CIVIL DISOBEDIENCE IN THE SUPREME COURT: RETROACTIVITY AND THE COMPROMISE BETWEEN FORMAL AND SUBSTANTIVE JUSTICE

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I. INTRODUCTION

In the area of criminal law, specifically criminal procedure, the Supreme Court makes a compromise between the sometimes competing notions of "formal" and "substantive" justice. This compromise, found in the Court's doctrine of retroactivity, was developed to prevent the perceived injustice of allowing the factually guilty to challenge their previously rendered convictions on the basis of new developments in case law. The doctrine of retroactivity (which is really one of nonretroactivity) prevents these challenges by providing courts with a mechanism to apply some decisional law prospectively, depending on the law at issue and the stage of the litigant's case. As a judicial contrivance that departs from centuries of precedent, the doctrine of retroactivity may be understood as an act of "civil disobedience" by the Supreme Court designed to avoid the unpalatable and perhaps, unjust, effect that a mechanistic application of the law would produce. This article will demonstrate that, in making this compromise, the Supreme Court subordinates the role of formal justice to achieve the substantive goal of punishing wrongdoers. In order to arrive at this point, this article will first examine the theories of "formal" and "substantive" justice.

A. Formal and Substantive Justice

Formal justice (sometimes referred to as "procedural justice"[1]) is a principle of justice for an institution, such as a government.[2] The legal philosopher, John Rawls, described formal justice as

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[1] WOJCIECH SADURSKI, GIVING DESERT ITS DUE 49 (1985).

[2] JOHN RAWLS, A THEORY OF JUSTICE 47 (Oxford Univ. Press 1999) (1971).

"adherence to principle . . . [or] obedience to system."[3] Its central precept is that the law must be administered evenhandedly.[4] This precept is often formulated as "treat like cases alike."[5] Treating like cases alike requires that the law be administered in accordance with itself, regardless of the circumstances of a particular case and without consideration of its "defects or virtues."[6] Formal justice—a highlight of the American legal system—requires officials to apply the law in the same way to everyone, regardless of whether they approve of the content of the law or the result such uniform application produces.

Substantive justice, on the other hand, involves a value judgment about the content of law and its consequences.[7] It is concerned with the *outcome* or *effect* of the law.[8] Whereas formal justice finds value internally in the regular and consistent application of law, substantive justice finds value through externalities such as morality, religion, or culture. For example, a system of criminal law may dictate that punishment be proportionate to the crime, or that punishment serve ends such as retribution or rehabilitation. These are substantive goals and substantive justice would be achieved if these ends were met. Accordingly, the theory of substantive justice does not embody any particular substantive goal; indeed, what is considered "substantively just" may vary from person to person.

There is debate as to whether a system of formal justice necessarily produces substantively just outcomes.[9] However, the notion that justice may be achieved solely through rigid adherence to the rule of law (or, that formal justice is the epitome of justice) is easily refuted. For example, imagine a law which prohibited people with red hair from entering the park. This law could be equally enforced, with only those who have red hair being punished under the rule. While the evenhanded application of this law would satisfy the requirements of formal justice, it can fairly be said that

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[3] *Id.* at 51.

[4] *See, e.g.*, David Lyons, *On Formal Justice*, 58 CORNELL L. REV. 833, 833 (1973); *see also* RAWLS, *supra* note 2, at 51; H. L. A. HART, THE CONCEPT OF LAW 155 (Oxford Univ. Press 1965) (1961) (discussing the principle of treating like cases alike).

[5] HART, *supra* note 4, at 155.

[6] Lyons, *supra* note 4, at 833. As such, under formal justice, justice is found in the form of the law (as opposed to its content) and is delivered through adherence to that form.

[7] *Id.*

[8] SADURSKI, *supra* note 1, at 49.

[9] *Id.*; PHILIP SELZNICK, THE MORAL COMMONWEALTH 437 (Univ. of Cal. Press 1994) (1992); *see also* Lyons, *supra* note 4, at 834 (describing the theory of formal justice); RAWLS, *supra* note 2, at 52 ("[I]t is maintained that where we find formal justice, the rule of law and the honoring of legitimate expectations, we are likely to find substantive justice as well.").

few people would find such a law just.[10] On the other hand, a law that prohibited people from littering in the park is, arguably, substantively just (because it forwards a worthwhile environmental purpose), but it would be unjust if the park police arbitrarily enforced this rule, based on whim, bias, or any other reason. Thus, injustice appears to result when either formal or substantive justice is missing from the equation. The overlap between formal and substantive justice suggests that a comprehensive theory of "justice" must incorporate elements of each. Rather than tackling that issue here (which, thankfully, is beyond the scope of this piece), this article will demonstrate how a conflict between the two theories gave rise to the doctrine of retroactivity, which subordinates formal justice (process) to substantive justice (outcome). By emphasizing outcome over process, the doctrine of retroactivity prioritizes substantive justice over precedent and may thus be understood as an act of "civil disobedience."

B. Civil Disobedience

In *A Theory of Justice*, John Rawls argues that, within an otherwise just institution, civil disobedience is justified in order to "bring[] about . . . change in the law" that "addresses the sense of justice of the majority."[11] That is, citizens are justified in departing from the law, in light of the majority's conception of justice, to achieve positive reform of the law.[12] In the following sections, I argue that the Supreme Court departs from the principle of formal justice by refusing to "treat like cases alike," in an act of Rawlsian "civil disobedience," to achieve the substantive goal of punishing wrongdoers.[13] I've described the Court's departure from the law as "civil disobedience" in order to highlight that this departure was intended to serve "justice" as opposed to some personal or political goal. Some might refer to this as "judicial activism,"[14] but I employ

[10] One might argue that the content of this hypothetical law violates formal justice in that it fails to "treat like cases alike" by discriminating based upon an irrelevant difference, the color of one's hair. It is important to note, however, that formal justice ignores the content of law and focuses solely on its evenhanded application.

[11] RAWLS, *supra* note 2, at 320.

[12] *See id.* at 335–43.

[13] When Rawls wrote of civil disobedience, he did not describe the courts themselves departing from the law in order to effect changes in the law—but this notion does not conflict with the fundamental idea of civil disobedience.

[14] *See generally* Frank M. Johnson, Jr., *In Defense of Judicial Activism*, 28 Emory L.J. 901 (1979) (discussing judicial activism); *see also* BLACK'S LAW DICTIONARY 380 (2d Pocket ed. 2001) (defining judicial activism as "[a] philosophy of judicial decision-making whereby judges

the concept of "civil disobedience" liberally to emphasize that the Court created the doctrine of retroactivity to address what Rawls refers to as the "sense of justice of the larger society,"[15] as opposed to the individual justices's personal views of public policy. As such, I do not intend to discuss whether the Court's departure is actually justified, but that the Court departs from the law because it believes it to comport with society's "sense of justice."

II. THE EVOLUTION OF RETROACTIVITY

During the Warren Court, great advances were made in the field of criminal law, especially with regard to the rights of the accused.[16] Perhaps the most influential of these advances was the incorporation of the Bill of Rights against the states.[17] Incorporation threatened to have a dramatic effect on the criminal justice system because, up to that point, the states had largely disregarded the Bill of Rights. During the same period, the availability of habeas corpus was expanded by *Brown v. Allen*[18] and *Fay v. Noia*.[19] *Brown* held that constitutional claims raised in state courts were not barred by res judicata on collateral review,[20] and *Fay* held that prisoners who had failed to litigate their constitutional claims on direct appeal were not barred by collateral estoppel from raising those claims on collateral review.[21] These decisions embody the formal justice principle of "treating like cases alike" by allowing habeas petitioners to raise constitutional claims advanced by other litigants, regardless of the procedural posture of

allow their personal views about public policy, among other factors, to guide their decisions").

[15] RAWLS, *supra* note 2, at 339.

[16] *See generally* MELVIN L. UROFSKY, THE WARREN COURT: JUSTICES, RULINGS, AND LEGACY 156 (2001) (discussing the most influential decisions of the Warren Court).

[17] *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961) (Fourth Amendment); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to assistance of counsel); Malloy v. Hogan, 378 U.S. 1 (1964) (Fifth Amendment); Pointer v. Texas, 380 U.S. 400 (1965) (right to confront adverse witnesses); Klopfer v. North Carolina, 386 U.S. 213 (1967) (right to a speedy trial); Washington v. Texas, 388 U.S. 14 (1967) (right to compulsory process to obtain witness testimony); Duncan v. Louisiana, 391 U.S. 145 (1968) (right to a trial by an impartial jury). For an exhaustive discussion of important Warren Court decisions, see UROFSKY, *supra* note 16, at 156.

[18] Brown v. Allen, 344 U.S. 443, 458 (1953) (holding that constitutional claims raised in state courts are not barred by res judicata).

[19] Fay v. Noia, 372 U.S. 391 (1963).

[20] *Brown*, 344 U.S at 458.

[21] *Fay*, 372 U.S. at 398–99 (holding that a prisoner who had failed to litigate his constitutional claims on appeal was not barred by collateral estoppel from raising those claims on collateral review); *see also* Desist v. United States, 394 U.S. 244, 261 (1969) (Harlan, J., dissenting) (noting the conflict between finality and retroactivity).

their appeals.

When combined with the newly incorporated Bill of Rights, the expansion of habeas corpus made it possible for thousands of prisoners, with convictions rendered in violation of the Bill of Rights, to challenge their convictions.[22] Most of these prisoners were factually guilty,[23] but the evidence upon which they were convicted would now have to be excluded under the protections of the Bill of Rights. Under formal justice, this would be the correct result because we would fail to treat like cases alike if some defendants were allowed to exclude incriminating, but improperly gathered evidence, while others (already convicted upon such evidence) could not. This is considered to be the correct result despite the occasional side-effect of allowing the wrongdoer to escape punishment through such legal technicalities. Indeed, formal justice is valued in the American system as protective of liberty despite that it occasionally allows wrongdoers to go free.[24] While it is protective of liberty, formal justice may generate the substantive injustice of allowing wrongdoers to escape punishment. This substantive injustice is an unintended consequence that is generally tolerated as the best alternative to a system that is less protective of individual rights. However, the expansion of habeas corpus and the incorporation of the Bill of Rights combined to create the possibility for many wrongdoers to escape punishment—a substantive injustice the Supreme Court was unwilling to tolerate.

In order to avoid this injustice, the Court subordinated formal justice to substantive justice by holding that some decisional law would operate prospectively in *Linkletter v. Walker*.[25] Practically speaking, this ruling was intended to limit the impact of the Court's recent decisions by preventing thousands of prisoners from seeking habeas review.[26] Beyond its practical consequence, however,

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[22] *See* Linkletter v. Walker, 381 U.S. 618, 636 (1965); *see also* L. Anita Richardson & Leonard B. Mandell, *Fairness Over Fortuity: Retroactivity Revisited and Revised*, 1989 UTAH L. REV. 11, 19–21 & n.72, 22 (1989) (discussing the circumstances and impact of the decision in *Fay*).

[23] For example, the factual guilt of the defendant in *Linkletter* was never called into question. Rather, it was the fact that the evidence used against him was obtained without a warrant that would have allowed him to overturn his conviction.

[24] Recall Blackstone's statement that "it is better that ten guilty persons escape than that one innocent suffer." 4 WILLIAM BLACKSTONE, COMMENTARIES *352.

[25] *Linkletter*, 381 U.S. at 636.

[26] *See* Mackey v. United States, 401 U.S. 667, 676 (1971) (Harlan, J., concurring in part, dissenting in part) ("That doctrine was the product of the Court's disquietude with the impacts of its fast-moving pace of constitutional innovation in the criminal field. Some members of the Court, and I have come to regret that I was among them, initially grasped this doctrine as a way of limiting the reach of decisions that seemed to them fundamentally

Linkletter and its progeny reveal a judicial sensitivity to the "effects" of law as opposed to its mechanistic application.[27]

A. Retroactivity as the Status Quo

At common law all judicial decisions were given retroactive effect,[28] even in cases already final (meaning that "the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari ha[s] elapsed").[29] Automatic retroactivity was part of the Anglo-American common law tradition under which courts did not make law but merely discovered it.[30] Under this view, "new rules" were not actually new, but a declaration of what has always been the law. When a court overruled a prior decision and announced a "new rule," the old interpretation of the law was said to be "a failure at true discovery and was consequently never the law."[31] Lord Blackstone argued for this view of adjudication, noting that it was beyond the power of the court to "pronounce new law"; rather, it was the duty of the court to "maintain and expound the old [law]."[32] This jurisprudential position is referred to as the "declaratory theory of adjudication,"[33] or, simply, the "Blackstonian view."[34]

Under the "Blackstonian view," decisional law was given retroactive effect because it wasn't considered to be "new." Instead, the old interpretation of the law never really was the law, despite that previous courts had applied it as such. Automatic retroactivity was the standard because if a law existed prior to its explicit declaration in a judicial opinion, then it must necessarily have a retroactive effect. In actuality, it wasn't considered to be retroactive at all because the law was deemed to have already been in force.

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unsound. Others rationalized this resort to prospectivity as a 'technique' that provided an 'impetus for the implementation of long overdue reforms, which otherwise could not be practicably effected.'" (quoting Jenkins v. Delaware, 395 U.S. 213, 218 (1969))).

[27] *See* Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1237 (1930) (insisting on an evaluation of the law "in terms of its effects, and an insistence on the worthwhileness of trying to find these effects").

[28] *See Linkletter*, 381 U.S. at 622.

[29] *Id.* at 622 n.5.

[30] *Id.* at 622 n.6 ("I know of no authority in this court to say that, in general, state decisions shall make law only for the future. Judicial decisions have had retrospective operation for near a thousand years." (quoting Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910) (Holmes, J., dissenting))).

[31] *Linkletter*, 381 U.S. at 623.

[32] 1 WILLIAM BLACKSTONE, COMMENTARIES *69.

[33] Anastasoff v. United States, 223 F.3d 898, 901 (8th Cir. 2000).

[34] *Linkletter*, 381 U.S. at 624.

Thus, under the "Blackstonian view," a defendant convicted under a law which was subsequently overruled was convicted under no law at all, and should receive the benefit of the new interpretation. For example, when the Court decided *Mapp v. Ohio*,[35] holding that the states are bound by the Fourth Amendment, the Court was not announcing new law, but that the Fourth Amendment had always applied to the states (or, at least since the adoption of the Fourteenth Amendment) and that interpretations otherwise were incorrect.[36] If the Fourth Amendment had always applied to the states, then convictions obtained in violation of it were rendered unconstitutional. It was against this jurisprudential background that the *Linkletter* Court held that some judicial decisions would operate only prospectively.

Victor Linkletter was convicted of burglary in a Louisiana District Court in 1959.[37] Directly after his arrest and without a warrant, the police used his keys to enter his home and seize incriminating evidence against him.[38] It was not until after Linkletter's case had become final that *Mapp* was decided. Based on the new *Mapp* rule, Linkletter filed a petition for habeas corpus.[39] The question before the Court was whether or not the *Mapp* rule should apply retroactively to Linkletter.[40]

In examining this issue, the Court contrasted the "Blackstonian view" with that of the positivist John Austin, who "maintained that judges do in fact do something more than discover law; they *make* it interstitially by filling in with judicial interpretation [the terms of the law] that alone are but the empty crevices of the law."[41] The consequence of the view that judges make law, rather than merely "discover" it, is that new interpretations do not "erase[]" previous decisions, which are considered "existing juridical fact[s]," that "are not to be disturbed."[42] While the Court did not explicitly adopt the Austinian position, it employed it as a counter-example to Blackstone to help demonstrate that its adoption of nonretroactivity had some theoretical support. Finding support for the prospective operation of law in Austin's positivism, and that the Constitution

[35] Mapp v. Ohio, 367 U.S. 643 (1961).
[36] *See id.* at 655–57.
[37] *Linkletter*, 381 U.S. at 621.
[38] *Id.*
[39] *Id.* at 619 (citing Mapp v. Ohio, 367 U.S. 643 (1961)).
[40] *Linkletter*, 381 U.S. at 619.
[41] *Id.* at 623–24 (emphasis added).
[42] *Id.*

had "no voice upon the subject,"[43] the *Linkletter* Court determined that it was under no obligation to apply a new rule retroactively to a case already final. Instead of automatic retroactivity, (which until then had been the standard)[44] the Court adopted a balancing test to determine when a new rule would be given retroactive effect in a case already final.[45] The test weighed the purpose of the new rule, reliance on the old rule, and the effect retroactive application would have on the administration of justice.[46] New rules would apply automatically to the defendant in the rule-making case and to other cases pending on direct review, but cases on collateral review, like Linkletter's, would be subject to the balancing test.[47] Applying this test, the Court held that *Mapp* would not operate retroactively.[48]

The majority opinion ignored that under its new rule, defendants on direct review received different treatment than those on collateral review. Justice Black attacked this inequity in his dissent, labeling it an injustice and arguing that the "different treatment of Miss Mapp and Linkletter points up at once the arbitrary and discriminatory nature of the judicial contrivance utilized here."[49] Justice Black believed it was unfair for the Court to simultaneously maintain that Mapp suffered a redressable violation of her rights, but Linkletter—despite suffering the same Constitutional injury—would be denied relief. Justice Black's argument is formalist in that it focuses on the arbitrary application of the law as opposed to the substantive injustice that "some guilty persons might escape."[50] The *Mapp* decision itself also argued along this formalist rationale, stating that "[t]he criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."[51]

B. Expansion of Linkletter

The *Linkletter* retroactivity test was soon expanded beyond

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[43] *Id.* at 629 (quoting Great N. Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 364 (1932)).

[44] *See Linkletter*, 381 U.S. at 628 n.13 (citing cases where new rules were given retroactive effect upon decisions already final).

[45] *Id.* at 625.

[46] *Id.* at 636.

[47] *Id.* at 622, 628.

[48] *Id.* at 620.

[49] *Id.* at 641 (Black, J., dissenting).

[50] *Id.* at 650.

[51] Mapp v. Ohio, 367 U.S. 643, 659 (1961).

collateral review to cases on direct review in *Johnson v. New Jersey*[52] and *Stovall v. Denno*.[53] Both cases, like *Linkletter*, dealt with the retroactive application of exclusionary rules.[54]

Johnson, a habeas proceeding, sought the retroactive application of *Ecscobedo v. Illinois*[55] and *Miranda v. Arizona*,[56] which held, respectively, that criminal suspects have a right to counsel during police interrogations and that in order for a confession to be admissible at trial a defendant must have been informed of his or her right to counsel and right against self-incrimination, and have voluntarily waived those rights.[57] The Court applied the *Linkletter* test and held that neither *Escobedo*, nor *Miranda* would be given retroactive effect, emphasizing that the purpose prong of the test weighed heavily against retroactivity.[58] Because the purpose of the new rules in *Miranda* and *Escobedo* was to "merely guard against the possibility of unreliable statements" the danger of not having the protection of those rules was "not necessarily as great."[59] In addition, the Court emphasized that retroactive application would burden the "administration of justice," because it "would require the retrial or release of numerous prisoners found guilty by trustworthy evidence in conformity with previously announced constitutional standards."[60] Thus, for the *Johnson* Court, the determination hinged on the actual guilt of the defendant, as opposed to the violation of his constitutional rights. This emphasis on the petitioner's guilt, as opposed to the violation of his rights (or, the failure of officials to adhere to the law in convicting him), reveals a concern for the *outcome* over the *process*, or in other words, for substantive justice over formal justice.[61]

Going even further, the Court held, for the same reasons, that

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[52] Johnson v. New Jersey, 384 U.S. 719 (1966).

[53] Stovall v. Denno, 388 U.S. 293 (1967).

[54] *See id.* at 294–95; *Johnson*, 384 U.S. at 721.

[55] Ecscobedo v. Illinois, 378 U.S. 478 (1964).

[56] Miranda v. Arizona, 384 U.S. 436 (1966). Interestingly, and in contrast with the positivism adopted in *Linkletter*, the *Miranda* Court stated that its holding was "not an innovation in [its] jurisprudence, but is an application of principles long recognized and applied in other settings. . . . These precious rights were fixed in our Constitution only after centuries of persecution and struggle." *Id.* at 442.

[57] *See id.* at 467; *Escobedo*, 378 U.S. at 491.

[58] *See Johnson*, 384 U.S. at 721.

[59] *Id.* at 730.

[60] *Id.* at 731, 733.

[61] In this sense, it can be argued that the purpose and effect prongs of the *Linkletter* test contain an element of substantive justice. That is, if the purpose of a rule is "the reliability of a conviction" and the defendant is clearly guilty, then it is irrelevant whether or not the rule was applied as a just result was obtained (despite the fact that the law was not followed).

neither *Escobedo*, nor *Miranda* would apply to cases on direct review.[62] Again, the Court noted that it found "no jurisprudential or constitutional obstacles" to the prospective operation of *Escobedo* and *Miranda*.[63] As a result, the defendants in *Miranda* and *Escobedo* would be the only litigants to receive the retroactive benefit of those decisions. Commentators have dubbed this sort of retroactivity, where the new rule is applied retroactively only to the litigant in the law-changing case, "quasi-prospectivity."[64] "Quasi-prospectivity" violates the precept of treating like cases alike in that only the defendant in the law-changing case receives the benefit of the new rule (and those whose conduct occurs after the rule is announced), while similarly situated defendants with cases pending on direct or collateral review will not.

The following year, in *Stovall v. Denno*,[65] the Court formally adopted the *Linkletter* purpose-reliance-effect test for all retroactivity questions, making explicit the holding in *Johnson* that "no distinction is justified between convictions now final . . . and convictions at various stages of trial and direct review."[66] The Court reasoned that the factors of "reliance and burden on the administration of justice" overwhelmingly tipped the scales against retroactivity even for cases on direct review.[67] In so holding, the Court acknowledged the inequity of selective application of new rules, but passed it off as "an insignificant cost for adherence to sound principles of decision-making."[68] Here, it appears that sound decisionmaking is not treating like cases alike but avoiding the substantive injustice of allowing wrongdoers to escape punishment.

C. The Movement Toward Formal Justice, Driven by Justice Harlan

In *Desist v. United States*[69] the Court applied the *Linkletter* test to *Katz v. United States*[70] (which held that the Fourth Amendment prohibited searches even when there was no actual trespass or

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[62] *Id.* at 733.
[63] *Id.*
[64] Richardson & Mandell, *supra* note 22, at 24.
[65] Stovall v. Denno, 388 U.S. 293 (1967).
[66] *Id.* at 300.
[67] *Id.* at 300–01.
[68] *Id.* at 301 n.5.
[69] Desist v. United States, 394 U.S. 244 (1969). It is important to note that the defendant in *Desist* was convicted of conspiring to import heroin upon tape recordings made through a hotel room wall. *See id.* at 244–45.
[70] Katz v. United States, 389 U.S. 347 (1968).

entry into an enclosure),[71] and denied it retroactive effect.[72] The ruling sparked a vigorous dissent from Justice Harlan who urged that "'[r]etroactivity' must be rethought."[73]

Justice Harlan wrote that "[w]e do not release a criminal from jail because we like to do so, or because we think it wise to do so, but only because the government has offended constitutional principle in the conduct of his case."[74] For Justice Harlan, justice required that when a "similarly situated defendant comes before [the Court], must grant the same relief or give a principled reason for acting differently."[75] As such, Justice Harlan's argument insists on formal justice in two ways. First, it is unjust to imprison someone based on a conviction obtained in violation of the law. Second, injustice results when the law has been applied arbitrarily, overturning some convictions, but not others.

For cases on collateral review, Justice Harlan argued that their "finality" was a difference justifying different treatment from cases on direct review.[76] Withholding the application of new rules on collateral review did not violate the principle of treating like cases alike, he argued, because they were not alike. The difference of finality outweighed competing interests because "there be a visible end to the litigable aspect of the criminal process. Finality in the criminal law is an end which must always be kept in plain view."[77]

The Court eventually adopted Justice Harlan's view in *United States v. Johnson*,[78] identifying two norms of constitutional adjudication that were violated by the retroactivity doctrine. First, the *Linkletter*-retroactivity doctrine was not based on "principled decisionmaking" or precedent.[79] Rather, it was fabricated as a "technique" used to reduce the impact of the incorporation of the Bill of Rights. Second, selective application of new rules violated the formalist principle of "treating similarly situated defendants

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[71] *See id.* at 353.

[72] *Desist*, 394 U.S. at 246.

[73] *Id.* at 258 (Harlan, J., dissenting).

[74] *Id.* (Harlan, J., dissenting).

[75] *Id.*

[76] *Id.* at 261–62. As an aside, it is interesting to note that Justice Harlan disagreed with the decisions in *Noia* and *Brown*, believing that no new rules could be raised on collateral review. *See id.* This suggests that his approach to retroactivity on collateral review was colored by his dissatisfaction with the expansion of habeas review in those cases, perhaps due to a view that it was substantively unjust to allow prisoners, whose cases were already final, the chance to have their convictions overturned.

[77] Mackey v. United States, 401 U.S. 667, 690 (1971) (Harlan, J., concurring in part, dissenting in part).

[78] United States v. Johnson, 457 U.S. 537 (1982).

[79] *Id.* at 546.

similarly."[80] When a court announces a new rule, the nature of adjudication requires that it apply retroactively to the defendant in that case.[81] Therefore, if the defendant in the law-changing case receives the retroactive benefit of the new rule, then it would be a violation of treating like cases alike to deny other defendants, similarly situated, the retroactive benefit of that same rule. Trial and appellate processes in the country's many tribunals proceed at varying paces, resulting in an "obvious unfairness . . . when it gives only the most conveniently situated defendant the retrospective benefit of a newly declared rule."[82] In other words, the timing of one's case is not a difference sufficient to justify different treatment. These two norms embody the concept of formal justice by requiring that like cases be treated alike and that the most current understanding of the law should apply in any particular case.

Ultimately, the *Johnson* Court held that decisions construing the Fourth Amendment would operate retroactively to cases on direct review.[83] It was not until *Griffith v. Kentucky* that the Court held that all new rules would apply retroactively to cases on direct review,[84] recognizing the inequity that resulted by "[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule."[85]

D. Collateral Review Becomes the Threshold for Substantive Justice

In *Teague v. Lane*, the Court finally adopted the whole of Justice Harlan's approach for questions of retroactivity on habeas review.[86] Teague was convicted of attempted murder, armed robbery, and

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[80] *Id.* at 547.

[81] It operates retroactively because the defendant's conduct (or law enforcement's conduct which gave rise to the new rule as is usually the case with exclusionary rules) occurred prior to the declaration of the new rule. As such, when the new rule reaches that conduct, it operates retrospectively.

[82] *Johnson*, 457 U.S. at 556 n.17. The government argued the substantive position that retroactive operation of the rule would "accomplish nothing but the discharge of a wrongdoer." *Id.* at 561. In response the Court urged that their determination should depend not on the defendant's guilt but on whether or not his conviction was obtained in accordance with the law. *See id.* at 561–62.

[83] *See id.* at 562–63.

[84] *See id.*; Griffith v. Kentucky, 479 U.S. 314, 328 (1987).

[85] *Johnson*, 457 U.S. at 547 (quoting Mackey v. United States, 401 U.S. 667, 678–79 (1971) (Harlan, J., concurring in part, dissenting in part)).

[86] Teague v. Lane, 489 U.S. 288, 309–11 (1989).

aggravated battery.[87] During jury selection, the prosecutor used all of his preemptory challenges to eliminate black jurors.[88] Teague, an African American man, was convicted, and his conviction became final after his appeals to the Illinois court system and the United States Supreme Court were denied.[89] Teague then filed a habeas corpus petition,[90] arguing for a new rule based on the fair-cross section requirement in *Taylor v. Louisiana*.[91] While Teague's case was pending, the Court decided *Batson v. Kentucky*,[92] which lowered the burden of establishing a prima facie case of racial discrimination through the use of preemptory challenges.[93] By the time Teague's case arrived at the Supreme Court, he was arguing not only for a new interpretation of *Taylor*, but also for the retroactive application of *Batson*.[94]

Justice O'Connor, writing for the plurality, held that retroactivity should be a threshold question when a petitioner argues for a new rule.[95] Pursuant to this holding, if a petitioner argues for a new rule on collateral review, before deciding whether or not to adopt the new rule, the Court should decide if the rule would operate retroactively to other cases on collateral review.[96] If it would not, then the Court should not address the merits of the argument.[97] The rationale for treating retroactivity as a threshold question was that it would be unfair to announce a new rule on habeas review, apply it to the petitioner in the law-changing case, and then deny it to all other collateral review petitioners. Justice O'Connor wrote, "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."[98] Thus, if a new rule would not apply to all cases on collateral review, then, out of fairness, it should apply it to none.

For petitioners seeking the benefit of a newly announced rule, the Court followed Justice Harlan, holding that nonretroactivity on

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[87] *Id.* at 292–93.
[88] *Id.* at 293.
[89] *Id.*
[90] *Id.* at 292.
[91] Taylor v. Louisiana, 419 U.S. 522 (1975).
[92] Batson v. Kentucky, 479 U.S. 79 (1986).
[93] *Teague*, 489 U.S. at 295.
[94] Oral argument took place on October 4, 1988, quite some time after both *Taylor* and *Batson* were decided. *See id.* at 288.
[95] *Id.* at 300.
[96] *See id.*
[97] *Id.*
[98] *Id.*

collateral review did not violate the principle of treating like cases alike because "finality" made cases on collateral review different from cases on direct review. Harlan wrote, "[t]he relative frame of reference . . . is not the purpose of the new rule whose benefit the [defendant] seeks, but instead the purposes for which the writ of habeas corpus is made available."[99] The interest in finality outweighed the interest of equality and adjudicating convictions according to the most current understanding of the law.[100]

E. The Teague *Exceptions Reveal a Concern for Substantive Justice*

The Court, again following Justice Harlan, adopted two exceptions to the rule of nonretroactivity for cases on collateral review. First, a new rule should be applied retroactively on collateral review if it "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'"[101] In other words, if the new rule is not one of procedure, but a substantive rule holding that certain conduct is protected by the Constitution, then the rule will be applied retroactively. Second, new rules that "without which the likelihood of an accurate conviction is seriously diminished" would also operate retroactively.[102] These two exceptions embody a substantive principle of justice, namely, that innocent people should not be punished. The first in that the petitioner's conduct is no longer viewed as criminal and the second in that the petitioner may actually be innocent.

From another perspective, these exceptions are not available to those who are guilty of wrongdoing. Thus, the *Teague* exceptions imply that it is substantively just for the guilty to remain incarcerated, even if their convictions were achieved in violation of the law. Apparently, the principle that the guilty should be punished overrides the principle of treating like cases alike.

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[99] *Id.* at 306 (quoting Mackey v. United States, 401 U.S. 667, 682 (1971) (Harlan, J., concurring in part, dissenting in part)). Justice Harlan noted in an earlier case that "the 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." Kuhlmann v. Wilson, 477 U.S. 436, 447 (1986).

[100] *Teague*, 489 U.S. at 306.

[101] *Id.* at 311 (quoting Mackey v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in part, dissenting in part)).

[102] *Teague*, 489 U.S. at 313.

III. FINALITY IS NOT A DIFFERENCE JUSTIFYING DIFFERENT TREATMENT

Hart added to the precept of "treat like cases alike" that we must also "treat different cases differently."[103] Because it is possible to find similarities and differences between nearly any two cases, Hart argued that "until it is established what resemblances and differences are relevant" the precept of "treat like cases alike" is "an empty form."[104] As such, the precept must be "supplemented" before we can "criticize laws or other social arrangements as unjust."[105] The relevant resemblances and differences between cases become more obvious, Hart argued, "when we are concerned not with the justice or injustice of the *law* but of its *application* in particular cases. For here the relevant resemblances and differences . . . are determined by the law itself."[106] Conversely, the determination whether a law is substantively just cannot depend on the law itself, but must be contingent on some externality. For example, a law prohibiting people with red hair from entering a park may be justly administered only if those who have broken the law are punished, but it would be absurd to say that the law itself is just because it has only been applied to people with red hair. However, when we are concerned solely with whether the law has been administered evenhandedly, we need only look to the law itself. Hart gives the example of a law against murder: such a law is justly applied when it is applied impartially to those "who are alike in having done what the law forbids."[107] Thus, in order to determine whether a new rule should be applied to a case on collateral review, we need only look to the case itself to determine if it falls within the rule. In Linkletter's case, for example, the relevant inquiry should have been whether Linkletter suffered the same Constitutional injury as Ms. Mapp. To focus on externalities, such as the procedural posture of the case (collateral versus direct) is to focus on an irrelevant difference.

The difference in treatment between collateral petitioners and those on direct review has nothing to do with the merits of their claims, but rather, with the timing of their cases.[108] Given the

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[103] HART, *supra* note 4, at 155.

[104] *Id.*

[105] *Id.*

[106] *Id.* at 156.

[107] *Id.*

[108] This article is not the first to point out this inequity, see William J. Sheils, *Nonretroactivity on Habeas Corpus: Whittling at the Great Writ*, 24 SUFFOLK L. REV. 743, 776 (1990).

number of cases on every court's docket and the individual attention given to each case, there is inevitably a delay between the time one's trial or appeal is commenced and the time when it is reviewed by a court. The Supreme Court found that full retroactivity on direct review was justified because it was unfair to deny an appellant the retroactive operation of a new rule simply because his or her case happened to be reviewed after a new rule was announced. This logic applies with equal force to cases on collateral review. For example, it is conceivable that one's case could become final a day before a new rule is announced. It is no less arbitrary to deny that case the retroactive benefit of a new rule, when it comes on collateral review, then it would be to deny a direct review appellant the new rule, as was held in *Griffith*.[109] Thus, when deciding whether a new rule should be applied to a case on collateral review, we shouldn't consider the "finality" of the case, rather, we should look to see if the petitioner suffered the same injury as in the law-changing case.

If finality is not a real difference, then why do cases on collateral review receive different treatment? Up to the point of collateral review, the Court prioritizes formal justice over substantive justice. Different treatment of cases on collateral review was justified by reference to the difference of finality, but as we have seen, finality is really only a temporal difference between cases, a difference that was dispensed with for cases on direct review. From a descriptive point of view, however, cases on collateral review are treated differently because principles of substantive justice have taken priority over those of formal justice, as revealed by the *Teague* exceptions. Rather than adhering to the principle of treating like cases alike, the Court focuses on the substantive justice (or injustice) of allowing prisoners on collateral review the benefit of new rules of criminal procedure. This focus has to do with the nature of the new rules which drove the Court's retroactivity jurisprudence. For instance, the new rules in *Mapp* and *Katz* are exclusionary rules which often prevent the prosecution from presenting incriminating evidence against factually guilty defendants. The Court was aware that the retroactive application of these rules would result in the release of many factually guilty prisoners. To apply these new rules retroactively would allow wrongdoers to go free (or at least allow them new trials, the reliability of which would be uncertain due to evidence spoliation

[109] Griffith v. Kentucky, 479 U.S. 314, 316 (1987).

and witnesses's faded memories).

Adherence to formal justice, in the case of the retroactive application of many new rules of criminal procedure, would result in the substantive injustice of allowing wrongdoers to avoid punishment for their crimes. As Philip Selznick wrote: "[L]egal 'correctness' has its own costs. Like any other technology, it is vulnerable to the divorce of ends and means. When this occurs, legality degenerates into legalism. Substantive justice is undone when there is too great a commitment to upholding the autonomy and integrity of law."[110]

Here, substantive justice would be "undone" through the release of the factually guilty. The Court was willing to tolerate this substantive injustice for cases on direct review, perhaps because it was more likely that prosecutors could obtain a just conviction in a retrial. Or perhaps the Court was less troubled by the image of defendants going free during the trial and appellate process than opening the prison doors to release those convicted long ago. Nevertheless, and for whatever reason, the Court has made a compromise between substantive and formal justice. As Rawls wrote, "in a state of near justice at least, there is normally a duty . . . to comply with unjust laws provided that they do not exceed certain bounds of injustice."[111] In the case of the retroactivity of new rules of criminal procedure, we are not dealing with unjust laws, but with unjust outcomes. Still, the principle applies, and it seems that the "bounds of injustice" begin at collateral review.

When is it appropriate to depart from the precept of treating like cases alike? Is "noncompliance" with the principle "morally wrong?"[112] One commentator argues that "[f]ormalistic notions of justice misplace value by valuing mere form, thereby obscuring the essential connection between justice and the treatment of persons."[113] As discussed above, Rawls also argued that there are circumstances under which it would be appropriate to depart from formal legal principles through the use of civil disobedience, to "address the sense of justice of the majority."[114] It appears that the Court departs from formal justice when it comes to collateral review because it would offend society's "sense of justice" to release the factually guilty on the basis of a new procedural rule that was not in

[110] SELZNICK, *supra* note 9, at 437.
[111] RAWLS, *supra* note 2, at 312.
[112] Lyons, *supra* note 4, at 834.
[113] *Id.* at 839–40.
[114] RAWLS, *supra* note 2, at 335.

effect when the they were convicted.[115]

For Rawls, noncompliance with unjust arrangements, or "justified civil disobedience" is a part of any "well-ordered society."[116] While Rawls may not have envisioned the Court itself engaging in civil disobedience, it is a useful way to view the Court's departure from formal justice. By denying the factually guilty collateral relief under new constitutional rules the Court is not following precedent, or the precepts of formal justice. Rather, it is refusing to effect a result that would be objectionable to nearly all members of society, except, perhaps, those criminals who would benefit from it.

The Court, as admitted by Justice Harlan, invented retroactivity to allow them to adopt new rules of criminal procedure (designed to protect the rights of the accused) without the effect of releasing those convicted under the old procedures.[117] In other words, the Court used retroactivity as a means to achieve the end of improving the rights of the accused. As such, the doctrine had substantive justice in mind as well as practical motivations, but it resulted in the formal injustice of the failure to treat like cases alike.

IV. CONCLUSION

The concepts of formal justice and substantive justice are often at odds within our system of criminal law. The Supreme Court's approach to resolve this conflict was to adopt a threshold test, a compromise, between the two. Formal justice prevails for cases on direct review, yet substantive justice overrides when it comes to collateral. Whether this balancing act achieves justice overall is another question, but understanding the current state of justice is a helpful first step.

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[115] A strict Rawlsian account would determine the point at which one should prioritize substantive justice over formal justice from the original position behind the "veil of ignorance." *See id.* at 15–19.

[116] *Id.* at 336.

[117] *See* Mackey v. United States, 401 U.S. 667, 676 (1971) (Harlan, J., concurring in part, dissenting in part).