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INTRODUCTION

For several years the Supreme Court has struggled with the issue of when criminal defendants should be given the benefit of rules of criminal procedure which were established after their trials.[1] The Court started this debate in *Linkletter v. Walker*[2] by declining to apply the exclusionary rule of *Mapp v. Ohio*[3] retroactively to cases on habeas corpus review.[4] Finding that "the Constitution neither prohibits nor requires retrospective effect,"[5] the *Linkletter* Court held that "though [a *Mapp* violation] might be fundamental it is not of the nature requiring us to overturn all final convictions based upon it."[6]

Following the *Linkletter* decision, a divided Court struggled with retroactivity analysis and produced a series of controversial decisions.[7] The Court discarded the distinction between direct and collateral appeals[8] and for a

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1. Whenever the Supreme Court "lays down a new constitutional procedural rule that overrules or substantially departs from prior precedent" the issue of who receives the benefit of that rule arises. Note, United States v. Johnson: *Reformulating the Retroactivity Doctrine,* 69 CORNELL L. REV. 166, 167 (1983). A rule is fully retroactive when it is available to all litigants, regardless of whether their cases have already been adjudicated. *Id.*

2. 381 U.S. 618 (1965). Prior to this case all new rules of criminal procedure were applied retroactively. *Id.* at 628 & n.13 ("It is true that heretofore, without discussion, we have applied new constitutional rules to cases finalized before the promulgation of the rule."). However, previous civil rulings had been prospectively applied. *Id.* at 624-29. The Court used these to support its decision. *Id.* at 628-29. For a discussion of why *Linkletter* "misused" this precedent, see Haddad, *The Finality Distinction in Supreme Court Retroactivity Analysis: An Inadequate Surrogate for Modification of the Scope of Federal Habeas Corpus,* 79 NW. U.L. REV. 1062, 1064-68 (1985).

3. 367 U.S. 643 (1961). The *Mapp* Court held that states are required to exclude evidence from trials that was seized in violation of the search and seizure provisions of the fourth amendment. This overruled Wolf v. Colorado, 338 U.S. 25 (1949), where the Court had held that although the fourth amendment was applicable to the states, the exclusionary rule was not the required remedy for violations.

4. The new rule had already been applied retroactively to cases on direct review. *Linkletter,* 381 U.S. at 622.

5. *Id.* at 629.

6. *Id.* at 639-40.

7. For a history of this period, see Case Note, *Retroactive Application of Constitutional Rules Regarding Criminal Procedure:* Griffith v. Kentucky, *107 S. Ct. 708 (1987),* 56 U. CIN. L. REV. 1097, 1099-1107 (1988).

8. Stovall v. Denno, 388 U.S. 293, 300 (1967). The Court reestablished the distinction in United States v. Johnson, 457 U.S. 537 (1982).

period of years applied a three part balancing test implied by *Linkletter.*[9] During this time Justice Harlan emerged as one of the strongest critics of the *Linkletter* test. In several dissenting opinions he argued for a new standard which used the procedural distinctions among defendants as the primary means for determining retroactivity.[10]

In 1987, the Supreme Court partially overruled *Linkletter* and applied Harlan's retroactivity analysis to defendants on direct review.[11] Following that decision the treatment of habeas defendants remained uncertain.[12] However, last term the Court completed the recent overhaul of retroactivity analysis. In *Teague v. Lane*[13] a plurality of the Court extended a modified form of the Harlan approach to all retroactivity cases.[14] A few weeks later in *Penry v. Lynaugh*[15] the Court extended the new retroactivity analysis to habeas death penalty cases.

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9. Under this test, courts considered three factors: (1) the new rule's purpose and whether that purpose would be advanced by retroactive application of the rule; (2) the extent of reliance on old precedent; and (3) the effect of retroactivity on the administration of justice. *Stovall,* 388 U.S. at 293. For cases that provide extensive discussion of this test, see *e.g.,* Brown v. Louisiana, 447 U.S. 323 (1980) (ruling that prohibits conviction by non-unanimous six person jury should be applied retroactively); Daniel v. Louisiana, 420 U.S. 31 (1975) (ruling that exclusion of women from a jury violates the sixth and fourteenth amendments will not be applied retroactively); Adams v. Illinois, 408 U.S. 278 (1972) (decision that preliminary hearing is critical stage of prosecution requiring presence of counsel will not be applied retroactively).

10. Mackey v. United States, 401 U.S. 667, 675-81 (1971) (Harlan, J., dissenting); Desist v. United States, 394 U.S. 244, 258-59 (1969) (Harlan, J., dissenting); *see also* United States v. United States Coin & Currency, 401 U.S. 715, 724 n.13 (1970); Jenkins v. Delaware, 395 U.S. 213, 222-24 (1969) (Harlan, J., dissenting).

11. Griffith v. Kentucky, 479 U.S. 314 (1987) (applying Batson v. Kentucky, 476 U.S. 79 (1986)).

12. In Allen v. Hardy, 478 U.S. 255 (1986), which was handed down a few months before *Griffith,* the Court used the *Linkletter* test to decide against applying *Batson* retroactively to habeas cases. However, in *Griffith,* the Court held that *Batson* would be applied retroactively to cases on direct review. In reaching this result the Court did not justify, or discuss, the distinction between defendants on direct and collateral review. *Griffith,* 479 U.S. at 332 n.1 (White, J., dissenting). Therefore, it was unclear whether the *Griffith* holding had any ramifications for habeas defendants. Comment, Griffith v. Kentucky: *Partial Adoption of Justice Harlan's Retroactivity Standard,* 10 CRIM. JUST. J. 153, 165-66 (1987). Justice Powell, concurring in *Griffith,* noted that the treatment of habeas defendants was uncertain: "[I]t was not necessary for the Court to express an opinion with respect to habeas corpus petitions. As I read the Court's opinion, this question is carefully left open until it is squarely presented." *Griffith,* 479 U.S. at 329 (Powell, J., concurring).

13. 109 S. Ct. 1060 (1989).

14. Although Justice White concurred in the result, he indicated that he basically agreed with the retroactivity rule created by *Teague:*

> I regret the course the Court has taken to this point, but . . . I have insufficient reason to continue to object . . . . [T]he result reached in Parts IV and V of Justice O'Connor's opinion is an acceptable application in collateral proceedings of the theories embraced by the Court in cases dealing with direct review, and I concur in that result.

Id. at 1079 (White, J., concurring in result).

15. 109 S. Ct. 2934 (1989).

These three recent cases appear to end the debate that has raged for years over retroactivity. However, difficult problems remain. The *Penry* Court was sharply divided, with four dissenters arguing that the majority had misapplied the retroactivity test which had been created only weeks earlier in *Teague.*[16] In addition, lower courts have had difficulty applying the principles established by *Teague* and *Penry.*[17] Thus, although the Court abandoned the flexible *Linkletter* balancing test partially to attain greater certainty and consistency in retroactivity analysis,[18] that goal has not yet been achieved. The Court will have to revisit this thorny issue to clarify application of its new rules.

In this Note I argue that the Court should not attempt to use categorical rules to resolve the retroactivity problem in habeas corpus cases. To support this argument, in Part I, I discuss the Court's newest retroactivity test. In Part II, I compare the *Teague* approach with the earlier *Linkletter* balancing test and identify a flaw common to the two approaches. I argue that like *Linkletter,* the *Teague* retroactivity test fails to provide a mechanism for judges to accommodate concerns about inaccurate convictions in individual cases. I close in Part III by proposing a new exception to the *Teague* retroactivity test. Under my proposed approach, retroactivity is determined largely on an individual, rather than categorical, basis.

I. THE NEW TEST

The Court's new retroactivity test is based on the analysis contained in Justice Harlan's dissents from the *Linkletter* era.[19] For purposes of retroactivity, Justice Harlan drew a sharp dividing line between direct and collateral review.[20] He believed that the Court should apply all new rules

16. *Id.* at 2964-65 (Scalia, J., dissenting). "It is rare that a principle of law as significant as that in *Teague* is adopted and gutted in the same Term." *Id.* at 2965.

17. *See, e.g.,* Moore v. Zant, 885 F.2d 1497 (11th Cir. 1989) (decided on grounds of abuse of the writ, however four different concurring or dissenting opinions were filed by judges disagreeing about retroactivity principles); Hopkinson v. Shillinger, 888 F.2d 1286 (10th Cir. 1989); Sawyer v. Butler, 881 F.2d 1273 (5th Cir. 1989), *cert. granted sub nom.* Sawyer v. Smith, 110 S. Ct. 835 (1990).

18. *See Teague,* 109 S. Ct. at 1070 ("The *Linkletter* retroactivity standard has not led to consistent results.").

19. Mackey v. United States, 401 U.S. 667, 675-81 (1971) (Harlan, J., dissenting); Desist v. United States, 394 U.S. 244, 256-69 (1969) (Harlan, J., dissenting). Harlan initially supported applying the balancing test created by *Linkletter* as a vehicle to "limit the impact of constitutional decisions which seemed to [him] profoundly unsound in principle." *Id.* at 258. Four years after *Linkletter,* disillusioned with the "extraordinary collection of rules" that *Linkletter* had spawned, Harlan proposed the alternative retroactivity standard contained in these dissents.

20. Justice Harlan noted that a case is on collateral review when the prisoner has filed a writ of habeas corpus under 28 U.S.C. § 2241 or a motion to vacate a judgment under 28 U.S.C. § 2255 in federal court. *Mackey,* 401 U.S. at 681 n.1. The Supreme Court's current definition is essentially identical. *See* note 29.

of criminal procedure retroactively to cases on direct review.[21] This followed from his conviction that the function of judicial review is to decide cases and apply the Constitution as "one source of the matrix of governing legal rules."[22] Harlan considered selective application of constitutional rules—including newly-created ones—a departure from this obligation and a legislative activity.[23]

Harlan's approach to habeas cases was also derived from his interpretation of the function of judicial review. He reasoned that collateral attacks on judgments were not within the scope of the Court's obligation to decide actual cases and controversies.[24] Consequently, retroactivity was not constitutionally mandated and other non-constitutional interests could be considered. He argued that generally the interests of society and the defendant were both served by finality in criminal judgments.[25] Therefore, with limited exceptions, Harlan favored non-retroactivity for cases on collateral review.[26]

In *Griffith v. Kentucky*[27] and *Teague v. Lane*,[28] the Court accepted the Harlan distinction between direct and collateral review as the primary means for determining retroactivity.[29] In *Griffith*, the Court held that full retro-

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

22. *Mackey*, 401 U.S. at 678-79.

23. *Id.* at 679. Justice Harlan stated:

> [T]he Court's assertion of power to disregard current law in adjudicating cases before us [on direct review], is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation. We apply and definitively interpret the Constitution, under this view . . . not because we are bound to, but only because we occasionally deem it appropriate, useful, or wise.

Id.

Harlan also noted "unacceptable ancillary consequences" of denying retroactivity to defendants on direct review. *Id.* at 681. In his view, prospective overruling cut the Court loose from the stabilizing force of precedent and discouraged lower courts from attempting to anticipate Supreme Court rulings, reducing them "largely to the role of automatons." *Id.* at 680-81. Finally, he argued that giving only the litigant in the rule-changing case the benefit of the decision violated the constitutional requirement of treating similarly situated defendants alike. *Id.* at 679; *Desist*, 394 U.S. at 258-59.

24. *Desist*, 394 U.S. at 260.

25. *Mackey*, 401 U.S. at 679.

26. There were two exceptions. First, decisions which placed certain conduct "beyond the power of the criminal law-making authority" merited retroactive effect. *Mackey*, 401 U.S. at 692. The *Teague* plurality adopted this exception as part of its new retroactivity test. *See infra* text accompanying notes 38-39. The second exception to the rule of finality was for "nonobservance of those procedures that . . . are 'implicit in the concept of ordered liberty.'" *Mackey*, 401 U.S. at 693 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)). The *Teague* plurality also incorporated a modified form of this exception into its new retroactivity test. *See infra* text accompanying notes 40-42.

27. 479 U.S. 314 (1987).

28. 109 S. Ct. 1060 (1989).

29. An appeal is collateral if it begins after the judgment becomes final. The Court has defined a final judgment as one where "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." *Griffith*, 479 U.S. at 321 n.6.

activity is required for defendants on direct review.[30] Conversely, in *Teague,* the Court held that defendants on collateral review will receive the retroactive benefit of new rules only in very unusual cases.[31]

Under *Teague,* retroactivity for habeas corpus cases is determined by a two-step analysis. First, the court making the retroactivity decision must decide if the rule in question is a new one, or merely an extension of old precedent. If the rule is not new, then no retroactivity problem arises and the court must apply the rule to the pending case.[32] Second, the court must decide whether the new rule falls within one of the very narrow exceptions created in *Teague.* Unless an exception applies, all new rules are non-retroactive.[33]

The *Teague* plurality adopted a very broad test for determining when a rule is new. Under this test, "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal government."[34] This occurs whenever "the result was not *dictated* by precedent existing at the time the defendant's conviction became final."[35] Under this expansive new rule definition, it is hard to imagine any rules of criminal procedure that will not trigger retroactivity analysis.[36] As Justice Brennan noted in his *Teague* dissent, "[f]ew decisions on appeal or collateral review are '*dictated*' by what came before . . . . Virtually no case that prompts a dissent on the relevant legal point, for example, could be said to be '*dictated*' by prior decisions."[37]

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30. *Id.* at 328.

31. *Teague,* 109 S. Ct. at 1070.

32. Even prior to *Teague,* the Court consistently considered whether a rule was new before applying retroactivity analysis. *See, e.g.,* Yates v. Aiken, 484 U.S. 211, 215-18 (1988) (unanimous decision) (rule not new so no retroactivity problem).

33. *Teague,* 109 S. Ct. at 1075.

34. *Id.* at 1070.

35. *Id.* (emphasis in original).

36. The *Teague* plurality's new rule analysis is much broader than the analysis proposed by Justice Harlan. Justice Harlan recognized that the new rule distinction could be a difficult one. *Desist,* 394 U,S. at 263; *Mackey,* 401 U.S. at 695. Consequently, he defined new rules with reference to the purposes behind habeas corpus review. Because habeas serves as an incentive for state court judges to adhere to existing constitutional norms, Justice Harlan felt that a rule should not be considered "new" unless it could be said with assurance that the Supreme Court would not have adopted the rule given the opportunity at the time the defendant's case became final. *Desist,* 394 U.S. at 263-64. In making this decision, adherence to precedent would not always be sufficient: "[T]he doctrine of *stare decisis* cannot always be a complete answer to the retroactivity problem if a habeas petitioner is really entitled to the constitutional law which prevailed at the time of his conviction." *Id.* at 264. Rather, Harlan acknowledged that when a rule had been questioned in subsequent Supreme Court decisions, a later overruling of that case might not be considered a new rule. *Id.* at 264-65.

The *Teague* plurality departed from Harlan's analysis by adopting an expansive new rule definition based on adherence to precedent. Although Harlan appeared to consider some modifications in the law not "new rules," *see Desist,* 394 U.S. at 264-68, the *Teague* plurality held that unless a rule is required by existing precedent, it will be considered new for retroactivity purposes.

37. *Teague,* 109 S. Ct. at 1087-88 (Brennan, J., dissenting) (emphasis in original). *But see*

The *Teague* plurality created two exceptions to the rule of non-retroactivity in habeas corpus cases. The first exception is for decisions which place certain conduct "beyond the power of the criminal law-making authority to proscribe."[38] This exception will apply when the Court has created a new rule based on substantive due process grounds.[39] The second exception is for new rules of criminal procedure which "implicate the fundamental fairness of the trial."[40] A rule will fall within this exception only if it is "accuracy-enhancing" such that "without [it] the likelihood of an accurate conviction is seriously diminished."[41] The *Teague* plurality made it clear that this exception will be met only in rare cases:

> [W]e believe it unlikely that many such components of basic due process have yet to emerge. We are also of the view that such rules are "best illustrated by recalling the classic grounds for the issuance of a writ of habeas corpus—that the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted from the defendant by brutal methods."[42]

The retroactivity test created in *Teague* could virtually eliminate retroactive rules from habeas corpus cases. Taken together, the broad new rule definition and the extremely limited exceptions to non-retroactivity will greatly reduce the chances that defendants receive the benefit of new rules of criminal procedure on habeas corpus review. However, the impact of *Teague* will depend partially on how lower courts interpret it.

II. *TEAGUE* VS. *LINKLETTER*: CHANGE FOR THE BETTER?

In *Teague,* the plurality attempted to end the long struggle with retroactivity rules. However, the few cases which have followed *Teague* suggest that it has by no means ended the retroactivity debate. Despite the fact that the flexible *Linkletter* test has been replaced by the rule-bound Harlan approach, definitional problems remain which will plague courts trying to apply this test. These problems are inevitable given the nature of the current retroactivity analysis.

Penry v. Lynaugh, 109 S. Ct. 2934 (1989) (holding prompted vehement dissent, but rule still not considered new), discussed *infra* text accompanying notes 65-90.

38. *Teague,* 109 S. Ct. at 1075 (quoting *Mackey,* 401 U.S. at 692 (Harlan, J., dissenting in part and concurring in part)).

39. *See Mackey,* 401 U.S. at 692-93. The *Penry* Court expanded this exception to include "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Penry,* 109 S. Ct. at 2953.

40. *Teague,* 109 S. Ct. at 1076.

41. *Id.* at 1076-77.

42. *Id.* at 1077 (quoting Rose v. Lundy, 455 U.S. 509, 544 (1982) (Stevens, J., dissenting)).

A. The Problems with Categorical Analysis

Like its predecessor, *Teague* is a categorical balancing test. Under *Teague* courts must treat similarly all defendants whose trials were tainted by the same newly-recognized constitutional error. Therefore, each retroactivity decision determines the rights of a whole class of defendants. This creates a problem when the constitutional error had the potential of affecting the accuracy of some, but not all, of the trials of those who will be bound by the retroactivity ruling.

As Justice Harlan once noted, "a fundamental value determination of our society [is] that it is far worse to convict an innocent man than to let a guilty man go free."[43] Although Supreme Court Justices and scholars continue to debate the purposes of the habeas corpus review,[44] virtually all agree that one of the central functions of habeas corpus review is to protect innocent people from incarceration.[45]

Despite the consensus that habeas corpus review should be used to ensure that convictions are accurate, the *Teague* retroactivity test limits the ability of lower courts to consider the impact of newly-recognized errors on the accuracy of trials. Under *Teague,* courts are required to deny retroactive

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43. *In Re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

44. For example, compare the majority and concurring opinions in Kimmelman v. Morrison, 477 U.S. 365 (1986). For a comprehensive discussion of the different interpretations of the purposes of habeas corpus review, see Peller, *In Defense of Habeas Corpus Relitigation,* 16 HARV. C.R.-C.L. L. REV. 579 (1982).

45. *See, e.g.,* Teague v. Lane, 109 S. Ct. 1060, 1076 (1989) ("[O]ur cases have moved in the direction of reaffirming the relevance of the likely accuracy of convictions in determining the available scope of habeas review."); Murray v. Carrier, 477 U.S. 478, 496 (1986) (exception to procedural default rules when defendant probably innocent); Stone v. Powell, 428 U.S. 465, 491 n.31 (1976):

> Resort to habeas corpus, especially for purposes other than to assure that no innocent person suffers an unconstitutional loss of liberty results in serious intrusions on values important to our system of government. . . . We nevertheless afford broad habeas corpus relief, recognizing the need in a free society for an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty.

Id.; see also Kuhlmann v. Wilson, 477 U.S. 436, 452 (1986) (plurality opinion):

> The prisoner may have a vital interest in having a second chance to test the fundamental justice of his incarceration. Even where, as here, . . . many judges . . . have determined that his trial was free from constitutional error, a prisoner retains a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated.

Id.

The dissenting Justices in *Kuhlmann* supported a broader conception of habeas corpus review. *Id.* at 464-71 (Brennan, J., dissenting); *id.* at 476 (Stevens, J., dissenting). This standard incorporates concerns about inaccurate convictions. *Id.* at 471 n.5, 476.

For the seminal article arguing that a showing of innocence should be required before a writ of habeas corpus is granted, see Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments,* 38 U. CHI. L. REV. 142 (1970).

effect to a new rule unless they find that the rule is a bedrock procedural element which is "central to an accurate determination of innocence or guilt."[46] However, many rules have multiple purposes and the effect of a newly-recognized error on the accuracy of the trial may be a "question of probabilities."[47] In these cases, *Teague* forces courts to choose between complete retroactivity and non-retroactivity; there is no room for a selective approach that would only benefit defendants whose trials were probably inaccurate.

Given the fundamental concern for protecting the innocent, it is arguable that complete retroactivity is mandated whenever there is doubt about the accuracy of some trials where the newly-recognized constitutional violation occurred. However, the costs of complete retroactivity are high. In a recent case interpreting procedural limits on habeas corpus litigation,[48] Justice O'Connor noted that "the Great Writ entails significant costs."[49] These include extending the ordeal of the trial for the accused and the society,[50] and degrading the prominence of the trial by encouraging participants to look to habeas proceedings to enforce procedural safeguards.[51] In addition, the lapse of time between a trial and the granting of the writ may cause "erosion of memory, and dispersion of witnesses . . . render[ing] retrial difficult, even impossible."[52]

The institutional concerns associated with writs of habeas corpus are heightened in retroactivity cases. Finality concerns are strongly implicated; retroactive application may affect defendants whose trials are long since over.[53] The impact of retroactive application is also much more disruptive

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46. *Teague,* 109 S. Ct. at 1077.

47. Johnson v. New Jersey, 384 U.S. 719, 729 (1966). Difficulties determining the impact of new procedural rules were encountered during the *Linkletter* era. As the Supreme Court noted in one case, "Constitutional protections are frequently fashioned to serve multiple ends; while a new standard may marginally implicate the reliability and integrity of the factfinding process, it may have been designed primarily to foster other, equally fundamental values . . . ." Brown v. Louisiana, 447 U.S. 323, 328-29 (1980).

48. Engle v. Isaac, 456 U.S. 107 (1982).

49. *Id.* at 126.

50. This frustrates the goals of deterrence and rehabilitation. *Id.* at 127 n.32.

51. *Id.* at 127.

52. *Id.* at 127-28.

53. Generally, defendants have the incentive to file a habeas corpus petition directly after exhausting channels of direct review. However, a ruling that is available retroactively may prompt filings years after a conviction has become final.

Capital cases are an exception to the general practice of prompt filing of habeas petitions. Defendants on death row are likely to wait until after the date of execution has been set before filing a habeas petition. Their purpose in filing the petition is not to get out of jail but to use the process to delay the execution. Therefore, the time differential between a normal capital habeas petition and one spurred by a retroactive decision may be minimal, if not non-existent. Also, unlike cases where the defendant is imprisoned for life, there is obviously an outer limit on the filing of habeas petitions in death penalty cases (the date of the execution).

than the occasional use of habeas corpus to enforce ignored constitutional rights. In some cases retroactivity would overturn thousands of trials which were valid under old precedent,[54] and public confidence in the criminal justice system could deteriorate if the Court required such extensive retroactivity.[55] Finally, federalism concerns are compelling in this situation. Reversal of convictions that were free from error at the time they became final is a significant intrusion into state court autonomy.[56]

Although institutional concerns caution against extensive retroactivity, some rights are sufficiently important to justify extending them to all cases on habeas corpus review. For example, before *Teague,* the Supreme Court retroactively applied decisions creating the right to counsel,[57] the right to cross-examine a witness[58] and rulings establishing the state's burden of proof.[59] The decisions creating these rights merit complete retroactivity because they involve procedures affecting the fairness and accuracy of all trials. Presumably such fundamental rights would also be considered retroactive under the accuracy-enhancing exception in *Teague.*

Unfortunately, many cases involve rules whose purposes and effects on trials are not entirely clear. In these cases, balancing the interest in accuracy against the interest in finality can be extremely difficult. By framing the accuracy-enhancing exception very narrowly, the *Teague* plurality indicated that the balance should almost always be struck in favor of finality. However, this result will not always be consistent with notions of justice and may lead to difficulties in application of the *Teague* test.

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54. *See, e.g.,* DeStefano v. Woods, 392 U.S. 631, 634 (1968) (retroactivity could jeopardize all convictions for serious crimes in certain states).

55. For an article deploring retroactive application of new rules because of the adverse effects on society and consequent erosion of confidence in the criminal justice system, see Nicholson, *The SLA, Retroactive Court Decisions and Our Giant Judicial Junkyard,* 54 CAL. ST. B.J. 224 (1979).

56. One justification for habeas review is that it can be used to insure state compliance with federal constitutional law. *See, e.g.,* Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court,* 86 YALE L.J. 1035 (1977). However, this justification is not present in retroactivity cases. When a new rule is declared retroactive, reversal of state convictions is mandated even though the trials were constitutional at the time they became final. In this situation, state courts have committed no error that justifies the federal intrusion.

57. Arsenault v. Massachusetts, 393 U.S. 5 (1968) (applying White v. Maryland, 373 U.S. 59 (1963) creating a right to assistance of counsel at a preliminary hearing); McConnell v. Rhay, 393 U.S. 2 (1968) (applying Mempa v. Rhay, 389 U.S. 128 (1967) creating a right to counsel at sentencing). Other right to counsel decisions were also applied retroactively, but these were decided prior to *Linkletter,* so the balancing test was not applied. *E.g.,* Gideon v. Wainwright, 372 U.S. 335 (1963).

58. Berger v. California, 393 U.S. 314 (1969) (per curiam) (applying Barber v. Page, 390 U.S. 719 (1968)).

59. Hankerson v. North Carolina, 432 U.S. 233 (1977) (retroactivity of Mullany v. Wilbur, 421 U.S. 684 (1975)); Ivan V. v. City of New York, 407 U.S. 203 (1972) (per curiam) (retroactivity of *In Re* Winship, 397 U.S. 358 (1970)).

B. *Application of* Teague

Although the *Teague* retroactivity test advances institutional and federalism interests, it fails to provide a mechanism for judges to respond to accuracy concerns in individual cases. When the new rule does not fall within *Teague*'s narrow accuracy-enhancing exception, the constitutional right does not extend to any cases within the category, even if the violation has undermined the accuracy of individual trials. Because this anomalous result fails to adequately protect defendants, it will tempt lower courts to expand the *Teague* categories either to respond to a compelling claim of innocence in the case before them or to prevent future claims from being foreclosed by a non-retroactivity ruling. The pressures created by *Teague*'s failure to address accuracy concerns will be manifested in two places: in new rule analysis, and in the accuracy-enhancing exception to non-retroactivity.

1. New Rule Analysis

The new rule determination has plagued the Court for years. The Court explicitly introduced this element into retroactivity analysis in 1969.[60] Before applying the *Linkletter* test, the Court considered whether the rule was new enough to trigger the retroactivity test. The Court concluded: "[h]owever clearly our holding in [the rule-changing case] may have been foreshadowed, it was a clear break with the past, and we are thus compelled to decide [the retroactivity issue]."[61] Subsequent cases suggested differing and often inconsistent interpretations of the nature of this threshold inquiry,[62] and many prompted vehement disagreement among the Justices.[63]

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

61. *Id.* at 248.

62. *Compare* Harlin v. Missouri, 439 U.S. 459 (1979) (per curiam) (holding that no retroactivity issue exists with respect to the application of Duren v. Missouri, 439 U.S. 357 (1979) because it did not announce new standards not evident from previous decisions) *with* United States v. Peltier, 422 U.S. 531 (1975) (rejecting the Ninth Circuit's retroactive application of Almeida-Sanchez v. United States, 413 U.S. 266 (1973) by focusing on the good faith reliance of police officers but not addressing the existence of previous precedents) *and* United States v. Johnson, 457 U.S. 537 (1982) (creating three categories of cases based on the relative novelty of the precedent).

63. *See, e.g.*, Truesdale v. Aiken, 480 U.S. 527 (1987) (per curiam) (Powell, J., dissenting) (disagreeing that the new rule followed from old precedent); Solem v. Stumes, 465 U.S. 638, 655-67 (1984) (Stevens, J., dissenting) (arguing that no retroactivity question exists because decision based on principles previously announced by the Court); Milton v. Wainwright, 407 U.S. 371, 381 n.2 (1972) (Stewart, J., dissenting) (arguing that no retroactivity issue arises unless "the decision overrules clear past precedent, or disrupts a practice long accepted and widely relied upon." (citations omitted)).

With acceptance of the Harlan approach to retroactivity, new rule analysis becomes even more important than it was under *Linkletter*.[64] If the Harlan exceptions are construed narrowly, finding that a rule is not new will be the only plausible way to extend the recently established constitutional right to habeas defendants. Thus, this already difficult threshold inquiry may become a focal point of debate.

Under the *Teague* retroactivity analysis, any decision that is not *dictated* by prior precedent is considered to have created a new rule.[65] Strictly applied, this test would subject most newly-recognized constitutional rights to retroactivity analysis. However, when judges are concerned that denial of retroactivity may result in an inaccurate conviction being upheld, they may manipulate the new rule analysis to avoid this harsh result.

The Court's surprising decision in *Penry v. Lynaugh*[66] confirms this prediction. Although decided only weeks after *Teague,* this case illustrates a softening of *Teague*'s rigid new rule analysis. *Penry* involved the constitutionality of the Texas death penalty statute. Under the Texas statute, juries are required to answer three questions during the death penalty stage of trials.[67] The questions relate to whether the crime was committed deliberately and without provocation, and whether the defendant is likely to be a continuing threat to society.[68] An affirmative answer to all three questions results in imposition of the death penalty.[69]

In *Jurek v. Texas*[70] the Supreme Court found the Texas death penalty statute constitutional on its face. Although that case produced no majority opinion, three Justices reasoned that the statute passed constitutional muster because it channeled the jury's discretion through the use of the statutorily mandated questions.[71] In reaching this conclusion, they relied on the state appellate court's analysis:

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64. *But see United States v. Johnson,* 457 U.S. at 549 (stating that under the *Linkletter* test, if a rule of criminal procedure was "a clear break with the past" the Court would almost invariably find that rule non-retroactive).

65. *See supra* notes 34-37 and accompanying text.

66. 109 S. Ct. 2934 (1989).

67. *Id.* at 2942.

68. *Id.* The three questions are:

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (Vernon 1981 and Supp. 1989).

69. *Id.*

70. 428 U.S. 262 (1976) (plurality opinion).

71. *Id.* at 276 (opinion of Stewart, Powell, and Stevens, JJ.).

> In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct. It could further look to the age of the defendant and whether . . . he was acting under duress . . . [and] consider whether the defendant was under an extreme form of mental or emotional pressure . . . .[72]

Because lower courts had permitted juries to consider a broad range of mitigating evidence, the plurality concluded that the statute did not unconstitutionally limit the jury's sentencing discretion.[73]

The petitioner in *Penry,* however, argued that the sentencing scheme upheld in *Jurek* violated the eighth amendment when applied to his case. Penry had a mental age of six and one-half years and suffered from an organic brain disorder.[74] He had been abused as a child and had been in and out of state institutions from an early age.[75] Although the jury had been instructed to consider this evidence,[76] Penry argued that the jury had been unable to give effect to it when answering the special questions. He argued that when defendants present mitigating evidence that has no relevance to the statutory questions, the jury should be advised that they may give effect to it in the sentencing proceedings.[77]

In assessing Penry's claim, the Court first considered whether a holding in favor of Penry would constitute a new rule.[78] Justice O'Connor, writing for the majority, found that it would not.[79] In reaching this conclusion, she relied upon the plurality's statement in *Jurek* that "the constitutionality of the Texas procedures turns on whether the enumerated questions allow consideration of particularized mitigating factors."[80] O'Connor found that

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72. Jurek v. State, 522 S.W.2d 934, 939-40 (Tex. Ct. App. 1975).

73. *Jurek,* 428 U.S. at 273-74.

74. *Penry,* 109 S. Ct. at 2941.

75. *Id.* at 2941-42.

76. *Id.* at 2943 ("The jurors were further instructed that in answering the three special issues, they could consider all the evidence submitted in both the guilt or innocence phase and the penalty phase of the trial.").

77. *Id.* at 2945.

78. *Id.* at 2944. *Teague* operates as a threshold inquiry. If the rule the Court is considering would be a new one, it cannot be recognized in a habeas corpus case because it would be unavailable to all habeas petitioners (including the one before the Court). This aspect of the *Teague* holding was severely criticized by the *Teague* dissenters. *Teague,* 109 S. Ct. at 1084 (Brennan, J., dissenting) ("the plurality would for the first time preclude the federal courts from considering on collateral review a vast range of important constitutional challenges"); *id.* at 1079 n.2 (Stevens, J., dissenting) ("the plurality inverts the proper order of adjudication").

79. *Penry,* 109 S. Ct. at 2945. The four *Teague* dissenters, Justices Brennan, Marshall, Blackmun and Stevens, all concurred in Part II(B) of O'Connor's opinion in which she determined that *Penry* was not seeking a new rule. *Id.* at 2959 (Brennan, J., dissenting); *id.* at 2963 (Stevens, J., dissenting).

80. *Jurek,* 428 U.S. at 272.

this language implied that the state must direct the jury to consider all mitigating evidence, including evidence unrelated to the questions.[81] In Penry's case, this obligation could only be met by giving special instructions to the jury. O'Connor concluded: "the relief Penry seeks does not 'impos[e] a new obligation' on the State of Texas. Rather, Penry simply asks the State to fulfill the assurance upon which *Jurek* was based . . . ."[82]

Justice Scalia, writing for the dissenters, accused the majority of only paying "lip-service" to *Teague*.[83] Scalia stated that "it challenges the imagination to think that today's result is 'dictated' by our prior cases."[84] Instead, he argued that the most plausible interpretation of *Jurek* was that it foreclosed Penry's claim.[85] He based this conclusion on the fact that the *Jurek* Court had approved the Texas statute because it directed the jury to consider mitigating evidence *in connection with* the statutory questions. He argued that the majority's reasoning "flatly contradicts that analysis,"[86] because the majority was now holding "that the constitutionality turns on whether the questions allow mitigating factors not only to be considered (and, of course, given effect . . .) *but also to be given effect in all possible ways, including . . . purposes not specifically permitted by the questions.*"[87] Scalia concluded that the majority's application of the new rule analysis rendered *Teague* meaningless:

> In a system based on precedent . . . it is the tradition to find each decision "inherent" in earlier cases (however well concealed its presence might have been) . . . . If *Teague* does not apply to a claimed "inherency" as vague and debatable as that in the present case, then it applies only to habeas requests for plain overruling—which means that it adds little if anything to the principles already in place concerning the retroactivity of new rules in criminal cases . . . .[88]

The debate between the majority and the dissent illustrates problems inherent in the new rule analysis. Both sides fairly point to aspects of earlier opinions which appear either to foreclose or support Penry's claim. In the end, Justice Scalia has the better of the arguments: by recognizing a rule

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81. Justice O'Connor supported her argument that this was not a new obligation by referring to other cases in which the Court had held that the state may not instruct the jury *not* to consider mitigating evidence. For this proposition she cited Lockett v. Ohio, 438 U.S. 586 (1978) (plurality opinion) (state may not preclude jury from considering mitigating evidence) and Eddings v. Oklahoma, 455 U.S. 104 (1982) (judge may not prohibit jury from considering mitigating evidence).

82. *Penry*, 109 S. Ct. at 2945 (citation omitted).

83. *Id.* at 2964 (Scalia, J., dissenting). Scalia's dissent was joined by the two other Justices who had joined O'Connor's plurality opinion in *Teague*.

84. *Id.* at 2965.

85. *Id.* at 2966-67.

86. *Id.* at 2966.

87. *Id.* (emphasis in original).

88. *Id.* at 2965.

that was at most implied by previous cases, the *Penry* majority retreated from the extremely expansive new rule analysis established in *Teague.*

In future cases the Supreme Court will undoubtedly try to clarify this issue. However, the conflict between *Teague* and *Penry* demonstrates that new rule analysis is a gray area, subject to continual manipulation. The Court has not managed to end the new rule controversy; the determination is as difficult as it was during the *Linkletter* era. In fact the situation is worse than before. Under the stringent retroactivity test created by *Teague,* courts have limited opportunity to give weight to concerns that a conviction has been inaccurate. In cases similar to *Penry,* new rule analysis may be twisted to give the benefit of a rule of criminal procedure to a defendant who clearly deserves it.[89]

Indeed, O'Connor's liberal interpretation of *Teague*'s new rule test may have stemmed from her concern about the accuracy of this particular sentencing. As one lower court noted: "O'Connor's application . . . of *Teague*'s 'new rule' formula may well have turned upon facts which she thought unique to Penry's claims."[90] However, as will be discussed below, the new rule analysis is not the only mechanism for judges to vindicate concerns about individual injustices. Considerable room for judicial disagreement also remains in the construction of the retroactivity exceptions.

2. The Accuracy-enhancing Exception to Non-retroactivity

The *Teague* exception to non-retroactivity for accuracy-enhancing procedural rules will likely be the subject of some controversy.[91] In *Teague* itself, there were disagreements over both the wording and application of the test.[92] If this exception becomes another means by which judges accommodate accuracy concerns, it is likely that it will be construed broadly. If this occurs, the institutional problems of extensive retroactivity will reappear as entire categories of defendants gain the benefit of new rules.

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89. It is not clear that Penry's claim, had it been found a "new" one, would have fallen within one of the narrow exceptions to retroactivity. Clearly, the four dissenters, who did not support recognizing the claim at all, would not have found it to be a "bedrock procedural element" without which the likelihood of an accurate conviction was severely diminished. In Penry's case, denying retroactivity would have amounted to letting the death penalty stand, which seems a particularly harsh result on the basis of retroactivity principles.

90. Sawyer v. Butler, 881 F.2d 1273, 1288 (5th Cir. 1989), *cert. granted sub nom.* Sawyer v. Smith, 110 S. Ct. 835 (1990).

91. It is unlikely that there will be significant disagreement over whether a rule falls within the substantive due process exception. In *Penry,* the otherwise sharply divided court unanimously agreed on application of this test. *Penry,* 109 S. Ct. at 2952-53.

92. *See Teague,* 109 S. Ct. at 1080-81 (Stevens, J., concurring) (disagreeing with both the wording of the test and the application of it); *id.* at 1084, 1092 (Brennan, J., dissenting) (against adopting a new test but also arguing that under the plurality's test the petitioner's claim fell within an exception).

Lower courts have already begun to debate the scope of the accuracy-enhancing exception. In 1985, the Supreme Court created a new rule of criminal procedure to govern the sentencing phase of capital trials. In *Caldwell v. Mississippi*,[93] the Court ruled that the prosecutor may not refer to appellate review of the jury's sentencing decision unless this reference is accompanied by "a full description of the appellate process"[94] or instructions which prevent the jury from being misled.[95] The purpose of this rule is to insure that capital juries understand that they bear full responsibility for deciding the fate of the criminal defendant.[96]

The Fifth Circuit and the Tenth Circuit have considered the retroactivity of *Caldwell* and have arrived at divergent conclusions.[97] Both courts agree that *Caldwell* constitutes a new rule under the *Teague* threshold inquiry.[98] However, unlike the Fifth Circuit, the Tenth Circuit has concluded that *Caldwell* falls within the accuracy-enhancing exception to non-retroactivity. In reaching this conclusion, the majority admitted that a rule regulating reference to appellate process does not seem to qualify as a bedrock procedural rule under *Teague*.[99] However, the court concluded that because the *Caldwell* rule insures that juries understand "[their] core function in a capital sentencing hearing"[100] it is "fundamentally related to the accuracy of a death sentence."[101]

The Fifth Circuit disagreed. After an extensive discussion of *Teague*, the court concluded that *Caldwell* was not sufficiently fundamental to merit retroactive effect. The court noted:

> [The petitioner] can argue at most that there would be a possibility, absent the alleged *Caldwell* violation, of a different outcome to the jury's sentencing procedure. Yet . . . the Court's *Teague* opinion makes quite clear that *not every procedural rule affecting the accuracy of a trial will fit within the [exception]* . . . . Instead, the examples listed by the *Teague* Court—trial by mob rule, use of perjured testimony, or the extraction of confessions through brutal torture—either so distort the judicial process as to leave one with the impression that there has been no judicial determination at all, or else skew the actual evidence crucial to the trier of fact's disposition of the case.[102]

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93. 472 U.S. 320 (1985).

94. Hopkinson v. Shillinger, 888 F.2d 1286, 1291 (10th Cir. 1989) (interpreting *Caldwell*).

95. *Id.* at 1291-92.

96. The Court noted that the premise of capital sentencing schemes is that "jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences . . . ." *Caldwell*, 472 U.S. at 329-30 (citing McGautha v. California, 402 U.S. 183, 208 (1971)).

97. *See Sawyer*, 881 F.2d at 1273; *Hopkinson*, 888 F.2d at 1286.

98. *Sawyer*, 881 F.2d at 1287-91; *Hopkinson*, 888 F.2d at 1291.

99. *Hopkinson*, 888 F.2d at 1291-92.

100. *Id.* at 1292.

101. *Id.*

102. *Sawyer*, 881 F.2d at 1294 (emphasis added).

Therefore, the court concluded that although the *Caldwell* violation could have implicated the accuracy of some sentencing decisions, it could not be given retroactive effect under *Teague.*[103]

A recent Supreme Court decision in a related context supports the Fifth Circuit's decision not to apply *Caldwell* retroactively.[104] In *Dugger v. Adams,*[105] the Court considered whether a *Caldwell* violation is so fundamental that it should be automatically available to defendants, even if they have not properly preserved the issue for appeal.[106] The Court held that it is not, stating that although a *Caldwell* violation is "the kind of error that might have affected the accuracy of a death sentence"[107] this does not mean that any one individual sentenced in violation of *Caldwell* "probably is 'actually innocent' of the sentence he or she received."[108] This language implies that the Supreme Court would not find *Caldwell* "so central to an accurate determination of innocence or guilt"[109] that it merits retroactive effect under *Teague.*

Although it appears that the Tenth Circuit has misinterpreted *Teague,* the decision is nonetheless justified. A violation of *Caldwell* clearly has a possible impact on the reliability of the sentencing decision. This was the basis for the decision.[110] The Tenth Circuit's decision to apply *Caldwell* retroactively is the only way the court could insure that the rule would be available in cases where the violation had seriously undermined the accuracy of a sentence. Because the *Teague* categorical test forced the Tenth Circuit into an all-or-nothing choice, the court interpreted the accuracy-enhancing exception broadly to guard against future inaccurate sentences.[111]

The circuit split over *Caldwell* is the first retroactivity disagreement since *Teague* was decided. However, because the stakes are so high, it is likely that courts will continue to debate over the content of the accuracy-enhancing exception to *Teague.* Courts will either undermine finality concerns by applying the *Teague* exception broadly, or fail to protect individual defendants by honoring the language and spirit of the *Teague* decision.[112]

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103. *Id.*

104. This case was cited by the Fifth Circuit as one basis for its holding. *Id.* at 1293.

105. 109 S. Ct. 1211 (1989).

106. The issue was procedurally defaulted. For a description of the procedural default rules, see *infra* text accompanying notes 121-31.

107. *Dugger,* 109 S. Ct. at 1218 n.6.

108. *Id.*

109. *Teague,* 109 S. Ct. at 1077.

110. *Caldwell,* 472 U.S. at 340.

111. The majority was not worried about the case before them, which they concluded had not been affected by the error. *Hopkinson,* 888 F.2d at 1296-97. However, they were clearly concerned about other cases in which the error might have been more serious. *Id.* at 1293.

112. *See Sawyer,* 881 F.2d at 1290 (stating that the court should honor the spirit and language of the new rule analysis).

III. RESOLVING RETROACTIVITY

The categorical retroactivity test created by the plurality in *Teague* will be difficult to apply and will lead to inconsistent results. The test also violates notions of fairness by foreclosing consideration of constitutional claims even in cases where verdicts were probably inaccurate. Because the competing interests in finality and accuracy are both so fundamental, the retroactivity problem cannot be completely resolved by a categorical test.[113] Instead, in most cases an individualized approach will better accommodate the competing interests.

The categorical accuracy-enhancing exception created by *Teague* is appropriate for unusually important new rulings. When the Supreme Court recognizes a new constitutional violation that has undermined the accuracy of most of the trials involving it, the accuracy-enhancing exception should be applied to the entire category of affected cases. The substantial societal costs of complete retroactivity justify keeping this exception narrow.[114] As Justice O'Connor admonished in *Teague,* "it is unlikely that many such components of due process have yet to emerge."[115]

However, to prevent unjust incarcerations, the extremely narrow accuracy-enhancing exception to non-retroactivity should be supplemented by a new exception for individual cases. An exception to the *Teague* retroactivity test should be available to any defendant able to show that: 1) a violation of a new rule of criminal procedure occurred in his case that would be grounds for reversal had the case been on direct review, and 2) the violation probably caused his trial to yield an incorrect verdict. To satisfy the second requirement the defendant could rely on the record of the case or on newly obtained evidence, but in either case would have to raise a significant question[116] as to the accuracy of the trial.

There are several advantages to adopting this new retroactivity exception. These advantages include striking the appropriate balance between fairness and finality, preserving the integrity of *Teague* and conforming retroactivity analysis to an analogous habeas corpus doctrine.

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113. Nor is the problem likely to go away. The Supreme Court continues to recognize important new rules of criminal procedure, especially in the area of death penalty cases. As one court notes:

> During [a] ten year period ending with the final day of the Supreme Court's 1988 term, it granted plenary review in sixty-seven cases and at least thirty-five of those can, with little dissent, be described as presenting issues of substantial reach. The destabilizing impact of such a sea-change in controlling law presents problems of administration unique to death cases.

Sawyer v. Butler, 881 F.2d 1273, 1289 (5th Cir. 1989), *cert. granted sub nom.* Sawyer v. Smith, 110 S. Ct. 835 (1990).

114. *See supra* text accompanying notes 48-56.

115. Teague v. Lane, 109 S. Ct. 1060, 1077 (1989).

116. This determination would be within the discretion of the district court. Reversal would be required if the court found it more likely than not that the trial was inaccurate.

A. *Balance of Fairness and Finality*

The individualized exception to non-retroactivity would preserve the important innocence-screening function of habeas corpus while minimizing the costs of this type of review. In *Teague* and *Linkletter,* the Court rejected case-by-case retroactivity analysis in favor of a categorical approach based on the type of rule created. These categorical approaches run the risk of casting too wide a net—or one not wide enough. In the former case, defendants whose trials were fair and accurate receive new trials. This result should be avoided because of the significant costs of this type of habeas review. In the latter case potentially innocent defendants are denied review because most similarly situated defendants received accurate verdicts. This conflicts with the concern for protecting the innocent that is at the heart of our criminal justice system.

The innocence-oriented exception to non-retroactivity coupled with the *Teague* test avoids problems of underinclusiveness or overinclusiveness. Limiting the categorical accuracy-enhancing exception to bedrock procedural rules advances the strong societal interest in finality of criminal verdicts. However, the exception for actual innocence allows courts to honor the fundamental policy that habeas corpus review should be used to reverse inaccurate convictions.

B. *Preserving the Integrity of* Teague

In the twenty-five years since *Linkletter* was decided, the Court has handed down a series of controversial retroactivity rulings. These rulings have generated a barrage of academic criticism[117] and have divided the Court, provoking vehement dissents from a number of Justices.[118] In addition, retroactivity cases have consumed a significant amount of the Court's

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117. *See, e.g.,* Corr, *Retroactivity: A Study in Supreme Court Doctrine "As Applied,"* 61 N.C.L. Rev. 745 (1983); Haddad, *"Retroactivity Should be Rethought": A Call for the End of the* Linkletter *Doctrine,* 60 J. Crim. L., Criminology & Police Sci. 417 (1969); Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law,* 79 Harv. L. Rev. 56 (1965); Schaefer, *Prospective Rulings: Two Perspectives,* 1982 Sup. Ct. Rev. 1 (1982). The *Teague* plurality also commented on the lack of popularity of its previous retroactivity decisions: "Not surprisingly, commentators have 'had a veritable field day' with the *Linkletter* standard, with much of the discussion being 'more than mildly negative.'" *Teague,* 109 S. Ct. at 1071 (quoting Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal,* 61 Va. L. Rev. 1557, 1558 & n.3 (1975)).

118. The sharp division in *Penry v. Lynaugh,* 109 S. Ct. 2934 (1989), is an example of the disputed nature of the retroactivity cases. *See supra* text accompanying notes 66-89. Moreover, over the years retroactivity cases have often been decided by plurality opinions. *See, e.g., Teague,* 109 S. Ct. at 1060; Brown v. Louisiana, 447 U.S. 323 (1980); Gosa v. Mayden, 413 U.S. 665 (1973); Adams v. Illinois, 405 U.S. 278 (1972).

limited time—since 1965 as many as six cases per year have been devoted to retroactivity analysis.[119]

The time has come for the Court to end the retroactivity debate. However, the current categorical approach will not permit this. Concerns about accuracy in individual cases will pressure lower courts to twist the *Teague* analysis. As a result, courts will continually disagree about the meaning and content of the new rule inquiry and the exceptions to non-retroactivity. The Supreme Court will again be faced with a plethora of inconsistent lower court opinions and will be required to intervene to settle the controversy.

After years of disagreement, the Supreme Court has finally developed a theoretically sound test for dealing with retroactivity problems.[120] However, an exception is needed to preserve the integrity of the new approach. The proposed exception would serve this function by alleviating the pressure on lower courts to expand the *Teague* categories. It would also shift much of the decisionmaking in retroactivity cases from the Supreme Court to the lower federal courts. This would result in an efficient use of judicial resources. Since district courts already have the primary responsibility for overseeing habeas corpus cases and can respond to the evidence of each individual case, they can best resolve the merits of retroactivity disputes.

C. Congruence with Other Habeas Doctrines

The suggested approach to retroactivity parallels the analysis used in procedural default cases, another area of habeas corpus litigation. There are three advantages to using similar tests to resolve both issues. First, consistency between the two approaches is theoretically sound because both doctrines have been created to address the same concerns. Second, similarity between the two will aid lower courts applying the new exception. Finally, unification of the approaches will simplify some cases which raise both issues. These benefits will be discussed after an analysis of the current procedural default rules.

1. Procedural Default Rules

In most states, defendants waive their rights to appeal any issue they fail to raise at trial. However, the defendant may still raise the defaulted issue

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119. In 1969, the Court decided six cases primarily or partially on the basis of retroactivity issues: DeBacker v. Brainard, 396 U.S. 28 (1969), Jenkins v. Delaware, 395 U.S. 213 (1969), Halliday v. United States, 394 U.S. 831 (1969), Foster v. California, 394 U.S. 440 (1969), Desist v. United States, 394 U.S. 244 (1969) and Berger v. California, 393 U.S. 314 (1969). Other big years for retroactivity analysis were 1968 (five cases), 1971 and 1973 (three cases) and 1974 (four cases).

120. The *Teague* test is based largely on Justice Harlan's analysis. Both tests are premised on a model of judicial review which justifies distinguishing between direct review and collateral attacks on judgments. *See supra* text accompanying notes 20-31.

in a petition for a writ of habeas corpus, because federal courts are not bound by state procedure. In order to avoid continual litigation of claims that should have been raised at trial, the Supreme Court has developed a set of rules dealing with procedural default. Generally, a defendant will be barred from raising a defaulted issue unless there is both cause for the default and prejudice arising from it.[121] Cause for the default exists if the defendant's lawyer is incompetent,[122] or if the issue was so novel at the time of the trial that the lawyer had no reasonable legal basis for raising it.[123]

Despite these rules, the Court has stated that lower courts can waive the cause requirement[124] in appropriate cases. In *Murray v. Carrier,*[125] the Court confronted the issue of whether mistakes by counsel which did not meet the constitutional test for incompetence could provide cause for procedural default.[126] This case involved a lawyer's inadvertent omission of an issue from his appellate brief.[127] After deciding that procedural default rules applied to the appellate process,[128] the majority held that the error did not constitute cause for the default. In doing so, they rejected the argument that procedural default rules should be framed with reference to the character of the constitutional claim being asserted.[129] However, the Court explicitly retained an exception geared towards individual injustices:

> We remain confident that, for the most part, "victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard." But we do not pretend that this will always be true. Accordingly, we think that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.[130]

The case was remanded to determine whether the defaulted issue was one which could establish the defendant's actual innocence.[131]

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121. Wainwright v. Sykes, 433 U.S. 72 (1977).

122. Murray v. Carrier, 477 U.S. 478, 488 (1986). If incompetence of counsel is the reason for the default, the exhaustion doctrine requires the issue to first be raised in state court. *Id.* at 488-89.

123. Reed v. Ross, 468 U.S. 1, 16 (1984).

124. If the defendant is unable to show cause, then the prejudice prong of the inquiry is generally irrelevant. *See Wainwright,* 433 U.S. at 87 (requiring both elements).

125. 477 U.S. at 478.

126. The defaulted claim was a trial court's denial of discovery of a victim's statements prior to the trial.

127. *Id.* at 481-82.

128. *Id.* at 492.

129. *Id.* at 493. The Court was discussing Justice Stevens' concurring opinion, *id.* at 497-516.

130. *Id.* at 495-96 (citations omitted).

131. *Id.* The Supreme Court also recognized the possibility of an individual—not categorical—exception to procedural default rules in Dugger v. Adams, 109 S. Ct. 1211 (1989).

2. The New Retroactivity Exception

The proposed exception to *Teague* would bring retroactivity analysis in line with the current procedural default test. In both retroactivity and procedural default, the Supreme Court has created a general test to determine when an issue that was not litigated in state court can be raised in a petition for habeas corpus. However, the Supreme Court has created an exception to the procedural default rules when necessary to prevent a "fundamental miscarriage of justice."[132] Permitting a similar exception in the context of retroactivity would eliminate the discrepancy between these otherwise similar doctrines.

Consistency between procedural default and retroactivity rules has both theoretical and practical appeal. It is theoretically sound for these doctrines to be similar, because they serve the same interests. As one circuit court has noted:

> Similar concerns underlie both the procedural default doctrine and the *Teague* doctrine prohibiting reliance on new rules. Both doctrines recognize the importance of finality in criminal convictions. Both doctrines promote federal-state comity by requiring federal courts to defer to the integrity of state convictions. And both doctrines put a premium upon the obligation of defendants to raise all relevant arguments before their convictions become final.[133]

Congruence among these doctrines demonstrates that the Court is making principled, reasoned decisions and tends to rebut claims that the Court is influenced by ideological considerations.

Creating a new retroactivity exception would not require the creation of a new doctrine. The proposed exception is identical to the one used in procedural default cases. In both situations the lower court must assess the constitutional claim being asserted and overturn convictions based on that claim only when there is some question about the accuracy of the trial. Therefore, if the proposed exception is adopted, lower courts would not have to grapple with new legal doctrine, but simply extend the established *Murray v. Carrier* exception to a new context.

Unification of the approaches will also simplify cases which raise both issues. The Court has already twice dealt with the problem of procedural default in the context of retroactively applied decisions.[134] This is likely to be a recurring issue because in many cases a retroactive ruling will affect an issue not raised at trial.

Under current analysis, when an issue controlled by a new Supreme Court ruling has been procedurally defaulted, courts must apply the retroactivity

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132. *Murray*, 477 U.S. at 495.
133. *Sawyer*, 881 F.2d at 1293.
134. *Reed*, 468 U.S. at 1; Engle v. Isaac, 456 U.S. 107 (1982).

test and the procedural default test. Of course, if a rule is found non-retroactive, then the procedural default issue in that case is irrelevant because the retroactivity ruling already bars the claim. However, when *Teague* categories are construed broadly to extend retroactivity to entire categories of rules, courts must apply the complicated procedural default analysis to the retroactively-recognized issue. If the court finds that the procedural default test has not been met, the court must finally consider whether the "miscarriage of justice" exception should be applied in the case.

Adopting the proposed retroactivity exception would vastly simplify this process. The individual exception to non-retroactivity would eliminate the pressure on courts to expand the *Teague* categories. Instead, most retroactivity decisions would be made on an individual basis. In these cases, the need for procedural default analysis would be eliminated. If a defendant makes a showing of innocence adequate to retroactively receive the benefit of a new rule, he has necessarily met the standard for receiving the *Murray v. Carrier* exception. Therefore, the combined retroactivity and procedural default analysis would be completed with one inquiry.

CONCLUSION

The suggested innocence-oriented exception to the *Teague* analysis would solve a number of problems. First, this exception would not be categorical. Any individual would be entitled to the retroactive benefit of a new rule if the rule affected the accuracy of his trial. Under this approach courts could successfully balance the need for finality with the concern for fairness. Second, the exception would preserve the integrity of *Teague.* Under *Teague,* courts are free, in exceptional circumstances, to require complete retroactivity if a new constitutional rule is integral to the fairness of all trials. However, unless the Court permits an exception for probable innocence, new rule analysis and the limited accuracy-enhancing exception will be expanded to accommodate concerns about accuracy in individual cases. The proposed exception will prevent such a costly expansion. Finally, the addition of an exception to the *Teague* test would not require the development of a whole new body of law to determine retroactivity. The proposed exception mirrors the current approach to procedural default and in fact would simplify some cases that raise both issues.

In *Desist v. United States,*[135] Justice Harlan laid down a challenge to the Court. Troubled by the post-*Linkletter* confusion, he declared "'Retroactivity' must be rethought."[136] In *Griffith v. Kentucky* and *Teague v. Lane* the Supreme Court began the needed overhaul of retroactivity analysis. However, the Court's work has not yet been completed.

135. 394 U.S. at 244.
136. *Id.* at 258.

EPILOGUE

As this Note was going to press, the Supreme Court handed down two new retroactivity decisions. In *Butler v. McKellar*[137] and *Saffle v. Parks,*[138] the Court declined to apply newly-recognized constitutional rules retroactively to habeas cases. In both cases, the Court used an extremely expansive new rule analysis to justify its decisions. Thus, the Court has made it clear that the more flexible new rule analysis used in *Penry* will be limited to the facts of that case.

In *Butler,* the Court considered whether the rule created by *Arizona v. Roberson,*[139] should be considered new for the purposes of the retroactivity inquiry. In *Roberson,* the Court held that when a suspect in custody is being interrogated about two different crimes, request for counsel in connection with one crime also bars interrogation in connection with the second crime. The Court stated that the result was required by a previous fifth amendment case, *Edwards v. Arizona.*[140] The petitioner in *Butler* relied on the majority's analysis in *Roberson* to argue that *Roberson* did not create a new rule, but merely followed from *Edwards.*

In *Butler,* five members of the Court rejected this claim. Instead, the majority held that a rule would be considered new as long as reasonable judges could have concluded that the rule was not required by precedent existing at the time the petitioner's conviction became final. The Court stated:

> The "new rule" principle therefore validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions. . . .
>
> . . . .
>
> . . . [T]he fact that a court says that its decision is within the "logical compass" of an earlier decision, or indeed that it is "controlled" by a prior decision, is not conclusive for purposes of deciding whether the current decision is a "new rule" under Teague.[141]

The Court concluded that the outcome in *Roberson* was "susceptible to debate among reasonable minds," and therefore created a new rule. This expansive new rule analysis was followed, without significant modification, in *Saffle v. Parks.*

In addition to broadening new rule analysis, the Court will soon address the scope of the accuracy-enhancing exception to *Teague.* On January 16,

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137. No. 88-6677 (U.S. March 5, 1990) (LEXIS, Genfed library, U.S. file).
138. No. 88-1264 (U.S. March 5, 1990) (LEXIS, Genfed library, U.S. file).
139. 486 U.S. 675 (1988).
140. 451 U.S. 477 (1981). In *Roberson,* the Court stated: "Arizona asks us to *craft an exception* to [*Edwards*] . . . ." *Roberson,* 486 U.S. at 677 (emphasis added).
141. *Butler,* No. 88-6677 (U.S. March 5, 1990) (LEXIS, Genfed library, U.S. file) at *13-15.

1990 the Court granted certiorari to *Sawyer v. Butler,*[142] the Fifth Circuit case that discusses the retroactivity of *Caldwell v. Mississippi.*[143] The Justices may use this new case to resolve the circuit split over the retroactivity of *Caldwell.*[144] The Court will probably reverse the Tenth Circuit's liberal interpretation of *Teague*'s accuracy-enhancing exception to non-retroactivity.[145]

These recent cases indicate that the Supreme Court intends to strictly enforce *Teague,* and reverse any lower court attempts to modify the stringent test. If this occurs, the institutional problems of extensive retroactivity discussed earlier in this Note may be reduced. However, there will still be a pressing need for an individual exception to non-retroactivity. The primary rationale for permitting this exception is to enable a prisoner to gain the benefit of a new rule when the constitutional violation undermined the accuracy of his trial. As the Supreme Court expands the parameters of non-retroactivity, the chances increase that a wrongly-convicted prisoner will be denied the benefit of an important constitutional rule. The Court should not lose sight of the central function of habeas corpus review—reversing inaccurate convictions—as they continue to reduce the availability of new rules of criminal procedure to defendants on habeas corpus review.

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142. 881 F.2d 1273 (5th Cir. 1989), *cert. granted sub nom.* Sawyer v. Smith, 110 S. Ct. 835 (1990).

143. 472 U.S. 320 (1985).

144. *See* discussion *supra* notes 93-111.

145. If the Court permits the expansive interpretation of the accuracy-enhancing exception, it will increase the institutional problems of retroactivity. As argued earlier, accuracy concerns are better accommodated on a case-by-case basis than by a categorical exception. *See supra* notes 43-60, 117 and accompanying text.