Supplementary Material

Chapter 10: The Reagan Era—Criminal Justice/Due Process and Habeas Corpus/Habeas Corpus

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

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*Frank Dean Teague, a person of color, was tried for attempted murder, armed robbery, and aggravated battery. During jury selection, the prosecutor used all his preemptory challenges to exclude African-Americans from the jury. After Teague was convicted, he appealed on the ground that the prosecution had violated his right to be tried by a representative jury. The Illinois Supreme Court in 1982 rejected that claim and the Supreme Court of the United States in 1983 refused to give Teague a writ of certiorari. Teague filed a federal habeas corpus suit claiming that the prosecutor violated his constitutional rights by striking all African-Americans from the jury. While that suit was being litigated, the Supreme Court in* Batson v. Kentucky *(1986) ruled that prosecutors could not use preemptory challenges to exclude blacks from juries and that defendants could rely solely on evidence that all persons of color were stricken from the jury. The Court of Appeals for the Seventh Circuit nevertheless held that* Batson *did not apply to* Teague*, because Teague's conviction was final before* Batson *was decided (a conviction is final after all direct appeals have failed). Teague appealed to the Supreme Court of the United States.*

*The Supreme Court by a 7–2 vote refused to grant the writ. Justice O'Connor's plurality opinion held that* Batson *did not apply to habeas corpus petitioners whose convictions were final at the time that* Batson *was decided. On what basis did Justice O'Connor determine what Supreme Court opinions will have retroactive effect and what decisions will be applied prospectively? Did she provide a sound basis for making that distinction? Why did Justice Brennan disagree and what are the merits of his view?*

*In* Butler v. McKellar *(1990), the Supreme Court by a 5–4 vote ruled that no capital punishment exception existed to the rule of Teague. This decision had the effect of allowing states to execute murderers even if, at the time of the execution, federal law recognized a constitutional violation occurred at their trial, as long as federal law at the time of the trial (and first appeal) did not recognize that constitutional right. Assume you agree with the result in* Teague*. Does the result in* Butler *follow as a matter of precedent/stare decisis or should a death penalty exception exist?*



JUSTICE O'CONNOR announced the judgment of the Court.

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In *Allen v. Hardy* (1986), the Court held that *Batson v. Kentucky* (1986) constituted an "explicit and substantial break with prior precedent" because it overruled a portion of *Swain*. Employing the retroactivity standard of *Linkletter v. Walker* (1965), the Court concluded that the rule announced in *Batson* should not be applied retroactively on collateral review of convictions that became final before Batson was announced. The Court defined final to mean a case "'where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision in' *Batson*. . . ."

Petitioner's conviction became final 2½ years prior to Batson, thus depriving petitioner of any benefit from the rule announced in that case. . . .

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Petitioner candidly admits that he did not raise the Swain claim at trial or on direct appeal. Because of this failure, petitioner has forfeited review of the claim in the Illinois courts. "It is well established that 'where an appeal was taken from a conviction, the judgment of the reviewing court is res

judicata as to all issues actually raised, and those that could have been presented but were not are deemed waived.' "

Under *Wainwright v. Sykes* (1977), petitioner is barred from raising the Swain claim in a federal habeas corpus proceeding unless he can show cause for the default and prejudice resulting therefrom. . . . Petitioner does not attempt to show cause for his default. . . .

Accordingly, we hold that petitioner's Swain claim is procedurally barred, and do not address its merits.

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In the past, the Court has, without discussion, often applied a new constitutional rule of criminal procedure to the defendant in the case announcing the new rule, and has confronted the question of retroactivity later when a different defendant sought the benefit of that rule. . . .

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In our view, the question "whether a decision [announcing a new rule should] be given prospective or retroactive effect should be faced at the time of [that] decision." Retroactivity is properly treated as a threshold question, for, once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated. Thus, before deciding whether the fair cross section requirement should be extended to the petit jury, we should ask whether such a rule would be applied retroactively to the case at issue. This retroactivity determination would normally entail application of the *Linkletter* standard, but we believe that our approach to retroactivity for cases on collateral review requires modification.

It is admittedly often difficult to determine when a case announces a new rule, and we do not attempt to define the spectrum of what may or may not constitute a new rule for retroactivity purposes. . . . [A] case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final. . . . Given the strong language in *Taylor* and our statement in *Akins v. Texas* (1945), that "[f]airness in [jury] selection has never been held to require proportional representation of races upon a jury," application of the fair cross section requirement to the petit jury would be a new rule.

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In *Griffith v. Kentucky* (1987), we [held] . . that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." We gave two reasons for our decision. First, because we can only promulgate new rules in specific cases and cannot possibly decide all cases in which review is sought, "the integrity of judicial review" requires the application of the new rule to "all similar cases pending on direct review." . . . Second, because "selective application of new rules violates the principle of treating similarly situated defendants the same," we refused to continue to tolerate the inequity that resulted from not applying new rules retroactively to defendants whose cases had not yet become final. Although new rules that constituted clear breaks with the past generally were not given retroactive effect under the *Linkletter* standard, we held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past."

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Justice Harlan believed that new rules generally should not be applied retroactively to cases on collateral review. . . .

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We agree with Justice Harlan's description of the function of habeas corpus. "[T]he Court never has defined the scope of the writ simply by reference to a perceived need to assure that an individual accused of crime is afforded a trial free of constitutional error." Rather, we have recognized that interests of comity and finality must also be considered in determining the proper scope of habeas review. . . .

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. . . Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect. The fact that life and

liberty are at stake in criminal prosecutions "shows only that 'conventional notions of finality' should not have as much place in criminal as in civil litigation, not that they should have none." . . .

The "costs imposed upon the State[s] by retroactive application of new rules of constitutional law on habeas corpus . . . generally far outweigh the benefits of this application." In many ways the application of new rules to cases on collateral review may be more intrusive than the enjoining of criminal prosecutions, for it continually forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards. Furthermore, . . . "[s]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands."

We find these criticisms to be persuasive. . . . Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.

Petitioner's conviction became final in 1983. As a result, the rule petitioner urges would not be applicable to this case, which is on collateral review, unless it would fall within an exception.

. . . [A] new rule should be applied retroactively if it requires the observance of "those procedures that . . . are 'implicit in the concept of ordered liberty.' [This exception should be reserved for watershed rules of criminal procedure. . . .

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An examination of our decision in Taylor applying the fair cross section requirement to the jury venire leads inexorably to the conclusion that adoption of the rule petitioner urges would be a far cry from the kind of absolute prerequisite to fundamental fairness that is "implicit in the concept of ordered liberty." The requirement that the jury venire be composed of a fair cross section of the community is based on the role of the jury in our system. Because the purpose of the jury is to guard against arbitrary abuses of power by interposing the commonsense judgment of the community between the State and the defendant, the jury venire cannot be composed only of special segments of the population. "Community participation in the administration of the criminal law . . . is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system." . . . [T]he fair cross section requirement "[does] not rest on the premise that every criminal trial, or any particular trial, [is] necessarily unfair because it [is] not conducted in accordance with what we determined to be the requirements of the Sixth Amendment." Because the absence of a fair cross section on the jury venire does not undermine the fundamental fairness that must underlie a conviction or seriously diminish the likelihood of obtaining an accurate conviction, we conclude that a rule requiring that petit juries be composed of a fair cross section of the community would not be a "bedrock procedural element" that would be retroactively applied under the second exception we have articulated.

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If there were no other way to avoid rendering advisory opinions, we might well agree that the inequitable treatment described above is "an insignificant cost for adherence to sound principles of decision-making." But there is a more principled way of dealing with the problem. We can simply refuse to announce a new rule in a given case unless the rule would be applied retroactively to the defendant in the case and to all others similarly situated. . . . We think this approach is a sound one. Not only does it eliminate any problems of rendering advisory opinions, it also avoids the inequity resulting from the uneven application of new rules to similarly situated defendants. We therefore hold that, implicit in the retroactivity approach we adopt today, is the principle that habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to all defendants on collateral review through one of the two exceptions we have articulated. Because a decision extending the fair cross section requirement to the petit jury would not be applied retroactively to cases on collateral review under the approach we adopt today, we do not address petitioner's claim.

JUSTICE WHITE, concurring in part and concurring in the judgment.

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JUSTICE BLACKMUN, concurring in part and concurring in the judgment.

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JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins concurring in part and concurring in the judgment.

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When a criminal defendant claims that a procedural error tainted his conviction, an appellate court often decides whether error occurred before deciding whether that error requires reversal or should be classified as harmless. I would follow a parallel approach in cases raising novel questions of constitutional law on collateral review, first determining whether the trial process violated any of the petitioner's constitutional rights and then deciding whether the petitioner is entitled to relief. If error occurred, factors relating to retroactivity—most importantly, the magnitude of unfairness—should be examined before granting the petitioner relief. . . .

In general, I share Justice Harlan's views about retroactivity. . . . Thus I joined the Court in holding that, as Justice Harlan had urged, new criminal procedural rules should be applied to all defendants whose convictions are not final when the rule is announced. I also agree with Justice Harlan that defendants seeking collateral review should not benefit from new rules unless those rules "fre[e] individuals from punishment for conduct that is constitutionally protected" or unless the original trial entailed elements of fundamental unfairness. . . .

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The plurality wrongly resuscitates Justice Harlan's early view, indicating that the only procedural errors deserving correction on collateral review are those that undermine "an accurate determination of innocence or guilt. . . ." I cannot agree that it is "unnecessarily anachronistic" to issue a writ of habeas corpus to a petitioner convicted in a manner that violates fundamental principles of liberty. Furthermore, a touchstone of factual innocence would provide little guidance in certain important types of cases, such as those challenging the constitutionality of capital sentencing hearings. Even when assessing errors at the guilt phase of a trial, factual innocence is too capricious a factor by which to determine if a procedural change is sufficiently "bedrock" or "watershed" to justify application of the fundamental fairness exception. See ante, at 1076. In contrast, given our century-old proclamation that the Constitution does not allow exclusion of jurors because of race, a rule promoting selection of juries free from racial bias clearly implicates concerns of fundamental fairness. . . .

As a matter of first impression, therefore, I would conclude that a guilty verdict delivered by a jury whose impartiality might have been eroded by racial prejudice is fundamentally unfair. Constraining that conclusion is the Court's holding in *Allen v. Hardy* (1986)—an opinion I did not join—that *Batson v. Kentucky* (1986) cannot be applied retroactively to permit collateral review of convictions that became final before it was decided. It is true that the Batson decision rested on the Equal Protection Clause of the Fourteenth Amendment and that this case raises a Sixth Amendment issue. In both cases, however, petitioners pressed their objections to the jury selection on both grounds. Both cases concern the constitutionality of allowing the use of peremptories to yield a jury that may be biased against a defendant on account of race. Identical practical ramifications will ensue from our holdings in both cases. Thus if there is no fundamental unfairness in denying retroactive relief to a petitioner denied his Fourteenth Amendment right to a fairly chosen jury, as the Court held in Allen, there cannot be fundamental unfairness in denying this petitioner relief for the violation of his Sixth Amendment right to an impartial jury. I therefore agree that the judgment of the Court of Appeals must be affirmed.

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JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

. . . Out of an exaggerated concern for treating similarly situated habeas petitioners the same, the plurality would for the first time preclude the federal courts from considering on collateral review a vast

range of important constitutional challenges; where those challenges have merit, it would bar the vindication of personal constitutional rights and deny society a check against further violations until the same claim is presented on direct review. In my view, the plurality's "blind adherence to the principle of treating like cases alike" amounts to "letting the tail wag the dog" when it stymies the resolution of substantial and unheralded constitutional questions. Because I cannot acquiesce in this unprecedented curtailment of the reach of the Great Writ, particularly in the absence of any discussion of these momentous changes by the parties or the lower courts, I dissent.

The federal habeas corpus statute provides that a federal court "shall entertain an application for a writ of habeas corpus in behalf of a person in 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." For well over a century, we have read this statute and its forbears to authorize federal courts to grant writs of habeas corpus whenever a person's liberty is unconstitutionally restrained. . . . Our thorough survey of the history of habeas corpus at common law and in its federal statutory embodiment led us to conclude that "conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review." [F]ederal courts have the power to inquire into any constitutional defect in a state criminal trial, provided that the petitioner remains "in custody" by virtue of the judgment rendered at that trial. . . .

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Our precedents thus supply no support for the plurality's curtailment of habeas relief. Just as it was "a fortuity that we overruled *Swain v. Alabama* (1965) in a case that came to us on direct review" when "[w]e could as easily have granted certiorari and decided the matter in a case on collateral review," so too there is no reason why we cannot decide Teague's almost identical claim under the Sixth Amendment on collateral review rather than in a case on direct review. . . .

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None of the reasons we have hitherto deemed necessary for departing from the doctrine of stare decisis are present. Our interpretations of the reach of federal habeas corpus have not proceeded from inadequate briefing or argumentation, nor have they taken the form of assertion unaccompanied by detailed justification. No new facts or arguments have come to light suggesting that our reading of the federal habeas statute or our divination of congressional intent was plainly mistaken. In addition, Congress has done nothing to shrink the set of claims cognizable on habeas since it passed the Habeas Corpus Act of 1867, despite our consistent interpretation of the federal habeas statute to permit adjudication of cases like Teague's. Finally, the rationale for our decisions has not been undermined by subsequent congressional or judicial action. None of the exceptions to the doctrine of stare decisis we have recognized apply. I therefore remain mystified at where the plurality finds warrant to upset, sua sponte, our time-honored precedents.

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. . . Certainly it is desirable, in the interest of fairness, to accord the same treatment to all habeas petitioners with the same claims. Given a choice between deciding an issue on direct or collateral review that might result in a new rule of law that would not warrant retroactive application to persons on collateral review other than the petitioner who brought the claim, we should ordinarily grant certiorari and decide the question on direct review. . . .

Other things are not always equal, however. Sometimes a claim which, if successful, would create a new rule not appropriate for retroactive application on collateral review is better presented by a habeas case than by one on direct review. In fact, sometimes the claim is only presented on collateral review. In that case, while we could forgo deciding the issue in the hope that it would eventually be presented squarely on direct review, that hope might be misplaced, and even if it were in time fulfilled, the opportunity to check constitutional violations and to further the evolution of our thinking in some area of the law would in the meanwhile have been lost. In addition, by preserving our right and that of the lower federal courts to hear such claims on collateral review, we would not discourage their litigation on federal habeas corpus and thus not deprive ourselves and society of the benefit of decisions by the lower federal courts when we must resolve these issues ourselves.

The plurality appears oblivious to these advantages of our settled approach to collateral review. Instead, it would deny itself these benefits because adherence to precedent would occasionally result in one habeas petitioner's obtaining redress while another petitioner with an identical claim could not qualify for relief. In my view, the uniform treatment of habeas petitioners is not worth the price the plurality is willing to pay. Permitting the federal courts to decide novel habeas claims not substantially related to guilt or innocence has profited our society immensely. Congress has not seen fit to withdraw those benefits by amending the statute that provides for them. And although a favorable decision for a petitioner might not extend to another prisoner whose identical claim has become final, it is at least arguably better that the wrong done to one person be righted than that none of the injuries inflicted on those whose convictions have become final be redressed, despite the resulting inequality in treatment. . . .

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Even if one accepts the plurality's account of the appropriate limits to habeas relief, its conclusion that Teague's claim may not be heard is dubious. . . . Teague's claim is simply that the Sixth Amendment's command that no distinctive groups be systematically excluded from jury pools or from venires drawn from them, applies with equal force to the selection of petit juries. He maintains that this firmly established principle prohibits the prosecution from using its peremptory challenges discriminatorily to prevent venire persons from sitting on the jury merely because they belong to some racial, ethnic, or other group cognizable for Sixth Amendment purposes. . . .

Once Teague's claim is characterized correctly, the plurality's assertions that on its new standard his claim is too novel to be recognized on habeas corpus, and that the right he invokes is "a far cry from the kind of absolute prerequisite to fundamental fairness that is 'implicit in the concept of ordered liberty,'" are dubious. As we said in *Rose v. Mitchell* (1979), "Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice. Selection of members of a grand jury because they are of one race and not another destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process. . . ."

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