RACIST INTENT REAPS RACIST RESULTS: WHY *RAMOS V. LOUISIANA*'S JUSTICE IS INCOMPLETE WITHOUT RETROACTIVITY

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INTRODUCTION

The classic 1957 film *12 Angry Men* depicts a principled, admirably stubborn juror as he single-handedly uses logic and patient reasoning to convince the other eleven men in the deliberation room that the government has not adequately proven its case.[1] However, a film based on the unusual jury rules previously in place for non-murder felony trials in Oregon and Louisiana would illustrate a very different, much less ideal process.

This hypothetical film, titled *A Short and Civil Conversation*, opens just after closing arguments in a trial. The State accuses a defendant of color of aggravated robbery. The jurors (who are only slightly less likely to be White than the actors portraying the *Angry Men*[2]) file into the deliberation room. They follow the judge's instructions to elect a jury foreperson,[3] then take a preliminary poll to see how far the group is from the ten-vote majority required to return a conviction. Even though the ten hands raised for 'guilty' make the sentiments of the group clear, the jurors make a good faith effort to skim the case's facts. Because the judge has instructed them that a majority of ten or eleven is sufficient, they ultimately conclude that the standard has been met after a cursory overview. Though one or two of the jurors may harbor questions (Was the witness really credible? Does this actually meet the standard for aggravation?), they do not feel empowered to push back against the majority because the votes to convict already appear to be in place. Deliberation comes to an end, and within an hour of entering the room, the foreman informs the court of the jury's 'guilty' verdict, and the defendant is led from the courtroom to face his sentence. The end credits roll. This production, filmed in real-time, would be much shorter than the classic film.[4]

The Sixth Amendment's guarantee of the right to a trial by jury includes the requirement that any conviction is based on that jury's

1. 12 ANGRY MEN (United Artists 1957).

2. *See id.*

3. If classroom and workplace group exercises that require nominating a leader or spokesperson are any indication, the jurors will most likely choose the first person to say with hesitation, "So, who should be foreman?"

4. *See* 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, 14 (2016) ("In each of the three cases addressed in Apodaca, the juries took less than fifty-one minutes to assemble in the room, elect a foreman, deliberate, and inform the court of its verdict."). 12 Angry Men is 96 minutes in length. *See* 12 ANGRY MEN, *supra* note 1.

unanimous verdict.[5] However, until the decision in *Ramos v. Louisiana*, the states of Oregon and Louisiana allowed non-murder felony convictions on the basis of a ten or eleven vote majority in favor of guilt.[6] These jurisdictions preserved the practice of non-unanimity in reliance on an anomalous 1972 Supreme Court decision of questionable controlling precedent. While a majority of the Justices of the *Ramos* Court agreed that the case condoning non-unanimous jury verdicts, *Apodaca v. Oregon*,[7] should be overturned in affirmation of the Sixth Amendment right to a unanimous jury verdict, the Court declined to address the issue of retroactivity, instead reserving that determination for future litigation.[8] Following closely on Ramos's heels, the Court granted certiorari on a case bringing the issue of retroactivity in *Edwards v. Vannoy*.[9] At the time, no rule of criminal procedure had been applied retroactively under the framework governing such decisions.[10] *Edwards* did not change that tradition, and instead foreclosed any possibility that future rules of criminal procedure established by the Court may become retroactive regardless of the magnitude of the rights they implicate.[11] In light of the Court's refusal to remedy the harm done to defendants convicted prior to the *Ramos* decision, the prohibition on non-unanimous jury verdicts must now be applied retroactively by the states to uphold equal protection principles and the fundamental right to a fair trial guaranteed by the Constitution.

Justice dictates the retroactive application of Ramos' rule because non-unanimity in jury verdicts began with racist intentions, and this rule of criminal procedure in Oregon and Louisiana has deprived many defendants of their right to a fair trial. Non-unanimous juries originated as an explicitly racist tool to reduce barriers against convicting minority defendants and decrease the power of the few minority citizens selected for jury service.[12] Unsurprisingly, this systemic denial of rights has had a disproportionate impact on defendants of color.

5. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1396–97 (2020).

6. *See* OR. CONST. of 1859, art I, § 11; LA. CONST. of 1898, art. 116.

7. *See* 406 U.S. 404, 406 (1972).

8. *See Ramos*, 140 S. Ct. at 1420 (Sotomayor, J., concurring).

9. *See* 141 S. Ct. 1547, 1553 (2021).

10. *See Ramos*, 140 S. Ct. at 1407.

11. *See Edwards*, 141 S. Ct. at 1560 ("New procedural rules do not apply retroactively on federal collateral review. The watershed exception is moribund.").

12. *See* Thomas Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1597–98 (2018).

When *Apodaca* presented the Supreme Court with the opportunity to strike down the practice of non-unanimity in 1972, the Court instead issued a perplexing plurality opinion. Four Justices correctly found that the Sixth Amendment right to trial by jury includes the right to a unanimous verdict, and the Sixth Amendment is incorporated against the states to the effect that this right applies in both federal and state criminal trials.[13] These Justices were outvoted.[14] Another four voted to uphold the non-unanimous verdict in question because they doubted the function of unanimity in contemporary society—an arguably interesting inquiry, though not a legal framework for evaluating rules of criminal procedure.[15] The final Justice joined those voting to uphold the verdict, but rejected the plurality's reasoning.[16] Instead, Justice Powell openly and explicitly defied precedent in finding that the Sixth Amendment applies differently to state trials than federal trials.[17] In essence, the Court declined to strike the practice down but did not offer reasoning supported by a majority of the Court for its constitutionality. This fracturing of the Justices resulted in the Court-sanctioned continuation of the systemic racism perpetuated by non-unanimous juries, without any concrete constitutional grounds to solidify binding precedent.[18]

Apodaca's legacy has since manifested decades of felony trials in which defendants were not afforded their full constitutional rights in the two non-unanimous states. By endorsing a reduction in the number of votes necessary to convict, *Apodaca* deprived defendants in Oregon and Louisiana of the complete fact-finding and deliberating power of the jury itself. American criminal juries are charged with determining whether the government has proved each element of a crime beyond a reasonable doubt.[19] Moreover, the government is prohibited from taking any citizen's freedom until and unless a jury of their peers concludes that the government has met the reasonable doubt standard as to each element of the charged crime.[20] Allowing such conviction without a unanimous vote of the jurors generally reduces the quality

13. *See* Apodaca v. Oregon, 406 U.S. 404, 414 (1972) (Stewart, J., dissenting).
14. *See id.*
15. *See id.* at 406.
16. *See* Johnson v. Louisiana, 406 U.S. 366, 366 (1972) (Powell, J., concurring).
17. *See id.* at 380.
18. *See id.*
19. *See In re* Winship, 397 U.S. 358, 362 (1970) (holding that all elements of a crime must be proven beyond a reasonable doubt, regardless of whether the defendant is tried as an adult or a juvenile).
20. *See id.*

and length of deliberations and directly undermines the reasonable doubt standard.[21]

This Note argues that overturning *Apodaca* alone is not enough to achieve equity for defendants deprived of their fundamental Sixth Amendment rights at the time of their trial, and accordingly, *Ramos* must be given retroactive effect by any means necessary. First, a review of the historical setting in which Oregon and Louisiana implemented non-unanimity will demonstrate the explicitly racist intent that drove these changes. Non-unanimity was proposed in both states to make convicting defendants easier and minimize the impact of any minority voices in the jury room.

Next, an exploration of *Apodaca*'s legacy shows that the case resulted in damage to the fairness and accuracy of criminal trials in the two states with non-unanimity rules. This degradation of fundamental constitutional rights has had a disproportionate impact on defendants of color because both individual and group decision-making (and therefore jury deliberations) are significantly impacted by race.

Finally, the *Ramos* Court held that the Sixth Amendment has always guaranteed the right to a unanimous jury verdict in both state and federal courts.[22] It follows that withholding post-conviction relief for defendants whose freedom was improperly revoked does further violence to them, and the Court in *Edwards* made the injustices permanent for those whose convictions were final before *Ramos*. Because the *Edwards* Court failed to do so, Oregon and Louisiana should take decisive action to right the wrongs of *Apodaca* and reckon with the history of racism that birthed jury non-unanimity. In the meantime, local legal activist efforts in formerly non-unanimous states are currently functioning to bring justice to those who suffered harm in the era of *Apodaca*.

I. JURY NON-UNANIMITY WAS BORN OF EXPLICITLY RACIST INTENTIONS

Louisiana enacted a constitutional provision allowing criminal convictions based on a guilty vote by as few as ten of the impaneled jurors as the direct result of a white supremacist Constitutional Convention held in 1898.[23] A few decades later, amid a rising wave of Ku Klux Klan activity in the Pacific Northwest and following a particularly racially charged trial, the state of Oregon adopted non-

21. *See infra* Part II.
22. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1397 (2020).
23. *See* Frampton, *supra* note 12, at 1597, 1612.

unanimous jury convictions for non-murder felonies by ballot initiative in 1934.[24] While legislation subverting jury unanimity requirements was anomalous to Louisiana and Oregon, the actions taken by those states must be understood within the greater historical context of jury service and racial dynamics following the civil war.

A. The Reconstruction Jury

The end of the Civil War in 1860 appears to coincide with the first evidence of the inclusion of Black Americans in jury service, however, this was not widespread by any means.[25] The idea of Black jury service was unthinkable to Congress in 1864, as demonstrated by the debates over a piece of legislation allowing Black postal workers to testify in federal court in the event their evidence against a White defendant accused of mail robbery was necessary.[26] Conservative Democrats opposed the bill, arguing that allowing Black people to testify in this way would lead to their qualification as jurors.[27] In response, Republicans did not argue that Black jury eligibility could be desirable. Instead, they went to great lengths to refute that allowing a person to serve as a witness did not necessitate their eligibility for jury service.[28] The specter of Black access to the jury box was defeated for a few years. Later, in 1867, Congress took up the issue of Black jury service more directly as part of a bill intended to confer such rights in the District of Columbia.[29] Opponents openly exposed their prejudice as they argued that Black people would not be capable of trying cases fairly and accurately, saying that such a right would lead to "black domination" given the area's population.[30] In this way, individual lawmakers' prejudice combined with the need to sustain white domination and power to bar Black participation in jury service.

Amid these federal debates, jury trials were becoming weaponized as a tool of racist terrorism in the post-Civil War South, consequently becoming the focus of racial equality activists. All-White juries meted out harsh punishment for Black defendants accused of violence against White persons and almost invariably acquitted White defendants accused of violence against Black

24. *See* Kaplan & Saack, *supra* note 4, at 3–6.

25. *See* James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 YALE L. J. 895, 910 (2004).

26. *See id.* at 911.

27. *See id.*

28. *See id*.

29. *See id*. at 912–13.

30. Forman, *supra* note 25, at 913.

persons.[31] Accordingly, advocates for Black jury service saw the need as two-fold. Jury service for Black citizens was considered imperative to justice for Black defendants, but it was also necessary to protect Black victims of crime.[32] As the Ku Klux Klan perpetrated heinous racially motivated violence in the South, the relevance of the jury was seen unmistakably by members of that terrorist organization. The very oaths taken by newly inducted members of the KKK included a promise to protect other members if appointed to a jury against them, demonstrating the central role that jury trials and the makeup of those juries occupied in racial conflict at the time.[33]

In Washington, D.C., Congress began to take steps at the federal level to address the situation in the South. The Klu Klux Klan Act of 1871 denied jury eligibility to those who "had conspired to deny the civil rights of blacks, and provided for penalties for those who perjured themselves during jury selection."[34] This legislation proved effective in the few years following its enactment, as subsequently empaneled juries with proportionate Black representation convicted many Klan members guilty of terrorist violence against Black citizens.[35] A few years later, the enactment of the Civil Rights Act of 1875 prohibited exclusion from jury service on the basis of race in any state or federal court.[36] However, enforcement of both of these laws was inconsistent at best and certainly did not last, as there have been no convictions for jury discrimination under the Civil Rights Act in more than a century.[37]

While debates took place in Washington D.C. and legislation aimed at addressing the issues in the South was produced at the federal level, the actual practice of integrating the jury box in the South was complex and turbulent. As Reconstruction commenced after the Civil War, Black jurors immediately started to be impaneled in some parts of the South. For instance, the 1870s in New Orleans found Black people serving on federal grand juries at rates nearly proportionate to the jurisdiction's Black population.[38] With jury service viewed by many in the South as a form of holding public office, areas in Texas in the same timeframe saw juries that made up of more than one-third

31. *See id.* at 909–10.
32. *See id.* at 916.
33. *See id.* at 921–22.
34. *Id.* at 923.
35. *See* Forman, *supra* note 25, at 925.
36. *See* Frampton, *supra* note 12, at 1600–01.
37. *See id.* at 1599.
38. *See id.* at 1601.

Black citizens.[39] One courthouse was "besieged by numbers of colored men anxiously awaiting to be summoned" for jury service.[40]

Black jurors' presence, and the difference in the outcomes they achieved, triggered anger and backlash among white supremacists.[41] Newspapers in Louisiana bemoaned Black juror service by noting that a single juror of color had compromised a verdict and publishing sentiments such as how "the decent members of their race shield [the savages]' rendering '[a] law trial of . . . negro jurors . . . a farce."[42] One Mississippi newspaper in 1887 went so far as to speculate that Black citizens were members of a secret society whereby a Black defendant could escape justice and achieve a hung jury by installing a member of this "order" on the jury that tried him.[43] Perhaps the publication was blind to the irony of this accusation; that members of the KKK took oaths to protect their own in just this way.[44] Alternatively, maybe it was precisely because white supremacists had engaged in these tactics that suspicions of racial bias were projected onto the Black citizenry.

B. Louisiana's Constitutional Convention

As federal attention to jury discrimination trickled out of the nation's capital and activists continued to work against racial injustice, overt discrimination began to shift into racially motivated policy defensible as facially race-neutral. In addition to spurring racially and politically motivated violence, the limited progress made in jury equality during Reconstruction also brought reactionary legal changes crafted to undermine federal equality laws while reasserting white supremacy.[45] One manifestation of this phenomenon was the adoption of practices allowing criminal conviction based on a non-unanimous jury verdict.

In Louisiana, a Constitutional Convention held in 1898 resulted in an amendment making a guilty verdict rendered by less than twelve jurors legally sufficient to criminally convict a defendant and revoke their freedom.[46] Though no mention of race could be found in the amendment itself, legislative history from the convention and media

39. *See id.*
40. *Id.* at 1601–02.
41. *See* Frampton, *supra* note 12, at 1602–03.
42. *Id.* at 1603.
43. *See id.*
44. See Forman, *supra* note 25, at 921–22.
45. *See* Frampton, *supra* note 12, at 1599, 1605.
46. *See id.* at 1612.

coverage from Louisiana and other southern states reveals the debate's social context.[47] There was a clear understanding that the amendment was adopted with language intended to subvert federal discrimination restrictions.[48]

Calls for non-unanimous jury trials had begun in 1893 in Louisiana following a particularly heinous lynching.[49] A group of White people murdered three Black men in retaliation for a perceived wrong.[50] Newspapers in Louisiana and other Southern states began to feature editorials claiming that permitting non-unanimous jury convictions would function as a remedy for lynching by reducing the prosecution's burden and obviating the ability of one juror to preclude conviction.[51]

The Constitutional Convention was held in this social context with the explicitly advertised purpose of "the elimination of the vast mass of ignorant, illiterate and venal negroes from the privileges of the elective franchise."[52] However, delegates at the convention knew that overtly discriminatory provisions were likely to be rejected at the federal level as unconstitutional.[53] Even so, there was no attempt to conceal the racist motives of the non-unanimous jury amendment as seen in closing comments by the Judiciary Committee's chairman at the time: "We have so also so changed the judicial system that the delays which have so often resulted in a man being hung by a mob will disappear."[54] These comments directly affirmed the original reasoning for the amendment as seen in newspapers of the time, exalting the "efficiency" gained as an antidote to murder by an angry, racist mob. The Chairman further celebrated the body of work produced by the committee by stating, "Our mission was, in the first place, to establish the supremacy of the white race in this State to the extent to which it could be legally and constitutionally done."[55]

47. *See id.*

48. *See id.* at 1616.

49. *See id*. at 1612–13.

50. *See* Frampton, *supra* note 12, at 1612–13.

51. *See id.* at 1613–14.

52. *Id.* at 1612 (quoting *The Following Resolutions*, DAILY PICAYUNE, Jan. 4, 1898, at 9 (publishing Louisiana Democratic Party resolution concern Convention)).

53. *See id.* at 1616.

54. *Id.* at 1618 (quoting Thomas Semmes, Chairman of the Judiciary Comm., Address at the Louisiana Constitutional Convention of 1898 (Feb. 8, 1898), *in* CONSTITUTIONAL CONVENTION OF THE STATE OF LOUISIANA at 379 (H. J. Hearsey, convention Printer 1898) [hereinafter Semmes Address]).

55. Frampton, *supra* note 12, at 1615 (quoting Semmes Address at 375).

The final result of the Judiciary Committee's work was an overarching reduction in the right to a jury trial in the state of Louisiana, executed in such a manner as to impact Black citizens disproportionately.[56] The new constitution abolished jury trials for misdemeanors, reduced juries for low-level felonies to five members, and enshrined that serious non-capital felonies were to be decided by nine concurring people sitting on a jury of twelve.[57] Efficiency, indeed. While other states in the South celebrated Louisiana's racist 'innovation' in the criminal jury trial, none immediately followed suit.[58]

C. Oregon's Reactionary Ballot Measure

In 1934, amidst a rising wave of KKK activity throughout the Pacific Northwest and a zeitgeist of anti-Semitism, voters approved non-unanimous jury conviction for non-murder felonies by ballot initiative in the state of Oregon.[59] In contrast to the escalating tensions spanning decades that led to Louisiana's non-unanimity rule, Oregon's ballot measure was a direct reaction to a single catalytic trial.[60] Jacob Silverman, a Jewish man, was charged by the state with the first-degree murder of Jimmy Walker on a theory of aiding and abetting.[61] Evidence was presented at trial indicating that a man resembling Silverman was seen getting into a car with other men suspected of shooting Walker.[62] The jury deliberated for nearly seventeen hours, with a single juror refusing to convict Silverman of first-degree murder.[63] Instead of continuing to debate until unanimity could be reached or returning as a hung jury resulting in a mistrial, the jury in the Silverman trial decided to compromise by convicting Silverman of manslaughter.[64]

This result, arising from one juror's reasonable doubt, was maligned in contemporary media. Having followed all aspects of the trial closely, the *Morning Oregonian* reasoned following the verdict that "Americans have learned, with some pain, that many peoples in the world are unfit for democratic institutions, lacking the traditions

56. *See id.* at 1618–19.
57. *See id.* at 1618.
58. *See id*. at 1619.
59. *See* Kaplan & Saack, *supra* note 4, at 2–4.
60. *See id.* at 3.
61. *See id.* at 3–4.
62. *See id.* at 4.
63. *See id.* at 4–5.
64. *See* Kaplan & Saack, *supra* note 4, at 5.

of English-speaking peoples."[65] The paper editorialized that "the Silverman case in Oregon and the epidemic of lynchings elsewhere came at exactly the right time to bring unprecedented pressure to bear upon the legislature."[66]

Oregon Ballot No. 302-03 was proposed to "prevent one or two jurors from controlling the verdict or causing a disagreement," and no opposition parties contested the value of the goal of judicial efficiency.[67] The measure passed with more than 60% of the vote, and Oregon thereby joined Louisiana in its subversion of jury trial rights.[68]

II. THE DAMAGING RACIST LEGACY OF *APODACA*

The petitioner in *Apodaca v. Oregon* challenged the practice of non-unanimous jury verdicts after being convicted in a split jury decision.[69] The Supreme Court upheld non-unanimous jury practices in state criminal courts in an unusually split decision of questionable precedential value.[70] Regardless of its anomalous reasoning, the effect of the Court's decision in *Apodaca* was to condone the continuation of jury non-unanimity practices in both Louisiana and Oregon. To understand Apodaca's lasting legacy, it is necessary to evaluate what a defendant loses when a jury is provided instructions allowing for a non-unanimous verdict.

Defendants convicted by a non-unanimous jury ultimately forfeit their Sixth Amendment right to the jury's full deliberating power. Juries, by and large, achieve reasonable outcomes through measured deliberation. Anecdotal accounts from jurors, judges, and journalists generally indicate that jurors are careful, serious, and fair in evaluating evidence and their deliberations.[71] Empirical studies support this notion and show that juries generally reach verdicts supported by a reasonable view of the evidence.[72] One study used the frequency with which judges agreed with the verdicts of the juries they supervised to

65. *Id.* (quoting *Debauchery of Boston Juries*, THE MORNING OREGONIAN, Dec. 11, 1933).

66. *Id*. (quoting *Jury Reform Up to Voters*, THE MORNING OREGONIAN, Nov. 3, 1933).

67. *Id.* at 6.

68. *See id.* at 6.

69. *See* 406 U.S. 404, 406 (1972).

70. *See id.* at 413–14; *infra* Part III.

71. *See* Richard Lempert, *The American Jury System: A Synthetic Overview*, 90 CHI. KENT L. REV. 825, 840 (2015).

72. *See id.* at 842.

evaluate the accuracy of jury verdicts.[73] Researchers found that judges and juries agreed approximately 75% of the time and that instances of disagreement were found primarily when the evidence could reasonably support either party's conclusion.[74] In some cases, judges in the study even attributed their disagreement with a jury verdict to facts the judge had ruled inadmissible, confirming that the jury had applied the law appropriately in not considering those facts.[75]

However, this ideal exercise of care and reasonable judgment by juries is significantly impaired when a jurisdiction removes the unanimity requirement. In discussing the removal of the unanimity requirement, jury scholar Richard Lempert noted that "[t]he Justices were . . . mistaken when they predicted that meaningful deliberations would continue even after a majority rule jury received sufficient concurrence to return a verdict."[76] In the state of Oregon, more than forty percent of felony jury verdicts were non-unanimous before *Ramos*.[77] This high rate of non-unanimous convictions reflects the tendency of juries operating under majority rule to cease deliberations after the requisite number of votes is reached, consciously or unconsciously, favoring an interest in a quick return to their own lives over careful consideration of a verdict that may equate to decades of the defendant's life.[78] The impact of this reduced deliberation reflects the original racist intent behind unanimity, disproportionately impacting defendants of color as designed. A 2018 study of approximately 3,000 recent felony cases in Louisiana found that non-unanimous jury verdicts resulted in convictions for Black defendants 43% of the time, while their white counterparts were convicted non-unanimously at a rate of 33%.[79]

In addition to less careful deliberation, non-unanimity is a direct contradiction to the principle of reasonable doubt. Professor Aliza Kaplan argues that *Apodaca*'s preservation of non-unanimity "deprives defendants of the right to have dissenting jurors' views count against unreliable evidence, proof of innocence, or anything else

73. *See id.*

74. *See id.*

75. *See id.*

76. Lempert, *supra* note 71, at 828.

77. *See* Kaplan & Saack, *supra* note 4, at 19.

78. *See id.*

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

that creates reasonable doubt."[80] The involuntary forfeiture of this Sixth Amendment right "represents more than a theoretical harm caused by legal ambiguity because, even though one or two jurors did not believe the State proved its case beyond a reasonable doubt, defendants have been sentenced to decades of imprisonment, life sentences, and hard labor."[81]

Additionally, when a defendant is facing the revocation of their freedom, the Sixth Amendment guarantees them the right to a jury representative of the community.[82] It also guarantees that the jury has the opportunity to thoroughly deliberate in order to arrive at a unanimous verdict based on what they collectively believe constitutes proof beyond a reasonable doubt.[83] Non-unanimity not only causes truncated deliberations and undermines the reasonable doubt standard, but it also functions to deprive the defendant of the benefit of minority voices in the jury room and the cultural context that minority juror perspectives can add to the deliberation process.[84] Because the American criminal justice system charges the jury with the duty of fact-finding and carriage of justice, understanding the mechanics of both individual and group decision-making in the context of race helps to illuminate the actual loss suffered by defendants subjected to non-unanimity rules.

A. Group and Individual Decision-Making

The impact of racial composition on deliberating bodies was inherently acknowledged by those adopting non-unanimous jury verdicts, and research shows that race correlates with differences in individual decision-making and significantly changes the manner and outcome of group deliberations.[85] As Justice Thurgood Marshall noted in *Peters v. Kiff*:

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on

80. Kaplan & Saack, *supra* note 4, at 32–33.
81. *Id.* at 17.
82. *See id.* at 32.
83. *See id.* at 34.
84. *See id.* at 32–33.
85. *See* Kaplan & Saack, *supra* note 4, at 33.

> human events that may have unsuspected importance in any case that may be presented. [86]

1. The Impact of Individual Juror's Race, Thoughts, and Experience in Jury Deliberations

How, in fact, do the varied experiences and beliefs of jurors of color and White jurors impact their thinking as they approach information at trial and during jury deliberations?

Researchers have found that racial stereotypes correlate to attributions of criminality and that White people, in particular, are prone to assigning criminal attributes to Black people more so than other racial groups.[87] Whites demonstrate a general mistrust of Black people, and this mistrust in combination with racial stereotypes is linked to punitiveness in outcomes.[88] These beliefs are often relied upon by prosecutors, who use negative imagery dependent on racial stereotypes in the arguments they present to the jury.[89] In one mock jury study, groups of White mock jurors were shown the same trial summary with either a White or Black defendant.[90] Individual jurors who had viewed the version with the Black defendant were more likely to render a guilty verdict than those who had seen the White defendant.[91] In another study, White mock jurors ignored incriminating evidence ruled inadmissible when the defendant was White but considered it in their verdict when the defendant was Black.[92] This empirical evidence supports the conclusion that White jurors are likely to treat Black defendants less favorably than White defendants, perhaps because their particular life experience makes it easier to for them to experience empathy for White defendants.

However, research also suggests that many White people desire to be egalitarian and are motivated to avoid bias actively, especially if

86. 407 U.S. 493, 503–04 (1972).

87. *See* William J. Bowers, Benjamin D. Steiner & Marla Sandys, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 179 (2001).

88. *See id.*

89. *See id.* at 180.

90. *See* Samuel R. Sommers & Phoebe C. Ellsworth, *The Jury and Race: How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI. KENT L. REV. 997, 1006 (2003).

91. *See id.*

92. *See id.* at 1006–07.

race is a salient issue in the material presented.[93] One study concluded that while an inflammatory article about a Black defendant resulted in White mock jurors rendering harsher verdicts, the addition of an implication that the article was racially biased mitigated that effect.[94] As stated by one of the only researchers to devote significant scholarship to the impact of race on jury deliberations, Samuel Sommers, "[a]s long as this egalitarian motivation is active—which tends to occur when race is salient in a situation or when normative cues to avoid bias are strong—Whites can often successfully avoid prejudice."[95] In other words, White jurors are generally susceptible to negative prejudice against Black defendants, but reminding them that bias is a possibility causes them to consciously attempt to sidestep prejudicial assumptions.

In contrast, Black people are more likely than White people to harbor profound mistrust of both police and the court system as a whole.[96] Black people are also more likely to observe racial bias in decisions to charge, convict, and sentence crimes.[97] These views are the logical product of the Black community's shared experience concerning contact with police and other encounters with law enforcement and people in positions of power (including others such as landlords and employers).[98] Perspectives of this kind may lead Black jurors to be more critical of evidence presented, especially police testimony and eyewitness identification.[99] In cases involving a potential death sentence, Black jurors may reasonably view mitigating evidence from a Black defendant "with whom they may be better able to identify and empathize, and whose background and experiences they may feel they understand better than do their white counterparts" differently.[100]

These opinions, experiences, and prejudices are inextricable from their human owners, and they carry them into the jury deliberation room. They are reflected in the questions each juror poses, the facts

93. *See* Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCH. 597, 600 (2006).

94. *See id.*

95. Sommers & Ellsworth, *supra* note 90, at 1011.

96. *See* Bowers, *supra* note 87, at 180.

97. *See id.*

98. *See id.* at 180–81.

99. *See id.* at 181.

100. *Id.*

each finds most relevant, and how evidence is understood, analyzed, and turned into a verdict.

2. The Impact of Racial Representation in Group Deliberation

In addition to the conclusion that "the collective judgments of diverse groups are superior to judgments reached by individuals,"[101] it is also clear that diversity results in better decision-making than homogeneity within groups. While social status tends to replicate itself in the courtroom in terms of the election of a foreperson and the level of active participation in deliberations observed, a diverse group is likely to perform better than a homogenous one despite the manifestation of social differences between individuals.[102]

Given that diversity increases accuracy, the measurable difference in results produced by diverse and homogenous juries becomes especially significant. For instance, in a study of actual capital juries sentencing Black defendants, William Bowers found that juries with at least one Black male returned a death sentence forty-three percent of the time as compared to seventy-two percent of defendants receiving death sentences from juries without a Black male.[103] This stark disparity suggests that the impact of diversity goes beyond a simple difference in White and Black jurors' likely votes, as a single Black male juror would not control the verdict of the group. Therefore, the difference in outcome must be partially attributable to the effect that the Black juror's presence has on White jurors' deliberation process. What differences in the mechanics of deliberation could explain these results?

One study conducted by researcher Samuel Sommers provides particular insight into quantifiable differences in diverse and homogenous groups' deliberation.[104] In this study, actual jurors were recruited to serve as mock juries of six people each.[105] They were assigned either to an all-White jury or a diverse jury of four White people and two Black people.[106] While able to see the group with which they could expect to participate, mock jurors completed one of two jury selection questionnaires, one of which included explicitly

101. Lempert, *supra* note 71, at 839.

102. *See id.* at 845. Individuals in the room with higher social status are elected as foreperson more frequently, and they tend to demonstrate a greater frequency of participation in the deliberation discussion. *See id.*

103. *See id.*

104. *See* Sommers, *supra* note 93, at 600.

105. *See id.*

106. *See id.*

race-conscious questions and one of which did not.[107] The mock juries were shown a video of an actual trial featuring a Black defendant and somewhat ambiguous evidence, and each group's deliberation was then recorded and analyzed.[108]

The results showed multiple significant distinctions between the activities of diverse and homogenous juries, and the impact of diversity in the group was observed even before deliberations had begun.[109] Those White jurors who anticipated deliberating with a diverse group were more likely to vote not guilty on a private, pre-deliberation questionnaire, demonstrating their openness to perceiving reasonable doubt.[110] Once they began to discuss the trial, diverse groups deliberated for longer and discussed a more significant number of case facts than all-white groups.[111] Diverse groups stated fewer factual inaccuracies and corrected inaccurate assertions within the group more often than all-white groups.[112] Diverse groups exhibited more frequent discussion of evidence that was not present at trial, such as a particular witness's testimony, and they mentioned racism more often.[113] It was also evident in the data that the differences in deliberations observed in diverse groups were attributable not only to the contributions made by Black members of the group, but to differences in the observable contributions of the White participants.[114] In summation, the diverse groups showed demonstrably superior results in the depth, breadth, and accuracy of information discussed, and this difference was attributable to all members of the group.[115]

In addition to the distinction in the treatment of information between the diverse and homogenous groups, Sommers suggests that the differences may also be attributable to White jurors' motivational differences when seated in diverse groups.[116] Sommers indicates that when the potential impact of the defendant's race was raised in homogenously White juries, it was invariably dismissed by other

107. *See id.* at 601–02.
108. *See id.* at 602.
109. *See* Sommers, *supra* note 93, at 606.
110. *See id.* at 607.
111. *See id.* at 608.
112. *See id.*
113. *See id.* at 597.
114. *See* Sommers, *supra* note 93, at 607.
115. *See id*. at 605–08.
116. *See id.* at 607.

jurors.[117] The diverse juries did not react to the possibility of racism by changing the subject, but instead, they spent time in substantive conversation discussing this sometimes polarizing issue.[118] The group's willingness to devote time to the consideration of racial issues may therefore function as mitigation to White juror prejudices.

Sommers's findings are consistent with the sociological principles of epistemology. The epistemology of disagreement is an evolving discipline that seeks to understand how disagreement within a decision-making body relates to the truth of the underlying decision.[119] The central principle of this discipline is that when decision-makers with similar information and decision-making capability disagree, the fact of that disagreement should reduce the confidence of each in their original conclusion.[120] When the deliberations of the diverse jury groups in Sommers' study are viewed through this lens, it seems that lengthened deliberation and the group's willingness to entertain differing perspectives on race is demonstrative of epistemological principles. These diverse groups seem better equipped to raise helpful disagreement during deliberation and to use that disagreement to arrive at a verdict that considers all perspectives.

B. Apodaca to the Power of Batson

The damaging racist legacy of *Apodaca* is, taken by itself, enough to justify the retroactive application of *Ramos*. However, these impacts are multiplied by ongoing discrimination issues in jury selection.

While the Civil Rights Act of 1875 had long prohibited racial discrimination in jury selection, it was not until the Supreme Court's decision in *Batson v. Kentucky* that the use of peremptory challenges during *vior dire* was held to be specifically covered by the Equal Protection Clause.[121] Under the test provided in *Batson*, however, a prosecutor need only offer a passable "race-neutral" reason for their use of a peremptory strike in order to counteract a defendant's assertion that the strike was racially discriminatory.[122] In addition to the fact that *Batson*'s framework lacks meaningful enforcement of its anti-discrimination holding, it is also woefully prone to manipulation

117. *See id.* at 608.

118. *See id*.

119. *See* Alex Stein, *Law and the Epistemology of Disagreement*, 96 WASH. U. L. REV. 51, 53 (2018).

120. *See id.* at 54.

121. *See* 476 U.S. 79, 86 (1986).

122. *See* Snyder v. Louisiana, 552 U.S. 472, 476–77 (2008).

by prosecutors.[123] A prosecutor may assert "race-neutral" reasons for exercising a strike; such as mistrust of law enforcement, reluctance to impose the death penalty, or the fact that a prospective juror has an incarcerated friend or family member.[124] These assertions are likely to be accepted by a trial judge as sufficient to preclude a successful *Batson* challenge even though they reflect personal views and experiences that are "deeply embedded in the lived experience of race" for Black Americans.[125] This reliance on race-neutrality is evocative of the adoption of facially race-neutral laws such as jury-unanimity implemented with clear racial intent and consequences. This framework's effect is that only peremptory strikes with an explicit racial motivation are likely to be found unconstitutional, as other characteristics closely correlated with race can be easily substituted for any but the most egregious racial assertions made by prosecutors.[126]

Regardless of the justifications offered, however, the empirical evidence available shows that prosecutors make disproportionate use of peremptory strikes to exclude Black jurors.[127] A particularly robust recent study performed by investigative journalists in Louisiana examined information from more than 5,000 criminal jury trials occurring there between 2011 and 2017.[128] The study concluded that prosecutors use both for-cause challenges and peremptory strikes against Black prospective jurors at an "extraordinarily disproportionate rate" and with even greater frequency when the defendant facing trial is themselves Black.[129] The apparent racial divide shown in the study's jury selection data illustrates a solid connection to jury verdict outcomes, as Black jurors were far more likely to cast "not guilty" ballots in the jury room.[130] This connection reveals a weakness in our criminal justice system's adversarial nature—the motivation inherent in the job of a prosecutor creates an incentive to operate in this way, excluding individuals based on their

123. *See* Annie Sloan, Note, *"What to do About* Batson*?": Using a Court Rule to Address Implicit Bias in Jury Selection*, 108 CALIF. L. REV. 233, 235 (2020).

124. *See id.* at 236–45.

125. Frampton, *supra* note 12, at 1627.

126. *See* Caren Myers Morrison, *Negotiating Peremptory Challenges*, 104 J. CRIM. L. & CRIMINOLOGY 1, 30 (2014).

127. *See* Frampton, *supra* note 12, at 1624–25.

128. *See id.* at 1621.

129. *Id.* at 1621–22.

130. *Id.* at 1622.

likelihood to return a guilty verdict as opposed to their ability to assess and interpret evidence.

In this way, it is possible to see that the explicitly white supremacist reasoning used to limit access to the jury box for people of color and adopt non-unanimous verdicts continues to be wielded today through jury selection tactics thinly disguised by race-neutral language. When these active racist efforts compound with Louisiana and Oregon's non-unanimous jury verdicts, the effect is to first bar people of color from having a place in jury deliberation at all, and second, do away with the effectiveness of any dissent they may offer. For defendants of color, the presence of one or more jurors on the panel who understand their cultural perspective and can identify harmful racial dynamics in the trial or investigation could mean the difference between conviction and acquittal—unless that defendant was subjected to a jury system in which the majority need not account for minority opinions during deliberation.

III. RIGHTING *APODACA*'S WRONGS

Oregon and Louisiana codified the racist practice of non-unanimous juries, and *Apodaca* allowed those practices to continue, but the Supreme Court's decision in *Ramos v. Louisiana* has correctly overturned non-unanimity going forward.[131] The opinion was uniquely positioned to result in the Court's first ruling in favor of retroactivity of a rule of criminal procedure under the legal framework provided by *Teague v. Lane*.[132] In deciding *Edwards*, the Court had two viable paths to retroactivity: (1) Ramos was an old rule dictated by precedent and, therefore, it has always applied, or (2) if Ramos is a new rule, it has watershed implications requiring retroactive application. However, even in the absence of a federal retroactivity mandate, Oregon and Louisiana should offer post-conviction relief to any defendant whose trial was impacted by non-unanimity.

A. The Rule and Reasoning of Ramos

Conservative Justice Neil Gorsuch authored and delivered the Court's opinion in *Ramos*.[133] His frank and transparent discussion of non-unanimous jury law's racist origins is distinct from much of the Court's existing jurisprudence in its willingness to confront this type of history. The Court's choice to grapple with the well-documented

131. *See id.* at 1649–50; Ramos v. Louisiana, 140 S. Ct. 1390, 1408 (2020).
132. *Ramos*, 140 St. Ct. at 1419 (Kavanaugh, J., concurring).
133. *See id.* at 1393.

discriminatory reasons for the law in both Oregon and Louisiana lends strength to its decisiveness. Gorsuch details the history of the Sixth Amendment's requirement for unanimity in jury trials, tracing its enshrinement from 14th century England through the young American colonies.[134] He then cites 13 times that the Court has commented on the unanimity requirement in the past 120 years.[135] The opinion takes pain to ensure that readers understand both the non-unanimity rule's reprehensible history and the long history of unanimity as inherent to an impartial trial by jury.

Following the historical survey, the Court turns to an appropriately scathing treatment of the idiosyncratic *Apodaca* plurality opinion.[136] Referring to the *Apodaca* Court's opinion, Justice Gorsuch posits that "the Sixth Amendment's otherwise simple story took a strange turn in 1972" and further repudiated *Apodaca* as "a badly fractured set of opinions."[137] While four Justices in *Apodaca* would have held that the Sixth Amendment guarantee of unanimity applied to jury trials in state courts, four wrote to uphold the defendant's conviction on the unprecedented basis that a requirement for unanimity did not serve an important "'function' in 'contemporary society.'"[138] Justice Powell cast his deciding vote in an opinion the *Ramos* court refers to as "neither here nor there,"[139] in which the Justice declines to ascribe to the reasoning of those in favor of upholding the conviction, instead favoring a theory of "dual-track" incorporation of the Sixth Amendment, whereby a right guaranteed by the constitution could have different meanings as invoked against a state or federal government.[140] Justice Gorsuch notes that Justice Powell's reasoning was clearly foreclosed by precedent at the time *Apodaca* was decided, stating that Justice Powell was aware of that precedent and issued his opinion in the case in explicit defiance of its existence.[141]

Having determined that the "strange" fate of a state requirement for jury unanimity under *Apodaca* was highly flawed in both the structure of its holdings and the jurisprudence on which its deciding opinion relied, Justice Gorsuch goes on to conclude that *Apodaca*

134. *See id.* at 1395–96.
135. *See id.* at 1395–97.
136. *Id*. at 1397.
137. *Ramos*, 140 St. Ct. at 1397.
138. *Id.* at 1397–98 (citing Apodaca v. Oregon, 406 U.S. 404 (1972)).
139. *Id.* at 1398.
140. *Id.*
141. *See id.* at 1398.

created no precedent.[142] Justice Gorsuch stated that "not even Louisiana tries to suggest that *Apodaca* supplies a governing precedent" and "the parties before us accept that *Apodaca* yielded no controlling opinion at all."[143] In effect, *Apodaca* upheld the conviction of the defendant at issue based on a utility framework fabricated by the plurality and an openly defiant opinion by Justice Powell. Though the opinion did not overturn the conviction of the defendant at issue, it also did not create a binding precedent condoning non-unanimity at the state level because a majority of the Justices recognized that the Sixth Amendment requires unanimity.[144] Thus, Justice Gorsuch reasons that *Apodaca* itself created no holding that the Court could feasibly apply to jury unanimity, and, therefore, created no binding precedent.[145] In this way, *Ramos* overturns *Apodaca* not as an exception to stare decisis doctrine, but instead by finding that the actual precedent in place from the time the Bill of Rights was ratified to the time *Ramos* was decided was only the Sixth Amendment unanimity requirement.[146]

In its unambiguous 5–4 decision, the *Ramos* Court holds clearly that "at the time of the Sixth Amendment's adoption, the right to trial by jury *included* the right to a unanimous verdict."[147] The Court finds that "[t]here can be no question either that the Sixth Amendment's unanimity requirement applies to state and federal criminal trials equally."[148] Accordingly, *Apodaca* decided only the named defendant's fate and created no binding precedent. In the absence of any binding holding under *Apodaca*, the Court's other jurisprudence on unanimity cited by Justice Gorsuch and the Sixth Amendment itself have always constituted governing precedent.

B. Ramos Should Have Applied Retroactively Under Either Prong of Teague

Though the decision in *Ramos* was decisive and unequivocal in its rejection of *Apodaca*, the Court explicitly left open the question of whether the right to a unanimous verdict affirmed under *Ramos* should apply retroactively.[149] The case of petitioner Thedrick Edwards,

142. *Ramos*, 140 S. Ct. at 1397, 1404.
143. *Id.* at 1402–03.
144. *See id.* at 1403.
145. *See id.* at 1404–05.
146. *Id.* at 1405.
147. *Ramos*, 140 S. Ct. at 1402.
148. *Id.* at 1397.
149. *See id.* at 1407.

argued before the Court in December 2020, was granted certiorari to resolve this issue.[150] Edwards is a Black man serving a life sentence in Louisiana because of a non-unanimous conviction entered without regard to the dissenting vote of the single Black juror impaneled at his trial.[151] His attorneys argued that Edwards's rights were violated both through the improper use of peremptory strikes to remove all but one Black juror from the panel, and by the state-sanctioned overriding of that single juror's reasonable doubt.[152]

The standard the Court applied in deciding *Edwards* is the retroactivity doctrine laid out in *Teague v. Lane* in 1989.[153] The Supreme Court in *Teague* determined that when an opinion results in a change in criminal procedure, "old rules" would apply retroactively, but "new rules" of criminal procedure were not to be applied retroactively.[154] A rule is considered "new" if "the result was not dictated by precedent existing at the time the defendant's conviction became final."[155] In order to overcome the presumption of non-retroactivity, a new rule would need to be a "watershed rule" that "significantly improve[s] the pre-existing fact finding procedures" and "implicate[s] the fundamental fairness of the trial."[156] While no new rules of criminal procedure have been given retroactive effect under this exception to date,[157] the Court in *Edwards* was presented with a clear opportunity to break new ground and decide in favor of retroactivity for the Ramos rule.

The Court had two possible paths to retroactivity under the Teague's framework: the rule could have been considered an old rule not subject to the retroactivity doctrine for new rules, or the Court could also have feasibly found that the constitutional guarantee of a unanimous jury verdict meets the "watershed rule" exception.[158] A rational analysis of *Teague* would have shown that the holding of *Ramos* is an old rule entitled to retroactivity. However, the fundamental deprivation of Sixth Amendment rights inherent in non-

150. *See* Brief for Petitioner-Appellant at 6, Edwards v. Vannoy, No. 19-5807 (July 15, 2020).

151. *See id.* at 5–6.

152. *See id.* at 11–12.

153. *See* Peter Bozzo, *What We Talk About When We Talk About Retroactivity*, 46 AM. J. CRIM. L. 13, 15–16 (2019); 489 U.S. 288, 316 (1989).

154. *See Teague*, 489 U.S. at 316.

155. Bozzo, *supra* note 153, at 19.

156. *Id.* at 19; *Teague*, 489 U.S. at 312.

157. Ramos v. Louisiana, 140 S. Ct. 1390, 1407 (2020).

158. *See* Bozzo, *supra* note 153, at 19.

unanimous jury verdicts should most certainly have made *Ramos* into the first watershed rule under *Teague.*

1. Ramos Was an Old Rule

The majority opinion in *Ramos* reasons that *Apodaca* supplied no holding that would constitute a binding precedent.[159] As such, *Ramos's* prohibition on non-unanimous convictions was "dictated by precedent existing at the time the defendant's conviction became final,"[160] the standard for an old rule under *Teague*, for any defendant convicted by such a split jury before and after *Apodaca*. Justice Gorsuch's opinion is structured to facilitate this argument, referencing numerous examples of jurisprudence by the Court before and after *Apodaca* supporting unanimity as a requirement of the Sixth Amendment, and finally concluding that there has been no period in the United States in which unanimity was not guaranteed.[161]

Petitioner Edwards argued that the *Ramos* decision was required by a confluence of three controlling Court precedents.[162] First, the result was required because "the Sixth Amendment's unanimity requirement is an 'ancient guarantee' that is synonymous with the right to trial by jury."[163] Second, the right to trial by jury, inclusive of unanimity, is "fundamental to the American scheme of justice and therefore incorporated against the States through the Fourteenth Amendment."[164] Third, and most lethal to Justice Powell's stance in *Apodaca*, the provisions of the Bill of Rights "bear the same content when asserted against States as they do when asserted against the federal government."[165] Taken together, these three principles can result in no other conclusion than non-unanimous jury verdicts are an unconstitutional means by which to revoke a citizen's freedom. For these reasons, *Ramos* should not have been treated as a new rule because these precedents existed despite *Apodaca* at the time prisoners currently serving their sentences were convicted by split juries.

However, the *Edwards* court quickly dismissed this argument by stating that "many courts interpreted *Apodaca* to allow for non-unanimous jury verdicts in state criminal trials."[166]

159. *See Ramos*, 140 S. Ct. at 1405.
160. *Teague*, 489 U.S. at 301.
161. *Ramos*, 140 S. Ct. at 1396–97.
162. Brief for Petitioner-Appellant, *supra* note 150, at 20.
163. *Id.*
164. *Id*. at 14.
165. *Id.* at 15.
166. Edwards v. Vannoy, 141 S. Ct. 1547, 1556 (2020).

2. Ramos Was a Watershed Exception to the Doctrine of Non-Retroactivity

The *Edwards* Court did not follow the breadcrumbs of Justice Gorsuch's reasoning in *Ramos* and did not accept the petitioner's arguments on the topic.[167] Still, *Ramos* should have qualified as a watershed "new rule" subject to retroactivity because it both "significantly improve[s] the pre-existing fact-finding procedures" and "implicate[s] the fundamental fairness of the trial."[168] First, enforcing the constitutional mandate for unanimous jury verdicts significantly improves the fact-finding features of trials in Louisiana and Oregon. The fact-finding in which non-unanimous juries engage is demonstrably short, lacking in detailed discussion, and verdict-focused.[169] The non-unanimous jury verdict robs the defendant of the full reasoning, fact-finding capability, and diversity of perspectives of the deliberating body that has the power to revoke their freedom.[170] Therefore, the requirement of unanimity constitutes a significant improvement in the fact-finding features of the trial.

Second, the fundamental fairness of the trial is implicated by the unanimity requirement. Allowing for a non-unanimous jury verdict undermines and ultimately violates the reasonable doubt standard by invalidating juror dissent.[171] It also undermines the right to a jury representative of the community that was the subject of *Teague*.[172] In addition to procedural fairness, *Ramos* implicates racial fairness and equal protection consideration.[173] Given the racist history that led to the implementation of non-unanimity laws, allowing verdicts to stand on this basis gives permanent effect to those racist intents in the lives of those defendants currently imprisoned on this basis.[174] Given the continued racial issues that have arisen as a result of non-unanimous verdicts, denying defendants of color the benefit of dissenting voices in jury deliberation further implicates the trial's fundamental fairness.[175] As Justice Kagan put it in her *Edwards* dissent, "Rarely does this Court make such a fundamental change in the rules thought

167. *See id.* at 1560–61.

168. Bozzo, *supra* note 153, at 19.

169. *See* Kaplan & Saack, *supra* note 4, at 33–35.

170. *See* discussion *supra* Part II.

171. *See* Kaplan & Saack, *supra* note 4, at 51.

172. *See* Teague v. Lane, 489 U.S. 288, 292 (1989).

173. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1410 (2020) (Sotomayor, J., concurring).

174. *See* discussion *supra* Part I.

175. *See* discussion *supra* Part II.

necessary to ensure fair criminal process. If you were scanning a thesaurus for a single word to describe the [*Ramos*] decision, you would stop when you came to 'watershed.'"[176]

Justice Kavanaugh's majority opinion does not engage in an analysis of the meaning of "watershed," however.[177] Instead, the majority rejects the petitioner's arguments by listing a number of prior cases in which retroactivity was considered and rejected, making somewhat cursory comparisons before concluding that unanimity could not be a watershed rule because the Court could "see no good rationale for treating *Ramos* differently" from previous rules.[178] Justice Kavanaugh then begins an unprompted discussion of the merits of the *Teague* watershed exception in which he determines that the lack of utilization of the exception has rendered it entirely theoretical in nature.[179] In a holding not requested by any party, the majority concluded its opinion by explicitly foreclosing on any future access to *Teague's* watershed exception.[180] Justice Kavanaugh writes simply that "[n]ew procedural rules do not apply retroactively on federal collateral review. The watershed exception is moribund."[181]

The reasoning applied by the majority in its holding is both thin and somewhat circular. Justice Kagan's dissent asserts that because the majority was unable to articulate specific reasons that *Ramos* did not meet the definition of a watershed rule, the Court chose to override retroactivity precedent "out of the blue" on the basis that future rules are unlikely to meet the standard.[182] As she elegantly states, "[t]he result follows trippingly from the premise. . . . Thus does a settled principle of retroactivity law die, in an effort to support an insupportable ruling."[183]

C. Localized Paths to Retroactive Application of Ramos

Though a federal requirement for retroactivity would have been the most powerful approach to the pursuit of justice for defendants denied their Sixth Amendment rights, alternative paths to post-conviction relief are viable if pursued at the state or local level.

176. Edwards v. Vannoy, 141 S. Ct. 1547, 1574 (2020) (Kagan, J., dissenting).
177. *See id*. at 1551–63.
178. *Id.* at 1559.
179. *See id.* at 1559–60.
180. *Id.* at 1560.
181. *Edwards*, 141 S. Ct. at 1560.
182. *Id.* at 1574 (Kagan, J., dissenting).
183. *Id.*

The Supreme Court's decision in *Danforth v. Minnesota* declined to force states to apply the rule of *Teague*, allowing individual states to grant retroactivity to new rules of criminal procedure by legislation or decisions made in state court.[184] In the absence of a decision for retroactivity in *Edwards*, both Oregon and Louisiana must take action at the state level to grant convicted citizens access to the full benefits of a unanimous jury trial and rectify historical and modern racial inequity effected during the era of non-unanimity. However, even if Oregon and Louisiana refuse to address retroactive access to convicted citizen's Sixth Amendment rights, those harmed by non-unanimity may find hope in the form of local initiatives aimed at addressing the historical inequities perpetuated by *Apodaca*.

While Louisiana ended non-unanimous convictions by legislation in 2018, the state declined to apply that rule retroactively.[185] Therefore, from a legislative perspective, the state likely considers the matter of retroactive relief settled. However, the District Attorney for Orleans Parish, Jason Williams, has taken action that offers real hope for some of Louisiana's 1,600 estimated state prisoners convicted under the rule of *Apodaca*.[186] Williams promised during his election campaign to allow defendants with final convictions in place at the time of the *Ramos* decision to receive new trials, and he is delivering that promised relief in addition to other creative options.[187] Citing the goal of "wiping away the stains of the Jim Crow legal era," Williams has waived objections to new trials for some affected inmates and granted freedom to other harmed defendants as part of plea agreements.[188] Additionally, the District Attorney's office is proactively reviewing some cases to determine if there were flaws in the original prosecution that might warrant relief.[189] Williams's efforts have drawn calls from Republican former Grant Parish District Attorney Ed Tarpley for other jurisdictions within the state of Louisiana to offer similar relief.[190] Most recently, Louisiana's 3rd and 4th Circuit Appellate Courts have issued contradictory decisions

184. 552 U.S. 264, 266 (2008).

185. *See* Matt Sledge, *New Orleans DA Jason Williams Granting New Trials to 22 Convicted by Split Juries*, NOLA.COM, (Feb. 26, 2021, 11:45 AM), https://www.nola.com/news/courts/article_b3545d42-784d-11eb-9e12-8fb36f86a313.html.

186. *See id.*

187. *See id.*

188. *Id.*

189. *See id.*

190. *See* Sledge, *supra* note 185.

regarding retroactive application of jury non-unanimity rights, creating a circuit split likely to be resolved by the Louisiana Supreme Court as the two cases seek certiorari.[191]

The Oregon legislature briefly considered a bill effecting retroactivity after *Ramos* was decided, but the effort was ultimately abandoned.[192] In the fall of 2021, the Oregon Senate heard testimony on the topic and appears likely to take up the issue again in the coming session.[193] Until a legislative mandate for retroactivity, each case in which a person was convicted by non-unanimous verdict that was final before *Ramos* must be handled individually. At the time *Ramos* was argued in 2019, Oregon Attorney General Ellen Rosenblum argued (disappointingly, if not predictably) that overturning *Apodaca* would overwhelm the Oregon judicial system, requiring the state to retry "hundreds if not thousands" of cases.[194] However, Lewis and Clark College of Law Professor Aliza Kaplan's review of the cases referenced by Rosenblum found that the cases included instances where the verdict would not have been affected by the *Ramos* ruling because the defendants either were not subject to a non-unanimous verdict or could not prove non-unanimity in their trial records.[195] In fact, it is likely the majority of those who would be eligible for relief have already filed, with the total number of cases estimated at fewer than 300.[196]

Rosenblum was unwilling to prioritize incarcerated Oregonians' rights over the exaggerated claims of administrative burden even when the issue was only prospective in nature. This position does not bode well for the implementation of potential policy for retroactivity at the state level. In fact, the state has already argued against retroactivity in

191. *See* John Simerman, *New Rulings Set Up Louisiana Supreme Court Showdown Over 1,500 Non-Unanimous Jury Verdicts*, NOLA.COM (Nov. 11, 2021, 12:57 PM), https://www.nola.com/news/courts/article_6c4e7c96-4310-11ec-9410-336bb57972ca.html.

192. *See* Conrad Wilson, *Oregon Lawmakers to Consider Relief for Those Convicted by Non-Unanimous Juries*, OR. PUB. BROAD. (Nov. 16, 2021, 8:00 AM), https://www.opb.org/article/2021/11/16/non-unanimous-juries-new-oregon-legislation/.

193. *See id.*

194. Aliza Kaplan, *Opinion: Attorney General Rosenblum is on the Wrong Side of History*, THE OREGONIAN (Oct. 6, 2019, 7:00 AM), https://www.oregonlive.com/opinion/2019/10/opinion-attorney-general-rosenblum-is-on-the-wrong-side-of-history.html.

195. *See id.*

196. *See* Wilson, *supra* note 192.

proceedings for post-conviction relief.[197] Instead of taking an opportunity to dismantle a portion of Oregon's history of racial discrimination, Rosenblum continues to take the position that the state's judicial system is not capable of the workload associating with looking backward.[198] As stated by Calvin Duncan: "If Black lives – and the lives of other minorities – matter to the attorney general, she will do the right thing and give . . . a new trial . . . to all of those convicted by racially tainted nonunanimous juries, even those whose cases are beyond direct appeal."[199]

Similar to the situation in Louisiana, the fate of Oregon defendants convicted by non-unanimous juries may need to be resolved by the efforts of local activists. One organization actively pursuing justice for such defendants in Oregon is the Ramos Project, a group within Lewis and Clark College of Law's Criminal Justice Reform Clinic.[200] Led by Professor Kaplan, who is an outspoken jury unanimity advocate, the team has completed outreach to more than 500 prisoners potentially impacted by non-unanimity.[201] They compile information on the circumstances of each non-unanimous verdict they encounter and assist defendants in filing the necessary documents requesting post-conviction relief under the existing rules in the state.[202] Using data the project has compiled and analyzed, the team assists in constructing post-conviction relief arguments based on

197. *See* Calvin Duncan, *Opinion: Rosenblum Must End Persisting Injustice of Nonunanimous Juries*, THE OREGONIAN (Aug. 30, 2020, 6:15 AM), https://www.oregonlive.com/opinion/2020/08/opinion-rosenblum-must-end-persisting-injustice-of-nonunanimous-juries.html. Calvin Duncan spent 28 years imprisoned in the state of Louisiana for a crime he did not commit. He was eventually released after the discovery of exculpatory evidence that had been concealed from his defense attorney at trial. While in prison, he assisted other inmates in their pursuit of post-conviction relief. During that time, he took note of the non-unanimous jury rules in Oregon and Louisiana that had led to wrongful convictions in many cases. One of his petitions constituted the beginning of the *Ramos* case, and he is now a law student at Lewis and Clark College of Law in Portland, Oregon. *Id.*

198. Oregon resolves an estimated 28,000 criminal cases annually. *See* Kaplan, *supra* note 194.

199. Duncan, *supra* note 197.

200. *See* Len Reed, *Responding to Ramos: Focus in Oregon Shifts to Reviewing Cases and Addressing Jurors' Implicit Bias*, *in* OR. STATE BAR BULL. 18, 22 (Nov. 2020), https://www.osbar.org/bulletin/issues/2020/2020November/offline/download.pdf.

201. *See id.*

202. *See Clinic Projects*, LEWIS & CLARK L. SCH., https://law.lclark.edu/clinics/criminal_justice_reform/clinic-projects/ (last visited June 5, 2022).

equal protection in cases where race appears to have been a salient issue in the non-unanimity of a verdict.[203] In the event the defense attorney failed to preserve the issue of non-unanimity at trial, the Ramos Project will assist an inmate in arguing that the omission constituted ineffective assistance of counsel by showing that the defense attorney should have known to preserve the issue based on information available to the legal community at the time of the conviction.[204] As the project has grown, the group is coordinating with Portland-area law firms to assist with cases on a pro bono basis.[205] As Kaplan notes, the damage experienced by these prisoners is an ongoing harm: "People are suffering unconstitutional convictions. . . . Anyone convicted with a nonunanimous jury, whenever it happened, should get to start over."[206]

In the absence of willingness within state leadership in Oregon and Louisiana to correct the wrongs of non-unanimity retroactively, the local legal communities in both states are working in different ways to dismantle the racist impacts of non-unanimity one case at a time.

CONCLUSION

The law is well and truly settled—the Sixth Amendment has always promised criminal defendants the right to a trial by jury inclusive of a unanimous verdict. While it may be unrealistic to hope that every defendant might have the benefit of a stalwart Old Hollywood juror measuredly advocating for reasonable doubt on their behalf, a system permitting non-unanimous verdicts ensures that defendants will not have the complete protection of the constitutional right to a jury trial. The Supreme Court's decision in *Ramos* guarantees this protection for future defendants, but this justice is incomplete without the retroactive application of the prohibition on non-unanimity.

To appropriately reckon with the racist past and continuing problematic present of non-unanimity rules, it is a moral and legal imperative to ensure that those who have been impacted by this systemic and discriminatory denial of rights have access to relief as well. Prisoners in the States of Oregon and Louisiana subjected to non-

203. *See* Resource Manual, RAMOS PROJECT (updated Feb. 8, 2021) (original on file with the author).

204. *See id.*

205. *See* Reed, *supra* note 200, at 25.

206. *Id.* at 22.

unanimous verdicts unequivocally deserve an opportunity to revise the script that brought them to prison, pursuing the type of justice that has thus far been more common in American media than in American courtrooms. Previously non-unanimous states lose little by offering citizens convicted unfairly under these rules a chance at a plot twist through retroactivity. However, to citizens who have lost their freedom over the reasonable doubts of a jury of their peers, *Ramos* retroactivity could provide an end to the story of unconstitutional conviction and a return to the liberty promised by the founding fathers.