University of Miami Law Review

Volume 76 | Number 3 Article 6

6-7-2022

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When the Supreme Court changes course and announces a new rule of constitutional criminal law, the question remains: what happens to those imprisoned by the old practice now deemed unconstitutional? Since 1989, that question has been answered by Teague v. Lane*, a restrictive holding that limits retroactivity by prioritizing judicial resources over the constitutional rights of incarcerated people. But should it matter if the old rule has explicitly racist origins?*

Convictions by non-unanimous juries emerged in Louisiana and Oregon with the stated intention of rendering Black jurors' votes meaningless. In 2020, the Supreme Court in Ramos v. Louisiana *held that non-unanimous juries violate the Sixth Amendment right to a trial by jury, recognizing the practice's racist origins. Yet, when deciding the issue of Ramos retroactivity in* Edwards v. Vannoy*, the Court doubled down on its retroactivity ban, leaving thousands of people imprisoned by a relic of Jim Crow.*

This Note analyzes the Court's retroactivity framework through the lens of non-unanimous jury verdicts. It explores the history of non-unanimous juries, the role of fed-

* J.D. Candidate 2022, University of Miami School of Law; B.S.J. 2014, Northwestern University. I would like to thank Professor Scott Sundby for his meaningful mentorship on this Note and throughout law school. Thank you to Professor Annette Torres for making me a better legal researcher and writer. I would also like to thank the Promise of Justice Initiative for its tireless efforts representing Louisianans convicted by non-unanimous juries and for sparking my outrage about Jim Crow juries. Finally, I would like to thank my family and my fiancé Ian for supporting me, loving me unconditionally, and spending countless hours listening to me talk about non-unanimous jury verdicts.

eral habeas review of state convictions, and the evolution of the Court's retroactivity doctrine. It proposes adopting a new retroactivity framework: one that accounts for the harmful origins and impacts of an old rule. It suggests that by leaving people incarcerated by a Jim Crow-era procedure, the Court perpetuates systemic racism.

INTRODUCTION

"Thedrick Edwards is a Black man who was convicted by a non-unanimous Louisiana jury and sentenced to life in prison over the lone Black juror's vote to acquit on all counts."[1] In forty-eight states and federal court, he would not have been convicted.[2] Louisiana, however, allowed criminal convictions even where one or two jurors voted not guilty.[3] Convictions by non-unanimous juries—also known as Jim Crow juries[4]—had roots in white supremacy, emerging "'to ensure that African-American juror service would be meaningless.'"[5] Non-unanimous juries continued to disparately impact Black defendants[6] long after Louisiana's stated motivation underlying the practice changed to "judicial efficiency."[7]

In April 2020, the Supreme Court held in *Ramos v. Louisiana* that convictions by non-unanimous juries violate the Sixth Amendment right to a trial by jury as incorporated against the States by the Fourteenth Amendment;[8] the decision impacted cases still on direct appeal in Louisiana, Oregon, and Puerto Rico.[9] Evangelisto Ramos—the petitioner in *Ramos v. Louisiana* convict-

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[1] Brief for Petitioner at 2, Edwards v. Vannoy, 141 S. Ct. 1547 (2021) (No. 19-5807).

[2] Ramos v. Louisiana, 140 S. Ct. 1390, 1394 (2020).

[3] *Id.*

[4] *See generally* Thomas W. Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593 (2018).

[5] *Ramos*, 140 S. Ct. at 1394 (quoting State v. Maxie, No. 13-CR-72522 (La. 11th Jud. Dist., Oct. 11, 2018)).

[6] *See* Jeff Adelson, Gordon Russell & John Simerman, *How an Abnormal Louisiana Law Deprives, Discriminates and Drives Incarceration: Tilting the Scales*, THE ADVOC. (Apr. 1, 2018, 8:05 AM), https://www.theadvocate.com/baton_rouge/news/courts/article_16fd0ece-32b1-11e8-8770-33eca2a325de.html.

[7] *Ramos*, 140 S. Ct. at 1426 (Alito, J., dissenting) (quoting Louisiana v. Hankton, 122 So. 3d 1028, 1038 (La. App. 4th Cir. 2013)).

[8] *Id.* at 1397.

[9] *See* Adam Liptak, *Supreme Court Weighs Sweep of Its Ruling on Non-Unanimous Jury Verdicts*, N.Y. TIMES (Dec. 2, 2020), https://www.nytimes.com/2020/12/02/us/supreme-court-non-unanimous-jury-verdicts.html; *see also* Matt Reynolds, *Oregon and Louisiana Grapple with Past Criminal Convictions Made with Split Verdicts*, ABA JOURNAL (Oct. 1, 2020, 2:10 AM), https://www.abajournal.com/magazine/article/after-ramos-decision-oregon-and-louisiana-grapple-with-split-verdicts. Puerto Rico, a U.S. territory, also allowed non-unanimous jury verdicts.

ed by a ten-to-two jury—had his conviction reversed.[10] But the *Ramos* decision provided no relief for Mr. Edwards. Because his conviction became final before *Ramos*, the opinion left his conviction in a state of repose.[11] Just weeks after the *Ramos* Court handed down its opinion, the Court granted certiorari in Edwards' case to decide if *Ramos* applies retroactively to cases on federal habeas corpus review.[12]

Since 1989, *Teague v. Lane* has governed the retroactivity of new constitutional rules of criminal law for cases on federal post-conviction review.[13] The *Teague* decision, prioritizing the government's interest in the finality of convictions, set a general rule *barring* retroactive application of new rules of criminal law on habeas appeal.[14] The Court, though, outlined two exceptions: one for substantive rules of criminal law[15] and one for watershed rules of criminal procedure.[16] The number of rules the Court has deemed substantive have been "few and far between,"[17] and the Court has never, since the establishment of the *Teague* doctrine, deemed a new rule of criminal procedure to be "watershed."[18] The Court's enforcement of *Teague*'s retroactivity bar has been so steadfast that it has been called "draconian."[19]

"[I]s this a false promise?" Justice Gorsuch asked of *Teague*'s exception for watershed rules of criminal procedure.[20] The ques-

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[10] *Ramos*, 140 S. Ct. at 1408.

[11] *See id.* at 1407.

[12] Edwards v. Vannoy, 140 S. Ct. 2737, 2737–38 (2020).

[13] Teague v. Lane, 489 U.S. 288, 310 (1989).

[14] *Id.*

[15] *Id.* at 307 ("[A] new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'") (quoting Mackey v. United States, 401 U.S. 667, 692 (1971)).

[16] *Id*. at 311–13 (defining watershed rules of criminal procedure as rules that implicate the "fundamental fairness" of the trial, "without which the likelihood of an accurate conviction is seriously diminished.").

[17] Ruthanne M. Deutsch, *Federalizing Retroactivity Rules: The Unrealized Promise of* Danforth v. Minnesota *and the Unmet Obligation of State Courts to Vindicate Federal Constitutional Rights*, 44 FLA. ST. U. L. REV. 53, 62 (2016).

[18] *See* Ramos v. Louisiana, 140 S. Ct. 1390,1407 (2020).

[19] Deutsch, *supra* note 17, at 76.

[20] Transcript of Oral Argument at 25, Edwards v. Vannoy, 141 S. Ct. 1547 (2021) (No. 19-5807).

tion came during oral arguments in Edwards' case.[21] Justice Sotomayor asked a similar question: "Are we claiming an exception that . . . we're never going to utilize?"[22] Justice Alito analogized the search for a watershed rule of criminal procedure to "the quest for an animal that was thought to have become extinct."[23]

On May 17, 2021, the "animal" officially became extinct; the Court handed down its opinion in *Edwards v. Vannoy*, rejecting Mr. Edwards' claim for habeas corpus relief and refusing to apply *Ramos* retroactively.[24] In the decision, the Court explicitly killed the *Teague* exception for watershed rules of criminal procedure, eliminating all hope for people convicted by procedures later deemed unconstitutional.[25] The exception, long thought to be a "false promise,"[26] has been replaced with a grim certainty: "[n]ew procedural rules do not apply retroactively on federal collateral review."[27]

From a historical perspective, "[a]t common law there was no authority for the proposition that judicial decisions made law only for the future."[28] Under a Blackstonian theory of law, the Court ought to apply new constitutional decisions retroactively.[29] Yet, over the course of the twentieth century, the Court limited retroac-

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[21] *Id.*

[22] *Id.* at 46.

[23] *Id.* at 13–14 ("This whole quest for watershed rules is rather strange. We keep saying there were some in the past that were discovered, but it's not clear that there are any new—any new ones that haven't yet been discovered, but, you know, maybe, just maybe there might be a watershed rule out there that hasn't been discovered. It—I mean, it sort of reminds me of something you see on some TV shows about the—the quest for an animal that was thought to have become extinct, like the Tasmanian tiger, which was thought to have died out in a zoo in 1936, but every once in a while, deep in the forests of Tasmania, somebody sees a footprint in the mud or a howl in the night or some fleeting thing running by, and they say, a-ha, there still is one that exists.").

[24] Edwards v. Vannoy, 141 S. Ct. 1547, 1552 (2021).

[25] *Id.* at 1560.

[26] Transcript of Oral Argument at 25, Edwards v. Vannoy, 141 S. Ct. 1547 (2021) (No. 19-5807).

[27] *Edwards*, 141 S. Ct. at 1560.

[28] Linkletter v. Walker, 381 U.S. 618, 622 (1965). Sir William Blackstone, influential English jurist, "is always cited as the foremost exponent of the declaratory theory." *Id.* at 623 n.7.

[29] *See id*. at 622–23.

tivity for cases on collateral review so greatly that retroactivity became an "empty promise."[30]

In rendering its decision in *Edwards*, the Court was constrained by the fact that it had never declared a rule to be watershed in the thirty years since *Teague*.[31] The Court repeatedly pointed to the Sixth Amendment right to counsel articulated in *Gideon v. Wainwright* as an example of a watershed rule of criminal procedure.[32] The *Gideon* case, decided decades before the establishment of the *Teague* framework, stood alone as the Court's example of a watershed rule, providing a beacon of hope to defendants challenging their convictions on habeas corpus review.[33] By eliminating that hope of applying new procedural rules retroactively,[34] the Supreme Court placed states' exaggerated interest in the finality of convictions over the concrete constitutional rights of the accused.[35]

Given that *Teague*'s exception for watershed rules is now extinct, the Court should rethink its entire retroactivity framework for new rules of criminal law on habeas review. In order to understand why *Ramos* and *Edwards* underscore the flaws of the *Teague* framework, it is necessary to understand the history of non-

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[30] *Edwards*, 141 S. Ct. at 1560.

[31] *See, e.g.*, Whorton v. Bockting, 549 U.S. 406, 421 (2007) (rejecting retroactivity for Crawford v. Washington, 541 U.S. 35 (2004)); Schriro v. Summerlin, 542 U.S. 348, 358 (2004) (rejecting retroactivity for Ring v. Arizona, 546 U.S. 584 (2002)); Beard v. Banks, 542 U.S. 406, 420 (2004) (rejecting retroactivity for Mills v. Maryland, 486 U.S. 367 (1988)); O'Dell v. Netherland, 521 U.S. 151, 167 (1997) (rejecting retroactivity for Simmons v. South Carolina, 512 U.S. 154 (1994)); Lambrix v. Singletary, 520 U.S. 518, 539–40 (1997) (rejecting retroactivity for Espinosa v. Florida, 505 U.S. 1079 (1992)); Sawyer v. Smith, 497 U.S. 227, 245 (1990) (rejecting retroactivity for Caldwell v. Mississippi, 472 U.S. 320 (1985)).

[32] *See, e.g.*, *Bockting*, 549 U.S. at 419 ("Guidance in answering this question is provided by *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), to which we have repeatedly referred in discussing the meaning of the *Teague* exception at issue here."); *Banks*, 542 U.S. at 417 ("In providing guidance as to what might fall within this exception, we have repeatedly referred to the rule of *Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963) (right to counsel), and only to this rule."); *Parks*, 494 U.S. at 495 ("Although the precise contours of this exception may be difficult to discern, we have usually cited *Gideon v. Wainwright*, 372 U.S. 335 (1963)[.]").

[33] *See supra* note 32 and accompanying text.

[34] *Edwards*, 141 S. Ct. at 1560.

[35] *See* Deutsch, *supra* note 17, at 56.

unanimous juries, their impact, and the precedent that allowed them to continue. Part I of this Note explores the history of split verdicts, their demise, and the monumental *Ramos* decision. Part II briefly outlines the role of habeas corpus, its expansion, and its contraction. Part III outlines the Court's retroactivity doctrine before *Teague*, after *Teague*, and the criticism the *Teague* framework has engendered. Part IV explains the failures of the *Edwards* opinion—in both the Court's refusal to apply *Ramos* retroactively and its destruction of the *Teague* exception for watershed rules of criminal procedure. The *Edwards* decision shows that *Teague* is an unworkable framework for determining retroactivity. Part V explores the states' ability to deviate from *Teague* when reviewing their own decisions on collateral review and highlights alternatives to *Teague* that could account for states' interest in the finality of convictions while ensuring that those convicted in violation of their constitutional rights can get the relief they deserve.

I. THE ROAD TO *RAMOS*

Dissenting in *Ramos*, Justice Alito claimed that "all the talk about the Klan, etc., is entirely out of place" in the debate about non-unanimous juries; he asserted that even if split verdicts were initially adopted to promote white supremacy, the motivation changed years later.[36] He noted that both Louisiana and Oregon "readopted their rules under different circumstances in later years" with a new stated purpose of "'judicial efficiency.'"[37] To argue the discussion about the racist origins of non-unanimous jury schemes is entirely out of place is to deny American history and to ignore the racially disparate effects of non-unanimous juries that continued into the twenty-first century.[38] Eighty percent of the Louisianans still impacted by Jim Crow juries are Black.[39]

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[36] Ramos v. Louisiana, 140 S. Ct. 1390, 1427 (2020) (Alito, J., dissenting).

[37] *Id.* at 1426 (Alito, J., dissenting).

[38] *See* Nicholas Chrastil, *Divergent Rulings on How to Treat Old Split-Jury Verdicts Could Prompt Action from La. Supreme Court*, THE LENS (Nov. 11, 2021), https://thelensnola.org/2021/11/11/divergent-rulings-on-how-to-treat-old-split-jury-verdicts-could-prompt-action-from-la-supreme-court/.

[39] *Id.* at 38.

A state's averred interest in judicial efficiency does not, as the state of Louisiana asserted, "cleanse[] its non-unanimous jury law of any purported racial animus."[40] As Angela A. Allen-Bell—a Southern University law professor—noted, the first proponents of non-unanimous jury verdicts also hid behind the veil of efficiency.[41] That purpose, she argued, is no different than transparent racism:

> I also find this the same conversation given the fact that the majority of Louisiana's prison population is African American. In this regard, judicial efficiency suggests the aim is to obtain disposition of criminal cases faster. In a state like Louisiana where sentences are harsh, this is as offensive as an explicit racial slur on the official records.[42]

Even as Louisiana disentangled itself from the explicitly racist motivations for convictions by non-unanimous juries, Black defendants continued to be disparately impacted by them.[43] With all due respect to Justice Alito, America's racist history *must* be part of the discussion about non-unanimous jury verdicts because the future of judicial legitimacy depends on correcting it.[44] This section explores that history and the efforts that finally brought split verdicts to an end.

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[40] Brief of Respondent at 44, Edwards v. Vannoy, 141 S. Ct. 1547 (2021) (No. 19-5807).

[41] Angela A. Allen-Bell, *How the Narrative About Louisiana's Non-Unanimous Criminal Jury System Became a Person of Interest in the Case Against Justice in the Deep South*, 67 MERCER L. REV. 585, 605 (2016).

[42] *Id.* at 605–06.

[43] *See* Adelson, Russell & Simerman, *supra* note 6 (finding that forty-three percent of Black defendants' convictions resulted from non-unanimous juries, compared to thirty-three percent of white defendants' convictions).

[44] Brief for The Promise of Justice Initiative et al. as Amici Curiae Supporting Petitioner at 32, Edwards v. Vannoy, 141 S. Ct. 1547 (2021) (No. 19-5807) (quoting Buck v. Davis, 137 S. Ct. 759, 778 (2017)) ("As this Court recognizes, the influence of race 'poisons public confidence' in the judicial process. It thus injures not just the defendant, but 'the law as an institution, . . . the community at large, and . . . the democratic ideal reflected in the processes of our courts.'") [hereinafter Brief for The Promise of Justice Initiative et al.].

A. *The Racist Origins of Non-unanimous Jury Verdicts in Louisiana*

Louisiana codified non-unanimous jury verdicts in the state constitution at the Constitutional Convention of 1898.[45] The convention aimed to "eliminate from the electorate the mass of corrupt and illiterate voters"[46] and "establish the supremacy of the white race in this State to the extent to which it could be legally and constitutionally done."[47] The Constitution of 1898 included several hallmarks of Jim Crow: a poll tax, a literacy requirement for voting, and a three-hundred-dollar property requirement.[48] Non-unanimous jury verdicts emerged as "one pillar of a comprehensive and brutal program of racist Jim Crow measures against African-Americans."[49] The impact of the new state constitution was staggering: the number of registered Black voters dropped from 130,344 in 1897 to 598 in 1922.[50]

For non-unanimous jury verdicts, the alleged purpose was to "relieve the parishes of the enormous burden of costs in criminal trials."[51] But the establishment of the practice followed the federal government's demands "that the U.S. attorney general account for black participation on state juries."[52] Accordingly, Louisiana's constitutional "convention delegates sculpted a 'facially race-neutral' rule" permitting non-unanimous jury verdicts "to ensure that African-American juror service would be meaningless."[53]

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[45] THOMAS AIELLO, JIM CROW'S LAST STAND: NONUNANIMOUS CRIMINAL JURY VERDICTS IN LOUISIANA 5 (updated ed. 2019).

[46] *Id.* at 23.

[47] John Simerman & Gordon Russell, *In Louisiana's Split-Verdict Rule, White Supremacist Roots Maintain Links to Racist Past*, THE ADVOC. (Apr. 7, 2018, 11:00 PM), https://www.theadvocate.com/baton_rouge/news/courts/article_35e1664a-38ed-11e8-89d7-1ff0a664198b.html (quoting an excerpt from the Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana) (internal quotations omitted).

[48] AIELLO, *supra* note 45, at 23.

[49] Ramos v. Louisiana, 140 S. Ct. 1390,1417 (2020) (Kavanaugh, J., concurring).

[50] AIELLO, *supra* note 45, at 23.

[51] Simerman & Russell, *supra* note 47.

[52] *Id.*

[53] *Ramos*, 140 S. Ct. at 1394 (quoting State v. Maxie, No. 13-CR-72522 (La. 11th Jud. Dist., Oct. 11, 2018)).

Louisianans needed a way to procure free labor following the abolition of slavery.[54] The Thirteenth Amendment did not ban slavery or involuntary servitude "as a punishment for crime."[55] Convict leasing—slavery in all but name—emerged in the second half of the nineteenth century.[56] Louisiana rented out prisoners to corporations who would use them for labor and pay the state in exchange.[57] Samuel Lawrence James, a former Confederate major who expanded the state's convict leasing efforts, leased and eventually purchased an old slave plantation called Angola where prisoners worked without pay to produce profit for James.[58] With almost no oversight, convict leasing proved brutal and deadly:[59] "14 percent of leased convicts died" in 1881, and in 1882, "more than 20 percent died."[60] In 1901, the state of Louisiana purchased Angola and made it—and the entire penal system—a "state-run business without the middleman."[61] To this day, Angola is home to Louisiana State Penitentiary where inmates serve sentences at hard labor for as little as four cents per hour.[62]

Convict leasing proved lucrative for the state and the leasing corporations,[63] and it allowed white people in Louisiana "to reimpose some kind of version of white control over the system which they felt they had lost ever since the loss of the Civil War."[64] To ensure a steady supply of labor for convict leasing, the state legislature created a law allowing convictions by nine out of twelve

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[54] Jessica Rosgaard & Wallis Watkins, *The History of Louisiana's Non-Unanimous Jury Rule*, 89.9 WWNO NEW ORLEANS PUBLIC RADIO (Oct. 22, 2018, 5:16 PM), https://www.wwno.org/post/history-louisianas-non-unanimous-jury-rule.

[55] U.S. CONST. amend. XIII.

[56] AIELLO, *supra* note 45, at 10.

[57] *Id.* at 10–11.

[58] *Id.* at 11–12.

[59] *Id.* at 12.

[60] *Id.* at 12.

[61] *Id.* at 13.

[62] Bryce Covert, *Louisiana Prisoners Demand an End to 'Modern-Day Slavery'*, THE APPEAL (June 8, 2018), https://theappeal.org/louisiana-prisoners-demand-an-end-to-modern-day-slavery/.

[63] AIELLO, *supra* note 45, at 11–12.

[64] Rosgaard & Watkins, *supra* note 54.

jurors in 1880,[65] codified into the state constitution nine years later.[66]

B. *The Racist Origins of Non-unanimous Jury Verdicts in Oregon*

Aside from Louisiana, Oregon was the only other state that allowed convictions by non-unanimous jury verdicts.[67] Like Louisiana, Oregon did not allow split verdicts when it first became a state but adopted the practice in the early twentieth century.[68] The racist and xenophobic motivations underlying non-unanimous juries were not unique to Louisiana: "Oregon's rule permitting nonunanimous verdicts can be similarly traced to the rise of the Ku Klux Klan and efforts to dilute 'the influence of racial, ethnic, and religious minorities on Oregon juries.'"[69] In the 1920s, the Ku Klux Klan arrived in Oregon at the same time as Jews and Catholics began immigrating from Europe in greater numbers.[70] After "several high profile cases with racial and religious undertones," pressure mounted to secure convictions more easily.[71] After Jacob Silverman, a Jewish man charged in a well-publicized double murder, was convicted of the lesser charge of manslaughter, an editorial in one Oregon newspaper called for a change to the jury process:

> This newspaper's opinion is that the increased urbanization of American life, the natural boredom of human beings with rights once won at great cost, and *the vast immigration into America from southern and eastern Europe, of people untrained in the*

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65 AIELLO, *supra* note 45, at 5.

66 *Id.*

67 *See* Reynolds, *supra* note 9.

68 AIELLO, *supra* note 45, at 39.

69 Ramos v. Louisiana, 140 S. Ct. 1390, 1394 (2020) (citing State v. Williams, No. 15-CR-58698 (C. C. Ore., Dec. 15, 2016)).

70 Brief for Prominent Current and Former State Executive and Judicial Officers et al., as Amici Curiae Supporting Petitioner at 5–6, Ramos v. Louisiana, 140 S. Ct. 1390 (2020) (No. 18-5924) [hereinafter Oregon Executive and Judicial Officers Brief].

71 *Id.* at 7.

> *jury system*, have combined to make the jury of twelve increasingly unwieldy and unsatisfactory.[72]

Shortly after, on November 24, 1933, the Oregon Senate began the process to amend its state constitution to allow ten jurors to convict a defendant for all crimes except first-degree murder.[73] Voters approved the constitutional amendment, and Oregon continued its use of split verdicts until 2020.[74]

C. *The Beginning of the End for Non-unanimous Juries*

The use of non-unanimous jury verdicts continued *almost* entirely unchanged until 2019.[75] The practice survived constitutional challenges in the United States Supreme Court in two companion cases in 1972,[76] and in 1974, Louisiana amended its constitution to require guilty verdicts from at least ten out of twelve jurors to secure a conviction, rather than nine.[77] While the expressed motivation changed from the promotion of white supremacy to "judicial efficiency,"[78] the practice still disproportionately affected Black defendants.[79] In a Pulitzer Prize winning series,[80] The Advocate—the Baton Rouge newspaper—analyzed nearly 1,000 criminal convictions and found that forty percent of trial convictions had at least one juror who did not believe the defendant guilty.[81] "When the defendant was black, the proportion went up to 43 percent, ver-

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[72] *Id.*at 10–11 (emphasis added).

[73] *Id.* at 11.

[74] *Id.* at 14, 16.

[75] AIELLO, *supra* note 45, at 49–50. Louisiana voters approved a constitutional amendment requiring jury unanimity for all convictions starting in 2019. *Id.* at x–xii.

[76] Apodaca v. Oregon, 406 U.S. 404, 406 (1972) (upholding the constitutionality of non-unanimous jury verdicts for an Oregonian defendant); Johnson v. Louisiana, 406 U.S. 356, 363–65 (1972) (decided the same day, upholding the constitutionality of non-unanimous jury verdicts for a Louisianan defendant).

[77] AIELLO, *supra* note 45, at 49–51.

[78] Ramos v. Louisiana, 140 S. Ct. 1390, 1426 (2020) (Alito, J., dissenting) (quoting Louisiana v. Hankton, 122 So. 3d 1028, 1038 (La. App. 4th Cir. 2013)).

[79] Adelson, Russell & Simerman, *supra* note 6.

[80] *Staff of The Advocate, Baton Rouge, La.*, THE PULITZER PRIZES (2019), https://www.pulitzer.org/winners/staff-advocate-baton-rouge-la.

[81] Adelson, Russell & Simerman, *supra* note 6.

sus 33 percent for white defendants. In three-quarters of the 993 cases in the newspaper's database, the defendant was black."[82] Analysis of The Advocate's data illustrated that not only were Black defendants "30 percent more likely to be convicted by non-unanimous juries than white defendants," but also that black *jurors* "casted 'empty' votes at 64 percent above the expected rate whereas white jurors casted 'empty' votes at 32 percent less than the expected rate."[83] The term "empty votes" refers to votes cast by dissenting jurors that nevertheless resulted in a conviction.[84]

Thanks to the work of grassroots organizers like Norris Henderson[85] and Calvin Duncan,[86] momentum grew in Louisiana in the fight against the use of Jim Crow juries.[87] Henderson was wrongfully convicted of second-degree murder by a ten-to-two jury and spent twenty-seven years in prison.[88] He founded the Unanimous Jury Coalition, which "embarked on a massive statewide campaign" to require unanimous jury verdicts.[89] Duncan, incarcerated for twenty-three years at Angola, spent his time there working as inmate counsel for twenty cents per hour.[90] "He could not understand how a Louisiana law that allowed non-unanimous juries in criminal cases could be constitutional. He would not let it go, working on about two dozen failed attempts to persuade the

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[82] *Id.*

[83] State v. Gipson, 296 So. 3d 1051, 1053 n.1 (La. 2020) (Johnson, C.J., dissenting) (citing State v. Maxie, No. 13-CR-72522 (La. 11th Jud. Dist., Oct. 11, 2018)).

[84] *See id.*

[85] AIELLO, *supra* note 45, at 79.

[86] Adam Liptak, *A Relentless Jailhouse Lawyer Propels a Case to the Supreme Court*, N.Y. TIMES (Aug. 5, 2019), https://www.nytimes.com/2019/08/05/us/politics/supreme-court-nonunanimous-juries.html.

[87] AIELLO, *supra* note 45, at 79.

[88] Debbie Elliott, *'Jim Crow's Last Stand' in Louisiana May Fall to Ballot Measure*, WABE (Nov. 5, 2018), https://www.wabe.org/jim-crow-s-last-stand-in-louisiana-may-fall-to-ballot-measure/; AIELLO, *supra* note 45, at 79.

[89] AIELLO, *supra* note 45, at 79.

[90] Liptak, *supra* note 86 ("Mr. Duncan himself has nothing to gain from his efforts, having been convicted by a unanimous jury. Innocence Project New Orleans secured his release in 2011 as part of a deal in which he agreed to plead guilty to lesser charges in exchange for a sentence of time served. He has always maintained his innocence.").

Supreme Court to address the issue."[91] His work, and the work of so many others, eventually paid off. In November 2018, sixty-four percent of Louisiana voters approved a constitutional amendment to require unanimous jury verdicts for felonies.[92] The amendment, though, only applied to convictions after January 1, 2019.[93] Duncan's efforts "shepherding and presenting the cases" led The Promise of Justice Initiative ("PJI") to file a petition for Evangelisto Ramos with the United States Supreme Court.[94]

D. Ramos v. Louisiana

Evangelisto Ramos was convicted of second-degree murder in 2016,[95] two years before Louisiana voters approved the constitutional amendment requiring unanimous jury verdicts for felonies.[96] In forty-eight states, his trial would not have produced a conviction because "a pair of jurors believed that the State of Louisiana had failed to prove Mr. Ramos's guilt beyond reasonable doubt."[97] His case provided the lens through which the United States Supreme Court would determine whether non-unanimous jury verdicts were constitutional.[98]

On April 20, 2020, the United States Supreme Court decided *Ramos v. Louisiana* in Mr. Ramos's favor, holding the Sixth Amendment right to a trial by jury, as incorporated against the states by the Fourteenth Amendment, requires a unanimous jury verdict to convict someone of a serious crime.[99] In rendering its decision, the majority noted the racist origins of non-unanimous

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[91] Liptak, *supra* note 86.

[92] AIELLO, *supra* note 45, at xiii; Advocate Staff Report, *Tilting the Scales Series: Everything to Know about Louisiana's Controversial 10-2 Jury Law*, THE ADVOC. (Apr. 1, 2018, 8:01 AM), https://www.nola.com/news/courts/article_64f67fc8-9ab4-56b6-bb45-598b6795cffa.html.

[93] *Id.*

[94] Liptak, *supra* note 86.

[95] State v. Ramos, 231 So. 3d 44, 46 (La. Ct. App. 2017), *rev'd sub nom.* Ramos v. Louisiana, 140 S. Ct. 1390 (2020).

[96] AIELLO, *supra* note 45, at x–xii.

[97] *Ramos*, 140 S. Ct. at 1394.

[98] *Id.* at 1394–95.

[99] *Id.* at 1397.

verdicts[100] and acknowledged that the right to a trial by jury has always been understood to require unanimity.[101] In fact, the Supreme Court has affirmed the Sixth Amendment's unanimity requirement at least "13 times over more than 120 years."[102] Still, Oregon and Louisiana continued to deprive criminal defendants of jury unanimity with the blessing of the Supreme Court in *Apodaca v. Oregon*[103] and its companion case *Johnson v. Louisiana*,[104] decided in 1972.

The *Apodaca* decision involved a "badly fractured set of opinions"[105] with the plurality conducting a functionalist analysis and deciding that the costs of jury unanimity outweighed its benefits.[106] Justice Powell's concurrence in *Apodaca*—providing the deciding vote supporting the constitutionality of non-unanimous jury verdicts—recognized that the Sixth Amendment requires jury unanimity.[107] Still, Justice Powell asserted that the Fourteenth Amendment "does not render this guarantee against the federal government fully applicable against the States."[108] The Court, though, had long rejected Justice Powell's theory of dual-track incorporation—the idea that the Fourteenth Amendment applies to the States only a "watered-down, subjective version of the individual guarantees of the Bill of Rights."[109]

Given that "no one on the Court today is prepared to say [*Apodaca*] was rightly decided,"[110] the question in *Ramos* turned on whether the Court felt compelled to adhere to precedent that was

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100 *Id.* at 1394 ("[N]o one before us contests any of this; courts in both Louisiana and Oregon have frankly acknowledged that race was a motivating factor in the adoption of their States' respective nonunanimity rules.").

101 *Id.* at 1395 ("Wherever we might look to determine what the term 'trial by an impartial jury trial' meant at the time of the Sixth Amendment's adoption—whether it's the common law, state practices in the founding era, or opinions and treatises written soon afterward—the answer is unmistakable. A jury must reach a unanimous verdict in order to convict.").

102 *Id.* at 1397.

103 Apodaca v. Oregon, 406 U.S. 404, 406 (1972).

104 Johnson v. Louisiana, 406 U.S. 356, 363–65 (1972).

105 *Ramos*, 140 S. Ct. at 1397.

106 *Id.* at 1398.

107 *Id.*

108 *Id.*

109 *Id.* (citing *Johnson*, 406 U.S. at 384 (Douglas, J., dissenting)).

110 *Id*. at 1405.

"egregiously wrong."[111] In addition to Justice Powell's flawed concurrence, the *Ramos* Court also rejected "that the [*Apodaca*] plurality subjected the ancient guarantee of a unanimous jury verdict to its own functionalist assessment in the first place."[112] More than 120 years after convictions by non-unanimous jury verdicts emerged, the Court finally deemed their use unconstitutional and reversed Mr. Ramos's conviction.[113]

At the time of the *Ramos* decision, the constitutional amendment requiring non-unanimous jury verdicts had already taken effect.[114] The opinion, though, expanded relief to those whose convictions occurred *before* January 1, 2019[115] whose cases were still on direct appeal.[116] *Ramos* also halted the use of non-unanimous jury verdicts in Oregon, the last state to permit them.[117] At the time, Louisiana had approximately 100 split verdict convictions on direct appeal, and Oregon had more than 1,000.[118]

However, the *Ramos* decision did not determine the fate of those convicted by non-unanimous juries whose cases had already become final. As the majority noted, "[w]hether the right to jury unanimity applies to cases on collateral review is a question for a future case where the parties will have a chance to brief the issue and we will benefit from their adversarial presentation."[119] PJI, a New Orleans based non-profit organization, identified 1,601 people convicted by non-unanimous jury verdicts whose cases became final before the *Ramos* decision.[120] Jamila Johnson, Managing Attorney for PJI's Unanimous Jury Project, worked with more than 150 lawyers at 40 law firms to secure those defendants representa-

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111 *Id.* at 1416 (Kavanaugh, J., concurring).

112 *Id.* at 1401–02.

113 *Id.* at 1408.

114 *See* AIELLO, *supra* note 45, at xiii; *see also* Advocate Staff Report, *Tilting the Scales Series: Everything to Know about Louisiana's Controversial 10-2 Jury Law*, THE ADVOC. (Apr. 1, 2018, 8:01 AM), https://www.nola.com/news/courts/article_64f67fc8-9ab4-56b6-bb45-598b6795cffa.html.

115 Reynolds, *supra* note 9.

116 *Id.*

117 *Id.*

118 *Id.*

119 Ramos v. Lousiana, 140 S. Ct. 1390, 1407 (2020).

120 Brief for The Promise of Justice Initiative et al., *supra* note 44, at 11.

tion.[121] She articulated the injustice felt by those whose convictions became final before *Ramos*: "[i]magine what it feels like to hear the *Ramos* decision come down, and to hear the thing that put you in prison was unconstitutional . . . . That night you go to sleep, and there's no guarantee that you're going home."[122]

Because *Ramos* corrected nearly 50 years of "egregiously wrong"[123] precedent and approximately 100 years of denying criminal defendants their Sixth Amendment rights,[124] the Court should have ensured those people imprisoned in Louisiana in violation of their constitutional rights could receive new, constitutional trials.[125] Instead, the *Edwards* Court eliminated the elusive exception for retroactive application of watershed rules of criminal procedure and made retroactivity for new constitutional rules of criminal law a near impossibility for defendants on federal habeas review.[126]

II. FEDERAL HABEAS REVIEW OF STATE CONVICTIONS

Habeas corpus gives federal courts authority to review state convictions for constitutional violations.[127] The writ of habeas corpus dates back to the Magna Carta.[128] At common law in England, the writ was "used to challenge arbitrary imprisonment without charge, and at least occasionally improper confinement as well."[129] Before the founding of the United States, habeas corpus was brought to the colonies,[130] and Alexander Hamilton called it one of

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121 Reynolds, *supra* note 9.

122 *Id.*

123 *Ramos,* 140 S. Ct. at 1416 (Kavanaugh, J., concurring).

124 *See id.* at 1394, 1397.

125 *See generally* Brief for The Promise of Justice Initiative et al., *supra* note 44.

126 *See* Edwards v. Vannoy, 141 S. Ct. 1547, 1559–60 (2021).

127 Timothy Finley, *Habeas Corpus—Retroactivity of Post-Conviction Rulings: Finality at the Expense of Justice*, 84 J. CRIM. L. & CRIMINOLOGY 975, 976 (1994).

128 William J. Sheils, Note, *Nonretroactivity on Habeas Corpus: Whittling at the Great Writ*, 24 SUFFOLK U. L. REV. 743, 744 (1990).

129 Steven Semeraro, *Two Theories of Habeas Corpus*, 71 BROOK. L. REV. 1233, 1239 (2006).

130 *Id.*

the greatest "securities to liberty and republicanism."[131] The Framers recognized the writ explicitly in the Constitution: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[132]

Initially, under the Judiciary Act of 1790, federal habeas corpus "acted only to correct jurisdictional errors made by the federal courts."[133] But the Habeas Corpus Act of 1867 expanded the Great Writ, giving federal courts jurisdiction to review state court convictions and grant relief—release or retrial—where the conviction resulted in a constitutional violation.[134] "As civil rights and constitutional guarantees expanded in the 1960s, the writ of habeas corpus enabled federal courts to enforce the Bill of Rights against the states."[135] The Rehnquist Court, however, walked back the scope of the writ, and one of the most "effective limitations on federal habeas corpus" has been the Court's decision in *Teague.*[136] Congress further restricted the scope of federal habeas corpus relief by passing the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[137] AEDPA imposed a one-year statute of limitations for state defendants seeking federal habeas review[138] and required federal habeas courts to give great deference to state courts' decisions.[139] Now, "all habeas petitioners face the hurdle of *Teague* as

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131 THE FEDERALIST NO. 84, at 266 (Alexander Hamilton).

132 U.S. CONST. art. I, § 9, cl. 2.

133 Finley, *supra* note 127, at 976.

134 *Id.*at 976–77.

135 *Id.*at 977.

136 *Id.*at 977.

137 28 U.S.C. § 2254 (1996).

138 28 U.S.C. § 2244(d)(1) (1996).

139 28 U.S.C. § 2254(d) ("An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(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." (emphasis added)).

well as the procedural hurdles of the AEDPA[,]"[140] minimizing the scope of the once Great Writ. The states' interest in the finality of convictions—the interest underlying the Court's decision in *Teague*—is already served by AEDPA, making *Teague*'s bar on retroactivity both redundant and damaging to state defendants' constitutional rights.

III. RETROACTIVITY OF NEW CONSTITUTIONAL RULES OF CRIMINAL LAW ON COLLATERAL REVIEW

Since 1989, *Teague* has imposed a general bar on retroactive application of new constitutional rules of criminal law for cases on federal collateral review.[141] Yet, a historical analysis—and an analysis of Blackstone's theory of the law—calls for the opposite: the general retroactive application of newly announced constitutional decisions.[142] This section explores the evolution of the retroactivity doctrine throughout the twentieth century and how one justice—Justice John Marshall Harlan II—influenced the *Teague* Court to prioritize the finality of convictions over the newly-realized constitutional rights of criminal defendants.[143]

A. *Retroactivity before* Teague

Before 1965, the Court and the common law "recognized a general rule of retrospective effect" for its constitutional decisions, subject to limited exceptions.[144] The Court abandoned that rule in

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[140] Lyn S. Entzeroth, *Reflections on Fifteen Years of the* Teague v. Lane *Retroactivity Paradigm: A Study of the Persistence, the Pervasiveness, and the Perversity of the Court's Doctrine*, 35 N. MEX. L. REV. 161, 199 (2005).

[141] *See* Teague v. Lane, 489 U.S. 288, 310 (1989).

[142] *See* Linkletter v. Walker, 381 U.S. 618, 622–24 (1965).

[143] *See Teague*, 489 U.S. at 310.

[144] Robinson v. Neil, 409 U.S. 505, 507 (1973); *accord Linkletter*, 381 U.S. at 628 ("It is true that heretofore, without discussion, we have applied new constitutional rules to cases finalized before the promulgation of the rule."). Still, until 1963, prisoners could not challenge their convictions based on constitutional decisions, "not because of the law of retroactivity, but because they were deemed to have procedurally defaulted these claims by failing to raise them on direct review." Robert J. Jackson Jr., *Rethinking Retroactivity*, 118 HARV. L. REV. 1642, 1645 (2005). In 1963, the Court decided Fay v. Noia, requiring federal courts for the first time to determine whether a prisoner could assert federal

Linkletter v. Walker, holding the Court may, "in the interest of justice," make a new rule of constitutional law apply only prospectively.[145] The *Linkletter* Court determined "the Constitution neither prohibits nor requires retrospective effect."[146]

In reaching that conclusion, the Court explored more than one hundred years of legal theory and contrasting views of the role of the courts.[147] In Blackstone's view, "the duty of the court was not to announce a new law, but to maintain and expound the old one."[148] According to that view, the judge is not the "creator" of the law, but its "discoverer."[149] Thus, an overruled decision was merely a "failure at true discovery and was consequently never the law," and an overruling decision was not a new law, but "an application of what is, and theretofore had been, the true law."[150] This view "ruled English jurisprudence and cast its shadow over our own,"[151] supporting the general rule that prevailed pre-*Linkletter* mandating retrospective application of the Court's constitutional decisions.[152]

The other position, endorsed by John Austin, viewed judges as creators of the law who "make it interstitially by filling in with judicial interpretation the vague, indefinite, or generic statutory or common-law terms that alone are but the empty crevices of the law."[153] Under the Austinian approach, the cases decided under a rule the Court later overruled ought not to be disturbed.[154] This view gained acceptance in American jurisprudence in the twentieth century, with support from Justice Cardozo.[155]

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rights set forth in a decision announced after a conviction became final. 372 U.S. 391, 435–36 (1963).

145 *Linkletter*, 381 U.S. at 628.

146 *Id.* at 629.

147 *Id.* at 622–24.

148 *Id.* at 622–23.

149 *Id.* at 623.

150 *Id.*

151 *Id.* at 624.

152 *Id.* at 622–24.

153 *Id.* at 623–24.

154 *Id.* at 624.

155 *Id.* (citing Cardozo, Address to the N. Y. Bar Assn., 55 Rep. N. Y. State Bar Assn. 263, 296–297 (1932)) (asserted repealing decisions created "hardship to those who [had] trusted to its existence.").

The Court in *Linkletter* adopted the Austinian view, reiterating Cardozo's belief that the "federal constitution has no voice upon the subject" of retroactivity of new constitutional rules of criminal law.[156] Under *Linkletter*, the Court moved to a case-by-case retroactivity analysis, directing courts to weigh the "merits and demerits of each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."[157]

The *Linkletter* standard was later refined in *Stovall v. Denno*, which created a three-factor test for retroactivity.[158] Under *Stovall*, retroactivity of a new rule depended on "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."[159] Justice Harlan, though, grew dissatisfied with the *Linkletter* standard,[160] inspired by a Harvard Law Review article written by Paul J. Mishkin, a University of Pennsylvania Law Professor.[161] Mishkin criticized the *Linkletter* holding, arguing the problem was not one of "prospectivity or retroactivity of the rule but rather of the availability of collateral attack—in this case federal habeas corpus—to go behind the otherwise final judgment of conviction."[162] Justice Harlan shared Mishkin's view that the question of retroactivity should depend, not on the factors laid out in *Linkletter* and *Stovall*, but whether an appellant challenged his or her conviction on direct or collateral review.[163] According to Har-

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156 *Id.* at 629 (quoting Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 364 (1932)).

157 *Id.*

158 Stovall v. Denno, 388 U.S. 293, 297 (1967).

159 *Id.*

160 Teague v. Lane, 489 U.S. 288, 303 (1989).

161 Robert J. Jackson Jr., *Rethinking Retroactivity*, 118 HARV. L. REV. 1642, 1646–48 (2005).

162 Paul J. Mishkin, Foreword: *The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 77 (1965).

163 Desist v. United States, 394 U.S. 244, 260 (1969) (Harlan, J., dissenting) ("While, as I have argued, a reviewing court has the obligation to rule upon every decisive issue properly raised by the parties on direct review, the federal courts have never had a similar obligation on habeas corpus."); Mackey v. United States, 401 U.S. 667, 689 (1971) (Harlan, J., concurring in part and dissenting in part) ("[I]t is sounder, in adjudicating habeas petitions, generally to apply the

lan, retroactive application of new rules of criminal law to cases on federal habeas appeal undermined states' interests in the finality of convictions and upset the role of habeas corpus as a collateral remedy:

> The interest in leaving concluded litigation in a state of repose, that is, reducing the controversy to a final judgment not subject to further judicial revision, may quite legitimately be found by those responsible for defining the scope of the writ to outweigh in some, many, or most instances the competing interest in readjudicating convictions according to all legal standards in effect when a habeas petition is filed.[164]

Harlan penned opinions in two separate cases[165] that inspired the Court to abandon the *Linkletter*/*Stovall* standard and embrace his—and Mishkin's—views of retroactive application of new constitutional rules of criminal law.[166]

B. Teague v. Lane

Two years before *Teague*, the Court embraced Harlan's view on retroactivity in *Griffith v. Kentucky*; the *Griffith* Court held that cases pending on direct review at the time a new rule was announced would receive retroactive application of the new rule.[167] In doing so, the Court reasoned that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication."[168]

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law prevailing at the time a conviction became final than it is to seek to dispose of all these cases on the basis of intervening changes in constitutional interpretation.").

[164] *Mackey*, 401 U.S. at 682–83 (Harlan, J., concurring in part and dissenting in part).

[165] *Id.*; *Desist*, 394 U.S. at 260 (Harlan, J., dissenting).

[166] *See* Teague v. Lane, 489 U.S. 288, 308–10 (1989).

[167] Griffith v. Kentucky, 479 U.S. 314, 322 (1987).

[168] *Id*. at 322–23 (quoting *Mackey*, 401 U.S. at 679 (1971) (Harlan, J., concurring in part and dissenting in part)) ("If we do not resolve all cases before us on direct review in light of our best understanding of governing constitutional principles, it is difficult to see why we should so adjudicate any case at all . . . .").

The Court was then left to address whether new rules of criminal law would apply to convictions that had become final in habeas corpus proceedings.[169] It did so in *Teague v. Lane*, where the Court yet again adopted Justice Harlan's view on retroactivity.[170] Prioritizing the finality of criminal judgments, Justice Harlan asserted new rules should *not* be applied retroactively for cases on collateral review.[171] Still, Justice Harlan—and thus the *Teague* Court—outlined two exceptions for the general rule of non-retroactivity.[172] The first exception was for substantive rules of criminal law: rules that placed "'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'"[173] The second exception was for watershed rules of criminal procedure—rules that "implicate the fundamental fairness of the trial" and "without which the likelihood of an accurate conviction is seriously diminished."[174] The *Teague* Court felt compelled to modify the "*Linkletter*/*Stovall* regime"[175] because the standard had "not led to consistent results"[176] and led "to the disparate treatment of similarly situated defendants" on direct and collateral review.[177]

Because *Teague* only applies to new rules of criminal law, any *Teague* analysis first requires assessing whether a rule is truly new:[178]

> [A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government . . . . To put it 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.[179]

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169 *Teague*, 489 U.S. at 305–06.
170 *Id.* at 310.
171 *Id.*
172 *Id.* at 307.
173 *Id.* at 311 (quoting *Mackey*, 401 U.S. at 692).
174 *Id.* at 312–13.
175 Deutsch, *supra* note 17, at 61.
176 *Teague*, 489 U.S. at 302.
177 *Id.* at 303, 305.
178 *Id*. at 301.
179 *Id.*

If a rule is deemed old, it will not be governed by *Teague* and will be applied retroactively.[180] If a rule is new, and if the case at issue is on collateral appeal, the new rule will not be applied retroactively unless it falls under either *Teague* exception.[181]

Under the first exception, "[a] rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes . . . In contrast, rules that regulate only the *manner of determining* the defendant's culpability are procedural."[182] "[U]ntil the recent rulings in *Montgomery* and *Welch*," the examples of new substantive rules have been "few and far between."[183] In *Montgomery*, the Court addressed the retroactivity of the rule announced in *Miller v. Alabama*.[184] In *Miller*, the Court established that mandatory life without parole for juveniles violated the Eighth Amendment's bar on cruel and unusual punishment.[185] The *Montgomery* Court held *Miller* announced a substantive rule, reasoning that "[p]rotection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment[;]"[186] therefore, *Miller* applied retroactively to cases on collateral review.[187]

The second exception—the exception for watershed rules of criminal procedure—required that the rule affect both the "fundamental fairness" and "accuracy" of the trial.[188] The exception was "a demanding one, so much so that this Court has yet to announce a new rule of criminal procedure capable of meeting it."[189] Since *Teague*'s ruling, the Court repeatedly rejected efforts to characterize new rules as watershed.[190] When asked what constituted a wa-

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[180] *Id.* at 305.

[181] *Id.* at 310.

[182] Schriro v. Summerlin, 542 U.S. 348, 353 (2004).

[183] Deutsch, *supra* note 17, at 62 (discussing Montgomery v. Louisiana, 577 U.S. 190 (2016) and Welch v. United States, 578 U.S. 120 (2016)).

[184] Montgomery v. Louisiana, 577 U.S. 190, 212–13 (mandating retroactive application of Miller v. Alabama, 567 U.S. 460 (2012)).

[185] Miller v. Alabama, 567 U.S. 460, 465 (2012).

[186] *Montgomery*, 577 U.S. at 206.

[187] *Id.* at 212–13.

[188] Teague v. Lane, 489 U.S. 288, 312–13 (1989).

[189] Ramos v. Louisiana, 140 S. Ct. 1390, 1407 (2020).

[190] *See, e.g.*, Whorton v. Bockting, 549 U.S. 406 (2007) (rejecting retroactivity for Crawford v. Washington, 541 U.S. 35 (2004)); Schriro v. Summerlin, 542 U.S. 348 (2004) (rejecting retroactivity for Ring v. Arizona, 546 U.S. 584

tershed rule of criminal procedure, the Court "referred to the rule of *Gideon v. Wainwright* . . . and only to this rule."[191] In pointing to *Gideon*, the Court noted that the case's holding, establishing a defendant's constitutional right to be represented by counsel,[192] "alter[ed] our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding."[193] Still, the Court in 1990 acknowledged that there *could* be other rules that fall within this exception.[194] But, with the *Edwards* opinion, the Court sounded the death knell for the watershed exception once and for all.[195]

C. *Criticisms of* Teague

In replacing *Linkletter/Stovall* to establish a general bar on retroactivity for cases on collateral review, the *Teague* Court reasoned that "[t]he fact that life and liberty are at stake in criminal prosecutions 'shows only that "conventional notions of finality" should not have *as much* place in criminal as in civil litigation, not that they should have *none*.'"[196] The Court, by making finality the "overriding concern,"[197] placed too much weight in the interest in the finality of convictions and too little weight in the constitutional rights of defendants. This move was intentional, with Justice O'Connor parroting Justice Harlan's view that the writ of habeas corpus does not require "that an individual accused of crime is af-

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(2002)); Beard v. Banks, 542 U.S. 406, 420 (2004) (rejecting retroactivity for Mills v. Maryland, 486 U.S. 367 (1988)); O'Dell v. Netherland, 521 U.S. 151 (1997) (rejecting retroactivity for Simmons v. South Carolina, 512 U.S. 154 (1994)); Lambrix v. Singletary, 520 U.S. 518 (1997) (rejecting retroactivity for Espinosa v. Florida, 505 U.S. 1079 (1992)); Sawyer v. Smith, 497 U.S. 227, 245 (1990) (rejecting retroactivity for Caldwell v. Mississippi, 472 U.S. 320 (1985)).

191 *Banks*, 542 U.S. at 417 (citing Gideon v. Wainwright, 372 U.S. 335 (1963)).

192 Gideon v. Wainwright, 372 U.S. 335, 343–45 (1963).

193 *Banks*, 542 U.S. at 418 (quoting *Sawyer*, 497 U.S. at 242).

194 *See* Saffle v. Parks, 494 U.S. 484, 495 (1990) ("Whatever one may think of the importance of respondent's proposed rule, it has none of the primacy and centrality of the rule adopted in *Gideon* or *other rules* which may be thought to be within the exception.") (emphasis added).

195 Edwards v. Vannoy, 141 S. Ct. 1547, 1560 (2021).

196 Teague v. Lane, 489 U.S. at 288, 309 (1989) (quoting Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. CHI. L. REV. 142, 150 (1970)).

197 Deutsch, *supra* note 17, at 62.

forded a trial free of constitutional error."[198] In the wake of the *Teague* opinion, litigants still tried, and failed, to get collateral relief in federal courts:

> [T]he norm under *Teague* is that state prisoners serving already final sentences will, more often than not, find no recourse from federal habeas courts when constitutional rules change in their favor. Their federal rights will not be vindicated although governing constitutional decisions show they have been imprisoned based on unconstitutional procedures.[199]

The *Edwards* opinion, in rewriting *Teague* to eliminate the exception for watershed rules of criminal procedure, only further restricted the retroactivity framework to deny habeas corpus relief even where the changed rule affects both the fundamental fairness and accuracy of the trial.[200] While the *Teague* Court at least acknowledged that finality should not have "*as much*" place in criminal litigation where life and liberty are at stake,[201] the *Edwards* Court placed finality above all else[202]—even correcting Jim Crow era practices rooted in egregiously wrong precedent.

Teague has proved just as arbitrary as *Linkletter* in its application. While the *Teague* Court charged the policy considerations in *Linkletter* and *Stovall* with producing inconsistent results,[203] under *Teague*, factors like "the vagaries of timing, differences in lawyering skills, and duration of state procedures" now affect retroactivity.[204] For example, "the longer your appeal takes, the more likely you are to benefit from a favorable change in law" because the case will remain in the direct appeal phase longer, and thus have a

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198 *Teague*, 489 U.S. at 308 (quoting Kuhlmann v. Wilson, 477 U.S. 436, 447 (1986)).

199 Deutsch, *supra* note 17, at 63–64.

200 *See Edwards*, 141 S. Ct. at 1560.

201 *Teague*, 489 U.S. at 309 (quoting Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. CHI. L. REV. 142, 150 (1970)).

202 *See Edwards*, 141 S. Ct. at 1554.

203 *Teague*, 489 U.S. at 302.

204 Deutsch, *supra* note 17, at 61.

better chance of receiving retroactive application of a new rule.[205] Also, note that Mr. Ramos was convicted by a non-unanimous jury in 2016,[206] while Mr. Edwards was convicted by the unconstitutional practice in 2007.[207] The date of their convictions—determining the procedural posture of their cases at the time the Court deemed non-unanimous jury verdicts unconstitutional—is the sole reason the former benefitted from the *Ramos* opinion, while the latter remains a victim of the Jim Crow era practice.[208]

Scholars have also criticized *Teague*'s explanation of what constitutes a new rule of criminal law, arguing the case itself contains "two contradictory" explanations.[209] "Under *Teague*, a new rule is one which either 'breaks new ground' or is 'not *dictated* by precedent' . . . [t]he former definition appears relatively narrow . . . while the latter is obviously quite broad."[210] The new versus old rule distinction has also, in its application, provided yet another test that favors non-retroactivity:

> [T]he new rule doctrine is interpreted in such an extraordinarily broad manner that it is removed from the traditional concerns and concepts that gave rise to retroactivity limits in general and in the context of habeas corpus proceedings in particular. At this point in time, it is not a stretch to say that a majority of the Court believes that almost all Supreme Court decisions interpreting or applying a principle of

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[205] *Id.*

[206] State v. Ramos, 231 So. 3d 44, 46 (La. Ct. App. 2017), *rev'd sub nom.* Ramos v. Louisiana, 140 S. Ct. 1390 (2020).

[207] Edwards v. Cain, No. 15-305-JWD-RLB, at *2 (M.D. La. Apr. 24, 2018).

[208] *Compare Ramos*, 140 S. Ct. at 1408 (reversing Mr. Ramos' conviction on direct appeal), *with Edwards*, 141 S. Ct. at 1562 (affirming Mr. Edwards' conviction on federal habeas corpus review).

[209] Christopher N. Lasch, *The Future of* Teague *Retroactivity, or "Redressability," after* Danforth v. Minnesota*: Why Lower Courts Should Give Retroactive Effect to New Constitutional Rules of Criminal Procedure in Postconviction Proceedings*, 46 AM. CRIM. L. REV. 1, 27 (2009).

[210] *Id.* (quoting Teague v. Lane, 489 U.S. 288, 301 (1989)).

> constitutional criminal procedure may be deemed a new rule.[211]

The *Edwards* opinion affirms that suspicion; the Court held that *Ramos* announced a new rule,[212] rejecting Mr. Edwards' reasonable claim that the decision merely re-articulated an old rule.[213] Mr. Edwards asserted that the rule announced in *Ramos* was "dictated by precedent"[214] because the Court had repeatedly affirmed both that the Sixth Amendment required unanimity and that the Fourteenth Amendment fully incorporates the Bill of Rights against the States.[215] Thus, "[t]he States' interests in comity and finality are not impaired by retroactively applying well-established constitutional principles like jury unanimity, in part because reasonable jurists should have anticipated them."[216] The *Edwards* Court, though, rejected that argument, interpreting what constitutes a new rule as broadly as possible.[217] The Court held *Ramos* articulated a new rule because a rule is only considered an old rule if it was "already 'apparent to all reasonable jurists.'"[218]

IV. *EDWARDS V. VANNOY* AND THE DESTRUCTION OF THE WATERSHED EXCEPTION

Having decided *Ramos* established a new rule, the *Edwards* Court was left to decide whether it announced a watershed rule of criminal procedure.[219] With a six-to-three vote, the Court said no.[220] And given that no rule has been deemed to be a watershed

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[211] Entzeroth, *supra* note 140, at 212 (noting as possible exceptions the cases of Williams v. Taylor, 529 U.S. 362 (2000) and Wiggins v. Smith, 529 U.S. 510 (2003)).

[212] Edwards v. Vannoy, 141 S. Ct. 1547, 1556 (2021).

[213] Brief for Petitioner at 12, Edwards v. Vannoy, 141 S. Ct. 1547 (2021) (No. 19-5807).

[214] *See Teague*, 489 U.S. at 301.

[215] Ramos v. Louisiana, 140 S. Ct. 1390, 1397 (2020).

[216] Brief for Petitioner at 12, Edwards v. Vannoy, 141 S. Ct. 1547 (2021) (No. 19-5807).

[217] *Edwards*, 141 S. Ct. at 1555–56.

[218] *Id.* (quoting Lambrix v. Singletary, 520 U.S. 518, 528 (1997)).

[219] *Id.* at 1556.

[220] *Id.* at 1552.

rule in the three decades since *Teague*, the Court decided to abandon of the exception altogether.[221]

Justice Kagan penned a scathing dissent, joined by Justices Breyer and Sotomayor. First, the dissent argued emphatically that *Ramos* announced a watershed rule.[222] It pointed to the *Ramos* majority's own use of words like "vital," "essential," "indispensable," and "fundamental" to describe the constitutional right to jury unanimity.[223] The dissenters noted the historical importance of unanimous jury verdicts dating back before the founding of the United States that continued for centuries.[224] "If you were scanning a thesaurus for a single word to describe the decision, you would stop when you came to 'watershed,'" the dissent wrote.[225] Indeed, the *Edwards* dissent suggested that because *Ramos* so plainly announced a watershed rule, the *Edwards* majority needed to eliminate the exception altogether to justify its holding:[226] "Thus does a settled principle of retroactivity law die, in an effort to support an insupportable ruling."[227]

The majority's justification for eliminating the exception for watershed rules centered on two key points: (1) a state's interest in the finality of convictions[228] and (2) the Court's perpetual refusal to apply new rules of criminal procedure retroactively.[229]

A. *A State's Interest in the Finality of Convictions is Overvalued*

On the first point, the Court claimed—without support—that conducting new trials for the defendants convicted by Jim Crow juries would require "significant state resources."[230] Not so. The Promise of Justice Initiative's research illustrates that, of the 1,601 people convicted by non-unanimous jury verdicts, only 1,302 will

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221 *Id.* at 1559–60.
222 *Id.* at 1574 (Kagan, J., dissenting).
223 *Id.* at 1573.
224 *Id.* at 1576.
225 *Id.* at 1574.
226 *Id.* at 1574.
227 *Id.*
228 *Id.* at 1554–55 (majority opinion).
229 *Id.* at 1557–58; *see supra* note 190.
230 *Id.* at 1554.

likely require new proceedings.[231] Given that there were 143,401 new criminal cases filed in Louisiana courts in 2019,[232] and 574 assistant district attorneys in Louisiana, PJI estimates retrying cases with non-unanimous jury verdicts would add, on average, 2.5 new cases per assistant district attorney.[233] That is a burden the State would be able to handle.[234] Finally, on the issue of resources, the Court ignores the tremendous financial and ethical cost of continuing to incarcerate 1,601 people even though their convictions were unconstitutional.[235]

In addition to the concerns over state resources, the *Edwards* Court used the well-being of crime victims and public safety to justify a strict retroactivity standard.[236] Those interests are only served, however, if the person incarcerated is the one who actually committed the crime. The now-defunct *Teague* exception for watershed rules of criminal procedure—rules that affect the fundamental fairness and accuracy of the trial—emerged for the very reason of "assur[ing] that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted."[237]

According to the Innocence Project and Innocence Project New Orleans, non-unanimous jury verdicts increase the risk of wrongful

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[231] Brief for The Promise of Justice Initiative et al., *supra* note 44, at 12. PJI estimates: 37 defendants will likely be released from prison within the next five years, having served the majority of their sentence; 219 defendants are serving sentences for a habitual offender conviction, the most recent of which was non-unanimous; 43 defendants are serving simultaneous sentences for a unanimous conviction. [source]. Countless others will likely take a plea. *Id.* at 12–14.

[232] *Id.* at 15.

[233] *Id.*at 17–18.

[234] *Id.* at 17–18.

[235] In 2015, the average annual cost per inmate in Louisiana was $16,251, and state-wide prison expenditures were more than $622 million. *Prison Spending in 2015*, VERA INSTITUTE OF JUSTICE, https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends-prison-spending (last visited Jan. 1, 2022).

[236] *Edwards*, 141 S. Ct. at 1554 ("When previously convicted perpetrators of violent crimes go free merely because the evidence needed to conduct a retrial has become stale or is no longer available, the public suffers, as do the victims.").

[237] Teague v. Lane, 489 U.S. 288, 312 (1989) (quoting Desist v. United States, 394 U.S. 244, 262 (1969).

convictions by allowing convictions based on "very slim evidence," by shortening deliberation times, and by silencing the votes of Black jurors.[238] Because data on wrongful convictions began to emerge late in the practice's 120-year history,[239] it is impossible to know exactly how many people have been wrongfully convicted by non-unanimous juries in Louisiana. But, since 1990, of the 56 *known* exonerations in Louisiana, thirteen involved innocent men convicted by non-unanimous juries.[240] Those thirteen men spent a "combined 206 years and four months in Louisiana's prisons."[241] Efforts to identify and correct wrongful convictions have only scratched the surface.[242] Still, the National Registry of Exonerations shows that Louisiana has the second-highest per capita rate of exonerations of any state, and Orleans Parish[243] has the highest per capita rate of exonerations of any major metropolitan county.[244]

The Court also wrongfully assumed all crime victims oppose *Ramos* retroactivity. While some have spoken out against the retrying of cases,[245] others support granting retrials to those convicted by non-unanimous juries.[246] One victim, raped as a child by a man

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[238] Brief for Innocence Project New Orleans and The Innocence Project as Amici Curiae Supporting Petitioner at 4, Ramos v. Louisiana, 140 S. Ct. 1390 (2020) (No. 18-5924). [hereinafter Brief for Innocence Project New Orleans and The Innocence Project].

[239] *See id.*at 7.

[240] *Id.* at 5–9. Of the 56 exonerations, only 30 involved cases that were even eligible for non-unanimous jury verdicts because 15 were tried as capital cases and thus required unanimous jury verdicts, five were tried by a judge, four pled guilty, one person plead not guilty by reason of insanity, and one person was tried by a six-person jury which required unanimity. *Id.*

[241] *Id.* at 3.

[242] *See* Brief for The Promise of Justice Initiative et al., *supra* note 44, at 20–23.

[243] Orleans Parish is the county where the city of New Orleans is located.

[244] Brief for Innocence Project New Orleans and The Innocence Project, *supra* note 238, at 6.

[245] Matt Sledge, *Sweeping Project to Undo Split-Jury Convictions in New Orleans Hits Speed Bump*, NOLA.COM (July 7, 2021, 6:36 PM), https://www.nola.com/news/courts/article_41eae4a6-df4e-11eb-8aef-ebae8db4885a.html.

[246] Blake Paterson, *Legislation Granting Louisiana Inmates Convicted by Split Juries New Trials Temporarily Shelved*, THE ADVOC. (May 13, 2021, 4:18 PM), https://www.theadvocate.com/baton_rouge/news/article_d7d564e4-b421-

who was convicted by a non-unanimous jury, spoke in support of state legislation that would have granted him a new trial: "The possibility of him getting out of prison absolutely paralyzes me and would be trading his life sentence for mine, regardless of that I can't in good conscience teach my sons that we support the rule of law only when it doesn't potentially hurt us."[247]

Jermaine Hudson's case exemplifies how unreliable non-unanimous jury verdicts can be and the extent of the harm they have caused.[248] He was convicted by a ten-to-two jury of armed robbery.[249] At the time, he had a ten-month-old daughter and a two-week-old daughter.[250] After serving twenty-two years, his accuser came forward and admitted to fabricating the entire robbery.[251] The two dissenting jurors were right.[252] By the time the Supreme Court recognized that their votes mattered—that Mr. Hudson had a constitutional right for their votes to matter—it was twenty-two years too late.[253] Family members died while he sat in prison; he missed the chance to see his children grow up.[254]

B. *The Court's Elimination of the Watershed Exception was Unjustified and Exemplifies the Need to Overhaul the* Teague *Framework*

The main justification provided by the *Edwards* Court in refusing to apply *Ramos* retroactively—and in eliminating the exception for watershed rules of criminal procedure altogether—is the Court's perpetual refusal to hold any new rule of criminal procedure retroactive under *Teague*.[255] The majority pointed to a laun-

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11eb-b3f0-17c2da5a7193.html?utm_medium=social&utm_source=twitter&utm_campaign=user-share.

247 *Id.*

248 Matt Sledge, *New Orleans Man Freed After Accuser Says He Fabricated Robbery: 'I Have Been Tortured by the Lie I Told'*, NOLA.COM (Mar. 30, 2021, 4:00 AM), https://www.nola.com/news/courts/article_29f8c3e8-90e5-11eb-98a0-dff328f992d5.html.

249 *Id.*

250 *Id.*

251 *Id.*

252 *Id.*

253 *Id.*

254 *Id.*

255 *See* Edwards v. Vannoy, 141 S. Ct. 1547, 1557–58 (2020).

dry list of post-*Teague* cases where the Court declined to deem new rules watershed.[256] But, many of the cases cited affect sentencing[257] and thus cannot qualify as watershed under *Teague*'s exception, which must affect the jury's "determination of innocence or guilt."[258] Additionally, as the dissent aptly argued, none of the cases cited by the majority have all three of the factors that make *Ramos* watershed: its significance, its return to original meaning, and its role in preventing racial discrimination.[259] Finally, the most significant cases cited by the majority—*Mapp*,[260] *Miranda*,[261] *Batson*,[262] and *Duncan*[263]—were denied retroactive application before *Teague* became the controlling retroactivity framework.

The *Edwards* majority opinion shows the Court's willingness to abandon precedent for even the "sketchiest of reasons," without being asked to.[264] The Court's treatment of stare decisis is inconsistent at best.[265] Of course, the *Ramos* decision itself overturned

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[256] *Id.* at 1557 (citing Beard v. Banks, 542 U.S. 406, 408 (2004) (refusing to retroactively apply the rule from Mills v. Maryland, 486 U.S. 367, 384 (1988)); O'Dell v. Netherland, 521 U.S. 151, 153, (1997) (refusing to retroactively apply the rule from Simmons v. South Carolina, 512 U.S. 154, 156 (1994)); Lambrix v. Singletary, 520 U.S. 518, 539–40 (1997) (refusing to retroactively apply the rule from Espinosa v. Florida, 505 U.S. 1079, 1082 (1992)); Sawyer v. Smith, 497 U.S. 227, 229 (1990) (refusing to retroactively apply the rule from Caldwell v. Mississippi, 472 U.S. 320, 323 (1985))).

[257] *See supra* note 256. All of the rules cited therein affect sentencing.

[258] Teague v. Lane, 489 U.S. 288, 313 (1989).

[259] Edwards v. Vannoy, 141 S. Ct. 1547, 1579 (2021) (Kagan, J., dissenting).

[260] Mapp v. Ohio, 367 U.S. 643, 655 (1961) (incorporating the exclusionary rule against the states) (retroactivity denied by Linkletter v. Walker, 381 U.S. 618, 639–640 (1965)).

[261] Miranda v. Arizona, 384 U.S. 436, 444–445 (1966) (requiring law enforcement to inform people of their constitutional rights before a custodial interrogation) (retroactivity denied by Johnson v. New Jersey, 384 U.S. 719, 721 (1966)).

[262] Batson v. Kentucky, 476 U.S. 79, 92–94 (1986) (prohibiting state prosecutors from discriminating on the basis of race when striking jurors) (retroactivity denied by Allen v. Hardy, 478 U.S. 255, 261 (1986)).

[263] Duncan v. Louisiana, 391 U.S. 145, 161–62 (1968) (guaranteeing the right to a jury trial in state prosecutions) (retroactivity denied by DeStefano v. Woods, 392 U.S. 631, 635 (1968)).

[264] Edwards v. Vannoy, 141 S. Ct. 1547, 1580–81 (2021) (Kagan, J., dissenting).

[265] *Id.* (Kagan, J., dissenting).

precedent, but the *Ramos* opinion "also shows how high stare decisis sets the bar for overruling a prior decision . . . The [*Edwards*] majority crawls under, rather than leaps over, the stare decisis bar."[266] Instead of eliminating the sole aspect of *Teague* that accounted for the important constitutional rights of the accused, the Court should have overhauled the *Teague* framework entirely and adopted a retroactivity framework that values liberty over finality.

V. *DANFORTH V. MINNESOTA*, STATE HABEAS REVIEW, AND ALTERNATIVES TO *TEAGUE*

Several states have opted against following the *Teague* framework. The Supreme Court acknowledged, in *Danforth v. Minnesota*, that states are not required to follow *Teague* when reviewing their own convictions.[267] Yet most states follow *Teague*'s framework anyway, either fully or partially.[268] Five states, though, have opted out of the *Teague* framework—Alaska, Florida, Missouri, Utah, and West Virginia—and utilize a *Linkletter*-based test.[269]

The Florida Supreme Court's decision to use a *Linkletter* framework sought to balance the interests of defendants against the state's interest in finality.[270] The court held that the doctrine of finality can be abridged "when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications."[271] For example, before the United States Supreme Court handed down its decision in *Montgomery v. Louisiana*, the Florida Supreme Court applied the holding of *Miller v. Alabama* retroactively and decided to resentence juveniles who received sentences of mandatory life without the possibility of parole, regard-

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[266] *Id.* at 1580 (Kagan, J., dissenting).

[267] Danforth v. Minnesota, 552 U.S. 264, 282 (2008) ("[T]he *Teague* decision limits the kinds of constitutional violations that will entitle an individual to relief on federal habeas, but does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed 'nonretroactive' under *Teague*.").

[268] Brief for the United States as Amicus Curiae Supporting Petitioner at 4a–6a, Montgomery v. Louisiana, 577 U.S. 190 (2016).

[269] *Id.* at 10a.

[270] *See* Witt v. State, 387 So. 2d 922, 925 (Fla. 1980).

[271] *Id.*

less of whether their convictions had already become final.[272] The Florida court reaffirmed its commitment to its retroactivity framework that outlined two categories of rules that receive retroactive application: (1) substantive rules and (2) "changes of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test" under *Linkletter* and *Stovall*.[273] Ultimately, the court determined that *Miller* announced a substantive law—just as the United States Supreme Court would decide a few months later[274]—and did not reach the question of whether the rule met the *Linkletter*/*Stovall* test.[275] However, the court reinforced its commitment to the *Linkletter*/*Stovall* test, explaining that "[c]onsiderations of fairness and uniformity make it very 'difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases.'"[276] Failing to apply *Miller* retroactively, the court reasoned, would give defendants with "indistinguishable cases" different sentences: "[t]he patent unfairness of depriving indistinguishable juvenile offenders of their liberty for the rest of their lives, based solely on when their cases were decided, weighs heavily in favor of applying the Supreme Court's decision in *Miller* retroactively."[277] That reasoning underscores *Teague*'s biggest flaw: defendants with indistinguishable cases can receive vastly different outcomes based solely on when their case was decided.[278] Similarly, leaving it up to states to decide whether or not to apply a less draconian retroactivity framework than *Teague* means defendants with indistinguishable cases can receive vastly different outcomes based solely on where their case was decided.

For *Ramos* defendants, Louisiana has thus far opted to follow *Teague* fully[279] and Oregon has chosen to apply *Teague* to decide

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272 Falcon v. State, 162 So. 3d 954, 962–64 (Fla. 2015).

273 *Id.* at 961.

274 Montgomery v. Louisiana, 577 U.S. 190, 212 (2016).

275 *Falcon*, 162 So. 3d at 962.

276 *Id.* at 960 (citing *Witt*, 387 So. 2d at 925).

277 *Id.* at 962.

278 *See id.*

279 State ex rel. Taylor v. Whitley, 606 So. 2d 1292, 1296–97 (La. 1992). On February 15, 2022, the Louisiana Supreme Court granted cert to decide whether the state will apply *Ramos* retroactively. *State v. Reddick*, 2021-01893 (La. 02/15/22). The question presented is whether split-jury verdicts apply retroac-

retroactivity of federal rules but apply a state test for state rules.[280] Different outcomes in each state could leave some defendants imprisoned by a Jim Crow-era practice while granting other similarly situated defendants relief. In 2020, then-Louisiana Supreme Court Chief Justice Bernette Johnson urged the Court to abandon the *Teague* framework of retroactivity in favor of a framework that accounts for the harm caused by a previous rule:

> The importance of the *Ramos* decision—and the historic symbolism of the law that it struck—present the opportunity to reassess *Taylor* and the wisdom of Louisiana using the *Teague* standard in retroactivity analysis. We should. The original purpose of the non-unanimous jury law, its continued use, and the disproportionate and detrimental impact it has had on African American citizens for 120 years is *Louisiana*'s history.[281]

The current *Teague* doctrine—now without even an exception for watershed rules of criminal procedure—leaves it up to states to afford any weight to the interests of criminal defendants.[282] As retired Chief Justice Johnson articulated, *Ramos* demonstrates the importance of having a retroactivity doctrine that accounts for the racist origins or the harm done by a previous rule.[283]

In replacing *Linkletter*, the *Teague* Court reasoned that "[t]he fact that life and liberty are at stake in criminal prosecutions 'shows only that "conventional notions of finality" should not have *as much* place in criminal as in civil litigation, not that they should have *none*.'"[284] But under *Teague*, finality has become the sole

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tively under the state constitution. John Simerman, *Louisiana Supreme Court Will Consider Whether Ban on Split-Jury Verdicts is Retroactive*, NOLA.COM (Feb. 15, 2022, 4:47 PM), https://www.nola.com/news/courts/article_3ac04e2c-8e9f-11ec-8399-ebdb4c350091.html. It is unclear whether the Louisiana Supreme Court will reconsider its decision in *Taylor* to fully follow *Teague*.

280 Page v. Palmateer, 84 P.3d 133, 136–37 (Or. 2004).

281 State v. Gipson, 296 So. 3d at 1054–55 (Johnson, C.J., dissenting).

282 *See* Deutsch, *supra* note 17, at 63–64.

283 *Gipson*, 296 So. 3d at 1054–55 (Johnson, C.J., dissenting).

284 Teague v. Lane, 489 U.S. 288, 309 (1989) (quoting Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. CHI. L. REV. 142, 150 (1970)).

remaining consideration, with little regard for the life or liberty at stake.[285] There are two alternatives the Court should consider. First, the Court can revert to a pre-*Linkletter* standard, with a presumption of applying new rules retroactively.[286] That retroactivity framework would embrace a Blackstonian view of the law: that judges are discoverers of the law and thus, overruling decisions are merely an application of what "is, and theretofore had been, the true law."[287] That presumption of retroactivity could be rebutted by a state's assertion, supported by evidence, that retroactive application of a new rule would impose an impossible burden on state resources.

Alternatively, the Court could revert back to the *Linkletter* standard, directing courts to weigh "merits and demerits of each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."[288] Such a standard could account for the racist history of a prior rule, as former Louisiana Chief Justice Johnson urged.[289] A case-by-case, or rule-by-rule, determination of retroactivity that weighs the costs and benefits of retroactive application of new rules of criminal law would allow courts to consider the harm done to criminal defendants by an old rule and weigh that harm against the state's interest in finality. The criticism of the *Linkletter* standard was that it had "not led to consistent results"[290] and led "to the disparate treatment of similarly situated defendants" on direct and collateral review.[291] *Teague* has suffered the same fate. By implementing a distinction between cases on direct and collateral review, factors like time, lawyering skills, and duration of state procedures affect whether a defendant benefits from a new constitutional rule.[292] And by leaving it up to states to choose to adopt a less draconian retroactivity framework, the state of a defendant's conviction could mean the difference between a new

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285 Lasch, *supra* note 209, at 56–57, 61.
286 *See* Linkletter v. Walker, 381 U.S. 618, 628 (1965).
287 *See id.* at 623.
288 *Id.* at 629.
289 *Gipson*, 296 So. 3d at 1054–55 (Johnson, C.J., dissenting).
290 *Teague*, 489 U.S. at 302.
291 *Id.* at 303, 305.
292 Deutsch, *supra* note 17, at 61.

constitutional trial and life in prison. A case-by-case analysis, as implemented under *Linkletter*, would better balance the state's interests in finality against a defendant's interest in life, liberty, and constitutional rights. A *Linkletter* standard would not burden states' resources; in fact, a number of key cases—*Mapp*, *Miranda*, *Batson*, and *Duncan*—were denied retroactive application under the *Linkletter*/*Stovall* regime.[293]

CONCLUSION

Writing for the majority in *Ramos*, Justice Gorsuch said: "[e]very judge must learn to live with the fact he or she will make some mistakes; it comes with the territory. But it is something else entirely to perpetuate something we all know to be wrong only because we fear the consequences of being right."[294] The *Edwards* opinion failed to live up to those words, perpetuating and affirming convictions known to be wrong, known to be racist in origin and impact, and known to violate one of the most fundamental constitutional rights.[295] Why? Because the Court previously failed to correct prior harms by refusing to hold other criminal rules retroactive.[296]

The *Edwards* opinion not only highlights the flaws of *Teague*'s retroactivity framework, it exacerbates it by eliminating the exception for watershed rules of criminal procedure—the sole piece of the doctrine that accounted for the fairness and accuracy of the underlying trial.[297] The *Teague* retroactivity framework fails to account for the racist origins or impacts of a previous rule of criminal law, puts too much weight on states' interests in the finality of convictions, and ignores the importance of the constitutional rights at stake.[298] Now, even the false promise of retroactivity is gone.

To acknowledge this country's racist past (and present) and correct the harms of systemic inequality, the Court ought to adopt a Blackstonian theory of the law by treating racist precedent as

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293 *See supra* notes 260–263.
294 Ramos v. Louisiana, 140 S. Ct. 1390, 1408 (2020).
295 *Id.* at 1394–95.
296 *See* Edwards v. Vannoy, 141 S. Ct. 1547, 1557–58 (2021).
297 *See supra* section IV.
298 *See supra* section IV.

though it was never law.[299] Under that view, an unconstitutional act "confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."[300] Convictions by non-unanimous juries are—as we now know—unconstitutional acts.[301] They should have no legal significance, regardless of procedural posture. Yet, the people convicted by unreliable, unconstitutional Jim Crow juries largely remain in prison.[302] "If the right to a unanimous jury is so fundamental—if a verdict rendered by a divided jury is 'no verdict at all'—then Thedrick Edwards should not spend his life behind bars over two jurors' opposition."[303]

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[299] *See* Linkletter v. Walker, 381 U.S. 618, 622–23 (1965) (citing Norton v. Shelby County, 118 U.S. 425, 442 (1886)).

[300] *Id.* (quoting *Norton*, 118 U.S. at 442).

[301] Ramos v. Louisiana, 140 S. Ct. 1390, 1408 (2020).

[302] Nicholas Chrastil, *Legislature Creates Task Force to Consider Relief for People Still in Prison on Non-unanimous Jury Convictions*, THE LENS (June 11, 2021), https://thelensnola.org/2021/06/11/legislature-creates-task-force-to-consider-relief-for-people-still-in-prison-on-non-unanimous-jury-convictions/.

[303] Edwards v. Vannoy, 141 S. Ct. 1547, 1508 (2021) (Kagan, J., dissenting) (quoting *Ramos*, 140 S. Ct. at 1395).