assure their colleagues that newly conceived constitutional rules will have only limited implications because they will not affect existing convictions. *See* Fallon & Meltzer, *supra* note 12, at 1739 ("It was much easier for the Court to lay down the *Miranda* rules, for example, knowing that the prison doors need not necessarily swing open for every inmate convicted with the aid of confessions not preceded by the requisite warnings."). On this theory, the *Mackey* prong serves to provide courts with "wiggle room" to accommodate jurists prepared to extend constitutional rights in prospective cases but unwilling to accept the consequences of such a decision for those already convicted. This Note has argued that the history of the writ demands that an extension of constitutional rights necessary to improve significantly the accuracy of future punishment is equally necessary to ensure the accuracy of ongoing punishment. However, if retroactivity jurisprudence indeed reflects judges' preference to define most constitutional rules of criminal procedure prospectively, this Note argues that courts should do so explicitly rather than under the guise of an ill-defined conception of fundamental rights.

[135] It might be argued that Congress has already barred *Apprendi* from retroactive application on habeas through 28 U.S.C. § 2254(a), which limits grants of the writ to cases in which a prisoner is in custody "in violation of the Constitution or laws or treaties of the United States," as construed in *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977), which requires a showing of "cause and prejudice" to excuse a procedural default of a constitutional claim. Although the Court has held that the novelty of a constitutional claim may constitute cause, *see* Reed v. Ross, 468 U.S. 1, 13 (1984), it is at least arguable that *Apprendi* was not sufficiently new to justify a failure to raise an analogous claim during state proceedings, and that most *Apprendi* claims are therefore barred under § 2254(a) as procedurally defaulted unless prejudice or cause can be shown under *Wainwright*. *Cf.* THE FEDERAL COURTS AND THE FEDERAL SYSTEM, *supra* note 4, at 1374.

D. Schriro v. Summerlin *and the Prospect of Clarity*

The Court's recent decision in *Schriro v. Summerlin*, holding that the rule of *Ring v. Arizona*[136] is not retroactively available on collateral review,[137] provides some hope that the Court may finally have discarded *Mackey*'s untethered standard in exchange for nearly exclusive emphasis on decisional accuracy. The rule of *Ring* — itself an extension of *Apprendi* to a death penalty procedure empowering a judge to find aggravating factors that made a defendant eligible for capital punishment — holds that the Sixth Amendment requires that a jury make these findings.[138]

In *Summerlin*, a prisoner sought retroactive application of *Ring*'s rule to invalidate a capital sentence imposed after judicial factfinding made him eligible for the death penalty.[139] Assessing whether *Ring* should be applied retroactively, Justice Scalia heavily emphasized Justice Harlan's *Desist* dissent and concluded:

> [T]he question is whether judicial factfinding [rather than jury factfinding] so "*seriously* diminishe[s]" accuracy that there is an "'impermissibly large risk'" of punishing conduct the law does not reach. The evidence is simply too equivocal to support that conclusion.[140]

Although the majority and dissent disagreed with respect to *whether* jury factfinding enhanced the accuracy of the underlying proceedings, they appeared to agree that "protecting the innocent against erroneous conviction" was among the Great Writ's "basic objectives."[141]

Summerlin, then, is perhaps indicative of an emerging consensus at the Court to take seriously *Teague*'s admonition that it "would be unnecessarily anachronistic" to import *Palko*'s analysis into retroactivity doctrine.[142] Drawing from *Teague*'s suggestion that the Court should balance the state's interest in finality by "limiting the scope of the . . . exception to those new procedures without which the likelihood of an accurate conviction is *seriously diminished*,"[143] the *Summerlin* Court suggested that the new rule must *inarguably* improve the accuracy of every conviction to which it is applied.

Arguments that *Summerlin*'s outcome suggests that the Court will similarly deny retroactive effect to the reasonable doubt holding of *Ap-*

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136 536 U.S. 584 (2002).

137 Schriro v. Summerlin, 124 S. Ct. 2519, 2526 (2004).

138 *Ring*, 536 U.S. at 609.

139 *See Summerlin*, 124 S. Ct. at 2521.

140 *Id.* at 2525 (third alteration in original) (citation omitted) (quoting *Teague v. Lane*, 489 U.S. 288, 312–13 (1989) (emphasis added) (quoting *Desist v. United States*, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting))).

141 *Id.* at 2528 (Breyer, J., dissenting).

142 *Teague*, 489 U.S. at 312.

143 *Id.* at 313 (emphasis added).

prendi ignore that *Ring* did not implicate *Winship* in any way.[144] Because the implications of the jury right for decisional accuracy are in fact ambiguous, *Summerlin*'s holding is fully consonant with the reassessment of retroactivity counseled in this Note. Indeed, because the analysis set forth here requires an exclusive focus on the accuracy implications of a new constitutional rule, rethinking retroactivity in this manner would not require revisiting *Summerlin*. To the contrary, the *Summerlin* Court's near-exclusive emphasis on considerations of accuracy strongly suggests that the *Winship* right guaranteed in *Apprendi* should survive the Court's retroactivity analysis. Because only *Apprendi*'s reasonable doubt guarantee unambiguously improves the accuracy of underlying criminal proceedings, only that guarantee — and not the jury right implicated in *Ring* and *Summerlin* — should be retroactively available on collateral attack.

IV. CONCLUSION

The much-maligned rule of *Teague v. Lane* has yielded an indeterminate doctrine of collateral retroactivity that has strayed some distance from its jurisprudential roots. Drawing on the history of the *Teague* test and Justice Harlan's substantial influence on its development, this Note has argued that *Teague*'s retention of *Mackey*'s references to unpredictable notions of fundamental fairness has incorporated policy considerations — including a jurist's sympathy for the procedural rule itself — that are out of place in the habeas context. Fidelity to *Teague*'s jurisprudential roots would shift the emphasis to whether a new rule implicates the accuracy of the proceedings, an approach that is both consistent with the Court's post-*Teague* jurisprudence and more closely tied to Justice Harlan's conception of the functional purpose of the Great Writ.

In view of these considerations, this Note has argued that retroactive application of the reasonable doubt holding of *Apprendi v. New Jersey* provides a welcome opportunity for the Court to refocus its jurisprudence on those procedures that significantly improve the accuracy of criminal punishment. The courts of appeals' doctrinal struggle with this question indicates that the Court's existing jurisprudence

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[144] The procedure at issue in *Ring* required the judge making sentencing findings to do so beyond a reasonable doubt and therefore did not implicate *Apprendi*'s reasonable doubt protections. *See* Ring v. Arizona, 536 U.S. 584, 597 (2002). Most commentators have agreed that *Summerlin* has no analytical implication for *Apprendi*'s collateral retroactivity because, as this Note argues, it is the *Winship* right, rather than the Sixth Amendment right, that most implicates the values consistent with a grant of the writ of habeas corpus. *See, e.g.*, Nancy J. King & Susan R. Klein, *Beyond* Blakely, 16 FED. SENTENCING REP. 316, 323–25 (2004) (distinguishing *Summerlin*'s analysis from an assessment of the retroactivity of *Apprendi* and concluding that "the Court in *Summerlin* addressed only the retroactivity of the right-to-jury holding of *Ring*").

provides little guidance. A review of Justice Harlan's approach, however, suggests that even his narrowest conception of retroactivity would counsel retroactive application of *Apprendi*'s reasonable doubt requirement.

Although collateral retroactivity jurisprudence requires a difficult balance between the states' interest in finality and individual defendants' substantive rights, habeas must ensure — as Justice Harlan recognized — that the judgment of each conviction in the United States meets the standard of certainty demanded by the Constitution. Because a higher standard of proof directly serves this purpose, the Court's extension of this standard to sentencing factors must be given retroactive application to defendants whose punishment extends beyond the maximum legally authorized sentence based solely upon facts proved beyond a reasonable doubt.