United States v. Johnson: Reformulating the Retroactivity Doctrine

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UNITED STATES V. JOHNSON: REFORMULATING THE RETROACTIVITY DOCTRINE

The Supreme Court has struggled with the issue of retroactivity since the Court's recognition in Linkletter v. Walker\(^1\) that not all new constitutional rules of procedure will operate retroactively to benefit criminal defendants tried before the new rule is announced. In United States v. Johnson,\(^2\) the Court for the first time reconsidered the Linkletter Court's balancing test for resolving retroactivity questions and adopted a new approach in cases involving the fourth amendment exclusionary rule.\(^3\) The Court in Johnson acknowledged that its application of the traditional test in the years following Linkletter resulted in incompatible decisions and unequal treatment of similarly situated defendants.\(^4\) In an attempt to rectify these problems, the Johnson Court endorsed, in part, the retroactivity approach that Justice Harlan had proposed in prior dissenting opinions.\(^5\)

The Johnson Court, however, neglected to remedy the cause of the problems that plagued the Linkletter rule; it failed to set forth a principled purpose or theory to guide judicial resolution of retroactivity problems. Since the inception of the doctrine, the Justices have been unable to agree on the purposes or policy concerns that should guide the Court's retroactivity analysis. Nor have they concurred on an alternate, jurisprudential rationale for the form of the retroactivity doctrine. The Johnson analysis evidences another compromise among members of the Court who seek a common result for different reasons.\(^6\) As a consequence, the new retroactivity analysis is not only internally inconsistent and doctrinally confusing, it is also of limited utility in forecasting the future course of retroactivity law. Examination of the Johnson decision makes clear only one thing: the Court must come to some explicit agreement on a guiding purpose or rationale for its retroactivity doctrine or it will suffer continued charges of unprincipled decisionmaking and unequal protection.

\(^1\) 381 U.S. 618 (1965).
\(^2\) 457 U.S. 537 (1982).
\(^3\) See infra notes 99-124 and accompanying text.
\(^5\) See Johnson, 457 U.S. at 562; see also infra notes 53-81 and accompanying text (discussing Harlan's retroactivity approach).
\(^6\) See infra notes 61-62 and accompanying text.
I

BACKGROUND

A retroactivity issue arises in the criminal context when the Court lays down a new constitutional procedural rule that overrules or substantially departs from prior precedent. The Court must decide who among three classes of litigants will receive the benefit of the new protection: (1) litigants in past and pending cases; (2) the litigants in the case that established the new rule; and (3) future litigants (litigants whose cases have not yet begun). Courts have resolved the retroactivity issue by applying rules retroactively, nonretroactively, or prospectively. A retroactive ruling applies to all cases before the court; past, present, or future litigants receive the benefit of the new rule. A nonretroactive ruling affects the parties in the rule-changing case, litigants whose cases began before the date of the rule-changing decision but in whose cases the practice or condition found unconstitutional occurred after the rule-changing decision, and future litigants. A prospective ruling applies to

7 Cf. Rossum, New Rights and Old Wrongs: The Supreme Court and the Problem of Retroactivity, 23 Emory L.J. 381, 381 n.2 (1974) ("nonretroactive" operation referred to as "'limited' retroactive effect").

8 This discussion assumes for the sake of clarity that the Court would determine who among past litigants would receive the nonretroactive benefit of a new rule by reference to whether the date of the constitutional violation covered by the new rule occurred before or after the announcement of the new rule. The Court, however, has been inconsistent in determining the cutoff point beyond which new rulings become effective. It has, at various times, employed four different points of departure:

(1) The new rule is denied only to persons whose convictions have become final prior to the date of the new rule's decision. See, e.g., Linkletter v. Walker, 381 U.S. 618 (1965) (holding Mapp v. Ohio, 367 U.S. 643 (1961) (extending fourth amendment exclusionary rule to states) inapplicable to convictions that became final before Mapp was decided); Tehan v. Shott, 382 U.S. 406 (1966) (holding Griffin v. California, 380 U.S. 609 (1965) (prohibiting prosecutor from commenting adversely on defendant's failure to testify) not applicable to judgments final before date Griffin was decided).

(2) The new rule is denied to all persons whose trials began before the date of the new decision, whether or not their convictions have become final. See, e.g., Johnson v. New Jersey, 384 U.S. 719 (1966) (holding Escobedo v. Illinois, 378 U.S. 478 (1964) and Miranda v. Arizona, 384 U.S. 436 (1966) applicable only to cases in which the trial began after the date of Escobedo and Miranda); DeStefano v. Woods, 392 U.S. 631 (1968) (per curiam) (holding rights to trial granted in Bloom v. Illinois, 391 U.S. 194 (1968) and Duncan v. Louisiana, 391 U.S. 145 (1968), applicable only to cases in which the trial began after date of Bloom and Duncan).

(3) The new rule is denied to all persons in whose cases the constitutional violation covered by the new rule occurred before the date of the new decision, whether or not their convictions have become final. See, e.g., United States v. Peltier, 422 U.S. 531 (1975) (holding Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (invalidating warrantless automobile searches conducted by roving border patrol agents without probable cause) applicable only to cases in which search occurred after date of Almeida-Sanchez decision); Stovall v. Denno, 388 U.S. 293 (1967) (holding United States v. Wade, 388 U.S. 218 (1967) and Gilbert v. California, 388 U.S. 263 (1967) (requiring exclusion of identification evidence secured in absence of counsel)
pending cases in which the constitutional violation occurred after the
date of the rule-changing case and to future cases, but not to the par-
ties in the rule-changing case.

In determining the classes of defendants to which a new rule should
apply, courts have traditionally balanced the competing interests of the
litigants and the state, using the factors set out by the Supreme Court in
Linkletter v. Walker.

A. The Linkletter Test

Prior to the decision of Linkletter v. Walker in 1965, the Supreme
Court gave retroactive effect to all constitutional rules of criminal pro-
dure. Any criminal defendant directly appealing a conviction or col-

(4) The new rule is denied to all persons, whether on direct appeal or collaterally attack-
ing a final judgment, in whose cases the illegal evidence was introduced before the date of the
decision that declared it illegal. See, e.g., Desist v. United States, 394 U.S. 244 (1969) (holding
fourth amendment rule of Katz v. United States, 389 U.S. 347 (1967) applicable only to cases
in which prosecution seeks to introduce fruits of electronic surveillance obtained without war-
rant after date of Katz decision); Fuller v. Alaska, 393 U.S. 80 (1968) (holding fourth amend-
ment rule of Lee v. Florida, 392 U.S. 378 (1968) applicable only to cases in which evidence
seized in violation of § 605 of Federal Communications Act was introduced after date of Lee
decision).

Recently, the Court seems to have adopted the most logical cutoff point: the date of the
violation of constitutional rights. See, e.g., United States v. Peltier, 422 U.S. 531 (1975); see
also Beytagh, Ten Years of Non-Retroactivity: A Critique and a Proposal, 61 VA. L. REV. 1557, 1604
(1975).

9 The Supreme Court seldom has granted a case true prospective application by deny-
ing the benefit of the decision to the litigant in the rule-changing case. See infra notes 13, 37
and accompanying text. More frequently, the Court mislabels a holding as prospective when
it is in fact nonretroactive in effect. See, e.g., Desist v. United States, 394 U.S. 244, 256 (1969)
(Douglas, J., dissenting) ("At least the Court should not say as respects Katz that it is given
'wholly prospective application,' when it was made retroactive in his case."); Johnson v. New
Jersey, 384 U.S. 719, 732 (1966) (although Court applied Escobedo and Miranda rules to de-
fendants in those ground-breaking cases, it held new procedural rules "prospective [in] appli-
cation only").

10 For the purposes of simplicity, the discussion is again premised on the Court's use of
the date of the constitutional violation as its reference point. See supra note 8.

11 See generally Beytagh, supra note 8, at 1557; Rossum, supra note 7, at 381 n.2.

12 381 U.S. 618 (1965).

13 See id. at 628 ("It is true that heretofore, without discussion, we have applied new
constitutional rules to cases finalized before the promulgation of the rule."). Although no
majority opinion had addressed the issue prior to Linkletter, individual Justices had suggested
that certain new constitutional holdings be applied prospectively or nonretroactively. See,
e.g., Jackson v. Denno, 378 U.S. 368, 349-40 (1964) (Harlan, J., dissenting); Eskridge v. Wash-
ington Prison Bd., 357 U.S. 214, 216 (1958) (Harlan & Whittaker, JJ., dissenting); Griffin v.
Illinois, 351 U.S. 12, 25-26 (1956) (Frankfurter, J., concurring). For an excellent treatment of

12 381 U.S. 618 (1965).
laterally attacking\textsuperscript{14} a final judgment\textsuperscript{15} was entitled to the benefit of a new constitutional protection.\textsuperscript{16} In \textit{Linkletter}, the Court broke with this
\begin{itemize}
\item the pre-\textit{Linkletter} retroactivity case law, see \textit{Note, Limitation of Judicial Decisions to Prospective Operation, 46 Iowa L. Rev. 600} (1960-61) [hereinafter cited as \textit{Note, Limitation}]; \textit{Note, Prospective Overruling and Retroactive Application in the Federal Courts, 71 Yale L.J.} 907 (1962) [hereinafter cited as \textit{Note, Prospective Overruling}].
\item Professor Mishkin contends that the Court's per se retroactivity doctrine stemmed from the declaratory theory of jurisprudence. \textit{"[W]hatever the Court now holds to be the law of the Constitution becomes 'what has always been the law'—even if the new holding overrules an earlier decision of the Court."} Mishkin, \textit{The Supreme Court 1964 Term—Foreword: The High Court, The Great Writ, and The Due Process of Time and Law, 79 Harv. L. Rev.} 56, 57 (1965). The theory's initial premise is that the law exists independently of judicial decisions. Thus, a court's function is to "discover" this absolute law and once it has been found, to maintain and expand the old law, not to pronounce new law. 1 W. Blackstone, \textit{Commentaries} bk. I *69-70 (W. Hammond ed. 1890). When precedent is overruled, "it is declared, not that such a sentence was bad law, but that it was not law." \textit{Id.} at *70 (emphasis in original). The declaratory theory therefore compels retroactive operation for all judicial decisions. This theory prevailed in the United States where it was generally assumed that all judicial decisions operated retroactively. \textit{See, e.g.,} Norton v. Shelby County, 118 U.S. 425 (1886). For a fuller discussion of this theory as it relates to retroactivity, see Levy, \textit{Realist Jurisprudence and Prospective Overruling, 109 U. Pa. L. Rev. 1} (1960); Mishkin, supra, at 57-59; Rossum, supra note 7, at 381-98; \textit{Note, Prospective Overruling, supra} at 907-15.
\item Even before the Supreme Court repudiated this declaratory theory in \textit{Linkletter}, courts had been making exceptions to the general rule of retroactivity in nonconstitutional cases where "the plainest principles of justice" demanded prospectivity. Note, \textit{Limitation, supra} at 603 n.16. Courts primarily limited decisions invalidating state statutes or overruling established common law doctrines to prospective application to avoid damaging those who had justifiably relied on prior authority. \textit{See, e.g.,} Gelpeke v. City of Dubuque, 68 U.S. (1 Wall.) 175 (1863) (issue of municipal bonds, valid under judicial decisions existing when issued, remained valid after those judicial decisions were overruled); State v. Jones, 44 N.M. 623, 107 P.2d 324 (1940) (conduct formerly determined innocent held criminal but decision prospective in effect); Bingham v. Miller, 17 Ohio 445 (1948) (divorces, valid when granted by legislature, remained valid after court found that legislature had no power to grant them). The Supreme Court upheld a state court's power to prospectively overrule prior decisions, stating that the "federal constitution has no voice upon the subject." \textit{Great N. Ry. v. Sunburst Ref. Co., 287 U.S. 358, 364} (1932).
\end{itemize}
\textsuperscript{14} Defendants may petition the Court to reverse their convictions, citing newly recognized constitutional requirements, either by seeking direct review of their nonfinal judgments (appeal or certiorari) or by collaterally attacking their final judgments (habeas corpus or motion to vacate judgment). Because the different avenues of collateral attack available to state and federal prisoners are virtually identical (a state prisoner's habeas action under 28 U.S.C. § 2241 (1976) and a federal prisoner's motion to vacate judgment under 28 U.S.C. § 2255 (1976)), this Note will refer to both as habeas corpus. \textit{See Mackey v. United States, 401 U.S. 667, 681} (1971) (Harlan, J., dissenting); Hill v. United States, 368 U.S. 424 (1962).
\textsuperscript{15} A judgment is final when a conviction is rendered, the availability of appeal is exhausted, and the time for petition for certiorari has elapsed. \textit{See United States v. Johnson, 457 U.S. 537, 542 n.8} (1982) (quoting \textit{Linkletter v. Walker, 381 U.S. 618, 622 n.5} (1965)).
\textsuperscript{16} This Note is concerned with the retroactivity issue as it almost always arises—in the context of decisions expanding constitutional rights. Courts, however, have considered the issue in connection with new rules that narrow previously recognized fourth amendment rights. Because retroactive treatment of such cases does not conflict with the deterrent purpose of the fourth amendment exclusionary rule or the integrity of the fact-finding process, these deci-
tradition by holding the exclusionary rule of *Mapp v. Ohio* inapplicable to convictions that had become final before the date of the *Mapp* decision. The *Linkletter* Court declared that "the Constitution neither prohibits nor requires retrospective effect" for new constitutional rules. It then concluded that in each case, a court must resolve the temporal conflict of law question by considering three factors: (1) the new rule's intended purpose and the efficacy of retroactive application of the rule in furthering that purpose (the "purpose factor"), (2) the extent of relations have generally received retroactive effect. Even though an officer in such cases acts in violation of a rule that the Court had not yet abandoned, "to suppress [the fruits of the violation] in the name of deterrence would make sense only if there was some reason to believe that otherwise police might violate other Supreme Court decisions in the expectation that the Court would abandon them." 3 W. LAFAVE, SEARCH AND SEIZURE 11.5(d) (1978); see, e.g., Maine v. Patten, 457 U.S. 1114 (1982) (vacating judgment of Supreme Judicial Court of Maine based on portion of *Robbins v. California*, 453 U.S. 420 (1981), overruled in United States v. Ross, 456 U.S. 919 (1982), and remanding for consideration in light of *Ross*); United States v. Martin, 690 F.2d 416, 421 n.4 (4th Cir. 1982) (applying *Ross* retroactively stating: "Generally, we must apply a Supreme Court decision construing the Fourth Amendment retroactively to all convictions that were not yet final when the decision was rendered."); Stocker v. Hutto, 547 F.2d 437 (5th Cir. 1977) (applying retroactively Stone v. Powell, 428 U.S. 465 (1976)); Taylor v. Arizona, 471 F.2d 848 (9th Cir.) (applying retroactively *Warden v. Hayden*, 387 U.S. 294 (1967) (rejecting "mere evidence" rule of *Gouled v. United States*, 255 U.S. 298 (1921))), cert. denied, 409 U.S. 1130 (1972); cf. Stone v. Powell, 428 U.S. 465, 495 n.38 (1976) (denying prospective effect to holding that federal courts are not constitutionally required to apply exclusionary rule on habeas review of fourth amendment claim if state prisoner had full and fair opportunity to litigate fourth amendment claim on direct review).


18 In *Linkletter*, the petitioner sought federal habeas corpus relief from a state conviction based on unconstitutionally seized evidence. *Linkletter* claimed that *Mapp*, which extended the fourth amendment exclusionary rule to the states, operated to nullify his conviction. Although the Court had already applied the *Mapp* rule to cases on direct review in which the evidence had been illegally seized before the date of the *Mapp* decision, see *Stoner v. California*, 376 U.S. 483 (1964); *Fahy v. Connecticut*, 375 U.S. 85 (1963); *Ker v. California*, 374 U.S. 23 (1963), it declined to apply the new rule to *Linkletter's* claim because his conviction had become final before *Mapp* was decided. *Linkletter*, 381 U.S. at 622.

19 381 U.S. at 629.

20 Id. at 636. In *Linkletter*, the Court found that the prime purpose of the *Mapp* exclusionary rule, deterrence of illegal police actions, would not be advanced by making the rule retroactive. The Court stated that "[t]he misconduct of the police prior to *Mapp* has already occurred and will not be corrected by releasing the prisoners involved. . . . [T]he ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late." *Linkletter*, 318 U.S. at 637.

Justice Black, in dissent, objected to the Court's characterization of the *Mapp* rule as "a mere punishing rod to be applied to law enforcement officers." *Linkletter*, 381 U.S. at 649 (Black, J., dissenting). Black charged that in denying that the rule conferred on *Mapp* a right to be free of unconstitutional searches, the Court was departing from prior precedent and impermissibly engaging in legislation. Id. at 649; see also Currier, *Time and Change in Judge-Made Law: Prospective Ovrruling*, 51 VA. L. REV. 201, 268 (1965).

The Court has since made clear, however, that "the exclusionary rule is a judicially
B. Post-Linkletter Application of the Linkletter Test

In the cases following Linkletter, the Court's retroactivity analysis focused primarily on the purpose factor, which represented the interests of individual litigants seeking the benefit of a new decision. In making its purpose inquiry, the Court weighed the degree to which the new rule was designed to ensure "the fairness of the trial—the very integrity of the fact-finding process." The Court generally gave retroactive effect to new constitutional rules aimed principally at eliminating conduct or conditions that "substantially" impaired a trial's truth-finding function and thereby raised questions about the accuracy of guilty verdicts in past trials.24

21 Linkletter v. Walker, 381 U.S. 618, 636 (1965). The Court has not been clear in setting forth what kind of reliance it deems sufficient to tip the scales toward retroactivity. Some cases distinguish between reliance upon a previous decision that the Court has consistently upheld and less justified reliance upon decisions that the Court has continually weakened so that the later, overruling decision was "foreshadowed." See id. at 637; see also Tehan v. Shott, 382 U.S. 406, 417 (1966). Later cases, however, found justifiable reliance based only upon the previous refusal of the Court to condemn certain police practices, see, e.g., Johnson v. New Jersey, 384 U.S. 719 (1966), and reliance upon a previous decision clearly eroded by subsequent holdings, see, e.g., Desist v. United States, 394 U.S. 244 (1969). See generally Comment, supra note 8, at 204-05.

22 Linkletter, 381 U.S. at 636. Among the considerations that the Court weighed in evaluating the effect factor were: the possibility that hearings would be required on evidence that has been lost or destroyed; the staleness of the evidence and the unavailability of witnesses; the number of convictions that would have to be nullified; and the burden that retrials would place on the court calendar. Id. at 637; see Tehan v. Shott, 382 U.S. 406, 418-19 (1966); Johnson v. New Jersey, 384 U.S. 719, 731 (1966).

23 Linkletter v. Walker, 381 U.S. 618, 628 n.13, 639 & n.20 (1965). The Linkletter Court used this purpose inquiry to justify earlier cases in which new constitutional rules of criminal procedure had been applied retroactively, purportedly because their purpose was to ensure the reliability of the verdict. See, e.g., Gideon v. Wainwright, 372 U.S. 335 (1963) (denial of right to counsel); Griffin v. Illinois, 351 U.S. 12 (1956) (denial of full appeal). However, because the Court had never debated the issue before Linkletter, see supra note 13, the Court had not originally predicated the retroactivity of these holdings on a purpose determination. This language from Linkletter has become the standard for the balancing test's purpose factor.

The Court phrased the standard in a variety of ways. See, e.g., Brown v. Louisiana, 447 U.S. 323, 329 n.6 (1980).

24 See Williams v. United States, 401 U.S. 646, 653 (1971) (plurality opinion) ("Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted prac-
The Court stated that courts should weigh heavily the state's interest, embodied in the reliance\(^2^5\) and effect\(^2^6\) factors, only when the new practices nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances.\(^\text{25}\). The Court in Williams denied retroactive operation to its decision in Chimel v. California, 395 U.S. 752 (1969), because the Chimel rule, which narrowed the scope of permissible searches incident to arrest, was not primarily directed at ensuring the reliability of the evidence seized. See also Berger v. California, 393 U.S. 314 (1969) (per curiam) (giving retroactive effect to Barber v. Page, 390 U.S. 719 (1966)); Arsenault v. Massachusetts, 393 U.S. 5 (1968) (per curiam) (giving retroactive effect to right to counsel provided in White v. Maryland, 373 U.S. 59 (1963)); McConnell v. Rhay, 393 U.S. 2 (1968) (per curiam) (giving retroactive effect to right to counsel provided in Mempa v. Rhay, 389 U.S. 128 (1967)); Roberts v. Russell, 392 U.S. 293 (1968) (per curiam) (giving retroactive effect to Bruton v. United States, 391 U.S. 123 (1968)).

The Court, however, has also found nonretroactive rules that it acknowledged to be aimed in part at preserving the reliability of the truth-finding process. See, e.g., Johnson v. New Jersey, 384 U.S. 719, 730 (1966) (Escobedo v. Illinois, 378 U.S. 478 (1964), and Miranda v. Arizona, 384 U.S. 435 (1966), "guard against the possibility of unreliable statements in every instance of in-custody interrogation" but were denied retroactive effect); Stovall v. Denno, 388 U.S. 293, 298 (1967) ("Although the [United States v. Wade, 388 U.S. 218 (1967), and Gilbert v. California, 388 U.S. 263 (1967),] rules also are aimed at avoiding unfairness at the trial by enhancing the reliability of the fact-finding process in the area of identification evidence." Court held those rules nonretroactive). See generally Hasler, supra note 8, at 8-11.

The Court has attempted to reconcile these cases, stating:

> [W]e have recognized that the extent to which the purpose of a new constitutional rule requires its retroactive application "is necessarily one of degree."

\(\ldots\) Constitutional protections are frequently fashioned to serve multiple ends; while a new standard may marginally implicate the reliability and integrity of the fact finding process, it may have been designed primarily to foster other, equally fundamental values in our system of jurisprudence.\(\ldots\)

In short, "[t]he extent to which a condemned practice infects the integrity of the truth-determining process at trial is a 'question of probabilities.'" Stovall v. Denno, 388 U.S. 293, 298 (1967) (quoting Johnson v. New Jersey, 384 U.S. 719, 729 (1966)).

\(^2^5\) See supra note 21. The most common justification for denying retroactive effect to new decisions is that retroactivity might harm those who justifiably relied on prior precedents. See Note, Limitation, supra note 13, at 601. Commentators argue, however, that in the context of new rules of criminal procedure, the reliance factor should not be considered because it is not clear exactly who would be harmed by complete retroactivity. As one commentator noted:

> [I]t is fair to ask, what injury will result from disregard of reliance? Judges and law enforcement officers may be frustrated and miffed, but certainly not injured nor punished for their misplaced reliance.\(\ldots\) Societal interests in protecting innocent citizens from "dangerous men" may be affected, but once again, might not more serious evils result from the society's disregard for liberty and equality and the dictates of its own laws?

Rossum, supra note 7, at 398-99; see also Schwartz, Retroactivity, Reliability and Due Process: A Reply to Professor Mishkin, 33 U. CHI. L. REV. 719, 756 (1966).

Critics also argue that a state's reliance on previous doctrines should never be a sufficient reason for keeping in jail prisoners who were convicted because of the lawless conduct of state officials. See Linkletter v. Walker, 381 U.S. 618, 652 (1965) (Black, J., dissenting); Mishkin, supra note 13, at 73. This argument is compelling on the facts of Linkletter, where police officers knew that the practice was proscribed but relied upon pre-Mapp precedent that state convictions would not be reversed because the evidence obtained in violation of the constitution was used at trial. The state's reliance on the pre-Mapp inapplicability of the exclusionary rule to the states was justified, but it is scarcely a compelling reason to find that Linkletter,
rule would not substantially affect the reliability of the verdict and when retroactive application was unnecessary to further the rule's intended purpose. The inconsistent body of retroactivity case law, however, indicates that the Court applied this formula at best unevenly.

Indeed, the Court seemed to accord new constitutional rules a presumption of nonretroactivity, particularly in the fourth amendment area, unless the purpose factor unequivocally required retroactive application of the rule. Dissenting Justices and commentators repeatedly criticized the Court's inconsistent application of the Linkletter factors. They

whose constitutional rights were knowingly violated, cannot retroactively challenge his conviction. See Mishkin, supra note 13, at 73. But see Rossum, supra note 7, at 399 (defending use of reliance factor as "respectable and necessary," although easily misused).

26 See supra note 22. Dissenting Justices and commentators have objected to consideration of the effect on judicial administration because it goes against basic principles for the Court to allow "mere expense and inconvenience... to prevail over personal liberty." Torcia & King, The Mirage of Retroactivity and Changing Constitutional Concepts, 66 DICK. L. REV. 269, 287 (1962); see Mallamud, Prospective Limitation and the Rights of the Accused, 56 IOWA L. REV. 321, 347 (1970); Mishkin, supra note 13, at 73. But see Rossum, supra note 7, at 399 (arguing that where new rule does not affect reliability of verdict, retroactivity may impair state's ability to reconvict guilty and handicap development of constitutional law by over-taxing limited resources of judges, attorneys, and policemen).


28 Although the Court clearly indicated that if the purpose factor mandated retroactivity, the reliance and effect factors would not be considered, see, e.g., Williams v. United States, 401 U.S. 646, 653 (1971); Desist v. United States, 394 U.S. 244 (1969), it has allowed these latter two factors to outweigh the purpose factor, see, e.g., DeStefano v. Woods, 392 U.S. 631 (1968); Stovall v. Denno, 388 U.S. 293 (1967); Johnson v. New Jersey, 384 U.S. 719 (1966); see also supra note 24. More often, the Court simply has stated, without analysis, its conclusion that all three factors point toward nonretroactivity, see, e.g., Michigan v. Payne, 412 U.S. 47 (1973) (holding nonretroactive North Carolina v. Pearce, 395 U.S. 711 (1969) (due process limitations imposed to guard against vindictiveness in resentencing after retrial)); Adams v. Illinois, 405 U.S. 278 (1972) (holding nonretroactive Coleman v. Alabama, 399 U.S. 1 (1970) (preliminary hearing is critical stage of criminal process at which accused is constitutionally entitled to assistance of counsel)), or that the purpose factor requires that the new rule receive retroactive application, see, e.g., Roberts v. Russell, 392 U.S. 293 (1968); Ivan v. City of New York, 407 U.S. 203 (1972) (per curiam) (holding retroactive In re Winship, 397 U.S. 358 (1970) (proof beyond reasonable doubt is essential to due process when juvenile tried for act that would be criminal if committed by adult)).


30 See Beytagh, supra note 8, at 1604-05 ("The Court has also been criticized for inconsistent application of its stated criteria... This criticism appears to be justified. The Court has never provided the lower courts or practitioners with a thoughtful evaluation of the relative significance of the criteria."); Rossum, supra note 7, at 402-03 ("[T]he Court has deviated from its announced and avowed criteria. Despite continued verbal obeisance to them, it has in practice broken free of their restraints."); see also United States v. Johnson, 457 U.S. 537, 544 (1982); Michigan v. Payne, 412 U.S. 47, 61-63 (1973) (Marshall, J., dissenting); infra notes 61-63 and accompanying text (Justice Harlan's views). But see United States v. Johnson, 457
called for a formula for weighing the factors that the Court would adhere to in practice as well as in theory.\(^{31}\)

The Court in \textit{Linkletter} used the procedural posture of the litigant to determine who among past litigants would be in the nonretroactive class benefiting from the new rule.\(^{32}\) Having applied the \textit{Mapp} rule prior to \textit{Linkletter} in cases on direct review in which evidence had been illegally seized before the date of the \textit{Mapp} decision, the Court continued to allow litigants in these cases the benefit of \textit{Mapp} without restriction.\(^{33}\) It declined to apply the new rule to Linkletter’s claim, however, because he was collaterally attacking a conviction that had become final before \textit{Mapp} was decided.\(^{34}\) The Court in later cases discarded this distinction between persons whose convictions were final and those whose convic-

\(\text{U.S. 537, 566-67 (1982) (White, J., dissenting) (finding Court’s doctrine clearly and consistently applied).}\)

Professor Beytagh attributes much of this difficulty to the “erratic procedural way in which the Court has handled retroactivity/prospectivity questions.” \textit{Beytagh, supra} note 8, 1605, 1617-25; \textit{see also infra} note 31. Professor Hasler, however, attributes the inconsistencies to the Court’s failure to be frank about the actual purpose of the doctrine, which is to facilitate change in the rules of criminal procedure. \textit{See Hasler, supra} note 8, at 6.


\(\text{31 Commentators also take issue with the way in which the Court accepts and announces retroactivity cases. As Professor Beytagh explains:}\)

Sometimes the Court has given plenary consideration to the question in a case coming to it some time after the law-changing decision. \textit{[See, e.g., Tehan v. Shott, 382 U.S. 406 (1966); Linkletter v. Walker, 381 U.S. 618 (1965).]} Sometimes it has decided the matter in summary fashion, without briefing or argument, and has written only a cryptic per curiam opinion that often hides as much as it discloses about the Court’s reasoning. \textit{[See, e.g., Mack v. Oklahoma, 103 S. Ct. 201 (1982); Roberts v. Russell, 392 U.S. 293 (1968).]} At other times the Court has announced its resolution of the retroactivity/prospectivity question in the very case announcing the new constitutional rule, but often in an equally summary manner. \textit{[See, e.g., Morrissey v. Brewer, 408 U.S. 471 (1972).]} \textit{Beytagh, supra} note 8, at 1605 (footnotes omitted).

Professor Beytagh advocates that the Court formally adopt a new procedural mechanism for dealing with the retroactivity question. \textit{Id. at 1619-25; see also Hasler, supra} note 8, at 20, 20-23 ("The methods by which the retroactivity decisions are selected for review [and announced] foster further uncertainties [sic].").

\(\text{32 \textit{Linkletter v. Walker, 381 U.S. 618, 622 (1965); see supra} notes 8, 18. The Court maintained this distinction in Tehan v. Shott, 382 U.S. 406 (1966).}\)

\(\text{33 \textit{See supra} note 18.}\)

\(\text{34 \textit{See Linkletter v. Walker, 381 U.S. 618, 622 (1965).}}\)
tions were at various stages of trial and direct review. It expanded the class of persons excluded from the nonretroactive benefit of a rule to include litigants on direct appeal in whose cases the constitutional violation occurred before the date of the new decision as well as litigants seeking to collaterally attack judgments that had become final before the date of the new decision.

Although the Supreme Court extended the scope of nonretroactivity in post-Linkletter cases to permissibly exclude persons on direct appeal from a new rule’s protection, it refused to exclude the litigant in the rule-changing case. Thus, although willing to expand the nonretroactivity of new rules, the Court was unwilling to make them purely prospective in application. The Court recognized the inequality of allowing the defendant in the rule-changing case to benefit from the new rule while denying the rule’s protection to other similarly situated defendants who were not fortunate enough to be selected as the vehicles for announcement of the new rule. The Court justified this doctrine and its attendant inequality as an unavoidable consequence of the article III requirement that the Court resolve “actual cases and controversies” so that “constitutional adjudications not stand as mere dictum.”

35 “We... conclude that... no distinction is justified between convictions now final, as in the instant case, and convictions at various stages of trial and direct review.” Stovall v. Denno, 388 U.S. 293, 300 (1967).
37 See supra note 9 and accompanying text. But see Morrissey v. Brewer, 408 U.S. 471, 490 (1972) (establishing basic requirements applicable only to “future revocations of parole”).
38 As Justice Douglas explained in Desist v. United States, 394 U.S. 244 (1969):
The most notorious example is Miranda v. Arizona, 384 U.S. 436, where, as I recall, some 80 cases were presented raising the same question. We took four of them and held the rest and then disposed of each of the four, applying the new procedural rule retroactively [to them]. But as respects the rest of the pending cases we denied any relief [in Johnson v. New Jersey, 384 U.S. 719 (1966)].
Id. at 255-56 (Douglas, J., dissenting).
39 Stovall v. Denno, 388 U.S. 293, 301 (1967); see also Desist v. United States, 394 U.S. 244, 254-55 n.24 (1969). The Court reasoned that if the overruling decision is prospectively applied, the overruling language is mere dicta. Furthermore, the decision may be interpreted as an advisory opinion, forbidden the Court by article III of the Constitution.

Critics discount the validity of the article III argument. Justice Douglas, dissenting in Desist, rejected the majority’s constitutional argument, stating that “[w]here the spirit is strong, there has heretofore been no impediment to producing only dictum through a ‘case or controversy.’ Indeed that tradition started with Marbury v. Madison, 1 Cranch 137.” 394 U.S. at 256 (Douglas, J., dissenting); see also Beytagh, supra note 8, at 1614-17; Currier, supra note 20, at 216-18; Levy, supra note 13, at 15 n.48; Mallamud, supra note 26, at 331-35. But see Note, Prospective Overruling, supra note 13, at 930-36, 951 (endorsing nonretroactivity). Com-
It regarded the inequality of treatment as "an insignificant cost for adherence to sound principles of decision-making." The Court also noted that prospective application of new standards might dim the incentive of counsel to raise issues requiring a change in the law. Dissenting Justices and commentators, however, remained troubled by the disparate treatment of similarly situated defendants and unconvinced by the Court's justifications.

As its retroactivity doctrine evolved, the Court recognized two categories of cases in which the Linkletter analysis was "simply not appropriate." To distinguish cases in the first category, the Court implicitly at first, and then explicitly, commenced its retroactivity analysis...
with a threshold inquiry: whether the rule sought to be applied in the case was a "clear break with the past." If the Court determined that a rule did constitute a "clear break" with past decisions, it went on to decide the retroactivity issue by balancing the Linkletter purpose, reliance, and effect factors. If the rule resulted from the Court's application of settled principles in a new factual context, however, no retroactivity issue existed because application of the preexisting principles and retroactive operation of the "new" rule would ideally yield the same result. Therefore, when a decision did not overrule or significantly change prior precedents, the Court accorded it retroactive operation.

States, 394 U.S. 244 (1969), the Supreme Court implicitly required that the test be satisfied. See, e.g., Linkletter, 381 U.S. at 619 n.1 ("Although Mapp, may not be considered an overruling decision . . . its effect certainly was to change existing law with regard to enforcement of the [search and seizure provisions of the fourth amendment]."). See generally United States v. Peltier, 422 U.S. 531, 547 & n.5 (1975) (Brennan, J., dissenting).

The Desist decision illustrates the difficulty of ascertaining what constitutes a "clear break with the past." In Desist, the Court held Katz v. United States, 389 U.S. 347 (1967), applicable only to cases in which the surveillance made illegal in Katz was conducted after the date of that decision. In Katz, the Court had overruled Goldman v. United States, 316 U.S. 129 (1942) and Olmstead v. United States, 277 U.S. 438 (1928), in holding that electronic eavesdropping upon a private conversation is a search or seizure requiring a warrant. The Desist Court recognized that the overruled decisions had been modified by the Court and generally discredited but concluded that "however clearly our holding in Katz may have been foreshadowed, it was a clear break with the past, and we are thus compelled to decide whether its application should be limited to the future." Desist, 394 U.S. at 248. Justice Fortas dissented, emphasizing that "the ruling at issue is neither novel nor unanticipated." Id. at 271 (Fortas, J., dissenting); see also id. at 255 (Douglas, J., dissenting) (Katz represented "variation[n] of old constitutional doctrine").

Desist v. United States, 394 U.S. 244, 248 (1969). The "clear break" test has been phrased in a variety of ways. See infra note 49; see also Note, A La Recherche Du Temps Perdu: Retroactivity and the Exclusionary Rule, 54 N.Y.U. L. Rev. 84, 86 n.7 (1979).

In general, the Court has not subsequently read a decision to work a 'sharp break in the web of the law,' Milton v. Wainwright, 407 U.S. 371, 381, n.2 (1972) (Stewart, J., dissenting) unless that ruling caused 'such an abrupt and fundamental shift in doctrine as to constitute an entirely new rule which in effect replaced an older one,' Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 498 (1968). Such a break has been recognized only when a decision explicitly overrules a past precedent of this Court, see, e.g., Desist v. United States, 394 U.S. 244 (1969); Williams v. United States, 401 U.S. 646 (1971), or disapproves a practice this Court arguably has sanctioned in prior cases, see, e.g., Gosa v. Mayden, 413 U.S., at 673 (plurality opinion); Adams v. Illinois, 405 U.S., at 283; Johnson v. New Jersey, 384 U.S., at 731, or overturns a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved. See, e.g., Gosa v. Mayden, 413 U.S., at 673 (plurality opinion) (applying nonretroactively a decision that "effected a decisional change in attitude that had prevailed for many decades"); Stovall v. Denno, 388 U.S., at 299-300. See also Chevron Oil Co. v. Huson, 404 U.S. 97, 107 (1971); Cipriano v. City of Houma, 395 U.S. 701 (1969); Milton v. Wainwright, 407 U.S., at 381-382, n.2
without recourse to the Linkletter analysis.\textsuperscript{50}

The second category of cases, in which the Linkletter test was similarly inapplicable, involved rulings that a trial court lacked the authority to convict or punish a criminal defendant.\textsuperscript{51} The Court automatically applied these cases retroactively based on the idea that the prior convictions were void ab initio because the trial court "lacked jurisdiction in the traditional sense."\textsuperscript{52}

C. Justice Harlan's Critique of Traditional Analysis and His Proposed Standard

Justice Harlan was a consistent critic\textsuperscript{53} of the Linkletter formulation. He focused his attack on the Court's asserted power to deny retroactive application of new constitutional rules to cases before it on direct review.\textsuperscript{54} Harlan contended that such a denial constituted a departure

(Stewart, J., dissenting) ("sharp break" occurs when "decision overrules clear past precedent . . . or disrupts a practice long accepted and widely relied upon").


\textsuperscript{51} The Court has invalidated inconsistent prior judgments where its reading of a particular constitutional guarantee immunizes a defendant's conduct from punishment, see, e.g., United States v. United States Coin & Currency, 401 U.S. 715, 724 (1971) . . . or serves "to prevent [his] trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of [that] trial."


\textsuperscript{53} Harlan did join in some of the earlier nonretroactivity opinions because he "thought it important to limit the impact of constitutional decisions which seemed to [him] profoundly unsound in principle." Desist v. United States, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting). In Desist, Justice Harlan broke with the Court, stating, "I can no longer . . . remain content with the doctrinal confusion that has characterized our efforts to apply the basic Linkletter principle. 'Retroactivity' must be rethought." Id.

\textsuperscript{54} Justice Harlan stated in Desist: "I have concluded that Linkletter was right in insisting that all 'new' rules of constitutional law must, at a minimum, be applied to all those cases which are still subject to direct review by this Court at the time the 'new' decision is handed down." Id. at 258.
from the traditional principles underlying judicial review and an impermissible incursion into the legislator's domain.\footnote{See Mackey v. United States, 401 U.S. 667, 675-81 (1971) (Harlan, J., dissenting); Desist v. United States, 394 U.S. 244, 258-59 (1969) (Harlan, J., dissenting).} He argued that the Court must weigh the purpose and scope of a proposed rule in arriving at a decision in the first instance. Once the Court renders its decision, however, it must apply the new rule retroactively to all cases on direct review because a proper perception of the Court's duties as "a court of law, charged with applying the Constitution to resolve every legal dispute within [its] jurisdiction on direct review mandates that [the Court] apply the law as it is at the time, not as it once was."\footnote{Mackey v. United States, 401 U.S. 667, 681 (1971) (Harlan, J., dissenting); see also Note, Prospective Overruling, supra note 13, at 912 (courts should dispose of cases on basis of existing law, regardless of precedent and conceptually should not enforce that which is no longer law).} Harlan also catalogued a number of unacceptable consequences of the Court's nonretroactivity doctrine. First, he contended that the nonretroactive application of new rules violated the constitutional requirement that similarly situated defendants receive equal protection under the law.\footnote{Mackey v. United States, 401 U.S. 667, 679 (1971) (Harlan, J., dissenting) ("Simply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule constitutes an indefensible departure from [the] model of judicial review.").} Although prospective application of new rules might alleviate this defect, Harlan argued that anything short of retroactive application to nonfinal convictions might deter litigants from challenging established precedent. Faced with the possibility that the Court might not extend the protection of a new constitutional interpretation to the litigant who successfully asserts it, a litigant has little incentive to present new constitutional claims.\footnote{This argument is more persuasive in the context of pure prospectivity when even the defendant in the rule-changing case is denied the benefit of the rule he precipitated. However, the concern is still valid in a nonretroactivity context because very few cases are accepted for Supreme Court review and a litigant's chances of participating in a rule-changing case are slight. See, e.g., supra note 38 (4 out of 80 possible appellants benefited from Miranda decision). A litigant may choose not to commit her resources to an appeal because even if the court accepts her theory, the rule may not apply retroactively to her if hers is not chosen to be the precedent-changing case. But see supra note 41 (minimizing this concern).}

Justice Harlan expressed even greater concern that the nonretroactive and prospective application of new rules would lead to excessive judicial activism. Nonretroactivity allows the Court to revise constitutional rules of criminal procedure free of the practical repercussions that such a revision would entail if the rule were to apply to all defendants. It "tends to cut the Court loose from the force of precedent, allowing [the Court] to restructure artificially those expectations legitimately created by extant law and thereby mitigate the practical force of stare
decisis."

At the same time, Harlan argued that the nonretroactivity doctrine had the opposite effect on lower courts, reducing them "largely to the role of automatons." Harlan contended that the doctrine distorted the process of constitutional adjudication in the lower courts by encouraging decisional obedience instead of the development of new constitutional principles from past cases. A court had no incentive to develop the law because if it correctly foresaw a new constitutional rule, the Supreme Court might still reverse the holding on the ground that the Court's new rule did not operate retroactively.

In addition to his objections to the principle of nonretroactivity and its consequences, Justice Harlan criticized the Court's inconsistent application of the Linkletter test. He pointed out that individual Justices used nonretroactivity for different purposes, some to limit new rules that they considered wrongly decided, some to facilitate broad reforms. These differing approaches resulted in a body of retroactivity case law that was virtually impossible to reconcile with the Court's stated criteria.

In response to these problems, Harlan proposed a different rule that focused on the adjudicatory process by which the litigant sought review of his constitutional claim, rather than on a legislative inquiry into purpose, reliance, and effect. Harlan asserted that the principles of judicial

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59 Mackey v. United States, 401 U.S. 667, 680 (1971) (Harlan, J., dissenting) (citation omitted); see also Beytagh, supra note 8, at 1562-63 ("Linkletter and its progeny may... have their greatest significance in freeing a reform-minded Court from any apprehension about the past."); Haddad, supra note 20, at 439 ("[T]he prospective-only technique... is designed to increase a court's freedom of action... The alternative to the prospective-only technique is a more conservative approach to constitutional criminal procedure.").

60 Mackey v. United States, 401 U.S. 667, 680 (1971) (Harlan, J., dissenting); see Desist v. United States, 394 U.S. 244, 259 (1969) (Harlan, J., dissenting); id. at 277 (Fortas, J., dissenting); see also Beytagh, supra note 8, at 1617-19; Hasler, supra note 8, at 23-27.

Professor Hasler argues that lower courts may refuse to consider the litigant's constitutional claim because "even if [the court] were to conclude that the reasoning of the litigant is correct and that the logical extension of constitutional principles compels a certain conclusion, the litigant could not benefit from such a ruling because of the nonretroactivity of the decisions employed, and that therefore any such consideration is moot." Hasler, supra note 8, at 27.

61 See Beytagh, supra note 8, at 1563-64. Initially, Justice Harlan belonged in this camp. See supra note 53.

62 See supra note 59.

63 See Mackey v. United States, 401 U.S. 667, 676 (1971) (Harlan, J., dissenting) ("The upshot of this confluence of viewpoints was that the subsequent course of Linkletter became almost as difficult to follow as the tracks made by a beast of prey in search of its intended victim."); Desist v. United States, 394 U.S. 244, 256-57 (1969) (Harlan, J., dissenting); see also supra notes 24, 30-31.
review required courts to apply all rules of constitutional law to all convictions not yet final at the time of the decision. Harlan conceded, however, that "the choice of law problem as it applies to cases [heard] on habeas seems . . . a more difficult one." 

In determining that courts should apply the law existing at the time of original trial to litigants seeking to nullify convictions on habeas, Harlan again focused on the "nature, function and scope of the adjudicatory process." Harlan explained that although "the entire theoretical underpinnings of judicial review and constitutional supremacy" compel federal courts to adjudicate every issue of law on direct review, the courts have never had the same obligation on habeas. In his estimation, habeas review was not intended to be a substitute for direct review; Harlan viewed it as a collateral remedy the scope of which could be circumscribed by society's interest in the finality of criminal convictions.

Noting his disagreement with the Court's expansion of the habeas writ but feeling bound by it, Harlan isolated two general purposes of habeas review. First, habeas "lies to inquire into every constitutional

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64 Because Harlan would apply all constitutional rulings to claims before the court on direct review, he addresses the "new" rule or "clear break" inquiry only in dealing with cases on collateral attack. Harlan distinguished cases in which the Court has "simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered," from cases which enunciated "new" rules of constitutional law. Desist v. United States, 394 U.S. 244, 263 (1969) (Harlan, J., dissenting). Harlan would apply cases in the former category retroactively, even to cases on collateral attack, because "one could never say with any assurance that [the] Court would have ruled differently at the time the petitioner's conviction became final." Id. at 264. However, where the Court announces a "new" rule, the habeas prisoner would be entitled only to the law prevailing at the time of his conviction. Id. at 263. Harlan also recognizes the difficulty of determining whether a decision constitutes a "clear break." Id. at 263-65.

65 See supra note 54.

66 Mackey v. United States, 401 U.S. 667, 682 (1971) (Harlan, J., dissenting). Harlan recognized that the retroactivity problem arose because the extent of inquiry into alleged constitutional errors was drastically expanded by decisions such as Fay v. Noia, 372 U.S. 391 (1963) (holding for first time that in certain circumstances, habeas corpus petitioner could collaterally attack his conviction even though "new" constitutional rule upon which he based his attack was not suggested in original proceedings) and Kaufman v. United States, 394 U.S. 217 (1969) (specifically holding that fourth amendment claim of unconstitutional search and seizure, although not made at trial or assigned as error on appeal, is cognizable in federal habeas corpus petition). But see Stone v. Powell, 428 U.S. 465, 494 n.37 (1975) (decided after Harlan's dissents in Mackey and Desist; holding that "a federal court need not apply the exclusiory rule on habeas review of the fourth amendment claim absent a showing that the state prisoner was denied an opportunity for a full and fair litigation of that claim at trial and on direct review"). He therefore analyzed the "retroactivity" issue as "none other than a problem as to the scope of the habeas writ," to be resolved by reference to the purpose of the writ. See Mackey v. United States, 401 U.S. 667, 684 (1971) (Harlan, J., dissenting).


68 Id.

69 Id.

70 Id. at 682-83.

71 Id. at 685.
defect in any criminal trial, where the petitioner remains "in custody" because of the judgment in that trial." 72 Second, habeas provides a quasi-appellate review function that forces state and federal courts to "toe the constitutional mark." 73 Harlan asserted that neither of these purposes require retroactive application of new rules on habeas. He claimed that the Constitution does not mandate that courts apply existing law 74 in determining whether an individual is "in custody in violation of the constitution." 75 Additionally, although courts have assumed that they should apply current constitutional law to habeas petitioners' claims, Harlan thought it unwise and unnecessary to do so to further the enforcement purpose of the expanded writ. 76

Finally, in weighing the individual and state interests implicated by the scope of the writ and the choice of law problem, Harlan regarded society's interest in finality in the criminal process as paramount. 77

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72 Id. (citing Brown v. Allen, 344 U.S. 443 (1953) and Kaufman v. United States, 394 U.S. 217 (1969)).
73 Mackey, 401 U.S. at 687 (Harlan, J., dissenting).
74 Id. at 686-87.
76 Mackey, 401 U.S. at 687 (Harlan, J., dissenting).
77 For a criminal system to work, "[n]o one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved." Id. at 691.

Justice Powell, in his concurrence in Schneckloth v. Bustamonte, 412 U.S. 218, 259-66 (1972) (Powell, J., concurring), also emphasized the societal costs of habeas. Among the societal interests that he contended would be adversely affected by an expansive writ were: "(i) the most effective utilization of limited judicial resources, (ii) the necessity of finality in criminal trials, (iii) the minimization of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded." Id. at 259.

Additionally, one commentator contended that broad availability of the writ undermines a sense of "repose [that] is a psychological necessity in a secure and active society." See Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 HARV. L. REV. 441, 446 (1963). Others point out that prisoners themselves suffer from the lack of finality because of the detrimental impact it has on rehabilitation efforts. See, e.g., Amsterdam, Search, Seizure and Section 2255, 112 U. PA. L. REV. 378, 373-384 (1964). See generally Mishkin, supra note 13, at 77 n.71 (weighs finality interest as Harlan and Powell do).

Many critics have found these views unconvincing. First, they contend that convenient administration of justice cannot outweigh a litigant's interest in vindicating his constitutional rights. See supra note 26. One commentator also asserted that "[s]ober reflection upon why we have devised a system which allows a continued questioning of its processes discloses that our purpose is not so much to remove the discomforting doubt or to achieve the ultimate reassurance, as it is to give safeguard to rights not readily visible or easily acknowledged. . . . [W]ith knowledge of our fallibility and a realization of past errors, we can hardly insure our confidence by creating an irrevocable end to the guilt-determining process.


Some commentators reject the idea that a lack of finality may have an adverse effect on prisoner rehabilitation, asserting instead that "the availability of collateral relief is a very
Harlan contended, therefore, that subject to a few exceptions,78 a habeas petitioner should not receive the retroactive benefit of new constitutional protections.79

Although Justice Harlan's approach has its critics,80 the Court recognized the force of his critique and seemingly applied the Harlan analysis in United States v. Johnson.81

wholesome kind of therapy.” Freund, Symposium on Habeas Corpus, 9 Utah L. Rev. 18, 30 (1964); cf. Schwartz, supra note 25, at 744 (too little is known about rehabilitation to enable one to judge effects of expansive reading of habeas relief).

Finally, critics assert that the real source of state resentment against federal intrusions is the Supreme Court's expansion of prisoners' rights, not an expanded remedy for violations of those rights. See Chisum, In Defense of Modern Federal Habeas Corpus for State Prisoners, 21 De Paul L. Rev. 682, 693 (1972).

Justice Harlan would permit two exceptions to the nonretroactivity of new rules in habeas proceedings: (1) where the new rules are ones of substantive due process putting certain conduct beyond the government’s authority to punish (as in Street v. New York, 394 U.S. 576 (1969), Stanley v. Georgia, 394 U.S. 557 (1969), and Griswold v. Connecticut, 381 U.S. 479 (1965)); and (2) where the Court finds new procedural rules that are “implicit in the concept of ordered liberty” under Palko v. Connecticut, 302 U.S. 319 (1937) (as in Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel at trial)). See Mackey, 401 U.S. at 693 (Harlan, J., dissenting).

Justice Harlan considered an additional exception in the form of an inquiry, akin to the Linkletter purpose analysis, into whether the rule is designed to improve the reliability of the verdict, but rejected the idea. He found “inherently intractable the purported distinction between those new rules that are designed to improve the fact finding process and those designed to further other values.” Mackey, 401 U.S. at 695 (Harlan, J., dissenting). Justice Harlan cites in support of this contention the difficulty the Mackey plurality had in explaining DeStefano v. Woods, 392 U.S. 631 (1968) (per curiam), Stovall v. Denno, 388 U.S. 293 (1967), and Johnson v. New Jersey, 384 U.S. 719 (1966). See supra note 24. But see Williams v. United States, 401 U.S. 646, 655 n.7 (1971) (plurality opinion); id. at 665 (Marshall, J., concurring in part and dissenting in part) (noting that determining whether procedure is “implicit in the concept of ordered liberty” is more difficult than applying Linkletter test).


Critics of the Harlan approach assert that “[t]here is no magic dividing line between cases on direct review and those under collateral attack.” Beytagh, supra note 8, at 1601. The function and actual operation of the two procedures are virtually indistinguishable and, in many cases, there is no significant difference with respect to the age or difficulty of retrying cases on direct appeal as opposed to those on collateral attack. See Schwartz, supra note 25, at 731.

Although critics concede that the Harlan approach would alleviate some of the “patent arbitrariness of nonretroactivity,” Beytagh, supra note 8, at 1601, they contend that the greatest evil of nonretroactivity, treating similarly situated defendants differently, remains. See Williams v. United States, 401 U.S. 646, 657 n.9 (1971) (plurality opinion) (Justice White illustrates inequalities that would remain); Beytagh, supra note 8, at 1601; Schaefer, The Control of “Sunbursts”: Techniques of Prospective Overruling, 42 N.Y.U. L. Rev. 631, 645 (1967): [W]hen a court is itself changing the law by an overruling decision, its determination of prospectivity or retroactivity should not depend upon the stage in the judicial process that a particular case has reached when the change is made. Too many irrelevant considerations, including the common cold, bear upon the rate of progress of a case through the judicial system.

See Schwartz, supra note 25, at 732.

81 See infra notes 99-118 and accompanying text.
II
RETROACTIVITY IN FOURTH AMENDMENT EXCLUSIONARY RULE CASES: A REVERSAL IN DOCTRINE

A. United States v. Peltier: Presumptive Nonretroactivity in Fourth Amendment Cases

Although the Supreme Court had stressed in the cases following *Linkletter* that "the retroactivity or non-retroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based," it consistently found fourth amendment cases dealing with the exclusionary rule nonretroactive. These decisions turned on a determination that retroactive application of new rules did not serve the primary purpose of the fourth amendment exclusionary rule, deterrence of illegal police action.

The Court recognized fourth amendment cases as a distinct area of retroactivity law in *United States v. Peltier*. In *Peltier*, the Court held *Almeida-Sanchez v. United States*, which invalidated warrantless, roving automobile searches by border patrol agents acting without probable cause, not applicable to searches conducted prior to the date of the *Almeida-Sanchez* decision. The *Peltier* Court departed from traditional

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83 It is indisputable, however, that in every case in which the Court has addressed the retroactivity problem in the context of the exclusionary rule, whereby concededly relevant evidence is excluded in order to enforce a constitutional guarantee that does not relate to the integrity of the factfinding process, the Court has concluded that any such new constitutional principle would be accorded only prospective application.


84 The *Peltier* Court also discussed the "imperative of judicial integrity" rationale for the exclusionary rule. See 422 U.S. at 536. The Court had previously ignored this rationale in applying the *Linkletter* purpose test in fourth amendment cases. As Justice Brennan explained it, the exclusionary rule "enab[es] the judiciary to avoid the taint of partnership in official lawlessness and assur[es] the people that the government would not profit from its lawless behavior." *United States v. Calandra*, 414 U.S. 338, 357 (1974). Justice Brennan, in his dissent in *Peltier*, welcomed the reintroduction of this "core value" but noted that "the Court merges the 'imperative of judicial integrity' into its deterrence rationale, . . . and then ignores the imperative when it applies its new theory to the facts of this case." 422 U.S. at 554 n.13 (Brennan, J., dissenting).

85 See Williams v. United States, 401 U.S. 646, 653 (1971) (plurality opinion) (because exclusionary rule in fourth amendment cases does not "proscribe the use of certain evidence . . . to minimize or to avoid arbitrary or unreliable results" and thereby "raises no question about the guilt of defendants convicted in prior trials," *Linkletter* reliance and effect factors compel nonretroactivity); see also supra note 83 and accompanying text.

86 422 U.S. 531 (1975).

87 413 U.S. 266 (1973).
analysis by concentrating exclusively on the purpose of the new ruling and abandoning the “clear break” threshold inquiry in reaching its decision. By altering the Linkletter test in this way, the Court in Peltier made explicit the Court’s presumption of nonretroactivity in fourth amendment cases.

In Peltier, the Court concluded that retroactive application of a fourth amendment ruling does not serve either of the twin justifications for the exclusionary rule—“the imperative of judicial integrity” or the deterrence of illegal police conduct—if law enforcement officers reasonably believed in good faith that the evidence they seized would be ad-

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88 Whether or not the exclusionary rule should be applied to the roving Border Patrol search conducted in this case, then, depends on whether considerations of either judicial integrity or deterrence of Fourth Amendment violations are sufficiently weighty to require that the evidence obtained by the Border Patrol in this case be excluded.

Peltier, 422 U.S. at 539; see also Note, supra note 47, at 97-99.

89 The Peltier opinion contains no reference to the “clear break” threshold test, but its repudiation of this test is implicit in its treatment of the lower court’s opinion. The majority in the court of appeals held that because Almeida-Sanchez merely “reaffirmed well-established Fourth Amendment standards” that did not “disturb a long-accepted and relied upon practice,” Peltier v. United States, 500 F.2d 985, 988 (9th Cir. 1974), Peltier was entitled to the benefit of the decision, “not because of retroactivity but because of Fourth Amendment principles never deviated from by the Supreme Court.” Id. at 989. The Ninth Circuit dissent in Peltier concluded that Almeida-Sanchez overruled a consistent line of courts of appeals precedent. Because the decision stated a “new” rule, the dissenters applied the Linkletter factors and found that the case should operate nonretroactively. Peltier, 500 F.2d at 991 (Wallace, J. dissenting).

Justice Rehnquist, writing for the Court in Peltier, outlined the traditional rule that the majority and dissent on the Ninth Circuit had used in reaching their differing positions. The Court, however, did not endorse the analysis of the lower court dissent in reversing the Ninth Circuit’s determination. Instead, it avoided discussion of the threshold question, the source of the split below, and emphasized that “the policies underlying the [exclusionary] rule do not justify its retrospective application.” United States v. Peltier, 422 U.S. 531, 534-35 (1975). Courts and commentators have read the Court’s opinion as an abandonment of the “clear break” threshold test. See, e.g., Peltier, 422 U.S. at 544-49 (Brennan, J., dissenting); United States v. Esealante, 554 F.2d 970 (9th Cir.) (en banc), cert. denied, 434 U.S. 862 (1977); Note, supra note 47, at 86, 87 n.9. But cf. United States v. Blake, 632 F.2d 731 (9th Cir. 1980) (employing “clear break” test and traditional Linkletter analysis in determining that its decision in United States v. Prescott, 581 F.2d 1343 (9th Cir. 1978), announcing same rule Supreme Court later set out in Payton, applied retroactively).

90 See United States v. Johnson, 457 U.S. 537, 564 (1982) (White, J., dissenting) (“[N]ew extensions of the exclusionary rule do not serve [to overcome a flaw in the truth determining process] and, therefore, will not generally be applied retroactively.”); United States v. Peltier, 422 U.S. 531, 550 (1975) (Brennan, J., dissenting) (“[T]he Court substitutes at least as respects cases involving searches invalid under the Fourth Amendment, a presumption against the availability of decisions of this Court except prospectively.”); United States v. Ross, 655 F.2d 1159, 1162 (D.C. Cir. 1981) (“In [Peltier], the Supreme Court reiterated that decisions expanding the scope of the exclusionary rule should have prospective effect only.”); Note, supra note 47, at 87, 102-05 (Court “created a general presumption against retroactive applicability” of cases involving searches invalid under fourth amendment); see also infra notes 93-98 and accompanying text (asserting that by formulating test in which illegally seized evidence should be suppressed only if knowledge of new standard can be imputed to law enforcement officer, Court begins with presumption of nonretroactivity).

91 See supra note 84.
missible at trial. Thus, the Peltier Court refused to apply new fourth amendment decisions retroactively to suppress the fruits of searches made illegal by those decisions unless the law enforcement officer "had knowledge or [could] properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment."

Under the Peltier rule, the novelty of the fourth amendment ruling, formerly the focus of the threshold "clear break" test, became a part of the inquiry into the police officer's knowledge or blameworthiness. The Court held that the Almeida-Sanchez ruling was unanticipated and thus, the officer in Peltier could not have known that his actions were unconstitutional; without such knowledge, retroactive application of Almeida-Sanchez would not advance the deterrent purpose of the exclusionary rule. The consequence of this departure from traditional analysis was a dilution of the "clear break" test, resulting in a presumption of nonretroactivity in fourth amendment cases. For example, if the Court had raised but reserved, or never explicitly resolved, a constitutional question, a police officer could not be expected to perform a court's function by applying settled principles in new and immediate factual situations.

92 422 U.S. at 537.
93 Id. at 542. The Peltier Court does not make clear whose knowledge is determinative, that of the officer who conducted the illegal search or that of the law enforcement establishment. The Court also left vague the quantum of knowledge sufficient to trigger retroactivity. See Note, supra note 47, at 99; see also Peltier, 422 U.S. at 553 n.12, 554, 558-59 (Brennan, J., dissenting). However, the Peltier Court's reference to "the law enforcement officer," 422 U.S. at 542, and its emphasis on excluding evidence only when blameworthy conduct by the police is involved, 422 U.S. at 537-39, 542, yield the conclusion that the Court intended the individual officer's knowledge to be the target of the Peltier test. See Note, supra note 47, at 102. By focusing on the individual officer's knowledge, the Court also answered the question of what quantum of knowledge is sufficient to produce retroactive application: "[G]iven their greater legal sophistication, law enforcement institutions can reasonably be held accountable to a much higher standard of constructive knowledge than could an officer in the field. Police officers could probably be held accountable for only deliberate or negligent disregard of explicit, preexisting guidelines." Note, supra note 47, at 99.

The Court's conclusion is consistent with a theory of specific deterrence in which the officers involved learn through the sanction of exclusion. Brennan objects to the belief that the exclusionary rule is designed to punish an individual officer so that he will not repeat his mistake. He asserts that "the exclusionary rule, focused upon general, not specific, deterrence, depends not upon threatening a sanction for lack of compliance but upon removing an underlying inducement to violate Fourth Amendment rights." Peltier, 422 U.S. at 557 (Brennan, J., dissenting); see also Note, supra note 47, at 105-09.

The distinction between specific and general deterrence is significant because in the absence of departmental sanctions, exclusion of evidence does not injure the individual policeman and thus is not an effective deterrent. If, however, the retroactivity of a rule is predicated upon the knowledge of those who have the greatest stake in convictions—the police and judicial establishment—the exclusion sanction may provide a meaningful incentive to be more sensitive to constitutional standards.

94 In Peltier, the majority concluded that "[I]t was in reliance upon a validly enacted statute, supported by longstanding administrative regulations and continuous judicial approval, that Border Patrol agents stopped and searched respondent's automobile . . . . [W]e cannot regard as blameworthy those parties who conform their conduct to the prevailing statutory or constitutional norm." 422 U.S. at 541-42. But see supra note 89; infra note 96.
A court could not reasonably charge law enforcement officials with anticipating many constitutional rules that the court, endowed with greater legal sophistication, would have held to be mere extensions of settled principles. Thus, under Peltier's knowledge rule, a new standard could be applied retroactively only if the issue were one that the Court had previously addressed—a situation presenting no retroactivity question under traditional analysis.

Justice Brennan, dissenting in Peltier, asserted that Almeida-Sanchez merely reaffirmed traditional fourth amendment principles and therefore warranted retroactive operation. The dissent further objected to the majority's silent repudiation of the "clear break" test. Brennan argued that the "tolerable anomaly" of inequity among defendants when a new rule is applied nonretroactively becomes "intolerable, and a travesty of justice" when the Court denies similarly situated defendants the benefit of long-established constitutional principles. Additionally, the dissent protested that when the Court denies retroactive application of a decision that is not a "clear break" with precedent, it encourages law enforcement officials to honor only those standards that the Court has set forth precisely. After Peltier, police officials could safely disregard inconvenient precedent until the Court specifically decided that settled principles were applicable in a particular factual situation.

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95 See United States v. Johnson, 457 U.S. 537, 560 (1982); infra note 116. For an example of how little the Court expects police officers to anticipate new law, see Michigan v. DeFillippo, 443 U.S. 31, 38 (1979):

Police are charged to enforce laws until and unless they are declared unconstitutional. The enactment of a law forecloses speculation by enforcement officers concerning its constitutionality—with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws.


97 See supra note 89.

98 Peltier, 422 U.S. at 548-49 (Brennan, J., dissenting).

99 Id. at 549. As Justice Fortas explained in Desist v. United States, 394 U.S. 244, 277 (1969) (Fortas, J., dissenting):

To decide on nonretroactivity without a "clear break" test add[s] this Court's approval to those who honor the Constitution's mandate only where acceptable to them or compelled by the precise and inescapable specifics of a decision of this Court. And they award dunce caps to those law enforcement officers, courts, and public officials who do not merely stand by until an inevitable decree issues from this Court, specifically articulating that which is clearly
B. *United States v. Johnson:* The Court Discards the *Peltier* Analysis in Fourth Amendment Cases—But What Remains?

In *United States v. Johnson,* the Supreme Court reconsidered the standard applicable to retroactivity questions in fourth amendment cases and adopted a significantly different approach than that prescribed in *Peltier.* The *Johnson* Court adopted, in part, Justice Harlan's approach in applying *Payton v. New York* retroactively to Johnson's nonfinal conviction. *Payton* prohibits police from making a warrantless

immanent in the fulfillment of the Constitution, but who generously apply the mandates of the Constitution as the developing case law elucidates them.

Justice Brennan also criticized the *Peltier* formulation because it "could stop dead in its tracks judicial development of Fourth Amendment rights." *422* U.S. at 554 (Brennan, J., dissenting). He asserted that courts will automatically deny an accused's motion to suppress evidence that the accused claims was unconstitutionally seized unless the accused can cite a case invalidating a search or seizure on identical facts. Thus the rule's value in "forcing judges to enlighten our understanding of Fourth Amendment guarantees," by reviewing alleged violations, is lost. *Id.* at 555. Additionally, on a practical level, the *Peltier* inquiry into an officer's subjective knowledge will introduce another layer of fact finding into an already overburdened judicial system. *Id.* at 560. But see *id.* at 543 n.13 ("Whether today's decision will reduce the responsibilities of district courts, as the dissent first suggests, or whether that burden will be increased, as the dissent also suggests, it surely will not fulfill both of these contradictory prophecies.") (emphasis in original)

Finally, Justice Brennan contended that the Court's treatment of the exclusionary rule in fourth amendment cases as a specific deterrent designed to punish individual officers presages the demise of the exclusionary rule. The dissent believed that the new *Peltier" knowledge" inquiry, with its focus on the good faith of the individual officer, would not "be confined to putative retroactivity cases. Rather, [they] suspec[ed] that when a suitable opportunity arises, [the] revision of the exclusionary rule [requiring the courts to probe the subjective knowledge of the officer who orders the search or seizure] will be pronounced applicable to all search-and-seizure cases." *Id.* at 552 (Brennan, J., dissenting).


On May 5, 1977, two secret service agents, suspecting respondent Raymond Eugene Johnson of attempting to negotiate a misdelivered United States Treasury check, entered Johnson's home without a warrant and without his consent. After advising him of his rights, the agents interrogated Johnson and, when he admitted his participation in the scheme, the agents formally arrested him.

Before trial, Johnson sought to suppress his statements as fruits of an unlawful arrest not supported by probable cause. The district court found the arrest proper and admitted the evidence. The jury convicted Johnson of aiding and abetting obstruction of correspondence in violation of 18 U.S.C. §§ 2, 1702 (1982). In an unreported decision filed on December 19, 1978, the court of appeals affirmed Johnson's conviction. *Johnson,* 457 U.S. at 539-40.

On April 15, 1980, while Johnson's petition for rehearing was pending before the Ninth Circuit, the Supreme Court held in *Payton v. New York,* 445 U.S. 573 (1980), that the fourth amendment prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest. The *Payton* decision settled an "important constitutional question" that the Court had "expressly left open in a number of... prior opinions." *Johnson,* 457 U.S. at 551. The Court, in deciding to invalidate the New York statutes authorizing this practice, noted that although the appellate courts and state courts had reached mixed results on the question, the judicial trend had been toward the *Payton* view. *Johnson,* 457 U.S. at 553 n.15.

On September 2, 1980, the Ninth Circuit granted respondent Johnson's petition for rehearing, withdrew its prior opinion, and on the strength of *Payton,* reversed the conviction. The Supreme Court granted certiorari and affirmed the reversal of Johnson's conviction. *100* 445 U.S. 573 (1980).
nonconsensual entry into a suspect's home in order to make a routine felony arrest.

Justice Blackmun, writing for the Court in Johnson, neither relied on, nor expressly rejected, Peltier in finding Payton retroactive, even though the Peltier analysis clearly would have required a nonretroactive result. The Court instead focused on the rule that emerged from Linkletter, "that all newly declared constitutional rules of criminal procedure would apply retrospectively at least to judgments of conviction not yet final when the [new] rule was established." The Johnson opinion noted that in post-Linkletter cases, the Court had departed from this "basic principle," but documented a "stream" of separate opinions consistent with the original formulation. The Court detailed approvingly Justice Harlan's arguments in favor of this retroactivity standard and concluded that, subject to certain exceptions, a decision construing the fourth amendment is applicable to all convictions not final at the time that decision was rendered.

The Court qualified its adoption of Harlan's approach by recognizing the continued vitality of certain categories of precedent. The Johnson Court defined three narrow categories of cases in which the Court purportedly had resolved the choice of law question by application of a threshold determination rather than the Linkletter test.

The Court first identified the category of cases determined by "jurisdictional" threshold inquiries. In these cases, the Court always had "recognized full retroactivity as a necessary adjunct to a ruling that a trial court lacked authority to convict or punish a criminal defendant in

\[101\] See supra notes 82-95 and accompanying text.


\[103\] Id. at 543.

\[104\] Id. at 545.

\[105\] Id. at 546-48.

The Court stated that in Harlan's view, failure to apply new constitutional rulings to cases pending on direct appeal at the time of the decision violated three norms of constitutional adjudication: (1) The Court's "ambulatory retroactivity doctrine" conflicted with the norm of principled decisionmaking. Id. at 546; see supra notes 61-63 and accompanying text; see also supra note 30 (discussing Court's inconsistent application of Linkletter criteria). (2) The Court, in prescribing nonretroactive applications for new rules, is improperly performing a legislative function. 457 U.S. at 546-47; see supra notes 54-56 and accompanying text. (3) The Court's nonretroactivity doctrine inevitably results in unequal treatment of similarly situated defendants. 457 U.S. at 547-48; see supra note 57 and accompanying text.

\[106\] 457 U.S. at 562.

\[107\] The Johnson Court stated that these cases "have not proved 'readily susceptible of analysis under the Linkletter line of cases.'" 457 U.S. at 548 n.11 (quoting Robinson v. Neil, 409 U.S. 505, 508 (1973)). It rejected the dissent's argument that the three categories exclude the "most obvious" line of cases, those relating to the integrity of the verdict, because those cases turned on the Linkletter purpose factor. Johnson, 457 U.S. at 548. The Johnson majority failed to account, however, for its own use of a "clear break" category of cases whose nonretroactivity it specifically ascribes to the weight of two Linkletter factors, reliance and effect. See infra text accompanying note 114.

\[108\] Id. at 547 n.10, 548 n.11.
the first place.”

Justice Blackmun developed the other two categories of precedent and a residuary class of cases not controlled by prior retroactivity cases through an imaginative reading of the “clear break” threshold test. Before Johnson, the “clear break” test separated those cases that, as products of settled principles, did not pose a retroactivity problem from cases that, as vehicles for new principles of constitutional law, warranted analysis under the Linkletter test to determine retroactivity. The Johnson Court distinguished three classes of cases using the same test: (1) decisions that were extensions of settled principles; (2) decisions in which the Court had “expressly declared a rule of criminal procedure to be ‘a clear break with the past’”; and (3) decisions like Payton that fall within neither of the other “narrow” categories and thus are not controlled by existing precedent.

The Court’s restatement of the “clear break” test significantly changed the test’s content and effect. According to the traditional analysis, either a rule was a “clear break with the past” or it was not—no middle ground existed. The Johnson Court, by narrowly redefining prior cases, created a third, residual class of cases. Because Payton fit within neither the “clear break” nor the “settled precedent” categories of existing precedent, the logic of the Harlan approach controlled and dictated retroactivity. Thus, the restated “clear break” test allowed the Court to justify its result without overruling seemingly irreconcilable precedents. It simply dismissed the government’s contention that Peltier was controlling precedent in fourth amendment cases by classing Peltier as one of the “clear break” cases.

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109 Id. at 550; see supra notes 51-52 and accompanying text.
110 Johnson, 457 U.S. at 549.
111 Id. at 549-50.
112 Id. The Court found that Payton fit within none of the categories of controlling precedent. Johnson, 457 U.S. at 551. Because the Payton question had been expressly left open in prior decisions, the rule was not a settled one. Nor did Payton hold that the trial court lacked jurisdiction “in the traditional sense.” Johnson, 457 U.S. at 554. Finally, Payton was not a “clear break” with past precedents; it did not disapprove a practice the Court had arguably sanctioned in previous cases, nor overturn a long-standing and widespread practice that the Court had not addressed, but which a near unanimous body of lower courts had expressly approved. Johnson, 457 U.S. at 552-54.
113 Johnson, 457 U.S. at 558. The Court stated:

Because Almeida-Sanchez . . . represented a “clear break with the past,” . . . under controlling retroactivity precedents, the nonretroactive application of Almeida-Sanchez would have been appropriate even if the case had involved no Fourth Amendment question. In that respect, Peltier resembles several earlier decisions that held “new” Fourth Amendment doctrine nonretroactive, not on the ground that all Fourth Amendment rulings apply only prospectively, but because the particular decisions being applied “so change[d] the law that prospectivity [was] arguably the proper course.”

Id. at 558-59 (quoting Williams v. United States, 401 U.S. 649, 659 (1971) (plurality opinion)).
Through its classification of precedent, the Court also was able to attribute the consistent nonretroactivity of prior fourth amendment decisions to the weight of the reliance and effect factors when in fact the Court had reached those decisions by relying almost exclusively on its prior conclusion that retroactive application would not fulfill the deterrent purpose of the exclusionary rule. The Court thus avoided its previous preoccupation with purpose, which had culminated in Peltier’s “knowledge” rule.

Finally, the Court’s reformulation of the “clear break” test arguably changed the consequences of the Court classifying a case as a “clear break with the past.” Justice Blackmun noted that for this class of cases, the reliance and effect factors “virtually compelled a finding of nonretroactivity.” The “clear break” test seemingly has been transformed from a threshold question to a classification question whose resolution will definitively determine the retroactivity issue. Should a fourth amendment decision be the product of the Court’s application of settled principles, a “jurisdictional” decision, or a decision that fits within none of the categories of existing precedent, it will operate retroactively. The only instance in which a fourth amendment ruling will not apply to cases on direct review under Johnson is if the ruling sought to be applied is a “clear break with the past.”

The Johnson decision clearly reversed the thrust of fourth amendment retroactivity analysis. Although Johnson did not expressly overrule Peltier, it repudiated the Peltier analysis by reinstating a modified “clear break” threshold test and by dispensing with Peltier’s emphasis on the deterrent purpose of the exclusionary rule. The result is manifestly at odds with the Peltier presumption of nonretroactivity. To end any doubt about the continued efficacy of the Peltier approach, the Court expressly renounced any inquiry into the subjective state of an arresting officer’s mind for retroactivity purposes. The Court, however, did

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114 Johnson, 457 U.S. at 549-50.
115 See United States v. Robinson, 690 F.2d 869 (11th Cir. 1982) (holding fourth amendment aspects of United States v. Berry, 670 F.2d 583 (5th Cir. 1982) (en banc) retroactive at least as to all convictions not yet final when Berry was decided). The Robinson court stated that, under Johnson,

[jn deciding the retroactivity of Berry, we need consider only whether Berry involves a “clear break” with past precedent, and thus falls within the second of the three [Johnson] categories [of cases]. . . . If not, then Berry merits retroactive effect (1) because even if Berry fell into the first and third categories discussed above [“jurisdictional” and “settled principle” cases], those categories lead to a conclusion of retroactivity, and (2) absent the applicability of one of the three categories, a decision construing the Fourth Amendment applies retroactively to all convictions not yet final at the time of the decision.

Robinson, 690 F.2d at 874.
116 Johnson, 457 U.S. at 559-60. The Johnson opinion also recognized that an objective test, focusing on the knowledge that could reasonably be imputed to the enforcement official, also is inappropriate because it would reduce retroactivity inquiries to “an absurdity.” Id. at 560. Under such a theory, the only fourth amendment rulings qualifying for retroactive ap-
limit the reach of this reshaping of retroactivity theory. It declined to extend the Johnson holding to other constitutional provisions or to pass on the retroactivity test applicable to fourth amendment claims before the Court on collateral attack. Justice Brennan underlined Johnson's limitations by expressly conditioning his concurrence in the result on the understanding that Johnson left undisturbed retroactivity precedents as applied to final convictions.

Justice White, writing for the dissent in Johnson, objected to the majority's "intricate and confusing opinion." In his view, the Court had clearly enunciated and consistently applied traditional retroactivity doctrine in fourth amendment cases, including Peltier, which he regarded as controlling. The dissent reiterated Peltier's emphasis on the purpose of a new rule and endorsed the "knowledge" test for resolving retroactivity issues in exclusionary rule cases. White also asserted that before Johnson, the same principles governed all retroactivity determinations, regardless of the adjudicatory process by which the defendant arrived before the Court.

Justice White's most fundamental objection to the majority's new rule was that it failed to resolve the "theoretical" problem of unequal treatment of similarly situated defendants. He claimed that by distinguishing those litigants on direct review from those on habeas for the purpose of resolving the retroactivity issue, the Court "simply [drew] what is necessarily an arbitrary line in a somewhat different place than the Court had previously settled upon." According to White, inequality is unavoidable unless the Court is willing to adopt either pure retroactivity or pure prospectivity; short of this, he saw no principled reason for adopting an "abstract procedural approach" instead of employing a balancing test that weighs the substantive purpose of the new rule. Finally, the dissent concluded that the Court's refusal to extend its asserted resolution of the inequality problem to other than fourth amendment decisions or to expressly overrule conflicting precedents made clear the inadequacy of the Court's analysis.

application are those in which the officers violated preexisting guidelines. Such cases, however, as applications of settled principles, present no retroactivity question. Id.

117 Id. at 562. The opinion also stated that retroactivity questions in civil cases continue to be governed by the standard set forth in Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971). See Johnson, 457 U.S. at 563.

118 Johnson, 457 U.S. at 563-64 (Brennan, J., concurring).

119 Id. at 566 (White, J., dissenting).

120 Id.

121 Id.

122 Id. at 567.

123 Id. at 568.

124 Id.
III

ANALYSIS

The *Johnson* decision appears to signal a significant change in the Court's retroactivity doctrine. The *Johnson* Court reconsidered its retroactivity principles and attempted to establish a new rule that courts can apply in a principled and equitable manner. Like prior retroactivity doctrine, however, the *Johnson* opinion fails to set forth a guiding jurisprudential or legislative rationale for the form of its new rule.

When the *Linkletter* Court first recognized its general power of prospective limitation in constitutional cases, it set out three factors to guide resolution of retroactivity decisions. It did not, however, account for the sudden recognition of a retroactivity issue in terms of either jurisprudential or legislative needs. Although the Court tried to explain nonretroactivity as a purely constitutional theory, various Justices have since acknowledged that they viewed it as a practical tool either to limit new rules with which they disagreed or to facilitate the expansion of constitutional rights. The Justices' conflicting purposes in employing the *Linkletter* test produced inconsistent results and charges of unprincipled decisionmaking. Additionally, the Court's failure to articulate the real factors behind its retroactivity decisions or to adhere to a principled rationale for its retroactivity doctrine confused the lower courts. The Court's refusal to acknowledge that its retroactivity inquiries were motivated by legislative concerns also resulted in the unequal treatment of similarly situated defendants.

The *Johnson* decision does not solve the problems that afflicted the Court's prior retroactivity doctrine because it fails to define a single principle to guide future retroactivity analysis. The Court in *Johnson* adopts the retroactivity approach taken by Harlan in fourth amendment exclusionary rule cases on direct review. Both *Johnson* and a later fifth amendment case, *Mack v. Oklahoma*, demonstrate the Court's intention to use this approach in all areas of constitutional adjudication. The new doctrine, however, is justified as a remedy for the prior doctrine's inadequacies, not as the result of Harlan's jurisprudential theory.

The Court acknowledges Justice Harlan's concern with the principles of judicial review, but fails to ground the *Johnson* reformulation on the core of Harlan's approach. Harlan viewed the retroactivity issue as a choice of law question to be resolved by reference to the nature, func-

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125 See supra notes 53, 59 and accompanying text.
126 See supra note 63 and accompanying text.
127 See generally Hasler, supra note 8.
128 See supra notes 37-43 and accompanying text.
129 103 S. Ct. 201 (1982).
130 See infra notes 151-63 and accompanying text.
tion, and scope of the adjudicatory process in which the retroactivity claims arise, not by reference to the purpose of the new rule from which the litigant seeks to benefit.

By qualifying Harlan’s approach with a “clear break” category of controlling precedent, the Court in *Johnson* demonstrates that it does not view that approach as a jurisprudential imperative. The *Johnson* doctrine requires courts to determine as a threshold question whether the rule sought to be applied is a “clear break” with the past. If deemed a “new” rule, the *Linkletter* reliance and effect factors seem to compel non-retroactive application even to cases on direct review because the deterrent purpose of the new rule is not served by retroactive effect.

Although this threshold category of cases reconciles past precedent with the Court’s new approach, the concerns that resulted in the “clear break” precedents are irreconcilable with the principles underlying Harlan’s approach. Harlan’s jurisprudential theory requires retroactive operation on direct review regardless of the novelty of the decision sought to be applied or the outcome of the *Linkletter* balancing test. Thus, the internally inconsistent *Johnson* decision does not validate Harlan’s retroactivity jurisprudence, but instead represents a compromise among Justices who use the retroactivity doctrine to achieve purposes unrelated to a principled retroactivity theory. The *Johnson* majority responded to at least four concerns which required a new formula for resolving retroactivity issues.

The *Johnson* Court’s stated concern was the inconsistent application of the *Linkletter* analysis and the disparate treatment of similarly situated defendants. An unarticulated factor in the Court’s reasoning was the objection expressed by the *Peltier* dissent to the presumption of nonretroactivity in fourth amendment cases and the implications of the *Peltier* knowledge rule for the validity of the exclusionary rule in other contexts. Finally, the *Payton* rule itself and the general direction of fourth amendment

131 United States v. Johnson, 457 U.S. 537, 549 (1982); see also supra notes 107-15 and accompanying text.

132 One wonders whether the Court refused to explicitly overrule its fourth amendment precedent for fear that it would then be faced with the issue of whether *Johnson* applies retroactively. This seems unlikely, however, because to benefit from a retroactive application of *Johnson*, one still would have to be on direct appeal from a conviction that occurred before the date of the *Johnson* decision and seeking the benefit of rules such as *Almeida-Sanchez*, which presumably would be applied to relatively recent cases even under *Peltier*. Thus, few defendants would be able to claim the retroactive benefit of *Johnson*.

133 Another indication that the *Johnson* Court did not found its analysis on Harlan’s theory of judicial review was the Court’s limitation of the *Johnson* rule to fourth amendment exclusionary rule cases. Although the Court’s acknowledgement of the flaws of prior precedents may compel it to expand its application of Harlan’s approach to other constitutional areas, it is not so compelled by adherence to Harlan’s jurisprudence. Had the Court recognized a jurisprudential imperative to apply all rulings to cases on direct review, it would have been unable to limit the *Johnson* doctrine to fourth amendment cases.

134 *See supra* note 98. Some courts have interpreted the reasoning underlying the *Peltier*
amendment law may have affected the Court's analysis.

The various concerns underlying the Johnson majority's restructuring of retroactivity analysis were seemingly satisfied by that decision. The Johnson rule seems to remedy past abuses, dispense with the Peltier knowledge rule, and underscore the substantive content of Payton. These varying concerns, however, may divide the Court in its future attempts to define and apply retroactivity law in all constitutional contexts.

The Court's failure to develop a single, explicit principle or purpose for resolving retroactivity issues makes it difficult to predict the future course of retroactivity law. The Johnson approach, however, clearly will not put to rest the criticisms directed at prior nonretroactivity results. The Johnson analysis may create unprincipled decisionmaking and doctrinal confusion because it can be applied to yield results reflecting all of the Court's varying and often conflicting concerns. Moreover, the Court's reformulation may actually add to the problem of unequal treatment: in addition to providing for nonretroactivity in "clear break" cases, the Court creates a procedural distinction between cases on direct review and cases on collateral attack without justifying the distinction by judicial theory or a coherent and openly debated weighing of values. Closer examination demonstrates that the concerns voiced by Justice Harlan and endorsed by the Johnson Court will continue to plague the Court.

A. The Potential for Unprincipled Application and Doctrinal Confusion: Two Readings of Johnson

1. The Narrow Application: Returning to Nonretroactivity by Expanding the Scope of the "Clear Break" Test

It is unclear whether a majority of the Court favors the continued existence of the Harlan approach even in fourth amendment cases.\textsuperscript{135}

knowledge rule as a validation of a good faith exception to the exclusionary rule. See United States v. Williams, 622 F.2d 830, 840 (5th Cir. 1980) (holding that "evidence is not to be suppressed under the exclusionary rule where it is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though mistaken, belief that they are authorized," and citing Peltier among others in support); United States v. Sotomayor, 592 F.2d 1219, 1226-27 (2d Cir. 1979) ("Under the circumstances of this case and the reasoning of Peltier and Linkletter we do not believe that the police should be penalized for failure to anticipate the later interpretation [of the New York statute at issue].") (footnote omitted); United States v. Darenbourg, 520 F.2d 985, 989 (5th Cir. 1975) (upholding validity of state search warrant against claim based in part on Aguilar-Spinelli requirements, noting "a more bright-line rule [than that proposed by the dissent] is needed if police are to apply it day by day and if we are to pass on their good faith in doing so, as Peltier indicates we must"). The Court in Johnson, however, expressly rejected the government's claim "that new Fourth Amendment rules must be denied retroactive effect in all cases except those in which law enforcement officers failed to act in good-faith . . . ." 457 U.S. at 559.

\textsuperscript{135} In an article written after Peltier in 1975, Professor Beytagh noted that "at present a comfortable working majority of the justices support the non-retroactivity doctrine as it has developed during the past decade, although the Court is quite divided . . . on certain thresh-
For some Justices, the immediate stimulus for the reformulation, the *Peltier* knowledge rule, has been eliminated. Justice Brennan, who cast the deciding concurring vote in *United States v. Johnson*, seemed partic-

old questions." Beytagh, supra note 8, at 1611. Beytagh expressed concern that because the Court is less activist, the importance of the retroactivity doctrine would wane. Thus, he feared that the Court would rest content with its *Peltier* formulation without addressing the problems of inequality and lower court confusion. Id. at 1611-12.

But *Johnson* represents a complete change in direction, at least in the fourth amendment area. The *Johnson* reformulation can be seen as a compromise between Justices who have in the past taken very different positions on the retroactivity issue. It is not the result of a new membership, illustrated by the fact that Justices Harlan, Douglas, and Black, consistent critics of the *Linkletter* nonretroactivity approach, have left the Court, while Justice O'Connor, a supporter of the traditional analysis, has joined the bench. Reference to the former positions of the *Johnson* majority and the Justices' stands on the still unresolved habeas issue demonstrates how unstable the new coalition may be.

The consistent advocates of a *Linkletter-Peltier* nonretroactivity formula are Chief Justice Burger and Justices White, Rehnquist, and O'Connor. Predictably, these Justices dissented in *Johnson* and, with Justices Blackmun and Powell, comprised the majority in *Peltier*. After *Peltier*, Justice Powell adopted the Harlan approach in *Hankerson v. North Carolina*, 432 U.S. 233, 246 (1977) (Powell, J., concurring). In *Brown v. Louisiana*, 447 U.S. 323 (1980), a plurality consisting of Justices Brennan, Stewart, Marshall, and Blackmun found that *Burch v. Louisiana*, 441 U.S. 130 (1979) (holding unconstitutional conviction of nonpetty criminal by nonunanimous jury of six), applied retroactively to petitioner, who was before the Court on direct review. Justice Powell and Stevens concurred in the judgment but would not accept the plurality's traditional *Linkletter* analysis, preferring instead to ground their decision on Harlan's principles. Chief Justice Burger and Justices Rehnquist and White dissented. Justice Marshall's position in the *Brown* plurality was curious given his earlier statement in *Williams v. United States*, 401 U.S. 646, 665 (1971) (Marshall, J., concurring in part and dissenting in part), that, for the reasons articulated by Harlan, he thought new rules should apply retroactively to cases on direct review but that he would apply *Linkletter* to determine the retroactivity of new rules on collateral attack. By joining the plurality instead of the Powell concurrence in *Brown*, Justice Marshall endorsed use of the *Linkletter* approach instead of the Harlan theory to find retroactive a case on direct review.

Finally, in *Johnson*, Justices Blackmun, Marshall, Powell, and Stevens consolidated their views to form the plurality with Chief Justice Burger and Justices White, Rehnquist, and O'Connor in dissent. Justice Brennan concurred on the understanding that the decision would not disturb retroactivity precedents for final convictions. Justice Brennan in his majority opinion in *Stovall v. Denno*, 388 U.S. 293 (1967), and in his *Peltier* dissent, indicated that he was less concerned with the inequality that flows from nonretroactivity, a central concern of the *Johnson* plurality, than with reinstating the "clear break" test and reaffirming the vitality of the exclusionary rule. See *United States v. Peltier*, 422 U.S. 531, 548-49 (1975) (Brennan, J., dissenting); see also supra note 98. Justice Brennan may have an uncertain future as a Harlan adherent now that the *Peltier* language has been discredited in *Johnson*. Justice Blackmun, as author of *Johnson*, apparently reversed his *Peltier* position. Justice Stevens adopted the Harlan view earlier in *Brown* and reaffirmed his position in *Johnson*.

Significant differences within the Court also seem to exist on the question of what retroactivity standard applies to convictions that became final before the date of the rule-changing case. See *United States v. Johnson*, 457 U.S. 537, 547 n.10 (1982) (indicating that question of whether equal treatment requires retroactive application of new constitutional rules to cases before Court on collateral attack is still under debate); see also id. at 563-64 (Brennan, J., concurring); *Williams v. United States*, 401 U.S. 646, 665 (1971) (Marshall, J., dissenting).

It is unclear whether the status of review question will divide the present coalition and whether the Justices, Justice Brennan in particular, will react as they did in *Johnson* to non-fourth amendment questions.

136 457 U.S. 537 (1982); see infra note 169 and accompanying text.
ularly concerned with Peltier's presumption of nonretroactivity and the decision's effect on the exclusionary rule.\textsuperscript{137} Whether Brennan also shares the Johnson plurality's stated remedial purpose in overhauling the retroactivity doctrine is unclear.\textsuperscript{138}

Members of the Court also may abandon Harlan's retroactivity approach in other contexts because they view Payton v. New York\textsuperscript{139} as representative of a distinct class of fourth amendment cases that alone merits retroactive effect. Payton, Johnson, and Steagald v. United States,\textsuperscript{140} which arguably represent the only recent cases in which the Court has expanded fourth amendment guarantees,\textsuperscript{141} all deal with violations of a defendant's home.

In Payton, the Court held that the fourth amendment prohibits police without a warrant or consent from entering a suspect's home to make a routine felony arrest. The Court characterized both entries to arrest and entries to search as intrusions that "breach . . . the entrance to an individual's home."\textsuperscript{142} Similarly, in Steagald, the Court held that absent consent or exigent circumstances, police cannot search a third party's home for the subject of an arrest warrant without first obtaining a search warrant.\textsuperscript{143} The Court has drawn "a firm line at the entrance to the house"\textsuperscript{144} for determining the legality of search and seizures under the fourth amendment.

The Johnson decision, then, can be interpreted as attempting to underscore this "home" distinction. If Johnson is construed in this manner, its significance lies in its fourth amendment implications and not in its reformulation of retroactivity doctrine. By resorting to Harlan's approach, the Court simply might be indicating its desire to apply Payton and similar fourth amendment "home" cases retroactively—a result it

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\textsuperscript{137} See supra note 98 and accompanying text; see also supra note 134.

\textsuperscript{138} Given Justice Brennan's past endorsement of the Linkletter test, his concurrence on the understanding that Johnson left undisturbed Linkletter precedents for cases on collateral attack, and the Court's implicit overruling of Peltier, Brennan's continued commitment to the Harlan approach seems doubtful. See supra note 135.

\textsuperscript{139} 445 U.S. 573 (1980).


\textsuperscript{142} Payton v. New York, 445 U.S. 573, 589 (1980). The Court went on to emphasize that [t]he Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home. . . . In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house.

\textsuperscript{143} 451 U.S. at 216.

\textsuperscript{144} 445 U.S. 573, 590 (1980).
would have difficulty drawing from the *Linkletter* balancing test or the *Peltier* rule because of their focus on the deterrent purpose of the exclusionary rule.\(^{145}\)

The Court is able to reformulate its retroactivity analysis in fourth amendment "home" cases such as *Johnson* because it has treated fourth amendment cases as a distinct area of retroactivity law in the past and thus can confine its reformulation to an area that will present few retroactivity issues. The Court's recent fourth amendment record suggests that retroactivity issues will arise only in "home" cases like *Payton*. By limiting the *Johnson* decision to fourth amendment cases, the Court also can avoid the difficult issue of what standard applies to petitioners seeking the benefit of new rules on habeas corpus because *Stone v. Powell*\(^{146}\) effectively precludes habeas review of fourth amendment claims.

Thus, it is not certain whether the Court will apply all fourth amendment rules retroactively to cases before it on direct review or expand the *Johnson* doctrine's applicability to other constitutional contexts as its stated remedial purpose implies. The *Johnson* decision can be interpreted to allow a new coalition of Justices to return to the Court's pre-*Peltier* nonretroactivity pattern and to limit formal recognition of Harlan's analysis to fourth amendment cases. This interpretation requires expanding the scope of the "clear break" category of cases and limiting *Johnson* to its stated facts. The *Johnson* Court restates the "clear break" threshold test so that it compels nonretroactive effect for "new" rules on the strength of the *Linkletter* reliance and effect factors. The flexibility of the "clear break" standard\(^{147}\) permits the Court to classify virtually any rule as "new" if it chooses to accord that rule nonretroactive effect.

On its stated facts, the *Johnson* decision establishes that a case resolving an issue expressly left undecided by the Court should be applied retroactively if its resolution "rest[s] on both long-recognized principles of Fourth Amendment law and the weight of historical authority."\(^{148}\) *Johnson*’s effect simply may be to clarify that borderline cases like *Payton*, whose rules have been foreshadowed but not expressly

\(^{145}\) The trouble the Court took to retain its fourth amendment *Linkletter* precedents for use in "clear break" cases while applying *Payton* retroactively supports this view. The *Peltier* Court read *Almeida-Sanchez* to be "a 'clear break' with the past," see supra note 94 and accompanying text, although it was clearly foreshadowed and anticipated by lower courts, see United States v. Peltier, 422 U.S. 531, 544-47 (1975) (Brennan, J., dissenting); Peltier v. United States, 500 F.2d 985, 988-90 (9th Cir. 1974); supra note 96.

By contrast, the *Johnson* Court found that *Payton* was not a "new rule" despite the fact that the lower state and federal courts split on the issue and of the ten state courts that had held warrantless arrests in the home unconstitutional, seven had done so on state and federal grounds. See *Payton* v. New York, 445 U.S. 573, 575 & nn.2-4 (1980).


\(^{147}\) See supra note 49.

laid out, must receive nonretroactive effect. Such a rule satisfies the Peltier dissent’s concern that unless questionable cases are resolved in favor of retroactivity, law enforcement officers “would have little incentive to err on the side of constitutional behavior.”

Although the Johnson majority endorses Harlan’s concerns and adopts his approach for cases before the Court on direct review, the Court might construe Johnson narrowly to serve a variety of ends. Narrowly applying the Johnson analysis will not, however, satisfy the remedial purpose articulated by the Court in subscribing to Justice Harlan’s critique. Such an interpretation will exacerbate the primary problems Harlan sought to solve in advocating his retroactivity approach. Failing to accord cases before the Court on direct review automatic retroactive effect, as suggested by Harlan, and reverting to the pre-Peltier retroactivity results, rightfully would be viewed as unprincipled decisionmaking. The narrow approach also would be difficult to apply consistently because of the difficulty of administering the “clear break” test. Finally, the nonretroactivity of “clear break” cases and the unexplained distinction between petitioners on habeas and those before the Court on direct review would result in continued unequal treatment of similarly situated defendants.

2. The Broad Reading: Adopting the Harlan Approach for Use in All Areas of Constitutional Adjudication

Although the Johnson majority may not be wedded to Harlan’s jurisprudence, it is interested in applying its retroactivity doctrine in a principled manner and relieving the unequal treatment that characterized prior retroactivity law. It is unclear whether a majority of the Court perceives the new approach as a broad remedy for past retroactivity problems or merely as a narrower solution to these problems in the fourth amendment area. The Johnson opinion and the Court’s subsequent decision in Mack v. Oklahoma suggest that the Court indeed intends to apply the Harlan approach outside the realm of fourth amendment retroactivity analysis. The Johnson Court emphasized the problems with prior retroactivity law, especially the unequal treatment inherent in nonretroactivity. In declaring broadly that the “time for

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149 Id. at 561.
150 The Court seems to have as much difficulty coming to a consensus on what constitutes a “clear break” as it does determining whether the purpose of a rule enhances the reliability of the verdict and would be served by retroactive application. See, e.g., United States v. Peltier, 422 U.S. 531, 541 (1975); id. at 543 (Douglas, J., dissenting); id. at 544 (Brennan, J., dissenting); Gosa v. Mayden, 413 U.S. 665, 673 (1973); id. at 693 (Marshall, J., dissenting); Desist v. United States, 394 U.S. 244 (1969); id. at 269-71 (Fortas, J., dissenting); id. at 257 (Harlan, J., dissenting); supra note 46.
151 103 S. Ct. 201 (1982).
toleration [of unequal treatment] has come to an end,"\textsuperscript{152} the Court enunciated a policy not restricted to alleviating injustices in fourth amendment cases.\textsuperscript{153} The Court acknowledged that even under its new approach a degree of inequality might result. It asserted, however, that the approach "ha[...]s the power to eliminate the obvious unfairness that results when [retroactivity doctrine] gives only the most conveniently situated defendant the retrospective benefit of a newly declared rule."\textsuperscript{154}

The Johnson Court referred to Harlan's approach throughout its analysis, stating that it "embrace[d] Harlan's views in Desist and Mackey"\textsuperscript{155} to the extent necessary to decide the case. The Johnson majority reiterated Harlan's views concerning the Court's retroactivity record and applied these views to determine whether a retroactivity "question would be fairly resolved by applying the rule in Payton to all cases still pending on direct appeal."\textsuperscript{156} Having acknowledged that Harlan's concerns are relevant to all retroactivity issues, the Court cannot easily confine their applicability to fourth amendment cases.

Inferences based on Johnson's fourth amendment context support a broad rather than a narrow\textsuperscript{157} interpretation of the decision. It is significant that the Court selected the area of case law most consistently presumed nonretroactive to reverse this presumption and declare its adoption of Harlan's retroactivity ideas. The Johnson majority could have rejected the nonretroactivity rule formulated in United States v. Peltier\textsuperscript{158} and given the Payton decision retroactive effect without creating such doctrinal upheaval.\textsuperscript{159} The Court's complete reversal and reformulation in retroactivity analysis indicates its desire to change retroactivity results in all areas of constitutional law.

The Court's recent refusal to expand fourth amendment guarantees except in the "home" cases also suggests that it does not intend to limit the Johnson retroactivity approach to the fourth amendment context. A reformulation of the fourth amendment retroactivity rule would be virtually meaningless unless the Court intended its expansive language to apply in other constitutional contexts.

Finally, a subsequent decision reflects the Court's intention to apply Johnson beyond its explicit bounds. In Mack v. Oklahoma\textsuperscript{160} the Court summarily vacated an Oklahoma state court's judgment that Carter v.

\textsuperscript{152} United States v. Johnson, 457 U.S. 537, 556 n.16 (1982).
\textsuperscript{153} But see supra note 133.
\textsuperscript{154} Johnson, 457 U.S. at 557 n.17 (1982).
\textsuperscript{155} Id. at 562.
\textsuperscript{156} Id. at 554.
\textsuperscript{157} See supra notes 140-46 and accompanying text.
\textsuperscript{158} 422 U.S. 531 (1975); see supra notes 82-98 and accompanying text.
\textsuperscript{159} It is possible to reconcile Peltier to the earlier line of cases by ignoring the Court's implicit analysis and deemphasizing the knowledge inquiry. See Beytagh, supra note 8, at 1592-94.
\textsuperscript{160} 103 S. Ct. 201 (1982).
Kentucky be denied retroactive effect. Although the Carter rule involved the fifth amendment privilege against self-incrimination, the Court remanded the case "for further consideration in light of United States v. Johnson." The court vacated the Oklahoma state court decision without opinion, but the case reflects its intention to apply the Johnson formula in resolving all future retroactivity questions.

If the Court does expand the Johnson approach's applicability, it is unclear what form the rule will take. The Court may develop a general rule mandating retroactive effect in most cases while retaining the flexibility to apply decisions nonretroactively by retaining the "clear break" category of controlling precedent. If the Court is truly interested in principled decisionmaking, however, it may disregard Blackmun's three categories of "controlling precedent" as mere dicta.

In sum, the Court may apply the Johnson rule only in fourth amendment cases or expand its scope to include all constitutional decisions. It may retain the expedient Johnson rule or dispense with its categories of controlling precedent to make application of Harlan's approach on direct review unqualified by a "clear break" distinction. Even if the Court formulates a retroactivity approach that can be applied in a consistent and principled manner by rejecting the Linkletter analysis and employing the Harlan approach in all retroactivity cases, it still must resolve the problem of its unequal treatment of similarly situated defendants.

B. Unequal Treatment: Another Arbitrary Distinction or a Principled Response to Judicial Needs?

The Court in United States v. Johnson attempted to remedy the unequal treatment inherent in nonretroactivity by applying Justice Harlan's retroactivity approach to cases before the Court on direct re-

161 450 U.S. 288 (1981) (holding that failure to give requested instruction on a defendant's failure to testify is violation of defendant's fifth amendment privilege against self-incrimination).

162 Id. The Mack dissent indicates that the petitioner specifically relied upon United States v. Johnson in arguing for retroactivity. 103 S. Ct. 201 (1982). Justice O'Connor, joined in dissent by Justice Rehnquist, objected to the Court's extension of Johnson without plenary review to cases arising under the fifth amendment. Id. at 201-02 (O'Connor, J., dissenting).

163 Id. Justice O'Connor also asserted that "[t]he court below will be understandably confused by the Court's action in vacating the judgment, and remanding to determine the applicability of a decision that by its explicit terms is restricted to the Fourth Amendment." Id. at 202.

164 Several lower courts, in applying Johnson, seem to subscribe to this latter view. See United States v. Martin, 690 F.2d 416, 421 n.4 (4th Cir. 1982) (applying Ross retroactively, stating that "[g]enerally, we must apply a Supreme Court decision construing the Fourth Amendment retroactively to all convictions that were not yet final when the decision was rendered"); see also United States v. Robinson, 690 F.2d 869, 873-74 (11th Cir. 1982) (holding that fourth amendment aspects of United States v. Berry, 670 F.2d 583 (5th Cir. 1982) (en banc) apply retroactively, at least to all convictions not final at time decision was rendered).
view. In retaining a “clear break” category of controlling precedent that required nonretroactivity for “new” rules, however, the Court perpetuated this unequal treatment. Even if the Court in the future overrules the “clear break” cases or ignores the “clear break” language in Johnson as dicta, it must confront a new form of disparity in treatment based on a petitioner’s status of review.

The Johnson Court created a procedural distinction between petitioners seeking retroactive relief on direct review and those before the Court on habeas without providing a rationale for treating the two classes of petitioners differently. This distinction is without foundation because the Johnson Court failed to define the retroactivity standard that applies to those fourth amendment cases cognizable on habeas. However, Justice Brennan’s caveat in Johnson and the Justices’ positions on this issue in past cases suggest that the Court will rely on a Linkletter purpose inquiry to resolve retroactivity questions arising on collateral attack. The Court seems unwilling to embrace Harlan’s choice of law on habeas because it might foreclose litigants collaterally attacking a final judgment from receiving the benefit of constitutional protections that affect the reliability of their convictions.

Although this concern is legitimate, the Court must give a principled rationale for its procedural distinction or suffer continued charges that it is drawing arbitrary lines among similarly situated defendants. The Court must establish either that a defendant seeking relief on direct review and a defendant collaterally attacking a final judgment are not similarly situated or that a classification based on status of review is

165 See United States v. Johnson, 457 U.S. 537, 547-48 (1982); see also supra notes 101-06 and accompanying text.

166 See supra notes 107-15 and accompanying text.

167 See supra note 164.

168 Johnson did not require the Court to decide the issue of what standard it will apply on habeas corpus both because the petitioner was before the Court on direct review and because Stone v. Powell, 428 U.S. 465 (1976), makes the issue moot in fourth amendment cases. Similarly, the Court in Mack v. Oklahoma, 103 S. Ct. 201 (1982), did not face the issue because the petitioner sought relief on direct review.

169 Brennan stated that he joined the plurality on the understanding that the “decision leaves undisturbed our retroactivity precedents as applied to convictions final at the time of decision.” United States v. Johnson, 457 U.S. 537, 563-64 (1982) (Brennan, J., concurring).

170 See supra note 135.

171 Critics of Harlan’s approach contend that automatic nonretroactive or prospective application of new rules on collateral attack will deny litigants on habeas the benefit of rules that may affect the reliability of the verdict. To this the Johnson Court responded that [t]he logic of our ruling, however, is not inconsistent with our precedents giving complete retroactive effect to constitutional rules whose purpose is to overcome an aspect of the criminal trial that substantially impairs its truthfinding function. . . . Depending on the constitutional provision involved, additional factors may warrant giving a particular ruling retroactive effect beyond those cases pending on direct review.

457 U.S. at 562 n.21.
reasonable in relation to legitimate judicial and societal needs.\textsuperscript{172}

To justify distinguishing between defendants based on their status of review, the Court should explicitly adopt Harlan's focus on the adjudicatory process by which the defendant came before the Court.\textsuperscript{173} Justice Harlan based his two-tiered approach on his belief that the nature, function, and scope of the two methods of review are fundamentally different and thus petitioners availing themselves of the habeas remedy are in a different class than those before the court on direct review. Harlan also asserted that society's legitimate interest in the finality of judgments outweighed other considerations and made such a distinction necessary.\textsuperscript{174} Although Harlan's view is subject to dispute,\textsuperscript{175} it is supported by the Court's recent decisions limiting the availability and scope of federal habeas corpus relief.\textsuperscript{176}

Furthermore, although a complete adoption of Justice Harlan's retroactivity theory would not resolve the underlying philosophical differences among Justices, it would allow them to express their concerns within a principled and easily applied analytical framework. In Harlan's view, the Court's function on direct review requires that it apply the law "as it is at the time, not as it once was,"\textsuperscript{177} but the Court's choice of law on habeas is not similarly restricted. The Harlan approach would enable the Court to weigh its present conception of the role of habeas review and society's interest in finality against the individual litigant's interest in receiving new constitutional protections that may affect the integrity of the truth-finding process. Thus, this approach is flexible enough to accommodate the interests of individual members of

\begin{itemize}
  \item \textsuperscript{172} Comment, supra note 43, at 242-43.
  \item \textsuperscript{173} For a view that both nonretroactivity and Harlan's distinction between defendants based on their status of review violate the equal protection clause, see Comment, supra note 43.
  \item \textsuperscript{174} \textit{See supra} notes 66-79 and accompanying text.
  \item \textsuperscript{175} \textit{See supra} note 80 and accompanying text.
  \item \textsuperscript{176} \textit{See}, e.g., United States v. Frady, 456 U.S. 152 (1982) (\textit{Sykes} cause and actual prejudice requirements govern petitions of federal prisoners under 28 U.S.C. § 2254 (1976)); Engle v. Isaac, 456 U.S. 107 (1982) (\textit{Sykes} cause and actual prejudice standard for excusing procedural defaults held applicable even in cases in which constitutional error may have affected truth-finding function at trial); Rose v. Lundy, 455 U.S. 509 (1982) (requiring total exhaustion of state remedies before federal courts will consider habeas corpus petitions); Wainwright v. Sykes, 433 U.S. 72 (1977) (state prisoner barred by procedural default from raising constitutional claim on direct appeal may only proceed on § 2254 federal habeas claim if showing of cause for and actual prejudice from default is made); Stone v. Powell, 428 U.S. 465 (1976) (federal habeas corpus relief unavailable for claim that illegally seized evidence was introduced at trial where state has provided opportunity for full and fair litigation of fourth amendment claim). See generally Olsen, Judicial Proposals to Limit the Jurisdictional Scope of Federal Post-Conviction Habeas Corpus Consideration of the Claims of State Prisoners, 31 BUFFALO L. REV. 301 (1983); Comment, Lundy, Isaac and Frady: A Trilogy of Habeas Corpus Restraint, 32 CATH. U.L. REV. 169 (1983).
  \item \textsuperscript{177} Mackey v. United States, 401 U.S. 667, 681 (1971) (Harlan, J., dissenting); \textit{see supra} notes 54-56 and accompanying text.
\end{itemize}
the Court with respect to the choice of law on habeas, yet it clarifies what factors the Court is weighing and why it is doing so.

In arriving at his choice of law, Harlan stated that "the relevant competing policies properly balance out to the conclusion that, given the current broad scope of constitutional issues cognizable on habeas, it is sounder, in adjudicating habeas petitions, generally to apply the law prevailing at the time a conviction became final." The Court's retreat from its expansive reading of the habeas writ and its imposition of new limits on habeas relief, however, require a reevaluation of the balance Harlan struck. Once a new balance is found, it can be applied consistently to all litigants until such time as the Court is compelled by a new interpretation of the scope of habeas to reexamine its position. Thus, although the Harlan approach contains a balancing inquiry, it is capable of consistent application. In sum, Harlan's approach is responsive to the changing contours of the writ, and can satisfy the Justices' unique concerns with respect to the choice of law on habeas within a principled framework for decision.

CONCLUSION

In United States v. Johnson, the Supreme Court attempted to "rethink" its retroactivity doctrine and thereby resolve the problems that have plagued the doctrine since its formulation in Linkletter v. Walker. The Court, however, neglected to address the source of these problems. Although it adopted Justice Harlan's choice of law in fourth amendment exclusionary rule cases arising on direct review, the Court again failed to enunciate a single purpose or rationale for its new approach to retroactivity issues.

Until the Court develops a principled theory to guide its retroactivity analysis, the Johnson formula will suffer from the same incoherent and inconsistent application that characterized the Linkletter balancing test. Furthermore, if the Court is to avoid continued charges of drawing arbitrary procedural distinctions among similarly situated defendants, it must establish that defendants benefitting from a new rule on direct review are not in the same class as habeas petitioners who are denied the protection of the rule. In the alternative, the Court must justify the Johnson procedural distinction as a reasonable means to further legitimate judicial and societal ends.

Justice Harlan's approach to retroactivity issues provides the necessary principled framework for resolution of retroactivity issues. It clearly mandates that all constitutional decisions be applied to convictions not yet final on the date of the decision. Harlan's approach re-

178 Mackey, 401 U.S. at 688-89 (Harlan, J., dissenting) (emphasis added).
179 See supra note 176.
quires that the choice of law on habeas be resolved by a balancing test that is responsive to the changing bounds of the habeas writ and allows the Court to consider forthrightly the concerns peculiar to retroactivity questions on habeas review. The Harlan approach is capable of consistent application and provides a legitimate rationale for distinguishing among defendants according to their procedural posture. The Court would do well to go beyond Johnson's adoption of the result of Justice Harlan's retroactivity analysis to an endorsement, in all areas of constitutional adjudication, of the theoretical construct that supports that result.

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