

Oregon's Non- Unanimous Jury Rule: A Present Relic of our Discriminatory Past

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'Dirty secret' of Oregon jury system could go before U.S. Supreme Court

Updated Sep 21; Posted Sep 19



The U.S. Supreme Court(Associated Press)

123     957 shares

By [Shane Dixon Kavanaugh](#)

The Oregonian/OregonLive



The Case: Prosecutors eventually charged Silverman, who was Jewish, with murder of Walker and sought the death penalty. No charges were ever brought him — or any other suspect — for McClain's death, however. The newspaper explained why.

Silverman's two-week trial began in early November at the Columbia County Courthouse in St. Helens. The Morning Oregonian described the defendant's demeanor as "mirthful" and one of "studied disinterest," even claiming at one point that Silverman "laughed off" his murder charge. During the trial, one of the jurists, a Spanish-American War veteran, committed suicide by stabbing himself in the chest near his home.

Silverman Trial, 1934

Racist/Xenophobic Response

The Morning Oregonian

The Outrage: Silverman's light sentence elicited scorn from The Morning Oregonian, which railed against the juror in an editorial tinged with racist undertones and nativist fervor. "This newspaper's opinion is that the increased urbanization of American life ... and the vast immigration into America from southern and eastern Europe, of people untrained in the jury system, have combined to make the jury of twelve increasingly unwieldy and unsatisfactory," it wrote on Nov. 25, 1933.

The remarks weren't the first time The Morning Oregonian took aim at ethnic jurors. In previous editorials around that time, the paper bemoaned "mixed-blood" jurors and lamented the role that some immigrants played on juries, questioning their "sense of responsibility" and "views on crime and punishment."

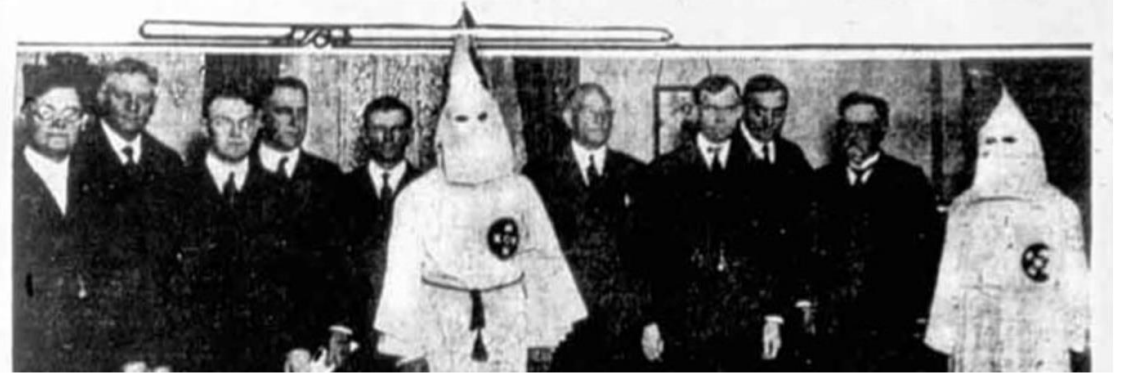
*One Juror
Against
Eleven, THE
MORNING
OREGONIAN,
Nov. 25, 1933*

Obviously, Silverman was not guilty of manslaughter. Either he murdered Walker or he was not involved. But the eleven who stood for second degree either had to give way, or the state had to pay the expenses of a second trial following disagreement.

This newspaper's opinion is that the increased urbanization of American life, the natural boredom of human beings with rights once won at great cost, and the vast immigration into America from southern and eastern Europe, of people untrained in the jury system, have combined to make the jury of twelve increasingly unwieldy and unsatisfactory. . . .



CHIEF KLUXERS TELL LAW ENFORCEMENT OFFICERS JUST WHAT MYSTIC ORGANIZATION PROPOSES TO DO IN CITY OF PORTLAND



The response was part of broader history of what was happening in Oregon at time.

THE MORNING OREGONIAN

“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.”

Jury Reform Up to Voters, The Morning Oregonian (December 11, 1933).

“Americans have learned, with some pain, that many peoples in the world are unfit for democratic institutions, lacking the traditions of the English-speaking peoples.”

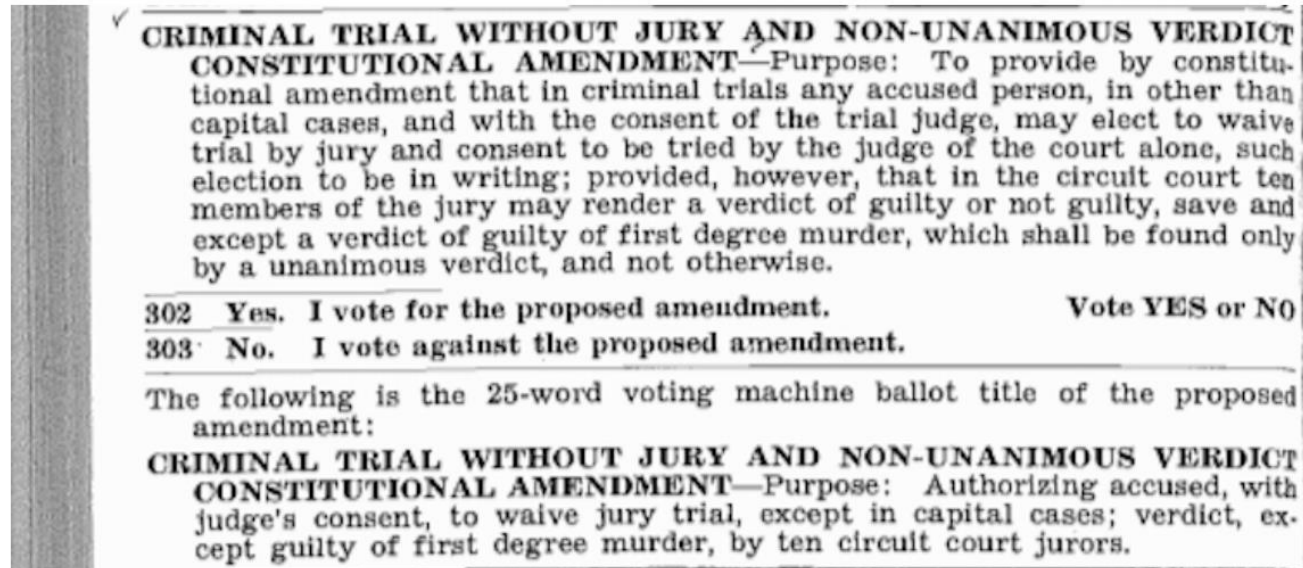
Debauchery of Boston Juries, The Morning Oregonian (November 3, 1933).

The “increased urbanization of American life,” “the vast immigration into America from Southern and Eastern Europe, of people untrained in the jury system, has made the jury of twelve increasingly unwieldy and unsatisfactory.”

The Morning Oregonian (November 25, 1933).

“No person’s rights can conceivably be impaired by the decision of ten out of twelve jurors,” and inferred that corrupt jurors might be the cause of hung juries.

Verdicts by Ten, The Morning Oregonian, (March 27, 1934).

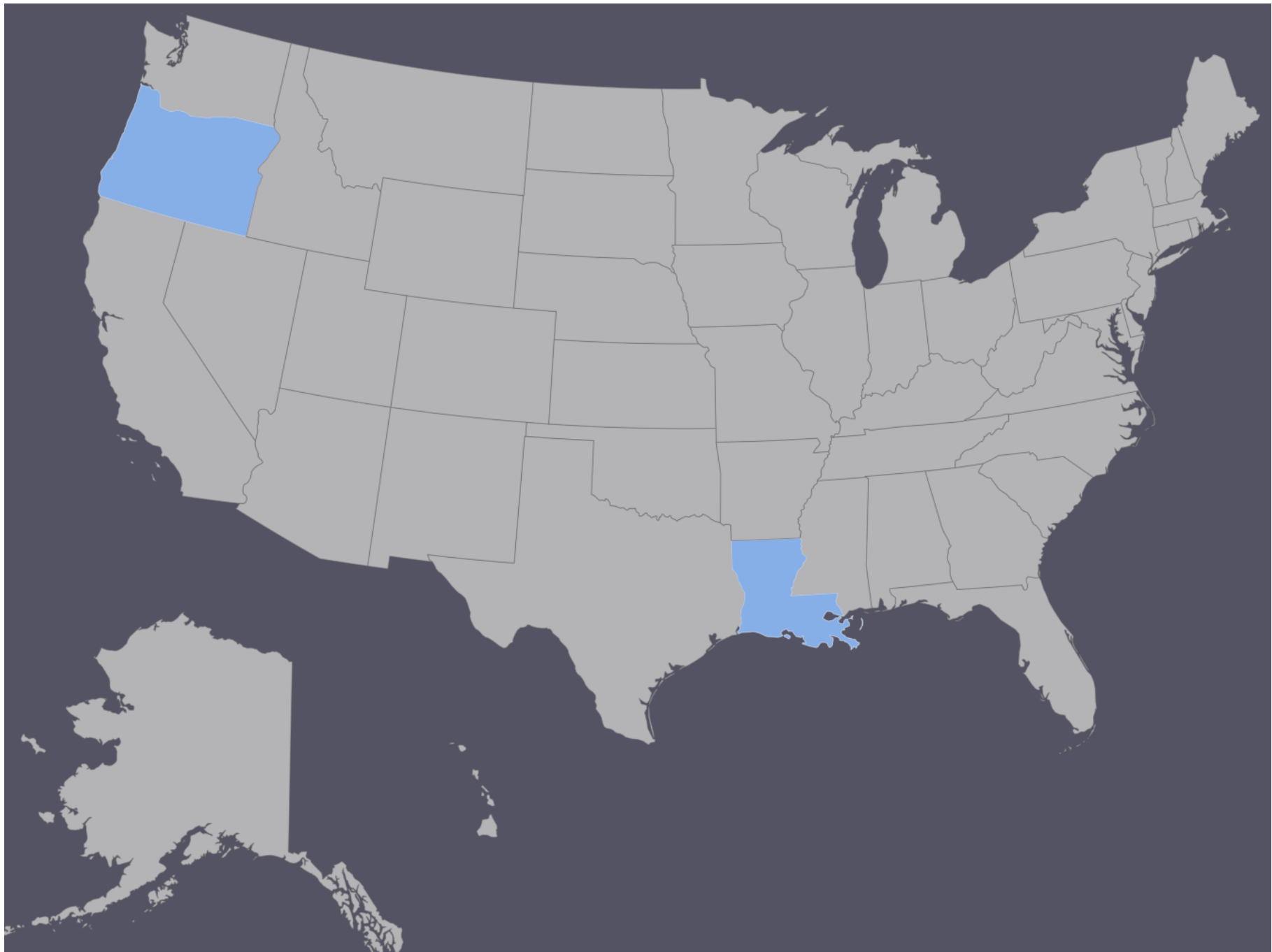


State Library of Oregon

The Backlash: Responding to growing public backlash, the Oregon Legislature recommended a public vote to amend the state's constitution to allow 10-2 jury verdicts in non-murder felony cases. The amendment would also allow juries to acquit defendants on a 10-2 vote.

Proponents of the amendment, known as Measure 302-03, cited the Silverman trial in the [May 1934 Special Election voter pamphlet](#) and newspapers in Eugene and Portland urged readers to support it.

The amendment, which received no organized opposition, [passed with 58 percent of the vote](#), making Oregon only the second state in the U.S. to have a non-unanimous jury system.



Jury Unanimity in the USA

Dates back to founding of the country:
In 1797, John Adams explained, “It is
the unanimity of the jury that preserves
the rights of mankind.”

Oregon had unanimous juries for over
70 years before the 1934 rule change; it
was in line with other states during this
time

48 states and federal government use
unanimous juries in criminal cases
today

Louisiana and Oregon are not often thought of in the same vein. But on the issue of non-unanimous juries, they are kindred spirits.

In these two states, the prosecutor needs to persuade only [10 of 12 jurors](#) for a felony conviction that does not involve the death penalty. All other states require unanimous jury decisions in felony cases — as does the federal system, including federal courts in Louisiana and Oregon.

These jury systems are largely unnoticed vestiges of white supremacy and oppression in our legal system. The Supreme Court now has the chance to accept a case that could end the use of non-unanimous juries in criminal cases. It should take this chance.

The historical reasons behind the jury systems in Louisiana and Oregon offend our democratic values. Louisiana required unanimous verdicts when it became a territory in 1803, but non-unanimous verdicts were formally adopted as law during Louisiana's 1898 constitutional convention, where lawmakers [declared](#) that their "mission was . . . to establish the supremacy of the white race." At the same convention, Louisiana adopted literacy tests for voting and one of the South's first "grandfather clauses," which exempted white voters whose father or grandfather had previously voted from taking literacy tests.

The Washington Post

Opinions

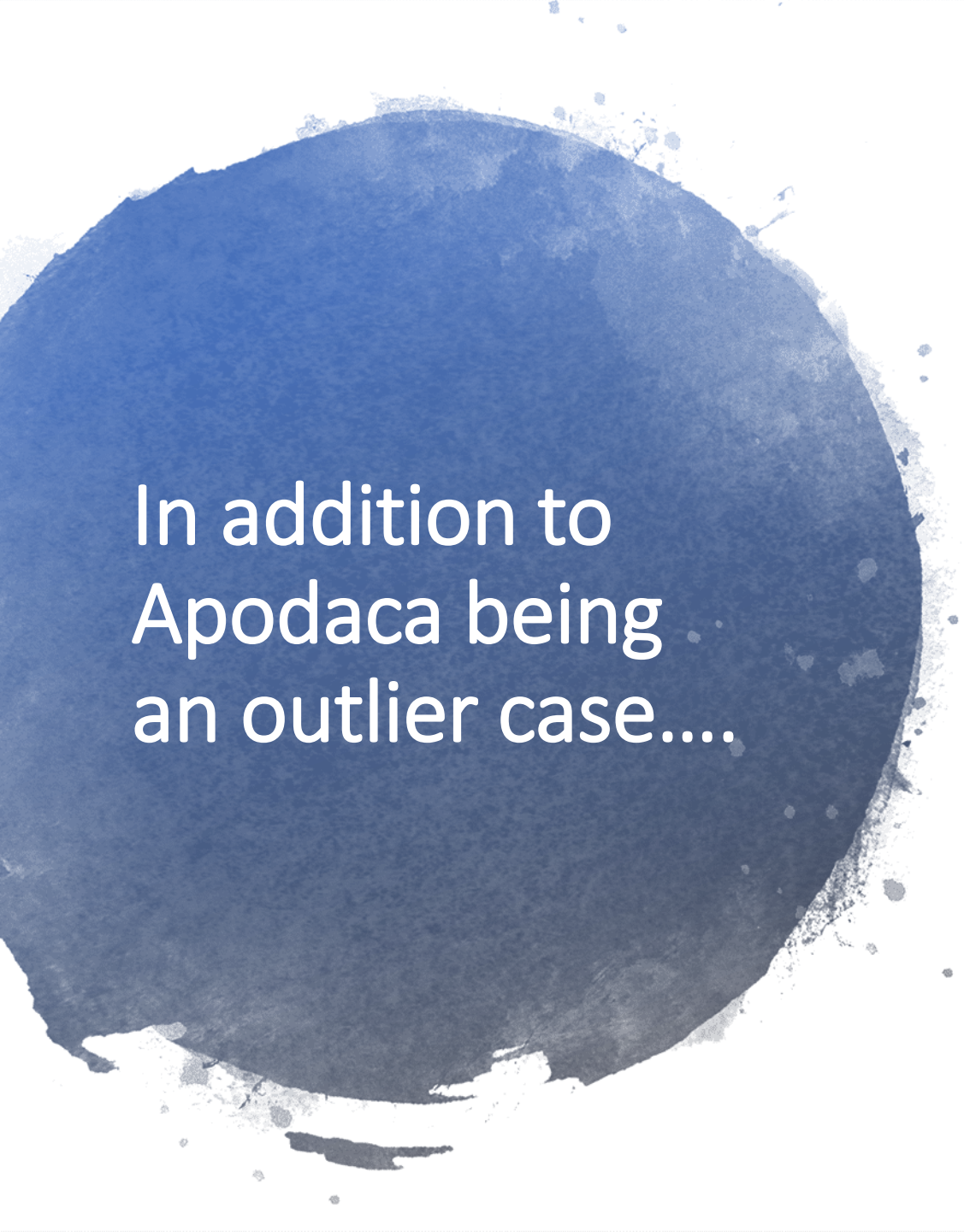
These jury systems are vestiges of white supremacy

Does a state defendant's Sixth Amendment right to a jury trial include a right to a unanimous verdict?

- SCOTUS upholds three Oregon Δ 's convictions by nonunanimous juries.
- Unanimity does not **materially contribute** to the purpose of trial by jury (14th Am.)
- **Not incorporated** in a right to trial by jury (6th Am.)
- **4-1-4 Split (no majority)**, called an "**outlier**" by SCOTUS in 2010

5 Justices agreed that the Sixth Amendment requires unanimity in trials, and 8 Justices agreed that the Sixth Amendment should apply the same in state and federal courts, SCOTUS still upheld nonunanimous convictions.

Apodaca v.
Oregon
SCOTUS 1972



In addition to
Apodaca being
an outlier case....

Social science relied on by the Court in Apodaca is based on jury studies from 1950s/early 1960s

- We now have social science on juries from 1980s, 1990s, 2000s

Supreme Court jurisprudence has changed significantly in the area of incorporation especially since 2010

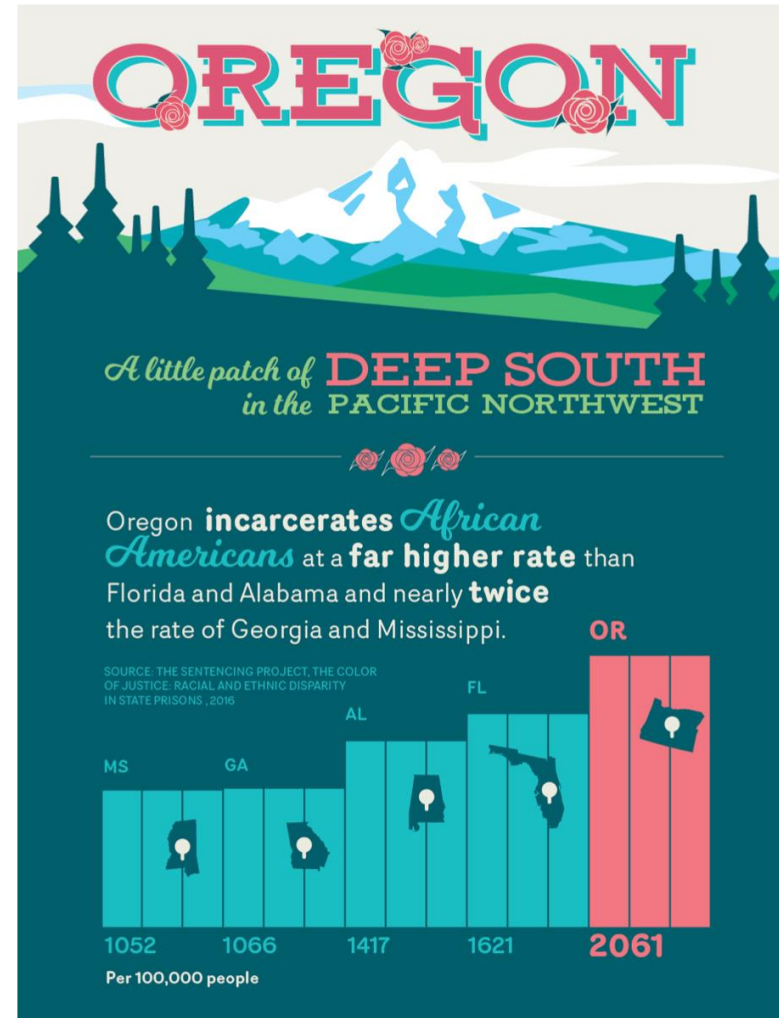
Research of discriminatory history of Oregon/Louisiana non-unanimous jury rules was not considered by the Court

“If one wanted to craft a system to silence the average number of non-white jurors on an Oregon jury, one could not create a more efficient system than 10-2,” he stated in the opinion.

Non-unanimous Jury Rule in Oregon Today

- Dilutes voices of jurors (this means 1 or 2 jurors' voices do not count); Oregon's demographics make this extra troubling
 - *State v. Williams 2016*: Black juror spoke up after conviction
- Verdict driven NOT Evidence driven
- Pressures Defendants to Plea
- We Deny in Felony Cases What We Mandate in Misdemeanor Cases

OR criminal justice system incarcerates Black people at a higher rate than MS and AL and yet we have a jury system where Black people's voices may not matter—this is how the rule plays out practically in OR



Verdict vs. Evidence Driven Deliberation

- **Non-unanimity requirement leads to verdict driven deliberation**
 - When state's evidence is neither particularly weak/strong
 - Contradicts "unreasonable juror" theory
 - May stop deliberation entirely once requisite majority is reached
 - Nonunanimous juries generally engage in **less deliberation**
 - Correlation between deliberation time and accurate decision making
- **Evidence driven juries are less outcome focused - instead eliciting opinions from all jurors while reviewing each evidentiary consideration.**
 - Thorough; produces **higher level of certainty**
 - Safeguards against unreliable evidence

Non-unanimous juries pressure defendants to plea

- 94% of Oregonian defendants take a plea bargain rather than take the chance on a jury
- Non-unanimous juries place additional pressure on people
- Even innocent people to plead out b/c 16.6% of the jury does not have to believe the State has proved its case
- Why chance it when the State doesn't even have to prove its case like it would in other states
- Juries don't have to engage in the same sort of wrestling before reaching their verdict

Misdemeanors and Capital Cases?

- Historically, all criminal cases except for capital/first degree murder cases were subject to non-unanimous jury convictions
- Today, all non-murder felony cases can be decided by 10-12 non-unanimous jury convictions while the lesser misdemeanor cases require 6 unanimous jury convictions
- We have made a choice to deny in felony cases what we mandate in misdemeanor cases

This law is indefensible for other reasons. Consider that the state requires unanimous juries for murder verdicts and death sentence recommendations. It also requires unanimity in misdemeanor verdicts, (though those lesser offenses are decided by smaller juries). That raises the logical question of why non-murder felonies - many of which carry mandatory prison terms - should be treated any differently. The answer, of course, is that they shouldn't.

We should take pride in what our justice system strives for, and we should act with humility in how our justice system underperforms. A unanimous jury doesn't guarantee justice but it is a step toward that goal. Guilty enough should no longer be good enough.

- *The Oregonian/OregonLive Editorial Board*

JUSTICE REQUIRES A TOUGHTER STANDARD THAN "GUILTY ENOUGH."

Mail Tribune, Jackson County

Oregon's sordid history of racial and ethnic discrimination is well known. Here in the Rogue Valley, a photo of the Ku Klux Klan parading through Ashland in the 1920s has been reprinted over and over when the issue of race relations comes up. What is less well known is that the state's criminal justice system still contains a relic of that intolerance. This month, the U.S. Supreme Court will decide whether to take up a challenge to that relic.

Editorial: Addressing Oregon's legacy of injustice

The Register Guard, Lane County

Re-examine split juries

Only Oregon and Louisiana allow 10-2 convictions

On Monday the U.S. Supreme Court declined to review the case of a Louisiana man convicted of murder by a 10-2 jury vote. In all other states and in federal courts, a unanimous jury verdict would have been required for a conviction. Oregon also requires unanimity — but only in murder cases. For all other felonies, only a 10-juror majority is needed. This sets Oregon and Louisiana apart, and people in both states should ask whether split juries can deliver justice. If the courts won't examine the question, Oregonians should do it themselves.

Requiring unanimous verdicts would not have reversed all those convictions. In many cases, the holdout jurors would have been persuaded to adopt the majority's view, or a compromise would have been reached. That's how it's done in 48 states and in the federal courts, where nothing less than a unanimous verdict will satisfy the principle that guilt must be established beyond a reasonable doubt. In Oregon, that principle has an asterisk that may need to be removed.

DAs themselves
seem to be split
about whether or
not we should
keep non-
unanimous juries

Even prosecutors are showing discomfort. Deschutes County District Attorney John [Hummel told The Bend Bulletin](#) that letting jurors ignore the voices of one or two people in the jury box compromises the integrity of the verdict. And Multnomah County District Attorney Rod Underhill wrote in an email to The Oregonian/OregonLive Editorial Board that he believes it's "time for a thoughtful review of this law," noting that the criminal justice system "is and should continue to be a reflection of our shared values."

Hummel said it's critical for jurors to consider and wrestle with opinions they don't agree with and not to dismiss them so quickly.

"We have a more efficient system of justice. But the flip side is you have a more efficient system of justice that might be delivering more verdicts that are unjust," Hummel said. "The question is: Is your goal justice or efficiency?"

John Hummel, the district attorney for Deschutes County, said a 10-2 verdict means 17 percent of the jury disagrees with the decision.

"That strikes me as a decision that we shouldn't have confidence in," he said. "That's not the confidence level that I think our justice system should deliver."

DA Hummel thinks non-unanimous juries are wrong


DA Underhill thinks it is time to review the non-unanimous jury rule

Multnomah County District Attorney Rod Underhill said that criminal justice system should be a reflection of the public's shared values.

"It is time for a thoughtful review of this law," Underhill told The Oregonian/OregonLive in a statement. "My hope is that such a discussion will bring attention to this important topic and serve to increase public confidence in our criminal justice system."

Clatsop County District Attorney Josh Marquis, a frequent critic of criminal justice reforms in Oregon, dismissed the researchers' assertion that Oregon's law is based on racism. The law offers benefits that criminal justice reformers overlook, such as fewer hung juries, he said.

DA Marquis thinks non-unanimous juries are fine



Ambiguity and
Confusion with
regard to the
non-unanimous
rule

This law is indefensible for other reasons. Consider that the state requires unanimous juries for murder verdicts and death sentence recommendations. It also requires unanimity in misdemeanor verdicts, (though those lesser offenses are decided by smaller juries). That raises the logical question of why non-murder felonies - many of which carry mandatory prison terms - should be treated any differently. The answer, of course, is that they shouldn't.

Oregon Constitution, Art. 1, Sec 11

Section 11. Rights of Accused in Criminal Prosecution. In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor; provided, however, that any accused person, in other than capital cases, and with the consent of the trial judge, may elect to waive trial by jury and consent to be tried by the judge of the court alone, such election to be in writing; provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise; provided further, that the existing laws and constitutional provisions relative to criminal prosecutions shall be continued and remain in effect as to all prosecutions for crimes committed before the taking effect of this amendment.

At a minimum: Discriminatory history, all Oregonian voices potentially muted every time non-unanimous jury verdict is returned



3 APPROACHES:

- REFER BALLOT MEASURE
- DA DISCRETION
- LEGISLATIVE FIX

BALLOT MEASURE: EXPENSIVE

Looks like they'll have to go about it the hard way. That means a lot of time and money to educate the public about Oregon's law and how it can compound existing disparities in the justice system's treatment of racial and other minorities. And how Oregon weirdly lets non-unanimous juries convict people of such serious crimes as manslaughter, but demands unanimous juries for much lesser crimes. And it means working with legislators to pass a bill that ultimately refers a measure to overturn this law to voters.

DA DISCRETION: AT BEST, INCONSISTENT

But advocates should also try to enlist county district attorneys into voluntarily committing to a unanimous jury standard. While that's admittedly a longshot, some prosecutors are acknowledging that it's time to give the non-unanimous jury law another look. As elected officials, district attorneys ultimately answer to voters. So while the Supreme Court may not be insisting on that standard, Oregonians can and should do that themselves.

LEGISLATIVE FIX: A POSSIBILITY

- Article 1, Sec. 11:

judge, may elect to waive trial by jury and consent to be tried by the judge of the court alone, such election to be in writing; provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise; provided further, that the existing laws and constitutional provisions relative to

- The non-unanimous jury rule **is not a mandate (it is a floor not ceiling)**
- We have legislated over Sec. 11 and this provision already, thus, **legislative fixing is possible**

1947 Legislature: 6 person jury for misdemeanors

Section 16. A jury in the district court shall consist of six jurors of like qualification as jurors in the circuit court. Jurors shall be drawn from the circuit court panel as provided by, and shall be subject to, all applicable laws relating to jurors in the circuit court, including compensation or manner of payment. Upon receipt of such application and the required fee, the clerk of the circuit court shall forthwith draw the names of as many jurors as the district judge may direct and shall notify such persons to appear at the time and place of trial.

ORS 136.450 provides:

"Except as otherwise provided, the verdict of a trial jury in a criminal action shall be by concurrence of at least 10 of 12 jurors except in a verdict for murder which shall be unanimous."

LEGISLATIVE FIXING

ORS 136.450 Number of Jurors Required for Verdict
(1973-1997)

LEGISLATIVE FIXING: ORS 136.450 (1997-today)

2015 ORS 136.450¹

Number of jurors required for verdict

Text

News

Annotations

Related Statutes

- (1)** Except as otherwise provided in subsection (2) of this section, the verdict of a trial jury in a criminal action shall be by concurrence of at least 10 of 12 jurors.
- (2)** Except when the state requests a unanimous verdict, a verdict of guilty for murder or aggravated murder shall be by concurrence of at least 11 of 12 jurors. [Formerly **136.610**; 1997 c.313 §25]

CONCLUSION

- The notion that this would be some radical change or that we need to study the issue forever is misplaced
- This happens in courtrooms all over America every day
- The question becomes do we want to continue to apply this historically racist/xenophobic rule that mutes Oregonians' voices?

THANK YOU

I am happy to answer
any questions today or in
the future.

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