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State Courts Must Combat Mass Incarceration by Granting Broader Retroactivity to New Rules Than is Provided Under the Federal Teague v. Lane Test

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STATE COURTS MUST COMBAT MASS INCARCERATION BY GRANTING BROADER RETROACTIVITY TO NEW RULES THAN IS PROVIDED UNDER THE FEDERAL *TEAGUE V. LANE* TEST

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INTRODUCTION

The United States causes significant damage to its residents through its excessive use of incarceration, the burden of which falls particularly heavily on Black, Indigenous, and People of Color (BIPOC) communities. Today, 2.3 million people are incarcerated in the nation's prisons and jails, and the country leads the world in its rate of incarceration. However, over the last 15 years, states and the federal government invested significant resources in legislative measures aiming to lower this astronomical incarceration rate. Since 2007, at least thirty-five states have passed legislative reforms targeting their sentencing and corrections policies with assistance through the Justice Reinvestment Initiative. This public-private partnership includes the U.S. Justice Department's Bureau of Justice Assistance, The Pew Charitable Trusts, the Council of State Governments Justice Center, the Crime and Justice Institute, and other organizations.[1] These efforts have been driven, at least in part, by a recognition that mass incarceration has significant negative impacts on society, including injuries to liberty, medical and mental health, education, family unity, and taxpayers.[2] These efforts have also been driven by a belief that prisons incarcerate people who should not be incarcerated, either by incarcerating people whose incarceration was not required or incarcerating people for too long.

Courts have not been sufficiently active participants in such reforms because they have left one valuable tool in the toolbox unused—the retroactivity of new rules to past convictions. Historically, rules of law were applied to conduct or activities that occurred in the past.[3] However, now

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[1] COUNCIL OF STATE GOVERNMENTS, *Justice Reinvestment: Reinvest in What Works*, https://csgjusticecenter.org/projects/justice-reinvestment [https://perma.cc/D9WF-3CDN] (last visited July 16, 2020); PEW CHARITABLE TRUSTS, PUBLIC SAFETY PERFORMANCE PROJECT, https://www.pewtrusts.org/en/projects/public-safety-performance-project/about [https://perma.cc/48PH-T4R5] (last accessed August 5, 2020).

[2] COUNCIL OF STATE GOVERNMENTS, JUSTICE REINVESTMENT: REINVEST IN WHAT WORKS, https://csgjusticecenter.org/projects/justice-reinvestment/ [https://perma.cc/D9WF-3CDN] (last accessed August 5, 2020); NANCY LA VIGNE, URBAN INST., JUSTICE REINVESTMENT INITIATIVE: EXPERIENCES FROM THE STATES 1–5 (2013).

[3] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS, VOL. 1, 69 (15th ed. 1809); *see* Chevron Oil Co. v. Huson, 404 U.S. 97, 106 (1971); Allen v. State Bd. of Elections, 393 U.S. 544, 572 (1969); Hanover Shoe v. United Shoe Mach., 392 U.S.

when an appellate court announces a rule that it considers "new," federal courts use the *Teague* test—set out by the United States Supreme Court in 1989—to decide whether to invalidate final convictions.[4] The narrow exceptions under *Teague* are notoriously stringent, denying any relief to many who are incarcerated because of convictions subsequently found to have been obtained in violation of the Constitution. Although the Supreme Court set forth this strict test, it subsequently made clear in *Danforth v. Minnesota* that *Teague* provides a floor and not a ceiling, such that states can choose to put in place their own tests to balance the interests of their states.[5] As a result, the injuries caused by incarceration have become clearer and state specific, and the desire to remedy these harms has become overwhelming.[6] It is therefore time to rethink some of the rationales that limit the application of criminal appellate decisions in ways that keep people with final convictions from obtaining relief.

This article argues that state courts should examine their states' interest in reforming mass incarceration and revive the courts' historical authority to more liberally make appellate decisions retroactive—in particular, decisions that establish constitutional defects in criminal trials. This liberal retroactivity power can create a mechanism for people incarcerated contrary to the Constitution to return home to their communities. Doing so will help lessen the country's reliance on prisons, undo the harm resulting from unconstitutional sentences courts were complicit in enforcing, and make the system the courts uphold a more honest mechanism of justice. To demonstrate the importance and possible application of this shift, this article will examine retroactivity in the context of a vestige of Louisiana's racist criminal system: non-unanimous juries.

I. THE ROAD TO MODERN RETROACTIVITY

Credit must be given to the many who have grappled with the long and winding history of retroactivity in the United States courts. The history of retroactivity jurisprudence has been thoroughly covered by previous

481, 496 (1968); Simpson v. Union Oil Co. of Cal., 377 U.S. 13, 25 (1964) (collectively holding that there are some narrow circumstances in which the equities may justify non-retroactivity).

[4] *See* Teague v. Lane, 489 U.S. 288 (1989); Welch v. United States, 136 S. Ct. 1257, 1259 (2016).

[5] Danforth v. Minnesota, 552 U.S. 264, 266 (2008).

[6] *Id.*

scholars.[7] This article makes only brief reference to that history to contextualize the argument that state courts must proactively reclaim their power to declare new rules retroactive.

Under English law, in which the United States judicial system claims its roots, all judicial decisions were retroactive.[8] Such an approach made sense. As originally conceived, courts did not make new law, they merely declared what was existing law. As such, "new" declarations applied to everyone, even if the case was final.[9] It was not the law that changed, but rather our understanding of the law.

The birth of non-retroactivity as a rule is a relatively recent phenomenon. The rule began as an effort to clamp down on inter-system review of state convictions by federal courts. It was further propelled by states' intense negative reactions to incorporating the Bill of Rights, and was eventually solidified in the effort to curtail the effects of the newly announced exclusionary rule.[10] After grappling with the formulation of the rule for many years, *Teague* was born, declaring that a new rule would not retroactively apply to final convictions unless it fell into one of two narrowly defined categories:[11] substantive constitutional rules,[12] or watershed rules of criminal procedure.[13] The change from retroactive application to nearly complete prospective application is best conceptualized as a policy decision aimed at protecting state convictions from federal review, no matter how much a state conviction offended the federal Constitution. In striking what others have

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[7] See 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, 6 n.18 (2009) (collecting articles) for a full history of retroactivity jurisprudence.

[8] *Id*. at 10–11; Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910) (Holmes, J., dissenting) ("Judicial decisions have had retrospective operation for nearly a thousand years."). Retroactivity, as used in this Article, refers to the application of a ruling by an appellate court regarding a defect in a conviction to allow people with final convictions to obtain either a new trial or a resentencing because those people share the same defect.

[9] See Christopher M. Smith, Schriro v. Summerlin: *A Fatal Accident of Timing*, 54 DEPAUL L. REV. 1325, 1328 (2005).

[10] *See* Lasch, *supra* note 7, at 3–5 (figures concerning lifespan of a typical state and federal criminal case); *see also* Smith, *supra* note 9, at 1328 n.35 (discussing Sir William Blackstone's position that decisions are inherently retroactive).

[11] *See* Kermit Roosevelt III, *A Retroactivity Retrospective, With Thoughts for the Future: What the Supreme Court Learned from Paul Mishkin, and What it Might*, 95 CAL. L. REV. 1677, 1694 (2007) (noting that so narrow are these categories that rules are rarely found to be retroactive).

[12] *Id.* at 126 (defining substantive constitutional rules as laws that placed "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe").

[13] Teague v. Lane, 489 U.S. 288, 311 (1989).

called an epistemologically unsound "Faustian bargain,"[14] the Court created in *Danforth* an escape hatch that reflected the roots of *Teague*'s creation. In holding that states could adopt their own retroactivity standard, the *Danforth* Court recognized that when the U.S. Supreme Court adopted *Teague*, it did so in recognition of the states' twin interests: comity and finality.[15]

II. STATES SHOULD USE THE AUTHORITY CONFIRMED BY *DANFORTH* TO CREATE NEW TESTS FOR APPLYING NEW RULES OF CRIMINAL PROCEDURE RETROACTIVELY TO MEET STATE INTERESTS

Critiques of *Teague* are legion.[16] Less common, but still present, are proposed alternatives to the *Teague* test.[17] However, even though *Teague* is a fraught test foisted on state courts to protect their own interests, few have seized the opportunity to adopt their own standards for determining when new rules will be retroactive to cases already final on direct appeal. Neither comity nor finality—the primary aims that justified *Teague*'s retreat from retroactivity—are persuasive reasons for a state to continue using the test. Moreover, when state courts adopt *Teague*, they unnecessarily deny themselves a tool to affect their state's criminal justice jurisprudence and landscape.

A. COMITY IS INAPPLICABLE TO STATES REVIEWING THEIR OWN STATE CONVICTIONS

As the Supreme Court clarified, nearly two decades after announcing its retroactivity standard, the premise underlying *Teague* was the federal court's limited authority to overturn final state convictions.[18] This concern should not enter into a state's analysis when considering which retroactivity standard to adopt, as the premise is inapplicable to states reviewing their own convictions. States have their own power to craft the laws and remedies that apply to their citizens, so long as those laws and remedies rise above the federal constitutional floor. *Danforth* granted the states authority to fashion their own retroactivity standard explicitly, because states differ in how they

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[14] *See* Lasch, *supra* note 7, at 5, 12.

[15] Danforth v. Minnesota, 552 U.S. 264, 279 (2008) (citing *Teague*, 489 U.S. at 306).

[16] *See* Lasch, *supra* note 7, at 6, n. 18 (collecting articles).

[17] Some of the alternatives to *Teague* proposed or adopted include pipeline retroactivity. *See, e.g.*, State v. Natale, 878 A.2d 724, 744 (N.J. 2005); *Linkletter-Stovall* test. *See*, People v. Barnes, 917 N.W.2d 577, 583 (Mich. 2018) ; liberal application of *Teague*. *See* State v. Mares, 335 P.3d 487, 504 (Wyo. 2014) *see also* Christopher M. Smith, Schriro v. Summerlin: *A Fatal Accident of Timing*, 54 DePaul L. Rev. 1325, 1362–69 (2005) (discussing retroactivity for death penalty cases).

[18] *Danforth*, 552 U.S. at 279–81.

define crimes, authorize punishment, and construct rules of evidence and criminal procedure. "States are independent sovereigns with plenary authority to make and enforce their own laws as long as they do not infringe on federal constitutional guarantees."[19] This premise, born from notions of comity and federalism cannot apply to states reviewing their own state convictions.[20] As such, the Court clarified that states were free to "provide remedies for a broader range of constitutional violations than are redressable on federal habeas."[21] One of the twin aims of *Teague*—comity—cannot justify a state's continued allegiance.[22]

Moreover, the potential for federal overreach into state convictions has been significantly curtailed since the passage of the Anti-Terrorism and Effective Death Penalty Act (AEDPA). AEDPA, by instituting strict standards of review that federal courts must obey when considering state convictions, has deeply circumscribed the federal courts' involvement in—and power to vacate—convictions secured by the states.[23] Continuing to employ *Teague* to blunt the impact of federal review cannot justify maintaining it. Not only does one of *Teague*'s aims not apply to states, but, as federal review becomes more impotent, *Teague* is arguably no longer necessary to protect state law convictions in federal courts.

B. THE CONCEPT OF FINALITY SHOULD HAVE A MINIMAL ROLE IN A STATE COURT'S INTEREST IN RETROACTIVITY

It has been said that "[f]inality in the criminal law is an end which must always be kept in plain view."[24] The *Teague* court called it "essential to the operation of our criminal justice system."[25] "Without finality, the criminal law is deprived of much of its deterrent effect."[26] Conceptually, this was so states would not have to gather their resources to relitigate a conviction after it was final.[27] The world has changed significantly since 1989 when *Teague* was decided. Today, the resources that may be spent by a state to relitigate a

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[19] *Id*. at 280.

[20] *Id.* at 279 ("Federalism and comity considerations are unique to *federal* habeas review of state convictions."); *see also* Louisiana *ex rel.* Taylor v. Whitley, 606 So. 2d 1292, 1301 (La. 1992) (Calogero, C.J., dissenting); Louisiana v. Gipson, 296 So. 3d 1051, 1054 (La. 2020); Rhoades v. Idaho, 233 P.3d 61, 68 (Idaho 2010).

[21] *Danforth*, 552 U.S. at 275, 277, 280–81, 288.

[22] *See also* Lasch, *supra* note 7, at 18–19.

[23] *See* Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443 (2007).

[24] Mackey v. United States, 401 U.S. 667, 690 (1971).

[25] Teague v. Lane, 489 U.S. 288, 309 (1989).

[26] *Id*. at 309.

[27] *Id*.

claim often pale in comparison to the cost of continuing to incarcerate a person convicted in a manner found to violate the Constitution.

The Bureau of Justice Statistics estimates that the United States spends more than $80 billion each year to keep roughly 2.3 million people behind bars. Many experts believe that figure is a gross underestimate, though, because it leaves out myriad hidden costs that are often borne by prisoners and their loved ones, with women overwhelmingly shouldering the financial burden.[28] These costs vary dramatically from state to state, but for many states retroactive application of rules may have an economic benefit to taxpayers and criminal justice systems.

Stepping away from the reality that a rule granting retroactivity narrowly is not likely to actually conserve resources, at the heart of this rule is a balancing question: what are the lives of incarcerated people worth when balanced against the expenses of relitigating an unconstitutional conviction? And what does it say that, in a system where the majority of people incarcerated are BIPOC, our courts value conserving the cost of additional litigation over the lives of those incarcerated in violation of our Constitution? Considering that the U.S. is no stranger to spending money (and that providing relief through retroactivity could save money) that so many state courts hew to the *Teague* test prompts the disturbing conclusion that state courts prioritize maintaining rules over just results—simplicity over fairness; ease over complexity; white comfort over BIPOC bodies. The state courts prioritize the *fear* of too much justice over real justice for BIPOC.

C. THERE IS NO GOOD REASON FOR STATES TO USE TEAGUE

Given *Teague*'s aims and its dubious application to states deciding redressability of a harm occasioned by their own conviction, there remains little reason for states to use *Teague*. In adhering to *Teague*, states sacrifice their own participation in doctrinal development, an important avenue for criminal justice reform, and forfeit crafting retroactivity principles tailored to their unique needs.

Strictly adhering to *Teague* restricts states' participation in doctrinal development in two ways. First, as detailed by Christopher Lasch in *The Future of Retroactivity*, the first time many state courts face important criminal justice issues—such as ineffective assistance of counsel and unlawful withholding of evidence by the State—is in post-conviction proceedings. But in treating retroactivity as a threshold issue, state courts

[28] Nicole Lewis & Beatrix Lockwood, *The Hidden Costs of Incarceration*, MARSHALL PROJECT (Dec. 17, 2019, 5:00 AM), https://www.themarshallproject.org/2019/12/17/the-hidden-cost-of-incarceration [https://perma.cc/AXK7-DL5Y].

often dispose of important constitutional issues without the benefit of rigorous debate and without issuing guidance for lower courts. In doing so, state courts have cut themselves out of the process of developing jurisprudence on these important issues.[29] There is good reason for states to contribute to developing legal doctrine: states have different histories, face unique problems, and can be laboratories for creative solutions that serve their populations' particular needs. States are also arguably more in tune with groundswells that catalyze change. But "*Teague* provides no incentive to the state courts . . . to do anything but apply current doctrine in a mindless and mechanical fashion."[30]

Second, in adopting *Teague* wholesale, states forgo grappling with the complex responsibility of according justice to their citizens and avoid coming to grips with the bargains they have struck. Instead, states take the mental shortcut of relying on the federal retroactivity standard instead of discerning a standard tailored to their unique laws and problems. Following *Teague* cripples states and defeats the very principle the *Teague* Court tried to advance. As Louisiana Supreme Court Justice Calogero pointed out in his dissent when Louisiana adopted *Teague*: "the majority's replication of the United States Supreme Court's rule in this area does not promote the goals of federalism; instead, in self-defeating circularity, the majority blindly replicates the very federal habeas rule by which the High Court attempts to accord comity to our state laws and decisions."[31] Sadly, after *Danforth,* most state courts considering the issue have only paid lip-service to their power to determine how to apply new rules to final convictions—and then left this authority unclaimed. Analysis of many states' retroactivity opinions "tend only to the conclusion that their results are dictated less by law and reason than by expedient judicial administration."[32] As proof, most states have adopted a strict construction of *Teague* post-*Danforth* with little to no discussion of their unique criminal justice landscape.[33] On the other hand,

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[29] Lasch, *supra* note 7, at 22–23 (2009).

[30] Smith, *supra* note 9, at 1366 (2005) (quoting 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, 242 (1998)).

[31] Louisiana *ex rel.* Taylor v. Whitley, 606 So. 2d 1292, 1303 (La. 1992) (Calogero, C.J., dissenting).

[32] *Id*. at 1296.

[33] Alabama (*see* Acra v. State, 105 So. 3d 460, 466 (Ala. 2012); Ferguson v. State, 13 So. 3d 418, 429–31 (Ala. Crim. App. 2008)); Alaska (*see* Charles v. State, 287 P.3d 779, 787 (Alaska Ct. App. 2012)); Arizona (*see* State v. Mills, No. 2 CA-CR 2008-0200-PR, 2008 WL 5048433, at *2 (Ct. App. Nov. 25, 2008)); Colorado (People v. Tate, 352 P.3d 959, 970–71 (Colo. 2015); Connecticut (Dyous v. Comm'r of Mental Health & Addiction Servs., 151 A.3d

states that claim their post-*Danforth* authority engage in a more searching, state-specific inquiry, taking into account a variety of factors, considering the uniqueness of their state, and making independent judgements about how to best achieve a just result.[34] States should claim their rightful place in the landscape of doctrinal development and chart their own path forward, taking into account the unique criminal justice issues faced by their state.

1247, 1253 (Conn. 2016)); Idaho (Fields v. State, 234 P.3d 723, 725 (Idaho 2010)); Illinois (People v. Davis, 6 N.E.3d 709, 720–21 (Ill. 2014)); Indiana (Membres v. State, 889 N.E.2d 265, 272–73 (Ind. 2008)); Iowa (Thongvanh v. State, 938 N.W.2d 2, 11–12 (Iowa 2020)); Kentucky (Leonard v. Commonwealth, 279 S.W.3d 151, 160 (Ky. 2009)); Massachusetts (Diatchenko v. Dist. Att'y Suffolk Cnty., 1 N.E.3d 270, 278 (Mass. 2013)); Minnesota (Danforth v. State, 761 N.W.2d 493, 498 (Minn. 2009)); Mississippi (Carr v. State, 178 So. 3d 320, 322 (Miss. 2015)); Montana (Beach v. State, 348 P.3d 629, 636 (Mont. 2015)); Nebraska (State v. Mantich, 842 N.W.2d 716, 724 (Neb. 2014)); Nevada (Ennis v. State, 137 P.3d 1095, 1099–100 (Nev. 2006)); New Mexico (Ramirez v. State, 333 P.3d 240, 244 (N.M. 2014)); New York (People v. Chacko, 119 A.D.3d 955, 955, 989 (N.Y. App. Div. 2014)); Ohio (State v. Bishop, 7 N.E.3d 605, 610 (Ohio Ct. App. 2014)); Pennsylvania (Commonwealth v. Washington, 142 A.3d 810, 816–17 (Pa. 2016)); South Carolina (Aiken v. Byars, 765 S.E.2d 572, 575 (S.C. 2014)); South Dakota (Siers v. Weber, 851 N.W.2d 731, 742–43 (S.D. 2014)); Tennessee (Bush v. State, 428 S.W.3d 1, 20 (Tenn. 2014)); Texas (*Ex parte* De Los Reyes, 392 S.W.3d 675, 679 (Tex. Crim. App. 2013)); Vermont (*In re* Barber, 195 A.3d 364, 369 (Vt. 2018)); Washington (*In re* Pers. Restraint of Colbert, 380 P.3d 504, 509 (Wash. 2016)).

[34] *See In re Brown*, 259 Cal. Rptr. 3d 56, 71 (Cal. Ct. App. 2020) (the state retroactivity standard considers "'(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.'" (quoting *In re* Lucero, 132 Cal. Rptr. 3d 499, 505 (Cal. Ct. App. 2011)); State v. Whitfield, 107 S.W.3d 253, 267 (Mo. 2013), *overruled on other grounds by* State v. Wood, 580 S.W.3d 566 (Mo. 2019) (stating that "the [*Linkletter-Stovall*] test permits [the Missouri Supreme Court] to consider the particular facts and legal issues relevant to the specific issue before the Court"); Verduzco v. State, 355 P.3d 902, 908 (Or. 2015) (acknowledging its authority post-*Danforth* to freely determine when new federal rule should be applied retroactively and noting that "[s]uch determinations can include a consideration of the state's interest in the finality of convictions, the effect of the new federal right on the validity of the conviction, the need for predictable retroactivity rules, and the value of additional review") (citation omitted); Wyoming v. Mares, 335 P.3d 487, 503 (Wyo. 2014) (holding that "the decisions of the courts of this state whether to give retroactive effect to a rule of law should reflect independent judgment, based upon the concerns of this Court and the 'uniqueness of our state, our Constitution, and our long-standing jurisprudence'") (citation omitted); Rhoades v. State, 233 P.3d 61, 70 (Idaho 2010) (same); State v. Jess, 184 P.3d 133, 153 (Haw. 2008) (noting the various permutations of retroactivity it is permitted to apply); State v. Kennedy, 735 S.E.2d 905, 923–24 (W. Va. 2012) (adopting a more liberal version of *Teague*).

III. STATES SHOULD ADOPT TESTS FOR RETROACTIVITY THAT REFLECT THEIR UNIQUE PROBLEMS IN THE ADMINISTRATION OF JUSTICE

As the history of how retroactivity was curtailed reveals, limiting the retroactive application of new judicial pronouncements had nothing to do with the Court's opinion that errors of constitutional magnitude are committed (and that it was the Court's job to remedy that wrong), and everything to do with the practical implications of according relief. As the *Danforth* Court found, "[a] decision by this Court that a new rule does not apply retroactively under *Teague* does not imply that there was no right and thus no violation of that right at the time of trial—only that no remedy will be provided in federal habeas courts."[35] States have the burden and the obligation to remedy the wrongs they have perpetuated. It is each *state* that will feel the burden of granting a remedy to those unconstitutionally convicted and imprisoned under the laws of that state.[36] Each *state* will also bear the consequences of failing to grant a remedy. Thus, the decision to provide a remedy beyond what the United States Supreme Court will provide, is best left with the states, which will feel the burden, but can also claim the power, of remedying past wrongs. The decision of whether to afford a remedy to an individual whose constitutional rights were violated by the judicial system should result from a searching reflection of the state's unique interests and values. As we have seen, the decision to grant retroactive application to a new rule can have a profound impact on the criminal justice system and has the power to embody important values. After all, the Supreme Court's decision to grant retroactive effect to their decision in *Atkins v. Virginia*, which held unconstitutional the execution of the intellectually disabled, did more than just spare the lives of condemned men and women, it evidenced our nation's advancing understanding of how the criminal justice system should accord dignity in punishment.[37] Similarly, the Supreme Court's decision banning mandatory life in prison without the possibility of parole for juveniles gave a future to men and women imprisoned as children, but it also affirmed our country's belief that the criminal justice system could be an institution of redemption and hope.[38] What the justice system communicates, both in its substantive decisions and in its choices about how to remedy harms, has the power to shape expectations, policy, and public confidence in the system. As such, each state's retroactivity inquiry should embody the particular criminal justice issues faced by that state, its

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[35] Danforth v. Minnesota, 552 U.S. 264, 291 (2008).

[36] Louisiana *ex rel.* Taylor v. Whitley, 606 So. 2d 1292, 1302 (La. 1992) (Calogero, C.J., dissenting).

[37] Atkins v. Virginia, 536 U.S. 304 (2002).

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

commitment to remedying past harms, and its goals for the future administration of justice.

IV. JIM CROW JURIES: A LOUISIANA CASE STUDY ON THE IMPORT OF A STATE RETROACTIVITY STANDARD

Louisiana is a state that should be particularly invested in its own decision-making regarding retroactivity because of its historic and present challenges with incarceration and the unique opportunity with which it is faced. In the 2019 term, the U.S. Supreme Court decided *Ramos v. Louisiana*, a ruling that could apply to approximately 1,600 people with final convictions in the State of Louisiana.[39] As of this writing, the United States Supreme Court is considering arguments about the retroactive application of *Ramos*. Even if the Supreme Court decides not to apply *Ramos* retroactively, Louisiana's racist past, its mammoth (mostly BIPOC) prison population, and its desire for reform, compel its state courts to envision a new way to decide retroactivity.[40]

A. LOUISIANA FACES UNIQUE CHALLENGES IN ITS CRIMINAL JUSTICE SYSTEM, MANY BORN DIRECTLY FROM THE STATE'S HISTORY WITH SLAVERY AND THE DECADES THAT FOLLOWED

Before the Civil War, about half of Louisiana's population was enslaved[41] and its prison population was predominantly white.[42] After slavery was abolished, Louisiana lawmakers enacted discriminatory laws aimed at re-enslaving freed Blacks, which contributed to a demographic change in Louisiana prisons.[43] The abolition of antebellum slavery

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[39] Brief of Amici Curiae the Promise of Justice Initiative, the Louisiana Association of Criminal Defense Lawyers, and the Orleans Public Defenders at 11, Edwards v. Vannoy, 140 S. Ct. 2737 (2020) (No. 19-5807), 2020 WL 4450431.

[40] It is possible that the U.S. Supreme Court will find that *Ramos* did not announce a new rule, while *Teague* only applies to "new rules." *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1437 (2020) (Alito, J., dissenting) ("*Teague* applies only to a 'new rule,' and the positions taken by some in the majority may lead to the conclusion that the rule announced today is an old rule.").

[41] U.S. CENSUS BUREAU, 1860 CENSUS: POPULATION OF THE UNITED STATES, (Jan. 16, 2018), https://www.census.gov/library/publications/1864/dec/1860a.html [https://perma.cc/WM33-KB7V].

[42] THOMAS AIELLO, JIM CROW'S LAST STAND: NONUNANIMOUS CRIMINAL JURY VERDICTS IN LOUISIANA 10 (2015); 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, 594–95 (2016) ("The number of imprisoned African Americans increased from less than one percent before 1861 to as much as ninety percent in certain counties and states after 1865.").

[43] Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 942 (2019).

transformed the penitentiary into a majority-Black institution, and also shifted the labor in Louisiana prisons from industrial to plantation work—bestowing control over newly freed Black populations to White legislators.[44] For instance, state lawmakers passed a law that provided that "'every adult freed man or woman shall furnish themselves with a comfortable home and visible means of support within twenty days'" after the passage of that law.[45] Black Louisianans were "immediately arrested by any sheriff or constable . . . and . . . hired out . . . to some citizen, being the highest bidder, for the remainder of the year" if they failed to find housing or employment.[46] Further contributing to this demographic shift in Louisiana prisons were local Black Codes such as one passed in Opelousas, Louisiana that criminalized any Black who came into the town of Opelousas without "*special permission from his employer*."[47]

Notably, the roughly thirty years between the Civil War and Louisiana's 1898 Constitutional Convention were bloody and filled with terror imposed upon Black Louisianans. Bloodshed often followed demands for Black suffrage: a right that would have granted Black Louisianans a way to oppose the very laws subjecting them to incarceration. This period, summarized well by Professor Bill Quigley, saw the creation of white terrorist organizations like Knights of the White Camelia and the White League, as well as numerous massacres perpetrated by members within their ranks:[48]

> In 1866, the whole nation was rocked by the New Orleans Massacre: **forty-eight people** were killed, and **hundreds wounded** when people gathered in an attempt to guarantee the right to vote to African American men.
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> In 1868, as many as **250 people**, mostly African American, were massacred by white mobs in Opelousas, Louisiana to suppress black voter turnout. Moreover, in 1868, at

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[44] AIELLO, *supra* note 42, at 10; *see also* Goodwin, *supra* note 43, at 934–35. Notably, there was a significant expansion of plantations in selected parishes in Louisiana—an increase of 286 percent between 1860 and 1880—in part tied to the change in penal labor and the exception to the Thirteenth Amendment; *see also* Nancy Virts, *The Efficiency of Southern Tenant Plantations, 1900–1945*, 51 J. ECON. HIST. 385, 387 n.7 (1991) (citing ROGER SHUGG, ORIGINS OF CLASS STRUGGLE IN LOUISIANA: A SOCIAL HISTORY OF WHITE FARMERS AND LABORERS DURING SLAVERY AND AFTER, 1840–1875, 239–41 (1966)).

[45] Goodwin, *supra* note 44, at 940 n.230 (quoting JAMES G. BLAINE, TWENTY YEARS OF CONGRESS: FROM LINCOLN TO GARFIELD 101–02 (1884)).

[46] *Id.*

[47] *Ordinance by the Board of Police of Opelousas, Louisiana, as Printed in a New Orleans Newspaper*, Freedmen and Southern Society Project (Aug. 3, 2020), http://www.freedmen.umd.edu/Opelousas.html [https://perma.cc/JM57-74FV].

[48] Bill Quigley, *The Continuing Significance of Race: Official Legislative Racial Discrimination in Louisiana 1861 to 1974*, 47 S.U. L. REV. 1, 13 (2019).

> least **thirty-five, possibly more than one hundred**, African Americans were murdered by marauding whites in St. Bernard Parish, Louisiana.
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> On April 13, 1873, a white mob in Colfax, Louisiana, attacked a courthouse full of people defending the right to vote, set fire to the building, shot down people trying to flee, and, ultimately, murdered **over one hundred black men**.
>
> In 1874, white Republican elected officials in Red River Parish were killed.
>
> Also, in 1874, the Crescent City New Orleans White League fought against city police and federal troops and took control of the city and the state house. Liberty Place Monument was erected to honor this insurrection—an event so important to white citizens that, seventy-five years later, they clamored for their ancestors to be included in glowing tributes.
>
> On November 23, 1887, in Thibodeaux, Louisiana, white paramilitaries murdered **sixty African Americans** striking for better working conditions on local sugar cane plantations.[49]

In the face of this extreme violence against Black Louisianans, and despite that it was most often perpetrated by white Louisianans, the population of prisons continued to shift from majority white to majority Black. After 1870, 75 percent of incarcerated persons sentenced to convict leasing (hard labor benefiting private entities) were Black.[50] In addition to laws enacted to keep Black citizens enslaved, significant sentencing disparities in Louisiana contributed to the disproportionate number of incarcerated Black citizens. Take, for instance, Theophile Chevalier: formerly enslaved, Mr. Chevalier received a five-year sentence for stealing $5 on the same day a white woman received "one hour in prison" for manslaughter.[51] That same day, a Black man was sentenced to one year in prison for killing a hog.[52]

The lengths to which Louisiana went to keep Black Louisianans from acquiring full citizenship rights is no more explicit than in the 1898 Louisiana Constitutional Convention, explicitly gathered to counteract calls for Black suffrage and to enshrine "white supremacy" in the State's legal system.[53]

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[49] *Id.* at 14–15 (discussing the racial historical context in which the Constitutional Convention was held) (emphasis added).

[50] AIELLO, *supra* note 42, at 12.

[51] *Id.*

[52] *Id.*

[53] Quigley, *supra* note 48, at 27–28 ("Judge Thomas J. Semmes, Chairman of the Judiciary Committee of the Convention and a former president of the American Bar Association, described the purpose of the Convention: 'We (meet) here to establish the supremacy of the white race, and the white race constitutes the Democratic party of this State.'") (quoting United States v. Louisiana, 225 F. Supp. 353, 371 (E.D. La. 1963); *see also* Quigley, *supra* note 47, at 29 ("The president of the constitutional convention is quoted as saying: '[w]hat

Everything—from the Democratic Party advertisements for the convention, to the opening statements at the convention—explicitly called for a renewed oppression of Black Louisianans.[54] All delegates to the Constitutional Convention were white.[55] The official journal stated: "Our mission was, in the first place, to establish the supremacy of the white race in this State to the extent to which it could be legally and constitutionally done."[56]

The agenda for the convention was Black suffrage, the criminal system, and public education.[57] At the conclusion, the Governor addressed the legislature, stating:

> The white supremacy for which we have so long struggled at the cost of so much precious blood and treasure, is now crystallized into the Constitution as a fundamental part and parcel of that organic instrument, and that, too, by no subterfuge or other evasions. With this great principle thus firmly imbedded in the Constitution, and honestly enforced, there need be no longer any fear as to the honesty and purity of our future elections.[58]

The Governor's prediction rang true. While there were 130,000 registered Black voters at the time of the 1898 Constitutional Convention, by 1922, that number had dramatically dropped to only 598 registered voters because of voting restrictions put in place during the convention.[59] The 1898 Constitutional Convention reinstated mandatory segregation of schools.[60] It allowed for sentence enhancements for multiple convictions, such as double or triple time or life for multiple offenses.[61] And finally, the convention

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care I whether the test that we have put be a new one or an old one? What care I whether it be more or less ridiculous or not? Doesn't it meet the case? Doesn't it let the white man vote, and doesn't it stop the negro from voting, and isn't that what we came here for?'") (quoting Debo P. Adegible, *Voting Rights in Louisiana, 1982–2006*, 17 S. CAL. REV. L. & SOC. JUST. 413, 416–17 (2008)).

[54] Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1612 (2018) (noting that the purpose of the Convention was to eliminate "'the vast mass of ignorant, illiterate and venal negroes from the privileges of the elective franchise . . . .'") (quoting *The Following Resolutions*, DAILY PICAYUNE, 9 (Jan. 4, 1898)); OFF. J. OF THE PROC. OF THE CONST. CONVENTION OF THE STATE OF LOUISIANA 381 (H. Hearsey ed. 1898) (quoting the opening address's call "to eliminate from the electorate the mass of corrupt and illiterate voters who have during the last quarter of century degraded a politics" and to perpetuate "the supremacy of the Anglo-Saxon race in Louisiana").

[55] Allen-Bell, *supra* note 42, at 596.

[56] OFF. J. OF THE PROC. OF THE CONST. CONVENTION OF THE STATE OF LOUISIANA 375 (H. Hearsey ed. 1898).

[57] Allen-Bell, *supra* note 42, at 596.

[58] United States v. Louisiana, 225 F. Supp. 353, 374 (E.D. La. 1963), *aff'd sub nom*, Louisiana v. United States, 380 U.S. 145 (1965) (quoting La. Senate J. 1898, 33–35).

[59] AIELLO, *supra* note 42, at 23.

[60] La. Const. Ann. art. 248 (1898).

[61] State v. Kierson, 72 So. 799, 799–800 (La. 1916).

sought to nullify the voices of Black jurors. As explained by Justice Gorsuch in *Ramos*:

> Just a week before the convention, the U.S. Senate passed a resolution calling for an investigation into whether Louisiana was systemically excluding African-Americans from juries. Seeking to avoid unwanted national attention, and aware that this Court would strike down any policy of overt discrimination against African-American jurors as a violation of the Fourteenth Amendment, the delegates sought to undermine African-American participation on juries in another way. With a careful eye on racial demographics, the convention delegates sculpted a "facially race-neutral" rule permitting 10-to-2 verdicts in order "to ensure that African-American juror service would be meaningless."[62]

Louisiana remained the only state to permit non-unanimous jury verdicts for non-petty convictions until 1934, when Oregon adopted a comparable law.

As the years passed, not only did non-unanimous jury verdicts silence the voices of Black jurors in criminal matters, but they also disproportionally affected Black defendants.[63] As Justice Kavanaugh explained in his concurrence: "In light of the racist origins of the non-unanimous jury, it is no surprise that non-unanimous juries can make a difference in practice, especially in cases involving Black defendants, victims, or jurors. After all, that was the whole point of adopting the non-unanimous jury requirement in the first place."[64]

Today, Louisiana has the highest incarceration rate in the United States. It leads the nation in life without the possibility of parole sentences. [65] As of June 30, 2020, 4,596 people in Louisiana were serving such sentences.[66]

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[62] Ramos v. Louisiana 140 S. Ct. 1390, 1394 (2020) (quoting State v. Maxie, No. 13-CRR-72522 (La. 11th Jud. Dist., Oct. 11, 2018)).

[63] Jeff Adelson, Gordon Russell & John Simerman, *How an Abnormal Louisiana Law Deprives, Discriminates and Drives Incarceration: Tilting the Scales*, ADVOCATE (Apr. 1, 2018, 8:05 AM), https://www.theadvocate.com/baton_rouge/news/courts/article_16fd0ece-32b1-11e8-8770-33eca2a325de.html [https://perma.cc/S7H7-95LF].

[64] *Ramos*, 140 S. Ct. at 1417–18 (Kavanaugh, J., concurring) ("silenc[ing] the voices and negat[ing] the votes of black jurors" would be particularly impactful "in cases with black defendants . . . .").

[65] Lea Skene, *Louisiana's Life Without Parole sentencing the Nation's Highest—and Some Say That Should Change*, ADVOCATE (Dec. 7, 2019, 4:59 PM), https://www.theadvocate.com/baton_rouge/news/article_f6309822-17ac-11ea-8750-f7d212aa28f8.html [https://perma.cc/HYR8-PHNR].

[66] John Bel Edwards & James M. Le Blanc, *Louisiana Corrections: Briefing Book* 28 (July 2020), https://s32082.pcdn.co/wp-content/uploads/2020/08/Full-BB-Jul-20.pdf [https://perma.cc/QTR2-TRUB]; TCR Staff, *Louisiana Leads Nation in Life Without Parole Terms*, CRIME REPORT (Dec. 12, 2019), https://thecrimereport.org/2019/12/12/louisiana-leads-nation-in-life-without-parole-terms [https://perma.cc/G3PL-8SDK] ("About 15 percent of Louisiana's

Louisiana has more inmates serving life without parole than Texas, Arkansas, Mississippi, Alabama and Tennessee *combined*.[67] By contrast, fewer than 70 people in United Kingdom are in prison with life without the possibility of parole sentences.[68] In Louisiana, almost one in five of the people serving these life without the possibility of parole sentences, received such a sentence because of a non-unanimous jury verdict,[69] ratified by that 1898 Constitutional Convention.

Incarcerating the most residents per capita than any other place in the word comes at a cost: Louisiana spends nearly $600 million dollars each year on its prison system.[70] Louisiana must grapple with its racist foundations and the real harm that these laws and practices have caused BIPOCs. Adopting a state-specific standard that accords a remedy to those incarcerated because of an unconstitutional and racist law provides an undeniable example of the power state courts can have to change the criminal justice landscape of their state by deeming "new" constitutional commands more broadly retroactive than they would be under federal law.

B. *RAMOS V. LOUISIANA* AS AN EXAMPLE OF A CASE THAT, REGARDLESS OF *TEAGUE*, SHOULD BE RETROACTIVE UNDER THE INTERESTS OF LOUISIANA.

In the 1970s, cases from both Louisiana and Oregon went to the U.S. Supreme Court seeking to end non-unanimous jury convictions. In *Apodaca v. Oregon*[71] and *Johnson v. Louisiana*,[72] the Court considered whether non-unanimous juries violated the Sixth and Fourteenth Amendments. The result was a tangle of seven separate opinions. Five Justices adhered to the Court's

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prison population consists of people serving life without parole, the highest percentage among all states.").

[67] TCR Staff, *supra* note 66.

[68] U.K. Ministry of Justice, *Offender Management Statistics Bulletin* (Oct. 31, 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/842590/OMSQ_2019_Q2.pdf#page=3 [https://perma.cc/YH6N-6B9S].

[69] Brief of Amici Curiae the Promise of Justice Initiative, the Louisiana Association of Criminal Defense Lawyers, and the Orleans Public Defenders at 26, Edwards v. Vannoy, 140 S. Ct. 2737 (2020) (No.19-5807), 2020 WL 4450431.

[70] Louisiana Department of Public Safety and Corrections – Corrections Services, Proposed Budget Supporting Document [FY 2019-2020], 2 https://www.doa.la.gov/opb/pub/FY20/SupportingDocument/08A_Corrections_Services.pdf [https://perma.cc/Q94Q-L2AW].

[71] Apodaca v. Oregon, 406 U.S. 404 (1972).

[72] Johnson v. Louisiana, 406 U.S. 356 (1972).

prior decisions holding that the Sixth Amendment requires unanimity.[73] Four of those five Justices also concluded that the incorporation doctrine required the states to abide by the Sixth Amendment's unanimity requirement.[74] No other outcome, the Justices explained, was available under the Court's Fourteenth Amendment precedent, which established that "once it is decided that a particular Bill of Rights guarantee [applies to the states], . . . the same constitutional standards apply against both the State and Federal Governments."[75] Yet Justice Powell refused to follow this precedent.[76] Instead, he cast his deciding vote based on his belief that "due process does not require that the States apply the federal jury-trial right with all its gloss."[77] His vote combined with the plurality opinion of Justice White, which suggested that the jury trial clause should turn on the "function served by the jury in contemporary society,"[78] to uphold the practice of allowing criminal convictions where some jurors disagreed with the verdict.[79] As this Court later put it, *Apodaca* "held that although the Sixth Amendment right to trial by jury requires a unanimous jury verdict in federal criminal trials, it does not require a unanimous jury verdict in state criminal trials."[80]

In the years following *Apodaca*, Louisiana amended—and subsequently abandoned—its non-unanimity rule. In 1973, the State amended its Constitution to require ten, instead of nine, out of twelve jurors to concur in a guilty verdict.[81] Then, in 2015, historian Thomas Aiello published *Jim Crow's Last Stand*, in which he described the non-unanimity rule as the last remnant of the racist "redeemer" agenda in the Louisiana legal system. The largest newspaper in Louisiana, *The Advocate*, also ran a series of pieces

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[73] *See id.* at 371 (Powell, J., concurring in *Johnson* and concurring in the judgment in *Apodaca*). *See also Apodaca*, 406 U.S. at 414 (Stewart, J., joined by Brennan & Marshall, JJ., dissenting); Johnson v. Louisiana, 406 U.S. 380, 381–83 (Douglas, J., dissenting in *Johnson* and *Apodaca*).

[74] *Apodaca*, 406 U.S. at 414–15 (Stewart, J., dissenting); *Johnson*, 406 U.S. at 380 (Douglas, J., dissenting in *Johnson* and *Apodaca*).

[75] *Johnson*, 406 U.S. at 385 (Douglas, J., dissenting in *Johnson* and *Apodaca*) (internal quotation marks and citations omitted).

[76] *Johnson*, 406 at 369–71 (Powell, J., concurring in *Johnson* and concurring in the judgment in *Apodaca*).

[77] *Id.* at 371.

[78] *Apodaca*, 406 U.S. at 410.

[79] *Id.* at 406, 406 n.1; *Johnson*, 406 U.S. at 366 (Powell, J., concurring in *Johnson* and concurring in the judgment in *Apodaca*).

[80] McDonald v. City of Chi., 561 U.S. 742, 766 n.14 (2010); *see also Johnson*, 406 U.S. at 383 (Douglas, J., dissenting in *Johnson* and *Apodaca*) (explaining the holding of *Apodaca* the same way at the time).

[81] *See* La. Const. Ann. art. 1, § 17(A) (1974); *see also* La. Code Crim. Proc. Ann. art. 782(A) (1974).

examining the non-unanimity rule's operation and effects. The series, which won a Pulitzer Prize, included an empirical analysis revealing that Black defendants were significantly more likely than white defendants to be convicted by non-unanimous verdicts.[82] This groundswell culminated in 2018, when the people of Louisiana voted to repeal the State's non-unanimity rule and replace it with a law requiring unanimous jury verdicts in every felony trial. However, the new law applied only prospectively to crimes *committed* on or after January 1, 2019.[83] It did not apply to cases arising from crimes occurring before that date, even if the cases have not yet gone to trial. Until April 20, 2020, people tried in Louisiana were still tried by juries who knew that their vote did not need to be unanimous.

Mr. Evangelisto Ramos's case was on direct review when the people of Louisiana amended the Louisiana Constitution in 2018. A grand jury charged Mr. Ramos with a single count of second-degree murder.[84] Mr. Ramos maintained his innocence and insisted on a trial. The State's case against Mr. Ramos was rooted in circumstantial evidence.[85] The State stressed that witnesses saw Mr. Ramos with the victim the day before her death and that he had admitted he had touched the garbage can in which her body was found.[86] But the State presented no eyewitness or physical evidence directly linking Mr. Ramos to the killing.[87] Even though police officers had thoroughly searched Mr. Ramos's home (where, under the prosecution's theory, the violent crime would presumably have taken place), the police found no murder weapon, blood from the victim, or any trace of physical evidence. Instead, the State relied on suppositions and innuendo. For example, the lead detective testified that other local residents had told him the stabbing must have been committed by a "Mexican or Hispanic" individual, because "they like to use knives."[88]

The jury was divided after about two hours of deliberation. Two jurors believed the prosecution had failed to prove Mr. Ramos guilty beyond a reasonable doubt while ten jurors thought the State had proven its case against Mr. Ramos.[89] Under Louisiana's then-applicable non-unanimity law, that was enough for a conviction.[90] The jury stopped deliberating and

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[82] Adelson, Russell & Simerman, *supra* note 63 [https://perma.cc/S7H7-95LF].

[83] *See* 2018 La. Reg. Sess., Act 722.

[84] State v. Ramos, 231 So. 3d 44, 46 (La. Ct. App. 2017).

[85] *Id.* at 50.

[86] *Id.* at 48.

[87] *Id.* at 50.

[88] *Id.* at 48.

[89] *Id.* at 46.

[90] *Id.* at 53.

delivered its verdict.[91] In 2016, the court sentenced Mr. Ramos to life in prison without the possibility of parole—the mandatory sentence for second-degree murder—and in March 2019 the Supreme Court granted certiorari to decide whether the Constitution permits a state to convict someone of a crime by a non-unanimous jury verdict.[92] On April 20, 2020, the Supreme Court reversed Mr. Ramos's conviction, holding that the Sixth Amendment's Jury Trial Clause requires unanimity,[93] and that this requirement applies to states via the Fourteenth Amendment.[94] In this monumental decision, the Court recognized the law's racist roots, Louisiana's desire to reconcile that past as demonstrated in the passage of the 2018 bill, and the need to give relief to those harmed by the bill. It stopped short, however, of declaring the new rule retroactive, a choice that the Court is currently confronting. When it does, the Court will be bound to apply *Teague*, or else overrule it in favor of a different model.

But the same concerns that led the Court to declare a unanimous jury a constitutional right are the concerns that militate in favor of granting retroactive relief to the one in five incarcerated Louisianans serving life in prison without the possibility of parole. As firmly and clearly stated by the Chief Justice of Louisiana's Supreme Court: "If concerns of comity and federalism ultimately mean that the federal courts do not force us to remedy those convictions which are already final through a writ of habeas corpus, the moral and ethical obligation upon courts of this state to address the racial stain of our own history is even more compelling, not less."[95] *Ramos* and the Louisiana state courts are positioned to provide a model for how states should approach retroactivity post-*Danforth*. As Louisiana's Chief Justice further noted:

> 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. The recent campaign to end the use of the law is already part of the history of this state's long and ongoing struggle for racial justice and equal rights for all Louisianans. That campaign meant many more citizens now understand the law's origins, purpose, and discriminatory impact. And that understanding contributes to a cynicism and fatal mistrust of Louisiana's criminal justice system by many citizens who see the lack of fundamental fairness and equal protection afforded to all. It is time that our state

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[91] *Id.* at 46.

[92] Ramos v. Louisiana, 139 S. Ct. 1318 (2019).

[93] Ramos v. Louisiana, 139 S. Ct. 1390 (2020).

[94] *Id*.

[95] State v. Gipson, 296 So. 3d 1051, 1056 (La. 2020) (Johnson, C.J. dissenting).

> courts—not the United States Supreme Court—decided whether we should address the damage done by our longtime use of an invidious law.
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> The racist history of the law was not explicitly relevant to the Supreme Court's determination that the Sixth Amendment requires jury unanimity. However, a majority of the justices considered that history as one of the principled justifications for abandoning *stare decisis* and departing from the "gravely mistaken" and "egregiously wrong" "outlier" precedent of *Apodaca v. Oregon*, 406 U.S. 404, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1972) (in which a plurality of the Supreme Court held that Oregon and Louisiana's non-unanimous jury schemes did not violate the Sixth Amendment) in favor of a correct interpretation of the Sixth Amendment's jury requirement. *Ramos*, 140 S. Ct. at 1405, 1418. That history should be just as—if not more—persuasive to us in deciding whether to overrule the erroneously reasoned *Taylor* case. I am persuaded that we should, and that we should replace *Teague*'s test with one that, at least in part, weighs the discriminatory effects of a stricken law when determining retroactive applicability in Louisiana.[96]

May the opportunity presenting Louisiana be a reminder of the role state courts can play in shaping their criminal justice system and a clarion call to re-claim the power they have abandoned.

CONCLUSION

> On what ground would anyone have us leave Mr. Ramos in prison for the rest of his life? Not a single Member of this Court is prepared to say Louisiana secured his conviction constitutionally under the Sixth Amendment. No one before us suggests that the error was harmless. Louisiana does not claim precedent commands an affirmance. In the end, the best anyone can seem to muster against Mr. Ramos is that, if we dared to admit in his case what we all know to be true about the Sixth Amendment, we might have to say the same in some others. But where is the justice in that? Every 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.
>
> – Justice Neal Gorsuch[97]

The burden of the inequity of the country's criminal justice system has, for too long, been born by our incarcerated population—disproportionately composed of people of color. By way of example, while approximately 32 percent of Louisiana's population is Black, 69.9 percent of prisoners incarcerated for felony convictions are Black.[98]

Unsurprisingly, as recent events have revealed, this has caused marked distrust and disillusionment with Louisiana's criminal justice system, particularly for the state's Black residents, for whom the connection between the criminal justice system and Louisiana's racist past is all too clear. This

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[96] *Id.* at 1055.
[97] *Ramos*, 140 S. Ct. at 1408.
[98] *Gipson*, 296 So. 3d at 1053.

moment is a time to begin shifting the costs of this unfair judicial system from our incarcerated population to the system that harmed them.

Let us start by telling those whom our system has harmed, and whose harm is declared constitutionally intolerable by the Court, that we will no longer deny them a remedy. Let us enact a retroactivity test that considers our own racialized past, our overcrowded prisons, our desire to repair, and our hope for a more just and equitable future. It is time to repair wounds inflicted by centuries of bad policy fueled by institutional racism, social inequity, fear, and politics. Each state must, for itself, decide whether the ideals that define its system of justice can bear the failure to accord a remedy to those convicted in violation of the Constitution. If each state performs this self-inquiry in earnest, the answer will be that the system cannot bear it; that the consequence of leaving unaddressed a system that has buckled under decades of injustice is more calamitous than the inconvenience of too much justice.