

NONUNANIMOUS ACQUITTALS*

PETER POVILONIS**

In forty-nine states, a jury needs to present a unanimous verdict to convict or acquit a defendant. If the jury is not unanimous, the result is a hung jury, which leads to a mistrial. The academic discussions around jury unanimity have almost exclusively focused on whether unanimity should be required to convict a defendant. However, the unanimity rule also applies to verdicts of acquittal—what can be called “symmetrical unanimity.” Although it is not clear why so many states enforce symmetrical unanimity, this Article casts doubt on the assumption that the same justifications for unanimous convictions are applicable to unanimous acquittals.

For one, unanimous convictions are required by the defendant’s Sixth Amendment right to a jury trial, but nothing in the Constitution requires an acquittal to be unanimous. Also, the difference in evidentiary burdens for acquittal and conviction may present a reason to doubt whether the same unanimity rule should apply to both. To convict, the government needs to present proof “beyond a reasonable doubt.” Requiring jury unanimity to convict may be seen as reinforcing the highest burden. But the burden of proof rationale does not apply to acquittals because there is no “burden” to acquit. Acquittal simply means the government failed to prove its burden to convict. Although symmetrical unanimity seems like a neutral, balanced rule, the two parties in a criminal trial do not start in equipoise—the defendant has the rights, and the government has the burden.

Not only should we doubt the assumption that unanimity should be applied symmetrically, but the balance of policy factors also weighs in favor of adopting nonunanimous acquittals. The justifications for unanimity—including community representation, improved deliberations, and reinforcement of the highest burden of proof—are persuasive for convictions but are less relevant for acquittals. Moreover, unanimous acquittals are more likely to create holdout

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** Assistant Professor of Law, DePaul University College of Law. For their insightful thoughts and comments, the author wishes to thank Douglas Baird, Nadia Banteka, William Baude, Shawn Bayern, Vince Buccola, Adam Chilton, Sharon Dolovich, Jacob Eisler, Sharon Fairley, William Hubbard, Brian Leiter, Jake Linford, Jared Mayer, Joseph Schottenfeld, Dana Sublett, and the participants in the University of Chicago Canonical Ideas Workshop. The author also wishes to thank the *North Carolina Law Review* staff for their insightful and thorough editorial work.

juror problems, and for no added benefit, as they are unlikely to prevent truly guilty defendants from going free.

Unanimous acquittals have a serious impact on the outcome of a trial. Because the Fifth Amendment right against double jeopardy does not prohibit a new trial after a nonunanimous acquittal, the government can reprosecute. The onus of a mistrial is not spread equally; the government obtains a strong advantage with an opportunity for a second trial. Allowing for nonunanimous acquittals can avoid some of the harms that the right against double jeopardy was designed to protect.

Oregon is currently the only state that has an asymmetrical unanimity rule, with a nonunanimous acquittal by a vote of 10–2 or 11–1 counting as a final acquittal. If other jurisdictions follow, they may differ on where to draw the line. This Article suggests some different approaches to delineating the transition between acquittal and hung jury.

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INTRODUCTION

In forty-nine states, a jury verdict for a serious criminal case must be reached by a unanimous jury—both to convict and to acquit¹—a rule that this Article calls “symmetrical unanimity.” Under symmetrical unanimity, unless every juror agrees to either convict or acquit, the result is a hung jury. A hung

1. See JOINT SERV. COMM. ON MIL. JUST., ATTACHMENT TO THE JOINT SERVICE COMMITTEE’S REPORT ON THE ADOPTION OF UNANIMOUS VERDICTS IN THE UNIFORM CODE OF MILITARY JUSTICE 40 n.222 (2024), https://www.nimj.org/uploads/1/3/5/5/135587129/25-f-2243_grant_in_full.pdf [<https://perma.cc/8T9Q-6S96>] (“Oregon appears to be the only jurisdiction permitting nonunanimous acquittal verdicts by allowing a vote of not guilty by 10 of 12 jurors to result in an acquittal.”).

jury results in a mistrial, which means that the government can reprosecute the defendant for that same offense.²

Although the unanimous verdict rule has been long debated, both the academic discussion and judicial precedent have focused almost exclusively on jury unanimity for convictions.³ What is all but absent from this discussion is whether unanimity should also be required for acquittal.⁴ Indeed, previous debates about unanimity were so focused on conviction that they largely overlooked unanimous acquittals, passively accepting both conviction and acquittal into a symmetrical unanimity rule.⁵

One might assume that every state adheres to symmetrical unanimity, supposing it to be a requirement under the United States Constitution. This assumption, however, is incorrect. Although the Constitution requires unanimous convictions, it does not require unanimous acquittals.⁶ In 2020, in *Ramos v. Louisiana*,⁷ the Supreme Court held that the Sixth Amendment right to a jury trial requires unanimity to convict.⁸ The Court did not hold that the Constitution requires unanimity to acquit.⁹

One might also assume that symmetrical unanimity has been adopted because it presents a fair, parallel rule, but there is reason to doubt this assumption as well. Convictions and acquittals do not provide parallel

2. See FED. R. CRIM. P. 31(b)(3) (“If the jury cannot agree on a verdict on one or more counts, the court may declare a mistrial on those counts. The government may retry any defendant on any count on which the jury could not agree.”).

3. See, e.g., REID HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, *INSIDE THE JURY* 228–30 (1983); Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1189–91 (1995); Richard A. Primus, *When Democracy Is Not Self-Government: Toward a Defense of the Unanimity Rule for Criminal Juries*, 18 CARDOZO L. REV. 1417, 1418–19 (1997); James Kachmar, Comment, *Silencing the Minority: Permitting Nonunanimous Jury Verdicts in Criminal Trials*, 28 PAC. L.J. 273, 294 (1996); Emil J. Bove III, Note, *Preserving the Value of Unanimous Criminal Jury Verdicts in Anti-Deadlock Instructions*, 97 GEO. L.J. 251, 251 (2008); Chenyu Wang, *Rearguing Jury Unanimity: An Alternative*, 16 LEWIS & CLARK L. REV. 389, 394–96 (2012); Aliza B. Kaplan & Amy Saack, *Overturning Apodaca v. Oregon Should Be Easy: Nonunanimous Jury Verdicts in Criminal Cases Undermine the Credibility of Our Justice System*, 95 OR. L. REV. 1, 8–9 (2016); see also Shari Seidman Diamond, Mary R. Rose & Beth Murphy, *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 NW. U. L. REV. 201, 218 (2006) (compiling empirical data on jury holdouts at the end of deliberations).

4. Recently, one scholar has pointed to the difference between conviction and acquittal regarding unanimity. See Sherry F. Colb, *Should Acquittals Require Unanimity?*, VERDICT (July 1, 2020), <https://verdict.justia.com/2020/07/01/should-acquittals-require-unanimity> [https://perma.cc/9MZA-W542 (staff-uploaded archive)]. In a similar vein, this Article represents a fully elaborated argument for adopting nonunanimous acquittals.

5. See *infra* Part II.

6. See *infra* Section III.A.

7. 140 S. Ct. 1390 (2020).

8. See *id.* at 1390.

9. See *State v. Ross*, 481 P.3d 1286, 1293 (Or. 2021) (“*Ramos* does not imply that the Sixth Amendment prohibits acquittals based on nonunanimous verdicts”); *Ramos*, 140 S. Ct. at 1395 (“A jury must reach a unanimous verdict in order to convict.” (emphasis added)).

outcomes. A conviction means that the defendant is guilty beyond a reasonable doubt,¹⁰ but an acquittal does not mean the defendant is innocent beyond a reasonable doubt.¹¹ Rather, an acquittal is the negation of a conviction—it means the defendant is *not* guilty beyond a reasonable doubt. While a conviction requires the government to satisfy an evidentiary burden, an acquittal has no similar “burden.” An acquittal occurs when the government fails to prove its burden to convict. Therefore, requiring unanimity for both conviction and acquittal may not be the most reasonable standard when only one outcome entails an evidentiary burden.

The difference in evidentiary burden between acquittal and conviction is exemplified by examining the relationship between jury unanimity and the standard of proof beyond a reasonable doubt. One argument for requiring unanimity to convict is that unanimity reinforces the highest burden of proof—every juror must agree the government has met its burden.¹² Before *Ramos*, states were allowed to convict with nonunanimous jury verdicts.¹³ This status quo was problematic because a nonunanimous conviction let the criminal system proclaim that the government must meet the highest burden of proof, while simultaneously discounting the jurors who concluded that the government failed to meet that burden.¹⁴ How could one say with certainty that there is no reasonable doubt when two or three jurors do, in fact, have doubts? This is not to say that a defendant could not truly have committed the crime if only nine or ten jurors vote to convict, but rather that the more jurors who disagree, the more questionable it seems to say that there is no remaining reasonable doubt.¹⁵

In contrast, the burden of proof rationale for unanimous convictions does not apply to acquittals. Unlike convictions, the defendant does not have the burden of proof; rather, innocence is *presumed* at the start.¹⁶ Requiring unanimous acquittals does not reinforce the highest burden of proof because an

10. *Beyond a Reasonable Doubt*, LEGAL INFO. INST. (Aug. 2025), https://www.law.cornell.edu/wex/beyond_a_reasonable_doubt [https://perma.cc/GV32-YKHD].

11. *Acquit*, LEGAL INFO. INST. (Aug. 2025), <https://www.law.cornell.edu/wex/acquit> [https://perma.cc/24KG-SY57]; *Not Guilty*, LEGAL INFO. INST. (Aug. 2021), https://www.law.cornell.edu/wex/not_guilty [https://perma.cc/2Z6A-EUUR].

12. See Kaplan & Saack, *supra* note 3, at 29 (“A nonunanimous verdict demonstrates the existence of reasonable doubt that could not be explained during the deliberation of twelve vetted jurors and shows that the government has failed to meet its burden of proof.”).

13. See *Apodaca v. Oregon*, 406 U.S. 404, 411 (1972) (plurality opinion), *abrogated by Ramos*, 140 S. Ct. 1390 (2020).

14. See Kaplan & Saack, *supra* note 3, at 28–31 (arguing that majority verdicts in criminal trials undermine the requirement that guilt be proven beyond a reasonable doubt).

15. See *Johnson v. Louisiana*, 406 U.S. 356, 366 (1972) (Blackmun, J., concurring) (“[A] system employing a 7–5 standard, rather than a 9–3 or 75% minimum, would afford me great difficulty.”).

16. *Presumption of Innocence*, LEGAL INFO. INST. (Aug. 2020), https://www.law.cornell.edu/wex/presumption_of_innocence [https://perma.cc/7LN8-6N3Y].

acquittal requires no burden at all. Furthermore, unanimous acquittals could undermine the presumption of innocence, as the requirement facilitates a lower standard for the government to achieve a mistrial—the government need only convince a single juror of the defendant’s guilt.

This is the outcome of the symmetrical unanimity rule: just as a defendant need only assure one juror of a lack of guilt to achieve a mistrial, the government need only convince one juror of the defendant’s guilt to achieve the same.¹⁷ But the two parties in a criminal proceeding are not supposed to have the same standard of proof—the burden is on the government.¹⁸ And yet, requiring unanimity for both convictions and acquittals seems to dilute the government’s burden, as both parties only need one juror on their side to receive the same result: a new trial. Perhaps symmetrical unanimity is seen as a neutral rule, but a neutral rule may not be optimal in a justice system where the criminal standard is not neutral—the government is supposed to have the burden and the defendant the rights.¹⁹

Not only is there reason to doubt whether unanimity should be reflexively applied to acquittals, but there are also reasons to think an asymmetrical unanimity rule is better policy than a symmetrical rule. Many justifications have been put forward to support the unanimity requirement for jury verdicts. For example, unanimity of verdict brings assurances that the jury, through deliberation, reached the best answer:²⁰ an answer that provides a definitive community statement regarding the defendant’s guilt.²¹ It also ensures that minority voices will not be suppressed.²² These are perhaps persuasive reasons for why there should be unanimity of verdict to convict. As this Article will explain, however, none of these reasons apply with equal force to a requirement of jury unanimity for acquittal.²³

Additionally, one major policy benefit of a nonunanimous acquittal is that it avoids the holdout-juror problem: that one stubborn juror voting against the

17. See *Williams v. Florida*, 399 U.S. 78, 101 (1970) (“It might be suggested that the 12-man jury gives a defendant a greater advantage since he has more ‘chances’ of finding a juror who will insist on acquittal and thus prevent conviction. But the advantage might just as easily belong to the State, which also needs only one juror out of twelve insisting on guilt to prevent acquittal.”).

18. *Victor v. Nebraska*, 511 U.S. 1, 22 (1994) (“The Due Process Clause requires the government to prove a criminal defendant’s guilt beyond a reasonable doubt . . .”).

19. See *id.*

20. See Gary J. Jacobsohn, *The Unanimous Verdict: Politics and the Jury Trial*, 1977 WASH. U. L.Q. 39, 40, 54–55 (arguing that the strongest defense of the unanimity requirement is that it encourages the deliberation necessary for a just determination of guilt or innocence and that public confidence in jury verdicts is likely higher when verdicts are unanimous).

21. See *In re Winship*, 397 U.S. 358, 363–64 (1970).

22. See Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1276–95 (2000) (“[M]ajority rule may also lead to the emergence of a largely homogeneous group outnumbering and outvoting the minority.”).

23. See *infra* Part IV.

majority can prevent a verdict, forcing a mistrial. Proponents of nonunanimous verdicts have suggested that “hung juries will interfere with the efficiency of the . . . justice system when one or two jurors can block a verdict.”²⁴ For a conviction, concerns for efficiency may be outweighed by the need to maintain the certainty of proof beyond a reasonable doubt. But an acquittal does not present the same certainty concerns. Where a nonunanimous acquittal counts as a final acquittal, one or two holdouts could not interfere with the justice system by preventing a defendant from obtaining an acquittal. Thus, the balance of policy factors weighs against requiring unanimous acquittals, especially because the holdout-juror problem cannot be justified by the highest evidentiary burden.

The concern over hung juries is not merely theoretical—there are approximately 8,000 hung juries in criminal trials in the United States each year.²⁵ The onus of a mistrial is not spread equally; the government obtains a strong advantage with an opportunity for a second trial. The very fear of an overzealous government continually prosecuting a defendant until the defendant is found guilty is why the Founders insisted on the Fifth Amendment right against double jeopardy.²⁶ The Double Jeopardy Clause was enacted because the government “with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense”²⁷ As noted, however, the right against double jeopardy does not protect a defendant after the first trial results in a mistrial from a hung jury.²⁸ Although there may be justified reasons to allow reprosecution of some hung juries, there is very little reason for allowing reprosecution of a nonunanimous verdict of acquittal. Yet, because a nonunanimous acquittal is not considered a final acquittal in forty-nine states, the defendant is exposed to a key harm that the right against double jeopardy was intended to protect against: “[T]he possibility that even though innocent he may be found guilty.”²⁹

Although the government may consider many factors in deciding whether to retry a defendant for the same crime after a mistrial, a prosecutor’s discretion is nearly limitless.³⁰ Indeed, a defendant can be tried multiple times over, as in

24. Diamond et al., *supra* note 3, at 228.

25. See Richard H. Menard, Jr., Note, *Ten Reasonable Men*, 38 AM. CRIM. L. REV. 179, 200 (2001). Data on hung juries are notably a couple decades old, but circumstances are unlikely to have changed dramatically. Indeed, data on hung jury rates are difficult to gather. See *infra* notes 44–47 and accompanying text.

26. U.S. CONST. amend. V (“No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . .”).

27. See *Green v. United States*, 355 U.S. 184, 187 (1957) (“The constitutional prohibition against ‘double jeopardy’ was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.”).

28. *United States v. Perez*, 22 U.S. 579, 580 (1824).

29. *Green*, 355 U.S. at 188.

30. See *infra* notes 202–03 and accompanying text.

the case against Curtis Flowers, a man who was tried six times for the same crime.³¹ In the end, Flowers spent two decades in prison for a crime where no conviction was ultimately sustained against him.³²

Currently, Oregon is the only state that allows for asymmetrical unanimity, with a verdict of 10–2 or 11–1 counting as a final acquittal.³³ If other jurisdictions began allowing nonunanimous acquittals, they may differ in terms of where to draw the line. This Article suggests some different approaches in delineating the threshold to reach a hung jury, although future research into hung juries will benefit the discussion.

This Article proceeds in six parts. Part I illustrates the meaning of a hung jury and explains the two “thresholds” present in a criminal jury trial. Part II provides an account of the historical development of jury unanimity, starting with English common law, explaining how concern about unanimity was principally a concern about unanimous convictions. Part III provides reasons to doubt that symmetrical unanimity is the proper rule. Part IV presents a positive argument for why nonunanimous acquittals are better policy than unanimous acquittals. Part V explains the impact unanimous acquittals have and how mistrials adversely affect defendants. Lastly, Part VI provides some thoughts on drawing the line between acquittal and mistrial.

I. THE HUNG JURY “PROBLEM”

A hung jury—sometimes called a “deadlocked” jury—refers to a situation in which members of the jury cannot agree on a verdict after deliberation.³⁴ In modern times, arriving at a hung jury will look something like the following: After closing arguments at trial, the judge will instruct the jury about the law and the decision it needs to make, after which the jury will deliberate in private. If the members of the jury cannot agree on a verdict, the judge might (re)instruct the jury to do their best to come to a decision, which is sometimes referred to as an “*Allen* charge.”³⁵ The judge may reinstruct the jury multiple times if it fails to agree, and if the jury still cannot make a decision, the judge will declare a mistrial. Then, should it choose to do so, the government will make a motion for retrial. When the judge grants the motion, a retrial will be set in the future, which will include swearing in a new set of jurors. Should the

31. See *Flowers v. Mississippi*, 139 S. Ct. 2228, 2234 (2019).

32. See *id.* at 2235.

33. *State v. Ross*, 481 P.3d 1286, 1293 (Or. 2021) (holding that *Ramos* does not invalidate Oregon law allowing for acquittal by nonunanimous jury vote).

34. *Deadlocked Jury*, LEGAL INFO. INST. (Aug. 2022), https://www.law.cornell.edu/wex/deadlocked_jury [<https://perma.cc/3V2A-5CWH>].

35. See *Allen v. United States*, 164 U.S. 492, 501 (1896) (upholding the judge’s instruction that stated, among other things, that “[i]f . . . the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority”).

new set of jurors also fail to agree on a verdict after a second trial, the process could repeat itself.

Hung juries are seen as problematic for multiple reasons, the strongest of which is efficiency. Putting on a trial is extremely expensive,³⁶ an expense that is multiplied when there are multiple trials. Moreover, the time and energy that both parties, the judge, witnesses, clerks, and administrators put into a trial may be seen as a waste if the first trial does not come to a definite conclusion. Historically, juries were seen as responsible for speaking for the community³⁷—so hung juries were an impediment to community resolution. Because the community was supposed to speak conclusively with one voice, hung juries were allegedly so frowned upon that judges would sometimes “imprison[] juries in unheated rooms without food or drink” until they could reach an agreement.³⁸ Modern courts have backed away from such coercive behavior in favor of instructing the jury with an *Allen* charge.³⁹

Some scholars have also suggested that the requirement of unanimity of verdict increases the likelihood of hung juries.⁴⁰ If all twelve jurors must agree, then “a single stubborn or misinformed juror can ‘hang’ a criminal jury even when the evidence of guilt is manifest.”⁴¹ This is perhaps why a nonunanimous verdict leads not to an acquittal but to a mistrial, which allows the government to retry the defendant. As Figures 1a and 1b show, the government need only convince one juror of the defendant’s guilt to land in mistrial territory. If the government’s evidence proves to be persuasive to all jurors, the result is a conviction.

Figure 1a. Chart of Unanimous Verdict Outcomes Under the Law of Forty-Nine States and the Federal System

Number of Jurors	Result
0 jurors voting to convict (12 jurors voting to acquit)	Acquittal
1–11 jurors voting to convict	Hung
12 jurors voting to convict	Conviction

36. George C. Thomas III & Mark Greenbaum, *Justice Story Cuts the Gordian Knot of Hung Jury Instructions*, 15 WM. & MARY BILL RTS. J. 893, 917 (2007) (“[R]etrial[s] are expensive. In many jurisdictions, a trial can cost around \$10,000 per day.”).

37. See *Powers v. Ohio*, 499 U.S. 400, 406–07 (1991).

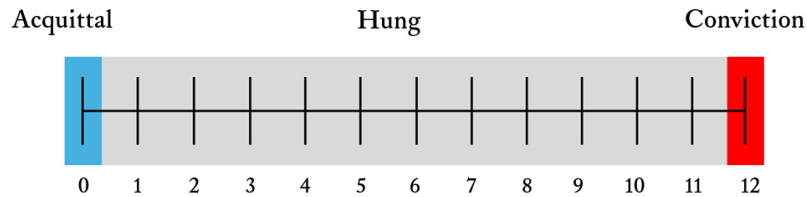
38. Thomas & Greenbaum, *supra* note 36, at 894 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES *375).

39. *Id.* at 904.

40. See *id.*; *infra* note 93 and accompanying text.

41. Thomas & Greenbaum, *supra* note 36, at 898.

Figure 1b. Linear Graph of Unanimous Verdict Outcomes Based on Number of Juror Votes to Convict

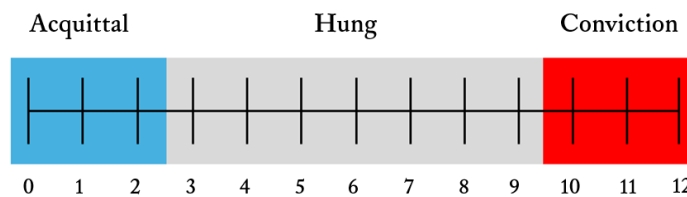


Before *Ramos*, Louisiana, Oregon, and Puerto Rico allowed for nonunanimous verdicts for both convictions and acquittals. Oregon's prior law is illustrated by Figures 2a and 2b.

Figure 2a. Chart of Oregon's Prior Law (1934–2020) Permitting 10–2 Verdicts

Number of Jurors	Result
0–2 jurors voting to convict (10–12 jurors voting to acquit)	Acquittal
3–9 jurors voting to convict	Hung
10–12 jurors voting to convict	Conviction

Figure 2b. Linear Graph of Oregon's Prior Law (1934–2020) Permitting 10–2 Verdicts



A jury verdict is supposed to answer the question of “guilty” or “not guilty,” leading to either a conviction or an acquittal. Yet, if the jury cannot unanimously decide on either of the two options, then the jury is hung, and a mistrial is declared. As such, there are three main outcomes of a jury verdict: (1) acquittal, (2) mistrial from a hung jury, or (3) conviction. The jurors begin the trial presuming the defendant is innocent, at which point every juror would

vote to acquit.⁴² If an acquittal is the starting point, then there are, so to speak, two “thresholds”: the threshold between acquittal and mistrial, and the threshold between mistrial and conviction. With symmetrical unanimity, if the government cannot convince a single juror of the defendant’s guilt, then the defendant is acquitted. If the government can convince at least one juror, then it has reached the first threshold: a mistrial.⁴³ If the government convinces all twelve jurors, then it has reached the second threshold: a conviction.

Most empirical research on hung juries is limited and dated, partly because “courts do not record systematic information on the number of hung juries,”⁴⁴ and polling a nonunanimous jury is prohibited.⁴⁵ The most expansive study found that from 1980 to 1997, the average hung jury rate for state felony trials was approximately 6.2%, and the rate for federal trials ranged from 1.2% to 2%.⁴⁶ The government continues to pursue cases that resulted in a mistrial from a hung jury almost 80% of the time.⁴⁷

The point of presenting these data is not, as many scholars typically argue, that the hung jury rate needs to go down.⁴⁸ Rather, the point is to establish that hung juries are a regularly occurring phenomenon affecting thousands of defendants every year.⁴⁹ Moreover, the fact that there is a consistent rate of hung juries (albeit low in comparison to verdicts) demonstrates that how states *define* an acquittal, mistrial, or conviction has significance. In accepting that hung juries are a reality for criminal trials, this Article suggests a rethinking of the transition from acquittal to mistrial. Although there is much academic work focusing on the conviction threshold, very little academic work has examined the acquittal-mistrial threshold.

42. For example, if the government for some reason did not put on any proof at all, resting as soon as its case-in-chief began, the jurors would all vote to acquit.

43. This Article will refer to this threshold as the “acquittal-mistrial threshold.”

44. PAULA L. HANNAFORD-AGOR, VALERIE P. HANS, NICOLE L. MOTT & G. THOMAS MUNSTERMAN, ARE HUNG JURIES A PROBLEM? 9 (2002).

45. *United States v. Williams*, 819 F.3d 1026, 1031 (7th Cir. 2016) (“Long ago, the Supreme Court held that it is always reversible error to ask a divided jury to reveal its numerical division (e.g., ten jurors on one side and two on the other).”) (citing *Brasfield v. United States*, 272 U.S. 448, 448 (1926)). The Federal Rules allow the polling of a jury only after it issues a unanimous verdict. FED. R. CRIM. P. 31(d).

46. See HANNAFORD-AGOR ET AL., *supra* note 44, at 22–25. The Hannaford-Agor study also found vastly different hung jury rates from one jurisdiction to the next—reported rates ranged from 0.1% in Pierce County, Washington to 14.8% in Los Angeles County, California. See *id.* at 25; see also HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 56 (1966) (reporting an average criminal hung jury rate of 5.5%).

47. See HANNAFORD-AGOR ET AL., *supra* note 44, at 27 fig. 2.6.a (noting 21.6% of cases that resulted in a mistrial from a hung jury were dismissed, with the rest resulting in a retrial, guilty plea, or other form of disposition).

48. See, e.g., Thomas & Greenbaum, *supra* note 36, at 918 (“[R]elying on retrials to solve the hung jury problem is a poor solution. A better solution would be to reduce the number of mistrials.”).

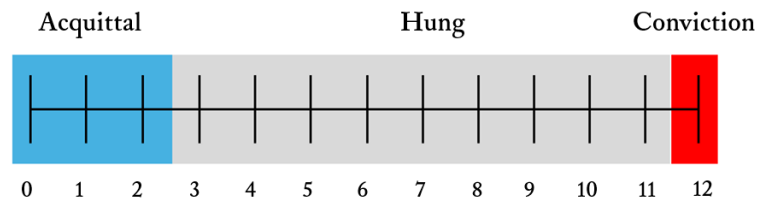
49. See *supra* text accompanying note 25.

Currently, Oregon is the only state that does not require symmetrical unanimity. This asymmetrical rule is illustrated in Figures 3a and 3b.

Figure 3a. Chart of Oregon's Current Law Since 2021, Permitting 10–2 Verdicts for Acquittal

Number of Jurors	Result
0–2 jurors voting to convict (10–12 jurors voting to acquit)	Acquittal
3–11 jurors voting to convict	Hung
12 jurors voting to convict	Conviction

Figure 3b. Linear Graph of Oregon's Current Law Since 2021, Permitting 10–2 Verdicts for Acquittal



II. THE DEVELOPMENT OF JURY UNANIMITY

Requiring unanimity for jury verdicts has a long history, emerging in England as early as the fourteenth century.⁵⁰ Exactly *why* this requirement emerged is less settled, and the “rule of unanimity in giving a verdict was by no means universal at first.”⁵¹ This was especially true if only one juror dissented; “the ground of this being the old rule that a single witness is nothing—*testis unus testis nullus*.”⁵²

The Supreme Court has noted four potential explanations for why unanimity became standardized.⁵³ One theory states that “unanimity arose out of the practice in the ancient mode of trial by compurgation of adding to the original number of 12 compurgators until one party had 12 compurgators

50. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1395 (2020).

51. JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 86 (1898).

52. *Id.*

53. See *Apodaca v. Oregon*, 406 U.S. 404, 407 n.2 (1972) (plurality opinion), *abrogated by Ramos*, 140 S. Ct. 1390 (2020). Although *Ramos* overruled *Apodaca*, *Ramos* did not dispute the *Apodaca* plurality’s historical findings.

supporting his position”⁵⁴ When this archaic method was abandoned, “the requirement that one side obtain the votes of all 12 jurors remained.”⁵⁵

A second theory explaining the move to unanimity posits that the requirement grew out of overly harsh perjury laws, under which a minority juror who had a different view of the facts could be punished.⁵⁶ The medieval view of the law was formalistic: there was only one correct view of the facts.⁵⁷ Those who declared otherwise, then, must have been lying. On this account, unanimity arose because conflicting opinions were not acceptable, especially when the jury was viewed as the *voice of God*.⁵⁸

A third possibility provided by the Court is that the unanimity requirement developed out of an understanding of the meaning of “consensus”—as “carr[ying] with it the idea of concordia or unanimity.”⁵⁹ Early English Parliaments often found that a majority vote was insufficient to bind the community.⁶⁰ While Parliament later changed to majority rule, jury verdicts remained unanimous.⁶¹ Still, there were similar concerns in eighteenth-century America about how only unanimity should bind the community.⁶² The idea that the community should speak definitively or conclusively before stripping a community member of liberty has also been argued as a justification for maintaining a unanimity requirement in modern days.⁶³

The Court’s final theory is that unanimity was used to “compensate for the lack of other rules ensuring that a defendant received a fair trial.”⁶⁴ As torture and other inhumane practices were acceptable,⁶⁵ demanding that all twelve jurors agree to convict could be seen as a safeguard against abuse of such practices. While due process concerns reformed many of these practices, unanimity remained.⁶⁶

54. *Id.* “Compurgation” refers to a common-law method of trial in which the defendant was acquitted on the sworn endorsement of a specified number of friends or neighbors. *Compurgation*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/compurgation> [<https://perma.cc/HN84-H43W> (staff-uploaded archive)].

55. *Apodaca*, 406 U.S. at 407 n.2.

56. *Id.*

57. *Id.*

58. *See id.*

59. *Id.*

60. *Id.*

61. *See id.*

62. *See id.*

63. *See infra* note 89 and accompanying text.

64. *Apodaca*, 406 U.S. at 407 n.2.

65. *See generally* John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3 (1978) (contrasting the modern American system of plea bargaining with the medieval European law of torture).

66. For support for this argument, see Eugene R. Sullivan & Akhil R. Amar, *Jury Reform in America—A Return to the Old Country*, 33 AM. CRIM. L. REV. 1141, 1141–42 (1996) (“The unanimous jury verdict may have been necessary to ensure a fair trial for a defendant in those times when a

Given these historical explanations, it is perhaps not surprising that the Court has found unanimity to be a “historical accident.”⁶⁷ Still, after centuries of jury trials, unanimous verdicts “had become an accepted feature of the common-law jury by the 18th century.”⁶⁸ This carried over to the American Colonies, and “[s]ix State Constitutions explicitly required unanimity.”⁶⁹ For example, Pennsylvania’s original constitution provided for one’s right to “trial[] by an impartial jury . . . without the unanimous consent of which jury he cannot be found guilty”⁷⁰ This was the “backdrop [against which] James Madison drafted and the States ratified the Sixth Amendment in 1791.”⁷¹ Indeed, Madison even presented the following Sixth Amendment proposal to Congress: “The trial of all crimes . . . shall be by an impartial jury of freeholders of the vicinage, *with the requisite of unanimity for conviction*”⁷²

Madison’s proposal, however, “ran into considerable opposition in the Senate.”⁷³ A conference committee was appointed and then finalized a version that deleted the entire clause incorporating the unanimity requirement.⁷⁴ Accordingly, the final version of the Sixth Amendment contains no mention of unanimity: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed”⁷⁵

Perhaps because unanimity was not expressly mandated in the Constitution, both Louisiana and Oregon later adopted laws allowing nonunanimous jury verdicts. At the height of the Jim Crow era, Louisiana permitted nonunanimous jury verdicts in most criminal cases by a vote of

defendant had few rights. But in modern times, a defendant enjoys many trial safeguards which ensure that a fair trial is given to all defendants.”).

67. *Williams v. Florida*, 399 U.S. 78, 90 (1970) (referring to number of jurors); *accord Apodaca*, 406 U.S. at 410 (referring to unanimity).

68. *Apodaca*, 406 U.S. at 407–08.

69. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1396 (2020).

70. PA. CONST. art. XI (1776); *see also* DEL. DECLARATION OF RTS. & FUNDAMENTAL RULES, § 14 (1776) (“[E]very man hath a right to . . . trial by an impartial jury, without whose unanimous consent he ought not to be found guilty.”); MD. CONST. art. XIX (1776) (“[E]very man hath a right to . . . trial by an impartial jury, without whose unanimous consent he ought not to be found guilty.”); N.C. CONST. art. IX (1776) (“[N]o freeman shall be convicted of any crime, but by the unanimous verdict of a jury of good and lawful men”); VT. CONST. ch. I, art. XI (1786) (“That in all prosecutions for criminal offences, a man hath a right to . . . an impartial jury of the country, without the unanimous consent of which jury he cannot be found guilty”); VA. CONST. § 8 (1776) (“[T]rial by an impartial jury of twelve men of his vicinage, without whose unanimous consent he cannot be found guilty”).

71. *Ramos*, 140 S. Ct. at 1396.

72. *Id.* at 1400 (emphasis added) (quoting 1 ANNALS OF CONG. 435 (1789) (Joseph Gales ed., 1834)).

73. *Apodaca*, 406 U.S. at 409.

74. *Id.*

75. U.S. CONST. amend. VI.

9–3.⁷⁶ Later research revealed that the legislative motive was based on racial animus:⁷⁷ creating a “facially race-neutral” rule which allowed the state to convict a Black defendant by ignoring the votes of Black members of the jury.⁷⁸ Likewise, Oregon’s constitutional amendment allowing nonunanimous jury verdicts of 10–2,⁷⁹ adopted in 1934, was based on similar motivations after a highly publicized trial involving a Jewish defendant accused of causing the death of a Protestant, in which a single holdout juror prevented a murder conviction.⁸⁰ Although both states’ amendments were aimed at allowing nonunanimous convictions, unanimity was proposed as a “neutral” rule which applied symmetrically to both convictions and acquittals.

Even though two states had active nonunanimity laws, by the mid-twentieth-century federal courts had been leaning the other direction, suggesting that jury unanimity to convict was constitutionally required.⁸¹ When the Federal Rules of Criminal Procedure became effective in 1946, Rule 31(a) required a unanimous verdict in federal criminal trials.⁸² The question of whether jury unanimity was constitutionally required was finally presented to the Supreme Court for the first time in 1972.

When it was presented, the question was only about conviction: whether the Constitution required unanimity to convict.⁸³ Indeed, in *Apodaca*, the Court considered whether the Sixth Amendment requires a unanimous jury verdict to convict and, if so, whether this right is incorporated against the states via the

76. LA. CONST. art. VII, § 41 (“Cases . . . shall be tried . . . by a jury of twelve, nine of whom must concur to render a verdict . . .”).

77. See Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1612 (2018) (“Recent scholarship questioning the origins and validity of Louisiana’s nonunanimous jury has highlighted this fact as proof that the adoption of nonunanimous juries was racially motivated.”).

78. See *Ramos v. Louisiana*, 140 S. Ct. 1390, 1394 (2020) (“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.’”) (footnotes omitted) (first citing *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880); and then quoting *State v. Maxie*, No. 13–CR–72522 (La. 11th Jud. Dist., Oct. 11, 2018), App. 56–57).

79. OR. CONST. art. I, § 11 (amended 1934) (“In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury . . . provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty . . .”).

80. Kaplan & Saack, *supra* note 3, at 3–6.

81. See *Patton v. Mississippi*, 332 U.S. 463, 468–69 (1947); *Maxwell v. Dow*, 176 U.S. 581, 604–05 (1900); *Thompson v. Utah*, 170 U.S. 343, 355 (1898).

82. FED. R. CRIM. P. 31(a).

83. *Apodaca v. Oregon*, 406 U.S. 404, 406 (1972) (plurality opinion), *abrogated by Ramos*, 140 S. Ct. 1390 (“[Petitioners] sought review in this Court upon a claim that conviction of crime by a less-than-unanimous jury violates the right to trial by jury in criminal cases.” (emphasis added)).

Due Process Clause of the Fourteenth Amendment.⁸⁴ A fractured majority upheld Oregon's law allowing nonunanimous convictions, holding that jury unanimity was not a fundamental aspect of the right to a jury trial.⁸⁵

The *Apodaca* decision fueled an academic debate about jury unanimity.⁸⁶ Although detailed summaries of the literature have been provided elsewhere,⁸⁷ a summary of the major arguments in favor of and against unanimity is warranted. Indeed, academics *in favor of* unanimity have argued that unanimity allows for better jury deliberations if jurors know they have to obtain everyone's agreement.⁸⁸ Another argument in favor of unanimity is that juries speak for the community (with one voice)—allowing dissenters could engender less public confidence that the decision is correct.⁸⁹ Likewise, the jury is supposed to represent a “cross-section” of the community, and a nonunanimous rule allowing majority vote effectively allows a jury to eliminate minority viewpoints.⁹⁰ Although some commentators still argue that unanimous juries produce more accurate results,⁹¹ “most agree that the outcomes of verdicts do not significantly vary with [a majority] decision rule.”⁹²

Arguments *against* unanimity are mostly focused on efficiency—lowering the hung jury rate.⁹³ Studies have shown that many hung juries are the result of only a couple of dissenting jurors.⁹⁴ As such, allowing for nonunanimous

84. *Id.* A companion case found that nonunanimous convictions do not violate the Due Process or Equal Protection Clauses of the Fourteenth Amendment. See *Johnson v. Louisiana*, 406 U.S. 356, 359–65 (1972), *abrogated by Ramos*, 140 S. Ct. 1390 (2020).

85. See *Apodaca*, 406 U.S. at 410–14 (plurality opinion). Justice Powell wrote a separate concurrence, representing the fifth vote. Unlike the plurality, Justice Powell found that “the Sixth Amendment requires a unanimous jury verdict to convict.” *Johnson*, 406 U.S. at 371 (Powell, J., concurring). Nonetheless, the lone justice found that a unanimous conviction requirement was not incorporated onto the states via the Fourteenth Amendment. *Id.* at 380. Therefore, five justices allowed the states to continue the practice of nonunanimous convictions. *Id.* at 410–14 (plurality opinion).

86. See *supra* note 3 for examples of contributions to this scholarly debate. One of these contributions expressly labels *Apodaca* as an academic catalyst. Diamond et al., *supra* note 3, at 207–08 (“*Apodaca* . . . stimulated a series of laboratory experiments on unanimous verdicts in criminal cases.”).

87. See Ethan J. Leib, *Supermajoritarianism and the American Criminal Jury*, 33 HASTINGS CONST. L.Q. 141, 168–71 (2006) (outlining the debate, including the different positions, proponents, and strengths and weaknesses of each position).

88. See Diamond et al., *supra* note 3, at 208 (“Researchers found that deliberations were shorter when juries were permitted to reach a non-unanimous verdict.”).

89. See Leib, *supra* note 87, at 169 (noting that one argument in favor of unanimity is “having community speak with one civic voice”).

90. See Taylor-Thompson, *supra* note 22, at 1274–77; cf. HANNAFORD-AGOR ET AL., *supra* note 44, at 2 (“[I]s it appropriate to undermine the significance of minority involvement in the justice system by diluting the effect of dissenting viewpoints?”).

91. See Wang, *supra* note 3, at 394 (arguing unanimity produces more accurate results).

92. Leib, *supra* note 87, at 144.

93. See Diamond et al., *supra* note 3, at 207 (citing KALVEN & ZEISEL, *supra* note 46, at 461) (“Kalven and Zeisel reported that hung juries in criminal cases were more likely in jurisdictions where unanimity was required.”).

94. See *infra* note 222 and accompanying text.

verdicts will prevent the holdout juror problem—that one stubborn juror can undermine justice by refusing to convict.⁹⁵ Fewer hung juries would “restore public confidence in the judicial system.”⁹⁶ Perhaps swayed by these arguments, multiple proposals for nonunanimous verdicts have been made at the state level.⁹⁷

What is most notable about the academic debate between unanimity and nonunanimity is that it was essentially a debate between symmetrical unanimity and symmetrical nonunanimity. Hardly anyone has questioned whether the unanimity rule should be asymmetrical—that a different rule should apply to conviction versus acquittal.⁹⁸

In 2020, the Court reconsidered the *Apodaca* decision in *Ramos v. Louisiana*.⁹⁹ The *Ramos* Court rejected the “functionalist” approach of the *Apodaca* plurality, holding that “the Sixth Amendment’s right to a jury trial requires a unanimous verdict to support a conviction.”¹⁰⁰

Reflecting on the tumultuous history of jury unanimity in the United States, the historical debate was almost exclusively focused on unanimity for conviction. Mostly absent from the pre-*Ramos* debates is any discussion of why the law should or should not require unanimity for acquittal.¹⁰¹ For example, the six state constitutions that had jury unanimity clauses in the late eighteenth century referred only to unanimity for conviction.¹⁰² Madison’s Sixth Amendment proposal only required unanimity “to convict.”¹⁰³ *Apodaca* and *Ramos* were concerned only with unanimous convictions.¹⁰⁴ Indeed, the history

95. See Sullivan & Amar, *supra* note 66, at 1142 (“Adoption of the ten-to-two (super-majority) jury vote would strengthen the power of the jury by eliminating the occurrences of hung juries as well as reducing the danger of a single juror corrupting the jury process.”).

96. Jere W. Morehead, *A “Modest” Proposal for Jury Reform: The Elimination of Required Unanimous Jury Verdicts*, 46 U. KAN. L. REV. 933, 935 (1998).

97. See Kaplan & Saack, *supra* note 3, at 19–20 (“In the 1980s the California Senate rejected a bill, sponsored by a former district attorney, proposing nonunanimous verdicts in criminal trials. In 1995, two bills proposing a constitutional amendment allowing 10–2 and 11–1 jury votes were presented to the California legislature. Similarly, the Washington State Legislature received a proposed amendment to the constitution along with a proposed act allowing 10–2 verdicts in criminal trials in 1997. In 2001, HB 1397 proposed to allow 10–2 criminal jury verdicts in Mississippi. In 2003, a New York resolution proposed a state constitutional amendment requiring only three-fourths of the jurors to agree on a verdict in felony cases . . . [A]ll of these proposed amendments ultimately failed.”).

98. See Leib, *supra* note 87, at 171 (noting that “[n]o one I’ve ever read” discusses “Asymmetrical Unanimity”). *But cf.* at 150 (presenting an argument, based on transaction costs, for an asymmetric rule allowing convictions by supermajoritarian vote while “endors[ing] a simple majority rule for acquittal”).

99. See *Ramos v. Louisiana*, 140 S. Ct. 1390, 1404–07 (2020).

100. *Id.* at 1397.

101. See *supra* notes 3, 98 and accompanying text.

102. See *supra* note 70 for the language of each state’s constitution.

103. See *supra* note 72 and accompanying text.

104. See *supra* note 83; *Ramos*, 140 S. Ct. at 1394 (“We took this case to decide whether the Sixth Amendment right to a jury trial—as incorporated against the States by way of the Fourteenth

of the unanimity requirement in the United States is the history of unanimity *to convict*. The focus on convictions is not particularly surprising—convictions involve the most serious deprivation of liberty and the highest potential for government overreach. Why, then, have unanimity laws been symmetrically applied to both conviction and acquittal?

The answer is not entirely clear. A unanimous acquittal requirement has been largely overshadowed by concern for convictions, and both conviction and acquittal have been subsumed under a symmetrical “unanimous verdict” requirement. In most states, unanimous acquittals seemed to have just gone along for the ride of unanimous convictions, whether forgotten in the debate or assumed in state law as a parallel rule to bolster the law’s facial neutrality. Even when Oregon and Louisiana enacted nonunanimous conviction laws, nonunanimity was applied symmetrically to acquittals. As Part III will explain, however, nothing requires the pairing of acquittal with conviction, and there may be reasons to doubt any assumption that unanimity must be a symmetrical rule.

III. DOUBTING THE SYMMETRICAL RULE

If unanimity laws have been applied symmetrically to acquittals every time they have been enacted for convictions, it might seem reasonable to assume that there are good reasons for treating both symmetrically. Although it is unclear why symmetrical unanimity has been adopted by most states, this Part casts doubt on any assumption that unanimous acquittals are required. This Part then questions the assumption that a symmetrical rule should apply to outcomes that have asymmetrical burdens.

A. *Difference in Constitutionality*

One might think that symmetrical unanimity is the law in almost every state because unanimous acquittals are constitutionally required. Indeed, after *Ramos* held that the Sixth Amendment requires a unanimous verdict to convict, one might assume that the same could be said of acquittals. But nothing in the Constitution requires a jury to reach a unanimous verdict to acquit.

Specifically, *Ramos* held that “the Sixth Amendment’s right to a jury trial requires a unanimous verdict to support a conviction.”¹⁰⁵ The Court arrived at this holding from originalist grounds:

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

Amendment—requires a unanimous verdict *to convict* a defendant of a serious offense.” (emphasis added) (footnote omitted)).

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

era, or opinions and treatises written soon afterward—the answer is unmistakable. A jury must reach a unanimous verdict in order to convict.¹⁰⁶

Although the common understanding of the right to a jury trial may have included a right to have a conviction be unanimous, there is no similar evidence suggesting that the right to a jury trial also required a unanimous acquittal.¹⁰⁷ Indeed, the language of several state constitutions—as well as Madison’s proposal—suggests the opposite.¹⁰⁸ Every state constitution that included a unanimity clause stated specifically that unanimity was required to convict—with no mention of unanimity to acquit.¹⁰⁹

The lack of a constitutional requirement for unanimous acquittals is further supported by judicial development after *Ramos*. In 2021, the Oregon Supreme Court issued a decision regarding how *Ramos* affected its nonunanimous verdict rule.¹¹⁰ In relevant part, the court affirmed that the Sixth Amendment right to a unanimous jury verdict, as held in *Ramos*, invalidated Oregon’s 10–2 jury verdict law insofar as it allowed for nonunanimous convictions.¹¹¹ However, it found that *Ramos* did not invalidate 10–2 jury verdicts as applied to acquittals.¹¹² As such, the court held that *Ramos*’s holding only applied to convictions. As a result of this decision, Oregon currently allows for nonunanimous acquittals.¹¹³

In 2022, a certiorari petition asked the Supreme Court to extend *Ramos* to acquittals: “The question presented here is whether, when this Court ruled that the Sixth Amendment means that ‘[a] jury must reach a unanimous verdict in order to convict,’ it meant to say that the Sixth Amendment requires a jury to reach a unanimous verdict to acquit.”¹¹⁴ The petition, however, was denied. Based on the subsequent judicial development, it seems unlikely that the Supreme Court would extend *Ramos* to require unanimous acquittals.

Furthermore, while the original justification for including the right to a jury trial in the Bill of Rights may support a unanimous conviction requirement, it does not suggest that unanimous acquittals are constitutionally required. The

106. *Id.* at 1395.

107. Cf. Nicholas M. Mosvick & Mitchell A. Mosvick, *The Heller-ization of Originalism: Ramos v. Louisiana and the Problem of Frozen Context*, 2019 CATO SUP. CT. REV., 309, 311 (2020) (“Historical evidence that the Sixth Amendment’s text constitutionalized unanimity is wanting.”).

108. See *supra* notes 69–72 and accompanying text.

109. See *supra* note 70 for the language of each state’s constitution.

110. See *State v. Ross*, 481 P.3d 1286, 1292–93 (Or. 2021).

111. See *id.* at 1293.

112. See *id.*

113. Louisiana amended its constitution during the *Ramos* litigation to require unanimity for trials after 2018. See LA. CONST. art. I, § 17. As such, Louisiana began requiring symmetrical unanimity before *Ramos* was decided, and it remains the law presently. See *id.*

114. Petition for Writ of Certiorari at 6, *Centeno v. Commonwealth of Puerto Rico*, 143 S. Ct. 89 (2022) (mem.) (No. 21-1398) (citation omitted).

Sixth Amendment right to a jury trial was based on juries at English common law. The establishment of juries at English common law was “clearly intended to protect the accused from oppression by the Government.”¹¹⁵ Previously, the Crown could bring “unfounded criminal charges brought to eliminate enemies,”¹¹⁶ and one solution was the “insistence upon community participation in the determination of guilt or innocence.”¹¹⁷

As a pillar of “protection against arbitrary rule,”¹¹⁸ a jury trial was one of the major protections provided by state constitutions during the late eighteenth century. As the Supreme Court has described, “guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered.”¹¹⁹ Every constitution adopted by the original states guaranteed a jury trial.¹²⁰ This reflected the “deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement.”¹²¹

Furthermore, a jury trial was designed to broaden the separation between the executive and the judiciary.¹²² Even for the United States Constitution, which created formal separation of powers, the Framers “insisted upon further protection against arbitrary action.”¹²³ As the Court has explained, both branches of government were susceptible to arbitrary action: “Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority.”¹²⁴

Thus, even though the Constitution separates the executive from the judiciary, a court can still be influenced by the other branches: “[B]y creating the office of judge *within* some governmental structure, in [an] important sense [the judge] is not independent, for he is a dependent of those for whom he holds

115. *Duncan v. Louisiana*, 391 U.S. 145, 155 n.23 (1968) (quoting *Singer v. United States*, 380 U.S. 24, 31 (1965)).

116. *Id.* at 156.

117. *Id.*

118. *Id.* at 151.

119. *Id.* at 155.

120. *Id.* at 153; *see also* Amar, *supra* note 3, at 1169 (“The only right secured in all state constitutions penned between 1776 and 1787 was the right of jury trial in criminal cases.”).

121. *Duncan*, 391 U.S. at 156.

122. *See Apodaca v. Oregon*, 406 U.S. 404, 411 (1972) (referring to the right to a jury trial as “the interest of the defendant in having the judgment of his peers interposed between himself and the officers of the State who prosecute and judge him . . .”).

123. *Duncan*, 391 U.S. at 156.

124. *Id.*

office.”¹²⁵ Moreover, the judge is expected to apply the criminal law—that is, the law protecting the “King’s peace.”¹²⁶

The right to a jury trial was an intense topic of discussion at the Founding. As one scholar has remarked, “[n]o idea was more central to our Bill of Rights—indeed, to America’s distinctive regime of government of the people, by the people, and for the people—than the idea of the jury.”¹²⁷ The Anti-Federalists especially thought the right to a jury trial was nonnegotiable.¹²⁸ Indeed, Patrick Henry is credited with saying, “[w]hy do we love this trial by jury? Because it prevents the hand of oppression from cutting you off. [The government] may call any thing rebellion, and deprive you of a fair trial by an impartial jury of your neighbors.”¹²⁹

Although the purpose and original justification for including the right to a jury trial in the Bill of Rights support a unanimous conviction requirement, they do not support requiring unanimous acquittals. For convictions, it seems appropriate that the group of twelve peers be unanimous in convicting another peer. Yet, if the right to a jury trial was contemplated as a protection against government overreach, requiring unanimous acquittals might instead undermine that goal. A jury where eleven jurors vote to acquit and only one juror votes to convict would not lead to an acquittal. This seems advantageous to the government, as it only needs to convince a single juror to prevent acquittal. Since the right to a jury trial is a defendant’s right, not the government’s, it would be strange to say that the defendant’s right gives the government an advantage. Indeed, saying that the defendant has the “right to a unanimous acquittal” would really be no right at all. A defendant might think

125. MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 20 (1981) (emphasis added).

126. *See id.* at 27 (“[E]ven in those few societies that seek to insulate the judge from the rest of the government, he is expected to administer the criminal law, that is, to impose the will of the regime on the party being prosecuted by the regime.”). Indeed, from the defendant’s perspective, the “impartiality” of the judge—or separation of judicial and executive—is not always immediately apparent. When charged with a crime and brought into a courtroom, the defendant will see a judge in dark robes at the center of the room, usually elevated, with the authority of the “government” to adjudicate the law and sentence citizens. Whether or not the defendant views the judge as hostile, “few of the defendants in contemporary Western criminal courts are likely to perceive their judges as anything other than officers of the regime seeking to control them.” *Id.* This governmental officer—the judge—then refers to the adverse party across the aisle as “the Government” (or “the State”). Thus, the major entities in the room are two government officers and one citizen. Here, the potential for oppressive practices and “coercion against one of the parties is at a maximum.” *Id.* at 19. Hence, adding a group of citizens—the jury—is an attempt to offset this skewed balance in favor of citizens, as “no tyrant could afford to leave a subject’s freedom in the hands of twelve of his countrymen.” *Duncan*, 391 U.S. at 155–56 n.23 (quoting PATRICK DEVLIN, *TRIAL BY JURY* 164 (1956)). Therefore, a jury broadens the separation between the executive and the judiciary by stripping a judge of its power to adjudicate and placing a limit on the executive’s the power to prosecute.

127. Amar, *supra* note 3, at 1169.

128. *See id.*

129. Thomas & Greenbaum, *supra* note 36, at 896.

twice about invoking their right to a jury trial if they know that a single juror could prevent acquittal. In that sense, it would be strange to say that the right to a unanimous acquittal is constitutionally required. Therefore, whereas the Constitution requires a jury to return a unanimous verdict to convict, there is no requirement that the jury unanimously acquit.

B. *Difference in Evidentiary Burden*

Another assumption for why forty-nine states have a symmetrical rule may be that unanimity for both conviction and acquittal provides an even, neutral rule. However, that assumption should be questioned, as a symmetrical rule may not be the most reasonable when the standards for achieving a conviction and an acquittal are asymmetric.

A conviction requires that the government establish the defendant's guilt beyond a reasonable doubt. Beyond a reasonable doubt, often referred to as the criminal standard, is considered the highest burden of proof.¹³⁰ The criminal standard is practically as old as the criminal system itself, even if it was not always phrased as "proof beyond a reasonable doubt."¹³¹ As one nineteenth-century treatise writer explains, "[a]lways and everywhere the great emphasis was placed on the rule that in criminal cases there can be no conviction unless guilt is established with very great clearness—as we say nowadays, beyond reasonable doubt."¹³² Similar to early English criminal law, the high standard of proof was present in the United States during the "early years as a Nation."¹³³

The heavy burden is two-fold: the government "bears *both* the production burden and the persuasion burden."¹³⁴ This extends to every element of the crime.¹³⁵ The burden is so demanding that the government sometimes even needs to prove the *absence* of a defendant's purported defense.¹³⁶

130. See THAYER, *supra* note 51, at 559.

131. See *id.* (tracing the historical development of the "beyond reasonable doubt" standard).

132. *Id.* at 552.

133. *In re Winship*, 397 U.S. 358, 361 (1970); see also *Brinegar v. United States*, 338 U.S. 160, 174 (1949) ("These rules are historically grounded rights of our system . . .").

134. *Mullaney v. Wilbur*, 421 U.S. 684, 702–03 n.31 (1975) (emphasis added).

135. See STEVEN POWLES, LYDIA WAINE & RADMILA MAY, *MAY ON CRIMINAL EVIDENCE* 52 (6th ed. 2015) ("[T]he prosecution must prove all the elements in the offence necessary to establish guilt."); Lawrence B. Solum, *Presumptions and Transcendentalism: You Prove It! Why Should I?*, 17 HARV. J.L. & PUB. POL'Y 691, 692 (1994) ("When we use the phrase 'burden of proof,' we sometimes refer to a complex standard incorporating a burden of production and a burden of persuasion: for example, the prosecution has the burden of production on each of the elements of a crime, and to meet that burden, the state must meet a burden of persuasion beyond reasonable doubt.").

136. See, e.g., *Mullaney*, 421 U.S. at 704 ("[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case."). See generally POWLES ET AL., *supra* note 135, at 53–55 (describing the prosecution's burden to disprove the defense).

There are two principled reasons for requiring proof beyond a reasonable doubt.¹³⁷ The first is that, at least in contemporary American society, the government is the prosecutor. The reasonable doubt standard therefore serves as a check on arbitrary government power. A higher standard of proof means it is more difficult for the government to prove the defendant guilty, which would lower the success rate of arbitrary or unfair prosecution. This protection against arbitrary prosecution was designed to prevent the citizenry from living in fear of government, allowing “every individual going about his ordinary affairs [to] have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.”¹³⁸

The second reason is that the consequences of a criminal trial are markedly more severe than those of a civil trial.¹³⁹ In contrast to civil trials, a criminal conviction results in loss of liberty¹⁴⁰—and, in historical England, often death by hanging.¹⁴¹ Since conviction produced such severe consequences, raising the standard meant society could be satisfied that a fellow citizen was not deprived of freedom unless there was a high degree of certainty. As the Court has explained, the criminal standard of proof “developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.”¹⁴²

Conversely, the task of establishing an acquittal, as compared to establishing a conviction, is fundamentally different. In fact, acquittals are not really “established” at all. Acquittal is the starting point, and the defendant bears no burden¹⁴³—if the trial ends as soon as it begins, the defendant is acquitted. Indeed, the government bears the production burden, meaning that if the government cannot produce sufficient evidence, the result is an acquittal.¹⁴⁴ If that happens, the defendant need not do anything at all—the defendant can rest on the presumption of innocence if the government alone cannot produce enough evidence to establish proof beyond a reasonable doubt.

137. There are also many other reasons for the standard, such as the “stigmatization” of a conviction, see *In re Winship*, 397 U.S. at 363–64 (“[A] society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt.”), and ensuring “respect and confidence of the community” that the defendant was truly guilty. *Id.*

138. *Id.* at 364.

139. See *id.* at 363 (“The accused during a criminal prosecution has at stake interests of immense importance . . .”).

140. *Id.*

141. See DAVID D. FRIEDMAN, *LAW’S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS* 267–74 (2000).

142. *Brinegar v. United States*, 338 U.S. 160, 174 (1949).

143. *POWLES ET AL.*, *supra* note 135, at 52 (“The defendant . . . has to prove nothing.”).

144. See *supra* notes 134–36 and accompanying text.

A vote of acquittal does not mean that the defendant did not commit the crime; an acquittal only means there is not enough proof for a conviction.¹⁴⁵ In that sense, an acquittal is merely the *absence of a conviction*. Even if the government presents enough evidence such that “[a] jury could believe the defendant more likely than not (though not by proof beyond a reasonable doubt) committed the crime, . . . it would still have to vote ‘not guilty.’”¹⁴⁶ In such a situation, the defendant is “not merely entitled to be acquitted . . . he *must* be acquitted.”¹⁴⁷ Although a criminal verdict is often ingenuously seen as answering the question—“guilty or innocent?”—in reality, it is slightly more complicated. Whether the defendant *actually* committed the crime is not the final question a juror must answer. Rather, the question is better phrased as “guilty or not guilty.” A juror can think the defendant committed the crime yet simultaneously find that the government did not establish its burden, which should result in a vote of “not guilty.”

Given the differences between proving a conviction and “proving” an acquittal, one might question whether the unanimous verdict rule should apply to both. For a conviction, it may seem rational to enforce a unanimous verdict. Although the burden of proof is one way to prevent the government from muscling its way to convictions, “[t]he modes of proof . . . are only half the story of how guilt is brought home. The other, and very important, half relates to the men who have to decide the issue.”¹⁴⁸ As such, the rule of unanimity for conviction could be seen as a way of reinforcing the highest burden of proof.¹⁴⁹

Indeed, if a conviction could be made by a *nonunanimous* jury, as was the case in Oregon pre-*Ramos*, this could be seen as undermining the certainty that the highest burden of proof is supposed to provide.¹⁵⁰ The fewer jurors who agree, the less confident one might be in the conviction.¹⁵¹ As the Court has noted, “[i]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.”¹⁵² Thus, nonunanimous convictions could be seen as “relax[ing]

145. See POWLES ET AL., *supra* note 135, at 52 (“If the prosecution do[es] not prove any of these elements, the prosecution fails and the defendant must be acquitted.”).

146. Colb, *supra* note 4.

147. See POWLES ET AL., *supra* note 135, at 71.

148. GLANVILLE WILLIAMS, *THE PROOF OF GUILT* 253 (3d ed. 1963). Indeed, the Court has found that the “Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated.” *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993). This is because “the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.” *Id.*

149. See Kaplan & Saack, *supra* note 3, at 29 (“[T]he unanimous jury has become the manifestation of the reasonable doubt standard.”).

150. See *id.* at 28 (“Majority [v]erdicts in [c]riminal [t]rials [u]ndermine the [r]equirement that [g]uilt be [p]roven [b]eyond a [r]easonable [d]oubt.”).

151. See *supra* note 15 and accompanying text.

152. *In re Winship*, 397 U.S. 358, 364 (1970).

the standard of reasonable doubt” by effectively lowering the government’s overall burden of convincing every juror.¹⁵³ As such, one way to justify unanimity to convict is that it reinforces the criminal standard.

However, since there is no burden of proof to acquit, unanimous acquittals cannot be seen as a way to uphold the highest burden. Whereas a few dissenting jurors may risk undercutting the certainty of a conviction, requiring an acquittal to be unanimous does not provide any more certainty to the finding of “not guilty,” since the finding does not make a determination as to whether the defendant did or did not carry out the act. This is the same regardless of whether the acquittal is unanimous or nonunanimous—even if all twelve jurors agree, they might still believe the defendant likely carried out the crime. If the overwhelming majority of jurors find reasonable doubt, that might seem like enough doubt to find the defendant not guilty.

Thus, the asymmetrical evidentiary burdens should cast doubt on enforcing a symmetrical unanimity rule. This is further illuminated by examining each party’s starting point at trial. If the government begins a trial with the highest burden of proof, the defendant, conversely, is presumed innocent.¹⁵⁴ The presumption of innocence is a “basic component of a fair trial”¹⁵⁵ and is another safeguard against unfair prosecution. The Court has even implied that a reasonable doubt standard without the presumption of innocence is inadequate.¹⁵⁶ Thus, the presumption provides the framework, and “[t]he [reasonable doubt] standard provides concrete substance for the presumption of innocence—that bedrock ‘axiomatic and elementary’ principle whose ‘enforcement lies at the foundation of the administration of our criminal law.’”¹⁵⁷

Accordingly, the defendant starts the trial with every juror oriented toward acquittal.¹⁵⁸ This is different from, as noted above, the ancient mode of trial by compurgation, where the accused had the obligation to convince twelve persons to come to their side.¹⁵⁹ With such an orientation, a neutral and symmetrical unanimity rule might be more reasonable. But in a modern

153. See *Johnson v. Louisiana*, 406 U.S. 356, 393 (1972) (Douglas, J., dissenting) (“Would the Court relax the standard of reasonable doubt still further by resorting to eight-to-four verdicts, or even a majority rule?”).

154. See *POWLES ET AL.*, *supra* note 135, at 52 (“The defendant bears no burden of proving anything and it is not his task to prove his innocence.”).

155. *Estelle v. Williams*, 425 U.S. 501, 503 (1976).

156. See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, 1 *FEDERAL EVIDENCE* § 3:17 (4th ed. 2023) (citing *Taylor v. Kentucky*, 436 U.S. 478, 486 (1978)).

157. *In re Winship*, 397 U.S. at 363 (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)).

158. See A. A. S. ZUCKERMAN, *THE PRINCIPLES OF CRIMINAL EVIDENCE* 125 (1989) (“Our starting-point must therefore be that an innocent person has a right not to be convicted and punished.”).

159. See *supra* note 54 and accompanying text.

criminal trial, every juror begins on the defendant's side.¹⁶⁰ A rule allowing the government to achieve a mistrial when it only convinces a single juror seems contrary to the presumption of innocence and highest burden of proof.

Thus, a criminal system in which the parties do not start neutral and have asymmetrical evidentiary burdens should cast doubt on whether enforcing a neutral, symmetrical rule of unanimity is good policy. As Part IV will illustrate, there may be good reasons to require unanimity to convict, but the balance of factors weighs against unanimity to acquit.

IV. POLICY JUSTIFICATIONS FOR ASYMMETRY

Given that there is no constitutional requirement, and that the asymmetrical evidentiary burdens may provide a reason to rethink symmetrical unanimity, it is worth examining whether there are good policy reasons for keeping unanimity symmetrical. Hardly any academic work has discussed whether the justifications for unanimity are applicable specifically to acquittals.¹⁶¹ This Part will argue that, while there may be justified reasons to require unanimity for conviction, the balance of factors weighs in favor of nonunanimous acquittals.

A. *Holdout Juror vs. Community Representation*

As noted previously, one of the biggest pragmatic concerns about unanimity is that one stubborn juror could refuse to agree with the majority, thus upending criminal justice. For example, suppose an abolitionist who refuses to convict on principle becomes a member of the jury. As the argument goes, this juror could be an impediment to justice if the defendant clearly committed the crime charged. Proponents of nonunanimous verdicts argue that this is a disadvantage of requiring unanimity. This same disadvantage could occur to prevent acquittal—a stubborn juror who is dead-set on convicting could force a mistrial, even if all other jurors think the defendant is not guilty.

On the other hand, proponents of jury unanimity argue that allowing a verdict despite one or more holdout jurors has a potential downside. Since the jury is supposed to represent a cross-section of the community, one reason for

160. There are many other legal rules that the court imposes to ensure the jury begins the trial with the presumption of innocence in mind. Historically, courts in Europe imposed a two-witness rule for conviction, meaning that only one witness cannot overcome the defendant's presumption of innocence, see Langbein, *supra* note 65, at 4, and this requirement is still enforced for some crimes today. See, e.g., U.S. CONST. art. III, § 3 ("No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."). Another rule designed to preserve the presumption of innocence is the prohibition on a defendant wearing shackles to trial—dressing the defendant as a prisoner can create the image that the defendant is already guilty despite being presumed innocent. See generally *Deck v. Missouri*, 544 U.S. 622 (2005) (holding that a visibly shackled defendant during closing arguments was a violation of clearly established law).

161. But see *supra* notes 4, 98 and accompanying text.

having jury verdicts be unanimous is that the verdict incorporates a broader range of viewpoints. A potential problem with mere majority rule (specifically, nonunanimous verdicts) is that it could allow a jury to silence minority viewpoints.¹⁶² This was the motivation of the Louisiana legislature when it adopted its constitutional amendment allowing 9–3 verdicts—to make it easier, for example, for nine white jurors to convict a Black defendant over the dissent of three Black jurors. Thus, requiring unanimity can ensure against a racist or bigoted majority from convicting a defendant on the basis of the defendant’s minority status. With this argument, the “holdout jurors” are seen as important, as they account for the minority voice in the community.

Given these opposing concerns, a unanimity rule should contemplate the proper balance between “preventing the holdout juror” and “excluding minority viewpoints.” With a unanimous conviction, allowing the holdout juror can be justified by competing policy concerns. A unanimous conviction is constitutionally required and embedded in the defendant’s right to a jury trial. As the right to a jury trial is seen as a protection against overzealous prosecution, the weight of this protection could be viewed as more valuable than the downside that it brings. This calculation is not new to criminal law and has been referred to as “Blackstone’s maxim”: “It is better that ten guilty persons escape than that one innocent suffer.”¹⁶³ As noted, unanimity can also be seen as reinforcing the highest burden of proof.¹⁶⁴ Furthermore, community representation is quite important for conviction, as excluding minority voices could undercut the very protection that the right to a jury trial brings.¹⁶⁵ Thus, the balance tilts in favor of unanimity to convict.

162. See Taylor-Thompson, *supra* note 22, at 1276–95.

163. 4 WILLIAM BLACKSTONE, COMMENTARIES *352. There have been many variations of this maxim. See Alex Stein, *Constitutional Evidence Law*, 61 VAND. L. REV. 65, 72 (2008) (“Under the prevalent moral vision, it is better to acquit a guilty defendant than to convict and punish an innocent person.”); Alexander Volokh, *n Guilty Men*, 146 U. PA. L. REV. 173, 182 (1997) (“It was apparently widely believed in English courts during the Middle Ages and the Renaissance that it was better to let many guilty men escape than to convict one innocent person”); WILLIAMS, *supra* note 148, at 186–87 (“The Romans had the maxim that it is better for a guilty person to go unpunished than for an innocent one to be condemned; and Fortescue turned it into the sentiment that twenty guilty men should escape death through mercy rather than one just man be unjustly condemned. The next recorded instance of this is . . . Sir Edward Seymour, who, . . . in 1696, said: ‘I am of the same opinion with the Roman, who . . . declared, he had rather ten guilty persons should escape, than one innocent should suffer.’ Hale took the ratio as five to one; Blackstone reverted to ten to one, and in that form it became established.”); *Coffin v. United States*, 156 U.S. 432, 456 (1895) (citing Roman law and English writers for the proposition that “it is better five guilty persons should escape unpunished than one innocent person should die”); *In re Winship*, 397 U.S. 352, 372 (1970) (Harlan, J., concurring) (“[It is] a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free”); *Henry v. United States*, 361 U.S. 98, 104 (1959) (“It is better . . . that the guilty sometimes go free than that citizens be subject to easy arrest.”).

164. See *supra* note 149 and accompanying text.

165. See Kaplan & Saack, *supra* note 3, at 35 (“Nonunanimous verdicts . . . give juries the choice to ignore the memories of two of their peers and limits the jury members’ ability to confront their own

For acquittal, which entails no burden of proof and is not constitutionally required, the same justifications are not present, so the balance of reasons tips against unanimity. First, there is reason to think the holdout juror problem is more serious for acquittals than for convictions. For conviction, overcoming a holdout juror can be seen as part of the high burden the government must meet; but for acquittal, a holdout juror who is determined to convict can be seen as an obstacle the *defendant* must overcome. But the defendant should be presumed innocent by the jury and should not have to meet a burden to achieve acquittal. Thus, a unanimous acquittal could allow a single juror to force a mistrial and allow the prosecution to retry the defendant—even when eleven other jurors think there is reasonable doubt. Moreover, Blackstone’s maxim—better to acquit than to convict—indicates that having safeguards against conviction is more important than having safeguards against acquittal. As such, allowing the holdout juror is not as easily justified for acquittal as it is for conviction.

The upside of a nonunanimous acquittal is avoiding the holdout juror problem entirely: a nonunanimous acquittal means that eleven against one, or ten against two, et cetera, can create a final acquittal. Yet, if a nonunanimous acquittal excludes one or two jurors, one might argue that this could lead to suppression of minority voices.¹⁶⁶ As an Oregon judge has explained, there could be “a situation where a white police officer is brought to trial for unjustly shooting and killing an unarmed black person, and the jury being made up of ten white people and two black [people].”¹⁶⁷ If the two Black jurors’ votes are allowed to be excluded, a nonunanimous acquittal could represent a problem.

Although this problem presents a concern for nonunanimous acquittals, requiring unanimity to acquit is not a better solution. Unanimous acquittals allow for worse—and more likely—suppression of minority voices. Despite the Oregon judge’s example above, a more likely situation could arise if nonunanimous acquittals are prohibited: when eleven Black jurors vote to acquit a Black defendant and one white juror votes to convict. In a unanimous acquittals jurisdiction, this would result *not* in an acquittal but a mistrial, allowing the government to re prosecute a defendant who should otherwise have been acquitted. Not only is this situation problematic, but it is also more likely, because it only requires one juror to hang the jury (rather than ten jurors as described in the Oregon judge’s example). In a nonunanimous acquittals jurisdiction, this example would result in an acquittal, and it would prevent a (racist) holdout juror from preventing acquittal.

implicit biases through group discussion. Ultimately, this impacts the jury’s ability to function as a jury—that is, to ensure that the State is not arbitrarily punishing citizens without sufficient evidence.”).

166. See *supra* notes 22, 90 and accompanying text.

167. *State v. Ross*, 481 P.3d 1286, 1292 (Or. 2021) (en banc) (quoting trial court) (holding that Oregon permits nonunanimous acquittals). See *supra* text accompanying notes 110–13 for explanation of the decision.

Thus, on balance, nonunanimous acquittals allow for less suppression of minority voices while avoiding the holdout juror problem.¹⁶⁸

B. *Definitive Statement and Better Deliberations*

Other policy reasons for unanimity are also less persuasive for acquittals. One argument for unanimous verdicts is based on the jury representing the conclusive or definitive statement of the community.¹⁶⁹ Unanimity of voice assures the community that it reached the right decision, whereas with a decision by mere majority, the public can less comfortably assert that the defendant truly committed the crime. This is perhaps important for a conviction, where the burden of proof is the highest and the consequences of a guilty verdict are the most extreme. But an acquittal is not a definitive statement that “the defendant is innocent”—it is merely the representation that the government did not reach its burden of proof.¹⁷⁰ There could be a preponderance—even clear and convincing evidence—that the defendant committed the crime, but that is not sufficient. This may be unsatisfying for the public, which may want right or wrong answers, but an acquittal does not provide a definitive answer—regardless of whether the verdict is unanimous or not. Indeed, any discontent with this criminal standard represents discontent with the criminal system in general, not unanimity.

Furthermore, a unanimous acquittal requirement would only exacerbate the problem. Requiring a unanimous acquittal means that an 11–1 vote results in a hung jury—there would *still* be no final or definitive statement. But if a nonunanimous acquittal resulted in a final acquittal, this would, at the very least, provide a definitive resolution.

Another related argument for unanimity is that the jury tends to have better discussions when it needs to reach a unanimous result.¹⁷¹ Recent scholarship has cast doubt on this argument, suggesting that jurors are

168. The general problem of suppression of minority voices is more problematic for nonunanimous convictions than for nonunanimous acquittals. Indeed, the problem is exacerbated with convictions, because a nonunanimous verdict can flip the role of the jury on its head. Instead of being a protection for the defendant, as explained above, the jury could become another instrument of state oppression, allowing citizens to arbitrarily condemn other (minority) citizens. The former Louisiana nonunanimity rule usurped the role of the jury, it is argued, by ignoring the minority voices on the jury and thereby allowing for conviction of minorities. *See supra* note 90. A nonunanimous conviction is an example of just how important the defendant’s right to a jury trial is, as it illustrates the actuality of the Founder’s fears of a society without jury protection at all. Conversely, nonunanimous acquittals do not usurp the jury because the right to a jury trial is a protection against arbitrary prosecution, not arbitrary acquittal. The argument that it is unfair when the jury does *not* convict a defendant misinterprets the jury as a *weapon of imprisonment* instead of a shield against overzealous prosecution.

169. *See supra* note 89 and accompanying text.

170. *See* Colb, *supra* note 4 (“People think of an acquittal as a sort of finding of innocence. It is not, of course.”).

171. *See supra* note 88 and accompanying text.

sometimes pressured into agreeing with the majority.¹⁷² Regardless, the argument goes as follows. With unanimity, jurors know that every juror has to agree to reach a verdict, so they are more likely to better listen and understand dissenting jurors' viewpoints.¹⁷³ With unanimity, if the initial internal juror vote were to reveal that the requisite majority for a verdict has already been reached, the majority would be less inclined to listen to the minority.¹⁷⁴ Under this argument, then, majority jurors who have to seriously consider the minority to achieve unanimity might be more inclined to change their view.

As with other justifications for unanimity, this argument is relevant for conviction. Considering that the jury needs to eliminate *all* reasonable doubt, ignoring one or two jurors who have reasonable doubts might be ignoring a consideration that pokes doubt in the majority's argument. But this logic does not comparably translate to acquittals. Of course, if one or two jurors think the defendant is guilty, it is possible that ten or eleven jurors completely misunderstood a certain piece of evidence or legal argument. But if ten or eleven jurors originally thought that the evidence was not strong enough, that would seem more like the government's failure to present the evidence sufficiently. Poor demonstration of the evidence generally means the government has not fulfilled its burden—exactly what is declared by the words “not guilty.”¹⁷⁵

Therefore, if the balance of factors weighs against unanimous acquittals, and if unanimous acquittals cannot be otherwise justified, more jurisdictions should consider adopting laws allowing for nonunanimous acquittals.¹⁷⁶

172. See Diag Davenport & Yuji K. Winet, *Pivotal Voting: The Opportunity to Tip Group Decisions Skews Juries and Other Voting Outcomes*, 119 PROCS. NAT. ACAD. OF SCIS. 1, 2 (2022) (“[P]ivotal voters are more likely to vote in favor of punishment than they otherwise would as nonpivotal voters and . . . they appear to adopt harsher views in order to rationalize their votes.”).

173. See Saul M. Kassir, *The American Jury: Handicapped in the Pursuit of Justice*, 51 OHIO ST. L.J. 687, 703 (1990) (“[I]deal deliberation is an openness to informational influence.”).

174. See Diamond et al., *supra* note 3, at 208 (“When juries were not required to be unanimous, they . . . were more likely to take the first formal ballot during the first ten minutes of deliberation and to vote often until they produced a verdict. In contrast, juries that heard the same case but were required to reach a unanimous verdict tended to delay their first vote and discussed the evidence more thoroughly.”). One response to this argument is that the first ballot is maintained 90% of the time anyways, according to one study. See KALVEN & ZEISEL, *supra* note 46, at 488–89.

175. Indeed, poor demonstration of the evidence can just as easily lead to an acquittal adopted by a unanimous jury. Moreover, if deliberations are still of concern, a state could adopt a rule that allows for a nonunanimous verdict of acquittal only after the jury deliberates for a certain amount of time. See Sullivan & Amar, *supra* note 66, at 1142 (“In England, the criminal code was changed in 1967 to allow a ten-to-two verdict after the jury has deliberated at least two hours . . . [which has] proved successful.”).

176. One exception to policy favoring a nonunanimous acquittal might be when the defendant is putting on a defense that requires the burden to shift to the defendant. Since the balance of factors differs based on the difference in evidentiary burden, certain policy justifications would contain different weight in light of burden shifting. However, the extent to which the justifications are affected would depend on the nature of the burden shifting, which standard is required to meet that burden, and whether the burden shifts back to the government. Many thanks to Nadia Banteka for this insight.

V. THE IMPLICATIONS OF NONUNANIMOUS ACQUITTALS

One might be tempted to think of a hung jury as a “tie,” where both parties start over on the same spot they started. In most cases, however, a defendant is more disadvantaged by the prospect of a second trial. As explained below, the adverse position of a defendant forced to defend against a subsequent trial was recognized in the right against double jeopardy. This Part will argue that, while there may be reasons for some mistrials, a mistrial from a nonunanimous vote of acquittal does not provide any meaningful benefit. Instead, it invokes the same concerns the right against double jeopardy was designed to prevent.

When a defendant is acquitted, the right against double jeopardy prevents the government from re-prosecuting the defendant for the same crime. The Fifth Amendment states: “No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb.”¹⁷⁷ As with the burden of proof, presumption of innocence, and right to a jury trial, the right against double jeopardy is far older than the United States Constitution. Although well established at English common law,¹⁷⁸ the guarantee against double jeopardy is even seen in Greek and Roman times.¹⁷⁹ As with the right to a jury trial,¹⁸⁰ the right against double jeopardy was added to the Constitution as a protection *for* the defendant *against* the government.¹⁸¹ Indeed, the “Double Jeopardy Clause snugly safeguards the role of the criminal jury” by preventing a second prosecution from overturning a jury verdict.¹⁸² As the Court has explained, “the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense.”¹⁸³

The right against double jeopardy recognizes the hardships a defendant would need to bear if faced with multiple trials. The Court has offered many justifications for the right against double jeopardy,¹⁸⁴ which can be broken into the following categories: finality of judgments, the embarrassment or shame of a subsequent trial, the financial expense of multiple trials, wearing down of the defendant, and giving the prosecution a tactical advantage. Each will be discussed briefly.

177. U.S. CONST. amend. V.

178. *Green v. United States*, 355 U.S. 184, 187 (1957) (“The underlying idea . . . is deeply ingrained in at least the Anglo-American system of jurisprudence.”).

179. 6 WAYNE R. LAFAYE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, *CRIMINAL PROCEDURE* § 25.1(b) (4th ed. 2015).

180. *See supra* text accompanying note 115.

181. *Green*, 355 U.S. at 187 (“The constitutional prohibition against ‘double jeopardy’ was designed to *protect* an individual.” (emphasis added)).

182. Amar, *supra* note 3, at 1171.

183. *Green*, 355 U.S. at 187.

184. *See United States v. DiFrancesco*, 449 U.S. 117, 128–29 (1980) (listing different justifications).

Finality of judgments is a principle spanning many areas of law,¹⁸⁵ but in criminal law, the concern is about the “public interest in the finality of criminal judgments.”¹⁸⁶ With a conviction or acquittal, the jury has made a pronouncement about a fellow citizen’s guilt, and the public should be able to rest assured that the jury’s decision conclusively decides the matter.

Likewise, whether guilty or innocent, being charged with a crime can create reputational harm for the defendant, and the nature of trials as public affairs “subject[s] him to embarrassment.”¹⁸⁷ Moreover, a retrial, which could occur months or even years later, “compel[s] him to live in a continuing state of anxiety and insecurity.”¹⁸⁸ The defendant could be held without bail the entire time, even though the defendant has never been found guilty. The right against double jeopardy encompasses concerns about the treatment of an accused defendant—even a guilty defendant.¹⁸⁹ And the process is not cheap: the “expense[] and ordeal” of defending a second trial disproportionately affects a defendant, who often does not have the same resources as the government.¹⁹⁰

There are further justifications against a second trial which apply specifically when the first trial resulted in acquittal. Indeed, with the right against double jeopardy, “[a]n acquittal is accorded special weight.”¹⁹¹ One might naïvely think that if the defendant is truly innocent, then there is no harm in trying the defendant again (disregarding the abovementioned harms), because the result would be an acquittal. Yet the right against double jeopardy quashes this “try-again-just-to-be-sure” logic, recognizing that our justice system does not always produce correct results and is prone to misuse. This is especially true because one party comes to trial backed by the power of the sovereign. Indeed, the right against double jeopardy incorporates a recognition that an acquittal the first time around may not mean an acquittal on the second or third time: the biggest fear in allowing retrial of a defendant after acquittal is “enhancing the possibility that even though innocent he may be found guilty.”¹⁹² The more trials prosecuted, the more likely the defendant will be found guilty.¹⁹³ This concern is expressed in two ways.

185. For example, Congress setting aside a final, retrospective judgment. *See* *Plaut v. Spendthrift Farm*, 514 U.S. 211, 213–15 (1995).

186. *DiFrancesco*, 449 U.S. at 129 (quoting *Arizona v. Washington*, 434 U.S. 497, 503 (1978)).

187. *Green*, 355 U.S. at 187.

188. *Id.*

189. *LAFAVE ET AL.*, *supra* note 179, § 25.1(b) (“The threat of governmental oppression cited in *Green* poses a concern that goes beyond the threat to the innocent.”).

190. *See Green*, 355 U.S. at 187.

191. *DiFrancesco*, 449 U.S. at 129 (“The law ‘attaches particular significance to an acquittal.’” (quoting *United States v. Scott*, 437 U.S. 82, 91 (1978))).

192. *Green*, 355 U.S. at 188.

193. *Id.* at 187–88.

First, by repetitively prosecuting, the government can “wear down a defendant.”¹⁹⁴ To receive a victory only to learn that the same battle must be fought again (and again) can dampen one’s enthusiasm to continue fighting. Especially if there is no limit: if the government can always re prosecute after an acquittal, there is no end to the battle at which the defendant can rest. The “wearing down” justification is not limited to just being at trial—the whole time between trials the defendant would deal with the “anxiety and insecurity” of another trial.¹⁹⁵ The government often has more resources to survive a battle of attrition. The longer a defendant must defend themselves, the higher the risk that the defendant will be defeated—even if innocent. The power imbalance would be especially concerning because the government alone can bring a prosecution, whereas a defendant cannot “bring” another trial after a conviction. Seeing no end in sight, a defendant may decide to cut their losses and enter into a plea.¹⁹⁶

Second, there is also the fear that the government will gain a “tactical advantage” in the second trial from having gone through the first.¹⁹⁷ The experience of the first trial gives the government the opportunity to put on a better second trial: “[I]f the Government may re prosecute, it gains an advantage from what it learns at the first trial about the strengths of the defense case and the weaknesses of its own.”¹⁹⁸ As the Court notes, “central to the objective of the prohibition against successive trials’ is the barrier to ‘affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.’”¹⁹⁹

Since the double jeopardy rule does not bar a mistrial due to a hung jury, a defendant who receives a nonunanimous vote for acquittal will still suffer many of the evils the Double Jeopardy Clause was meant to avoid. Imagine a two-week trial in which the prosecution has presented its entire case in chief—numerous witnesses and evidence accusing the defendant of the crime. After the defense rests, both parties present closing arguments, the judge instructs the jury, and the jury goes to deliberate. After three days (and perhaps numerous instructions from the judge), the jury votes 10–2 in favor of acquittal. The judge declares a mistrial, the government makes a motion for retrial, and a new trial date is set for three months in the future. With this example, many double jeopardy concerns are invoked, as explained below.

First, the prospect of “wearing down” the defendant is still present because the new trial still hangs over the defendant’s head. The defendant will have to

194. *DiFrancesco*, 449 U.S. at 130.

195. *Green*, 355 U.S. at 187.

196. The concern is not theoretical—approximately 31% of cases whose first trial results in a hung jury result in guilty pleas. See HANNAFORD-AGOR ET AL., *supra* note 44, at 27.

197. See *Arizona v. Washington*, 434 U.S. 497, 508 (1978).

198. *DiFrancesco*, 449 U.S. at 128.

199. *Id.* (quoting *Burks v. United States*, 437 U.S. 1, 11 (1978)).

continue waiting another three months (assuming no continuances) for a resolution. Although not convicted, the defendant may feel sufficiently defeated by the prospect of having to defend themselves again. The defendant may also be held in jail without bond between trials. The extended uncertainty of not knowing whether the defendant will be declared guilty may have harmful psychological effects, increasing the defendant's "anxiety and insecurity."²⁰⁰

Second, by getting another try, the government can learn from its first trial about what worked and what did not. The government now has a better understanding of what evidence was convincing—and where it might need to supplement it with additional "evidence which it failed to muster in the first proceeding."²⁰¹

Third, the defendant is burdened by the expense of having to finance a defense for a second trial, plus any hearings or motions in between. And finally, the defendant is once again subject to the embarrassment of a trial in which the defendant will be publicly exposed and accused of wrongful conduct by the government and other witnesses.

If not barred by double jeopardy, a prosecutor's discretion in retrying cases is nearly limitless.²⁰² Indeed, "[s]uch reluctance to interfere with prosecutorial discretion exists despite the potential for abuse and the strong public policy favoring reviewability of administrative action."²⁰³

One example of the prosecutor's ability to retry cases is the murder trials of Curtis Flowers.²⁰⁴ In 1996, four individuals were murdered at a furniture store in Winona, Mississippi, a crime Flowers was charged with committing.²⁰⁵ Winona is a small town, so the murder of four people was a major incident for the community.²⁰⁶ The District Attorney, Doug Evans, promised the people of Winona that he would find and convict the individual responsible at all costs.²⁰⁷

200. *Green*, 355 U.S. at 187.

201. *DiFrancesco*, 449 U.S. at 128. For example, in the subsequent trials of Curtis Flowers, the prosecution called new witnesses who claimed that Flowers confessed to the crime while in jail. *Curtis Flowers Exonerated in Mississippi After Attorney General Drops All Charges*, DEATH PENALTY INFO. CTR. (Mar. 14, 2025), <https://deathpenaltyinfo.org/curtis-flowers-exonerated-in-mississippi-after-attorney-general-drops-all-charges> [<https://perma.cc/ZCC5-HJQ6>].

202. See Megan S. Wright, Shima Baradaran Baughman & Christopher Robertson, *Inside the Black Box of Prosecutor Discretion*, 55 U.C. DAVIS L. REV. 2133, 2133 (2022) ("[P]rosecutors have unparalleled and nearly-unchecked discretion that leads to incarceration or freedom for millions of Americans each year.").

203. Roger P. Joseph, *Reviewability of Prosecutorial Discretion: Failure to Prosecute*, 75 COLUM. L. REV. 130, 130–31 (1975).

204. See generally *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019) (providing background on Flowers' six trials before a jury for the same murders).

205. *Id.* at 289.

206. See *id.*; IN THE DARK: Season 2, Episode 1: July 16, 1996, at 04:58 (Spotify, May 1, 2018) (investigative podcast about the murder trials of Curtis Flowers).

207. See *id.*

The costs amounted to six trials, all of which were tried by Evans himself.²⁰⁸ Two trials were mistrials due to hung juries; the other four were overturned due to prosecutorial misconduct.²⁰⁹ The trials involved different iterations of evidence, including different witnesses at different trials.²¹⁰ The trials spanned almost twenty years, all the while Flowers sat in prison.²¹¹ Flowers was finally released in 2019, and a conviction was never sustained against him.²¹²

Although this may be an extreme example, the attempts to re prosecute were by no means unusual. Indeed, the government continues to pursue cases that result in a mistrial from a hung jury almost 80% of the time.²¹³ For a prosecutor, retrying a case does not require much effort or approval.²¹⁴ And if the case is serious—or means a great deal to the community—then there may be more incentive to re prosecute.²¹⁵ Moreover, in terms of evaluating the strength of the case, a hung jury cannot be polled²¹⁶—meaning there is no way to determine how many jurors actually voted to convict.

At the same time, if all hung juries resulted in acquittals instead of mistrials, the realistic fear is that the court would be acquitting guilty defendants. This would be especially worrisome if ten or eleven jurors think a defendant is guilty, as the likelihood of the majority being correct perhaps increases.²¹⁷ This encapsulates the holdout juror problem: one or two stubborn jurors voting against conviction should not prevent justice from being served. However, the concern of acquitting a guilty defendant is less potent when a majority of jurors vote in favor of acquittal, especially with an 11–1 or 10–2 vote.²¹⁸

208. *See id.* at 01:10.

209. *Flowers*, 139 S. Ct. at 2234–35.

210. *See IN THE DARK*, *supra* note 206.

211. *See id.* at 31:09, 33:30.

212. *See Flowers*, 139 S. Ct. at 2234–35 (outlining the results of the first five trials and reversing the conviction of the sixth trial).

213. *See supra* text accompanying note 47.

214. *See Wright et al.*, *supra* note 202, at 2186 (noting that for “[t]he vast majority” of charging decisions, “a frontline prosecutor would make the decision alone”). As a former frontline prosecutor, I can also personally attest that the decision to pursue or dismiss nonserious cases rarely required supervisory approval.

215. *See id.* at 2168–86 (outlining the various reasons a sample of prosecutors provided for why they choose to pursue a case).

216. *See supra* note 45 and accompanying text.

217. *See Jacobsohn*, *supra* note 20, at 39, 40, 54–55.

218. *See supra* text accompanying notes 166–68; *infra* text accompanying notes 221–24. Even if a skeptic is doubtful that a nonunanimous acquittal provides the same assurance that a defendant is truly innocent, the double jeopardy rule should still bar a second trial after a 10–2 or 11–1 jury verdict. The right against double jeopardy embraces Blackstone’s maxim—that some acquittals will be wrong. *See United States v. DiFrancesco*, 449 U.S. 117, 129 (1980) (noting the principle against double jeopardy is “so strong that an acquitted defendant may not be retried even though the acquittal was based on an egregiously erroneous foundation.” (quoting *Arizona v. Washington*, 434 U.S. 497, 503 (1978))). So

Therefore, a unanimous acquittal requirement could potentially allow the government to continually harass a defendant whom it already failed to convict—the worst of all the fears behind double jeopardy. As such, the only two eventual outcomes are that the defendant is truly acquitted (through a second trial or by dropping the charges) or that “even though innocent he may be found guilty.”²¹⁹ Neither provides a justifiable outcome, and both are what the Double Jeopardy Clause is designed to protect against.

VI. DELINEATING THE THRESHOLD

If the balance of factors weighs against the symmetrical rule in favor of nonunanimous acquittals, more states should adopt an asymmetrical unanimity rule. In drafting such a rule, the natural inquiry is what threshold number of juror votes should count as a final acquittal. Drawing the line precisely may be difficult, given that the same reasons justifying an 11–1 acquittal are likely present in a 10–2 or even 9–3 vote of acquittal. Given that the most recent study into hung juries is over twenty years old,²²⁰ determining an optimal rule would greatly benefit from more contemporary research.

Moreover, there are many different angles at which one could approach line drawing. This Article suggests a few ways of looking at the issue based on the current data available, using Oregon’s current 10–2 acquittal rule.²²¹ Indeed, it could be argued that a 10–2 rule provides a good balance of guarding against the holdout juror problem while not allowing for quick suppression of minority voices. One or two stubborn jurors cannot force a mistrial, and conversely, a bare majority cannot quickly outnumber the minority and force an acquittal—there must be at least ten. Drawing the line specifically at two could resolve most of the holdout juror problem, given that forty-two percent of the hung jury cases deadlocked with only one or two jurors holding out against the majority.²²² However, if future research would suggest otherwise, drawing the line may look different.

even if the critic thought that a 10–2 acquittal stands on shakier foundation than a unanimous acquittal, then it should *still* be protected by double jeopardy. *Burks v. United States*, 437 U.S. 1, 16 (1978) (“[W]e necessarily afford absolute finality to a jury’s verdict of acquittal—*no matter how erroneous its decision*.” (emphasis added)). Indeed, the Double Jeopardy Clause was written to resolve the competing social costs between false acquittals and potential government oppression. *DiFrancesco*, 449 U.S. at 130 (“[H]owever mistaken the acquittal may have been, there would be an *unacceptably high risk* that the Government, with its superior resources, would wear down a defendant.” (emphasis added)).

219. *Green v. United States*, 355 U.S. 184, 188 (1957).

220. See HANNAFORD-AGOR ET AL., *supra* note 44.

221. See *supra* Figures 3a–b.

222. HANNAFORD-AGOR ET AL., *supra* note 44, at 11. Also, “the probability that an acquittal minority will hang the jury is about as great as that a guilty minority will hang it.” KALVEN & ZEISEL, *supra* note 46, at 461.

Another approach could be based on balancing the holdout juror problem against the fear that defendants who truly committed the crime are acquitted (specifically, false acquittals). For example, it could be argued that a 10–2 acquittal rule only acquits defendants who have been found “not guilty” by an overwhelming majority of jurors.²²³ Trials that end in a 7–5 or 8–4 verdict—where one might be less satisfied that the defendant did not commit the crime—would still end in a mistrial. Thus, one perspective is that there may be less risk in acquitting a defendant who truly committed the crime with a 10–2 verdict, as opposed to a bare majority (or even lower) voting for acquittal.²²⁴

Still, a skeptic may contend that any nonunanimous acquittal, including by 10–2, could allow a defendant who truly committed the crime to go free if, say, ten jurors think that the defendant probably committed the crime but nonetheless voted to acquit because there was no proof beyond a reasonable doubt. For example, suppose, for the sake of argument only, that beyond a reasonable doubt can be translated into a statistical view of legal proof,²²⁵ and that in this context proof of guilt means greater than 95% certainty. Then suppose that at Trial A, ten jurors find that Defendant A committed the crime with 93% certainty. The other two jurors found that they were 96% certain of Defendant A’s guilt (see Figure 4 below). This situation, in a 10–2 acquittal jurisdiction, would result in a final acquittal even though it is very likely that Defendant A truly committed the crime. That is true, and that might be disconcerting at first, but it is only marginally different than other “disconcerting” acquittals made by unanimous vote. For example, suppose that at Trial B, all twelve jurors think Defendant B committed the crime with 93% certainty. This would result in an acquittal in any jurisdiction, but it would still invoke the same disconcerting reaction: a defendant who very likely committed the crime will be acquitted. The difference between Defendant A and Defendant B is incredibly marginal, yet there are radically different outcomes in different jurisdictions. In that sense, any discontent with Trial A’s outcome is merely discontent with the standard of proof in general.

223. Compare that with unanimous acquittals, which allow the government to keep a criminal case alive even if a supermajority of jurors believe the defendant is “not guilty.”

224. It could be argued that if an acquittal is just the absence of a conviction, the defendant should be acquitted as soon as the government fails to reach its burden. If eleven jurors are insufficient, this would imply that a defendant should be acquitted if all but one juror votes for a guilty verdict. Although this argument may have merit, raising the number of jurors at the acquittal-mistrial threshold need not require abolishing hung juries. One downside, as noted, is that a single stubborn juror could force an acquittal even when eleven jurors vote to convict. If a single juror could control, this would no more resemble community jury protection than a single person undermining criminal justice.

225. This Article avoids making any affirmative argument that “beyond a reasonable doubt” can or should be turned into a certainty percentile. The reduction of the standard of proof to statistical form is used purely for purposes of analogy.

Figure 4. Chart of Various Trials Where the Standard of Proof Is Greater than 95%

Trial A	Trial B	Trial C
10 jurors = 93%	12 jurors = 93%	10 jurors = 5%
2 jurors = 96%		2 jurors = 96%

Alternatively, what a 10–2 acquittal safeguards against is *not* marginal. Suppose in Trial C that ten jurors find guilt is 5% likely, yet two stubborn jurors think it is 96%. Here, there is an overwhelming likelihood that Defendant C is innocent, yet forty-nine states declare this situation to be a mistrial. This is especially egregious because Trial B results in an acquittal, even though it is far more likely that Defendant B truly committed the crime.

The discrepancy between Trial C and Trial B is far wider than between Trial A and Trial B. At worst, when a false acquittal occurs because of a nonunanimous acquittal (Trial A), the chances that the false acquittal would also have occurred under a unanimity rule are almost as likely (Trial B), making the difference on that end marginal. On the other end, however, when it is extremely likely the defendant is innocent (Trial C), unanimous acquittals do not allow for acquittal—but they do allow acquittal when it is very likely the defendant is guilty (Trial B). Therefore, in weighing the dangers of a false acquittal, one could argue that a good reason to draw the line at 10–2 is that it provides a framework that is only marginally different than what we already allow in the criminal justice system, but one that has meaningful differences in outcomes.

These are just some approaches that could be considered in delineating the acquittal-mistrial threshold, and future research could be beneficial in determining an optimal rule.

CONCLUSION

The debate and development of jury unanimity in the United States have largely overshadowed concern for acquittals. Now that *Ramos* ended the debate on unanimity for the conviction threshold, the time is ripe to redefine the acquittal-mistrial threshold. Since the difference between conviction and acquittal seems to call for different standards of unanimity, this Article has reexamined whether policy justifies symmetrical unanimity.

The balance of policy factors favors an asymmetrical rule allowing nonunanimous acquittals. A nonunanimous acquittal avoids the holdout juror problem, and the justifications for maintaining unanimous convictions—reinforcing the burden of proof, community representation, and so on—are less persuasive for acquittals. Given the serious impact that unanimous acquittals

have on defendants who are “twice put in jeopardy of life or limb,”²²⁶ more states should adopt an asymmetric unanimity rule, as is currently the law in Oregon.

226. U.S. CONST. amend. V.