

# Non-Unanimous Jury Law in Oregon

By Aliza Kaplan

In 1934, Oregon amended its constitution to allow for non-unanimous jury verdicts in criminal cases, excluding those cases where a defendant is on trial for first-degree murder, making it one of only two states (along with Louisiana) that allow non-unanimous jury convictions in criminal felony cases. All other states and the federal government require that jury verdicts be unanimous in such cases. The non-unanimous jury rule, passed as a ballot measure in 1934, was a result of social conditions and a notorious murder trial and was intended, at least in part, to dampen the influence of racial, ethnic, and religious minorities on juries.

The trial involved Jacob Silverman, a hotel proprietor in Portland, who was charged with the murder of Jimmy Walker near Scappoose in April 1933. During jury deliberations, eleven jurors wanted to find Silverman guilty of first-degree murder, but one did not, so they compromised by finding him guilty of manslaughter. Many Oregonians were outraged at the lesser verdict, and the Oregon legislature proposed a constitutional amendment less than a month after Silverman was sentenced.

In the 1934 Voter Pamphlet published by the Secretary of State, advocates for the change argued that the amendment would “prevent one or two jurors from controlling the verdict or causing a disagreement,” results that can be costly to taxpayers and can cause congestion in the courts. Local news outlets supported the amendment by citing corrupt jurors and untrained immigrants as the cause of hung juries. “The increased urbanization of American life,” the November 25, 1933, *Oregonian* editorialized, “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.” The only argument against the amendment noted the irony of excluding the most egregious crimes from the less burdensome non-unanimous jury (increasing the likelihood of acquittal for first-degree murder) and suggested higher pay for district attorneys (who supported the measure) in order to attract competent lawyers to the job.

Oregonians approved the amendment with 58 percent of the vote. As a result, Article 1, Section 11 of the Oregon Constitution directs 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.”

The Sixth Amendment to the U.S. Constitution guarantees rights to the accused in a criminal prosecution, including the right to a trial by jury, but it is silent as to whether a jury verdict must be unanimous. In 1968, the U.S. Supreme Court addressed the issue of non-unanimous juries in *Duncan v. Louisiana*, ruling that the right to a jury trial is a fundamental right to be incorporated against the states by the Fourteenth Amendment and that unanimity is a characteristic of that right. (The incorporation doctrine is a constitutional doctrine through which provisions of the Bill of Rights are made applicable to the states through the Due Process Clause of the Fourteenth Amendment).

Yet, four years later, in *Apodaca v. Oregon* (1972) and *Johnson v. Louisiana* (1972), the U.S. Supreme Court declined to require unanimity in state criminal cases. In *Apodaca*, the Court held that state juries may convict a defendant by less than unanimity even though federal law requires federal juries to reach criminal verdicts unanimously. The opinion was split. Four Justices found that the Sixth Amendment did not mandate unanimity, while four Justices found that it did and that the Fourteenth Amendment incorporated the requirement against the states. Justice Lewis Powell, writing alone and deciding the outcome of the case, found that the Sixth Amendment required unanimity in federal cases but not in state cases.

The split court in *Apodaca* is important, because there is still debate over whether non-unanimous jury verdicts violate a criminal defendant's constitutional rights. Advocates argue that all states, including Oregon, should be subjected to the unanimous jury requirement in accordance with the U.S. Constitution because it is a right provided by the Sixth Amendment and ensures that the burden of proof beyond a reasonable doubt is met. They also argue that not only do

non-unanimous jury verdicts infringe on Oregonians' constitutional rights, but they also lead to the conviction of innocent defendants and disregard minority juror viewpoints. In order for the current law to change, the U.S. Supreme Court would have to overturn its decision in *Apodaca* or voters would have to approve an amendment to the Oregon Constitution.

## Sources

OR. CONST. art I, § 11.

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

Duncan v. Louisiana, 391 U.S. 145 (1968).

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

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

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