NORMATIVE RETROACTIVITY

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When the Court interprets the Constitution to accord a new right to criminal offenders, the question quickly becomes which prisoners might benefit from the new rule. The current retroactivity doctrine relies on a confusing substance-procedure dichotomy. Drawn from Teague v. Lane*, this test often results in lower court splits on the retroactivity question. Recently, the Supreme Court decided the question of retroactivity in two cases—*Montgomery v. Louisiana *and* Welch v. United States.

This Article rejects the substance-procedure dichotomy and offers a competing theoretical frame for considering the question of retroactivity. Specifically, the Article develops the concept of "normative retroactivity," arguing that retroactivity should relate directly to the normative impact of the new rule on previous guilt and sentencing determinations. Further, the article advances a doctrinal test for assessing normative retroactivity of new rules of criminal constitutional law that combines the normative impact of the rule with a balancing test that weighs the applicable values of fundamental fairness and equality under the law against the competing values of finality, comity, and government financial burden.

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The way to right wrongs is to shine the light of truth upon them.

—Ida R. Wells-Barnett

INTRODUCTION

When the Supreme Court interprets the Constitution to recognize a new right for criminal defendants, the outcome seems to be a cause for celebration for prisoners. The real question, though, is whether the decision applies retroactively to those convicted and sentenced in the manner now determined to be unconstitutional.[1]

The Court's decision in *Hurst v. Florida* in January 2016 provides a recent example of this kind of inquiry.[2] In *Hurst*, the Court held that Florida's capital sentencing scheme violated the Sixth Amendment.[3] By allowing the judge to determine whether the State had proved the aggravating facts required to impose the death penalty, Florida's law violated Hurst's right to

1 Although initially the subject of skepticism concerning the ability and propriety of judges to 'make law,' the retroactivity doctrine has been developed by the Court over the past several decades. *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *69 (explaining that a court's duty is not to "pronounce a new law, but to maintain and expound the old one"). *But see* Linkletter v. Walker, 381 U.S. 618 (1965) (marking the first in a line of cases moving away from the court's non-retroactivity doctrine).

2 136 S. Ct. 616 (2016).

3 *Id.* Florida currently has 396 prisoners on death row, the second largest death row in the United States behind California. *Death Row Inmates by State*, DEATH PENALTY INFO. CTR. (July 1, 2016), http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year.

a trial by jury.[4] While Hurst no longer faces execution, it is not clear whether the new constitutional rule will apply to others sentenced under the same unconstitutional process.[5] In addition, the Delaware Supreme Court held that its death penalty was unconstitutional because it granted judges, not juries, the ultimate decision-making power in capital cases, following the holding in *Hurst*.[6]

The Court applied the retroactivity doctrine in two cases in the October 2015 term, *Montgomery v. Louisiana* and *Welch v. United States*.[7] In *Montgomery*, the Court held that its prior decision in *Miller v. Alabama* applied retroactively.[8] *Miller* held in 2012 that mandatory juvenile life-without-parole sentences violated the Eighth Amendment's prohibition against cruel and unusual punishments.[9] The initial response of the states to the question of whether *Miller* applied retroactively was inconsistent, leading to a split among lower courts.[10]

In *Welch v. United States*, the Court similarly held its decision in *Johnson v. United States* applied retroactively.[11] *Johnson* held that the Armed Career Criminals Act's ("ACCA") definition of "violent felony" was

4 136 S. Ct. at 622. *See generally* Apprendi v. New Jersey, 530 U.S. 466, 495 (2000) (establishing the Sixth Amendment rule with respect to statutory maximums); Ring v. Arizona, 536 U.S. 584, 589 (2002) (applying the *Apprendi* rule to capital cases).

5 It appears that the decision in *Hurst* might apply retroactively, at least to cases in Florida. The Florida Supreme Court has not ruled on the question, but it did stay an execution scheduled for February 2, 2016. Mark Berman, *Florida Supreme Court Halts Scheduled Execution After Debate Over State's Death Penalty*, WASH. POST (Feb. 2, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/02/02/florida-supreme-court-halts-scheduled-execution-after-debate-over-states-death-penalty/. Interestingly, the *Hurst* decision did not stop Alabama, which has a similar system to Florida, from continuing to execute offenders. Alabama executed Christopher Brooks on January 21, 2016, nine days after the Court decided *Hurst*. The Court denied Brooks's petition for a stay and writ of certiorari. *See* Brooks v. Alabama, 136 S.Ct. 708 (2016) (denying petition for stay and writ of certiorari to consider whether *Hurst v. Florida* applies to Alabama's capital sentencing scheme). Justice Stephen Breyer dissented and called more broadly for a re-examination of the constitutionality of the death penalty. *Id.* (Breyer, J., dissenting) ("The unfairness inherent in treating this case differently from others which used similarly unconstitutional procedures only underscores the need to reconsider the validity of capital punishment under the Eighth Amendment.").

6 State v. Rauf, No. 1509009858, 2016 WL 320094 (Del. Super. Ct. Jan. 25, 2016).

7 Montgomery v. Louisiana, 136 S. Ct. 718 (2016); Welch v. United States, 136 S. Ct. 1257 (2016).

8 *Montgomery*, 136 S. Ct. at 736; *see generally* Miller v. Alabama, 132 S. Ct. 2455 (2012) (holding that the mandatory imposition of a sentence of life without the possibility of parole violates the Eighth Amendment's prohibition on cruel and unusual punishment).

9 *Miller*, 132 S. Ct. at 2475.

10 *Montgomery*, 136 S. Ct. at 725.

11 Welch v. United States, 136 S. Ct. 1257, 1268 (2016).

unconstitutionally vague.[12] Again, the question was whether, having received an unconstitutional sentence, prisoners have a right to resentencing through a retroactive application of the Court's decision.[13]

It is not enough, then, for the Supreme Court to hold that a particular kind of criminal sentence or sentencing procedure is unconstitutional.[14] Rather, the question remains whether that decision applies to those already serving such sentences—a retroactive application—or simply prohibits the prospective imposition of such sentences in the future.[15]

At face value, it is a travesty that offenders can remain in prison or even be executed in cases where, if decided today, the imposition of that sentence would violate their constitutional rights.[16] This seems offensive both as a matter of individual rights and as a matter of equal treatment under the law.[17]

And yet, the Court's cases have generally disfavored the retroactive application of constitutional decisions to criminal cases on collateral

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12 Johnson v. United States, 135 S. Ct. 2551, 2557 (2015). Specifically, the Court struck down the residual clause of the definition of violent felony, which defined it to include a crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another." *Id.* Without the "violent felony" enhancement, the statutory maximum sentence is ten years, but with the enhancement, the statutory *minimum* is fifteen years. 18 U.S.C. § 924(e) (2015).

13 There were strong arguments that *Johnson* should apply retroactively under the Court's doctrine. *See* Leah M. Litman, *Residual Impact: Resentencing Implications Of* Johnson*'s Potential Ruling On ACCA's Constitutionality*, 115 COLUM. L. REV. SIDEBAR 55, 60–63, 65–73 (2015) (discussing the potential effects of a Supreme Court ruling on *Johnson* following certiorari but prior to oral argument); Leah M. Litman, *Resentencing In The Shadow of* Johnson v. United States, 28 FED. SEN'G REP. 45, 47–49 (2015) (summarizing briefly the *Johnson* ruling's potential retroactive applications).

14 In theory, the Roman law principle of *ubi jus ibi remedium* ("where there is a right, there is a remedy") should control. *See* Ashby v. White [1703] 92 Eng. Rep. 126, 137 (U.K.) ("[E]very man that is injured ought to have his recompense."). From the Court's perspective, however, other values like finality and comity sometimes trump the constitutional rights of inmates who have completed their direct appeals. *See infra*, Part I.A.; *see also* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963) (arguing for narrowing the application of new constitutional rules to prisoners raising collateral challenges in habeas corpus).

15 *See, e.g.*, Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1059 (1997) (explaining the retroactivity inquiry and framing it as a study of legal change).

16 *See, e.g.*, Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991) (addressing the potential unfairness of non-retroactivity approaches to new constitutional rules by reframing the inquiry in terms of constitutional remedies doctrine); David R. Dow, Teague *and Death: The Impact of Current Retroactivity Doctrine on Capital Defendants*, 19 HASTINGS CONST. L.Q. 23 (1991) (exploring the unfairness of *Teague* in the death penalty context).

17 *See, e.g.*, Stephen R. Munzer, *Retroactive Law*, 6 J. LEGAL STUD. 373 (1977) (exploring theories of retroactivity, including fairness and equality, before arguing that the concept of legal validity should determine the content of "retroactive law").

review.[18] Several values compete with notions of fairness and equality under the law. The first concern is that allowing retroactive application of newly unearthed interpretations of the Constitution compromises the finality of prior criminal proceedings.[19] In addition, the cost of reopening cases serves as a second deterrent to retroactive application of new constitutional rules.[20] Finally, where the application of such rules would require state governments to retry or resentence cases, the value of comity—deference to state courts—provides another reason to apply decisions prospectively.[21]

The applicable rule with respect to retroactivity comes from *Teague v. Lane*.[22] In *Teague*, the Court declined to retroactively apply its holding in *Batson v. Kentucky*,[23] even though prosecutors had unconstitutionally used

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18 *See* Teague v. Lane, 489 U.S. 288, 295–96 (1989) (affirming a line of cases forbidding retroactive action of new precedents on collateral review of criminal convictions); Linkletter v. Walker, 381 U.S. 618, 622–40 (explaining the Warren Court's non-retroactivity doctrine).

19 *Teague*, 489 U.S. at 309 ("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."). *See also* Bator, *supra* note 15; Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443 (2007) (arguing that Court's adoption of concepts of finality misreads the purposes of AEDPA); Andrew Chongseh Kim, *Beyond Finality: How Making Criminal Judgments Less Final Can Further the "Interests of Finality,"* 2013 UTAH L. REV. 561 (2013) (arguing that "finality" is not an interest in itself, but rather a collection of interests that can actually be *harmed* by refusing to grant post-conviction relief).

20 *Teague*, 489 U.S. at 310 ("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."); *see also* Daniel E. Troy, *Toward a Definition and Critique of Retroactivity*, 51 ALA. L. REV. 1329 (2000) (emphasizing economic costs as an argument against retroactivity).

21 *Teague*, 489 U.S. at 308 ("If a defendant fails to comply with state procedural rules and is barred from litigating a particular constitutional claim in state court, the claim can be considered on federal habeas only if the defendant shows cause for the default and actual prejudice resulting therefrom."); *see also* Bator, *supra* note 14; Kovarsky, *supra* note 19. For a compelling argument against the value of comity, *see* Louise Weinberg, *Against Comity*, 80 GEO. L. J. 53, 55 (1991) ("Reciprocal comity is not the appealing prescription that it sounds, but instead, in implementation, is discriminatory and substantively damaging to the rule of law").

22 489 U.S. 288, 310 (1989) (plurality opinion). This rule is complimentary to the broader statutory scheme created by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Pub. L. No 104-132, 110 Stat. 1214 (codified at 28 U.S.C. §§ 2241-2254 (2006)). Specifically, AEDPA, section 2254(d)(1) limits habeas relief to state criminal sentences to cases where the state proceeding "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.* at § 2254(d)(1). But the AEDPA and *Teague* inquiries are separate. Horn v. Banks, 536 U.S. 266, 272 (2002) (per curiam).

23 Batson v. Kentucky, 476 U.S. 79, 96–98 (1986).

peremptory challenges to systematically eliminate black jurors during jury selection.[24] Despite the clear injustice, the Court held in *Teague* that the values of finality and comity outweighed the value of fairness to the individual defendant.[25]

Teague decided that new constitutional rules of criminal procedure generally did not apply retroactively, with two exceptions.[26] First, if the rule is substantive in nature, in that it places the conduct beyond the power of the government to proscribe its limits, the Court applies it retroactively.[27] Second, if the rule is procedural in nature, the Court does not apply it retroactively unless it is a "watershed rule" of criminal procedure, "implicit in the concept of ordered liberty."[28]

Thus, under *Teague*, constitutional holdings apply retroactively only when they are substantive; procedural outcomes generally do not fall under the "watershed rule" exception.[29] Certainly part of the rationale for this rule was the Court's belief that interests of finality and comity trumped the concepts of fundamental fairness and individual rights.[30]

Increasingly, the *Teague* test creates confusion for courts attempting to determine retroactivity.[31] As explained below, the line between substance and procedure becomes blurred in many cases.[32] Constitutional rules like

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24 *Teague*, 489 U.S. at 296.

25 *Id.* at 308. The decision in *Teague* sparked a considerable literature with respect to retroactivity. *See, e.g.*, Susan Bandes, *Taking Justice to its Logical Extreme: A Comment on* Teague v. Lane, 66 S. CAL. L. REV. 2453, 2458 (1993) (arguing that "*Teague* subverts congressional intent by achieving finality at the expense of all other values Congress meant habeas to safeguard, including fairness and accuracy, even in capital cases"); Fallon & Meltzer, *supra* note 16 (addressing the potential unfairness of non-retroactivity approaches to new constitutional rules); Joseph L. Hoffman, *Retroactivity and the Great Writ: How Congress Should Respond to* Teague v. Lane, 1990 BYU L. REV. 183, 210 (favoring a statutory approach to non-retroactivity doctrine); Linda Meyer, *"Nothing We Say Matters":* Teague *and New Rules*, 61 U. CHI. L. REV. 423, 424–25 (1994) (criticizing *Teague* on various grounds, including the conceptual difficulties of connecting "newness" and "holdings"); Kermit Roosevelt III, *A Retroactivity Retrospective, with Thoughts for the Future: What the Supreme Court Learned from Paul Mishkin, and What It Might*, 95 CALIF. L. REV. 1677, 1699–1700 (2007) (considering the application of the retroactivity framework to a line of cases under *Apprendi v. New Jersey*, 530 U.S. 466 (2000)).

26 *Teague*, 489 U.S. at 311–12.

27 *Id.* at 311.

28 *Id.* at 311-12.

29 *Id.*

30 *See id.* at 308 (citing the "interests of comity and finality").

31 The test's shortcomings are well-documented. *See, e.g.*, John Blume & William Pratt, *Understanding* Teague v. Lane, 18 N.Y.U. REV. L. & SOC. CHANGE 325, 326 (1991) (arguing that *Teague* failed to make retroactivity outcomes more predictable); Kermit Rooosevelt III, *A Little Theory is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 CONN. L. REV. 1075, 1113–15 (1999) (highlighting the difficulties of applying the *Teague* test).

32 *See, e.g.*, 1 CHARLES FREDERIC CHAMBERLAYNE, A TREATISE ON THE MODERN LAW OF EVIDENCE § 171 (1911) ("[T]he distinction between substantive and procedural law is

the one in *Miller* often have both substantive and procedural dimensions. Further, the vagueness of the substance-procedure distinction allows lower courts to respond to the determination of the Court based on other considerations, including the lower court's affinity (or disaffinity) for the new rule, the rule's effect on the court's criminal population, the rule's potential impact on the court's judicial resources, and the court's level of stigmatization of criminal offenders.[33]

Also, the *Teague* test appears disconnected from the competing values in this context—fairness and finality.[34] The idea that procedural errors should receive less scrutiny than substantive errors might be appealing in the abstract, but it can lead to absurd results in practice, with respect to retroactivity.[35]

This Article rejects the substance-procedure dichotomy and offers a competing theoretical frame for considering the question of retroactivity. Specifically, the Article develops the concept of "normative retroactivity," arguing that retroactivity should relate directly to the normative impact of the new rule on guilt and sentencing determinations. Further, the article advances a doctrinal test for assessing normative retroactivity of new rules of criminal constitutional law that combines the normative impact of the rule with a balancing test that weighs the applicable values of fundamental fairness and equality under the law against the competing values of finality, comity, and financial burden.

Part I of the Article outlines the retroactivity problem—the imbalance of the core values at stake and the inherent difficulty in applying the *Teague* doctrine. Part II proposes an alternative theoretical paradigm for understanding and applying the concept of retroactivity—normative retroactivity. Finally, in Part III, the Article describes the virtues of normative retroactivity.

I. THE RETROACTIVITY PROBLEM

The application of the retroactivity doctrine of *Teague* has suffered from two core problems. First, the doctrine has developed an inequity in

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one not only of but little consequence; it is one which is principally based . . . on a mere difference in the form of statement."); Walter Wheeler Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L. J. 333, 336 (1933) (finding the "alleged distinction" between procedure and substance unsatisfactory to find differences in meaning).

33 *See, e.g.*, Meyer, *supra* note 25 (criticizing vagueness of the *Teague* doctrine); Roosevelt, *supra* note 25, at 1701 (suggesting that *Teague* should be applied case-by-case).

34 *See, e.g.*, Bandes, *supra* note 25, at 2554 (stating that *Teague* failed to meet its self-described goals of fairness and finality); Blume & Pratt, *supra* note 31, at 354–56 (discussing *Teague* and finality); Roosevelt, *supra* note 31.

35 Roosevelt, *supra* note 25, at 1693–98.

balancing the competing interests at stake. For many years, the Court has prioritized the interests of finality and comity over fairness and equality under the law.

Equally troubling in the Court's analysis of the question of retroactivity has been the confusion created by employing a substance-procedure dichotomy by which to assess retroactivity. Generally, new substantive rules of constitutional law apply retroactively, and procedural rules do not, but there is often disagreement about whether a rule is substantive or procedural. This ambiguity results in lower court splits, and in many cases, the Court must decide the retroactivity question.

A. The Competing Values of Retroactivity Analysis

1. Fundamental Fairness and Equality under the Law

In determining whether a constitutional rule should apply retroactively to individuals convicted and sentenced prior to the adoption of that rule by the Court, the Court has articulated a series of competing considerations. Counseling in favor of retroactive applications are the concepts of fundamental fairness[36] and equality under the law.[37]

When the Court determines, for instance, that a particular punishment violates the constitutional rights of an individual, other offenders suffering that same punishment have two reasons to object to its continued imposition. First, the punishment is unfair in its own application—meaning that the state punished the individual in a manner inconsistent with the

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36 Griffith v. Kentucky, 479 U.S. 314, 323 (1987) (emphasizing that "selective application of new rules violates the principles of treating similarly situated defendants the same"); United States v. Johnson, 457 U.S. 537, 555–56 n.16 (1982) ("The problem is not merely the *appearance* of inequity, but the *actual inequity* that results when the Court chooses which of many similarly situated defendants should be the chance beneficiary of a retroactively applied rule."); Desist v. United States, 394 U.S. 244, 259 (1969) (Harlan, J., dissenting) ("If a 'new' constitutional doctrine is truly right, we should not reverse lower courts which have accepted it; nor should we affirm those which have rejected the very arguments we have embraced."); Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 YALE L.J. 922, 987 (2006) ("All of these doctrines require selection of a trigger point—a way of separating those who will benefit from a new decision from those who will not—which will almost invariably make a claimant's eligibility for relief depend on something over which she had little, if any, control.").

37 *See Desist*, 394 U.S. at 258–59 (1969) (Harlan, J., dissenting) ("We depart form the basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a 'new' rule of constitutional law."); Sarah French Russell, *Reluctance to Resentence: Courts, Congress, and Collateral Review*, 91 N.C. L. REV. 79, 161 (2012) ("Society has an interest in seeing people sentenced correctly in accordance with its laws. Allowing people to continue to serve years of extra prison time despite a plain error in their sentence undermines the legitimacy of the criminal justice system . . . .").

Constitution. Suppose an offender received a death sentence as a punishment for a rape, but the Court had interpreted the Eighth Amendment to prohibit capital sentences for rape because death was an excessive sentence for rape.[38] To impose a death sentence for rape would then be fundamentally unfair because it violates the constitutional rights of the offender.

Second, the punishment could be one that is unfair in that it is unequal under the law. In this context, the punishment would be unfair by comparison—the constitutional rule prohibited the imposition of the punishment on one offender, but not the other, with the only difference being *when* the state imposed the punishment. Using the same example, a death sentence for a rape offense would violate conceptions of equality under the law because no one going forward could receive that sentence for that crime.

Another word about equality under the law is instructive. While disparity in sentencing outcomes between offenders who commit essentially the same conduct exists as an ordinary function of allowing discretion in sentencing, such disparities become increasingly troubling as the severity of punishments increases. Indeed, the disparity in capital sentencing outcomes in the 1970s rose to such a level that it violated the Eighth Amendment's prohibition against cruel and unusual punishments.[39]

Likewise, when the sentence is no longer available because it is unconstitutional, the inequality under the law becomes more pronounced than when it is simply the product of different exercises of discretion. As explored below, the impact of the newly adopted constitutional rule bears heavily on whether prospective application infringes upon, and to what degree it infringes upon, conceptions of equality under the law.[40]

2. Finality, Comity, and Financial Burdens

The Supreme Court has long trumpeted the value of finality in criminal cases, particularly in the context of habeas corpus appeals.[41] The concept of

38 *See* Coker v. Georgia, 433 U.S. 584 (1977) (ruling that the death penalty is too harsh a punishment for rape).

39 Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (per curiam).

40 Note that the same fairness and rule of law concerns apply to procedural rights. In some cases, denying procedural rights arising under the constitution in criminal cases can create even more unfairness than the denial of substantive rights.

41 *See* Mackey v. United States, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in judgment in part and dissenting in part) ("No one, not criminal defendants, not the judicial system, not society as a whole is benefitted by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved."); Sanders v. United States, 373 U.S. 1, 24–25 (1963) (Harlan, J., dissenting) ("Both the individual criminal defendant and

finality embraces the value of a final judgment that settles a criminal matter.[42] Once a court has tried a case, found the defendant guilty, and sentenced the defendant, the value of finality warns against upsetting that judgment in all but the most extreme examples of injustice.[43]

Implicit in the concept of finality is the assumption that the criminal trial proceeding and sentencing were fair and accorded the defendant his constitutional rights, giving him his day in court.[44] Further, the assumption includes the ideas that the process was legitimate, non-arbitrary, and entailed the proof of the defendant's guilt beyond a reasonable doubt.[45] Perhaps most important, the concept of finality assumes the outcomes of the criminal trial and sentencing proceeding were accurate, and thus require no further review.[46]

This presumption of accuracy, both as a matter of law and a matter of policy, becomes even stronger after the courts have reviewed the defendant's direct appeals.[47] On habeas appeal, the courts are generally

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society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community."); Bator, *supra* note 14, at 471 (noting that throughout history "[t]he essential touchstone continued to be that the writ of habeas corpus was not to be used as a a writ of error, and that decisions of competent tribunals as to issues of fact or law bearing on convictions should be final").

42 *See, e.g.*, Bator, *supra* note 14, at 452 (stating that a lack of finality can undermine the functions of criminal law); Ryan W. Scott, *In Defense of the Finality of Criminal Sentences on Collateral Review*, 4 WAKE FOREST J. L. & POLICY 179, 181 (2014) (defending the finality of criminal sentences against challenges from recent scholarship).

43 *See, e.g.*, Bator, *supra* note 14, at 452–53 (explaining the advantages of finality); Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. CHI. L. REV. 142, 150 (1970) (stating that "conventional notions of finality" should have a place in criminal litigation).

44 Kovarsky, *supra* note 19, at 454 (noting that "[s]ocial acceptance of final judgment reflects the confidence in the institutions and procedures that produce it"); Ronald J. Tabak, *Finality Without Fairness: Why We are Moving Towards Moratoria on Executions, and the Potential Abolition of Capital Punishment*, 33 CONN. L. REV. 733, 737 (2001).

45 The adoption of AEDPA also contains echoes of this "full and fair" principle, such that receiving a full and fair proceeding closes the door on future consideration of the merits. *See* Claudia Wilner, *"We Would Not Defer to that Which Did Not Exist": AEDPA Meets the Silent State Court Opinion*, 77 N.Y.U. L. REV. 1442, 1453 (2002) (noting that under AEDPA a reviewing federal court must defer to the reasonable decisions of the state court).

46 *Id.*; *see also* Bator, *supra* note 14, at 450–51 (examining the link between finality and legality); Kovarsky, *supra* note 19, at 454 (noting that "[s]ocial acceptance of final judgment reflects the confidence in the institutions and procedures that produce it").

47 *See* John H. Blume, *AEDPA: The "Hype" and the "Bite"*, 91 CORNELL L. REV. 259 (2005) (emphasizing that nine years after AEDPA came into effect, no state had successfully opted into the special capital case procedures that had been highlighted by AEDPA's drafters).

reluctant to overturn a case based on substantive or procedural errors, based largely on this notion of finality.[48]

To demonstrate how ingrained finality has become, one need only to examine the Court's hesitancy to recognize a freestanding claim of actual innocence.[49] Even when the petitioner can prove his actual innocence of the crime, courts may bar that claim based on the failure to satisfy certain procedural requirements.[50]

As such, the principle of finality discourages retroactive application of new constitutional rules, particularly where such an application serves to reopen a significant number of cases for retrial or resentencing. The notion remains, barring extreme circumstances, that final judgments should remain final.[51]

A second, similar ground for deciding not to disturb final judgments is the value of comity—deference of the federal government towards the decisions of state governments and courts. Criminal law has traditionally remained in the purview of states. Although Congress has federalized certain areas—such as distribution of illegal drugs and corporate crimes—the states still administer most of the criminal law in the United States. The idea of comity counsels the Congress and the federal courts to defer to the determinations and actions of the state legislatures and courts where possible. Federal courts on habeas review, for instance, should accord a high level of deference to the factual findings of state trial courts according to the principles of comity. In the retroactivity context, constitutional interpretations should not, according to principles of comity, serve to undo a significant number of final criminal judgments of state courts.[52]

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48 Kovarsky, *supra* note 19; Wilner, *supra* note 45.

49 *See* House v. Bell, 547 U.S. 518, 554–55 (2006) (illustrating the stringent standard which must be satisfied to obtain an actual innocence exception); Herrera v. Collins, 506 U.S. 390 (1993) (holding that Defendant's claim of actual innocence did not entitle him to federal habeas relief); Robert Batey, *Federal Habeas Corpus Relief and the Death Penalty: "Finality with a Capital F"*, 36 U. FLA. L. REV. 252 (1984) (discussing the procedural doctrines limiting the availability of habeas relief); George C. Thomas III et al., *Is It Ever Too Late for Innocence? Finality, Efficiency, and Claims of Innocence*, 64 U. PITT. L. REV. 263, 263–64 (2003) (critiquing the Supreme Court's response to claims of actual innocence and recommending a different response).

50 The Court has long expressed the worry, vastly overstated, of criminal defendants "sandbagging" by not advancing their best claims at trial. *See* Graham Hughes, *Sandbagging Constitutional Rights: Federal Habeas Corpus and the Procedural Default Principle*, 16 N.Y.U. REV. L. & SOC. CHANGE 321 (1987-88) (discussing procedural default in habeas corpus claims).

51 *See, e.g.*, Bator, *supra* note 14, at 450–51 ("*[I]f* a criminal judgment is ever to be final, the notion of legality must at some point include the assignment of final competence to determine legality."); Friendly, *supra* note 43.

52 *See, e.g.*, Bandes, *supra* note 25, at 2457 ("*Teague* is part of the larger fabric of habeas decisions concerning successive petitions, procedural default, and deference to state

A consequence of retroactive application of new constitutional rules—the expenditure of state resources to retry or resentence cases—provides a third argument against retroactivity. In some ways the combination of finality and comity, this economic concern considers the degree to which a retroactive application would result in a heavy financial burden upon the states. Thus, the financial burden argument would challenge a court to weigh the value of the fairness, including the likelihood of actually changing the circumstances of convicted individuals, against the economic cost of re-litigating these cases.[53]

3. Weighing the Competing Values

At the heart of the analysis, then, are the values in favor of retroactive application of new constitutional rules—fairness and equality under the law—evaluated against the concerns of finality, comity, and economic burden. Historically, the Court has erred on the side of the latter, creating a presumption that new criminal constitutional rules should apply only prospectively.[54] As with finality more generally, inherent in this approach is the assumption that criminal trials are fair, provide accurate determinations as to guilt, and impose proportional and reasonable sentences.

As explored below, the impact of the constitutional rule, as well as the likely consequences of retroactive application, bear heavily on this question of balancing values. Too often, however, the Court has used difficult-to-apply doctrinal distinctions to determine the question of retroactivity. These approaches unfortunately obscure the balancing of values at stake, and all too often simply declare finality as the end goal without considering fairness.

B. The Doctrinal Confusion of Teague

Before exploring the Court's retroactivity doctrine, it is instructive to consider the different groups of offenders to whom retroactive application might apply. When the Court decides a case, the first group of offenders to consider are those whose cases are currently pending on direct appeal ("direct appellees"). A second group will be petitioners making habeas

findings, all of which put a premium on avoiding excessive interference with state court judgments.").

53 *See, e.g.*, Montgomery v. Louisiana, 136 S. Ct. 718, 736 (2016) (explaining that "[e]xtending parole eligibility to juvenile offenders does not impose an onerous burden on the States, nor does it disturb the finality of state convictions").

54 Arguably, some of this tendency may be a vestige of the non-retroactivity approach of the Warren Court. *See* Linkletter v. Walker, 381 U.S. 618, 622–28 (1965) (explaining the Warren Court's non-retroactivity doctrine).

corpus claims, collateral challenges to the constitutionality of the process that resulted in their punishment ("collateral appellees").[55]

Typically, a decision by the Supreme Court as to the constitutionality of a particular criminal law or procedure applies to direct appellees.[56] The retroactivity question, then, focuses on whether the decision applies to collateral appellees. If the Court determines that the decision should only apply prospectively, then collateral appellees become procedurally barred from raising a constitutional challenge based on the new decision.

A second consideration is whether the rule is a new one, or simply an application of established law.[57] Where the decision falls into the latter category, the retroactivity bar does not apply, because the Supreme Court decision did not create a new rule.

In such a situation, the applicable federal statute, the Antiterrorism and Effective Death Penalty Act ("AEDPA") applies, at least when the case involves a claim decided on the merits by a state court.[58] Under section 2254(d)(1) of AEDPA, a federal court may grant habeas relief if a state merits adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . ."[59]

Thus, if the rule was an established provision of law, it applies to the cases of collateral appellees because it was a rule in place at the time of their trial and sentencing. And to receive a hearing on the merits, the petitioner must overcome AEDPA's procedural bar.[60]

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55 Technically, a third category of offenders consists of those that have exhausted their collateral appeals and must make successive challenges to their sentence ("successive appellees"). For purposes of this article successive appellees will be merged with collateral appellees, putting aside the procedural thicket that AEDPA imposes on these prisoners for another time.

56 Griffith v. Kentucky, 479 U.S. 314, 328 (1987) (holding "that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending direct review or not yet final . . .").

57 While the determination of whether a rule is "new" is often a difficult one, the Court explained in *Teague* that "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." 489 U.S. 288, 301 (1989) (plurality opinion). Put differently, a case announces a new rule if "the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id.* *But see* Tung Yin, *A Better Mousetrap: Procedural Default as a Retroactivity Alternative to* Teague v. Lane *and the Antiterrorism and Effective Death Penalty Act of 1996*, 25 AM. J. CRIM. L. 203, 257 (1998) (expressing doubts about whether the rule considered in *Teague* was a "new" one).

58 Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No 104-132, 110 Stat. 1214 (codified at 28 U.S.C. §§ 2241-2254 (2006)).

59 28 U.S.C. § 2254(d)(1) (2006).

60 Stephen I. Vladeck, *AEDPA,* Saucier, *and the Stronger Case for Rights-First Constitutional Adjudication*, 32 SEATTLE U. L. REV. 595, 607-08 (2009) (noting that judicial resource

In addition to AEDPA, two barriers exist to the application of an old rule of criminal law or procedure clarified by the Supreme Court. First, collateral appellees must have, in most cases, preserved the particular claim as part of their appeals. Failure to raise a claim based on an old rule of criminal law or procedure can bar a collateral appellee or exhausted appellee from raising it on appeal.

Second, the harmless error doctrine serves to block many appeals based on clarifications of old criminal laws or procedures. Courts can determine that, although the criminal law or procedure contained a constitutional flaw, the result at trial and sentencing would have been the same, rendering the error harmless and inconsequential. Appellate courts that trust in the state criminal trial process rely heavily on the harmless error doctrine, particularly on collateral appeals.

1. The Origins of the Doctrine

As a result of the many new criminal procedure rules adopted by the Warren Court, questions arose concerning the application of those rules with respect to petitioners with cases on appeal.[61] In *Linkletter v. Walker*,[62] the Court considered whether the rule adopted in *Mapp v. Ohio*, which required states to exclude evidence seized in violation of the Fourth Amendment, applied to cases on direct appeal at the time.[63]

The Court in *Linkletter* recognized that the Court's traditional practice had been to apply its decisions in criminal cases prospectively.[64] The reason for this approach was the idea that the role of the Court was to interpret law, not make it.[65] The Court, however, continued its trend toward embracing more realist and less formalist approaches to decision-making in *Linkletter*.[66]

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constraints create a de facto procedural bar, even though courts have discretion to reach the merits on cases otherwise barred).

61 For an excellent discussion of the development of the law in this area, see BRANDON L. GARRETT & LEE KOVARSKY, FEDERAL HABEAS CORPUS: EXECUTIVE DETENTION AND POST-CONVICTION LITIGATION (2013).

62 Linkletter v. Walker, 381 U.S. 618 (1965).

63 Mapp v. Ohio, 367 U.S. 643 (1961); *Linkletter*, 281 U.S. at 619–20.

64 *Linkletter*, 318 U.S. at 622–23 ("At common law there was no authority for the proposition that judicial decisions made law only for the future. Blackstone stated the rule that the duty of the court was not to 'pronounce a new rule of law, but to maintain and expound the old one.' This Court followed that rule [in past cases]. . . . The judge rather than being the creator of the law was but its discoverer.") (citations omitted).

65 *See, e.g.*, Brown v. Allen, 344 U.S. 443 (1953) (arguing for the formalist approach of discovering law, not making it); *see also* BLACKSTONE, *supra* note 1 (explaining that the court's duty is not to make new law).

66 *Linkletter*, 318 U.S. 618. During the 1930s and 1940s, however, the Supreme Court moved away from legal formalism or classicism in a number of cases, moving toward a more realist view of decision-making. *See generally* WILLIAM WIECEK, THE LOST WORLD OF

Specifically, the Court held that to determine the retroactive application of a rule, it must examine the "prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."[67] In doing so, the Court determined that *Mapp* applied to prisoners whose cases were still on direct review, but not those whose cases were final.[68]

In the debate that followed *Linkletter*, two important concerns emerged that justified the prospective application of new constitutional rules.[69] First, the retroactivity question gave justices skeptical about the new constitutional rule a second venue to challenge, or at least limit, its application.[70] Also, the decision not to apply a new decision retroactively might make the new constitutional rule more palatable to members of the Court, particularly when the new rule was a disruptive one.[71] In *Mackey v. United States*, for instance, Justice John Marshall Harlan II called the prospective application of new rules "a technique that provided an impetus . . . for the implementation of long overdue reforms, which otherwise could not practicably be effected."[72]

Soon, however, the Court began to rethink the *Linkletter* principle, mostly based on the confusion resulting from its application.[73] Justice Harlan, in particular, criticized *Linkletter*, and offered his own alternative two-part analysis.[74] He first argued that the Court should give retroactive

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CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA 1886–1937 (1998) (tracing the historical arc of classic legal thought in America).

67 *Linkletter*, 381 U.S. at 629.

68 *Id.* at 627.

69 *See generally*, Fallon & Meltzer, *supra* note 16, at 1733–49 (1991) (discussing general theory of constitutional remedies, arguing "new" law doctrines all raise issues best analyzed as involving constitutional remedies); Paul J. Mishkin, *Foreward: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 77–79 (1965) (arguing that new decisions should always apply retroactively to decisions on direct appeal).

70 *Mapp* and *Linkletter* demonstrate this phenomenon, exposing the judicial discomfort with widespread application of the exclusionary rule. *Compare* Mapp v. Ohio, 367 U.S. 643 (1961) (forbidding state courts from admitting illegally obtained evidence in a criminal case), *with Linkletter*, 381 U.S. at 636–37 (recognizing that the breadth of Mapp made retrospective application both unfeasible and unwarranted in light of the purpose of the exclusionary rule). Likewise, Scalia's dissent in *Montgomery*, for instance, exudes this type of sentiment—that the initial decision was incorrect, and thus should be narrowed. *See* Montgomery v. Louisiana, 136 S. Ct. 718, 744 (2016) (noting that the implicit difficulty in administering the prior rule is exacerbated when it is applied retroactively).

71 Mackey v. United States, 401 U.S. 667 (1971).

72 *Id.* at 676 (Harlan, J., concurring in part and dissenting in part).

73 *See, e.g.*, Griffith v. Kentucky, 479 U.S. 314 (1987) (breaking from the *Linkletter* rule).

74 *See, e.g.*, Desist v. United States, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting) (arguing that the Court's subsequent decisions have changed the rule articulated in Linkletter); *Mackey*, 401 U.S. at 692–93 (Harlan, J., concurring in part and dissenting in part) (arguing about the application of new procedural due process rules articulated by the Court).

effect to decisions that constitutionally prohibited the punishment of previously-punishable conduct.[75] Justice Harlan also asserted that the federal courts should give retroactive effect to newly-announced procedural rules that were "implicit in the concept of ordered liberty."[76] While never adopted during his time on the Court, Justice Harlan's ideas influenced the development of the Court's retroactivity jurisprudence.[77] In *Griffith v. Kentucky*, the Court held that new rules applied to cases on direct review.[78] Following Justice Harlan, the Court reasoned that "the integrity of judicial review" requires the application of the new rule to "all similar cases pending on direct review."[79]

Then, in *Teague v. United States*, the Court again channeled Justice Harlan's ideas and adopted the current test for retroactivity for new rules of criminal constitutional law with respect to cases on collateral review.[80] In *Teague*, the Court considered whether its decision in *Batson v. Kentucky*, which prohibited racial discrimination in jury selection,[81] applied retroactively to Teague's case, which was on collateral review.[82]

In holding that the *Batson* decision did not apply retroactively, the plurality in *Teague* articulated a two-part test similar to Justice Harlan's test.[83] Emphasizing that the application of new rules retroactively to cases on collateral appeal should be narrow, the Court limited such application to two situations. The new rule applied retroactively either where the new rule made the conduct in question no longer criminal or where the new rule involved procedures "implicit in the concept of ordered liberty."[84] In adopting this test, the Court emphasized the values of comity and finality with respect to collateral appeals, noting the essential nature of both concepts to operation of the criminal justice system.[85]

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75 *Mackey*, 401 U.S. at 692 (Harlan, J., concurring in part and dissenting in part).

76 *Id.* at 693; *see also* Blume & Pratt, *supra* note 31, at 338 ("[O]ver time, changes in both social capacity and the expectations held of the judicial system can 'alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction.").

77 Fallon & Meltzer, *supra* note 16; Hoffman, *supra* note 25.

78 *Griffith*, 479 U.S. 314; *see also* Mishkin, *supra* note 69 (making the argument eventually adopted in *Griffith*).

79 *Griffith*, 479 U.S. at 322–23.

80 Teague v. United States, 489 U.S. 288 (1989).

81 Batson v. Kentucky, 476 U.S. 79 (1986).

82 *Teague*, 489 U.S. at 294; Hoffman, *supra* note 25.

83 *Teague*, 489 U.S. at 311–13.

84 *Id.* at 311–13.

85 *Id.* at 308.

2. *The Application of the Doctrine*

After *Teague*, the Court refined the two categories of exceptions, terming the first one "substantive" and the second one "procedural."[86] Under the substantive prong, the Court has held that certain new rules apply retroactively to cases on collateral appeal because they forbade criminalizing certain previously-criminal conduct or banned imposition of certain punishments on certain classes of offenders.[87]

The Court also has added the proviso that procedural rules do not apply retroactively unless they are "watershed" rules of criminal procedure.[88] The Court, though, has rejected every claim since *Teague* that a particular procedural rule fits the watershed category, as the rules in question have not implicated the "fundamental fairness and accuracy of the criminal proceeding".[89] It has explained that *Gideon v. Wainwright*, where the Court held that state courts must provide all felony defendants with a lawyer, is an example of a watershed rule, but has declined to find any other new procedural rules as fitting the exception.[90] Even in *Crawford v. Washington*, where the Court broadened the Confrontation Clause of the Sixth Amendment to prohibit the admission of hearsay statements without cross-examination,[91] the Court held that the new procedural rule did not meet the "watershed" threshold.[92]

For practical purposes, then, the substantive exception to the *Teague* bar provides the only real opportunity for retroactive application of new rules of

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86 *See* Montgomery v. Louisiana, 136 S. Ct. 718, 728–29 (2016) (noting *Teague* created an exception from the general bar of retroactivity for "new substantive rules of constitutional law" and new "watershed rules of criminal procedure" that raise issues of accuracy and fundamental fairness).

87 *Id.* at 729–30. There are several examples of this kind of case. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 578 (2005) (barring capital sentencing of juvenile offenders); Lawrence v. Texas, 539 U.S. 558, 578 (2003) (holding anti-sodomy laws unconstitutional because the Due Process Clause allows individuals to engage in consentual sexual conduct "without intervention of the government"); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that offenders with mental retardation cannot receive death sentences).

88 *Montgomery*, 136 S. Ct. at 728, 730 (referring to "watershed procedural rules" as the second *Teague* exception and explaining why changes in procedural rules do not automatically trigger retroactive application).

89 Schriro v. Summerlin, 542 U.S. 348, 352 (2004) (quoting Saffle v. Parks, 494 U.S. 484, 495 (1990)); *see also* Whorton v. Bockting, 549 U.S. 406, 418 (2007) ("[I]n the years since *Teague*, we have rejected every claim that a new rule satisfied the requirements for watershed status.").

90 *See, e.g.*, Gray v. Netherland, 518 U.S. 152, 170 (1996) (referring to the *Gideon* rule as a "paradigmatic example" of the watershed rule exception); *see generally* Justin F. Marceau, Gideon*'s Shadow*, 122 YALE L.J. 2482 (2013) (exploring the significance of *Gideon* more generally).

91 Crawford v. Washington, 541 U.S. 36, 68–69 (2004).

92 *Whorton*, 549 U.S. at 421.

criminal constitutional law to cases on collateral appeal. As such, the Court's determination of whether a new rule is substantive or procedural becomes paramount.

3. The Confusion Inherent in the Doctrine

Unfortunately, the distinction between substantive and procedural rules is often unclear.[93] At the margins, one can certainly separate the two concepts, despite their apparent fluidity.[94] Rules that eliminate particular crimes are clearly substantive.[95] The decision in *Lawrence v. Texas*, which decriminalized sodomy, provides a good example of an obvious substantive rule.[96]

Similarly, procedural rules that lack any doctrinal vestments and are substance-neutral, as Jeremy Bentham defined procedure, are clearly procedural under *Teague*.[97] Most procedural rules, however, have some substantive component to them.[98] While the procedure may still be simply a means to an end, the underlying requirements impose substantive duties on the litigants.[99]

The Court's recent decision in *Montgomery v. Louisiana* concerning the retroactivity of its decision in *Miller* provides a clear example of the confusion that arises from the substance-procedure dichotomy mandated by *Teague*.[100] *Miller* held that mandatory life-without-parole ("LWOP")

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93 *See generally* sources cited *supra* note 32; D. Michael Risinger, *"Substance" and "Procedure" Revisited with Some Afterthoughts on the Constitutional Problems of "Irrebuttable Presumptions"*, 30 UCLA L. REV. 189, 189–90 (1982) (describing the history of the substance-procedure distinction).

94 *See, e.g.*, John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 724–25 (1974) (observing that "[w]e were all brought up on sophisticated talk about the fluidity of the line between substance and procedure" but recognizing it is possible to give meaning to each term); Walter Wheeler Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333, 337, 340–44 (1933) (explaining that the utility of the terms depends on the meaning that one gives them); Risinger, *supra* note 93, at 204–09 (developing a framework for defining "procedural" and "substantive").

95 *See* Mackey v. United States, 401 U.S. 667, 692–93 (1971) (Harlan, J., concurring in judgments in part and dissenting in part) (stating that instances in which an individual is convicted for constitutionally protected actions presents "the clearest instance where finality interests should yield").

96 Lawrence v. Texas, 539 U.S. 558 (2003).

97 *See* 4 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, SPECIALLY APPLIED TO ENGLISH PRACTICE 477 (1827) (using the term "adjective" law as an idea separate from substantive law); Risinger, *supra* note 93, at 205–06 (describing purely procedural law as being solely concerned with "considerations of rational accuracy and time efficiency").

98 *See* sources cited *supra* notes 32 and 93.

99 *See* Risinger, *supra* note 93, at 209–11 (exploring how procedural regulations often beget substantive policies).

100 Montgomery v. Louisiana, 136 S. Ct. 718 (2016).

sentences imposed on juvenile offenders constituted cruel and unusual punishments in contravention of the Eighth Amendment.[101]

The question, then, is whether the rule adopted in *Miller* is procedural or substantive. The rule appears procedural in that it prohibits mandatory LWOP sentences, with the remedy being the provision of a new sentencing proceeding in which a judge can determine the appropriate sentence. The constitutional error in *Miller* involved the identity of the decision-maker with reference to the petitioner's sentence, with the court, not the legislature, being the constitutionally-mandated venue.[102]

On the other hand, mandatory LWOP sentences for juveniles constitute a substantive category of sentence that the Constitution now prohibits.[103] Considered as a unitary concept, a mandatory LWOP sentence creates constitutional infirmities because of the combination of the substantive characteristics of the sentence (mandatory), the sentence (LWOP), and the offender (a juvenile). The retroactivity question under *Teague* therefore turns on whether the decision in *Miller* removed a substantive sentencing option from the trial court's purview or, alternatively, simply required an additional procedure in cases involving juveniles.

In *Montgomery*, the Court held that the *Miller* decision was a substantive one, relying heavily upon the precedents upon which *Miller* relied.[104] *Miller* echoes two of the Court's prior decisions in the capital context—*Woodson v. North Carolina*,[105] which banned mandatory death sentences, and *Roper v. Simmons*,[106] which banned the execution of juvenile offenders.[107]

The latter clearly provides an example of a substantive decision in that it removed death as a possible sentence for juvenile offenders.[108] The former, though, also was a substantive decision in the Court's eyes because it did more than simply ban mandatory death sentences; it required individualized

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101 Miller v. Alabama, 132 S. Ct. 2455, 2460 (2012).

102 *Id.* at 2475 (holding that the judge or jury must be able to consider mitigating circumstances before imposing the harshes possible penalty on juveniles).

103 *Id.* at 2483–84.

104 *Montgomery*, 136 S. Ct. at 732–36.

105 428 U.S. 280 (1976).

106 543 U.S. 551 (2005).

107 Both *Woodson* and *Roper* applied retroactively. *Montgomery*, 136 S. Ct. at 725–29; Sumner v. Shuman, 483 U.S. 66, 72, 72 n.2 (1987) (indicating that states uniformly applied *Woodson* retroactively).

108 *Roper*, 543 U.S. at 578; *see Montgomery*, 136 S. Ct. at 732–33 (explaining the rule from *Roper* is substantive because it "goes beyond the manner of determining a defendant's sentence"); *see also* Penry v. Lynaugh, 492 U.S. 302, 329–30 (1989); Mackey v. United States, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in judgment in part and dissenting in part) (explaining that new constitutional rules limiting the types of sentences that can be levied against certain classes of defendants are substantive in nature).

sentencing consideration.[109] Thus, for the Court, the substantive component of the sentencing decision with respect to juvenile offenders, and not just the need to have the Court (and not the legislature) determine the sentence in the first place, made the decision in *Miller* a substantive one, despite its outcome requiring a new procedure in certain cases.[110]

The potential for confusion concerning whether a certain court decision applies retroactively based on the substance-procedure dichotomy is not just an academic concern. Rather, a number of cases have resulted in circuit splits and the finding of different outcomes with respect to whether a certain new rule applies retroactively.[111]

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109 *Montgomery*, 136 S. Ct. at 728; Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (Stewart, Powell, & Stevens, JJ.) (plurality opinion) (holding mandatory imposition of death penalty violative of the Eight Amendment); *see* Miller v. Alabama, 132 S. Ct. 2455, 2467 (2012) (explaining that the *Woodson* court found mandatory impositions of the death penalty unconstitutional because it prevented the defendant from introducing, and the sentencing authority from considering, substantive evidence of factors).

110 *Montgomery*, 136 S. Ct. at 734–35 (emphasizing that because *Miller* rendered LWOP an unconstitutional penalty to a class of criminals—"juvenile offenders whose crimes reflect the transient immaturity of youth"—it announced a substantive rule of constitutional law, regardless of the procedural component necessary to substantiate this substantive guarantee).

111 *See, e.g.*, Metrish v. Lancaster, 133 S. Ct. 1781, 1792 (2013) *rev'g* 683 F.3d 740 (6th Cir. 2012) (holding retroactive application of *People v. Carpenter*, 627 N.W.2d 276, 285 (Mich. 2001) (revoking "dimished capacity" defense based on that court's first hearing of statutory interpretation issue), violated the Due Process Clause); Chaidez v. United States, 133 S. Ct. 1103, 1106–07, 1113 (2013) (noting split among federal and state courts regarding the retroactive application of *Padilla v. Kentucky*, 559 U.S. 356 (2010) before adopting Seventh Circuit's view that *Padilla* announced a new rule that does not have retroactive effect); Dillon v. United States, 560 U.S. 817, 819 (2010) (declining to extend retroactive rule allowing sentencing authority discretion to impose sentence below range advised by the United States Sentencing Commission Guidelines Manual to judges considering modifying sentences in statutorily outlined proceedings); Carr v. United States, 560 U.S. 438, 444 (2010) (noting that there is a circuit split on how to interpret the Sex Offender Registration and Notification Act to avoid *ex post facto* implications); Danforth v. Minnesota, 552 U.S. 264, 266–68 (2008) (mentioning that states were divided on whether or not they could apply new rules of constitutional criminal procedure more broadly than as laid out in *Teague*); Whorton v. Bockting, 549 U.S. 406, 415 (2007) (noting that the Ninth Circuit opinion that Crawford v. Washington, 541 U.S. 36 (2004), should apply retroactively conflicted with the decisions of every other federal circuit and state supreme court that addressed the issue); Dodd v. United States, 545 U.S. 353, 356 (2005) (citing diverging views amongst the Courts of Appeals over when the limitiation period, during which a federal prisoner must file a motion to correct his or her sentence, begins to run in cases where the Supreme Court has recognized a new right that is retroactively applicable); Schriro v. Summerlin, 542 U.S. 348, 354–55 (2004) (observing that the Ninth Circuit's determination that *Ring v. Arizona*, 536 U.S. 584 (2002), was a new substantive rule because it reshaped the structure of the Arizona murder law directly conflicted with a decision of the Arizona Supreme Court); Beard v. Banks, 542 U.S. 406, 409–10 (2004) (admonishing the Third Circuit for failing to complete *Teague* analysis after accepting that the Pennsylvania Supreme Court determined that a case was retroactively applicable).

While the substance-procedure dichotomy may be clear at the margins, in practice it creates significant doctrinal confusion and disparities in lower courts such that the Supreme Court must determine the retroactivity question. In essence, the Court often ends up hearing the same case twice because it does not decide the retroactivity question during the initial decision and the application of the *Teague* rule is unclear.

The lack of clarity of the *Teague* doctrinal rule concerning retroactivity continues to plague litigants and courts alike based on its inherent uncertainty.[112] The potential ambiguity arising from the substance-procedure dichotomy also creates the opportunity for lower courts to align the retroactivity question with their view of the new constitutional rule.[113] If lower courts favor the rule, they will be more likely to find the rule to be substantive; if lower courts disfavor the rule, they will be more likely to find the rule to be procedural.[114]

Another problem with the substance-procedure dichotomy lies in its disconnect with the competing values at stake. The underlying assumption suggests that prospective application of substantive rules somehow evoke a greater degree of unfairness than procedural rules. While this is sometimes true, it is certainly not always the case. And even so, it undervalues procedural rules and their potential for unfairness.

Likewise, it is not clear that finality becomes more important in cases involving procedural errors than those involving substantive errors. It is certainly possible that finding a substantive rule retroactive in some cases could have a much more significant impact on the finality of cases than a particular procedural rule would. The same is true for the value of comity. Deferring to state courts may or may not be more appropriate in cases involving new procedural rules as opposed to substantive ones.

Even worse, the substance-procedure dichotomy does not provide for a direct weighing of these values. To be sure, the Court embraces or rejects the applicable value *post hoc* depending on whether it chooses to apply a new

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112 *See* Bandes, *supra* note 25, at 2455 ("However, *Teague* leads to unfairness on a much grander scale. The decision merely succeeds in creating a new arbitrary category of remediless prisoners: those whose cases happen to be on collateral, rather than direct, review at the auspicious moment when the Court hands down a decision classified as 'new law.' . . . [T]he Court's goal of eliminating the unfair application of retroactivity rules is virtually unattainable. The only way to eliminate all disparity would be to make every rule completely retroactive.") (citations omitted).

113 *See* Fisch, *supra* note 15, at 1083–84 (noting the argument that in deciding whether or not to apply a rule retroactively courts often "disassociate" the applicability of the rule with their desired outcome, and thus may decide that the parties are not entitled to the relief the retroactive rule provides).

114 *See id.*; *see also* Mackey v. United States, 401 U.S. 667, 676, 679 (1971) (Harlan, J., concurring in judgments in part and dissenting in part) (commenting on the result-oriented considerations that initially motivated "retroactivity" doctrine).

rule retroactively. But there is no obvious link between substantive rules or procedural rules and the concepts the Court ought to balance in answering the question of retroactivity.

Given the inherent flaws in the *Teague* test, demonstrated by the Court's recent history of granting certiorari to answer questions of retroactivity, this Article endeavors to offer an alternative theoretical framework by which to consider the concept of retroactivity.

II. NORMATIVE RETROACTIVITY

Instead of relying on the substance-procedure distinction, the concept of normative retroactivity frames the retroactivity inquiry in terms of the normative impact of the new constitutional rule at issue.[115] As explained below, by framing the retroactivity question in terms of normative impact, the competing values of fairness, equality under the law, finality, and comity play a more significant role in the retroactivity determination.

In this context, normativity refers to the impact of the new rule, its practical consequence with respect to criminal trials and/or sentencing. As a general matter, the degree to which the Court ought to require state courts to revisit final determinations on collateral review should relate directly to the hardship the failure to do so would impose in terms of fundamental fairness.[116]

A. Cataloging Normative Impact

The adoption of a new rule of constitutional criminal procedure falls into one of two broad categories: (1) a decision that bears on the trial court's determination of guilt or innocence, or (2) a decision that bears on the sentencing determination.

In the guilt-innocence category, there is a spectrum of possible impacts of a new constitutional rule. On one end of the spectrum lie the "easy" retroactivity cases, where the Court has determined that criminalizing

115 It is important to note that the theory of normative retroactivity applies to the application of the retroactivity question to cases on collateral appeal. As noted above, new rules already apply to cases on direct appeal. Griffith v. Kentucky, 479 U.S. 314, 328 (1987) (holding that new rules "for the conduct of criminal prosecutions" apply retroactively, regardless of whether or not they present a "clear break" from previous law); *see also* Mishkin, *supra* note 69, at 77 (declaring that retroactive application of the new rule established in *Mapp v. Ohio*, 367 U.S. 643 (1961), to convictions not yet final was "normal").

116 *See, e.g.*, Bandes, *supra* note 25, at 2465-66 (criticizing the *Teague* court for overreliance on logic and lamenting that it was not more guided by fairness and justice).

certain conduct violates the Constitution.[117] Clearly, individuals imprisoned for conduct no longer deemed criminal should receive the benefit of retroactive application of the new constitutional rule.[118]

On the other end of the spectrum lie cases where the constitutional rule tangentially impacts the evidence admitted during the guilt phase of the trial, but not in a way likely to have any influence on the guilt determination. Here, retroactivity seems less appropriate because its application would result in the retrial of cases without changing the ultimate outcome.[119]

In the sentencing context, a similar spectrum exists. Cases in which the defendant received a sentence that the new rule makes unconstitutional should receive a retroactive application.[120] By contrast, new rules that have only a tangential effect on the sentencing determination should not have a retroactive application.[121]

Interestingly, the stakes seem higher on both sides of the value spectrum in the guilt-innocence context. Where a new constitutional rule's application would raise serious doubts about the offender's innocence, the fundamental fairness concern seems particularly high.[122] At the same time, retrying the case imposes a significant burden on the state, in terms of

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117 Obvious examples of this would include: *Lawrence v. Texas*, 539 U.S. 558 (2003); *Roe v. Wade*, 410 U.S. 113 (1973); and *Griswold v. Connecticut*, 381 U.S. 479 (1965).

118 Mackey v. United States, 401 U.S. 667, 691–93 (1971) (Harlan, J., concurring in judgment in part and dissenting in part) (commenting that new rules that render criminal statutes regulating certain actions unconstitutional presents the clearest instance in which a rule should apply retroactively).

119 *See, e.g.*, Bator, *supra* note 14, at 526–28 (articulating that on collateral review in habeas cases, federal courts should have the power to determine such errors harmless).

120 *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407 (2008) (holding death penalty unconstitutional for conviction on child rape charge where victim was not killed); Roper v. Simmons, 543 U.S. 551 (2005) (holding imposition of death sentence upon juvenile offenders unconstitutional); Atkins, v. Virginia, 536 U.S. 304 (2002) (holding sentencing mentally disabled individuals to death unconstitutional).

121 Examples might include: *Gall v. United States*, 552 U.S. 38 (2007) (determining that the Courts of Appeals should apply an "abuse of discretion" standard when reviewing a District Court's sentencing determination); *Kimbrough v. United States*, 552 U.S. 85 (2007) (clarifying the steps required when a District Court determines an appropriate sentence while treating the United States Sentencing Comission's Guidelines Manual as advisory); and *Rita v. United States*, 551 U.S. 338 (2007) (holding that the Courts of Appeals may presume that a properly calculated sentence under the United States Sentencing Comission's Guidelines Manual is reasonable). *But see* Roosevelt, *supra* note 25, at 1702 (arguing for retroactive application of United State v. Booker, 543 U.S. 220 (2005) on a case-by-case basis in these types of cases).

122 Note that innocence here refers to innocence under the statute. Fourth Amendment rules, for instance, that prohibit admission of facts into evidence, would bear directly on guilt in this way, even though the defendant may have engaged in deviant conduct.

upsetting a final determination, ignoring comity considerations, and increasing costs.[123]

By contrast, the sentencing context seems less significant in terms of both sets of values, unless the offender is challenging a death sentence or life-without-parole sentence.[124] In non-death cases,[125] revisiting the sentencing determination may adjust the sentence, but the indeterminacy of the sentencing process itself makes a slightly longer sentence seem less unfair than imprisoning an innocent offender.

Similarly, the values of finality and comity seem less offended by resentencing an offender. Because most states have, at one time, had a parole system, resentencing seems like much less of a burden than retrying a case. Unlike a retrial, where evidence may have gone stale and witnesses may be unavailable, a resentencing can make use of new information about the offender's time in prison, and is generally a much less procedurally burdensome process.

In sum, the theoretical step taken by normative retroactivity shifts the focus onto the degree to which the new rule affects guilt-innocence determinations and sentencing determinations from the past, in the present, and for the future. Where the impact is significant, retroactivity becomes the favored outcome, largely because the impact magnifies the value of unfairness while minimizing the value of finality.

B. The Normative Retroactivity Test

1. An Overview of the Test

The normative retroactivity test has two parts: the impact inquiry and the balancing of values. As indicated above, its application differs depending on whether the constitutional rule bears on the guilt-innocence determination or sentencing determination.

With respect to the guilt-innocence determination, the impact inquiry asks whether, and to what degree, the new constitutional rule would have impacted the guilt-innocence determination at trial in the majority of cases on collateral or successive review. At the extremes of the above-described spectrum, the application is easy and does not require application of the

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123 *See* Bator, *supra* note 14, at 451 (emphasizing that finality in a legal proceeding allows for conservation of resources).

124 In many ways, these sentences are functional equivalents. William W. Berry III, *More Different than Life, Less Different than Death*, 71 OHIO ST. L. J. 1109, 1123–24 (2010) (exploring the similarities between sentences of death and life without parole).

125 William W. Berry III, *Life-With-Hope Sentencing*, 76 OHIO ST. L. J. 1051, 1053–54 (2015) (arguing that LWOP sentences should be considered to be in the same category if not worse than death sentences).

second question. Where the new constitutional rule decriminalizes the conduct, the new rule applies retroactively. Where the new constitutional rule has a *de minimis* impact on the guilt-innocence determinations, it does not apply retroactively.

Most cases, however, will not fall into either "easy" category. In such cases, the impact inquiry assesses whether the new rule has a significant impact, a medium impact, or a minor impact on the guilt-innocence determinations of cases on collateral appeal.

Having established where the case generally falls on the spectrum, the normative retroactivity test then requires the balancing of retroactivity values.[126] In other words, the Court must weigh the interests of fundamental fairness and equality under the law against the competing interests of finality, comity, and financial burden of retrying cases. In this weighing, however, the impact test should serve as a thumb on the scale in the determination. Where the new constitutional rule has a significant impact on the guilt-innocence determination, then the presumption should be in favor of retroactivity. Where the new constitutional rule has only a *de minimis* impact on the guilt-innocence determination, then the presumption should be against retroactivity.

It is in the hard cases in the middle where the balancing part of the test does the heavy lifting. In such cases, the Court should weigh the likelihood that application of the rule would result in finding some petitioners innocent against the economic cost, finality considerations, and comity concerns of retrying these cases.

In the sentencing context, the normative retroactivity test has a similar application. First, the Court must ask whether the new rule has a meaningful impact on the sentence of the offender. As with the guilt-innocence determination, there are easy cases in the context of the sentencing determination. Where a sentence would no longer be available for particular conduct or a particular type of offender, the application of the new rule should be retroactive. By contrast, where the new rule would have only a *de minimis* impact on the sentencing outcome, the application of the new rule should be prospective with respect to collateral appellees.

Where the impact test does not clearly answer the question, the Court should ask whether the impact of the new rule on sentencing outcomes is

126 Clearly this is not an exact science, but is the kind of process that courts engage in all of the time. *See* Charles Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755, 757 (1963) (explaining that when the Supreme Court is considering a conflict between individual constitutional rights and an assertion of governmental power it adjudicates by "weighing the competing interest") (citation omitted); Patrick M. McFadden, *The Balancing Test*, 29 B.C. L. REV. 585, 586 (1988) (defining the "balancing test" as a method of adjudicating that allows judges to avoid formalistic rules and, instead, balance the interests of the parties).

significant, involving capital sentences, life sentences, or removing mandatory sentences; meaningful; or minor. The Court should then apply the same balancing test—weighing fairness and equality under the law against finality and comity. Again, the impact test should serve as a thumb on the scale. Where the effect of the new constitutional rule on sentencing outcomes is significant, the presumption should be in favor of retroactivity. Where the effect of the new constitutional rule on sentencing outcomes is minor, the presumption should be against retroactivity.

As with the guilt-innocence determination, the hard cases use the balancing test to provide clarity where the impact test cannot. So, where the new rule has some meaningful effect on sentencing outcomes, but not a drastic one, the balancing of the competing values will determine the outcome. In such situations, the Court must weigh the likely length of shortening sentences and the unfairness of choosing not to do so against the costs of resentencing and the values of comity and finality.

Finally, it is possible in some rare cases that the new constitutional rule will bear both on the guilt-innocence determination and the sentencing determination. In such cases, the Court should apply the normative retroactivity test to both determinations to assess whether the rule should apply retroactivity in either, or perhaps both, contexts.

2. *Application to* Montgomery *and* Welch

To demonstrate the value of the normative retroactivity test, it is instructive to explore how it might apply to *Montgomery v. Louisiana* and *Welch v. United States*, the Court's most recent retroactivity decisions.[127] As discussed, the question in *Montgomery* was whether the Court's new constitutional rule adopted in *Miller v. Alabama* applies retroactively to cases on collateral appeal.[128] The rule in *Miller* determined that the Eighth Amendment barred the imposition of mandatory juvenile life-without-parole sentences.[129] Lower courts split over the question of whether this rule was substantive or procedural under *Teague*. In a narrow 6-3 decision, the Court held that it applied retroactively because it articulated a substantive rule under the *Teague* doctrine.[130]

Under the normative retroactivity test, the first question would be to determine whether the new rule impacted the guilt-innocence determination, the sentencing determination, or both. *Miller* clearly

127 Welch v. United States, 136 S. Ct. 1257 (2016); Montgomery v. Louisiana, 136 S. Ct. 718 (2016).

128 *See Montgomery*, 136 S. Ct. at 725.

129 *See* Miller v. Alabama, 132 S. Ct. 2455, 2460 (2012).

130 *Montgomery*, 136 S. Ct. at 736.

restricts the sentence that states and federal courts can impose against juvenile offenders.[131] As a result, the sentencing part of the normative retroactivity test would apply.

A court would then apply the impact test to assess what impact applying the sentence retroactively would have on sentencing outcomes. In *Miller*, the sentence at issue—a mandatory LWOP sentence—is no longer available.[132] As a result, it looks like it falls into the category of "easy cases," where the new rule has removed a possible sentencing outcome. The result would then be the retroactive application of the rule to all juveniles sentenced with mandatory LWOP sentences.

One might argue, in line with the substance-procedure set of arguments in *Miller*, that the sentence itself, life-without-parole, is still constitutionally available, and the consequence of *Miller* is simply to restrict the manner of its application. If one took this view under the normative retroactivity test, the result would be the same. The impact of the new constitutional rule on the sentencing process is significant—a resentencing could mean the difference between a death-in-custody sentence and the possibility of having some meaningful chance at life outside of prison.

Given that the impact of the new rule is clearly significant, there would be a strong presumption in favor of retroactivity. The Court would balance the competing values of fairness and equality under the law against finality, comity, and cost, but would find in favor of retroactivity, particularly given the thumb on the scale. The costs of resentencing, as indicated by Justice Kennedy, could be minimal—the state court would simply need to provide the opportunity for parole.[133]

The unfairness of the LWOP sentence (with its own kind of finality) would outweigh state interests in finality, as the consequence in most cases would simply be to shorten the sentence or adopt a similar sentence with a sentencing hearing. Comity is likewise a less important value in this context—the consequence of dying in prison far outweighs the inconvenience suffered by resentencing. Finally, the fairness considerations are significant in this context. The United States is the only nation in the world that imposes LWOP sentences on juvenile offenders.[134] To require a court to consider whether an offender should really receive this sentence, instead of automatically apply it, seems a fair request.

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131 *Miller*, 132 S. Ct. at 2460.

132 *Id.*

133 *Montgomery*, 136 S. Ct. at 736.

134 Saki Knafo, *Here are All the Countries Where Children are Sentenced to Die in Prison*, HUFFINGTONPOST.COM (Sept. 20, 2013), http://www.huffingtonpost.com/2013/09/20/juvenile-life-without-parole_n_3962983.html.

In *Welch v. United States*, the Court faced an entirely different new rule of constitutional law.[135] The issue in *Welch* was whether the Court's decision in *Johnson v. United States* applied retroactively.[136] In *Johnson*, the Court held that the Armed Career Criminal Act ("ACCA") was unconstitutionally vague in violation of the Due Process clause.[137] The statute provided for a mandatory minimum sentence for offenders who had received three violent felonies.[138] The constitutional defect rested in the vagueness residual clause, which defined "violent felonies" to include any felony that "involves conduct that presents a serious potential risk of physical injury to another."[139]

Under the *Teague* test, the Court held that the new constitutional rule was substantive.[140] First, it noted that the rule altered the lawful statutory sentencing range for a crime, removing the availability of the mandatory punishment under the statute as written.[141] Likewise, the Court explained that the new rule invalidated an element of a criminal offense that required the imposition of a mandatory sentence.[142]

And yet, as with *Miller*, one can see why the *Teague* test might cause confusion. The removal of a mandatory sentencing option typically does not remove the availability of sentence itself. Those less inclined to apply *Johnson* retroactively might argue that the constitutional rule simply altered the procedure—that sentencing under the ACCA is now a judicial and not a legislative determination. These arguments, however, carry less weight with the ACCA in particular because, without the violent felony provision, the statute imposes a ten-year statutory maximum on offenders.[143] Thus, the consequence of the new constitutional rule is to replace a fifteen-year statutory minimum with a ten-year statutory maximum, making the determination appear substantive.[144]

Applying the normative retroactivity test to *Welch* begins with the question of whether the new constitutional rule impacts the question of guilt-innocence or sentencing. The ACCA provision in question addresses a

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135 *See* Welch v. United States, 136 S. Ct. 1257, 1264–65 (2016) (identifying the new rule laid down in a *previous decision*).

136 *Id.* at 1264.

137 Johnson v. United States, 135 S. Ct. 2551, 2558 (2015).

138 *Id.* at 2555.

139 *Id.*

140 Welch v. United States, 136 S. Ct. 1257, 1260 (2016); *see generally* Leah M. Litman, *Residual Impact: Resentencing Implications of* Johnson*'s Potential Ruling on ACCA's Constitutionality*, 115 COLUM. L. REV. SIDEBAR 55, 60–63, 65–73 (2015); Leah M. Litman, *Resentencing in the Shadow of* Johnson v. United States, 28 FED. SEN'G REP. 45, 47 (2015).

141 Welch v. United States, 136 S. Ct. 1257, 1265 (2016).

142 *Id.*

143 18 U.S.C. §§ 924(a), (e) (2015).

144 Indeed, the DOJ agreed with the petitioner's determination as to retroactivity. *Welch v. United States*, 136 S. Ct. 1257, 1263 (2016).

sentencing enhancement, not a question of guilt-innocence. Specifically, *Johnson*'s new constitutional rule provides that a Court cannot impose a mandatory sentence under the ACCA section in question because it is unconstitutionally vague.[145]

The normative retroactivity test would then assess the impact of the new constitutional rule on sentencing. Because the new rule removes a possible sentence from consideration—the fifteen-year mandatory minimum—and replaces it with a ten-year statutory maximum, the case looks like it would fall into the category of "easy cases," and *Johnson* would apply retroactively. Even if one did not place it in the category of easy cases, it is clear that the impact of the new constitutional rule on criminal sentences would be significant. The difference in the sentencing outcome would be at least five years and, in many cases, *a decade* of time outside of prison. By replacing a fifteen-year minimum with a ten-year maximum, many offenders might have already served their sentence and would receive immediate release upon retroactive application.

As a result of the impact of the new rule on sentencing outcomes, the presumption would be in favor of retroactivity. Applying the competing values would not upset this presumption. In some cases, the unfairness of a sentencing enhancement that resulted in at least a 50% sentencing increase based on an unconstitutionally vague provision is significant. The unfairness might be less in other cases where the three felonies clearly involved violent acts.

In terms of finality and costs of resentencing, though, the burden would be insignificant. In many cases, the federal government could simply release the offender, or manually change the sentence, lowering it to the statutory maximum of ten years. As such, the resentencing proceedings would not raise serious finality issues. Finally, the value of comity would not apply in this case, as it involved federal, not state, sentencing.

C. When Fairness Should Trump Finality

The real problem with the application of the *Teague* doctrine rests in its favoring of the principles of finality and comity over the values of fundamental fairness and equality under the law. Indeed, under *Teague*, the presumption remains strongly in favor of prospective application of new constitutional rules to criminal cases on collateral appeal. As expressed in Professor Paul Bator's seminal article on the issue, the overall sentiment with respect to state court criminal proceedings was that generally, such

145 *See* Johnson v. United States, 135 S. Ct. 2551, 2558 (2015) ("[T]he residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates.").

procedures were full and fair, according criminal defendants adequate process and consideration.[146]

In the decades since Bator's article and the Supreme Court's embrace of this set of assumptions concerning state criminal proceedings, a different picture has emerged. The growing innocence movement suggests that state procedures are replete with errors, constitutional and otherwise. The availability of DNA evidence, new understandings of the fallibility of eyewitness testimony, the discovery of sham expert testimony,[147] the unreliability of forensic evidence procedures, the inappropriate conduct of some police officers, and the widespread evidence of racial discrimination at all levels of the criminal justice system, have all cast doubt on the degree to which state court proceedings should receive any deference.[148] Indeed, in capital cases, the error rate—the percentage of cases in which a constitutional error occurs requiring a retrial—is almost seventy percent.[149]

The sheer volume of injustice—over 1800 innocent people have served time in prison—suggests that revisiting criminal trials and sentencing determinations might be worth the effort in many cases.[150] As to sentencing, the mass incarceration epidemic likewise counsels in favor of revisiting sentencing decisions. The United States currently incarcerates more people than any nation in the history of the world, with almost 1 in 100 citizens serving prison sentences.[151] Certainly, the Court's over-emphasis on finality in habeas cases and the Bureau of Prisons restrictions on compassionate release[152] have contributed to this epidemic.

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146 Bator, *supra* note 14, at 450–51.

147 The FBI apparently faked an entire field of forensic science. *See* Dahlia Lithwick, *Pseudoscience in the Witness Box*, SLATE.COM (Apr. 22, 2015), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/04/fbi_s_flawed_forensics_expert_testimony_hair_analysis_bite_marks_fingerprints.html (reporting on a decades-long practice of submitting false testimony against criminal defendants).

148 *See* Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L. J. ANN. REV. CRIM. PROC. iii, iii–xii (2015) (providing a non-exhaustive list casting into doubt the criminal justice system as fundamentally just); *see also* Glossip v. Gross, 135 S. Ct. 2726, 2756, 2759 (2015) (Breyer, J., dissenting) ("[D]espite the difficulty of investigating the circumstances surrounding an execution for a crime that took place long ago, researchers have found convincing evidence that, in the past three decades, innocent people have been executed. . . . [T]here is significantly more research-based evidence today indicating that courts sentence to death individuals who may well be actually innocent or whose convictions (in the law's view) do not warrant the death penalty's application.").

149 James S. Liebman, et al., *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 TEX. L. REV. 1839, 1849–50 (1999).

150 *See* NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/browse.aspx (last visited Sept. 21, 2016) (identifying over 1800 exonerations).

151 William W. Berry III, *Eighth Amendment Presumptions*, 89 S. CAL. L. REV. 67, 77 (2015).

152 *See generally* William W. Berry III, *Extraordinary and Compelling: A Re-Examination of the Justifications for Compassionate Release*, 68 MD. L. REV. 850 (2009).

In light of this modern reality of errors and flaws persisting in the criminal justice system, finality ought to receive much less weight than in the past. When the chances are high that final determinations contain constitutional errors, courts should not forego robust judicial review in the name of finality.

The same is also true with comity. The volume of errors and mistakes in state courts, the practices of many prosecutors, and the inherent conflicts of interest that pervade the criminal justice system make the idea of comity illusory. For the federal government to respect state court proceedings when they follow basic rule of law principles is one thing; to stand idly by in the name of comity in the face of widespread malfeasance is another.

Thus, while the values of comity and finality should remain part of the calculus when assessing retroactivity, these ideas should no longer play the dominant role they have played in denying collateral appellees relief.

Just as the status quo has diminished the ideas of finality and comity, it has increased the weight that courts should accord to the concept of fundamental fairness. When the likelihood of unfairness is high, investigating the circumstances present in a given case on appeal becomes more justifiable. The retroactive application of new constitutional rules in more cases would help to rectify this imbalance.

Such an approach would not be about simply releasing prisoners. Rather, the idea would be to force state and federal criminal justice institutions to reduce the substantive and procedural errors inherent in the administration of criminal justice.

In particular, the value of fairness should trump economic costs when the stakes are highest for the prisoner. Where the impact on the question of innocence or on the sentencing determination is significant, fairness should prevail. The cost of failing to accord prisoners human rights far outweighs the economic costs of remedying earlier errors or malfeasance.

III. THE VIRTUES OF NORMATIVE RETROACTIVITY

Having described the normative retroactivity test and demonstrated its possible application to the retroactivity question, the Article concludes by making the case for its adoption as a substitute for the *Teague* rule. The central advantages of this approach to retroactivity include: (1) abandoning the confusion of the substance-procedure dichotomy of *Teague*, (2) undermining the flawed finality presumption, (3) preserving judicial resources, and (4) creating a greater connection between the practical application of the retroactivity doctrine and its theoretical underpinnings.

A. Abandoning the Substance-Procedure Dichotomy

The *Teague* doctrine, as explained, has created confusion in its application.[153] Specifically, the substance-procedure dichotomy has proved difficult to apply. At the heart of this confusion is the idea that almost all procedural rules have some substantive component. As a result, it is often difficult to determine whether to treat the rule as substantive, on account of its substantive component, or as procedural, because at its core it simply requires a certain procedure.

The trouble with the *Teague* doctrine goes further, however, in that the concepts of substance and procedure have no direct connection to the concept of retroactivity. As discussed above, it presumes that substantive rules establish rights that deserve retroactive application more than rights that arise from new procedural rules.[154]

Fundamental fairness does not hinge on whether a rule is substantive or procedural; neither does the concept of finality. A procedural rule may have a more significant impact on the question of fairness than a substantive one. Likewise, as seen in the sentencing context, finality often can be far more offended by the application of a new substantive rule than a procedural rule.

One benefit, then, of the normative approach to retroactivity is that it abandons the substance-procedure dichotomy. Instead, the normative approach focuses, as demonstrated, on the direct effect of the rule. By using the impact- and value-balancing aspects of the normative retroactivity test, courts can avoid the confusion of the substance-procedure dichotomy.

Neither of these tests rely on a determination of substance versus procedure. Instead, these tests eschew such a determination in favor of exploring the impact of the new rule, as well as weighing the competing interests at stake.

B. Undermining the Flawed Finality Presumption

Under the *Teague* test, the overall presumption is in favor of prospective application. The Court's idea, as explained above, is that finality is the most important of the applicable values in the retroactivity determination. Indeed, the bright-line principle that exists mandates applying new criminal constitutional rules prospectively unless the petitioner can demonstrate the substantive exception.

The current flawed state of criminal justice administration demonstrates why the Court should abandon this presumption. The frequency of error

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153 *See supra*, Section I.B.3.

154 *Id.*

and injustice, both in the high number of innocent offenders with convictions and in the imposition of excessive prison sentences, counsel against resting the retroactivity decision so heavily on the finality principle. Rather, devaluing finality has the consequence of creating the opportunity to remedy injustice in a deliberate and proportional way. Remember that retroactive application of rules enables the courts to explore whether an injustice has occurred. It does not necessarily mean that the petitioner will receive relief.

Under the normative retroactivity test, the concept of finality still plays a role in the retroactivity determination, but in a more balanced, principled way. The impact test ensures that the concept of finality will not trump fundamental fairness and justice at all costs, as it seemingly does in many applications of the current *Teague* rule. Instead, the balancing test incorporates the principle of finality in light of the impact of the constitutional rule, allowing its application to bar unnecessary review of cases on collateral appeal without preventing courts from remedying injustices.

C. Preserving Judicial Resources

Another value of the normative retroactivity test might be the preservation of judicial resources. With a number of new constitutional criminal law determinations in recent years, the Supreme Court has often needed to decide a second case to determine the retroactivity of the new rule.[155] When there is confusion concerning whether a new rule applies retroactively, the Supreme Court then must make a second determination (beyond the initial merits decision) with respect to a particular case. Given that the Court elects to hear less than 100 cases per term, the allocation of resources to determine retroactivity is a significant one.

The more significant use of resources occurs in the lower courts, however, where courts litigate the retroactivity issue. The lack of clarity of the *Teague* standard means that there is often widespread litigation with the adoption of a new rule, even in cases where the courts decide that the proper application of the new rule is prospective.

The normative retroactivity test offers more predictability than the *Teague* test does. While the court will need to litigate the hard cases (described above), the normative retroactivity provides clear guidance in many cases such that the lower court does not need to engage in lengthy analysis. Further, the applicable indicia—the impact of the case—rests upon

155 *See* Montgomery v. Louisiana, 136 S. Ct. 718 (2016) (finding rule prohibiting mandatory life sentences for juveniles to be retroactive); Welch v. United States, 136 S. Ct. 1257, 1264 (2016) (acknowledging the new rule and deciding if it ought to be retroactive).

objective indicia, which will then provide clarity in the framing of the retroactivity determination.

D. Connecting Theory to Practice

The best argument, however, for the adoption of the normative retroactivity test remains its connection to the core principles that underlie the concept of retroactivity as applied to cases on collateral appeal. Unlike the *Teague* test, the normative retroactivity test utilizes the potential impact of the retroactive application and its relationship to the values at stake to determine whether a new rule applies retroactively.

The normative theory understands the retroactivity question as one that concerns the practical impact of its application. Where the new constitutional rule has a wide bearing on the likely innocence of offenders or the disproportionality of their sentences, the application should be retroactive because the potential for unfairness is high. The value of fairness, then, guides the application of the retroactivity principle. Similarly, when the impact is likely to be minimal as to the guilt-innocence or sentencing outcomes, the new rule should not apply retroactively. Here, the value of finality relates directly to the minimal nature of the impact of the sentence.

The practical decision—the retroactivity question—thus stems directly from the impact of the new rule. In doing so, the competing principles of fairness and finality, embedded in the idea of impact, influence the retroactivity decision. Where the impact is unclear, these theoretical principles play a determinative role. The court must balance these competing considerations to assess retroactivity.

The theory inherent in the idea of retroactivity therefore guides its application to new rules of criminal constitutional law. As such, the retroactivity determination does not rely on arbitrary distinctions concerning procedure and substance. Instead the presence (or absence) of the reasons to grant (or deny) retroactive application serves to guide its application under the normative retroactivity approach.

CONCLUSION

In light of the Court's recent decisions in *Montgomery* and *Welch*, and the question of the application of *Hurst* to Florida and Alabama death cases, this Article has sought to explore the current application of the *Teague* retroactivity doctrine by the Supreme Court. The Article has first argued for the adoption of a different paradigm in light of the confusion inherent in the substance-procedure dichotomy that exists at the center of the *Teague* inquiry. Specifically, the Article has advocated the adoption of a normative retroactivity approach, where the impact of the new constitutional rule, as

well as the competing underlying values of retroactivity determine the application of the new constitutional rule to cases on collateral appeal.