

BREYER, J., dissenting

**SUPREME COURT OF THE UNITED STATES**

No. 99–6218

WILBERT K. ROGERS, PETITIONER *v.* TENNESSEE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF  
TENNESSEE, WESTERN DIVISION

[May 14, 2001]

JUSTICE BREYER, dissenting.

I agree with the Court’s basic approach. Justice Cardozo pointed out that retroactivity should be determined “not by metaphysical conceptions of the nature of judge-made law, . . . but by considerations of convenience, of utility, and of the deepest sentiments of justice.” *The Nature of the Judicial Process* 148–149 (1921). Similarly, the Due Process Clause asks us to consider the basic fairness or unfairness of retroactive application of the Tennessee court’s change in the law. That Clause provides protection against after-the-fact changes in criminal law that deprive defendants of fair warning of the nature and consequences of their actions. It does not enshrine Blackstone’s “ancient dogma that the law declared by . . . courts had a Platonic or ideal existence before the act of declaration,” *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U. S. 358, 365 (1932) (Cardozo, J.). Cf. *ante*, at 7–8 (SCALIA, J., dissenting).

I also agree with the Court that, in applying the Due Process Clause, we must ask whether the judicial ruling in question was “unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.” *Bouie v. City of Columbia*, 378 U. S. 347, 354 (1964) (quoting J. Hall, *General Principles of Criminal Law* 61 (2d ed. 1960) (internal quotation marks omitted)).

I cannot agree, however, with the majority’s application

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of that due process principle to this case. As JUSTICE SCALIA well explains, Rogers did not have fair warning that the Tennessee courts would abolish the year and a day rule or that they would retroactively apply the new law to the circumstances of his case, thereby upgrading the crime those circumstances revealed from attempted murder to murder. I therefore join Part II of JUSTICE SCALIA's dissenting opinion.