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Sixth Amendment--The Evolution of the Supreme Court's Retroactivity Doctrine: A Futile Search for Theoretical Clarity

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SIXTH AMENDMENT—THE EVOLUTION OF THE SUPREME COURT'S RETROACTIVITY DOCTRINE: A FUTILE SEARCH FOR THEORETICAL CLARITY

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

I. INTRODUCTION

In *Teague v. Lane*,[1] the Supreme Court completed the fitful transition from a rule-based test to a process-based test for determining the retroactivity of new rules of criminal procedure.[2] The Court held that the retroactive application of constitutional guarantees of criminal procedural rights, in this case the extension of the sixth amendment fair cross section requirement to the petit jury, hinges on the procedural posture of the defendants seeking the benefit of the new rule.[3] The Court formulated a test that focuses exclusively on a defendant's place in the review process, and approved narrow exceptions for new rules that affect conduct of a private nature or that would likely lead to the reversal of a conviction.[4] Thus, the test largely eliminated from consideration the factors that formerly lay at the core of its approach: the purposes and effects of the specific constitutional right involved.[5]

This Note will argue that such a complete break with the previous retroactivity standard is unnecessary to achieve the objectives

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[1] Teague v. Lane, 109 S. Ct. 1060 (1989).

[2] In this context, the "retroactivity doctrine" is the Court's analytical framework for deciding when a new rule of criminal procedure is to be applied to "prior" cases. Various commentators have observed that several reference points are available for defining a "prior" case: the point at which a conviction becomes final, the date of the commencement of trial, or the date of the violation of constitutional procedure. The Court has used all three reference points, and even a fourth (the date of introduction of illegally obtained evidence) in fourth amendment cases, without articulating a reasoned basis for its choices. *See* Note, United States v. Johnson: *Reformulating the Retroactivity Doctrine*, 69 CORNELL L. REV. 166, 167 n.8 (1983).

[3] *Teague*, 109 S. Ct. at 1069.

[4] *Id.* at 1075-77.

[5] *See, e.g.*, Stovall v. Denno, 388 U.S. 293, 297 (1967); Linkletter v. Walker, 381 U.S. 618, 636 (1965).

sought by the Court. The Court's practical interest in finality will be accepted here as a legitimate concern, though studies documenting the impact of pure retroactivity are lacking.[6] Yet the Court could adequately address its pragmatic concern without eliminating the safeguards of fundamental fairness that come from examining the nature and purposes of proposed rules. This Note suggests the framework of a test that would allow the Court to accommodate interests of finality and concerns for fundamental fairness.

II. FACTUAL AND PROCEDURAL BACKGROUND

In November 1979, Frank Dean Teague, a black man, was convicted by a jury composed exclusively of white jurors[7] on two counts of armed robbery, one count of aggravated battery, and three counts of attempted murder for his involvement in the robbery of a grocery store and subsequent shooting of police officers.[8] He was convicted on each count and was sentenced to serve concurrent thirty-year prison terms.[9]

During jury selection for trial, the prosecution used all ten peremptory challenges allotted to it to strike black members of the venire from the petit jury.[10] Teague's counsel first objected to the prosecutor's use of such challenges after the prosecutor had eliminated six potential black jurors; counsel then moved for a mistrial.[11] The court denied Teague's motion, asserting that a motion at that point was improper.[12] Once the jury selection process had been completed, Teague's counsel again moved for a mistrial, objecting that his client was being denied "a jury of his peers."[13]

The prosecutor responded to Teague's objection by volunteer-

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6 *See infra* note 139 and accompanying text.

7 *Teague*, 109 S. Ct. at 1065.

8 *Id.* at 1065.

9 People v. Teague, 108 Ill. App. 3d 891, 893, 439 N.E.2d 1066, 1068 (1982).

10 *Teague*, 109 S. Ct. at 1065.

11 United States *ex rel.* Teague v. Lane, 779 F.2d 1332, 1333 (7th Cir. 1985). *See infra* note 12 and accompanying text.

12 Joint Appendix at 2-3, *Teague* (No. 87-5259).

13 *Id.* at 3. The relevant exchange between the court and counsels took place as follows:

> Mr. Motta [Counsel for the defendant]: As the Court is aware State exercised 10 peremptory challenges and each challenge excused a black person. I feel that my client is entitled to a jury of his peers, your Honor. I feel that he is being denied this. I would ask the Court for a mistrial.
>
> Mr. Angarola [Prosecutor]: We exercised more than 10 challenges. In fact we exercised 11 challenges and didn't just excuse black individuals. Counsel is incorrect when he stats [sic] that.
>
> In fact, your Honor, one of the challenges, peremptory challenges exercised was against a white woman. In addition, your Honor, numerous individuals that were excused were of very young years. There was an attempt, your Honor, to have

ing the justification that he was attempting to eliminate very young jurors and to create a balance of men and women.[14] Without directly commenting on the validity of these reasons, the court denied Teague's second request for a mistrial and observed that the jury selected "appear[ed] to be a fair jury."[15]

Teague appealed his conviction on the ground that the manner in which the prosecution exercised its peremptory challenges violated his right to an impartial jury.[16] The appellate court rejected Teague's sixth amendment claim and affirmed the district court's decision.[17] Teague's appeal to the Illinois Supreme Court was denied,[18] as was his subsequent petition for writ of certiorari to the United States Supreme Court.[19]

In March 1984, five months after the denial of certiorari and more than four years after his conviction, Teague filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Illinois.[20] The State of Illinois answered with a

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a balance of an equal number of men and women as the jury is now comprised there are seven men and five women sitting on the jury.

We feel that counsel's motion is totally improper.

Mr. Motta: If I may respond to that briefly, your Honor, State exercised 10 peremptory challenges, all of 10 black people were excused; that their one peremptory challenge for an alternate juror excused, I believe, a white woman. I think the record will reflect the ages and background of the individuals that were excused. They were all to sit on the regular jury. I am not talking about the alternate, the one white alternate that was excused by the State.

Mr. Angarola: As your Honor previously pointed out, counsel himself excluded a black, Mrs. McCleary, your Honor, who was a black individual who was accepted by the People, and he excused her.

The Court: Counsel, I feel that it would appear that the jury appears to be a fair jury. I will deny your motion.

Id. at 3-4.

14 *Teague*, 779 F.2d at 1333.

15 Teague v. Lane, 820 F.2d 832, 833 (7th Cir. 1987). *See supra* note 13.

16 *Teague*, 109 S. Ct. at 1065.

17 Teague v. Lane, 108 Ill. App. 3d 891, 439 N.E.2d 1066 (1982).

18 People v. Teague, 93 Ill. 2d 547, 449 N.E.2d 820 (1983).

19 Teague v. Lane, 464 U.S. 867 (1983).

20 *Teague*, 109 S. Ct. at 1065. The sections of the United States Code authorizing a petition for the writ provide in pertinent part:

§ 2241. Power to grant writ.

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions . . .

. . .

(c) The writ of habeas corpus shall not extend to a prisoner unless . . .

. . .

(3) He is in custody in violation of the Constitution or laws or treaties of the United States . . . .

. . . .

§ 2254. State custody; remedies in Federal courts.

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in

motion for summary judgment, relying upon the standard set out in *Swain v. Alabama*.[21] Teague asserted that the prosecutor's use of all of his peremptory challenges to eliminate black venire members was a violation of his sixth amendment right to an impartial jury and his fourteenth amendment right to due process.[22] He based his fourteenth amendment argument on the claim that the Supreme Court had effectively discredited[23] the *Swain* requirement—a showing of a systematic pattern of discriminatory acts by the prosecutor in repeated cases[24]—in *McCray v. New York*.[25] The district court did not review the validity of Teague's argument, holding instead that it was bound by other precedent to deny the petition.[26]

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custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States. . . .

. . . .

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties . . . shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit . . .

. . .

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing . . .

. . .

(7) that the applicant was otherwise denied due process of law in the State court proceeding . . . .

28 U.S.C. §§ 2241, 2254 (1988).

21 380 U.S. 202 (1965). The *Swain* Court held that a black defendant's rights to equal protection under the fourteenth amendment were not violated by the prosecution's exercise of its peremptory challenges to exclude blacks from the jury in the absence of systematic exclusion of blacks from juries over a period of time. *Id.* at 221-23.

22 *Teague*, 109 S. Ct. at 1065, 1067. The sixth amendment provides that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI.

The fourteenth amendment provides in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

23 *Teague*, 109 S. Ct. at 1067.

24 *See supra* note 21.

25 461 U.S. 961 (1983). Although the Court denied certiorari in *McCray*, Justices Marshall and Brennan filed dissents calling for review of *Swain*. *Teague*, 109 S. Ct. at 1067.

26 *See* Teague v. Lane, 820 F.2d 832, 833-34 (7th Cir. 1987) (summary of the district court's unpublished order). The district court held that two Seventh Circuit decisions, United States v. Clark, 737 F.2d 679 (7th Cir. 1984) (facts did not support inference of racial discrimination), and United States *ex rel.* Palmer v. DeRobertis, 738 F.2d 168 (7th

Teague appealed the denial of his petition on the same grounds to the Seventh Circuit.[27] A panel of the appellate court initially determined that Teague had made out a prima facie case of racial discrimination under the "fair cross-section" standard of jury impartiality guaranteed by the sixth amendment.[28] The panel then submitted its preliminary decision to the court en banc, which withheld further consideration of the case pending the outcome of *Batson v. Kentucky*.[29]

In *Batson*, the Court held that a prima facie case of discrimination under the equal protection clause of the fourteenth amendment could be shown on the prosecutor's use of challenges in a single case.[30] The Court subsequently restricted the retroactive application of *Batson*, however, to cases not brought on collateral review.[31] Relying on these decisions, the Court of Appeals denied Teague the benefit of the *Batson* rule, dismissed his *Swain* claim on grounds of procedural default, and held that the "fair cross section" rule applied only to the composition and selection of the jury venire.[32]

The United States Supreme Court granted certiorari to consider three issues: 1) whether petitioner was in a position to benefit from the new standards for establishing prima facie discrimination in jury selection set out in *Batson*; 2) whether petitioner could make out a prima facie case of discrimination under the *Swain* standard based on an examination of the justifications volunteered by the prosecutor; and 3) whether Teague was entitled to a rule extending the sixth amendment guarantee to a jury drawn from a fair cross section of the community to the exercise of peremptory challenges in selecting the petit jury.[33] This Note will address only this last issue.[34]

Cir. 1984) (convicted appellant defaulted by failing to explain or show prejudice from failure to raise jury selection issue at trial), as well as *Swain*, precluded issuance of Teague's petition.

27 *Teague*, 109 S. Ct. at 1066.

28 *See* United States *ex rel.* Teague v. Lane, 779 F.2d 1332 (7th Cir. 1985) (Cudahy, J., dissenting from order of full court vacating panel opinion and voting to rehear case en banc).

29 779 F.2d 1332 (7th Cir. 1985) (en banc). Following the decision in Batson v. Kentucky, 476 U.S. 79 (1986), the en banc panel held that Teague was not entitled to the benefit of that new rule because it had expressly been held non-retroactive in Allen v. Hardy, 478 U.S. 255 (1986). *Teague*, 820 F.2d at 832.

30 *Batson*, 476 U.S. at 96.

31 *Allen*, 478 U.S. at 255.

32 *Teague*, 109 S. Ct. at 1066.

33 Teague v. Lane, 108 S. Ct. 1106 (1988).

34 The plurality opinion of the Court quickly dispatched with the first two arguments. Regarding the retroactive application of *Batson*, the Court held that *Allen*, 478 U.S. at 255, had previously determined that *Batson* was to be applied only prospectively in cases

III. THE RETROACTIVITY DOCTRINE PRIOR TO TEAGUE

Before 1965, the Court followed a general practice of applying new constitutional doctrine retroactively to all cases, whether heard on direct or collateral review.[35] The Court first attempted a comprehensive statement of its approach to the question of retroactivity in *Linkletter v. Walker*.[36] The Court argued that the view that judges merely interpret immanent, existing law had lost its credibility over the course of the previous century.[37] This view recognizes that law evolves new rules and that there may be compelling reasons not to disturb prior decisions in which courts had properly applied the constitutional law in effect at the time.[38] As a result, the Court asserted that the Constitution itself neither favored nor discouraged retroactive application of new rules in any context.[39] Although it did not venture to formulate criteria for deciding when a new rule had been "created," the Court emphasized that the interest in finality as well as the improvements in fairness implicit in the promulgation of new rules had to be factored into the retroactivity doctrine.[40] Thus, the Court fashioned a balancing test for retroactivity that weighed three factors: "the purpose of the [new rule], the reliance placed upon [the previous rule], and the effect on the administration of justice of a retroactive application of the [new rule]."[41]

However, the *Linkletter* Court itself provided no guidelines for the uniform application of these factors. In Linkletter's case, the Court asserted that the exclusionary rule had as its primary object

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of collateral review. The Court noted that Teague's petition for certiorari had been denied over two years earlier. It also held that its earlier denial of certiorari in *McCray*, issued while Teague's case was on direct appeal, had no legal effect upon the previous standard set forth in *Swain*. *Teague*, 109 S. Ct. at 1066-67 (citing McCray v. New York, 461 U.S. 961 (1983); Swain v. Alabama, 380 U.S. 202 (1965)).

On the petitioner's argument that the prosecutor's voluntary explanation permitted a deeper examination of the use of challenges, the Court held that Teague had failed to raise the issue below, thus waiving his claim. Habeas review was also barred to Teague, the Court said, because he did not make the required showing that considerations of fundamental fairness required that his failure to raise the issue be overlooked. *Id.* at 1067-69.

35 United States v. Johnson, 457 U.S. 537, 542 (1982).

36 381 U.S. 618 (1965). The *Linkletter* Court was confronted with the habeas petition of a man convicted of burglary on the basis of evidence obtained in warrantless searches of his home. The Court had held previously that the searches were too distant from the arrest to be held constitutional under the fourth amendment. *Id.* at 621 (citing Mapp v. Ohio, 367 U.S. 643 (1961)).

37 *Id.* at 623-24.

38 *Id.* at 624.

39 *Id.* at 629.

40 *Id.* at 636 (citing Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374 (1940)).

41 *Id.*

the deterrence of police misconduct during investigations; previous misconduct could not be undone by retroactive application.[42] Because the *Linkletter* Court defined the purpose of the exclusionary rule in terms of whether it focused on the merits of the defendant's case or on officer misconduct, it might have been expected that subsequent cases would have recognized the distinction between cases heard on direct and collateral review. However, the *Linkletter* Court went no further in structuring its inquiry into the "purpose" of new rules, nor did it address the problem of rules which shared both deterrence and fact-finding objectives.

Instead, the silence of the *Linkletter* Court on these questions led to creative use of the three *Linkletter* factors and expansive interpretations of the purposes of new rules undeserving of retroactive application. In *Tehan v. Shott*,[43] the Court applied the *Linkletter* "purpose" test to a case involving prosecutorial comment on a defendant's decision to invoke the right to remain silent, and asserted that the fifth amendment aims more at guaranteeing personal privacy than at furthering the truth-finding process in court.[44] Thus, the Court held that the defendant was not entitled to retroactive application of the new rule because the rule had no remedial purpose.[45] The following year, in *Johnson v. New Jersey*,[46] the Court rejected the direct/collateral review distinction. The *Johnson* Court denied retroactive application of the *Miranda* rule to a case brought on direct appeal, despite the threat that evidence obtained during interrogation would be misleading or inaccurate, because other means were available to prevent admission of unreliable statements.[47] Both *Tehan* and *Johnson* attempted to minimize the damaging impact of their decisions on the fact-finding process by emphasizing that the trial court did not violate ethical standards by applying the law in effect at the time.[48]

Following *Tehan* and *Johnson*, the Court continued to enlarge the range of rules that did not warrant retroactive application.[49]

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[42] *Id.* at 636-37.

[43] 382 U.S. 406 (1966).

[44] *Id.* at 416.

[45] *Id.* at 413.

[46] 384 U.S. 719 (1966).

[47] *Id.* at 730. The Court took a novel approach to its inquiry into the purpose of the rule. While it acknowledged that at least one purpose of the rule against self-incrimination was to prevent police officers from extracting misleading or incriminating information from a defendant without his awareness of his procedural rights, the Court minimized the importance of this purpose by citing other methods available to the defendant to contest the validity of the information he supplied. *Id.* at 729.

[48] *Tehan*, 382 U.S. at 416-17; *Johnson*, 384 U.S. at 731.

[49] *See, e.g.*, Allen v. Hardy, 478 U.S. 255 (1986) (rule that use of peremptory chal-

However, the inconsistent treatment of similarly situated defendants led Justice Harlan to criticize the new approach. The result in *Johnson* prompted Justice Harlan to undertake a thorough review of the *Linkletter* test.[50] In the first of his dissents, Justice Harlan argued that the appropriate focus of any inquiry into constitutional issues is whether the defendant's case "require[s] their resolution for a just adjudication on the merits."[51] He then argued that the Constitution demands that redress for a governmental violation of a constitutional right be given to all defendants on direct review.[52] Otherwise, Justice Harlan observed, prospective application results in the unequal treatment of defendants sharing the same procedural position and gives judges unlimited discretion to apply law in contravention of the pre-eminent constitutional law.[53]

Justice Harlan recognized two distinct purposes of collateral review: 1) ensuring the freedom of persons whose convictions were potentially affected by errors in fact-finding; and 2) creating an "incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards."[54] According to Justice Harlan, the focus in cases heard on collateral review concerned not so much unequal treatment, for collateral attack may be brought by a defendant at any point before or after conviction, as the effect of a particular rule on the integrity of the fact-finding process during trial.[55] Therefore, defendants on collateral review may be entitled to retroactive application of a new rule of constitutional criminal procedure not because they are indistinguishable from the defendant in the case announcing the new rule, but because their convictions may extend beyond standards of tolerable unfairness.[56]

Justice Harlan refined his views in *Mackey v. United States*.[57] In a concurring opinion, Justice Harlan affirmed the importance of finality in deciding not to give new rules retroactive application to cases

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lenges to strike members of a single race from jury held non-retroactive); Solem v. Stumes, 465 U.S. 638 (1984) (rule that statements made by suspect who has requested counsel are inadmissible unless he initiated them held non-retroactive); Desist v. United States, 394 U.S. 244 (1969) (fourth amendment rule that fourth amendment search need not involve physical intrusion held non-retroactive).

50 Mackey v. United States, 401 U.S. 667 (1971) (Harlan, J., concurring); *Desist*, 394 U.S. at 244 (Harlan, J., dissenting).

51 *Desist*, 394 U.S. at 258 (Harlan, J., dissenting).

52 *Id.* (Harlan, J., dissenting).

53 *Id.* at 258-59 (Harlan, J., dissenting).

54 *Id.* at 262-63 (Harlan, J., dissenting).

55 *Id.* at 262 (Harlan, J., dissenting).

56 *Id.*

57 401 U.S. 667, 675-702 (1971) (Harlan, J., concurring).

on collateral review.[58] Justice Harlan also created two exceptions to the general principle for 1) rules that invalidate proscriptions on "primary, private individual conduct,"[59] and 2) rules that affect procedural guarantees " 'implicit in the concept of ordered liberty.' "[60] While providing a reasonably precise definition of the first exception, Justice Harlan defined the second in terms of the protection of "bedrock procedural elements" to which all defendants are entitled.[61] Justice Harlan did not elaborate on the means of identifying such elements in defining this exception, but did expressly reject his earlier emphasis on improvements in the fact-finding process.[62]

Despite Justice Harlan's invocations, the Court continued to apply the rule-based *Linkletter* standard.[63] However, the emphasis of the Court's review of a new rule's purpose increasingly fell on the rule's effect on the reliability of evidence instead of fact-finding procedures. This shift was due in part to development of the retroactivity doctrine in the context of the expansion of the scope of the fourth amendment exclusionary rule.[64]

During the mid-1970s, the Court began in isolated cases to reexamine the *Linkletter* framework and to consider the advantages of the procedural distinction urged by Justice Harlan. The first departure from *Linkletter* came in *United States v. Peltier*.[65] In *Peltier*, the Court acknowledged the applicability of the fourth amendment but

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58 *Id.* at 682-83 (Harlan, J., concurring).

59 *Id.* at 692 (Harlan, J., concurring). Justice Harlan equated rules affecting this conduct with recently developed principles of substantive due process, such as the right to privacy. *Id.*; *see also* Griswold v. Connecticut, 381 U.S. 479 (1965).

60 *Mackey*, 401 U.S. at 693 (Harlan, J., concurring) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)). While Justice Harlan did not elaborate on what he meant by this phrase, he did attribute such procedures to cases where "time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will properly alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction," *id.*, and distinguished it from any rules that "significantly improve the pre-existing fact-finding procedures." *Id.* at 694 (Harlan, J., concurring).

61 *Id.* at 693-94 (Harlan, J., concurring).

62 *Id.* at 694 (Harlan, J., concurring).

63 *See supra* note 41 and accompanying text. In subsequent cases, the Court usually framed the test in terms of the statement of the three factors in Stovall v. Denno, 388 U.S. 293, 297 (1967).

64 *See, e.g.*, Solem v. Stumes, 465 U.S. 638 (1984) (rule of inadmissibility of a defendant's answers given in response to questioning of police officers after the defendant requested but did not receive a lawyer should not be given retroactive application because the accuracy of the conviction is affected but not seriously threatened). This theme has been echoed by courts confronted with the issue of retroactivity of other constitutional rules affecting pretrial procedures. *See, e.g.*, *Stovall*, 388 U.S. at 293 (identification process in which defendant was presented to witness without being given opportunity to retain counsel was not a sufficiently serious threat to fairness).

65 422 U.S. 531 (1975).

declined to exclude the unlawfully obtained evidence on the ground that the rule's purpose was primarily deterrence of police misconduct.[66] By framing its inquiry in terms of the remedy, however, the Court avoided the requirement, implicit in the *Linkletter* line of cases, of determining if the rule actually broke with precedent.[67] The Court expressed a more profound disagreement with the *Linkletter* approach in *United States v. Johnson*.[68] In *Johnson*, the Court declared that defendants on direct review were entitled to retroactive application of new fourth amendment rules.[69] The import of the decision lay in the Court's substantial reliance on the general principles of judicial integrity and equal treatment propounded by Justice Harlan. While the Court expressly limited its holding to fourth amendment cases, its method of analysis suggested a broader application.

The Court finally re-evaluated the *Linkletter* standard by adopting Justice Harlan's approach to cases on direct review in *Griffith v. Kentucky*.[70] The Court held that the interest in observing current law warranted retroactive application of new constitutional rules to all cases on direct review "regardless of the specific characteristics of the particular new rule announced."[71] The Court looked exclusively at the positions of the parties involved and the effect their disparate treatment would have on judicial integrity, rather than at the nature of the constitutional provision involved.[72] The *Griffith* decision left an opening for the Court to reconsider the standard in its entirety.

IV. THE SUPREME COURT DECISION

A. THE PLURALITY OPINION

Justice O'Connor wrote the opinion for a plurality of the *Teague* Court.[73] While acknowledging that the key substantive issue raised by the case was the extension of the sixth amendment fair cross sec-

66 *Id.* at 542.

67 *See supra* notes 40-48 and accompanying text.

68 457 U.S. 537 (1982).

69 *Id.* at 562.

70 479 U.S. 314 (1987).

71 *Id.* at 326.

72 *Id.* at 320-26.

73 Teague v. Lane, 109 S. Ct. 1060 (1989). Justice O'Connor wrote for a majority of the Court with respect to the first two issues admitted on certiorari. *See supra* note 33 and accompanying text. Her opinion with respect to the issue discussed here was joined by Chief Justice Rehnquist and Justices Scalia and Kennedy. *Teague*, 109 S. Ct. at 1060. Justice White concurred only in the judgment. *Id.*

tion requirement to petit jury selection,[74] Justice O'Connor began her opinion with a review of the place occupied by the Court's retroactivity doctrine in cases announcing new rules.[75] Justice O'Connor's review revealed that the Court has occasionally addressed the retroactivity question in the case announcing a new rule, and at other times has left the issue to be decided in later cases.[76] Arguing that any delay in deciding retroactivity threatens to treat the defendant in the case announcing the rule differently from others in the same position, Justice O'Connor held that the question must be decided at the outset of any case that could produce a new rule.[77] Under the plurality approach, if retroactivity is found not to be justified, concerns for equal treatment of defendants should supersede and prevent consideration of the defendant's substantive claims.[78]

Continuing on this theme, the plurality opinion presented a critical history of the practical effects of the retroactivity standard first set out in *Linkletter*.[79] Like Justice Harlan, Justice O'Connor was especially concerned with the result compelled by *Linkletter* in cases like *United States v. Johnson*,[80] where defendants on direct review are denied the benefits of admittedly constitutional law.[81] Justice O'Connor noted that the Court had resolved this discrepancy in *Griffith* by approving retroactive application of new rules to all cases still on direct review.[82] Justice O'Connor noted, however, that the

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74 *Id.* at 1065.

75 *Id.* at 1069.

76 *Id.* Those cases cited by Justice O'Connor as taking the latter approach include the following: Brown v. Louisiana, 447 U.S. 323 (1980) (addressing retroactivity of Burch v. Louisiana, 441 U.S. 130 (1979)); Robinson v. Neil, 409 U.S. 505 (1973) (addressing retroactivity of Waller v. Florida, 397 U.S. 387 (1970)); Stovall v. Denno, 388 U.S. 293 (1967) (addressing retroactivity of United States v. Wade, 388 U.S. 218 (1967), and Gilbert v. California, 388 U.S. 263 (1967)); Tehan v. Shott, 382 U.S. 406 (1966) (addressing retroactivity of Griffin v. California, 380 U.S. 609 (1965)). The cases in which the Court announced a new rule and decided its retroactivity are Morrissey v. Brewer, 408 U.S. 471 (1972), and Witherspoon v. Illinois, 391 U.S. 510 (1968).

77 *Id.* at 1069-70. Justice O'Connor defined a new rule as the principle arising from a case where "the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id.* at 1070 (emphasis in original). Justice Brennan later took issue with this potentially problematic definition, *id.* at 1087-88 (Brennan, J., dissenting), but the determination of an appropriate definition is beyond the scope of this Note.

78 *Id.* at 1070.

79 *Id.* at 1070-71 (citing Linkletter v. Walker, 381 U.S. 618 (1965)). See *supra* notes 36-48 and accompanying text for discussion of *Linkletter*.

80 457 U.S. 537 (1982).

81 *Teague*, 109 S. Ct. at 1071.

82 *Id.* at 1071 (citing Griffith v. Kentucky, 479 U.S. 314, 322 (1987)). Justice O'Connor advanced two reasons in support of this rule: 1) a court that denies a defendant on direct review the application of current constitutional law usurps legislative

Court had yet to deal with *Linkletter*'s disparate treatment of similarly situated defendants on collateral review.[83]

The plurality held that these problems stemmed from the *Linkletter* Court's misunderstanding of the distinct "nature and function of collateral review."[84] It asserted that these defendants stand in a fundamentally different procedural position in the eyes of the court because habeas corpus does not entitle them to a review of the merits of their cases.[85] Rather, the opinion concludes, collateral remedies are designed to ensure that trial and appellate judges properly adhere to constitutional principles.[86] The plurality contended that other cases decided by the Court had recognized the significance of this distinction, especially noting that a grant of habeas corpus relies on "interests of comity and finality" as well as protection of individual rights.[87] Furthermore, the plurality contended that the Court had never articulated a consistent policy on the purposes of habeas, but that it had recently affirmed its commitment to finality in several cases.[88]

Having accepted the essential distinction of the Harlan test, the plurality addressed the scope of the permitted exceptions.[89] Justice O'Connor determined that the first exception did not apply as Teague's case did not involve "any primary activity whatsoever."[90] Justice O'Connor then concluded that the second exception for procedures "implicit in the concept of ordered liberty" should be limited to "watershed" rules of criminal procedure.[91] The plurality noted that Justice Harlan, while concerned about procedures "creat[ing] an impermissibly large risk that the innocent will be convicted,"[92] expressed reservations about defining the exception solely in terms of rules that "significantly improve the pre-existing

power; and 2) defendants on direct review are in the same factual and procedural position.

83 *Id.* at 1072.

84 *Id.*

85 *Id.* at 1073-74 (citing Solem v. Stumes, 465 U.S. 638, 653 (1984), and Desist v. United States, 394 U.S. 244, 262-63 (1969) (Harlan, J., dissenting)).

86 *Id.* at 1073.

87 *Id.* (citing Wainwright v. Sykes, 433 U.S. 72, 87-91 (1977)). In *Wainwright*, the Court denied a habeas petition to a defendant who failed to rebut a presumption that he had been given an opportunity to raise his claim under a rule existing at the time he stood trial, but had instead defaulted on the claim. 433 U.S. at 91.

88 *Teague*, 109 S. Ct. at 1074.

89 *Id.* at 1075-77. *See supra* note 59-60 and accompanying text.

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

91 *Id.* at 1075. *See supra* note 60 and accompanying text.

92 *Teague*, 109 S. Ct. at 1076 (citing Desist v. United States, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting)).

factfinding procedures."[93]

The plurality argued that it would be possible to meet both concerns by utilizing a standard that would grant retroactive application of new rules where there was a significant likelihood that they would result in reversal of a conviction.[94] The Court based its argument on several considerations: 1) that the standard taken from Harlan's test had no specific content; 2) that the Court has moved towards relying on factual innocence as a requirement for habeas review; and 3) that ensuring accuracy places an intelligible limit on the scope of the second exception.[95]

The Court concluded by holding that the fair cross section requirement did not seriously diminish the likelihood of an accurate conviction.[96] Because he was undeserving of retroactive application in general, the Court could not give Teague the benefit of the rule without treating him differently than others in the same position.[97] The threshold test of retroactivity thus foreclosed consideration of the merits of Teague's constitutional claim.[98]

B. JUSTICE STEVENS'S DISSENT

Justice Stevens, joined by Justice Blackmun, wrote an opinion concurring in the plurality's judgment but finding fault with its structural and substantive modifications of Justice Harlan's retroactivity doctrine.[99] First, Justice Stevens was unable to find any precedent justifying the plurality's treatment of retroactivity as a threshold test.[100] On the contrary, Justice Stevens observed that under the conventional approach to determining whether procedural error affected a defendant's conviction, the Court must decide if an error occurred before ruling upon its effect on the conviction.[101] He would extend the same reasoning to cases petitioning for a new rule on collateral review.[102]

Justice Stevens accepted the utility of the distinction between

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93 *Id.* at 1076 (citing Mackey v. United States, 401 U.S. 667, 694 (1971) (Harlan, J., concurring)).

94 *Id.* at 1076-77.

95 *Id.*

96 *Id.* at 1077.

97 *Id.* at 1077-78.

98 *Id.* at 1078.

99 *Id.* at 1079 (Stevens, J., dissenting in part).

100 *Id.* at 1079 n.2 (Stevens, J., dissenting in part).

101 *Id.* at 1079 (Stevens, J., dissenting in part).

102 *Id.* (Stevens, J., dissenting in part). Justice Stevens noted that his approach is not inconsistent with the plurality's suggestion that new rules and the question of their retroactive effect be decided in the same proceeding.

direct and collateral review for preserving final decisions.[103] He also recognized the need for exceptions both for rules that protect constitutional rights of private behavior and for procedural errors that are fundamentally unfair.[104] However, he could not accept the plurality's interpretation of fundamental fairness.[105] Justice Stevens asserted that Justice Harlan expressly rejected limiting the exception to cases where the conviction would likely be reversed when he distanced himself from his earlier reliance on factfinding in *Desist*.[106] Justice Stevens questioned the practical value of using a standard of factual innocence to "determine if a procedural change is sufficiently 'bedrock' or 'watershed' " to affect the fundamental fairness of a trial.[107]

Instead, Justice Stevens would have looked to precedent to determine if the rights guaranteed by a proposed rule have been regarded as fundamental. In this light, he concludes, there is no question that claims of racial discrimination have been recognized as serious matters implicating fundamental concerns of fair treatment.[108] Despite his views, however, Justice Stevens felt constrained by the Court's decision in *Allen v. Hardy* to hold that claims of racial discrimination in selection of a petit jury do not raise issues of fundamental fairness.[109]

C. JUSTICE BRENNAN'S DISSENT

Justice Brennan presented a broader, more vigorous attack on the plurality's holding.[110] First, in response to the plurality's assertion that the purposes of habeas corpus are limited to deterrent effects, Justice Brennan argued that the courts have traditionally extended the writ to its fullest possible jurisdiction to give petitioners every opportunity to contest the constitutionality of their custody.[111] He observed that only where procedural default occurs have courts denied hearing of a petition.[112] In particular, Justice

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103 *Id.* at 1080 (Stevens, J., dissenting in part).

104 *Id.* at 1080-81 (Stevens, J., dissenting in part).

105 *Id.* at 1081-82 (Stevens, J., dissenting in part).

106 *Id.* at 1080 (Stevens, J., dissenting in part). *See supra* notes 57-62 and accompanying text.

107 *Teague*, 109 S. Ct. at 1081 (Stevens, J., dissenting in part).

108 *Id.* (Stevens, J., dissenting in part).

109 *Id.* at 1081-82 (Stevens, J., dissenting in part).

110 *Id.* at 1086 (Brennan, J., dissenting). In addition to contesting the substance of the plurality's approach to retroactivity, Justice Brennan criticized the plurality for deciding Teague's case without adequate briefing. *Id.* (Brennan, J., dissenting).

111 *Id.* at 1084 (Brennan, J., dissenting).

112 *Id.* at 1084-85 (Brennan, J., dissenting); *see, e.g.*, Rose v. Mitchell, 443 U.S. 545, 550-65 (1979); Jackson v. Virginia, 443 U.S. 307, 320-24 (1979).

Brennan noted, federal courts have been generous in granting habeas petitions where defendants bringing claims of racial discrimination in jury selection have exhausted state remedies.[113]

In addition, Justice Brennan asserted that the plurality's concern with the disparate treatment that results from denying retroactivity to cases on direct review should apply equally to cases on collateral review. The timing of the Court's decision to accept certiorari, he argued, has a random impact on the defendants in both situations.[114]

Justice Brennan next criticized the plurality for departing from tradition by broadly defining a "new rule" subject to the retroactivity doctrine as one not dictated by precedent.[115] He then cited a list of cases where the Court had decided key constitutional issues even though they neither raised questions about the accuracy of the defendant's conviction nor followed necessarily from precedent.[116] He noted that some questions suggesting the need for new constitutional rules are considered most often on collateral review. In such cases, the plurality's approach leaves the Court to withhold new doctrine it realizes to be constitutional until a defendant brings a case on direct review.[117]

Finally, Justice Brennan agreed with Justice Stevens that the plurality misconstrued the proper scope of the second exception to Justice Harlan's general rule against retroactivity in collateral review.[118] According to Justice Brennan, the plurality's opinion ignores an especially insidious form of fundamental injustice[119] in creating a standard based solely on the accuracy of conviction. Jus-

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113 *Teague*, 109 S. Ct. at 1085 (Brennan, J., dissenting).

114 *Id.* at 1085 (Brennan, J., dissenting); *see, e.g.*, Vasquez v. Hillery, 474 U.S. 254 (1986); Rose v. Mitchell, 443 U.S. 545 (1979); Brown v. Allen, 344 U.S. 443 (1953) (state prisoners alleging discrimination in selection of grand and petit juries entitled to federal review of claims).

115 *Teague*, 109 S. Ct. at 1087-88 (Brennan, J., dissenting).

116 *Id.* at 1089 (Brennan, J., dissenting); *see, e.g.*, Greer v. Miller, 483 U.S. 756 (1987) (case concerned a single cross-examination question about defendant's post-arrest silence); Estelle v. Smith, 451 U.S. 454 (1981) (rule barring psychiatrists who fail to warn defendants that the results of an examination could be introduced at trial from appearing as witnesses).

117 *Teague*, 109 S. Ct. at 1090 (Brennan, J., dissenting).

118 *Id.* at 1093 (Brennan, J., dissenting). *See supra* notes 105-07 and accompanying text.

119 *Teague*, 109 S. Ct. at 1093 (Brennan, J., dissenting).

> "It is obvious that discriminatory exclusion of Negroes from a trial jury does, or at least may, prejudice a Negro's right to a fair trial, and that a conviction so obtained should not stand. The trial jury hears the evidence of both sides and chooses what it will believe. In so deciding, it is influenced by imponderables—unconscious and conscious prejudices and preferences—and a thousand things we cannot detect or isolate in its verdict and whose influence we cannot weigh."

tice Brennan stated that the Court has consistently accorded allegations of racial discrimination during trial the most serious and careful scrutiny. In fact, Justice Brennan asserts, the Court has gone so far as to refuse to apply harmless-error review where a habeas petition alleges intentional discrimination.[120] In Justice Brennan's view, the issue of discrimination strikes at the heart of fundamental fairness and should be excepted from the plurality's test.

V. ANALYSIS

Expressing its frustration with the inconsistent results of the *Linkletter* standard, the *Teague* plurality made a clean break with that precedent in an attempt to establish a more coherent and workable test for the retroactivity doctrine. The brief case history cited by the plurality, as well as the summary presented above, testifies to the legitimacy of its concern that the rule-based factors of the *Linkletter* standard do not provide significant judicial guidance and free courts to ignore important considerations of finality.[121] In light of the inconsistent application of the previous retroactivity doctrine, the plurality's rigid standard has potential significance for its deterrent effects on criminal violations and for the conservation of limited judicial resources.[122]

Nevertheless, the plurality opinion attributes false theoretical significance to the concept of finality by mischaracterizing the nature and purpose of collateral review. As this analysis will show, the preservation of final decisions is a pragmatic interest that does not rest on a clear theoretical distinction between the purposes of direct and collateral review. No theoretical standard of partial retroactivity can completely avoid the injustice inherent in selecting a cutoff point for the application of new rules to prior events.[123] Thus,

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Id. at 1093 (Brennan, J., dissenting) (quoting Cassell v. Texas, 339 U.S. 282, 301-02 (1950) (Jackson, J., dissenting)).

120 *Id.* (Brennan, J., dissenting) (citing Vasquez v. Hillery, 474 U.S. 254, 262 (1986)).

121 *Id.* at 1074.

122 The judicial and scholarly debate surrounding the extent to which retroactive application of new rules would disturb prior convictions or burden courts has consistently taken place on an abstract level with limited statistical support. *See, e.g.*, Solem v. Stumes, 465 U.S. 638, 654 (1984) (Powell, J., concurring in judgment) (cited by the *Teague* plurality in support of claim that retroactivity overburdens judicial resources); Schwartz, *Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin*, 33 U. CHI. L. REV. 719, 745-47 (1966).

123 Critics of the general concept of retroactivity have argued that a rule of pure prospectivity (where even the defendant in the case announcing the rule is denied its benefits) would eliminate the dissimilar treatment accorded similarly situated defendants under partial retroactivity. Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 VA. L. REV. 1557 (1975). While pure prospectivity may pose additional

whether the Court pursues its previous course or draws a line between direct and collateral review, it will accord different treatment to defendants in similar positions.

Once the veil of theoretical justification is removed, the functional character of the plurality's test demands that its practical effects be examined more closely. Thus, the exceptions to the plurality test should account for the injustice of dissimilar treatment by seeking to mitigate its effects where fundamental societal values are implicated. Contrary to the plurality's contention, both precedent and logic are capable of supplying a coherent definition of fundamental justice—especially where the likelihood of racial discrimination during trial is significant. Not only has the Court recognized the fundamental nature of the right to be free from discrimination,[124] but it is difficult to determine whether a violation of such rights during trial were in any sense harmless or separable. The plurality's standard ignores these difficulties by creating a presumption that such violations did not affect the outcome. In its place, this Note proposes a test that respects the practical interest in preserving finality while expanding the second exception to the Harlan test[125] to account for these fundamental rights.

A. A BALANCED APPROACH TO RETROACTIVITY

1. The Inadequacy of the Linkletter *Rule*

The *Teague* plurality cited as its primary motivation for reformulating the retroactivity doctrine the inconsistent and unfair results produced by the *Linkletter* rule.[126] It would be difficult to dispute the legitimacy of this concern. In a preface to its holding of a new retroactivity approach, the plurality observed that the Court has at various times retroactively applied new rules to cases on direct review, denied retroactive application of rules to all cases still on direct review except for the case announcing the rules, and limited new rules to purely prospective application.[127] These cases amply demonstrate the realization of Justice Harlan's fear that the balancing test

problems—the facts of cases immediately before them and pre-existing principles of law have traditionally acted as constraints on judicial action—this Note must recognize the Court's holding in Griffith v. Kentucky, 479 U.S. 314 (1987), that new criminal procedural rules apply to cases still on direct review.

124 *Teague*, 109 S. Ct. at 1085 (Brennan, J., dissenting).

125 See *supra* notes 50-62 and accompanying text for a discussion of the principles and exceptions to the standard suggested by Justice Harlan.

126 *Teague*, 109 S. Ct. at 1070-71.

127 *Id.* See Desist v. United States, 394 U.S. 244 (1969) (Harlan, J., dissenting) for examples of the variations in the Court's previous approaches. *See also supra* notes 43-48 and accompanying text.

of *Linkletter* would permit the Court to "fish[] one case from the stream of appellate review, use[] it as a vehicle for pronouncing constitutional standards, and then permit[] a stream of similar cases subsequently to flow by."[128] With the test's vague emphasis on the purpose of rules, the relative procedural position of defendants seldom entered into the calculus of courts applying the *Linkletter* doctrine.

Moreover, this inconsistency of application on the procedural level has not been an unavoidable result of the attainment of a coherent policy on the nature and effect of the rules granted retroactive effect. Rather, courts have remained free to manipulate the three *Linkletter* factors to achieve inconsistent or even opposite results. One notable example is the discrepancy between the result in *Witherspoon v. Illinois*,[129] in which a new jury selection rule was given full retroactive effect because it went to the heart of the fact-finding process, and that in *Daniel v. Louisiana*,[130] where retroactive application of a rule barring systematic exclusion of women from juries was denied to the defendant on the ground that it was not integral to that process. Such contradictory outcomes reveal that the loss of procedural consistency has not been offset by greater doctrinal unity.

This lack of procedural or doctrinal consistency underscores the need for a standard providing some assurance that parties whose offenses and trials occur at almost the same time will be in a similar position with respect to receiving the benefit of new constitutional criminal procedures. The direct/collateral review distinction fulfills this need for a rough temporal dividing line because direct review takes place within a relatively discrete period of time.[131]

The plurality's approach reflects recognition of this practical need. Yet the plurality sought to prevent the inconsistencies of *Linkletter* by greatly restricting the scope of the second exception and by rigidly adhering to the direct/collateral review distinction described by Justice Harlan.[132] While providing a useful dividing line for the purposes of finality, this test only complicates the retroactivity picture by ignoring well-established Court precedent concerning both the purposes of collateral review[133] and the

128 Mackey v. United States, 401 U.S. 667, 679 (1971) (Harlan, J., concurring).

129 391 U.S. 510 (1968).

130 420 U.S. 31 (1975).

131 Beytagh, *supra* note 123, at 1601.

132 *See supra* notes 54-56 and accompanying text.

133 *See* Fay v. Noia, 372 U.S. 391, 399-402 (1962) (main purpose of habeas corpus is to prevent wrongful imprisonment of individual defendants); *see also* Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Law*, 79 HARV. L. REV. 56, 87 (1965).

fundamental importance of preventing the subtle effects of racial discrimination.[134] The remainder of this Note will explore the dangers posed by this approach and will suggest a fairer and more flexible alternative.

2. *The Inadequacy of the Plurality Approach: Habeas Corpus and the Nature of Finality*

The plurality defended its move from the *Linkletter* standard to a test based on the procedural position of defendants on the basis of an alleged distinction between the purposes of direct and collateral review.[135] It quoted approvingly (though incorrectly) language from Justice Harlan's dissenting opinion in *Desist* that seems to assert a shift in the purposes of judicial review once an appeal has become final.[136] In contrast to direct review, which aims at resolution of individual cases, the plurality implied that the primary goal of collateral review is to monitor the behavior of judges in applying constitutional rules.[137] The plurality argued that, so long as the lower court properly applied then-current constitutional law, the interest in finality must take priority because the federal court is no longer primarily concerned with the fate of individual defendants.[138] In short, the plurality argued that the focus of the Court's inquiry with respect to collateral review has shifted completely away from providing individual relief to deterrence of judicial departure from established norms. Upon this finding, Justice O'Connor concluded that the Court must accord equal weight to the state's interest in preserving final decisions, including respecting judicial reliance on the previous rule and minimizing the number of retrials.[139]

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134 *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 85-88 (1986) (emphasizing the "Court's unceasing efforts to eradicate racial discrimination" during jury selection); Rose v. Mitchell, 443 U.S. 545, 556 (1979).

135 Teague v. Lane, 109 S. Ct. 1060, 1073 (1989). *See supra* notes 84-88 and accompanying text.

136 *Id.* The plurality omitted the word "additional" that appeared prior to the "incentive" created by habeas corpus for courts to adhere to constitutional standards, as well as the phrase "in these cases" that limited the incentive purpose of habeas corpus to a subset of all cases heard on collateral review. *Id.*

137 *Id.* While not stating that habeas corpus serves only this purpose, Justice O'Connor depicts the writ as giving nearly full weight to concerns for finality where they are pressing. *Id.* at 1074. To remain consistent, the plurality cannot concede to habeas corpus a primary purpose of providing individual relief because this would merely recreate a *Linkletter*-type balancing test between purpose and effect that it attacked as unworkable. *See supra* notes 79-88 and accompanying text.

138 *Teague*, 109 S. Ct. at 1073-74.

139 *Id.* at 1074. To support its contention that interests in finality should be accorded equal weight in determining the availability of habeas review, the plurality relied on a

The theoretical structure that the plurality constructed to assert the priority of finality ultimately collapses in the absence of any substantive content. First, the Court's assertion that finality has consistently been a counter-balancing factor in habeas corpus analysis[140] ignores its dependent, functional purpose. As one commentator observed over twenty years ago, the finality of a judicial decision results from a pragmatic policy decision to vest final authority in a particular institution.[141] That institution will exercise final authority when it is felt that its review of the merits will combine with guarantees of constitutional rights to ensure a certain likelihood that the determination of guilt is accurate.[142] Even decisions of the Supreme Court are not final by nature, but only because we as a society have decided that the need to conserve judicial resources and to enforce convictions outweighs the need to continue review any further.

Therefore, a court possessing final authority must conform to accepted standards of review in order to justify use of that power. The exercise of final authority is legitimate only if the steps leading up to it have not been tainted by error. Consequently, an institution's exercise of final authority is not binding and need not be respected when it fails to exercise that authority according to constitutional standards of procedure. This conclusion implies that no pragmatic standard of finality can safely ignore the process of weighing the purpose and effects of new constitutional rulings implicit in habeas corpus analysis. Rather, the importance of finality is itself dependent upon the integrity of the prior review process.

A more thorough analysis of the history and principle underlying the use of habeas corpus reveals that it cannot be reduced to the single purpose of regulating the behavior of judges. The plurality's conclusion that finality necessarily follows from a clear distinction between direct and collateral review is untenable in light of the purposes of habeas corpus expressed in federal statute and in case law. The statute empowering federal courts to hear cases on habeas corpus does not limit its objective to correcting the behavior of

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civil case. *Id.* (citing Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940)). The plurality defended its extension of this precedent to the criminal context largely on the basis of the second and third *Linkletter* factors—the administrative burden of reopening cases and the justified reliance of judges on prior law. The plurality thus conceded that the justifications for finality are in reality more practical than theoretical. *Id.* at 1074-75.

140 *Id.* at 1073-74.

141 Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 444-53 (1963).

142 *Id.* at 447.

judges.[143] Rather, it sets forth the conditions under which a defendant may seek relief in federal courts from any illegal and unconstitutional imprisonment.[144] In addition, the most comprehensive review of the purposes of habeas corpus undertaken by the Supreme Court expressly recognized that habeas corpus serves as an important means of individual relief.[145] Thus, the plurality cannot correctly attribute a primary purpose of judicial deterrence to habeas corpus. More importantly, it cannot claim that finality takes priority in properly conducted collateral proceedings "by default" because habeas corpus still operates to afford relief to individual defendants. Instead, the pragmatic desire to preserve a final decision must remain dependent on the purpose of habeas corpus to prevent unconstitutional detention.

3. Habeas Corpus and the Trial Process

The foregoing discussion returns us to the inquiry into the threshold point at which federal courts are justified in granting habeas corpus to overcome constitutional error. The federal habeas corpus statute provides guidelines for determining when federal intervention in state custody questions is justified.[146] The statute requires that federal courts respect competent state determinations resulting in custody except where the factfinding procedure, development of facts, or other error denied a defendant a fair hearing of his or her case at trial.[147] Thus, habeas corpus review primarily focuses on errors that threaten the integrity of the trial process. This limited power of review is appropriate when one considers that state courts, or any court hearing a case on direct review, are not inherently more or less capable of applying the correct law than the federal court exercising habeas jurisdiction.[148] But when procedural violations that irreversibly affect the hearing of evidence occur during the course of a trial, the federal court is empowered to intervene to ensure a fair review of the facts.[149]

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143 28 U.S.C. §§ 2241, 2254 (1988). See *supra* note 20 for the text of the statute.

144 28 U.S.C. § 2241 (1988). *See supra* note 20.

145 Fay v. Noia, 372 U.S. 391, 412 (1963). Strangely, the plurality quoted the *Fay* Court's observation that the development of habeas corpus has included " 'some backing and filling,' " Teague v. Lane, 109 S. Ct. 1060, 1074 (1989) (quoting *Fay*, 372 U.S. at 412), without observing the Court's conclusion that this erratic growth has not changed the basic fact that "the historic office of the Great Writ [has been] to redress detentions in violation of fundamental law." *Fay*, 372 U.S. at 412.

146 *See supra* note 20.

147 28 U.S.C. § 2254(d)(2),(3),(7) (1988). See *supra* note 20 for the text of the statute.

148 *See, e.g.*, Bator, *supra* note 141, at 504.

149 28 U.S.C. § 2254(d)(2),(3),(7) (1988); *see supra* note 20; *see also* Bator, *supra* note 141, at 502.

Thus, the purpose of collateral review that emerges from this analysis extends significantly beyond ensuring that trial courts "conduct their proceedings in a manner consistent with established constitutional principles."[150] The statute does not look simply to the propriety of the trial court's behavior at the time of trial, an issue better left to a determination of the justified reliance by the court on the previous rule.[151] Instead, it focuses more broadly on whether a defendant was afforded a fair opportunity to have the facts of his case presented and considered fairly.[152] The Court's grant of habeas review despite the absence of court error in one case[153] reflects this intention to curb all procedural obstacles to an accurate conviction, not simply errors committed by the court.

The rationale for granting habeas review to cases where the state trial process threatens to distort the outcome should apply with equal force in cases involving the retroactive application of rules announced after a decision has become final. The foregoing analysis has established that the plurality's distinction between the purposes of direct and collateral review is illusory. Habeas corpus serves to redress individual claims of wrongful custody in cases where there is a possibility that the trial process itself has been distorted by procedural error.[154] Where a new rule directly implicates the integrity of the trial process conducted under the former rule, it necessarily raises doubts about the accuracy of the conviction. Given that habeas serves as an important means of individual relief,[155] the plurality's assertion that the outmoded rule was in some sense correct at the time of trial, but is not any longer, ignores the thrust of the availability of collateral review.

A rule of retroactivity for constitutional holdings that correct procedural errors occurring at trial would avoid the problems normally associated with a general policy of retroactive application. First, there is no objective basis for the claim that a defendant bringing a collateral claim because his trial or appeal was tainted by an alleged error, later confirmed by the Court, is undeserving of the new rule. When such a fundamental, pervasive rule is announced, the Court is expressly recognizing that the former standard was not simply inadequate but unfair. While the Court should not make

150 Teague v. Lane, 109 S. Ct. 1060, 1073 (1989).

151 See *supra* note 20 for the text of the statute.

152 *Id.*

153 Fay v. Noia, 372 U.S. 391 (1963) (Court granted collateral review of claim of coerced confession even where defendant did not claim lower court error). See *supra* note 133 for a description of *Fay*.

154 *See supra* notes 143-45 and accompanying text.

155 *See supra* notes 143-45.

apologies for not having reached the new rule sooner, it should recognize that a defendant on collateral review may justifiably feel cheated for not sharing in the benefit of the rule.

More importantly, the situation described avoids the possibility that valid convictions would be reversed on legal technicalities. This concern compelled Justice Harlan, the originator of the direct/collateral review distinction, to reconsider his earlier reliance on "factfinding" to define the second exception.[156] Justice Harlan backed away from the emphasis on any constitutional rule affecting factfinding for three reasons. First, he feared the possibility that a defendant convicted on the basis of other compelling evidence could be freed through application of a procedural rule that has a minimal impact on the factfinding process in his or her particular case.[157] This possibility arises when probative evidence is obtained or processed through illegal means. Whenever there is a possibility that the trial process itself was affected by a procedural error—as when the jury may be racially biased against the defendant—none of the evidence remains untainted by the possibility of error.[158] Second, Justice Harlan suspected that the "truth-determining" test would invite courts to undertake an independent adjudication on the merits of a defendant's case in violation of the purpose of habeas corpus.[159] In this regard, it has been noted that a new rule implicating the fundamental fairness of the trial process itself entitles a defendant to individual relief under collateral review regardless of the merits of his case.[160] Finally, Justice Harlan feared that factfinding rules may not be readily distinguishable from other rules. However, this fear does not apply to situations where a new rule is intended to alter the basic structure of the trial process rather than affect a particular aspect of the trial.

In sum, expansion of the second exception to include retroactive application of new rules implicating the integrity of the trial process does not offend our traditional justifications for respecting

156 Mackey v. United States, 401 U.S. 667, 694 (1971). See *supra* notes 60-62 and accompanying text for a discussion of Justice Harlan's second exception.

157 *Mackey*, 401 U.S. at 694-95.

158 Rules aimed at correcting perceived distortions occurring during trial differ from rules that correct errors made prior to trial in this respect. For example, fourth amendment exclusionary rules often affect only part of the evidence introduced at trial. If the exclusion leaves intact evidence sufficient for conviction, the appellate court is justified in respecting the lower court decision. *See* Solem v. Stumes, 465 U.S. 638, 643-44 (1984); *see also* Desist v. United States, 422 U.S. 244 (1969) (Court held that fourth amendment exclusionary rule did not affect the reliability of the trial process).

159 *Mackey*, 401 U.S. at 694.

160 *See supra* notes 147-55 and accompanying text.

the finality of decisions while conforming to the established purposes of habeas corpus review.

Significantly, an exception that focuses on the integrity of the trial process possesses two key advantages over the plurality's "accuracy of the conviction" standard. First, the "trial process" approach allows an exception from non-retroactivity to defendants seeking redress under a new rule for fundamental but insidious procedural errors whose effect would be nearly impossible to establish under the "accuracy of the conviction" standard. Teague's case highlights one of those difficult areas—race discrimination. Under the plurality test, Teague is asked to prove that a theoretical jury containing more black members would have reached a different verdict on the same facts.[161] The Court dismissed the possibility that such a change would likely have any difference on the finding of guilt.[162] This is due, of course, to the reality that much race discrimination operates on a subtle and unconscious level.[163] The effect is to deny actual victims of a potent force any realistic opportunity to win retroactive application of rules that are designed to reduce discrimination.

On the other hand, the trial process test recognizes that defendants in this and similar situations are at a marked disadvantage. The test would grant retroactivity to rules that address an evil that has pervaded the entire trial process. In addition, the trial process rule would be more consistent with precedent recognizing that a proposed new rule may implicate questions of fundamental fairness without necessarily affecting the verdict.[164] In his dissenting opinion, Justice Brennan noted several decisions finding issues of fundamental fairness to be involved where discrimination threatens the balanced composition of the jury, irrespective of a showing that the racially balanced jury would have reached a different conclusion.[165]

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

162 *Id.*

163 *Id.* at 1093 (Brennan, J., dissenting) (citing Cassell v. Texas, 339 U.S. 282, 301-02 (1950) (Jackson, J., dissenting)).

164 Justice Harlan expressly recognized that the Court has never defined fundamental fairness in terms of the outcome of a particular trial. *Mackey*, 401 U.S. at 693. In proposing a *Palko*-type inquiry into rules " 'implicit in the concept of ordered liberty,' " Justice Harlan looked to the nature of the rule involved and ignored the question of the accuracy of the immediate conviction. *Id.* at 693-95 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)); *see also* Beytagh, *supra* note 123, at 1598.

165 *Teague*, 109 S. Ct. at 1093 (Brennan, J., dissenting); *see, e.g.*, Rose v. Mitchell, 443 U.S. 545 (1979). One such precedent even recognized that the fundamental fairness of trial was jeopardized by a racially imbalanced grand jury. Vasquez v. Hillery, 474 U.S. 254 (1986). A racial imbalance in the petit jury, of course, more directly affects the fair presentation and consideration of evidence.

Certainly the urgency of this problem does not diminish simply because it is brought before the court on collateral review.

B. THE STRUCTURE OF THE RETROACTIVITY INQUIRY

The difficulties of the plurality opinion are not limited to the operation of the proposed test. By radically changing the focus of the retroactivity test and by requiring that it be decided as a threshold question,[166] the plurality has severely impaired its own ability to assess carefully and thoroughly the full importance of proposed rules. Under the *Linkletter* doctrine, the focus of any inquiry fell first on the purpose of the proposed rule.[167] Whether or not retroactivity was granted consistently in all cases, courts were at least forced to examine the nature of a rule, its intended and actual effects, and its similarities to existing rules. One advantage of this "rule first" approach was the safeguard of determining if the rule was really so new as to justify use of the retroactivity doctrine at all.

Prior to *Teague*, courts also usually decided the retroactivity question after the new rule had been debated and shaped in the opinion announcing the rule.[168] This practice provided additional protection against making decisions based on inadequate information about the "new" rule. This was true whether the retroactivity of a new rule was decided in the same proceeding announcing the rule or in a later case.

The plurality's radical restructuring removes both of these restraints on uninformed decisionmaking. Instead, the plurality would have the Court determine if a proposed rule is new at the outset, then focus on the procedural positions of the parties to determine whether an unexplored rule deserved retroactive application.[169] Its approach creates two difficulties. First, it is often unclear whether a proposed rule is "new," or whether it is a necessary corollary of an established rule. For instance, the application of the fair cross section requirement to the petit jury could arguably be necessary to implement the rationale of the requirement. The plurality's failure to give thorough treatment to this issue—it defined a "new rule" as any holding not demanded by precedent[170]—must raise questions about the depth of the Court's understanding of the principles involved in its inquiry.

Second, the plurality approach allows courts to dismiss issues of

166 *Teague*, 109 S. Ct. at 1069.
167 *See supra* note 41 and accompanying text.
168 *Teague*, 109 S. Ct. at 1069.
169 *Id.* at 1069-70.
170 *Id.* at 1070.

fundamental fairness on the basis of a procedural distinction without further study. The rule endorsed by the plurality permits disposition of cases raising important issues without ensuring adequate investigation of the nature and substantive impact of such issues, and encourages courts to shun their responsibilities under traditional habeas corpus doctrine.[171] If a court were to find on closer look that the rule simply modifies or marginally extends an existing rule, it would have failed to apply current law. In contrast, framing the second exception to Justice Harlan's test in terms of its effects on the trial process forces courts to conduct at least a preliminary inquiry into the nature and effects of the proposed rule.

This additional change made by the plurality without extensive discussion can thus be seen to work a significant and potentially harmful effect. The plurality's approach would restructure retroactivity to eliminate the necessity for a sound and principled analysis of proposed rules.

VI. CONCLUSION

In shaping its new retroactivity doctrine, the *Teague* plurality sought to avoid the need for an inquiry into the purposes of proposed new rules, which it blamed for the inconsistent results achieved under the *Linkletter* standard. This analysis has shown that the Court cannot avoid examining the purpose and effects of proposed new rules in shaping its retroactivity doctrine. While the Court may make a practical distinction between cases heard on direct and collateral review to further its stated interest in finality, it should not do so at the expense of established principles of fundamental fairness that ensure the integrity of the trial process itself. While this approach lacks the attractive theoretical neatness of the plurality's test, it would compel the federal courts to grant defendants on collateral review an opportunity for review of their cases free from distortion in its subtle as well as overt forms.

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[171] *Id.* at 1088 (Brennan, J., dissenting).