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Toward a Unified Theory of Retroactivity

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I. INTRODUCTION

In 1969, in *Teague v. Lane*,[1] the Supreme Court completely re-cast its methodology for determining when to give a new decision retroactive effect. Twenty years later, the concept of retroactivity and the retrospective[2] application of new decisions to old cases is still not well understood, and often misapplied.[3] One reason for this is that cases involving retroactivity issues are uncommon. While retroactivity concerns occasionally arise in civil cases, usually having to do with the retroactive effect of new statutes,[4] outside the context of habeas corpus proceedings it is highly unusual for an issue of the retrospective effect of a new decision to come before the courts.[5] The concept of retroactivity is also unusual in that it is almost completely judge-made, involving the practical ramifications of a jurisprudential principle with no underlying law supporting it. There is no language in the United States Constitution addressing it,[6] no statutory basis for it,[7] and no common law of retroactivity beyond the jurisprudential precept that underlies it. Being judge-made, it is entirely mutable. As will be seen, the Supreme Court has completely remade it twice in the last fifty years, casting off the existing practice to replace it, all at once, with a completely new and comprehensive approach to the problem.

Part II of this article will discuss the jurisprudential principle underlying the concept of retroactivity and the practical problems created by the application of that

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

2. This article will use the terms "retroactive" and "retrospective" synonymously. In *Danforth v. Minnesota*, 552 U.S. 264, 128 S. Ct. 1029 (2008), the Court pointed out that the use of the term "retroactivity" is slightly misleading because it suggests that if a case is not retroactive, then it is not backwards-looking at all, which, as will be discussed, is not accurate. The Court suggested that a better term would be "redressability," which is more to the point of the issue of whether, as a practical matter, the courts should provide relief to a defendant seeking post-conviction relief. However, the Court concluded that to change terminology would just add more confusion. *Id.* at 1035 n.5.

3. Since January 1, 2000, the Supreme Court has issued six decisions in which the application of *Teague* was a predominant issue. The last five decisions resulted in reversals on the *Teague* issue. *See* Danforth v. Minnesota, 552 U.S. 264, 128 S. Ct. 1029 (2008); Whorton v. Bockting, 549 U.S. 406 (2007); Beard v. Banks, 542 U.S. 406 (2004); Schriro v. Summerlin, 542 U.S. 348 (2004); Horn v. Banks, 536 U.S. 266 (2002). The sixth decision was *Tyler v. Cain*, 533 U.S. 656 (2001), in which the Court affirmed the lower court decision and resolved a split among the circuits.

4. *See, e.g.*, Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995); Rivers v. Roadway Express, Inc., 511 U.S. 298 (1994).

5. *See, e.g.*, Harper v. Va. Dep't of Taxation, 509 U.S. 86 (1993) (discussing retroactive effect of a recent Supreme Court decision holding state taxation scheme unconstitutional).

6. *See* Linkletter v. Walker, 381 U.S. 618, 629 (1965) ("[T]he Constitution neither prohibits nor requires retrospective effect."); Great N. Ry. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 364 (1932) ("We think the federal constitution has no voice upon the subject.").

7. The standard of retroactivity expressed in *Teague* has been incorporated into the federal habeas statutes to apply to other related issues, like the statute of limitations, *see* 28 U.S.C. § 2244(d)(1)(C) (2006); 28 U.S.C. § 2255(f)(3) (2006 & West Supp. 2008), the filing of second and successive petitions, *see* 28 U.S.C. § 2244(b)(2)(A) (2006); 28 U.S.C. § 2255(h)(2) (2006 & West Supp. 2008), and the right to a hearing, *see* 28 U.S.C. § 2254(e)(2)(A)(i) (2006), but not to the basic question of whether a new decision should be applied retrospectively.

principle. Part III will discuss how the underlying principle and the Court's solution to the practical problem in *Teague* inform a variety of issues in habeas corpus practice. Part IV will then discuss the unexplored relationship between *Teague* and the separate concept of structural error, and suggest that the Court expand the retroactive application of *Teague* in certain cases to address this relationship.

II. THE JURISPRUDENTIAL PRINCIPLE OF RETROACTIVITY

A. A Brief History

The concept of the retroactive operation of court decisions derives from the fundamental principle of Anglo-American jurisprudence that courts have "jurisdiction only to declare the law [and] not an authority to make it."[8] The principal is sometimes called the "declaratory theory of adjudication,"[9] or simply the "Blackstonian view"[10] from Lord Blackstone's statements that judges are "not delegated to pronounce a new law, but to maintain and expound the old one,"[11] and that when courts are called upon to overturn an existing precedent, they "do not pretend to make a new law, but to vindicate the old one from misrepresentation."[12] In fact, this principle was established well before Blackstone. Lord Coke, more than a century earlier, wrote that "[i]t is the function of a judge not to make, but to declare the law, according to the golden mete-wand of the law and not by the crooked cord of discretion."[13]

There is no question that the framers of the Constitution understood and accepted this principle.[14] James Wilson, a signer of the Declaration of Independence, and one of the original Justices of the Supreme Court, wrote that "every prudent and cautious judge will appreciate . . . his duty and his business is, not to make the law, but to interpret and apply it."[15] In The Federalist, Alexander Hamilton wrote that "[t]he interpretation of the laws is the proper and peculiar province of the courts."[16]

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8. Kuhn v. Fairmont Coal Co., 215 U.S. 349, 370 (1910) (Holmes, J., dissenting).

9. Anastasoff v. United States, 223 F.3d 898, 901 (8th Cir. 2000).

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

11. 1 William Blackstone, Commentaries *69.

12. *Id.* at *70.

13. *Anastasoff*, 223 F.3d at 901 (quoting 1 E. Coke, Institutes of the Laws of England 51 (1642)). A mete-wand is a "measuring staff of varying lengths," Black's Law Dictionary 1012 (8th ed. 2004), in modern parlance, a yardstick.

14. *See* Schick v. United States, 195 U.S. 65 (1904). By the late 1780s, Blackstone's Commentaries had sold more copies in America than in England, "so that undoubtedly the framers of the Constitution were familiar with it." *Id.* at 69. Indeed, Blackstone is quoted at least once in The Federalist. *See* The Federalist No. 84, at 577 (Alexander Hamilton) (Wesleyan Univ. Press 1961).

15. 2 James Wilson, The Works of James Wilson 161 (James DeWitt Andrews ed., Callaghan and Co. 1896).

16. The Federalist No. 78, at 525 (Alexander Hamilton) (Wesleyan Univ. Press 1961); *see also id.* at 526 (noting the role of courts is to "declare the sense of the law" and not to substitute "their pleasure to that of the legislative body.").

The philosophical underpinning of this principle is that "law" exists apart from, and independent of, the courts whose role it is to interpret it, and is, in effect, waiting for the courts to identify the correct legal precepts and apply them to the facts at hand. As a result, judicial determinations are not law in and of themselves, but are merely "the principal and most authoritative evidence, that can be given, of the existence of such a custom as shall form a part of the common law."[17]

If the law existed prior to the judicial decision identifying it, then a corollary of that principle is that a court's declaration of what the law is must necessarily have a retrospective effect. That is, when a court announces that a particular legal principle exists, it is a determination that the principle in question has been the law since the principle was established by the lawgiver, whether that is the Constitution, an act of the legislature, or the common law. Indeed, Justice Holmes, writing a century ago, commented that "[j]udicial decisions have had retrospective operation for near a thousand years."[18] Thus, when the Supreme Court in 2004, in *Crawford v. Washington*,[19] overruled prior precedent and held that the admission of hearsay testimonial statements not subject to cross-examination violates the Confrontation Clause, it was not a determination that the Sixth Amendment had changed in recent years, but rather that the admission of such statements has always been a violation of the Confrontation Clause. If there was any doubt that the current Supreme Court accepts this jurisprudential principle, it was recently put to rest in *Danforth v. Minnesota* when the Court explained that "the source of a 'new rule' is the Constitution itself, not any judicial power to create new rules of law. Accordingly, the underlying right necessarily pre-exists our articulation of the new rule."[20]

An example of this principle in practice outside the context of habeas corpus proceedings is the Supreme Court's decision in *Plaut v. Spendthrift Farm, Inc*.[21] In *Plaut*, the Court analyzed the retroactivity of its recent decision concerning the statute of limitations in securities fraud actions. When Congress enacted the Securities Exchange Act of 1934, it did not create an express private cause of action for securities fraud; that right was implied by the courts.[22] Without an express provision establishing a statute of limitations for such actions, the courts borrowed various state limitations provisions until the Supreme Court ended that practice in 1991 in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, by imposing a one

17. 1 William Blackstone, Commentaries *69.

18. Kuhn v. Fairmont Coal Co., 215 U.S. 349, 370 (1910) (Holmes, J., dissenting).

19. 541 U.S. 36 (2004).

20. 552 U.S. 264, 128 S. Ct. 1029, 1035 (2008). For an extended discussion of *Danforth*, see accompanying text, *infra* notes 71–72. *See also* Medellin v. Texas, 552 U.S. 491, 128 S. Ct. 1346, 1363 (2008) (noting that the approach to interpreting treaties proposed by the dissenters would be "tantamount to vesting with the judiciary the power not only to interpret but also to create the law.").

21. 514 U.S. 211 (1995).

22. *See* Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 128 S. Ct. 761, 768 (2008).

year/three year limitations period in all securities fraud actions.[23] Unhappy with this decision, Congress—instead of establishing a statute of limitations more to its liking[24]—attempted to overrule *Lampf*. The new legislation reinstated complaints previously dismissed as untimely if the complaint "would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, *as such laws existed*" the day before *Lampf* was decided.[25] In considering the constitutionality of that provision, the Supreme Court in *Plaut* pointed out that if taken literally, "such laws" on the day before *Lampf* was decided would be the same as law on the day after the decision; in fact, the law has remained the same since the Securities Exchange Act was passed in 1934 because "[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction."[26] Thus, if interpreted literally to mean "the law" as explained in *Lampf*, the statute would be "utterly without effect" and would lead to the conclusion that "Congress enacted, and the President approved, a blank sheet of paper . . . ."[27] Accordingly, the Court interpreted the offending language in the sense intended by Congress—to mean that courts should return to applying the borrowed limitations periods—which made the provision unconstitutional on separation-of-powers grounds.[28]

B. Restraints on Retroactivity

While the jurisprudential principle that all cases are retroactive is generally accepted as an explanation of the role of the courts in our system of government, there is also recognition that its unrestrained application could create chaos in the judicial system. If, for example, the Supreme Court were to determine tomorrow that an award of punitive damages in excess of a certain amount violates the Due Process Clause, then the unrestrained application of the principle would allow every civil defendant who has ever been required to pay punitive damages in excess of that amount to re-open the litigation to recover the excess payment.[29] Similarly, if every

23. 501 U.S. 350, 364 (1991). The action must be filed both within one year of the plaintiff's discovery of the fraud and within three years of the commission of the violation alleged. *See id.*

24. This did not occur for another eleven years. *See infra* note 28.

25. Federal Deposit Insurance Corporation Improvement Act of 1991 § 476, 15 U.S.C. § 78aa-1(b)(2) (2006) (emphasis added).

26. Plaut v. Spendthrift Farm, Inc., 514 U.S. 216 (1995) (quoting Rivers v. Roadway Express, Inc., 511 U.S. 298, 312–13 (1994)).

27. *Id.* at 216.

28. *See id.* at 240. The provision reinstating dismissed claims violated the separation of powers doctrine because it compelled the courts to set aside final judgments entered before the enactment of the statute. *See id.* As a result, the one-year/three-year limitations period remained in effect until 2002, when Congress enacted the Sarbanes-Oxley Act establishing a two-year/five-year limitations period. *See* Sarbanes-Oxley Act of 2002 § 804(a), 28 U.S.C. § 1658(b) (2006).

29. For a similar situation, *see Harper v. Va. Dep't of Taxation*, 509 U.S. 86 (1993), where the issue was whether state taxpayers were entitled to a refund by the retrospective application of a recent Supreme Court decision holding a provision of state tax law unconstitutional.

one of the thousands of criminal trials at which evidence was admitted in violation of *Crawford* needed to be retried, the criminal justice system would collapse.

Clearly, there needs to be some restraint, either direct or indirect, on the application of the jurisprudential principle. For the purposes of this article, direct restraints are those in which the courts create some rule which operates exclusively on the decision of whether to afford retrospective effect to a new decision. On the other hand, indirect restraints are those in which other procedural rules serve as some external limitation on the retroactive application of new decisions.

In the civil context, there are several indirect restraints on the application of the principle that all decisions have retrospective effect. First among these are statutes of limitation which cut off the right to bring civil actions after a given period of time. Thus, if a court had previously held that there was no cause of action for a putative tort, but has now reversed itself to provide for liability (a decision which would necessarily have retrospective effect), the generally applicable civil tort statute of limitations would limit the retroactive application of the decision to alleged violations that occurred within the statutory limitations period. Similarly, the principles of res judicata and collateral estoppel serve as additional indirect limitations on the retroactive application of decisions.[30] In criminal cases, the statute of limitations serves the same effect in some circumstances. That is, a judicial decision that particular conduct violates a particular statute does not authorize the government to bring indictments against persons who committed such violations outside the applicable statute of limitations, even though the decision is an "authoritative statement of what the statute meant before . . . the decision."

C. Restraints in Habeas Corpus Cases

These restraints do not have the same effect in habeas corpus cases. The purpose of a habeas corpus case is to allow a court to review retrospectively the constitutionality and accuracy of prior determinations of law, even after those determinations were subject to review during multiple layers of direct appeal. While federal habeas petitions are now subject to a one-year statute of limitations,[31] the limitations period only controls the timing of the filing of the petition and not the issues that can be raised. Indeed, rather than serving to cut off the retrospective application of new decisions to old cases, the habeas statute of limitations actually encourages such review by triggering a new one-year limitations period beginning on "the date on which the constitutional right asserted was initially recognized by the Supreme

30. *See* James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 535 (1991) ("[A] decision may be made fully retroactive . . . consistent with res judicata and procedural barriers such as statutes of limitations. This practice is overwhelmingly the norm and is in keeping with the traditional function of the courts to decide cases before them based upon their best current understanding of the law.") (citation omitted).

31. *See* 28 U.S.C. § 2244(d) (2006) (state prisoners); 28 U.S.C. § 2255(f) (2006 & West Supp. 2008) (federal prisoners).

Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review."[32]

The result is that retroactive application of a new decision in habeas cases is not restrained in the same manner as it is in other civil and criminal proceedings. As will be discussed below, the need for a restraint in post-conviction proceedings is paramount because the lack of such a control can potentially paralyze the criminal justice system.

To understand this need, consider the logical arguments of the parties when confronted with a right newly recognized by the Supreme Court. The petitioner's argument, reduced to its most elemental form, is as follows:

1. I have a strong due process interest in the accurate application of the law to my case.

2. At my trial, something happened which would now be regarded as constitutional error under the new decision by the Supreme Court.

3. The new decision is applicable to my case because all cases are retroactive.

4. *Therefore,* I should be granted a new trial at which the court can accurately apply the law as we now know it to be.

Assuming that the petitioner can actually make out the underlying substantive claim that a constitutional error occurred, the logical power of this argument is inescapable and not subject to any attack on its merits. As a result, the state's response is not to challenge the argument directly, but rather to attack it based on the practical ramifications of accepting the argument and the societal cost of applying the jurisprudential principle whenever it is invoked. Thus, the state's response is:

1. At the original trial, the state made a reasonable effort to apply the law as it was understood at the time.

2. The state has a strong interest in the finality of its criminal proceedings for several reasons:

   a. To compel the retrial of every case during which the error in question occurred would put the state in an untenable position as witnesses are no longer available, memories have faded, and evidence has been lost; and

   b. The effect of acquittals or dismissals based on this error would be to free many dangerous criminals not because they

32. 28 U.S.C. § 2244(d)(1)(C) (2006). The provision for federal prisoners is identical except that it omits the word "constitutional." 28 U.S.C. § 2255(f)(3) (2006 & West Supp. 2008).

were in fact innocent, but because the passage of time has made it impossible to convict them again.[33]

3. *Therefore,* the new constitutional decision should not be applied retroactively because the societal costs of doing so are too high.

This argument is just as compelling as the petitioner's, and creates a situation where these two powerful interests (graphically displayed below), are juxtaposed against one another with no obvious way to release the pressure created by this conflict.

State's interest in finality	➔➔	Petitioner's interest in accurate application of law

A safety valve is needed, and that valve has been changed several times over the last fifty years by the Supreme Court to meet the needs of the time.

Prior to the early 1960s, the Supreme Court routinely applied the jurisprudential principle of retroactivity in habeas corpus cases, allowing relief to state petitioners whose convictions were infected with constitutional error.[34] This did not present any serious practical difficulties because there were two important external limitations on the application of the principle of retroactivity. The first was the standard for granting federal habeas relief to state prisoners, which required relief only when the constitutional violation was "so serious that it effectively rendered the conviction void for lack of jurisdiction."[35] The definition of this standard was somewhat misleading, however, as it did not involve "jurisdiction" in the sense of a court not having the legal "authority to hear and determine"[36] a case, but rather in the sense that an error committed in a petitioner's case was so egregious that by committing the error, a court forfeited its authority to decide the case.[37] The second, even greater, limitation was that the key provisions of the Bill of Rights had not yet been made applicable to the states, thereby restricting the types of claims that could be raised in federal habeas petitions challenging state criminal convictions.

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33. *See* Mackey v. United States, 401 U.S. 667, 691 (1971) (Harlan, J., concurring).

> [I]ssuance of the habeas writ compels a State that wishes to continue enforcing its laws against the successful petitioner to relitigate facts buried in the remote past through presentation of witnesses whose memories of the relevant events often have dimmed. This very act of trying stale facts may well, ironically, produce a second trial no more reliable as a matter of getting at the truth than the first.

Id.

34. *See, e.g.*, Waley v. Johnston, 316 U.S. 101 (1942); *see also* Mooney v. Holohan, 294 U.S. 103 (1935) (holding that the knowing use of perjured testimony satisfied this standard, though the Court remanded so petitioner could exhaust state remedies).

35. Danforth v. Minnesota, 552 U.S. 264, 128 S. Ct. 1029, 1036 (2008).

36. McNitt v. Turner, 83 U.S. 352, 366 (1872).

37. *See, e.g.*, Moore v. Dempsey, 261 U.S. 86, 90–91 (1923) (lynch mob's domination of trial proceedings effectively deprived court of ability to provide defendants with due process).

The retroactivity problem came to the forefront of habeas corpus jurisprudence as both of these indirect restraints lost effect. The first restraint, the strict standard for relief, effectively disappeared in 1942 with the Court's decision in *Waley v. Johnston*.[38] In *Waley*, the Court abandoned the "lack of jurisdiction" requirement, instead holding that federal habeas relief is available "where the conviction has been in disregard of the constitutional rights of the accused . . . ."[39] While *Waley* lowered the standard for granting relief, it did little to expand the issues which were cognizable in habeas corpus cases, and there was no imminent need for the Court to address the question of retroactivity. That all changed in the 1960s when the second restraint was eliminated by the "serial incorporation of the Amendments in the Bill of Rights,"[40] which made a wide variety of claims of the denial of due process rights in state criminal proceedings cognizable in federal habeas petitions.[41]

D. The Linkletter Model

With the two restraints on retroactivity eliminated, the application of the jurisprudential principle requiring the retroactive application of new decisions in all cases created the potential for disaster. As decision after decision incorporating and expanding the various protections of the Fourth, Fifth, Sixth, and Eighth Amendments was handed down by the Supreme Court, it became increasingly likely that any given state prisoner could point to some federal procedural right—now made applicable to the states—that was violated during that prisoner's trial. Thus, an unbridled application of the general retroactivity principle could truly have resulted in the states being required to throw open their prison doors.

As a result, in the 1965 case of *Linkletter v. Walker*, the Court stepped in and, for the first time, addressed the question of retroactivity for habeas corpus.[42] In *Linkletter*, which involved the retroactive application of the Court's earlier decision in *Mapp v. Ohio*[43] making the Fourth Amendment exclusionary rule applicable to the states, the Court took a practical approach to the problem. First, the Court held that it was not bound to apply cases retroactively because "the Constitution neither prohibits nor

38. 316 U.S. 101 (1942).

39. *Id.* at 105; *see also* Wainwright v. Sykes, 433 U.S. 72, 79 (1977) ("[I]n *Waley*, the Court openly discarded the concept of jurisdiction . . . as a touchstone of the availability of federal habeas review, and acknowledged that such review is available for claims of disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights.") (citation omitted).

40. *Danforth,* 128 S. Ct. at 1036.

41. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968) (incorporating right to trial by jury); Klopfer v. North Carolina, 386 U.S. 213 (1967) (incorporating right to speedy trial); Washington v. Texas, 388 U.S. 14 (1967) (incorporating right to compulsory process); Pointer v. Texas, 380 U.S. 400 (1965) (incorporating right to confront witnesses); Malloy v. Hogan, 378 U.S. 1 (1964) (incorporating right against self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (incorporating right to counsel); Mapp v. Ohio, 367 U.S. 643 (1961) (incorporating right against unreasonable search and seizure).

42. 381 U.S. 618 (1965).

43. 367 U.S. 643 (1961).

requires retrospective effect."[44] Thus, the Court adopted a rule in which it would consider "the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."[45] Of critical importance to the Court was the effect of retroactive application on the administration of justice:

> To make the rule of *Mapp* retrospective would tax the administration of justice to the utmost. Hearings would have to be held on the excludability of evidence long since destroyed, misplaced or deteriorated. If it is excluded, the witnesses available at the time of the original trial will not be available or if located their memory will be dimmed. To thus legitimate such an extraordinary procedural weapon that has no bearing on guilt would seriously disrupt the administration of justice.[46]

The practical effect of *Linkletter* was that it allowed the Court to continue to expand the rights of criminal defendants and at the same time to tailor the retroactive application of each new rule to avoid placing an undue burden on the states to retry every previous case in which that new rule had been violated.[47] This approach was, at its heart, a legislative exercise because it left the Court "free to act . . . like a legislature, making its new constitutional rules wholly or partially retroactive or only prospective as it deem[ed] wise."[48] The greater problem with *Linkletter* was that it was almost completely standard-less. Its case-by-case approach, which focused on the extent to which the administration of justice would be affected by retroactive application, inevitably resulted in arbitrary outcomes both between petitioners who were previously deprived of the right in question, and between the different rights the Court was incorporating into the Fourteenth Amendment. As between petitioners, the *Linkletter* approach was in effect a lottery that allowed the Court to grant relief to the one petitioner who was fortunate enough to have his or her case selected for review but not to other prisoners who were denied the same right and whose cases were in exactly the same procedural posture as the lucky beneficiary of the Court's decision.[49] And, as between the newly-incorporated rights, the *Linkletter* approach differentiated among them based on how often the states had been violating the newly-recognized right prior to the new decision, regardless of the importance of the right, because

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44. *Linkletter*, 381 U.S. at 629. *See* Great N. Ry. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 364 (1932) (Cardozo, J.) ("We think the federal constitution has no voice upon the subject [of retroactivity].").

45. *Linkletter*, 381 U.S. at 629.

46. *Id.* at 637–38.

47. *See* Mackey v. United States, 401 U.S. 667, 676 (1971) (Harlan, J., concurring) (*Linkletter* "was the product of the Court's disquietude with the impacts of its fast-moving pace of constitutional innovation in the criminal field.").

48. *Id.* at 677.

49. As Justice Harlan put it, "[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule constitute an indefensible departure from [the Court's traditional] model of judicial review." *Id.* at 679 (Harlan, J., concurring).

those constitutional protections were the ones that would cause the most disruption to the system if accorded retroactive application.

As a result, *Linkletter* led to a wide disparity of results as the Court tailored the retrospective effect of each new decision to limit the institutional damage that could be caused by its full retroactive application. Thus, the decision in *Griffin v. California*,[50] which held that the government may not comment on a defendant's decision not to testify, was subsequently made applicable to cases then on direct review;[51] *Miranda v. Arizona*[52] was made applicable only to trials commencing after that decision;[53] and the cases concerning the right to counsel during lineups[54] were made applicable only to lineups conducted after those decisions.[55]

Linkletter soon met resistance from within the Court. In a series of concurrences and dissents, Justice Harlan closely examined the issue of retroactivity, and formulated a model for determining when to apply cases retroactively.[56] Twenty-four years after *Linkletter*, with the incorporation of the criminal protections in the Bill of Rights complete and the Court becoming increasingly more conservative, the Court in *Teague v. Lane* adopted Justice Harlan's model, virtually as formulated by him.

The *Teague* model basically draws a line at the conclusion of direct appeals (including a direct appeal to the Supreme Court). In contrast to the pre-*Linkletter* system, in which all new decisions were accorded retroactive effect, *Teague* allows full retroactive application in cases when direct appeals are ongoing at the time of the new decision,[57] but drastically limits retroactive review after that date. Justice Harlan and the *Teague* court described the system as first requiring the determination whether a decision stated a "new" rule, and if it did, then applying a general rule of non-retroactivity unless either of two exceptions applied.[58] A simpler way to look at *Teague,* though, is to view it as creating a strong presumption of non-retroactivity which can be overcome only in three limited circumstances: (1) if the recent decision is not "new;" (2) if the new decision establishes a substantive rule "that place[s] . . . certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,"[59] and (3), if the new decision establishes a bedrock procedural rule that is "implicit in the concept of ordered liberty."[60]

50. 380 U.S. 609, 615 (1965).

51. *See* Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 409 n.3, 419 (1966).

52. 384 U.S. 436 (1966).

53. *See* Johnson v. New Jersey, 384 U.S. 719, 721, 733 (1966).

54. *See* United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967).

55. *See* Stovall v. Denno, 388 U.S. 293, 296 (1967).

56. *See* Mackey v. United States, 401 U.S. 667, 675–703 (1971) (Harlan, J., concurring); Desist v. United States, 394 U.S. 244, 256–69 (1969) (Harlan, J., dissenting).

57. *See* Griffith v. Kentucky, 479 U.S. 314, 328 (1987).

58. *See* Teague v. Lane, 489 U.S. 288, 305–10 (1989); *Desist*, 394 U.S. at 260–64 (Harlan, J., dissenting).

59. *Mackey*, 401 U.S. at 692 (Harlan, J., concurring).

60. *Teague*, 489 U.S. at 307 (quoting *Mackey*, 401 U.S. at 693 (Harlan, J., concurring)).

The *Teague* model does recognize the importance of having the appropriate law applied to the petitioner's case,[61] but places the greatest emphasis on the need for finality in criminal proceedings because, in the words of Justice Harlan, retroactive application would "seriously distort the very limited resources society has allocated to the criminal process [by] expending substantial quantities of the time and energies of judges, prosecutors, and defense lawyers litigating the validity under present law of criminal convictions that were perfectly free from error when made final."[62] Furthermore, while this "drain on society's resources" might be well-spent if it resulted in more just decisions, such results were not likely because the "very act of trying stale facts may well, ironically, produce a second trial no more reliable as a matter of getting at the truth than the first."[63]

III. SITUATIONS WHEN RETROACTIVE APPLICATION IS PERMISSIBLE

A. Lack of "Newness"

The rule adopted in *Teague* is highly responsive to the logical arguments discussed earlier. *Teague* only applies the presumption of non-retroactivity when the Court's recent pronouncement "really announced a 'new' rule" as opposed to "simply appl[ying] a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law."[64] The need for this determination flows directly from the first part of the state's logical argument discussed above—that the state made a reasonable effort to apply the law as it was understood at the time. If the rule was not "new"; that is, if it was compelled by then-existing precedent, then the state's argument that it had acted reasonably fails. In Justice Harlan's language quoted above, this is not a case when the petitioner's conviction was "perfectly free from error when made final," so it is not entitled to the benefits of a rule allowing the need for finality to trump all other considerations.

B. Retroactivity of Federal Decisions in State Courts

Just as the lack of "newness" implicates the first premise of the state's argument, the Court's 2008 decision in *Danforth v. Minnesota*[65] involves a situation when the

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61. *Mackey*, 401 U.S. at 689 (Harlan, J., concurring).

> Assuring every state and federal prisoner a forum in which he can continually litigate the current constitutional validity of the basis for his conviction tends to assure a uniformity of ultimate treatment among prisoners; provides a method of correcting abuses now, but not formerly, perceived as severely detrimental to societal interests; and tends to promote a rough form of justice, albeit belated, in the sense that current constitutional notions, it may be hoped, ring more "correct" or "just" than those they discarded.

Id.

62. *Id.* at 691.

63. *Id.*

64. Desist v. United States, 394 U.S. 244, 263 (1969) (Harlan, J., dissenting).

65. 552 U.S. 264, 128 S. Ct. 1029 (2008).

state's second premise—its interest in finality—is lacking. The question confronted by the Court in *Danforth* was whether state courts are obligated to apply the *Teague* standard when considering whether to apply a decision of the United States Supreme Court retroactively in a state post-conviction proceeding.[66] The Court concluded that the state courts are free to impose a more lenient standard than *Teague*.[67] The Court reasoned that *Teague* "was intended to limit the authority of federal courts to overturn state convictions—not to limit a state court's authority to grant relief for violations of new rules of constitutional law when reviewing its own State's convictions."[68]

Two points concerning this decision are worth noting. First, the decision hints that a state court could easily evade a contrary rule simply by holding that the state constitutional right is co-extensive with the federal right at issue, and then applying the (more lenient) state retroactivity standard to its own decision interpreting its own state constitution. To take the example used by the Court in *Danforth*, "[a]ny State could surely have adopted the rule of evidence defined in *Crawford* under state law even if that case had never been decided."[69] Even after *Crawford* was decided, nothing would prevent a state from holding that *Crawford* accurately defines the limits of the state constitutional provision defining the right to confront witnesses. Having made such a finding, the state court would be free to apply the retroactivity standard it applies to its own decisions, whatever it might be,[70] and hold that the state constitutional principle should be applied retroactively.

Second, the decision in *Danforth* flows directly from the rationale of *Teague* that the social cost of enforcing the general jurisprudential principle is too high to impose on the states. The danger of allowing the retrospective application of decisions is that such a decision would place the state in the impossible position of either having to retry hundreds, or even thousands of cases adjudicated years before, or to release any prisoner who could now establish that a violation of the newly recognized rule occurred at his or her earlier trial. However, as Justice Stevens put it, "finality of state convictions is a *state* interest, not a federal one [so] States should be free to evaluate, and weigh the importance of [that interest] when prisoners held in state custody are

66. 128 S. Ct. at 1033 (framing the issue as whether "*Teague* constrains the authority of state courts to give *broader* effect to new rules of criminal procedure than is required by [*Teague*]" (emphasis added)). The Court did not address the possibility that a state court might decide to impose a narrower standard than *Teague*, for example, by eliminating the exceptions, or even deciding not to give retroactive effect to any cases. *See id.* at 1034 n.4. The Court's analysis, focusing on the remedial nature of *Teague* once a case reaches the federal courts, suggests that a state court can impose any standard it likes. *See id.* at 1039.

67. *See id.* at 1053.

68. *Id.* at 1041.

69. *Id.*

70. For example, both New York and New Jersey apply a rule based on *Linkletter* that considers the purpose of the new rule, the degree to which the courts and law enforcement relied on the old rule, and the effect that making the new rule retroactive would have on the administration of justice. *See* State v. Feal, 944 A.2d 599, 608 (N.J. 2008); People v. Martello, 93 N.Y.2d 645, 651 (1999).

seeking a remedy for a violation of federal rights . . . ."[71] In other words, if the state is willing to accept the potential social costs of retrial or possible release, then there is no federal interest in preventing it from doing so.[72]

C. The Reverse-Teague Problem

Another aspect of the *Teague* retroactivity analysis that has caused some consternation among courts and commentators is the question of how to apply *Teague* to a new decision that limited, or at least did not expand, the rights of criminal defendants.[73] To understand this problem, consider the following hypothetical situation:

> Ten years ago, the Arcadia Supreme Court held in *People v. Del Toro* that it was a denial of due process under the United States Constitution for the prosecutor to wear a red necktie during closing argument based on an

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71. *Danforth*, 128 S. Ct. at 1041.

72. Like so many areas of habeas corpus law, *Danforth* creates an opportunity while at the same time setting another trap for the unwary petitioner. Assume that the state's highest court, having accepted the invitation in *Danforth* to apply a more lenient standard than *Teague,* agrees to review retroactively a defendant's *Crawford* claim, but arguably applies *Crawford* erroneously to deny post-conviction relief. At that point, the defendant has two options available for further review of his conviction: to apply for review by the United States Supreme Court of the denial of state post-conviction relief *or* to file a federal habeas petition under 28 U.S.C. § 2254. This creates a problem for the defendant because while *Danforth* establishes an avenue for state review of the claim, in a federal habeas petition the *Crawford* claim would be lost since the federal district court would be obligated to apply the *Teague* standard. Indeed, the Supreme Court has already held that *Crawford* claims are not entitled to retroactive review in *Whorton v. Bockting*, 549 U.S. 406 (2007).

The trap in this situation is that if the defendant chooses the logical first step of seeking review of the *Crawford* claim by the Supreme Court (that is, finishing up litigation of the state proceeding before beginning a new federal proceeding), then under *Lawrence v. Florida*, 549 U.S. 327 (2007), the time spent preparing the petition for certiorari and any time while that petition was pending would not toll the one-year federal statute of limitations for bringing the section 2254 petition. *See id.* at 332. As a result, it is highly probable that the time for bringing the federal habeas petition would expire while the petition for Supreme Court review is pending, effectively denying the petitioner review of any non-*Crawford* claims. For example, the petitioner in *Lawrence* had only one day remaining in his limitations period when the state court denied relief, so his time for filing a section 2254 petition expired even before he filed his certiorari petition. *See id.* at 330; *see also* Rhine v. Boone, 182 F.3d 1153, 1155 (10th Cir. 1999) (holding that although petitioner had 112 days remaining when the state's highest court denied post-conviction relief, the limitations period expired while certiorari petition was pending).

Fortunately, there is a way to avoid this trap. "A petitioner denied relief by a State's highest court will now have to file, contemporaneously, a petition for certiorari in [the Supreme] Court and a habeas petition in federal district court." *See Lawrence*, 549 U.S. at 342 (Ginsburg, J., dissenting). A petitioner confronted with the task of simultaneously litigating the Supreme Court case and the habeas petition could then request a stay of the habeas petition while the separate petition for Supreme Court review moves forward. *See id.* at 335 (majority opinion). Indeed, the Court has also endorsed this procedure in the somewhat analogous situation when the petitioner filed a petition with unexhausted claims and was required to return to state court to exhaust those claims. *See* Rhines v. Weber, 544 U.S. 269, 276–78 (2005).

73. *See, e.g.*, 2 Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice & Procedure, §25.8, at 1245–47 (5th ed. 2005) (contrasting approach taken by courts immediately following *Teague* with that taken in *Lochart v. Fretwell*, 506 U.S. 364 (1993)).

> academic study that found that there was a high incidence of wrongful convictions when the prosecutor did so. This case was not appealed to the United States Supreme Court, but the issue was finally raised a year ago in another case, *Arcadia v. Matador*, in which the Court held that apart from the trial court's general authority to control decorum in the courtroom, the Fifth Amendment imposes no dress code on government attorneys. Smith, the current petitioner, was convicted at trial before *Del Toro* and appealed in the interim between *Del Toro* and *Matador*, but his counsel never raised the neckwear issue on appeal even though there was no question that the prosecutor was in violation of *Del Toro*. Smith is now raising the claim in a habeas petition, arguing that he was denied the right to effective assistance of counsel since, if the claim had been raised on appeal before *Matador*, he would have been granted a new trial by the state appellate court. The state's response is that *Matador* controls, so the claim should be denied, and Smith is arguing that under *Teague*, *Matador* should not be given retroactive effect.[74]

This problem is, in fact, a straightforward application of the basic principles of retroactivity discussed earlier in this article. The first principle of the law of retroactivity is that all court decisions are retroactive back to the source of the law underlying that decision. As a result, in the above hypothetical, after the decision in *Matador,* it is now clear that the holding in *Del Toro* was never "the law" in the jurisprudential sense that the term is used here; *Matador* has now conclusively established that there was no dress code implicit in the Due Process Clause for as long as there has been a Due Process Clause.[75] In effect, then, petitioner Smith is asking the federal habeas court to apply a decision that was erroneous when it was decided, and has since been thoroughly repudiated. This puts him in a far different position than the petitioner in a conventional *Teague* situation who is asking the habeas court to apply a decision which is now known to state the *correct* principle of law that, in a more perfect world, would have been applied to his case in the first place. When looked at from this perspective, any argument by Smith that the failure to apply the earlier, now repudiated decision is unfair to him lacks any force at all.[76] In effect, *Teague* is "a one-way street."[77]

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74. This hypothetical is not as far off the mark as it might seem. In *Carey v. Musladin*, 549 U.S. 70 (2006), the Court vacated a Ninth Circuit decision which had granted habeas relief on the grounds that it was a violation of the accused's due process rights for family members of a murder victim to wear a lapel button with a photograph of the victim at the trial of the accused. The Court held that since there was no clearly established federal law on this issue, habeas relief was precluded by 28 U.S.C. § 2254(d). *See Musladin,* 549 U.S. at 77.

75. *See Danforth*, 128 S. Ct. at 1035 ("[T]he source of a 'new rule' is the Constitution itself, not any judicial power to create new rules of law.").

76. *See* Desai v. Booker, 538 F.3d 424, 430 (6th Cir. 2008) ("The goal of the great writ is not to correct the misapplication of overruled precedents.").

77. Free v. Peters, 12 F.3d 700, 703 (7th Cir. 1993) (Posner, C.J.) ("The Supreme Court deems *Teague* a one-way street: . . . it entitles the state, but not the petitioner, to object to the application of a new rule to an old case.").

Indeed, the Supreme Court came to exactly that conclusion in *Lockhart v. Fretwell*, although the Court addressed the issue rather cryptically.[78] *Fretwell* involved an ineffective assistance of counsel claim based on trial counsel's failure to object to a jury charge allowing the jury to consider an aggravating factor in the sentencing phase of a capital trial[79] which had, at that time, been held unconstitutional by the federal court of appeals, but which was later upheld as valid by the Supreme Court.[80] After addressing the ineffective assistance of counsel issue at length, the Court addressed the *Teague* issue in the last two paragraphs of the decision (reprinted in the footnote below), holding that petitioners gain no benefit from *Teague* with respect to new decisions that do not expand the rights of criminal defendants.[81]

The ineffective assistance argument raised in the hypothetical is unavailing as well. One of the elements for a claim of ineffective assistance of counsel under *Strickland v. Washington* is that the defendant must establish prejudice, which is defined as an error "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."[82] In the reverse-*Teague* situation, a petitioner will never be able to demonstrate prejudice under that standard because the only harm that the petitioner suffered as a result of counsel's failure to raise the issue on direct review is that he or she was denied the opportunity to have a court make the same mistake again.[83] Thus, in our hypothetical, if counsel had raised the *Del Toro* defense, Smith may have received some (undeserved) relief at the state level, but the prosecution would

78. 506 U.S. 364 (1993).

79. *See Fretwell*, 506 U.S. at 367.

80. *See* Lowenfield v. Phelps, 484 U.S. 231 (1988).

81. *See Fretwell*, 506 U.S. at 372–73.

> [*Teague*] was motivated by a respect for the States' strong interest in the finality of criminal convictions, and the recognition that a State should not be penalized for relying on the constitutional standards that prevailed at the time the original proceedings took place. 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.
>
> A federal habeas petitioner has no interest in the finality of the state-court judgment under which he is incarcerated: Indeed, the very purpose of his habeas petition is to overturn that judgment. Nor does such a petitioner ordinarily have any claim of reliance on past judicial precedent as a basis for his actions that corresponds to the State's interest . . . . The result of these differences is that the State will benefit from our *Teague* decision in some federal habeas cases, while the habeas petitioner will not. This result is not, as the dissent would have it, a "windfall" for the State, but instead is a perfectly logical limitation of *Teague* to the circumstances which gave rise to it.

Id. (citations omitted).

82. 466 U.S. 668, 687 (1984).

83. *See Fretwell*, 506 U.S. at 371 (The only prejudice from defense counsel's error in not raising the now-discredited claim was that it "deprived respondent of the chance to have the state court make an error in his favor.") (quoting Brief for United States as Amicus Curiae at 10); *see also* Evans v. Hudson, 575 F.3d 560, 566 (6th Cir. 2009) (Petitioner "cannot show the necessary prejudice for his claim of ineffective assistance of appellate counsel based on the failure to raise a now-meritless claim . . . .").

inevitably have appealed that decision (as it did in *Matador*). The Supreme Court would then have identified the correct legal principle (except that Smith, and not Matador, would have his name on the key decision), and Smith would be in exactly the same position as he is now.

Another way to look at the situation, which leads to the same conclusion, is by reference to the concept of *Teague* as a valve releasing the pressure between the conflicting interests of the state and the petitioner. As discussed, *Teague* is a mechanism that serves to relieve the tension between the state's interest in the finality of its judgments and the petitioner's interest in the application of the correct legal principles to his case:

State's interest in finality → ← Petitioner's interest in accurate application of law

At first glance, the reverse-*Teague* situation appears to be the converse of this situation. Indeed, that is the position taken by Justice Stevens in his dissent in *Fretwell*:

> If, under *Teague*, a defendant may not take advantage of subsequent changes in the law when they are favorable to him, then there is no self-evident reason why a State should be able to take advantage of subsequent changes in the law when they are adverse to his interests.[84]

But when we test this hypothesis, it fails. If this were truly the converse situation, it would be graphically illustrated as:

State's interest in accurate application of law → ← Petitioner's interest in finality

The left side of this diagram is certainly true, that is, that the government in a reverse-*Teague* situation now has a powerful interest in the accurate application of the law. But, as the *Fretwell* court pointed out, "[a] federal habeas petitioner has no interest in the finality of the state-court judgment under which he is incarcerated: Indeed, the very purpose of his habeas petition is to overturn that judgment."[85] Thus, the true graphic representation of the reverse-*Teague* situation is:

State's interest in accurate application of law →

State's interest in finality →

As there is no conflict between the two interests at stake, there is no need for a release from the tension between them, and no need for the mechanism provided by *Teague*. Justice Rehnquist fittingly concluded his opinion in *Fretwell* by quoting the

84. 506 U.S. at 388 (Stevens, J., dissenting).

85. *Id.* at 373 (majority opinion).

Latin maxim "*Cessante ratione legis, cessat et ipsa lex*"[86] (when the reason for the law ceases, the law itself ceases).

A variation on *Fretwell*, but with a key difference that relates directly to the principles discussed here, is presented by the Fifth Circuit's decision in *Young v. Dretke*.[87] At the time of the offense in *Young*, Texas had an unusual speedy-trial provision under which a defendant arrested for a particular offense had a right to be indicted prior to the end of the next term of court. Failure to indict the defendant, in the absence of a showing of good cause, required that the charges be dismissed.[88] Another section of the code then provided that such a dismissal "is a bar to any further prosecution for the offense discharged and for any other offense arising out of the same transaction."[89] Thus, Texas law provided, in effect, that the only remedy for an unexcused pre-indictment delay was dismissal of the charges with prejudice.[90]

Young was arrested for murder in September 1991, which gave him the right to be indicted by early July 1992, but the indictment was not filed until February 1993.[91] Counsel never filed a motion to dismiss under the speedy trial provisions, although this likely would have led to a dismissal with prejudice.[92] Young was subsequently convicted and sentenced to sixty years in prison.[93] In the interim between Young's direct appeal and his state habeas petition, the Texas statutes were amended to eliminate the bar to prosecution for late-filed indictments, effectively allowing re-indictment if permitted under the applicable statute of limitations.[94]

On its face this seems like a reverse-*Teague* situation: Under current law, Young would have no claim that he received ineffective assistance of counsel because he could be re-indicted. The critical difference, however, between the situation in *Young* and that in the hypothetical situation is that in the latter, "the law" remained the same throughout—the legal principle expressed in *Del Toro* was always wrong and the principle expressed in *Matador* was always correct—while in Young's situation, the prior statute was the controlling legal principle until it was amended by the Texas

86. *Id.*

87. 356 F.3d 616 (5th Cir. 2004).

88. *See* Tex. Code Crim. Proc. Ann art. 32.01 (Vernon 2006).

89. Tex. Code Crim. Proc. Ann art. 28.061 (Vernon 2006).

90. In contrast to the Texas provisions, the federal Speedy Trial Act requires that the indictment be filed within thirty days of arrest, and the failure to do so requires dismissal of the charges. *See* 18 U.S.C. §§ 3161(b), 3162(a)(1) (2006). The trial court, however, has discretion to dismiss with or without prejudice. *See* 18 U.S.C. § 3162(a)(1). In New York, absent a showing of good cause, a defendant must be released from detention if not indicted within forty-five days of arrest, N.Y. Crim. Proc. Law § 190.80(b) (McKinney 2007), but there is no speedy trial provision requiring dismissal of the charges based on pre-indictment delay. Instead, this is treated as a due process issue applying a variation of the federal constitutional standard. *See* People v. Taranovich, 37 N.Y.2d 442, 444–45 (1975).

91. *See Young*, 356 F.3d at 620.

92. *See id.*

93. *See id.* at 620.

94. *See id.* at 621–22.

legislature. Therefore, Young was absolutely entitled to the application of the prior statute and the failure of counsel to raise what seems like a slam-dunk defense constituted ineffective assistance. This was precisely the conclusion reached by the Fifth Circuit in granting habeas relief.[95]

Surprisingly, the Fifth Circuit's grant of relief did not end Young's case. The state obtained a new indictment on the murder charge, which Young sought to dismiss on the basis that the dismissal under the prior statute had to be with prejudice. The trial court agreed and dismissed the new indictment, but the Texas Court of Criminal Appeals reversed, holding that the provision requiring dismissal with prejudice was unconstitutional under the Texas Constitution's explicit separation of powers provision.[96] In so holding, the court noted that its decision that the prior statute was unconstitutional brought *Fretwell* back into play because that decision would be entitled to retroactive application (that is, the statute was unconstitutional from the time of its passage), so Young had no right to rely on it.[97]

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95. *See id.* at 627–28.

> *Fretwell* dealt with a right declared by a judicial decision, a right which had achieved no recognition as a final statement of the law. Restated, the rule relied on by Fretwell was proclaimed by a single judicial decision and was not finally settled as a binding legal principle. The case, and the rule it announced, had, in fact, been overruled by the time Fretwell raised the issue in habeas. In short, Fretwell had no legal "entitlement" to a rule that had never "vested" as a final statement of the law. Implicit in this concept is that *finality* of a federal constitutional rule is never established until the Supreme Court has spoken.
>
> Statutes, as "final" statements of the law, are distinguishable. Once a statute is duly enacted by the legislature, it is a "final", if not necessarily permanent, statement of the law on that particular point. Although it may be attacked in collateral proceedings as unconstitutional, it has achieved recognition as a final statement of the law by the lawgiver, that is, the legislature and, indeed, the state, and the statute confers benefits that the law recognizes and protects. . . . Unlike the benefit sought in *Fretwell,* a state statute is not an error, misapprehension, or "right the law simply does not recognize." Thus Young was, at the time of his arrest, indictment and trial, legally entitled to the final "vested" rights conferred upon him by the duly enacted Texas statutes; Fretwell, on the other hand, was not lawfully entitled to claim the benefit of a judicial rule that had not become finally authoritative.

Id. (quoting Nix v. Whiteside, 475 U.S. 157, 186 (1986) (Blackmun, J., concurring)).

96. *See Ex parte* Young, 213 S.W.3d 327, 331–32 (Tex. Crim. App. 2006). For an explanation of the separation of powers issue, *see State v. Condran*, 977 S.W.2d 144, 144–47 (Tex. Cr. App. 1998) (Keller, J., dissenting). The basis of the argument is that the requirement that the indictment be dismissed with prejudice "seriously disrupts a prosecutor's ability to perform his duties," Ex parte *Young*, 213 S.W.3d at 331, without incorporating the constitutional standard for reviewing pre-indictment delays. *Condran*, 977 S.W.2d at 146 (Keller, J., dissenting).

97. *See Ex parte* Young, 213 S.W.3d at 332 n.4 ("Under *Fretwell*, appellant did not suffer legitimate *Strickland* prejudice because, like the subsequently overruled Eighth Circuit decision in *Fretwell*, the now unconstitutional version of Article 28.061 applicable to appellant's case no longer entitles him to a dismissal with prejudice of his murder prosecution.").

D. The First Teague Exception

The second ground for applying a new decision retroactively (in *Teague* parlance, the first exception) is for substantive rules "that place, as a matter of constitutional interpretation, certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe."[98] Like the *Danforth* and *Fretwell* situations, the first exception reflects an instance when the government's second premise—its strong interest in finality—lacks force. As Justice Harlan stated, finality has no place "in permitting the criminal process to rest at a point where it ought properly never to repose."[99] Furthermore, this situation "entails none of the adverse collateral consequences of retrial"[100] because a decision holding that, as a matter of constitutional law, the conduct in question could not have been punished criminally in the first place means that there can be no further proceedings.

At first glance, the first exception appears to be of narrow breadth, but, as it turns out, it has been invoked on several occasions, and recent events have brought it to the forefront of habeas corpus jurisprudence. The Supreme Court, however, has addressed the substance of the first *Teague* exception in only one decision, *Penry v. Lynaugh*.[101] This decision is unusual as Supreme Court decisions go, because it is entirely theoretical. The issue before the Court in *Penry* was (a) whether the execution of the mentally retarded is unconstitutional, and (b) if so, then whether that decision is entitled to retroactive application. The Court turned that question on its head, answering (b) first, even though a negative answer to (a) would have obviated any need to address (b) at all. This was necessary because if the holding of issue (a) could not be applied retroactively, then Penry would not be entitled to any relief, and therefore would have lacked standing to bring the challenge.[102]

The Court stated that the first exception is generally intended to apply to "new rules according constitutional protection to an actor's primary conduct . . . ."[103] This would include new rules "placing certain conduct beyond the State's power to punish *at all*," but the Court expanded that protection here to include new rules "placing a certain class of individuals beyond the State's power to punish *by death* . . . ."[104] Thus, the Court concluded that "*Teague* should be understood to cover not only rules forbidding criminal punishment of certain primary conduct but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense."[105]

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98. Mackey v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., concurring).

99. *Id.* at 693.

100. *Id.*

101. 492 U.S. 302 (1989).

102. *See id.* at 329.

103. *Id.*

104. *Id.* at 330 (emphasis added to both quotations).

105. *Id.*

The Court was thus free to discuss the substantive issue of whether the Constitution prohibits the execution of the mentally retarded, but held that it did not.[106] That substantive holding was reversed thirteen years later in *Atkins v. Virginia*,[107] but because it was a direct appeal the Court had no reason to revisit the *Teague* issue in *Atkins*. Lower courts, both state and federal, have unanimously concluded that the *Teague* discussion in *Penry* remains in force and that *Atkins* is entitled to retroactive application.[108]

Subsequently, in a situation quite similar to *Penry* and *Atkins,* the Supreme Court reversed prior precedent and held in *Roper v. Simmons* that the Eighth Amendment prohibits the execution of defendants who committed the underlying offense before reaching the age of eighteen.[109] Because *Roper* involved an appeal from the denial of state post-conviction relief, the Court did not discuss the retroactivity problem. However, the situation is indistinguishable from *Atkins*, as all of the lower courts to address the issue have held.[110]

Thus, prior to 2008, all of the discussion of the first *Teague* exception involved new rules limiting the application of the death penalty to certain classes of defendants.[111] That is all likely to change in the near future, however. In *District of*

106. *See id.* at 330–35, 340.

107. 536 U.S. 304, 317–21 (2002).

108. *See* Allen v. Buss, 558 F.3d 657, 661 (7th Cir. 2009); Davis v. Norris, 423 F.3d 868, 879 (8th Cir. 2005); *In re* Holladay, 331 F.3d 1169, 1173 (11th Cir. 2003); Bell v. Cockrell, 310 F.3d 330, 332 (5th Cir. 2002); Hill v. Anderson, 300 F.3d 679, 681–82 (6th Cir. 2002); Duncan v. State, 925 So. 2d 245, 250–51 (Ala. Crim. App. 2005) (citing Clemons v. State, CR-01-1355, 2003 Ala. Crim. App. LEXIS 217 (Ala. Crim App. Aug. 29, 2003)); Engram v. State, 200 S.W.3d 367, 369 (Ark. 2004); Head v. Hill, 587 S.E.2d 613, 621 (Ga. 2003); Pizzuto v. State, 202 P.3d 642, 650 n.4 (Idaho 2008); Williams v. State, 793 N.E.2d 1019, 1027 (Ind. 2003); Bowling v. Commonwealth, 163 S.W.3d 361, 370 (Ky. 2005); State v. Dunn, 831 So. 2d 862, 882 n.21 (La. 2002); Russell v. State, 849 So. 2d 95, 145–48 (Miss. 2003) (by implication); Johnson v. State, 102 S.W.3d 535, 539 n.12 (Mo. 2003); State v. Lott, 779 N.E.2d 1011, 1015 (Ohio 2002); Pickens v. State, 74 P.3d 601, 603 (Okla. Crim. App. 2003); Franklin v. Maynard, 588 S.E.2d 604, 606 n.6 (S.C. 2003).

109. *See* Roper v. Simmons, 543 U.S. 551, 575 (2005), *overruling* Stanford v. Kentucky, 492 U.S. 361 (1989). Note that *Penry* and *Stanford* were decided the same day.

110. *See* Holly v. State, No. 3:98CV53-D-A, 2006 WL 763133, at *1 (N.D. Miss. Mar. 24, 2006); Little v. Dretke, 407 F. Supp. 2d 819, 823–24 (W.D. Tex. 2005); Johnson v. Dretke, No. 4:00-CV-1709-Y, 2005 U.S. Dist. LEXIS 4763, at *8–14 (N.D. Tex. Mar. 24, 2005); Duncan v. State, 925 So. 2d 245, 250–52 (Ala. Crim. App. 2005); *see also* Sims v. Commonwealth, 233 S.W.3d 731, 733 (Ky. Ct. App. 2007) ("[A]lthough Roper must be given retroactive application in all those cases in which a sentence of death was imposed upon a defendant who was under the age of 18 at the time he committed the crime, this is not such a case.").

111. The Court's recent decision in *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008), which held that the death penalty may not be imposed in cases of child rape, would also fall within the same category as *Atkins* and *Roper*. It appears, however, that there are not any defendants who will need the retroactive application of *Kennedy*, as the direct appeal of the only other defendant sentenced to death under these circumstances was still pending at the time *Kennedy* was decided. *See id.* at 2657.

Another recent decision also raises retroactivity issues, but does not involve *Teague*. In *Begay v. United States*, 128 S. Ct. 1581 (2008), the Court held that state felony convictions for driving under the influence are not predicate offenses under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)

Columbia v. Heller, decided in June 2008, the Court held for the first time that the Second Amendment protects an individual right to possess firearms, and invalidated a provision of the D.C. Code that effectively precluded the possession of firearms in one's home.[112] Although no court decisions discussing the retroactivity of *Heller* under *Teague* have appeared as yet,[113] *Heller* is certain to be invoked by many convicted defendants seeking collateral relief, and it seems beyond argument that *Heller* is exactly the kind of case that would come within the first exception to *Teague*. *Heller* undoubtedly places certain primary, private individual conduct beyond the power of

(1) (2006). This decision would not qualify under the first *Teague* exception because it does not put any conduct beyond the authority of the government to punish as a constitutional matter, but rather is a determination that a federal criminal statute, as currently in effect, does not apply to the conduct in question. *See* Bousley v. United States, 523 U.S. 614, 620–21 (1998). The retroactivity of such decisions is governed, not by *Teague*, but by *Bousley* and *Davis v. United States*. 417 U.S. 333 (1974). *Davis* held that Supreme Court decisions determining that the defendant was found guilty "for an act that the law does not make criminal" should be applied retroactively. *Id.* at 346. In the first decision to address the retroactivity of *Begay*, the government conceded that *Begay* is entitled to retroactive application. *See* United States v. Glover, No. 08-CV-0261-CVE-FHM, 2008 WL 2951085, at *4 (N.D. Okla. July 28, 2008). Subsequent district courts have divided on the issue with some holding that *Davis* applies to allow retroactive application, *see, e.g.*, United States v. Radabaugh, No. 08-CV-762-CVE-TLW, 2009 WL 565065 (N.D. Okla. Mar. 5, 2009), while others apply *Teague*, incorrectly it would seem, and reject retroactive application. *See, e.g.*, United States v. Johnson, No. 04-269 (MJD/AJB), 2009 WL 2611279 (D. Minn. Aug. 24, 2009); *see also* United States v. Cobb, No. 3:04-171-CMC, 2008 WL 3166118 (D.S.C. Aug. 4, 2008) (holding defendant had sufficient number of other predicates to bring him within ACCA, without addressing retroactivity of *Begay*).

In early 2009, the Court held that the failure to report to jail for weekend confinement does not count as a predicate under the ACCA. *See* Chambers v. United States, 129 S. Ct. 687 (2009). *Chambers* raises identical retroactivity issues to *Begay*, and as with that decision, a split in the district courts has arisen. *Compare* United States v. Blue, Civ. No. 09-1108, 2009 WL 2581284 (D. Kan. Aug. 20, 2009) (holding *Davis* applies, so *Chambers* is retroactive) *with* United States v. Narvaez, No. 09-cv-222-bbc, 2009 WL 1351811 (W.D. Wis. May 12, 2009) (holding *Teague* applies so *Chambers* is not retroactive).

112. 128 S. Ct. 2783, 2799, 2821–22 (2008).

113. The first district court cases involving post-conviction motions raising *Heller* claims all involved arguments that 18 U.S.C. § 922(g) (2006), which prohibits the possession of weapons by convicted felons and other individuals, is unconstitutional. In *Heller*, the Court specifically stated that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill," 128 S. Ct. at 2816–17, so the district courts have denied the motions on the basis of that statement without discussing the retroactivity of *Heller* under *Teague*. *See* United States v. Lippman, No. 4:02-cr-082, 2008 U.S. Dist. LEXIS 88685, at *8 (D.N.D. Oct. 20, 2008) (person subject to domestic restraining order under section 922(g)(8)); Reynolds v. Sherrod, No. 08-cv-506-JPG, 2008 WL 3287042 (S.D. Ill. Aug. 8, 2008) (felon-in-possession under section 922(g)(1)); Johnson v. United States, No. 1:07CV155 HEA, 2008 U.S. Dist. LEXIS 51148 (E.D. Mo. July 2, 2008) (felon-in-possession under Section 922(g)(1)); *see also* Hamblen v. United States, No. 3:08-1034, 2008 U.S. Dist. LEXIS 98682 (M.D. Tenn. Dec. 5, 2008) (holding *Heller* does not invalidate 18 U.S.C. § 922(o) concerning possession of machineguns). It should be noted that courts are under an obligation to consider the retroactivity issue first whenever the government raises it. *See* Horn v. Banks, 536 U.S. 266, 271–72 (2002) ("[A] federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the state."); Caspari v. Bohlen, 510 U.S. 383, 389 (1994) ("[I]f the State does argue that the defendant seeks the benefit of a new rule of constitutional law, the court *must* apply *Teague* before considering the merits of the claim."). Therefore, it appears that the government may not have raised the issue in the cases involving post-conviction motions raising *Heller* claims.

the government to proscribe, although the parameters of that right are not yet clear. Thus, in the next few years we can expect numerous collateral challenges by state and federal prisoners raising *Heller* claims, although the interplay between *Heller* and the procedural habeas corpus rules is exceedingly complex.[114]

E. The Second Teague Exception

The third circumstance in which the presumption of non-retroactivity is overcome (known widely as *Teague*'s second exception) relates to errors of the highest magnitude that involve "those procedures that . . . are 'implicit in the concept of ordered liberty.'"[115] In *Teague*, Justice O'Connor, describing the exception as "reserved for watershed rules of criminal procedure," joined two concepts separately identified by Justice Harlan in *Mackey* and *Desist*.[116] First, the exception will apply only to those cases that implicate the fundamental fairness of criminal proceedings; that is, those decisions which "'will properly alter [an] understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction.'"[117]

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114. For defendants who have not previously filed a habeas petition under sections 2254 or 2255, a new one-year statute of limitations provision is triggered on "the date on which the constitutional right asserted was initially recognized by the Supreme Court . . . ." 28 U.S.C. § 2244(d)(1)(C) (2006); 28 U.S.C. § 2255(f)(3) (2006 & West Supp. 2008) (omitting the word "constitutional"). As the constitutional right—the individual right to possess firearms under the Second Amendment—was "initially recognized" on the date *Heller* was issued, June 26, 2008, prisoners seeking to challenge weapons convictions under *Heller* retroactively had until June 26, 2009 to file section 2254 or 2255 petitions. *See* Dodd v. United States, 545 U.S. 353, 357 (2005). The tolling provision, 28 U.S.C. § 2244(d)(2), would extend that time for state prisoners who begin state post-conviction proceedings in order to exhaust remedies, but this is further complicated by the Court's decision in *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), which held that a state petition dismissed as untimely is not "properly filed" under section 2244(d)(2), so it does not toll the federal limitations period. *Id.* at 410. Thus, if there is any question about the timing or procedural propriety of the state filing, the petitioner should file a federal petition immediately, and request a stay of the habeas petition under *Rhines v. Weber*, 544 U.S. 269 (2005), while the state proceeding moves forward.

    For petitioners who have filed a previous petition, the situation is even more complicated. A successive petition may not be filed under section 2244(b)(2)(A) or 2255(h)(2) until the Supreme Court itself holds the new decision is entitled to retroactive application under *Teague*. Tyler v. Cain, 533 U.S. 656, 662 (2001). As this did not occur in *Heller*, which was a direct appeal in a civil case, successive petitions are not yet ripe, even though the one-year statute of limitations is already running and will, in all likelihood, expire before the Supreme Court ever has the opportunity to address the retroactive application of *Heller*. Thus, for federal prisoners this appears to be an instance when the remedy provided by section 2255 is "inadequate or ineffective" under section 2255(e), justifying resort to the habeas corpus remedy in section 2241. For state prisoners, section 2254 does not include the same "inadequate or ineffective" language, but the interaction between section 2244(b)(2)(A) and the statute of limitations is arguably an unconstitutional suspension of the writ, again justifying resort to section 2241. The one-year limitations period does not apply to section 2241, *see* Morales v. Bezy, 499 F.3d 668, 672 (7th Cir. 2007); White v. Lambert, 370 F.3d 1002, 1008 (9th Cir. 2004), but it would obviously be the best course to file the section 2241 petition as soon as possible in order to avoid any suggestion of laches.

115. Mackey v. United States, 401 U.S. 667, 693 (1971) (Harlan, J., concurring) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

116. Teague v. Lane, 489 U.S. 288, 311 (1989) (O'Connor, J., plurality opinion).

117. *Id.* (quoting *Mackey*, 401 U.S. at 693–94 (Harlan, J., concurring)) (emphasis added by O'Connor, J.).

Second, the exception will only apply to decisions which "'significantly improve the pre-existing factfinding procedures,'"[118] that is, "those procedures without which the likelihood of an accurate conviction is seriously diminished."[119]

In the aftermath of *Teague*, the Court has never wavered from Justice O'Connor's formulation of the second exception, and has repeatedly emphasized that the exception is limited to that "small core of rules"[120] which constitute "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding."[121] Even if a decision enhances the accuracy of criminal proceedings, "[m]ore is required" for the decision to be retroactive.[122] Thus, the Court held that a decision meant to improve the accuracy of capital-sentencing proceedings was not entitled to retroactive application because "given that it was added to an existing guarantee of due process protection against fundamental unfairness, we cannot say this systemic rule enhancing reliability is an 'absolute prerequisite to fundamental fairness' of the type that may come within *Teague's* second exception."[123] Furthermore, rights afforded to defendants in "a limited class" of cases cannot be said to have altered the understanding of the bedrock procedural elements when compared to "the sweeping rule of *Gideon*, which established an affirmative right to counsel in all felony cases . . . ."[124]

The "small core of cases" that fit within the second exception is exceedingly small. Indeed, while the Court has repeatedly identified *Gideon v. Wainwright*, which held that all defendants charged with a felony have the right to counsel,[125] as coming within the exception, it has not recognized any post-*Teague* case as meeting the standard.[126] The lower courts have recognized several cases as coming within the exception, although most of these have been reversed or overruled by the Supreme

118. *Id.* at 312 (quoting *Desist*, 394 U.S. at 262 (1964) (Harlan, J., dissenting)).

119. *Id.* at 313.

120. Graham v. Collins, 506 U.S. 461, 478 (1993).

121. Saffle v. Parks, 494 U.S. 484, 495 (1990) (quoting *Teague*, 489 U.S. at 311).

122. Sawyer v. Smith, 497 U.S. 227, 242 (1990).

123. *Id.* at 244 (quoting *Teague*, 489 U.S. at 314).

124. O'Dell v. Netherland, 521 U.S. 151, 167 (1997).

125. 372 U.S. 335, 339–45 (1963). In *Gideon*, the State of Florida did not provide counsel to the petitioner even though he could not afford an attorney. Gideon therefore represented himself at trial and was convicted of burglary. The Supreme Court subsequently granted his pro se application for review. The Court remanded for a retrial, holding that the Sixth Amendment right to counsel applied to the states through the Fourteenth Amendment, and that indigent defendants charged with a felony were entitled to be provided with counsel at trial. *See id.* at 337–38, 340, 345. At a retrial conducted with appointed defense counsel, Gideon was acquitted. *See* Anthony Lewis, Gideon's Trumpet 237, 249 (Vintage Books 1989) (1964).

126. One recent possibility is *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), where the Court held that the denial of the right to counsel of choice is structural error. However, the first appellate court to consider the retroactive effect of *Gonzalez-Lopez* held that it did not fall within the second exception because it was predicated on the defendant's interest in autonomy and not on any interest in accuracy. *See* Rodriguez v. Chandler, 492 F.3d 863, 866 (7th Cir. 2007).

Court.[127] As will be discussed below, the few remaining cases are all subject to serious question.[128]

IV. TEAGUE AND STRUCTURAL ERROR

A. Structural Error

A species of error often discussed by the Court that involves a standard similar in tone and language to *Teague*'s second exception is structural error. In *Chapman v. California*, the Court held that constitutional errors do not necessarily require reversal of a criminal conviction and that most errors can be reviewed for harmless error.[129] In so holding, the Court divided constitutional errors into two broad categories: *trial errors* and *structural errors*. Trial errors are those errors that occur during the presentation of the case to the jury and that can be "quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt."[130] Structural errors are those errors that involve the denial of "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error."[131] The Court has subsequently described structural

127. *See, e.g.*, Bockting v. Bayer, 399 F.3d 1010 (9th Cir. 2005), *rev'd sub nom*. Whorton v. Bockting, 549 U.S. 406 (2007). *Gall v. Parker*, 231 F.3d 265 (6th Cir. 2000), and *Williams v. Dixon*, 961 F.2d 448 (4th Cir. 1992), both recognized *Mills v. Maryland*, 486 U.S. 367 (1988), as coming within the second exception. However, the Supreme Court in *Beard v. Banks*, 542 U.S. 406 (2004), later held that *Mills* did not fall within the second exception. Similarly, *West v. Vaughn*, 204 F.3d 53 (3d Cir. 2000), recognized *Cage v. Louisiana*, 498 U.S. 39 (1990), as a case that applied retroactively. The Supreme Court later held in *Tyler v. Cain*, 533 U.S. 656 (2001), that *Cage* does not apply retroactively.

128. *See* discussion of Graham v. Hoke, 946 F.2d 982 (2d Cir. 1991), *infra* Part IV.B., and discussion of Hall v. Kelso, 892 F.2d 1541 (11th Cir. 1991), *infra* note 196.

The only other federal decision invoking the second exception which has not been reversed or overruled, and which does not involve a non-structural error, is the Ninth Circuit's decision in *Ostrosky v. Alaska*, 913 F.2d 590 (9th Cir. 1990). In *Ostrosky*, the defendant twice violated a state fishing regulation, was convicted and appealed, but an intermediate court held the regulation unconstitutional. *See id.* at 592. While the state's appeal of that ruling was pending, the defendant committed a third violation and was charged again. *See id.* As an affirmative defense to the third charge, defendant argued that he was entitled to rely on the then-under-appeal order holding the statute unconstitutional even though the regulation had since been upheld on appeal after the third violation was committed. *See id.* The state court rejected that argument but a federal district court granted habeas corpus relief. *See id.* at 593. The Ninth Circuit held that a due process rule allowing a defendant to rely on "a lower court decision in his own case that a statute is unconstitutional even though the case is on appeal to a higher court" would constitute a new rule, but that it would fall within the second exception, although the court denied relief on substantive grounds. *Id.* at 594. With all respect, this is not a case involving the second exception at all. The sought-for rule would allow a defendant to avoid criminal prosecution for certain acts because of the legal status of the underlying regulation at the time of the offense. Thus, this is not a watershed rule of criminal procedure; indeed, it is not a rule of criminal procedure at all, but rather a substantive rule that would have the effect of putting "private individual conduct beyond the power of the criminal law-making authority to proscribe," Teague v. Lane, 489 U.S. 288, 290 (1989) (internal citation omitted), and would arguably fall within the first *Teague* exception.

129. 386 U.S. 18, 22 (1967).

130. Arizona v. Fulminante, 499 U.S. 279, 307–08 (1991).

131. *Chapman*, 386 U.S. at 23.

errors as those that "undermine[ ] the structural integrity of the criminal tribunal itself,"[132] and that "necessarily render[ ] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence."[133] Thus, while trial errors are subject to harmless error review under one of two standards depending on when the error is identified,[134] structural errors are "necessarily unquantifiable and indeterminate" and require reversal.[135]

The list of structural errors is also short. The Court has itself identified only seven such errors:[136] bias by the trial judge; total deprivation of the right to counsel; denial of the right to self-representation at trial; denial of the right to a public trial; discrimination in the selection of grand jurors; giving a defective jury instruction defining reasonable doubt; and denial of the right to counsel of choice.[137]

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132. Vasquez v. Hillery, 474 U.S. 254, 263–64 (1986).

133. Washington v. Recuenco, 548 U.S. 212, 218–19 (2006) (citation omitted).

134. In *Brecht v. Abrahamson*, 507 U.S. 619 (1999), the Court held that in cases on direct review, the harmless error standard is that described in *Chapman*, which is that reversal of the conviction is required unless the error was harmless beyond a reasonable doubt. *See Chapman*, 386 U.S. at 24. However, in habeas corpus cases, the standard is that described in *Kotteakos v. United States*, 328 U.S. 750 (1946), which is that the error is harmless unless it had a "substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos*, 328 U.S. at 776; s*ee Brecht,* 507 U.S. at 637 ("The *Kotteakos* standard, we believe, fills the bill.").

135. United States v. Gonzalez-Lopez, 548 U.S. 140, 150 (2006) (quoting Sullivan v. Louisiana, 508 U.S. 275, 282 (1993)).

136. The Court has listed the errors on several occasions. *See, e.g.*, *Recuenco*, 548 U.S. at 218 n.2; Neder v. United States, 527 U.S. 1, 8 (1999). On the same day *Recuenco* was decided, the Court added denial of the right to counsel of choice to the list in *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), but did not include it in the list of structural errors included in *Recuenco*.

In *Zedner v. United States*, 547 U.S. 489 (2006), the Court held that the trial court's failure to make on-the-record findings to support an ends-of-justice continuance as required by the Speedy Trial Act, 18 U.S.C. § 3161(h)(8)(A) (2006), was not subject to the harmless error rule. *See* 547 U.S. at 508–09. The Court's discussion, however, characterized this as an interpretation of statutory language in the Act as "an implied repeal" of the harmless error rule in Federal Rule of Criminal Procedure 52(a), rather than as a structural error. *See* 547 U.S. at 507.

If *Zedner* were to be characterized as structural error, it would be the first time the Court recognized a non-constitutional error as structural, an issue that has divided the lower courts. *Compare* United States v. Curbelo, 343 F.3d 273, 280 (4th Cir. 2003) (holding violation of Federal Rule of Criminal Procedure 23 not subject to harmless error rule because "whether violative of the Constitution or not, the error is structural") *and* McGriff v. Department of Corrections, 338 F.3d 1231, 1235 (11th Cir. 2003) (holding denial of statutory right to counsel in post-conviction hearing was "structural error") *and* Green v. United States, 262 F.3d 715, 717–18 (8th Cir. 2001) (holding denial of statutory right to counsel not subject to harmless error rule) *with* United States v. Gonzalez-Huerta, 403 F.3d 727, 734 (10th Cir. 2005) ("[G]enerally speaking structural errors must, at a minimum, be constitutional errors.") *and* United States v. Stevens, 223 F.3d 239, 244 (3d Cir. 2000) (A "nonconstitutional error . . . generally cannot amount to a structural defect.").

137. *See* Johnson v. United States, 420 U.S. 461, 468–69 (1997). In *Johnson*, the Court characterized these previously identified deprivations as structural errors. *See* Sullivan v. Louisiana, 508 U.S. 275 (1993) (defective jury instruction defining reasonable doubt); Vasquez v. Hillery, 474 U.S. 254 (1986) (discrimination in selection of grand jurors); Waller v. Georgia, 467 U.S. 39 (1984) (right to public trial); McKaskle v. Wiggins, 465 U.S. 168 (1984) (right of self-representation at trial); Gideon v.

The Court has imposed limitations that serve the purpose of keeping the list short, stating that "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to [the] harmless–error [rule]."[138] The lower courts, however, have recognized other structural defects that implicate the right to counsel[139] or involve the seating of a biased juror.[140] Courts have also found the "strong presumption" overcome in several instances when the trial court engaged in some egregious departure from normal trial protocol.[141] In addition, the lower courts are divided on the question of whether the failure to include a necessary element of the offense in an indictment is a structural error.[142]

Wainwright, 372 U.S. 335, (1963) (deprivation of right to counsel); Tumey v. Ohio, 273 U.S. 510 (1927) (bias by trial judge). In *Gonzalez-Lopez*, the Court recognized the right to counsel of choice and held the deprivation of it to be structural error. *See Gonzalez-Lopez*, 548 U.S. at 144–50.

138. Rose v. Clark, 478 U.S. 570, 579 (1986).

139. *See, e.g.*, McGriff v. Dep't of Corrections, 338 F.3d 1231, 1235 (11th Cir. 2003) (holding district court's failure to appoint counsel ahead of hearing on section 2254 petition was structural error); Green v. United States, 262 F.3d 715, 717–19 (8th Cir. 2001) (holding district court's failure to appoint counsel ahead of hearing on section 2255 motion was not subject to harmless error rule).

140. *See, e.g.*, United States v. Carpa, 271 F.3d 962, 967 (11th Cir. 2001); Hughes v. United States, 258 F.3d 453, 463 (6th Cir. 2001); Dyer v. Calderon, 151 F.3d 970, 973 n.2 (9th Cir. 1998) (en banc); Johnson v. Armontrout, 961 F.2d 748, 756 (8th Cir. 1992); *see also* Virgil v. Dretke, 446 F.3d 598, 607 (5th Cir. 2006) (referring to juror bias as structural error in the context of ineffective assistance of counsel claim). *But see* Fitzgerald v. Greene, 150 F.3d 357, 365 (4th Cir. 1998) (holding juror bias subject to harmless error review).

141. *See, e.g.*, United States v. Yakobowicz, 427 F.3d 144, 153–54 (2d Cir. 2005) (finding structural error where trial court allowed prosecutor to make interim summation after testimony of each government witness); United States v. Smith-Baltiher, 424 F.3d 913, 922 (9th Cir. 2005) (finding structural error where trial court prevented defendant from introducing evidence relevant to theory of defense); United States v. Curbelo, 343 F.3d 273, 280 (4th Cir. 2003) (finding structural error where trial court completed trial with eleven jurors in violation of Federal Rule of Criminal Procedure 23(b)); United States v. Harbin, 250 F.3d 532, 542–49 (7th Cir. 2001) (finding structural error where trial court allowed prosecution to exercise mid-trial peremptory challenge); United States v. Mortimer, 161 F.3d 240, 241–42 (3d Cir. 1998) (finding structural error where trial judge was absent from courtroom during defense's closing argument).

142. *Compare* United States v. Du Bo, 186 F.3d 1177, 1179 (9th Cir. 1999) (a deficient indictment is not "amenable to harmless error review.") *and* United States v. Spinner, 180 F.3d 514, 515–16 (3d Cir. 1999) (holding deficient indictment not subject to harmless error review) *with* United States v. Allen, 406 F.3d 940, 945 (8th Cir. 2005) ("[T]he defect in [the] indictment was not structural error.") *and* United States v. Robinson, 367 F.3d 278, 28 (5th Cir. 2004) ("[T]he absence of an indictment on the aggravating factors used to justify a death sentence is not structural error and is susceptible to harmless error review.") *and* United States v. Higgs, 353 F.3d 281, 306 (4th Cir. 2003) ("[T]he failure of an indictment to allege an element of a charged offense, may be reviewed for harmlessness . . . .") *and* United States v. Cor-Bon Custom Bullet Co., 287 F.3d 576, 580–81 (6th Cir. 2002) ("As [defendant] failed to meet its burden of proving prejudice, and has not even alleged prejudice, any defect in the indictment was harmless error.") *and* United States v. Prentiss, 256 F.3d 971, 981 (10th Cir. 2001) (en banc) ("[T]he failure of an indictment to allege an essential element of a crime . . . is subject to harmless error review.") *and* United States v. Corporan-Cuevas, 244 F.3d 199, 202 (1st Cir. 2001) ("[A]ny error resulting from [an indictment] omission was harmless"). *See also* United States v. Omer, 429 F.3d 835 (9th Cir. 2005) (Graber, C.J., dissenting) (suggesting that *Du Bo* rule "makes no sense" and "drains judicial resources").

B. The Relationship Between Teague and Structural Error

Although the standards governing structural error and *Teague*'s second exception are quite similar (both implicate the fundamental fairness of criminal proceedings and the accuracy of the fact-finding process), no court has attempted to analyze that relationship in any systematic way beyond suggesting that there may be some defined relationship between the two.[143] The remainder of this Article will attempt to do this.

As shown in the series of Venn diagrams in the following discussion, there are five potential relationships between the set of cases that constitute structural error and the set of cases that qualify for retroactive application under the second exception to *Teague*. They are:

1. No overlap; that is, no cases qualify as both structural error and under the second exception (see figure 1, below).

2. Complete overlap; that is, all structural errors qualify under the second exception, and vice versa (see figure 2, below).

3. Structural error is a subset of the second exception; that is, all structural errors are part of the larger group of cases which qualify under the second exception (see figure 3, below).

4. Partial overlap; that is, some but not all structural errors qualify under the second exception, and vice versa (see figure 4, below).

The Supreme Court has sent mixed signals on this issue, stating almost fifty years ago that this error is "far too serious to be treated as nothing more than a mere variance and then dismissed as harmless error." Stirone v. United States, 361 U.S. 212, 217 (1960). The Court, however, never included it in its list of structural errors. *See* Washington v. Recuenco, 548 U.S. 212, 218 n.2 (2006). In 2007, the Court accepted a case for argument to address this issue, but held instead that the omitted element need not have been included in the indictment for the particular offense at issue. *See* United States v. Resendiz-Ponce, 549 U.S. 102, 106–11 (2007).

Recent decisions of the Court suggest that this error might be viewed as harmless. For example, the Court has held that the failure to instruct a jury on an essential element of an offense can be harmless when the evidence supporting that element was such that no reasonable jury could have found it not to have been proven. *See* Neder v. United States, 527 U.S. 1, 16 (1999). On the other hand, one member of the Court has made it clear that he views this defect in an indictment as a structural error. *See Resendiz-Ponce*, 549 U.S. at 117 (2007) (Scalia, J., dissenting).

143. *See* Coleman v. United States, 329 F.3d 77, 90 (2d Cir. 2003) ("[I]t would be anomalous to say, on the one hand, that *Apprendi* errors are not 'structural' . . . and then to say, on the other hand, that *Apprendi* announced a 'watershed' rule of criminal procedure."); United States v. Sanchez-Cervantes, 282 F.3d 664, 670 (9th Cir. 2002) ("This implies that *Teague*'s second exception is even narrower than the category of structural-error rules."); United States v. Moss, 252 F.3d 993, 1001 (8th Cir. 2001) ("[F]inding something to be a structural error would seem to be a necessary predicate for a new rule to apply retroactively under *Teague*.") (quoting United States v. Sanders, 247 F.3d 139, 150–51 (4th Cir. 2001)); People v. Edwards, 101 P.3d 1118, 1124 (Colo. App. 2004) ("[I]t is difficult to conceive of a rule that could be considered a watershed principle when a violation of the rule is susceptible to plain or harmless error review."), *aff'd*, 129 P.3d 977 (Colo. 2006). The Colorado Supreme Court left open the possibility that a case may exist where a classification of harmless error coincides with watershed status. *See Edwards*, 129 P.3d at 988.

5. The second exception is a subset of structural error; that is, all cases which qualify under the second exception are part of the larger group of cases which qualify as structural error (see figure 5, below).

Determining which of these is correct has been simplified to some extent by the Supreme Court, which has eliminated the first three of the five possibilities. The first possibility, that there is no overlap between the two sets of cases, is illustrated as follows:

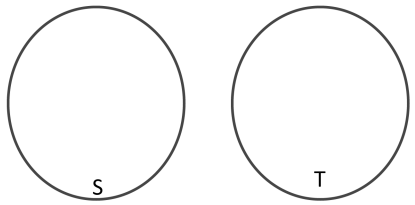

Figure 1. No overlap between structural error (S) and second exception (T).

This possibility can be eliminated if there is any case that would qualify as both being a structural error and falling under the second exception. The Court has made clear on numerous occasions that there is at least one such case: *Gideon v. Wainwright*.[144] It is indisputable that the constitutional error recognized in *Gideon*—the complete denial of counsel—is a structural error; indeed, it is conspicuously first when the Court lists such errors.[145] At the same time, the Court has repeatedly identified *Gideon* as the kind of error which would qualify under the second exception,[146] calling it the "paradigmatic example of a watershed rule,"[147] and the Court has recently stated that *Gideon* is "the only case that we have identified as qualifying under this exception . . . ."[148]

The second and third possible relationships, when there is complete overlap and when structural error is a subset of cases coming within the larger set of cases which qualify under the second exception, are illustrated as follows:

144. 372 U.S. 335 (1963).

145. *See* United States v. Gonzalez-Lopez, 548 U.S. 140, 148–49 (2006); Johnson v. United States, 520 U.S. 461, 468–69 (1997).

146. *See, e.g.*, O'Dell v. Netherland, 521 U.S. 151, 167 (1997) ("[W]e have cited [*Gideon*] as an example of the sort of rule falling within *Teague*'s second exception."); Saffle v. Parks, 494 U.S. 484, 495 (1990) ("[W]e have usually cited *Gideon* . . . to illustrate the type of rule coming within the [second] exception.").

147. Gray v. Netherland, 518 U.S. 152, 170 (1996) (citing *Saffle*, 494 U.S. at 495).

148. Whorton v. Bockting, 549 U.S. 406, 419 (2007); *see also* Beard v. Banks, 542 U.S. 406, 417 (2004) ("In providing guidance as to what might fall within this exception, we have repeatedly referred to the rule of *Gideon* and only to this rule.") (citation omitted).

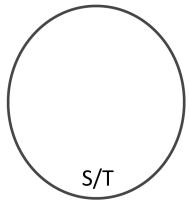

Figure 2. Complete overlap between structural error (S) and second exception (T).

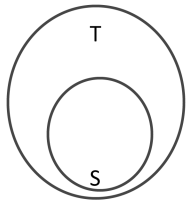

Figure 3. Structural error (S) is a subset of the second exception (T).

These both can be eliminated if there is any structural error that does not qualify under the second exception. Although the Court has never specifically identified a case that would meet those criteria, it has discussed the issue in terms that clearly indicate that there are such cases and lower courts have interpreted the Court's discussion in this way.

Tyler v. Cain[149] involved a successive habeas petition[150] that attempted to raise a claim for which the trial court had given the same reasonable doubt instruction found unconstitutional in *Cage v. Louisiana*.[151] This was an error the Court had subsequently identified as a structural error in *Sullivan v. Louisiana*.[152] In holding that *Sullivan* did not establish that *Cage* was entitled to retroactive application so as to permit petitioner

149. 533 U.S. 656 (2001).

150. A successive petition is one filed after a previous petition has been dismissed. The right to file such petitions is extremely limited, both substantively, *see* 28 U.S.C. § 2244(b)(2) (2006) (grounds for filing successive petition); 28 U.S.C. § 2255(h)(1)–(2) (2006 & West Supp. 2008) (same), and procedurally. *See* 28 U.S.C. § 2244(b)(3) (permission of court of appeals required before filing); 28 U.S.C. § 2255(h) (same).

151. 498 U.S. 39, 40 (1990).

152. *See* 508 U.S. 275, 281–82 (1993). *Cage*, *Sullivan*, and *Tyler* all involved a Louisiana jury instruction that described reasonable doubt using the terms "grave uncertainty," "actual substantial doubt," and language to the effect that "[w]hat is required is not an absolute or mathematical certainty, but a moral certainty." *Cage*, 498 U.S. at 40 (emphasis deleted); *see also Tyler*, 533 U.S. at 659 ("[T]he jury instruction defining reasonable doubt . . . was substantively identical to the instruction condemned in *Cage* . . . ."); *Sullivan*, 508 U.S. at 277 ("[T]he trial judge gave a definition of 'reasonable doubt' that was . . . essentially identical to the one held unconstitutional in *Cage* . . . ."). This instruction was held unconstitutional because these terms together suggest a "higher degree of doubt than is required for acquittal under the reasonable doubt standard." *Cage*, 508 U.S. at 41.

to file a successive petition,[153] the Court in *Tyler* responded to the argument that by holding the *Cage* error to be structural, *Sullivan* necessarily found it to fall within the second exception:

> There is no . . . case that held that all structural-error rules apply retroactively or that all structural-error rules fit within the second *Teague* exception. The standard for determining whether an error is structural is not coextensive with the second *Teague* exception, and a holding that a particular error is structural does not logically dictate the conclusion that the second *Teague* exception has been met.[154]

In a footnote, the Court continued:

> Classifying an error as structural does not necessarily alter our understanding of these bedrock procedural elements. Nor can it be said that all new rules relating to due process (or even the "fundamental requirements of due process") alter such understanding. On the contrary, the second *Teague* exception is reserved only for truly "watershed" rules.[155]

The Court concluded this footnote with one final indication of whether *Cage* is retroactive, reciting a comment first made in *Teague* and repeated many times since: "As we have recognized, it is unlikely that any of these watershed rules 'ha[s] yet to emerge.'"[156]

The Court did, however, stop just short of deciding whether *Cage* is entitled to retroactive application. The specific question before the Court was whether it had *previously* held *Cage* to fall within the second exception, a necessary precondition to filing a successive petition. Therefore a finding that *Cage* qualified for retroactive application "would not help Tyler in this case."[157]

Despite the repeated admonition that it was unlikely that any watershed rules had yet to emerge,[158] prior to *Tyler*, six federal circuit courts of appeals had unanimously

153. *See Tyler*, 533 U.S. at 664–66. Under 28 U.S.C. § 2244(b)(2)(A) (2006), one of the grounds for bringing a successive habeas petition is when "the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." A parallel provision creates the same grounds for bringing successive section 2255 motions by federal prisoners. *See* 28 U.S.C. § 2255(h)(2) (2006 & West Supp. 2008).

154. *Tyler*, 533 U.S. at 666–67 (citation omitted).

155. *Id.* at 666 n.7 (citations omitted).

156. *Id.* (quoting Sawyer v. Smith, 497 U.S. 227, 243 (1990)) (quoting Teague v. Lane, 489 U.S. 288, 313 (1989)); *see also* Butler v. McKellar, 494 U.S. 407, 416 (1990) (quoting *Teague*, 489 U.S. at 312–13). The Court has repeated this statement every time it has discussed *Teague* since *Tyler*. *See* Whorton v. Bockting, 549 U.S. 406, 417 (2007); Beard v. Banks, 542 U.S. 406, 417 (2004); Schriro v. Summerlin, 542 U.S. 348, 352 (2004).

157. *Tyler*, 533 U.S. at 668. Under 28 U.S.C. § 2244(b)(2)(A) (2006), a successive petition is permitted with respect to a claim "made retroactive to cases on collateral review by the Supreme Court . . . ." Thus, for Tyler's claim to fall within this provision, the Court must have *previously* held that *Cage* had been made applicable retroactively. As the Court had not done so in *Cage* or *Sullivan*, a finding now that *Cage* was entitled to retroactive application would still not qualify under this provision.

158. *See supra* note 156 and accompanying text.

concluded that *Cage* should be applied retroactively.[159] The only court to consider the issue after *Tyler*[160] was the Ninth Circuit in *Leavitt v. Arave*.[161] In *Leavitt*, the court rejected the earlier cases, stating that "[i]n light of *Tyler*, pre-*Tyler* circuit authority [holding *Cage* retroactive] is no longer persuasive."[162] Considering the question afresh,[163] and in light of *Tyler*, the Ninth Circuit held that *Cage* did not fall within the "'small core of rules' . . . that can truly be categorized as 'groundbreaking.'"[164] The court noted the oft-repeated caution of the Supreme Court that it is unlikely that any

159. *See* Tillman v. Cook, 215 F.3d 1116, 1121–23 (10th Cir. 2000); West v. Vaughn, 204 F.3d 53, 61–63 (3d Cir. 2000); Gaines v. Kelley, 202 F.3d 598, 604–05 (2d Cir. 2000); Humphrey v. Cain, 138 F.3d 552, 553 (5th Cir. 1998) (en banc); Adams v. Aiken, 41 F.3d 175, 178–79 (4th Cir. 1994); Nutter v. White, 39 F.3d 1154, 1157–58 (11th Cir. 1994).

160. It is not likely that this issue will arise again, as the operation of the statute of limitations in habeas cases tends to give issues like this a very short shelf life. In *Dodd v. United States*, 545 U.S. 353 (2005), the Supreme Court held that the one-year statute of limitations for petitions raising claims involving newly-recognized rights under 28 U.S.C. § 2244(d)(1)(C) and 28 U.S.C. § 2255(f)(3) begins to run from the date of the Supreme Court decision recognizing the new right, and not from the date that the retroactivity of that decision is recognized. *See Dodd,* 545 U.S. at 357. To make matters worse for petitioners, under *Tyler*, a successive petition raising a claim involving a newly-recognized right may not be raised until the Supreme Court itself finds the decision entitled to be applied retroactively. *See Tyler*, 533 U.S. at 662. As the Supreme Court rarely holds that a decision is retroactive within one year of that decision, in many cases the statute of limitations will expire before the right to file the claim accrues. *See Dodd*, 545 U.S. at 361 n.1, 364 (Stevens, J., dissenting); *id.* at 372 (Ginsburg, J., dissenting); *see also* Escamilla v. Jungwirth, 426 F.3d 868, 871–72 (7th Cir. 2005) (successive petitions must be timely under *Dodd* "even if time runs out before a given avenue of attack . . . becomes legally and factually tenable."). While these time periods may be extended for state prisoners by the provision which tolls the statute of limitations while the petitioner is attempting to exhaust the claim in the state courts, *see* 28 U.S.C. § 2244(d)(2) (2006), it is still highly likely that the effect of this is to create a right without a remedy. Thus, this situation is a good candidate for resort to a true habeas corpus petition under 28 U.S.C. § 2241. *See supra* note 114.

    In fact, the only time the Court has recognized the retroactivity of a decision under *Teague* was within one year of that decision, and it did so *before* the decision recognizing the existence of the new right. In *Penry v. Lynaugh*, 492 U.S. 302 (1989), the Court held that if the execution of the mentally retarded was unconstitutional, then it would fall within the first *Teague* exception, *see id.* at 330, but then held that the right did not exist. *See id.* at 340. Thirteen years later, in *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court reversed *Penry*, holding that the execution of the mentally retarded violates the Eighth Amendment. *See id.* at 321. Thus, the decision in *Atkins* satisfied *Tyler*, as the Court had already held the right to be retroactive in *Penry*, and triggered a new one-year limitations period under *Dodd*. *See In re* Hill, 437 F.3d 1080, 1083 (11th Cir. 2006) (successive petition raising *Atkins* claim was untimely since it was filed more than one year after *Atkins*).

161. 383 F.3d 809 (9th Cir. 2004).

162. *Id.* at 825.

163. The court's statement that this was an issue of first impression in the Ninth Circuit was slightly disingenuous. In *Harmon v. Marshall*, 69 F.3d 963 (9th Cir. 1995), the court held that *Sullivan* fell within the second exception. While the *Leavitt* court's statement that it had "never decided whether to apply *Cage* retroactively on habeas review," 383 F.3d at 824, is technically true, it is difficult to separate *Cage* and *Sullivan* since the question addressed by the Supreme Court in *Sullivan* was whether the reasonable doubt instruction given in *Cage* was structural error.

164. *Leavitt*, 383 F.3d at 825 (quoting Graham v. Collins, 506 U.S. 461, 478 (1993); Caspari v. Bohlen, 510 U.S. 383, 396 (1994)).

cases falling within the second exception have yet to emerge, concluding that "[i]t follows that it is 'unlikely' that *Cage* is a watershed rule."[165] As the Supreme Court has repeated this same caution after *Tyler*,[166] it is difficult to argue with this conclusion, and so the two possibilities in figures 2 and 3 would appear to be eliminated.

The fourth possible relationship between structural error and the second exception is that there is partial overlap between them:

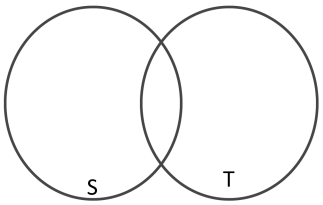

Figure 4. Partial overlap between structural error (S) and the second exception (T).

For this possibility to be correct, there have to be cases that fall into all three subsets in the diagram: from left to right (1) structural errors that are not watershed rules; (2) errors that are both structural and watershed rules; and (3) watershed rules that are not structural errors. The first two appear to exist: (1) *Cage* was held to be a structural error in *Sullivan,* and *Tyler v. Cain* all but held that *Cage* errors are not watershed rules;[167] and (2) *Gideon* has been held to be both structural error and a watershed rule. The question, then, is whether there can be decisions that are entitled to retroactive application under the second exception, but are not structural errors.

Clearly, the Supreme Court has never found such a case, as it has never identified any case except *Gideon* to be entitled to retroactive application under the second exception. An examination of the few cases that have been held by lower courts to satisfy the second exception reveals only one Supreme Court decision in which courts have held the decision entitled to retroactive application and then gone on to conduct harmless error review: cases involving the Supreme Court's decision in *Cruz v. New York*.[168]

Almost twenty years before *Cruz*, in *Bruton v. United States*, the Supreme Court held that the admission of the confession of a non-testifying codefendant against another defendant at a joint trial violates the Confrontation Clause.[169] Soon after that decision, a number of lower courts recognized an exception to *Bruton* for "interlocking confessions," holding that a codefendant's confession is admissible

165. 383 F.3d at 826 (quoting *Tyler*, 553 U.S. at 667 n.7).

166. *See supra* note 156 and accompanying text.

167. The Seventh Circuit recently placed *United States v. Gonzalez-Lopez*, 548 U.S. 163 (2006), in this category as well, holding that it is not entitled to retroactive effect after the Supreme Court held that the denial of the right to counsel of choice is structural error. *See* Rodriguez v. Chandler, 492 F.3d 863, 866 (7th Cir. 2007).

168. 481 U.S. 186 (1987).

169. 391 U.S. 123, 126 (1968).

against a defendant who also gave a confession that is corroborated by the codefendant's; that is, when the two confessions "interlock."[170] In *Parker v. Randolph*, the Supreme Court addressed this issue, but could not reach a majority on any question presented.[171] Finally, in *Cruz*, the Court returned to the issue, rejected the exception, and concluded that *Bruton* applies to interlocking confessions,[172] although the Court did hold that this error was subject to the harmless error rule.[173]

In *Graham v. Hoke*,[174] the Second Circuit confronted the question of whether *Cruz* is entitled to retroactive application under *Teague*. The first question the court considered was whether *Cruz* was in fact a "new" rule. On one hand, the *Cruz* court stated that it was a straightforward application of *Bruton*, which suggests that it is not "new" under *Teague*.[175] On the other hand, the Supreme Court in *Parker v. Randolph* had been unable to reach a majority decision on the same question later decided in *Cruz*, and the lower courts had divided roughly evenly on the issue in the interim between *Bruton* and *Cruz*.[176] Finding it difficult to analyze whether *Cruz* was new or not, the *Graham* court elected to turn to the question of whether the decision would be entitled to retroactive application under the second exception even if it were new.[177]

The *Graham* court concluded that *Cruz* fell within the second exception.[178] In the court's view, *Cruz* was a decision that satisfied the test for the second exception because it was primarily concerned with the accuracy of the criminal trial.[179] It further stated that *Cruz* passed the test because "there can be little doubt that the decision altered our understanding of a bedrock procedural principle aimed at ensuring a fair proceeding."[180]

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170. *See, e.g.*, People v. McNeil, 24 N.Y.2d 550, 552 (1969).

171. 442 U.S. 62 (1979). Four justices found that the exception for interlocking confessions existed. *See id.* at 74–75 (Rehnquist, J., plurality opinion). Justice Blackmun disagreed with that conclusion, but found that the error was subject to the harmless error rule, and that the error was harmless. *See id.* at 77–81 (Blackmun, J., concurring in part and concurring in judgment). Three Justices also rejected the exception, but did not reach the question of whether the harmless error rule should apply because they found that the lower courts' conclusion that the error was harmless precluded a finding to the contrary. *See id.* at 81–82 (Stevens, J., dissenting).

172. *See Cruz*, 481 U.S. at 191–93.

173. *See id.* at 193–94.

174. 946 F.2d 982 (2d Cir. 1991).

175. *Id.* at 991–93.

176. *Id.* at 993. *See Cruz*, 482 U.S. at 196–97 (White, J., dissenting) (collecting cases).

177. *See Cruz* 946 F.2d at 993. The court noted that if *Cruz* was not a new rule, then it would be entitled to retroactive application, and if it was a new rule that fell within the second exception, it would also be entitled to retroactive application, thereby eliminating the need to determine whether it stated a new rule or not. *Id.*

178. *See id.* at 993. In *People v. Eastman*, 85 N.Y.2d 265, 275–76, 1995), the New York Court of Appeals agreed that *Cruz* should be given retroactive effect. In addition, the Illinois Appellate Court applied *Cruz* retroactively in *People v. Kubik*, 573 N.E.2d 1337, 1343 (Ill. App. Ct. 1991).

179. *See Graham*, 946 F.2d at 993.

180. *Id.* at 993–94.

It also recognized that in *Roberts v. Russell*,[181] the Supreme Court had previously held that *Bruton* should be applied retroactively.[182] Having concluded that it could apply *Cruz* to Graham's case, the Second Circuit then considered whether the error at Graham's trial was harmless, and held that it was.[183]

Looking at *Graham* from today's perspective, it is clear that its retroactivity determination was incorrect.[184] An examination of the flaws in the decision is instructive for the purposes of analyzing the relationship between structural error and the second exception.

First, while the court did attempt to apply the standards created in *Teague*, it appeared to misunderstand them in a fundamental way. The second exception is limited to watershed rules of criminal procedure which alter our understanding of *the* bedrock procedural elements of criminal procedure. The *Graham* court discussed this element by stating that *Cruz* altered our understanding of *a* bedrock procedural element—the Confrontation Clause—but that misses the point of the exception which is limited to the "small core" of cases like *Gideon* that created a "sweeping rule . . . which established an affirmative right . . . in all felony cases . . . ."[185] The Second Circuit's invocation of the exception is far too broad, as nearly every constitutional criminal procedure case that reaches the Supreme Court is likely to alter our understanding of some bedrock procedural element in one way or another. What the Court was aiming at, it seems clear, was to encompass rules that fundamentally alter our understanding of the criminal process in the broadest sense, for example, the right to counsel or to a trial by an unbiased factfinder. *Cruz* involves a right afforded to "defendants in a limited class of . . . cases"[186] that falls far short of a watershed rule.[187]

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181. 392 U.S. 293 (1968).

182. *See Graham*, 946 F.2d at 994.

183. *See id.* at 994–97.

184. Several state courts, including the New York Court of Appeals, also found *Cruz* to fit within the second exception. *See supra* note 178. The Supreme Court's 2008 decision in *Danforth v. Minnesota*, 552 U.S. 264, 128 S. Ct. 1029, 1034–41 (2008), however, creates an interesting opportunity for New York counsel in future cases concerning the retroactive application of United States Supreme Court decisions in the state courts. At least two potential arguments are available: first, that the Court of Appeals should continue to apply *Teague* to address the retroactivity of federal decisions even though the Court of Appeals may have erroneously applied that standard in *Eastman*; and second, that to the extent the Court of Appeals believed that it was required to apply the *Teague* standard to rights protected by the federal constitution, *Danforth* freed it from that obligation allowing the court to apply its own more lenient standard based on *Linkletter.*

185. O'Dell v. Netherland, 521 U.S. 151, 167 (1997).

186. *Id.*

187. *Graham*'s analysis of *Cruz* as enhancing the accuracy of a conviction is also suspect. As the Supreme Court has stated, by precluding the admission of potentially accurate inculpatory evidence on Confrontation Clause grounds, "the overall effect of *Crawford* with regard to the accuracy of fact finding in criminal cases is not easy to assess." Whorton v. Bockting, 549 U.S. 406, 419 (2007). The same is obviously true of *Cruz*, which precludes the introduction of a co-conspirator's statement confirming the defendant's own statement that the defendant participated in the offense.

Second, even before *Graham*, the Supreme Court pointed out in *Sawyer v. Smith* that a rule "added to an existing guarantee of due process protection against fundamental unfairness [is not] 'an absolute prerequisite to fundamental fairness' of the type that may come within *Teague*'s second exception."[188] *Cruz* error is a subspecies of *Bruton* error—the issue in *Cruz*, after all, was whether interlocking confessions were an exception to the *Bruton* rule. And, as it turns out, *Bruton* errors are a subspecies of *Crawford* error, as the confession of a codefendant is simply one example of the out-of-court testimonial statements that the *Crawford* court found to violate the Confrontation Clause. The Supreme Court held in *Whorton v. Bockting*[189] that *Crawford* does not fall within the *Teague* exception,[190] raising the question of how the overarching procedural rule (*Crawford*) could *not* be a watershed rule while a subspecies of a subspecies of that rule (*Cruz*) could be.[191] Indeed, the Second Circuit had an opportunity to answer that question prior to *Whorton* in *Mungo v. Duncan*, where it held, without citation to *Graham*, that *Crawford* should not be applied retroactively.[192]

Third, and most critical for the discussion here, the *Graham* court never discussed the relationship between its finding that *Cruz* is entitled to retroactive application and its discussion of the harmless error rule. Although the Supreme Court never considered whether *Cruz* error is "structural," its endorsement of harmless error review of *Cruz* errors was an implicit holding that it was not a structural error, as structural error is defined as an error that can never be harmless. Thus, the *Graham* court placed *Cruz* into the third category of Figure 4, but without a discussion of what this means. By holding that *Cruz* was entitled to retroactive application, the *Graham* court necessarily found that the right recognized in *Cruz* was "essential to the accuracy and fairness of the criminal process,"[193] and, at the same time found that it was harmless error beyond a reasonable doubt.[194] While the Supreme Court has since held that the proper standard for assessing harmless error is less exacting in habeas cases (that an error is harmless unless it had a "substantial and injurious effect or influence in determining the jury's verdict"),[195] the unavoidable conclusion is that

188. 497 U.S. 227, 244 (1990) (citation omitted).

189. 549 U.S. 406 (2007).

190. *See id.* at 421.

191. Unfortunately, the *Whorton* Court did not discuss how its holding that *Crawford* was not entitled to retroactive application affected its earlier decision in *Roberts v. Russell*, 392 U.S. 293 (1968), where the Court held that *Bruton* should be applied retroactively. The obvious answer to that question is that *Roberts* was decided under the *Linkletter* standard repudiated in *Teague*. *See* Brief for the United States as Amicus Curiae Supporting Petitioner at 28 n.4, Whorton v. Bockting, 549 U.S. 406 (2007) (No. 05-595), (*Roberts* was "based on retroactivity principles that *Teague* condemned [and is] therefore inapposite here.").

192. 393 F.3d 327, 336 (2d Cir. 2004).

193. Sawyer v. Smith, 497 U.S. 227, 243 (1990).

194. *Graham*, 946 F.2d at 997.

195. Brecht v. Abrahamson, 507 U.S. 619, 627 (1999) (citation omitted).

these standards are mutually exclusive. A right cannot be both "essential to . . . accuracy and fairness" and trivial enough that it can be overlooked as harmless; that is, insubstantial and lacking injurious effect or influence on the verdict. That indeed is the crucial distinction between *Gideon* and *Cruz*. A proceeding in which the defendant was deprived of the right to counsel in violation of *Gideon* can never be fair even if all the evidence in the world establishes that defendant committed the offense. That is why *Gideon* both fits within the second exception and involves a structural error. On the other hand, a case involving a non-structural error like *Cruz*, which can be deemed harmless depending on the other evidence admitted, can never be essential to the accuracy and fairness of the proceeding for the simple reason that it has already been determined that it can sometimes be overlooked; that is, it is not an essential protection.[196] And if that is true, then there can be no cases that can fit in the third segment of Figure 4, and it too must be eliminated.

By default, then, we are left with the situation depicted in Figure 5, in which the second exception is a smaller subset of structural errors:

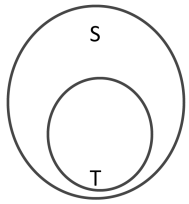

Figure 5. The second exception (T) is a subset of structural error (S).

Indeed, as noted previously, a number of courts have reached this conclusion intuitively.[197] There are several implications which follow from this conclusion. The first involves the issue in *Teague* analysis known as primacy. The Supreme Court has made it clear on several occasions that a court must address the question of whether a decision is entitled to retroactive application as a threshold matter before it can address the question of whether the defendant would be entitled to relief under the decision in question.[198] While the recognition that all cases within the second exception must also involve structural errors does not alter the need for this threshold

196. Another case that falls within the same category as *Graham* is *Hall v. Kelso*, 892 F.2d 1541 (11th Cir. 1990), which held that a violation of *Sandstrom v. Montana*, 442 U.S. 510 (1979), falls within the second *Teague* exception. *See Hall*, 892 F.2d at 1543 n.1. *But see* Johnson v. McKune, 288 F.3d 1187, 1200 (10th Cir. 2002) (holding *Sandstrom* not within second *Teague* exception); Cain v. Redman, 947 F.2d 817, 822 (6th Cir. 1991) (holding *Sandstrom* not within second *Teague* exception).

Hall suffers from the same problem as *Graham*. The Supreme Court has specifically held that *Sandstrom* error is subject to the harmless error rule. *See* Rose v. Clark, 478 U.S. 570, 583–84 (1986). Thus, even though the *Hall* court found the error not to be harmless, the fact that it is non-structural should be enough to disqualify it from consideration under the second exception. *See Hall*, 892 F.3d at 1546–47 ("[W]e find that the . . . constitutional error was harmful.").

197. *See supra* note 143.

198. *See, e.g.*, Horn v. Banks, 536 U.S. 266, 271–72 (2002); Caspari v. Bohlen, 510 U.S. 383, 389 (1994).

analysis, it suggests that the question of structural error should be integrated into the threshold *Teague* analysis. After all, if a case is determined not to fall within the larger set of structural errors (the larger circle in Figure 5), then it can never fall within the subset (the smaller circle) that is the second exception. This will make decisionmaking somewhat simpler, as the structural/non-structural determination seems to be easier for courts to apply.

Second, there is an absurd result lurking in this situation. Assume that a federal district court, in considering a habeas petition, erroneously applies existing precedent to hold that the petitioner did not establish a particular claim of a constitutional violation. The court of appeals then reverses that denial of relief, holding that there was an error under existing caselaw, but that it is subject to the harmless error rule and remands for a determination whether the error was harmless. While that remand is pending, the Supreme Court resolves a split in the circuits and holds that the error in question is structural, but that it is not a watershed rule entitled to retroactive application (that is, that it fits within the larger circle but not within the smaller circle in Figure 5). At this point, what is a district court to do? It cannot apply the new Supreme Court decision retroactively because it is not a watershed rule. At the same time, it cannot apply its original holding, which was incorrect even under then-existing precedent. This leaves it in the impossible position of having to do as it was instructed by the court of appeals: to conduct harmless error review even though the Supreme Court has just held that the error in question is not amenable to such analysis as a matter of constitutional law.

While this situation seems far-fetched, a variation on it actually arose in a recent Seventh Circuit case, although the court of appeals attempted to craft its opinion to avoid stating that it was placing the district court in this untenable position. In *Rodriguez v. Chandler*,[199] an earlier Seventh Circuit decision, the court held that relief for the erroneous denial of the right to counsel of choice is warranted upon a finding that the error had an adverse effect on the defense.[200] While the case was on remand in the district court for that determination, the Supreme Court decided *United States v. Gonzalez-Lopez*, holding that the erroneous denial of the right to counsel of choice is structural error.[201] The district court in the *Rodriguez* case then granted habeas relief on the basis of *Gonzalez-Lopez*, and the case returned to the Seventh Circuit.[202] The Seventh Circuit then held that *Gonzalez-Lopez* did not fall within the second *Teague* exception and that the district court should have applied pre-*Gonzalez-Lopez* law (the earlier decision by the court of appeals) and made the determination whether the error had an adverse effect.[203] Thus, although the Seventh Circuit attempted to

199. 492 F.3d 863 (7th Cir. 2007).

200. *See* Rodriguez v. Chandler, 382 F.3d 670, 673–76 (7th Cir. 2004).

201. 548 U.S. 140, 150 (2006).

202. *See* Rodriguez v. Chandler, 492 F.3d 863, 864 (7th Cir. 2007).

203. *See id.* at 866.

distinguish between this adverseness requirement and harmless error,[204] the court remanded the case to the district court to determine whether there is a role for harmless error analysis after the Supreme Court had already held that the error is not susceptible to this analysis at all.

This anomaly suggests that the Supreme Court needs to take another look at the second exception. By all appearances the Court has created an "exception" that is exceedingly small and that may never find another qualifying case. At the same time, *Rodriguez* reveals a logical flaw in the structural error/watershed rule analysis. The Court clearly has the authority to broaden or narrow the rules of retroactivity at will—it did so in adopting *Linkletter*, and again in jettisoning it in favor of *Teague*, and then broadened the first *Teague* exception in *Penry* by expanding its coverage from cases placing substantive conduct beyond "the State's power to punish *at all*" to include cases placing that conduct "beyond the State's power to punish *by death*."[205]

The simple remedy for this problem is to expand the second exception to make it co-extensive with structural error as represented in Figure 2.[206] Structural errors consist of a small group of cases all involving either the right to counsel, bias by the fact-finder, or some egregious departure from trial norms by the trial judge, so expanding the exception will not result in large numbers of cases being retried. Those cases that do get retried will all involve errors that "necessarily render[ed] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence,"[207] so the cases affected are truly those whose final judgments should not be entitled to respect in any event. They are all cases in which a petitioner's interest in the accurate application of a constitutional principle outweighs a state's interest in the finality of its badly flawed judgment, undermining the basic logic of *Teague*.

V. CONCLUSION

After twenty years of practice, it appears that the *Teague* model for addressing retroactivity problems in federal habeas corpus is here to stay, at least for the foreseeable future. The Supreme Court has shown no hint of wavering from the approach developed by Justice Harlan and adopted in *Teague*. At the same time, Congress has indicated its acceptance and support of the model by incorporating the *Teague* standard into the habeas corpus statutes in a number of ways.

The purpose of this article is to demonstrate how the declaratory theory of adjudication, a principle of jurisprudence recognized since the mid-seventeenth century, creates the need for a set of rules addressing the retroactive application of

204. *See id.*

205. *See supra* text accompanying notes 103–04.

206. It is also possible, at the theoretical level, that Congress could codify the *Teague* standard, somehow broadening the exception to make it coextensive with structural error. This is unlikely, however, as Congress has shown no inclination to broaden the number of convicted prisoners who are released on collateral review.

207. Washington v. Recuenco, 548 U.S. 212, 218–19 (quoting Neder v. United States, 527 U.S. 1, 9 (1999)).

new decisions by courts in general, and particularly by courts considering post-conviction petitions by criminal defendants. Indeed, habeas corpus presents a special problem with regard to retroactivity issues because the unrestrained application of the declaratory theory would lead to chaos, requiring state governments, at regular intervals, to throw open the prison gates. Accordingly, the *Teague* model was designed to strike some balance between the competing interests of the states and their criminal defendants inherent in the practical application of the declaratory theory. The model creates what is, at heart, a presumption of non-retroactivity which may be overcome in a few discrete situations directly responsive to the conflict between the state's interest in the finality of its decisions and the defendant's interest in the accurate application of the law.

One aspect of *Teague* that has not been explored by the courts is the relationship between structural errors—those errors not subject to the harmless error rule as a matter of constitutional law—and the *Teague* exception for watershed rules of criminal procedure. While the language defining structural error and the exception is quite similar, courts have tended to treat them as separate questions. In fact, there is a defined logical relationship between these concepts: the cases which fit within the exception are a subset of the cases which qualify as structural errors. Recognition of this relationship by the courts will improve their decisionmaking, as classification of an error as non-structural necessarily excludes that error from consideration under the second exception.

Finally, the article concludes with the suggestion that given the narrow scope of these two concepts—only a few cases qualify as structural errors and even fewer (actually none since *Teague* was decided) fall within the second exception—the Court should expand the exception to make it coextensive with structural error. Every structural error involves a serious departure from constitutional procedural requirements, so allowing retroactive application of Supreme Court decisions recognizing a structural error will further the interests of due process with little harm to the interests of the state in situations when the earlier error rendered the underlying judicial proceeding worthy of little or no respect.