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The 2020 Supreme Court Term in the Shadow of BLM, MeToo, and the Notorious RBG

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The 2020 Supreme Court Term in the Shadow of BLM, MeToo, and the Notorious RBG

The court has agreed to hear cases that involve the enduring white supremacist legacy of a Louisiana law that allowed for non-unanimous jury criminal convictions, standards for evaluating excessive use of force by police, what is required to sentence a juvenile to life without parole, and military sexual violence, says Rachel Van Cleave, a law professor and dean emerita at Golden Gate University School of Law

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Rachel Van Cleave, Golden Gate University School of Law dean

The upcoming Supreme Court term comes in the context of widespread protests about police violence, the criminal (in)justice system, continuing fallout from the #MeToo movement, and the death of iconic Supreme Court Justice Ruth Bader Ginsburg. The court has agreed to hear cases that involve the enduring white supremacist legacy of a Louisiana law that allowed

for non-unanimous jury criminal convictions, standards for evaluating excessive use of force by police, what is required to sentence a juvenile to life without parole, and military sexual violence.

It is imperative that the Court acknowledge the difficult truths that Black Lives Matter protesters, advocates for children and sexual violence survivors, and plain numbers have been telling us about entrenched problems with our criminal justice system. In addition, these cases elevate issues of humanity and dignity when it comes to how we treat some of the most vulnerable members of society—people of color, children and sexual violence survivors.

White Supremacist Law's Legacy

In April, the Court held in *Ramos v. Louisiana* that the unanimous jury requirement, followed by the federal courts and every other state (except Oregon), applies to all states. The court described the white supremacist origins of Louisiana's law allowing criminal convictions despite one or two jurors out of 12 concluding that the state did not prove the defendant guilty beyond a reasonable doubt. The goal of the 1898 Louisiana constitutional convention was to enact a racially neutral law that would dilute the impact of Black jurors, whom Louisiana could not exclude from jury service. Use of preemptory challenges by prosecutors has also worked to ensure that no more than two Black jurors actually served on a jury in the vast majority of cases. The echoes of this law have had a dramatically disproportionate impact on African Americans imprisoned in Louisiana.

In *Edwards v. Vannoy*, the court will determine whether some of the 1,558 prisoners convicted in Louisiana over the vote of at least one, and sometimes two, jurors will get the benefit of the *Ramos* ruling. Mr. Edwards, an African American, was convicted by a jury that included only one African American. The investigation and interrogation of Edwards, as well as what occurred at trial included several indicia of unreliability—the fact that police found no evidence of the crime upon searching Edwards' home within 48 hours of the offense, DNA that did not match that of Edwards, physical coercion by the police to elicit Edwards' "confession," and highly suggestive witness identification processes. At trial, the prosecutor challenged all but one African American juror. In addition, despite the fact that the witness who identified Edwards was white, the judge refused to allow expert testimony about the highly problematic and unreliable nature of cross-racial identification.

In the current environment calling for reimagining criminal justice, it is discouraging that the state of Louisiana has not established any conviction integrity units to evaluate the convictions of those in prison pursuant to the tainted law. Instead, Louisiana has decided to fight for continued imprisonment.

The court will focus on the doctrine of retroactivity. If the court determines that its ruling in *Ramos* was a watershed new rule that restored a bedrock principle of constitutional law in Louisiana, or that *Ramos* reaffirmed a longstanding rule despite the historical accident of a 1972 ruling by a

plurality of the court, Edwards, and others should get the benefit of the court's ruling in Ramos. *Edwards v. Vannoy* is scheduled for argument Nov. 30.

Police Excessive Force

It was dark in the early morning hours, when four police officers exited their unmarked car and approached Ms. Torres while she was in her parked car. The officers were planning to arrest someone else with whom Torres had no connection or relationship. Unable to read the markings on the officer's dark clothing, Torres feared they were carjackers. One officer attempted to open the locked driver's door. Torres began to drive away slowly, and the officers fired 13 rounds, shooting her twice in the back. Despite these injuries, Torres left the scene and shortly thereafter called 911 for assistance. In this civil rights lawsuit, the Tenth Circuit Court of Appeals found that Torres had not been "seized" and therefore had no claim that officers violated her Fourth Amendment rights, affirming the district court's order granting summary judgement in favor of the officers. Any plaintiff who brings an excessive force case against police has a number of formidable hurdles before the case may ever be heard by a jury—was the use of force reasonable, does the doctrine of qualified immunity apply, is the right asserted by the plaintiff "clearly established" to subject an officer to civil liability for violating the right. Here, the lower courts did not resolve these questions because they concluded that Torres had not been seized and therefore the Fourth Amendment did not apply.

In the wake of nearly 1,000 police killings in the last year, disproportionately affecting African Americans, the lower court rulings demonstrate a stunning level of disregard for the life and safety of people. Their reasoning is that since the officers did not actually prevent Torres from leaving, she was not seized and therefore cannot claim a Fourth Amendment violation. In other words, the fact that the police didn't kill Torres or inflict even more serious harm that would have prevented her from driving away, she has no claim against the officers. This makes no sense. In addition, it does not adhere to Supreme Court precedent holding that officers seize a person when they have applied physical force. Clearly, firing 13 shots, two of which entered Torres' back, amount to an application of physical force covered by the Fourth Amendment prohibition of unreasonable seizures. There is a straightforward path for the Supreme Court to hold police accountable for excessive use of force and recognize the humanity and dignity of those subject to police violence. *Torres v. Madrid* is scheduled for argument Oct. 14.

Punishment of Juveniles

Approximately 2,600 people are serving life without parole (LWOP) prison sentences for offenses they committed as juveniles. Some of these children were as young as 13 years old. Although Brett Jones is white, African Americans are disproportionately more likely to receive LWOP for offenses committed as juveniles. The court has gradually come to accept the significant evidence that differences between adults must be considered

when imposing punishment on children who commit crimes. Eight years ago, the court concluded in *Miller* that LWOP for juveniles is disproportionate under the Eighth Amendment in all but the rarest of circumstances; where the sentencing authority has found the juvenile to be “irreparably incorrigible.” In *Jones v. Mississippi*, the court is being asked to clarify the standard set out in *Miller*.

To recognize the humanity and dignity of children, the court must define “irreparably incorrigible” narrowly and require sentencing authorities to satisfy a high standard before imposing LWOP on juveniles. To do otherwise, would be to cast aside as disposable hundreds of people who made terrible mistakes when brain science shows that young people are not small adults; they are less mature, and their brains are far from fully developed. The court’s ruling should firmly ensure that LWOP is rarely, if ever, applied to those who commit offenses as children. *Jones v. Mississippi* is scheduled for argument Nov. 3.

Military Sexual Violence

The #MeToo movement has taught us that myriad reasons explain why survivors of sexual violence sometimes wait years before disclosing that they were sexually assaulted. Many #MeToo reports have illustrated that some survivors blame themselves and are ashamed to report sexual violence. Many survivors have stated that they did not trust others to believe them. Survivors of military sexual violence face the added pressure of conforming to military culture and expectations, and the likelihood of being retaliated against. In addition, military sexual assault survivors are reluctant to report rape when their commanding officer or instructor is the rapist. In the consolidated cases of *US v. Briggs*, *U.S. v. Collins*, and *U.S. v. Daniels*, the court is asked to resolve a matter of statutory interpretation about the statute of limitations for sexual violence crimes committed by military servicemembers.

The statutory interpretation question is complicated by the fact that the Uniform Code of Military Justice (UCMJ), until 2006, provided that rape was punishable by death. None of the defendants in these consolidated cases received the death penalty. However, they argue that at the time of the sexual assaults for which they were convicted, the UCMJ provided that offenses punishable by death had no limitation for prosecution and punishment. Here is where echoes of Justice Ruth Bader Ginsburg as an advocate enter.

In 1976, Ginsburg co-authored an amicus brief opposing capital punishment for the crime of rape, in *Coker v. Georgia*. The brief focused on the sexist and racist justifications that undergirded the death penalty. Sexist in how this reinforced the notion that women were the property of men and the rape damaged their woman’s purity. Racist in how the death penalty had been applied nearly exclusively to African American men in Georgia.

The court could skirt the death penalty issue and rely on the fact that the UCMJ has consistently had no statute of limitation for prosecuting rape and sexual assault, despite changes in statutory language. Nonetheless, we will miss Ginsburg's voice and clear-eyed analysis in resolving the tensions raised in these consolidated cases—procedural fairness for defendants, justice for survivors, racism and sexism. These cases are scheduled for argument Oct. 13.

During these tumultuous and uncertain times, I recognize that we cannot rely on the court to pave a path or light the way toward reimagining criminal justice. However, the court should pay attention to the injustices suffered by people of color, children and sexual violence survivors and not further dim the lights. Martin Luther King Jr. stated, "Darkness cannot drive out darkness; only light can do that. Hate cannot drive out hate; only love can do that."

Rachel A. Van Cleave is a professor of law and dean emerita at Golden Gate University School of Law where she teaches criminal procedure, constitutional law and reimagining criminal justice.

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