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ARTICLES

A New Approach to Overcoming the Insurmountable "Watershed Rule" Exception to *Teague*'s Collateral Review Killer

Ezra D. Landes[*]

I. INTRODUCTION

Timing is everything. Just ask Marvin Bockting or Lonnie Burton. Both men are prisoners convicted of heinous crimes. Bockting was sentenced to life in prison for sexual assault of a six-year-old girl,[1] while Burton was given forty-six years for rape, robbery and burglary.[2] Both men, however, were either convicted or sentenced under rules of criminal procedure that the United States Supreme Court finds wholly unconstitutional.[3] Yet, the Court has held that Bockting has no recourse through a writ of habeas corpus.[4] That is because final judgment was entered in his case prior to the Court's landmark holding in *Crawford v. Washington*,[5] which overruled *Ohio v. Roberts*[6] in establishing that the Sixth Amendment bars the admission of out-of-court statements unless the declarant is available to testify and can be cross-examined by the defendant.[7] For Burton, it appears equally unpromising. Final judgment was entered in his case before the landmark decision of *Blakely v. Washington*,[8] which held that the Sixth Amendment requires that

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1. Whorton v. Bockting, 127 S. Ct. 1173, 1178 (2007).
2. Burton v. Stewart, 549 U.S. 147, 149 (2007) (per curiam).
3. *See id.*; *Whorton*, 127 S. Ct. at 1178-79.
4. *See Whorton*, 127 S. Ct. at 1184.
5. 541 U.S. 36 (2004).
6. 448 U.S. 56 (1980).
7. *Whorton*, 127 S. Ct. at 1179.
8. 542 U.S. 296 (2004).

absent determinations by a jury, a judge's imposed sentence cannot fall outside of state sentencing guidelines.[9] For both defendants, perhaps the greatest impediment is that while *Crawford* and *Blakely* represent "landmark" rulings,[10] neither one appears to be "watershed,"[11] as required by *Teague v. Lane*.[12]

In *Teague*, the Court effectively barred the vast majority of its new rules from being applied retroactively on collateral review.[13] The Court did, however, carve out two very narrow exceptions.[14] First, new substantive rules can be applied retroactively.[15] Second, new procedural rules that are watershed can be applied retroactively.[16] On fourteen occasions the Court has been asked to determine whether or not a new rule is watershed. All fourteen times the Court has found the rule not to be watershed.[17]

This Article will propose a new approach to overcoming the seemingly insurmountable watershed rule exception. While a single case – such as *Crawford* or *Blakely* – may not rise to watershed status, this Article will

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9. Burton v. Stewart, 549 U.S. 147, 149-52 (2007) (per curiam).

10. *See, e.g.*, Joseph E. Kennedy, *Cautious Liberalism*, 94 GEO. L.J. 1537, 1540 (2006) ("Moreover, the government's best year by this measure was 2003, the year that the government suffered the *landmark* losses of *Blakely* and *Crawford*." (emphasis added)); Won Shin, Crawford v. Washington*: Confrontation Clause Forbids Admission of Testimonial Out-of-Court Statements Without Prior Opportunity to Cross-Examine*, 40 HARV. C.R.-C.L. L. REV. 223, 223 (2005) ("In the aftermath of . . . *Blakely v. Washington,* it was easy to forget that only a few months earlier, the Supreme Court made another revolutionary decision in the area of constitutional criminal procedure. That earlier *landmark*, *Crawford v. Washington,* marked a sea change in the Court's interpretation of the Confrontation Clause . . . ." (emphasis added) (footnotes omitted)).

11. *See Whorton*, 127 S. Ct. at 1183-84 ("In this case, it is apparent that the rule announced in *Crawford*, while certainly important, is not [watershed]."). The immediate reaction of commentators was to use the word "watershed" – if not in a legal sense – at least in a colloquial sense, when referring to both *Crawford* and *Blakely*. *See, e.g.*, Daniel J. Capra, *Amending the Hearsay Exception for Declarations Against Penal Interest in the Wake of* Crawford, 105 COLUM. L. REV. 2409, 2411 n.12 (2005) ("In *Blakely v. Washington*, another watershed case decided just three months after *Crawford* . . . ."); Joshua L. Dratel, *The Impact of* Crawford v. Washington *on Terrorism Prosecutions*, CHAMPION, Sept.-Oct. 2004, at 19, 19 ("The Supreme Court's recent opinion in *Crawford v. Washington* promises to be a watershed decision in many respects . . . ." (footnote omitted)).

12. 89 U.S. 288 (1989).

13. *Id.* at 310.

14. *See id.* at 310-12.

15. *Id.* at 311.

16. *Id.*

17. As recently as 2004, the Court noted that "it should come as no surprise that we have yet to find a new rule that falls under the second *Teague* exception." Beard v. Banks, 542 U.S. 406, 417 (2004); *see also infra* note 67 (listing all post-*Teague* cases that have considered the watershed rule exception).

suggest that a *line* of cases could be considered watershed.[18] It will be shown that the highly subjective nature of this exception lends itself perfectly to this type of reasoning, and that adoption of this approach would help reconcile some inherent conflicts encountered by the Court whenever *Teague* retroactivity comes before it.[19]

Part II of this Article will provide the necessary legal framework, by tracing habeas corpus and the issue of retroactivity from the writ's origins through *Teague* and its aftermath.[20] Part III will then propose the above mentioned "line of cases" approach and consider its potential in light of the Court's recent holdings in *Whorton v. Bockting* and *Burton v. Stewart*.[21] Finally, Part IV will conclude the Article.[22]

II. LEGAL FRAMEWORK

A. Origins of Habeas Corpus

The Great Writ of habeas corpus – granting prisoners relief from unlawful imprisonment – finds its origins in English common law. William Blackstone explained the issuance of these writs "on the ground that the 'king is at all times entitled to have an account, why the liberty of any of his subjects is restrained.'"[23] After four centuries of practice, codification finally came in the form of the Habeas Corpus Act of 1679.[24] This Act "enlarged habeas power by authorizing issuance of the writ throughout the realm (not merely in a particular region) and at any time (not just during the court's term)."[25]

The right of prisoners to petition for the writ when being held by federal authorities was adopted by the United States and provided for in the Constitution, which states in relevant part that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion

18. *See* discussion *infra* Part III.B.1.

19. *See* discussion *infra* Part III.B.2.

20. *See infra* notes 23-72 and accompanying text.

21. *See infra* notes 73-129 and accompanying text.

22. *See infra* notes 130-31 and accompanying text.

23. James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 923 & n.89 (1997) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 131 (St. George Tucker ed. 1803)).

24. *See* Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 802 n.353 (2001).

25. *Id.* (citing James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1443 n.39 (2000)).

the public Safety may require it."[26] Congress ultimately extended this right to state prisoners with the Judiciary Act of 1867.[27]

B. Retroactivity of Supreme Court Decisions on Habeas Review

1. Pre-1965

Before 1965, retroactivity was a non-issue: "[T]he Supreme Court assumed all of its decisions should apply retroactively."[28] In the 1960's, however, the Court began interpreting the Due Process Clause of the Fourteenth Amendment as incorporating provisions of the Bill of Rights (notably the Fourth, Fifth, and Sixth Amendments) against the states.[29] In extending these

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26. U.S. CONST. art I, § 9, cl. 2.

27. *See* Thomas C. O'Bryant, *The Great Unobtainable Writ: Indigent Pro Se Litigation After the Antiterrorism and Effective Death Penalty Act of 1996*, 41 HARV. C.R.-C.L. L. REV. 299, 302 (2006).

28. Linda Meyer, *"Nothing We Say Matters":* Teague *and New Rules*, 61 U. CHI. L. REV. 423, 427 (1994).

29. This movement was pioneered by Justice Black, who famously fired the first shots of the due process revolution with a riveting dissent in *Adamson v. California*, 332 U.S. 46, 89-90 (1947) (Black, J., dissenting). It was there that he stated:

> I cannot consider the Bill of Rights to be an outworn 18th Century "strait jacket" . . . . Its provisions may be thought outdated abstractions by some. And it is true that they were designed to meet ancient evils. But they are the same kind of human evils that have emerged from century to century wherever excessive power is sought by the few at the expense of the many. . . . I . . . follow what I believe was the original purpose of the Fourteenth Amendment—to extend to all the people of the nation the complete protection of the Bill of Rights. To hold that this Court can determine what, if any, provisions of the Bill of Rights will be enforced, and if so to what degree, is to frustrate the great design of a written Constitution.

Id. at 89. Justice Black's voice in this Vinson Court dissent would eventually be heard, as the expansion of the Bill of Rights would ultimately become one of the great legacies of the Warren Court. Some of these landmark (and/or watershed) holdings would include: *Mapp v. Ohio*, 367 U.S. 643 (1961) (holding that all evidence obtained by searches and seizures in violation of the Fourth Amendment must be excluded from criminal proceedings in state court); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that a defendant has a right to counsel); and *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding that suspects must be informed of their right to an attorney and their right against self-incrimination prior to being questioned by authorities). As a result of these holdings, the country "move[d] from a state-based criminal justice system to a criminal justice system that ha[d] to conform with nationally imposed rules." *See The Supreme Court* (PBS television broadcast Feb. 7, 2007) (interview with Professor Joseph F. Kobylka).

protections, however, the Court recognized the potentially disruptive influence retroactivity might have on state judicial systems.[30]

2. 1965: *Linkletter v. Walker*[31]

The Court attempted to alleviate the burden of retroactivity with its holding in *Linkletter* by deciding that the new exclusionary rule of *Mapp* – which overruled *Wolf v. Colorado*[32] – did not have retroactive effect for collateral habeas proceedings. *Linkletter* established a three-part balancing test for retroactivity. Throughout the *Linkletter* era, a determination on retroactivity was made "by examining the purpose of the [new] rule, the reliance of the States on prior law, and the effect on the administration of justice of a retroactive application of the [new] rule."[33] The *Linkletter* test was applied irrespective of whether the case was before the court on direct review or collateral review.[34]

3. 1965-1989: The *Linkletter* Years

Linkletter ruled the roost for nearly a quarter century, though its tenure was hardly subdued.[35] Inspired by Professor Paul Mishkin's *Harvard Law*

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30. *See* Meyer, *supra* note 28, at 427 ("It had never squarely faced this question before, primarily because the changes in its criminal law doctrines had been incremental and evolutionary, not revolutionary." (footnote omitted)).

31. 381 U.S. 618 (1965).

32. 338 U.S. 25 (1949).

33. Teague v. Lane, 489 U.S. 288, 302 (1989) (citing *Linkletter*, 381 U.S. at 636-40).

34. *See id.* at 303. The distinction between direct review and collateral review can be summarized as follows: Direct review is a traditional legal appeal made to an appellate court, which reviews the record of the trial court and the law applied by the trial court. *See* BLACK'S LAW DICTIONARY 204 (2d Pocket ed. 2001). Collateral review, on the other hand, is an avenue for reversing judgments that are otherwise final in a different proceeding and often requires consideration of evidence that is not part of the trial record. *See id.* at 108. "A petition for a writ of habeas corpus is one type of collateral attack." *Id.*

35. *Teague*, 489 U.S. at 303 ("Not surprisingly, commentators have 'had a veritable field day' with the *Linkletter* standard, with much of the discussion being 'more than mildly negative.'" (quoting Francis X. Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 VA. L. REV. 1557, 1558 & n.3 (1975))). Interestingly, this acknowledgement of the immense dissatisfaction was noted by Justice O'Connor as a preamble to her "modification" of *Linkletter* with the rules of *Teague*. The Court here is extending something of an olive branch, by conceding a quarter-century of flawed analysis. And yet, ironically, the new framework of *Teague*, it can be argued, has been even more vilified since its inception. *See* discussion *infra* note 71.

Review article,[36] Justice Harlan repeatedly criticized the test, particularly finding fault with *Linkletter*'s inability to distinguish defendants based on their procedural status. This amounted to a cruel game of certiorari roulette, as the eventual fate of two similarly situated prisoners depended almost entirely on which had the good fortune of being party to the direct review case the Court agreed to hear.[37] Shortly before his retirement, Justice Harlan argued in a series of dissenting opinions[38] that new rules should be applied retroactively to all cases on direct appeal, but should only be applied retroactively on collateral review if the rule placed the conduct of the convict beyond the power of the State to proscribe it,[39] or if applying the new rule retroactively was "implicit in the concept of ordered liberty."[40]

In 1987, Justice Harlan received some vindication, but only on his first point. In *Griffith v. Kentucky*,[41] the Court applied the new rule of *Batson v. Kentucky*[42] retroactively because the defendant's case was still pending on direct appeal.[43] *Griffith* did not speak to collateral review, and so for those cases *Linkletter* remained good law.

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36. Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56 (1965).

37. *Teague*, 489 U.S. at 303 ("Application of the *Linkletter* standard led to the disparate treatment of similarly situated defendants on direct review."). *Teague* acknowledged a host of flaws in the application of *Linkletter*. *Id.* at 302 ("*Linkletter* . . . has not led to consistent results. Instead, it has been used to limit application of certain rules to cases on direct review, other new rules only to the defendants in the cases announcing such rules, and still other new rules to cases in which trials have not yet commenced.").

38. *See* Mackey v. United States, 401 U.S. 667, 675 (1971) (Harlan, J., concurring in part and dissenting in part); Desist v. United States, 394 U.S. 244, 256 (1969) (Harlan, J., dissenting).

39. *See Mackey*, 401 U.S. at 691-93 (Harlan, J., concurring in part and dissenting in part). Justice Harlan cited as examples of this: *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that a State could not proscribe the activities of a physician who wished to distribute contraception on grounds that it violated the "right to privacy"); and *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that a State could not proscribe interracial marriages). *Mackey*, 401 U.S. at 692 n.7 (Harlan, J., concurring in part and dissenting in part). Under Justice Harlan's view it would be grossly unjust to not apply retroactively "[n]ew 'substantive due process' rules" that make legal any conduct that was at the time of a conviction illegal. *Id.* at 692.

40. *Id.* at 693 (Harlan, J., concurring in part and dissenting in part).

41. 479 U.S. 314 (1987).

42. 476 U.S. 79 (1986) (holding that the use of preemptory challenges to excuse jurors based solely on their race was a violation of the Equal Protection Clause of the Fourteenth Amendment).

43. *Griffith*, 479 U.S. at 322.

4. 1989: *Teague v. Lane*[44]

Finally, in 1989, the Court fully "embraced" Justice Harlan's distinction between direct and collateral review.[45] In *Teague*, the Court considered the retroactivity of *Taylor v. Louisiana*,[46] which "held that the Sixth Amendment required jury venire to be drawn from a fair cross section of the community."[47] Teague proposed that the fair cross section requirement be extended to the petit jury.[48] The Court refused, however, to answer whether or not it could, since a response in the affirmative would result in a new rule that regardless of its validity could not be applied retroactively.[49] *Teague*, therefore, established that "[r]etroactivity is properly treated as a threshold question," and also helped "clarify how the question of retroactivity should be resolved for cases on collateral review."[50] Agreeing that *Linkletter* "require[d] modification,"[51] Justice O'Connor, in a plurality opinion, outlined in great detail the rules of retroactivity that are unwaveringly in use today.

First, the Court was clear that old rules apply both on direct and collateral review.[52] The *Teague* doctrine, therefore, only applies to "new rules," which makes the distinction between new and old a rather significant inquiry and the source of great debate.[53] A rule that is "merely an application of the principle that governed" a prior Supreme Court case is old and retroactive.[54] "[A] case announces a new rule when it breaks new ground or

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44. 489 U.S. 288 (1989).

45. Professor Barry Friedman, one of *Teague*'s harshest critics, would hardly describe the Court's actions as an "embrace." He states the following:

> Justice O'Connor . . . would have the reader believe that the Court's decision simply adopted a sensible suggestion made twenty years before by Justice Harlan. This is unfair to Justice Harlan. What the *Teague* plurality actually did was piece together different things Justice Harlan said about habeas corpus and retroactivity, including positions that Justice Harlan later discarded, and then, for good measure add some new thoughts of their own. One might say that the *Teague* decision resembles Justice Harlan's views much like a kidnapping note pasted together from stray pieces of newsprint resembles the newspaper from which it came.

Barry Friedman, *Habeas and Hubris*, 45 VAND. L. REV. 797, 811 (1992) (footnotes omitted).

46. 419 U.S. 522 (1975).

47. *Teague*, 489 U.S. at 292.

48. *Id.* at 299.

49. *Id.* at 316 ("Because a decision extending the fair cross section requirement to the petit jury would not be applied retroactively to cases on collateral review under the approach we adopt today, we do not address petitioner's claim.").

50. *Id.* at 300.

51. *Id.* at 301.

52. *See id.* at 307.

53. *See* Friedman, *supra* note 45, at 811-12 & n.80.

54. *Teague*, 489 U.S. at 307.

imposes a new obligation on the States or the Federal Government."[55] The Court added that "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."[56] Despite the bit of emphasis in the original, one still might assume that by adding "precedent" to the mix, this elaboration would provide petitioners with a much needed qualifier of the broadly conceived first portion.[57] That has not been the case, however, as *Teague* and its progeny appear unwilling to find many of the Court's holdings "new,"[58] accomplishing this by taking

55. *Id.* at 301.

56. *Id.*

57. Meanwhile, the *Teague* dissenters paid little heed to the potential influence of "precedent" and remained concerned by the emphatic use of "*dictated*." Justice Brennan noted: "This account is extremely broad. Few decisions on appeal or collateral review are '*dictated*' by what came before. Most such cases involve a question of law that is at least debatable, permitting a rational judge to resolve the case more than one way." *Id.* at 333 (Brennan, J., dissenting). He concludes that "[v]irtually no case that prompts a dissent on the relevant legal point, for example, could be said to be '*dictated*' by prior decisions." *Id.* Justice Brennan's lack of faith in this standard proved to be an accurate forecast, as the rule has continually been applied with extreme breadth. *See infra* notes 58-60 and accompanying text.

58. *Teague* provides an example of a decision that is "*dictated* by precedent," in citing to *Francis v. Franklin*, 471 U.S. 307 (1985). *Teague*, 489 U.S. at 307. "*Sandstrom v. Montana*[, 442 U.S. 510 (1979),] made clear that the Due Process Clause of the Fourteenth Amendment prohibits the State from making use of jury instructions that have the effect of relieving the State of [its] burden of proof . . . on the critical question of intent in a criminal prosecution." *Francis*, 471 U.S. at 326. *Francis* later held that an instruction that allowed the jury to presume malice unconstitutionally relieved the State of its burden of proof beyond a reasonable doubt. *Id.* at 326-27. In *Yates v. Aiken*, 484 U.S. 211 (1988), the Court "held that *Francis* did not announce a new rule because it 'was merely an application of the principle that governed our decision in *Sandstrom v. Montana*, which had been decided before the defendant's trial took place.'" *Teague*, 489 U.S. at 307 (citation omitted) (quoting *Yates*, 484 U.S. at 216-17). Post-*Teague* holdings that previous cases do not announce new rules have been few and far between. In *Stringer v. Black*, 503 U.S. 222 (1992), the Court held that *Maynard v. Cartwright*, 486 U.S. 356 (1988), did not announce a new rule because it "applied the same analysis and reasoning" found in *Godfrey v. Georgia*, 446 U.S. 420 (1980). *Godfrey* held that the aggravating factor of "outrageously or wantonly vile, horrible or inhuman" used for the purpose of determining capital punishment eligibility was unconstitutionally vague. 446 U.S. at 432-33. *Maynard* subsequently found unconstitutional language that read "especially heinous, atrocious, or cruel." 486 U.S. at 363-64. *Stringer* held that the unconstitutional language in *Godfrey* and *Maynard* were similar enough, and that the latter did not "'break[] new ground.'" 503 U.S. at 229 (quoting Butler v. McKellar, 494 U.S. 407, 412 (1990)). It was, therefore, an old rule. *Id.*; *see also* Perry v. Lynaugh, 492 U.S. 302 (1989) (holding the relief a prisoner sought would not create a new rule because it was dictated by *Lockett v. Ohio*, 438 U.S. 586 (1978)). More recently, in *Williams v. Taylor*, 529 U.S. 362 (2000), the Court noted *Teague*'s non-implication when the petitioner's contention that he received ineffective assistance of counsel was

advantage of the word "*dictated*" to repeatedly find that the given precedent "support[s]" but does not "mandate" a rule.[59] To be free to call a rule "old," the Court demands a virtual carbon copy case, when the reality is that "few cases can be said to pose precisely the same legal issue resolved in a prior case."[60]

Proceeding under the assumption that most rules are new, *Teague* then went on to affirm what it had previously set forth in *Griffith* – that a new rule receives full retroactivity for cases on direct review.[61] Alternately, *Teague* held that new rules should receive very limited retroactivity for cases on collateral review. In those instances, a new rule applies retroactively "only if (1) the rule is substantive [and not procedural] or (2) the rule is a "'watershed rul[e] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding."[62] As to the first exception, a rule is substantive when "it alters the range of conduct or the class of persons the law punishes,"[63] but is procedural if it regulates "the manner of determining the defendant's culpability."[64] As to the second *Teague* exception, a rule is "watershed" only if it satisfies two requirements: (1) "Infringement of the rule must 'seriously diminish the likelihood of obtaining an accurate conviction,'" and (2) "the rule must 'alter our understanding of the bedrock procedural elements essential to the fairness of the proceeding.'"[65] *Teague* was codified

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dictated by the test of *Strickland v. Washington*, 466 U.S. 668 (1984). *Williams*, 529 U.S. at 391 ("[I]t can hardly be said that recognizing the right to effective counsel 'breaks new ground or imposes a new obligation on the States.'" (quoting *Teague*, 489 U.S. at 301)).

59. *See* Beard v. Banks, 542 U.S. 406, 414 (2004) ("The generalized *Lockett* rule (that the sentencer must be allowed to consider any mitigating evidence) could be thought to support the Court's conclusion in *Mills* and *McKoy*. But what is essential here is that it does not mandate the *Mills* rule.").

60. Friedman, *supra* note 45, at 802. Compare the broad definition of "new rule" supplied by the *Teague* plurality with "Justice Stewart's much more restrained approach in *Milton v. Wainwright*," 407 U.S. 371 (1972), as recalled by the dissent. *See Teague*, 489 U.S. at 333 n.4 (Brennan, J., dissenting). Justice Stewart stated that the "'issue of 'retroactivity' of a decision of this Court is not even presented unless the decision in question marks a *sharp break* in the web of the law. [It] is presented only when the decision overrules clear past precedent, or disrupts a practice long accepted and widely relied upon.'" *Id.* (Brennan, J., dissenting) (quoting *Milton*, 407 U.S. at 381 n.2 (Stewart, J., dissenting)) (emphasis added). *Teague* hardly demands a "sharp break," opting instead to "defin[e] a new rule as any rule not on all fours with prior precedent." *See* Friedman, *supra* note 45, at 812.

61. *Teague*, 489 U.S. at 304.

62. Whorton v. Bockting, 127 S. Ct. 1173, 1180-81 (2007) (citing Saffle v. Parks, 494 U.S. 484, 495 (1990) (quoting *Teague*, 489 U.S. at 311)).

63. Schriro v. Summerlin, 542 U.S. 348, 353 (2004); *see also supra* note 39 (discussing examples of altered punishable conduct provided by Justice Harlan).

64. *Schriro*, 542 U.S. at 353 (emphasis omitted).

65. Tyler v. Cain, 533 U.S. 656, 665 (2001) (quoting *Teague*, 489 U.S. at 311).

in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and remains the law today.[66]

5. Post-*Teague* Retroactivity Decisions

Since *Teague*, the Court has never found a new rule to be watershed. Of the fourteen cases that posed the question, nine of the new rules considered have related to sentencing.[67] In an effort to provide some guidance as to the

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66. Pub. L. No. 104-132, 110 Stat. 1214. Courts regularly note that this statute incorporates the *Teague* analysis. *See Whorton*, 127 S. Ct. at 1180 n.3. Under the AEDPA, the vehicle for a State prisoner who wishes to have a conviction or sentence reviewed in federal court for constitutional violations is 28 U.S.C. § 2254 (2000). For a federal court to have jurisdiction, the prisoner must first exhaust all available State court remedies. *See id.* The vehicle for federal prisoners to re-enter federal court for collateral review is 28 U.S.C. § 2255 (2000). Section 2254 and § 2255 petitions are only necessary when asking for review of final convictions. A case becomes final "where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed" before the decision for which retroactive application is sought. *See* Linkletter v. Walker, 381 U.S. 618, 622 n.5 (1965). The many nuances of § 2254 and § 2255 are for the most part beyond the scope of this Article. Suffice it to say that my principal interest here concerns those prisoners whose cases were made final prior to the decisions for which retroactive application is sought. Further, for the sake of avoiding any of the gatekeeping requirements that derailed *Burton v. Stewart*, 549 U.S. 147 (2007) (per curiam), my analysis is limited to those prisoners who have not previously filed a § 2254 or § 2255 petition.

67. It is worth reviewing, briefly, the post-*Teague* cases that have contemplated retroactivity prior to 2007, when the thirteenth and fourteenth cases were decided (*Teague* itself considered retroactivity, and should be treated as the first of the fourteen cases – and the first of the five non-sentencing cases.). The sentencing cases are: (1) *Saffle v. Parks*, 494 U.S. 484, 486 (1990) (holding that a new rule that forbids the trial court from "telling the jury to avoid any influence of sympathy, violates the Eighth Amendment" – is not watershed); (2) *Sawyer v. Smith*, 497 U.S. 227, 233 (1990) (determining that the new rule of *Caldwell v. Mississippi*, 474 U.S. 320, 328-29 (1985) – holding that "the Eighth Amendment prohibits the imposition of a death sentence by a sentencer that has been led to the false belief that the responsibility for determining the appropriateness of the defendant's capital sentence rests elsewhere" – is not watershed); (3) *Graham v. Collins*, 506 U.S. 461 (1993) (concluding that a proposed new rule that bars jury instructions that forbid a sentencing jury to consider mitigating evidence would not be watershed); (4) *Caspari v. Bohlen*, 510 U.S. 383, 396 (1994) (determining that the application of the Double Jeopardy Clause to noncapital sentencing proceedings constituted a new rule that is not watershed); (5) *Gray v. Netherland*, 518 U.S. 152 (1996) (establishing that the new rule that requires the state to give adequate notice of the evidence it intends to use in the sentencing phase is not watershed); (6) *O'Dell v. Netherland*, 521 U.S. 151 (1997) (concluding that the new rule of *Simmons v. South Carolina*, 512 U.S. 154 (1994) – holding that a defendant has a right to inform a sentencing jury contemplating capital punishment that he is parole-ineligible and therefore not a future danger – is not watershed); (7) *Beard v.*

type of new rule that qualifies as watershed, the Court has repeatedly pointed to the pre-*Teague* case of *Gideon v. Wainwright*,[68] which established defendants' right to counsel.[69] The Court clairvoyantly noted in *Teague* that it does not foresee any additional rules rising to the level of *Gideon*, and that it is "unlikely that many such components of basic due process have yet to emerge."[70] As Professor Friedman poignantly replied to that bit of conjecture: "What hubris!"[71] Justice Harlan simply offered an example, and the

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Banks, 542 U.S. 406 (2004) (deciding that the new rule of *Mills v. Maryland*, 486 U.S. 367 (1988) – holding unconstitutional capital sentencing schemes that require juries to disregard mitigating factors not unanimously found – is not watershed); and (8) *Schriro v. Summerlin*, 542 U.S. 348 (2004) (settling that the new rule of *Ring v. Arizona*, 536 U.S. 584 (2002), which held that aggravating factors which make a defendant eligible for the death penalty must be proved to a jury rather than a judge, is not watershed). The non-sentencing cases are: (1) *Butler v. McKellar*, 494 U.S. 407 (1990) (holding that the new rule of *Arizona v. Roberson*, 486 U.S. 675 (1988) – barring police-initiated interrogation following a suspect's request for counsel – is not watershed); (2) *Gilmore v. Taylor*, 508 U.S. 333 (1993) (concluding that the new rule of *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990) – holding unconstitutional jury instructions that allowed murder convictions without consideration of a diminished mental state – is not watershed); and (3) *Goeke v. Branch*, 514 U.S. 115 (1995) (per curiam) (determining that a new rule that gave a recaptured fugitive a right to appeal is not watershed).

68. 372 U.S. 335 (1963).

69. *See, e.g.*, *Saffle*, 494 U.S. at 495 ("Whatever one may think of the importance of respondent's proposed rule, it has none of the primacy and centrality of the rule adopted in *Gideon* or other rules which may be thought to be within the exception."); *Gray*, 518 U.S. at 170 (citing *Saffle*, 494 U.S. at 495); *O'Dell*, 521 U.S. at 167 (citing *Sawyer*, 497 U.S. at 242); *Beard*, 542 U.S. at 420 (citing *Saffle*, 494 U.S. at 495).

70. *Teague*, 489 U.S. at 313.

71. Friedman, *supra* note 45, at 824. Professor Friedman is one of many who have railed against *Teague* throughout the nearly two decades that it has been on the books. He has flatly stated that "*Teague* should be overruled," and that quite "[f]rankly, the Court ought to be just a little embarrassed with itself." Barry Friedman, *Pas De Deux: The Supreme Court and the Habeas Courts*, 66 S. CAL. L. REV. 2467, 2469 & n.143 (1993). While Professor Friedman may be the harshest critic of *Teague*, he is hardly alone among commentators. *See, e.g.*, David R. Dow, Teague *and Death: The Impact of Current Retroactivity Doctrine on Capital Defendants*, 19 HASTINGS CONST. L.Q. 23, 50 n.155 (citing no less than eight additional articles that criticize *Teague*); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1817 (1991) ("Equally troubling is the narrowness of the exceptions to *Teague*'s rule barring consideration of new law claims."); Yale L. Rosenberg, *Kaddish for Federal Habeas Corpus*, 59 GEO. WASH. L. REV. 362, 378 (1991) ("While the Rehnquist Court may not be ready to say kaddish for federal habeas corpus, the Justices have already done the deed that warrants the prayer.").

Court turned it into what has become an insurmountable gold standard.[72]

The purpose of this Article, however, is not to add to the academic chorus assailing *Teague* and its progeny. That has been adequately accomplished thus far, and the two most recent cases – *Whorton* and *Burton* – will undoubtedly inspire more authors to pile on the grievances. Rather, I will accept the Court's framework but try to influence a new way of thinking.

III. ANALYSIS OF *TEAGUE*'S WATERSHED RULE EXCEPTION AND A PROPOSED NEW APPROACH

Before introducing this Article's novel approach to *Teague*, I will first review the Court's most recent contemplations of the retroactivity doctrine. This new approach will then be presented in light of these cases and the rules attached to them.

A. The Supreme Court's 2007 Teague *Cases*

For the October 2006 term, certiorari was granted in two cases that asked the Court to consider retroactivity under the rules of *Teague*. True to the Court's precedents, neither case resulted in a favorable outcome for the prisoner.

1. *Whorton v. Bockting*[73]

The judgment in Marvin Bockting's case became final more than a decade before the Court adopted the new rule of *Crawford v. Washington*.[74] Had that rule been in effect at the time of Bockting's trial, the possibility exists that he would not have been convicted. Bockting was indicted for sexually assaulting his wife's six-year old daughter.[75] Despite conflicting testimony by the victim at the preliminary hearing, the trial court found the testimony of

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72. *See* Mackey v. United States, 401 U.S. 667, 694 (1971) (Harlan, J., concurring in part and dissenting in part) ("For example, ... I would continue to apply *Gideon* itself on habeas, even to convictions made final before that decision was rendered. Other possible exceptions to the finality rule I would leave to be worked out in the context of actual cases brought before us that raise the issue."). It is worth noting, however, that when Justice Harlan made a distinction between "procedural due process" and "substantive due process" rules, he listed *Gideon* as an example of the former, along with *Mapp v. Ohio*, 367 U.S. 643 (1961); *Miranda v. Arizona*, 384 U.S. 436 (1966); and *Chimel v. California*, 395 U.S. 752 (1969). *Mackey*, 401 U.S. at 692 n.6 (Harlan, J., concurring in part and dissenting in part). The list is a veritable who's who of criminal procedure cases from that era. It almost seems as if any of those cases could have been added to Justice Harlan's list of retroactive cases.

73. 127 S. Ct. 1173 (2007).

74. 541 U.S. 36 (2004); *Whorton*, 127 S. Ct. at 1178.

75. *Whorton*, 127 S. Ct. at 1177.

the girl's mother and a detective with whom the girl had spoken sufficient to hold Bockting over for trial.[76] When the court determined that the daughter was too distressed to testify, the judge allowed the victim's mother and the detective to recount at trial the victim's statements regarding the sexual assaults.[77] Under the rule of *Crawford*, those statements were inadmissible hearsay in violation of the Confrontation Clause.[78] *Crawford* established that a defendant such as Bockting has a right to confront his accuser when facing a conviction that would ultimately result in a life sentence.[79]

Bockting petitioned for habeas relief and contended that the rule of *Crawford* should be applied to his case retroactively, because it amounted to a watershed rule "that implicated 'the fundamental fairness and accuracy of the criminal proceeding.'"[80] The Ninth Circuit agreed.[81] For the moment, it appeared that given the extraordinary implications a *Crawford* violation can have on a trial's outcome, the Supreme Court might be forced to finally acknowledge that one of its new rules was comparable to *Gideon*'s import and was in fact watershed.[82] That hope was short-lived. In a decisive opinion written by Justice Alito, the Court unanimously overruled the court of appeals.[83] The Court concluded "that the rule announced in *Crawford*, while certainly important, is not in the same category with *Gideon*. . . . [and] does not fall within the *Teague* exception for watershed rules."[84]

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76. *Id.*

77. *Id.* at 1177-78.

78. *Id.* at 1179 ("While this appeal was pending, we issued our opinion in *Crawford*, in which we overruled *Roberts* and held that '[t]estimonial statements of witnesses absent from trial' are admissible 'only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine [the witness].'").

79. *See id.*

80. *Id.* at 1179-80 (quoting Saffle v. Parks, 494 U.S. 484, 495 (1990)).

81. *Id.* at 1180 ("Judge McKeown concluded that *Crawford* announced a new rule of criminal procedure, but that the decision was nevertheless retroactive on collateral review because it announced a watershed rule that 'rework[ed] our understanding of bedrock criminal procedure.'" (citations omitted)).

82. This hope was tempered by the fact that the Ninth Circuit's "decision that *Crawford* is retroactive to cases on collateral review conflict[ed] with the decision of every other Court of Appeals and State Supreme Court that had addressed the issue." *Id.*

83. *Id.* at 1184.

84. *Id.* at 1183-84. "The *Crawford* rule simply lacks the 'primacy' and 'centrality' of the *Gideon* rule." *Id.* at 1184.

2. *Burton v. Stewart*[85]

In 1994, "a Washington jury convicted petitioner Lonnie Burton of rape, robbery, and burglary."[86] Burton was sentenced to 562 months in prison – "153 months for robbery, 105 months for burglary, and 304 months for rape."[87] It was directed that the sentence be served consecutively, not concurrently.[88] This amounted to an "exceptional sentence" that enhanced Burton's imprisonment by over twenty-one years more than was allowed by his jury verdict alone.[89] Such a sentence ran afoul of *Apprendi v. New Jersey*,[90] in which the Court held that the Sixth and Fourteenth Amendments allow only juries – and not judges – to make factual determinations that result in an increase of a defendant's statutory maximum prison sentence.[91] In 2004, the Court held in *Blakely v. Washington*[92] that the rule also applied to the State of Washington's sentencing guidelines[93] – the same state in which Burton was sentenced.

Burton filed a habeas petition arguing that *Blakely* should be applied retroactively to his case, and that his sentence should be reduced as a result.[94] Here, the Ninth Circuit affirmed the district court's denial of habeas relief.[95] The Supreme Court took the case but never weighed in on the matter, having concluded after granting certiorari that Burton "failed to comply with the gatekeeping requirements of 28 U.S.C. § 2244(b)."[96] As a result, the retroactivity of *Blakely* remains a question for another day. However, given the Court's well-documented history when it comes to the "watershedness" of new sentencing rules, it does not appear that Burton or any similarly situated prisoners should rely heavily on this avenue as a means for relief.

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85. 549 U.S. 147 (2007).

86. *Id.* at 149.

87. *Id.*

88. *Id.*

89. *See id.* at 150.

90. 530 U.S. 466 (2000).

91. *Id.* at 490; *Burton*, 549 U.S. at 152.

92. 542 U.S. 296 (2004).

93. *Id.* at 305, 313. *Blakely* of course did more than this. It helped to define "'statutory maximum' for *Apprendi* purposes [a]s the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Id.* at 303. "In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Id.* at 303-04.

94. *Burton*, 549 U.S. at 151-52.

95. *Id.* at 152.

96. *Id.* at 149; *see also id.* at 152 ("We conclude, though, that because the 2002 petition is a 'second or successive' petition that Burton did not seek or obtain authorization to file in the District Court, the District Court never had jurisdiction to consider it in the first place.").

B. Rethinking the Retroactivity of Crawford *and* Blakely

Strong arguments can be made that the Court erred in *Whorton* and would have been equally in the wrong to deny retroactivity in *Burton*. To paraphrase the late Senator Lloyd Bentsen, *Whorton* stated with utter confidence that it knows *Gideon*, has seen *Gideon* at work, considers *Gideon* a friend of criminal justice – and that *Crawford* is simply no *Gideon*.[97] And to borrow again from Professor Friedman, "what chutzpah!"[98] To the contrary, one could argue that *Gideon* pales in comparison to *Crawford*. All the Cochrans, Kunstlers and Baileys in the world are useless to defendants if they cannot confront in open court the witness offering the most damaging testimony. Even a *pro se* defendant who has not availed himself of the rights afforded by *Gideon* might suffer without the assurances of *Crawford*.

When considering *Blakely*, the stronger argument in favor of retroactivity likely comes under the threshold question of whether the rule is new or old. Justice Scalia begins Part II of the *Blakely* opinion by resoundingly stating: "This case requires us to apply the rule we expressed in *Apprendi v. New Jersey*."[99] As previously noted, *Blakely*'s primary contribution is the definitions it supplied.[100] Therefore, one can certainly view *Blakely* as a case that provided some much-needed guidance in the wake of *Apprendi*, but it was by no means a case that intended to set forth anything that the Court had not hoped was already conveyed by its Garden State-borne predecessor. For myriad reasons, it appears more than likely, if given the opportunity, that the Court would not have broken with tradition and would have readily concluded that *Blakely* announced a new rule.[101]

All told, in the seas of retroactivity, the *Crawford* ship has sailed, and the *Blakely* ship is about to leave port. Both, however, are maiden journeys, and so we now unveil an improved navigational device to aid in their future voyages.

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97. E. J. Dionne Jr., *The Vice Presidential Debate: Bentsen and Quayle Attack on Question of Competence to Serve in the Presidency*, N.Y. TIMES, Oct. 6, 1988, at A1.

98. Friedman, *supra* note 45, at 824 n.146.

99. *Id.*

100. *See supra* note 93.

101. The Ninth Circuit easily reached this conclusion. The court of appeals "expanded the Certificate of Appealability and requested supplemental briefing on the impact of *Blakely*." *See* Burton v. Waddington, 142 F. App'x 297, 299 (9th Cir. 2005). The court of appeals subsequently held that *Blakely* "established a new rule that does not apply retroactively on collateral review." *Id.*

1. The "Line of Cases" Approach

Whenever retroactivity is considered under *Teague*, there is an inherent conflict in the Court's reasoning that has been repeatedly ignored. Those who wish to deny retroactivity must be capable of saying that the rule is not "*dictated* by precedent existing at the time the defendant's conviction became final."[102] Otherwise, the rule is old and retroactive.[103] At the same time, they must convincingly argue that this "new" rule does not "'alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.'"[104] In other words, the Court must eschew obviousness to satisfy the need for newness, while at the same time acknowledging obviousness to avoid "watershedness."[105]

Adopting a "line of cases" approach would help reconcile this tension. The proposal is premised on the old adage that a whole is often greater than the sum of its parts. *Crawford* and *Blakely* on their own may not be watershed, but when coupled with the cases that have and will continue to follow, watershed status can and should be anointed. Not only would they be watershed, but cases that are part of their own line of cases establish rules that are unequivocally new and not "*dictated* by precedent."

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102. Teague v. Lane, 489 U.S. 288, 301 (1989).

103. *See id.*

104. Tyler v. Cain, 533 U.S. 656, 665 (2001) (emphasis omitted) (quoting *Teague*, 489 U.S. at 311).

105. The struggle between newness and "watershedness" is apparent in *Whorton*. There, Justice Alito gave the impression that declaring *Crawford* "new" was a rather easy call. He stated: "[I]t is clear that *Crawford* announced a new rule. . . . The *Crawford* rule is flatly inconsistent with the prior governing precedent, *Roberts*, which *Crawford* overruled." Whorton v. Bockting, 127 S. Ct. 1173, 1181 (2007). But then, for the sake of assuring that *Crawford* "is in no way comparable to the *Gideon* rule," he was quick to remind that "*Crawford* overruled *Roberts* because *Roberts* was inconsistent with the original understanding of the Confrontation Clause. . . . Indeed, in *Crawford* we recognized that even under the *Roberts* rule, this Court had never specifically approved the introduction of testimonial hearsay statements." *Id.* at 1182-83. The latter portion – Justice Alito's "*Crawford* is no *Gideon*" argument – gives the impression that *Roberts* was merely a misstep that intervened during the time in between when the rule was established by the Framers and then reestablished by the *Crawford* Court. Applying that reasoning, *Crawford* is not a new rule, but a rule as old as the Constitution itself. *Roberts*, on the other hand, was in a sense new, and for that reason was deservedly overruled.

2. The *Crawford* and *Blakely* Lines of Cases

Under this approach – setting aside for the moment any argument that *Crawford* is tantamount to *Gideon*[106] – the Court was correct to hold that *Crawford* was not retroactive, because *Crawford* was merely first in the line. But since *Crawford*, a new body of Confrontation Clause case law has emerged, and as a result the line has grown longer.[107] In 2006, the Court took up its first post-*Crawford* case – *Davis v. Washington*[108] (paired with *Hammon v. Indiana*) – in an attempt to refine its recently adopted test. Both *Davis* and *Hammon* involved domestic violence, a type of crime that is "notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial,"[109] and thus a category of cases dramatically affected by *Crawford*.[110] *Davis* involved statements made by a victim during a 911 call, while *Hammon* involved a police officer interview at the victim's and defendant's home.[111] Although *Crawford* established the rule regarding the admissibility of "testimonial" statements, the Court there "declined to comprehensively define the operative term 'testimonial.'"[112] *Davis* did, however, and chose to find statements "testimonial" when they "are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination."[113] Applying this standard, the *Davis* 911 call was nontestimonial and admissible, while the *Hammon* interrogation was testimonial and inadmissible.[114] *Davis*,[115] therefore, represents case number two in the

106. *See* discussion *supra* Part III.B.

107. For up-to-the-minute reports on Confrontation Clause jurisprudence, see The Confrontation Blog, http://www.confrontationright.blogspot.com/ (last visited Jan. 25, 2009) ("This blog is devoted to reporting and commenting on developments related to *Crawford v. Washington*. *Crawford* transformed the doctrine of the Confrontation Clause, but it left many open questions that are, and will continue to be, the subject of a great deal of litigation and academic commentary." (citation omitted)).

108. 547 U.S. 813 (2006).

109. *Id.* at 832-33.

110. *See* JESSICA SMITH, EMERGING ISSUES IN CONFRONTATION LITIGATION: A SUPPLEMENT TO *CRAWFORD V. WASHINGTON*: CONFRONTATION ONE YEAR LATER 2 (2007) [hereinafter SMITH SUPPLEMENT].

111. *Davis*, 547 U.S. at 817-21.

112. *See* SMITH SUPPLEMENT, *supra* note 110, at 1.

113. *Davis*, 547 U.S. at 830. Aside from considering whether such statements are akin to live witness testimony, the case can also be viewed in terms of whether the statements are the equivalent of affidavits. *See* Akhil Reed Amar, *The Rookie Year of the Roberts Court & a Look Ahead: Criminal Justice*, 34 PEPP. L. REV. 522, 528 (2007) (rephrasing the inquiry to instead ask "[i]s that like an affidavit or not?").

114. *Davis*, 547 U.S. at 829-30.

115. The case should still be referred to as *Davis*, even though it is the *Hammon* portion of the opinion that serves our immediate interests.

Crawford line of cases.[116] Cases three and four, meanwhile, cannot be far behind. The *Davis* Court specifically refused "to produce an exhaustive classification of all conceivable statements – or even all conceivable statements in response to police interrogation – as either testimonial or nontestimonial."[117]

It is certainly noteworthy that the *Davis* Court was contemporaneous with the first year of the Roberts Court – a Court guided by a Chief Justice who seeks only incremental change. "[I]t is the conscious desire on the part of [Chief Justice] Roberts to issue rulings on the narrowest possible ground."[118] This Court's commitment to narrowness means that we are unlikely to ever see a revolutionary Warren Court style holding like a *Gideon* (or a *Mapp* or a *Miranda*), which in turn augurs ill for the watershed rule exception ever being satisfied under the current regime. That is a rather disconcerting aspect of what many would consider an otherwise sound judicial philosophy being implemented by the Chief Justice. Standards ought to have meaning, and the one being applied here is sorely lacking any teeth – or at least workable molars – due to its insurmountable nature. One can argue that it would be far more intellectually honest for the Court to abandon *Teague*'s unutilized exceptions and simply turn the case's main holding into a black-letter rule of law. This author, however, recognizes the value in the Court retaining a shred of discretion in the form of these ineffectual exceptions, to be relied upon on those rarest of occasions – that the Court has announced are "unlikely . . . to emerge."[119] This is nothing new, as the Court in the past has similarly chosen to keep its options open. Consider those cases that have challenged economic regulatory legislation under the Due Process Clause. Even though it has been seventy years since the Court last invalidated such a statute,[120] the Justices remain steadfast in their application of a rational basis

116. *Davis*, standing on its own, would meet the same uphill battle as *Blakely*. While it appears on its face to be a minor refinement of *Crawford*, the Court would likely treat each refinement as its own new rule.

117. *Davis*, 547 U.S. at 822.

118. Douglas W. Kmiec, *Overview of the Term: The Rule of Law & Roberts's Revolution of Restraint*, 34 PEPP. L. REV. 495, 516 (2007). Professor Kmiec adds: "[Chief Justice Roberts] said in a University speech that if it was not necessary to decide, it was not necessary to decide and he would not reach out for it." *Id.* (citing *Chief Justice Says His Goal is More Consensus on Court*, N.Y. TIMES, May 22, 2006, at A16).

119. Teague v. Lane, 489 U.S. 288, 313 (1989).

120. After years of refusing to do so, the Court finally struck down a state statute on due process grounds in *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), when it invalidated a law prohibiting the purchase of insurance for Louisiana property from companies not licensed in Louisiana. This was followed shortly thereafter by *Lochner v. New York*, 198 U.S. 45 (1905), where the Court similarly struck down a law limiting the hours a bakery employee could work on a daily and weekly basis. That trend continued until the decision in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), where the Court upheld a state minimum wage law for women. This sudden shift in

standard of review.[121] Again, intellectual honesty begs for a black-letter rule of law upholding all regulations of the sort. Yet the hollow charade goes on with much aplomb, accomplishing exactly the same result – only after full briefings and arguments – on the basis that the regulation at issue bears a rational relationship to legitimate State ends.

In the realm of retroactivity, the Court has the opportunity to avoid the same atrophy that economic legislation's rational basis test has suffered. Augmenting its current standards with the proposed "line of cases" approach allows the Court to honor its concerns, while simultaneously salvaging *Teague* by according it some practical meaning. This is especially vital when it comes to the *Crawford* line, since any subsequent cases will likely answer questions that are so narrow and arguably "*dictated* by precedent" that they will make it more and more difficult for the Court to call them "new" with anything resembling a straight face.[122] At the same time, the rules set forth

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favor of economic regulation was the result of a number of factors, among them a turnover in the Court's makeup, coupled with President Franklin Roosevelt's threat of Court-packing, and the New Deal program which required aggressive government intervention to preserve the nation's economy. *See* Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 FORDHAM L. REV. 459, 459-63 (2001). Since *Parrish*, the Court has consistently upheld all economic regulatory legislation by applying a rational basis standard of review. *See infra* note 121.

121. *See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144 (1938) (upholding a federal prohibition of the interstate shipment of filled milk on rational basis grounds); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955) (applying a rational basis level of review in upholding a state statute that prevented opticians from fitting lenses into eyeglass frames without a prescription); Ferguson v. Skrupa, 372 U.S. 726 (1963) (sustaining on rational basis grounds a Kansas law prohibiting non-lawyers from engaging in debt adjusting); Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 125 (1978) (holding a statute prohibiting producers and refiners from operating retail service stations "bears a reasonable relation to the State's legitimate purpose in controlling the gasoline retail market").

122. The numerous "open issues" that now exist in the wake of *Crawford* have been given full treatment by Professor Jessica Smith. *See* SMITH SUPPLEMENT, *supra* note 110, at 5-28 (focusing heavily, but not exclusively, on North Carolina law). Some examples of unresolved issues raised by Professor Smith include: "What constitutes an emergency and when does an emergency end?"; "How should a trial judge determine the primary purpose of a police interrogation?"; "Who are agents of the police for the purposes of police interrogations?"; "How much formality is required in order for the statement to be testimonial?"; "How should a trial judge evaluate statements that are volunteered to the police?" *Id.* Professor Smith also notes the overabundance of post-*Crawford* (and now post-*Davis*) litigation "focus[ing] on whether the evidence at issue is testimonial or nontestimonial." JESSICA SMITH, *CRAWFORD V. WASHINGTON*: CONFRONTATION ONE YEAR LATER 7 (2005). While *Davis* resolved 911 calls and a specific form of police interrogation, other cases are making their way through the courts that involve "Grand Jury Testimony," "Co-Defendants' and Accomplices' Statements," "Business Records," "Test Reports," "Autopsy Reports,"

by these future cases will be so fact-sensitive and will address such minutiae of the law that the emerging rules would not even warrant consideration for a declaration of watershed status.[123]

Unlike *Crawford*, which initiated its line of cases, *Blakely* fell into a line started by *Apprendi*. *Blakely* now stands smack dab in the middle of that line, otherwise known as the *Apprendi-Blakely-Booker* trilogy.[124] The last of these cases, *United States v. Booker*,[125] took the holdings of the first two and extended them to also apply to the *federal* sentencing guidelines.[126] Here we have a fully formed line of cases that demonstrates precisely why the Court should embrace this reasoning. It again becomes almost comical when one sits back and watches as the Court makes nitpicky distinctions between three nearly identical cases. It is difficult to imagine that there would have even been a *Booker* without a *Blakely* or a *Blakely* without an *Apprendi*, when each case is merely a refinement of its predecessor.

Be that as it may, this approach does not ask the Court to abandon its practice of making such marked distinctions. For all intents and purposes, it is probably simpler to call each refinement a "new rule." What this approach does, however, is suggest that at a certain point the Court should put on the brakes. Somewhere along the "line," the Court should stop for a moment and recognize that these two, three, four, or more newly announced rules amount to something greater – something that in the aggregate is in fact watershed.[127]

"Drug Testing," "Diary Entries," "Excited Utterances," "Wiretap Recordings," et cetera. SMITH, *supra*, at 7-26. Each one of these categories represents a potential ruling by the Court that could ultimately be added to the line of cases.

123. In reality, these cases would be so unanimously agreed upon by the lower courts as failing to qualify for watershed status, that they will likely never even make their way onto the Supreme Court's docket.

124. Some might argue that this trilogy of cases is really a quartet, with *Ring v. Arizona*, 536 U.S. 584 (2002) falling in between *Apprendi* and *Blakely*. *Ring* extended *Apprendi* to cover capital determinations. *Id.* at 589.

125. 543 U.S. 220 (2005).

126. *Id.* at 226-27; *see also* United States v. Cruz, 423 F.3d 1119 (9th Cir. 2005) (per curiam) (joining five other circuits in holding that *Booker* is not a watershed rule).

127. It is important to keep in mind that the Court's reluctance in utilizing the second *Teague* exception comes in some part out of a concern of massive numbers of petitions being filed by convicted criminals, and the disruption that it would cause to the judiciary. *See supra* Part II.B.1 (noting the Court's initial trepidation with regard to retroactivity). The adoption of a "line of cases" approach would appear to create precisely the type of disturbance that the Court is seeking to avoid. A disturbance that Justice Brennan once referred to as "a fear of too much justice." McCleskey v. Kemp, 481 U.S. 279, 339 (Brennan, J., dissenting). In a letter written to President Bush following the decision in *Booker*, the federal judiciary requested an additional $91.3 million in funds "for costs associated" with the holding's "immediate impact on the judiciary's workload." *See* Letter from Leonidas Ralph Mecham, Sec'y, Judicial Conference of the United States, to President George W. Bush (Feb. 17, 2005), *available at* http://www.uscourts.gov/Press_Releases/LtrtothePresident.pdf (last visited

But is it two, three, four, or more? What constitutes a "line of cases?" There is obviously no definitive number. In answering this, however, the Court generally will not have to look further than its own words. It is simply a matter of recognizing that there has been a fundamental shift in the law – and that it has come as a result of more than one case. Once a line of cases has been identified, the Court will then have to determine whether a subsequent case falls into that watershed line, or whether it truly is the primordial case of a new line.

Justice Scalia spoke eloquently in both *Crawford* and *Blakely* on the rights at issue. In the former he stated: "[W]e view this as one of those rare cases in which the result below is so improbable that it reveals a *fundamental* failure on our part to interpret the Constitution in a way that secures its intended constraint on judicial discretion."[128] And in the latter: "That right [to a jury trial] is no mere procedural formality, but a *fundamental* reservation of

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Dec. 31, 2008). Of that total, $60 million was specifically requested for defense counsel services associated with post-*Booker* habeas petitions. *See* FY 2005 Supplemental Requirements of the Judiciary $101.8 Million, http://www.uscourts.gov/Press_Releases/estimate.pdf (last visited Dec. 31, 2008). Perhaps the most sensible way to address these concerns is to invoke the Court's own words and recognize that "'[h]umane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations.'" Rhodes v. Chapman, 452 U.S. 337, 359 (1981) (quoting Jackson v. Bishop, 404 F.2d 571, 580 (8th Cir. 1968)). This sense of justice would seemingly be safeguarded by and balanced against the requirements of AEDPA, which imposes a one year statute of limitations for habeas petitions. 28 U.S.C. § 2255(f)(3) (2000). A concern for petitioners, however, is that the Court has held that the one year begins to accrue "from the date on which the right [the prisoner] asserts was initially recognized by this Court," not the date on which it was made retroactive. Dodd v. United States, 545 U.S. 353, 357, 360 (2005). *Dodd*, therefore, opens a can of worms, as it has created a separate potential roadblock for petitioners seeking retroactive application of any case, let alone a line of cases. Justice Stevens found this to be an "absurd result" and remained convinced that "Congress could not have intended that [(f)(3)] should be read in this manner." *Id.* at 368-69 (Stevens, J., dissenting). The majority, on the other hand, notes: "Although we recognize the potential for harsh results in some cases, we are not free to rewrite the statute that Congress has enacted." *Id.* at 359. What this tells us is that the onus is on Congress to amend the AEDPA to accommodate new rules that apply retroactively. In doing so, Congress can also write into the statute provisions that will facilitate a reduction in the number of petitions. Perhaps this can be accomplished in part with something akin to subsection (h) of § 2255, which prohibits successive petitions unless the prisoner can make an adequate showings to a court of appeals panel. *See* 28 U.S.C. § 2255(h) (2000). If a similar panel had the opportunity to conduct a quick review – with limited briefing – to consider whether or not a constitutional violation had in fact occurred, this could help to greatly reduce the overall number of habeas petitions. Once the panel determines that there was a violation as a result of the new rule's retroactive application, only then would the prisoner be permitted to "burden" a federal district court with a petition.

128. Crawford v. Washington, 541 U.S. 36, 67 (2004) (emphasis added).

power in our constitutional structure."[129] It is clear from these two statements that the Court recognized serious defects in our judicial system as fundamental as those found in *Gideon*. The sentencing guidelines – and the entire body of law surrounding them – were dismantled and rebuilt by the *Apprendi*, *Blakely* and *Booker* Courts, one brick at a time, case by case. Meanwhile, for the *Crawford* line, ground has been broken and a new foundation has been poured. The structures that will stand as a result of both of these lines of cases are watershed edifices.

IV. CONCLUSION

Teague pays little credence to the entirety of the statement of Justice Harlan, on which it bases its watershed rule exception. He wrote in *Mackey* that the alteration of "our understanding of the bedrock procedural elements" is due to those situations where the "*time and growth* in social capacity, as well as judicial perceptions" demand it.[130] A prisoner has nothing but time, and as it keeps on ticking into the future the criminal procedure landscape will develop in a host of unforeseeable ways. With every technological advancement there comes a rapidly evolving area of law,[131] and with it the chance that methods of adjudication once thought reliable will be deemed outdated – but oftentimes at a date later than their fallibility should have been

129. Blakely v. Washington, 542 U.S. 296, 305-06 (2004) (emphasis added). The non-emphasized portion of that statement is no less important, and is extremely relevant to a topic this Article has only briefly addressed – that being the first *Teague* exception. The words "no mere procedural formality" most likely suggest that Justice Scalia finds that this is actually a "major" procedural formality. Nonetheless, it is still susceptible to another interpretation, which is to say that when the time comes, Justice Scalia and others might be willing to call *Blakely* a substantive rule. Recall that under the first *Teague* exception, all substantive rules are applied retroactively on collateral review. *See* Teague v. Lane, 489 U.S. 288, 311 (1989). Granted, the language is only dictum, but perhaps the Justices are willing to be moved in that direction, and are simply looking for the grounds on which it can be done. If so, an argument can be made that adopting the "line of cases" approach would allow for the elevation of individual "procedural" cases to the status of a substantive line of cases that "alters the range of conduct of the class of persons the law punishes." Schriro v. Summerlin, 542 U.S. 348, 353 (2004).

130. Mackey v. United States, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in part and dissenting in part) (emphasis added); *see also Teague*, 489 U.S. at 311.

131. *See generally* Garrett E. Land, *Judicial Assessment of Judicial Notice? An Evaluation of the Admissibility Standards for DNA Evidence and Proposed Solutions to Repress the Current Efforts to Expand Forensic DNA Capabilities*, 9 J. MED. & LAW 95 (2005); Matthew D. Thurlow, *Lights, Camera, Action: Video Cameras as Tools of Justice*, 23 J. MARSHALL J. COMPUTER & INFO. L. 771 (2005); Elan E. Weinreb, Note, *"Counselor, Proceed With Caution": The Use of Integrated Evidence Presentation Systems and Computer-Generated Evidence in the Courtroom*, 23 CARDOZO L. REV. 393 (2001).

declared. This can have a significant impact on the due process rights of many, especially when the antiquated mechanism lacks the strength of a *Gideon*. It is for that reason that the Court should recognize the necessity of banding these cases together to form a line that is mighty enough to wield the same sword as its watershed ancestor.