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ADOPTED

AMERICAN BAR ASSOCIATION

CRIMINAL JUSTICE SECTION
OREGON STATE BAR
SECTION ON CIVIL RIGHTS AND SOCIAL JUSTICE
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REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association urges Louisiana and Oregon to require unanimous juries to determine guilt in felony criminal cases and reject the use of non-unanimous juries where currently allowed in felony cases.

REPORT

Introduction

Forty-eight states and the federal system currently afford full Sixth Amendment protections to criminal defendants. Louisiana and Oregon are outliers. They are the only two states that allow non-unanimous juries in their criminal cases.[1] While the motive and means for the change from a unanimous to a non-unanimous system may have differed in Oregon and Louisiana, the range of resulting injustices are consistent in both states.[2]

Under current United States Supreme Court Sixth Amendment jurisprudence, criminal cases heard in federal courts require a unanimous vote in order for a defendant to be convicted. This resolution and supporting report promotes the full incorporation of the Sixth Amendment jury trial right via the Fourteenth Amendment and thus opposes the use of non-unanimous jury trials in state, criminal cases.

Background

When the Framers adopted the trial guarantee, they did so with a unanimous jury in mind.[3] The Supreme Court of the United States has consistently recognized this. In 1930, the Supreme Court was called upon to resolve the question of whether the constitution allowed a jury of eleven to rule after one of the twelve seated jurors became incapacitated and the defendant agreed to a waiver. During its discussion, the Court did not mince words in expressing its disapproval of a vote by a non-unanimous jury:

> If a deficiency of one juror might be waived, there appears to be no good reason why a deficiency of eleven might not be; and it is difficult to say why, upon the same principle, the entire panel might not be dispensed

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[1] This article is limited to an evaluation of instances where twelve-person juries are allowed to cast a judgment with fewer than twelve individuals voting in favor of a finding of guilt in non-capital, felony, criminal cases. This article does not address civil jury practices or juries in misdemeanor or capital cases.

[2] "While no agency or body in the state tracks non-unanimous convictions, a study by Oregon's Office of Public Defense Services in 2009 offered some insight. It found that more than 40 percent of the 662 convictions it surveyed from 2007 and 2008 were non-unanimous." Shane Dixon Kavanaugh, Campaign to Repeal Oregon's Unusual Non-Unanimous Jury System Begins, The Oregonian, Jan. 10, 2018, available at http://www.oregonlive.com/portland/index.ssf/2018/01/campaign_to_repeal_oregons_unu.html (last visited 02/23/18).

[3] "As introduced by James Madison in the House, the Amendment relating to jury trial in criminal cases would have provided that: 'The trial of all crimes...shall be by an impartial jury of freeholders...of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites....'" *Williams v. Florida*, 399 U.S. 78, 94 (1970).

> with, and the trial committed to the court alone. It would be a highly dangerous innovation, in reference to criminal cases, upon the ancient and invaluable institution of trial by jury, and the constitution and laws establishing and securing that mode of trial, for the court to allow of any number short of a full panel of twelve jurors, and we think it ought not to be tolerated.[4]

Until its 1972 *Apodaca v. Oregon* ruling, the view of the Court prevailed that a unanimous verdict was an essential element of a Sixth Amendment jury trial.[5] *Apodaca* legalized a vote by a less-than-unanimous jury. In *Apodaca*, the Supreme Court declared that as few as ten jurors did not amount to an unconstitutional practice. Despite definite infirmities, *Apodaca* remains a precedent.

The *Apodaca* case resulted from challenges brought by two people convicted by non-unanimous juries (11 to 1 & 10 to 2) in Oregon. Those Oregon defendants raised Sixth and Fourteenth Amendment challenges. The *Apodaca* court failed to entertain any meaningful discussion of group decision making. Instead, the court focused its attention on the process. It devoted some of its attention to the history of unanimity in this country and on the function of a jury, which it said was to guard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. The *Apodaca* court reasoned that a jury consisting of a group of lay persons representative of a cross section of the community who have the duty and the opportunity to deliberate, free from outside attempts at intimidation was good enough to satisfy constitutional muster. In the end, the court determined that there was no difference between a vote of ten, eleven or twelve.

Apodaca is a plurality decision, which means that a majority agreement of the court never existed.[6] Despite this, Louisiana and Oregon courts have deemed

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[4] *See* Patton v. U.S., 281 U.S. 276, 302 (1930).

[5] *See Apodaca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972) was decided the same day as *Apodaca* and held that a conviction by a 9-3 verdict in certain noncapital cases did not violate the due process clause for failure to satisfy the reasonable-doubt standard; *see also Williams v. Florida*, 399 U.S. 78 (1970) (allowed for a six member jury and held that the Sixth Amendment did not require a vote of twelve); *Ballew v. Georgia*, 435 U.S. 223 (1978) (declared a five-member jury to be a violation of the Sixth and Fourteenth Amendments).

[6] *Apodaca* was a 4-1-4 decision. Both of the groups of four Justices determined the rule should be the same for federal and state trials. Justice Powell differed. Justice Powell believed there to be a distinction between state and federal standards governing the right to a jury trial. In his view, the Sixth Amendment required a unanimous verdict, while the 14th Amendment did not incorporate that requirement. Justice Powell was the swing vote so his position became the law. The opinion held that there was no constitutional right to a unanimous verdict – based on the opinion of only one Justice.

Apodaca a precedent and many now refuse to consider the merits of challenges to the non-unanimous jury system.[7]

Problems with Non-Unanimous Juries:

Promotes Discrimination by Undermining Batson v. Kentucky

Louisiana and Oregon's non-unanimous jury laws create a legal means of discriminating when it comes to jury practices. When it decided *Batson v. Kentucky*[8] in 1986, the Supreme Court outlawed discrimination in jury selection by preventing prosecutors from using race as a reason not to select someone for jury service. The non-unanimous jury laws in Oregon and Louisiana allow a prosecutor to accomplish through a seated jury what the law prevents during the jury selection process. This is so because the vote of one or two of the jurors can be ignored when votes are cast, having the same effect of just excluding one or two jurors during the selection process.

Ignores research

Since that 1972 Apodaca ruling, much more is known about group thinking. While the research does not show that unanimous juries are flawless or that non-unanimous juries always fail, the research does show that unanimous verdicts are more reliable, more careful and more thorough because a rule which insists on unanimity furthers the deliberative process by requiring the minority view to be examined and, if possible, accepted or rejected by the entire jury.[9]

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[7] When *Apodaca* was before the Supreme Court, the court was reviewing Oregon's law and not Louisiana's law. The two laws were not identical. Oregon's law did not allow non-unanimous verdicts in cases of first degree murder (and still does not); Louisiana does (in non-capital cases).[7] Louisiana's law explicitly exempts capital cases; no such language appears in the text of Oregon's law. In Louisiana, for first degree murder (that is not a capital case) and second degree murder, the sentence is an automatic term of natural life; this is not the case in Oregon (where the options span between life with or without parole, death and in excess of twenty-five years in custody).[7] In other words, in Louisiana—but not Oregon—a person can receive a sentence of life without parole by a non-unanimous verdict. To require unanimity for capital cases but not for those resulting in life without parole undermines the insistence on unanimity where the loss of life is at issue.

[8] *Batson v. Kentucky*, 476 U.S. 79 (1986).

[9] *See* Shari Seidman Diamond, Mary R. Rose and Beth Murphy, *Revising the Unanimity Requirement: The Behavior of the Non-Unanimous Jury*, 100 NW U L Rev. 201 (2006); American Psychological Association, *Are Six Heads as Good as Twelve?*, Am. Psychol. Ass'n (May 28, 2004), *available at* http://www.apa.org/research/action/jury.aspx (last visited 02/19/18); Michael H. Glasser, *Letting The Supermajority Rule: Nonunanimous Jury Verdicts In Criminal Trials*, 24 Fla. St. U. L. Rev. 659 (1997); Stephen Saltzburg, *Understanding The Jury With The Help of Social Science*, 83 Mich. L. Rev. 1120 (1985); Reid Hastie, Steven D. Penrod & Nancy Pennington, *Inside The Jury* (1983); Michael Saks, *Jury Verdicts: The Role of Group Size and Social Decision Rule* (1977); Robert Buckhout et al., *Jury Verdicts: Comparison of 6- vs. 12-Person Juries and Unanimous vs. Majority Decision Rule in a Murder Trial*, 10 Bull. Psychonomic Soc'y 175 (1977); Robert D. Foss, *Group Decision Processes in the Simulated Trial Jury*, 39 Sociometry 305 (1976); Norbert L. Kerr et al., *Guilt Beyond a Reasonable Doubt: Effects of Conceptual*

Contributes to Wrongful Convictions[10]

Louisiana is second in the rate of wrongful convictions in the nation. There is reason to believe that Louisiana's non-unanimous jury system is a contributor. In 2017, the Innocence Project- New Orleans reported that eleven of twenty-five Louisiana exonerations resulted from trials where non-unanimous juries were used.

Promotes Racism, Oppression & Undermines Public Trust

Louisiana and Oregon both initially required unanimous juries in all felony cases, as the other 48 states do today. Both made the change to a non-unanimous system for clear and demonstrable racist purposes. In Louisiana, the law was changed after Reconstruction with the express intent of achieving a system of white supremacy. In 1803, when Louisiana became a territory, unanimous verdicts were required. From its creation until the end of Reconstruction and the withdrawal of federal troops, Louisiana required unanimous jury verdicts. Non-unanimous verdicts first were introduced in 1880, after slavery ended, when, through newly emacted codal provisions, defendants could be convicted by vote of only nine of twelve jurors. Non-unanimous verdicts made its way to the Constitution of 1898 by way of article 116 where state officials, announced: "We need a system better adapted to the peculiar conditions existing in our State."[11] At this convention of all white males, these words were spoken in reflection: "Our mission was...to establish the supremacy of the white race..."[12] Louisiana citizens were not afforded the opportunity to vote to adopt the 1898 Constitution.

At the time of the 1898 Convention, 44% of the registered voters in Louisiana were African American. The change from unanimity was to: (1) obtain quick convictions that would facilitate the use of free prisoner labor (by means of Louisiana's convict leasing system) as a replacement for the recent loss of free slave

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Definition and Assigned Rule on the Judgment of Mock Juries, 34 J. Personality & Soc. Psychol. 282 (1976); Charlan Nemeth, *Interactions Between Jurors as a Function of Majority vs. Unanimity Decision Rules*, 7 J. Applied Soc. Psych. 38 (1977); Alice Padawer-Singer et al., *An Experimental Study of Twelve vs. Six Member Juries Under Unanimous vs. Nonunanimous Decisions*, Psychology in the Legal Process 77-86 (1977); James H. Davis et al., *The Decision Processes of 6 and 12 Person Mock Juries Assigned Unanimous and Two-Thirds Majority Rules*, 32 J. Personality & Soc. Psychol. 1 (1975).

[10] In 2014, Oregon changed its status from the last state in the union without an organization dedicated to actively investigating wrongful convictions in criminal cases. Data collection is a predicable challenge of such a new organization. As of the date of this report, the Oregon Innocence Project could not yet provide data explaining how many of their sixteen exonerations resulted from the use of non-unanimous juries.

[11] *Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana,* pp. 76 (1898); La. Const. art. 116 (1898).

[12] *Official Journal, supra, at* 374-375.

labor;[13] and, (2) ensure African American jurors would not use their voting power to block convictions of other African Americans.[14] History confirms such illicit intentions:

> [The end of segregation] prompted the State to try new devices to keep the white citizens in control. The Louisiana Legislature created a committee which became known as the 'Segregation Committee' to seek means of accomplishing this goal....[T]his committee...helped to organize...the Association of Citizens Councils, which thereafter acted in close cooperation with the legislative committee to preserve white supremacy. The legislative committee and the Citizens Councils set up programs, which parish voting registrars were required to attend, to instruct the registrars on how to promote white political control.[15]

When the 1898 law was revisited at the 1973 Constitutional Convention, the law was changed to require the vote of at least ten of twelve. As in 1898, "efficiency" was a stated reason. Some have mistakenly concluded that this sanitized the racial history surrounding the law. In truth, race was not completely removed from the discussion at the 1973 Convention. There was a warning that "ugly, poor, illiterate and mostly minority groups" would be impacted, as well as concerns expressed about the system undermining the reasonable doubt standard. This system survived—not because it was studied and deemed to be in the best interests of justice—but, because of a process that mutes the voices of some and amplifies the voices of others. As one scholar observed: "the constitution of 1974 was written...by a wide and self-interested assortment of assessors, sheriffs, legislators, judges, lackeys and anyone who could get elected or appointed."[16]

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[13] In the post-Civil War South, "recognition of freed slaves as full humans appeared to most white southerners not as an extension of liberty but as a violation of it, and as a challenge to the legitimacy of their definition of what it was to be white." Douglas A. Blackmon, *Slavery By Another Name* 41 (2008); "The notion that farms could be operated in some manner other than with groups of black laborers compelled by a landowner or his overseer to work as many as twenty hours a day was antithetical to most whites." *Id.* at 26.

[14] *See* Marjorie R. Esman, *Non-Unanimous Jury Verdicts Steeped in Racist Past*, The Advocate, Jan. 28, 2016, *available at* http://www.theadvocate.com/baton_rouge/opinion/our_views/article_e9fefca4-c278-57f6-a0fa-24eb1c93d2fd.html (last visited 02/19/18); Angela A. Allen-Bell, *How The Narrative About Louisiana's Non-Unanimous Criminal Jury System Became A Person Of Interest In The Case Against Justice In The Deep South*, 67 Mercer L. Rev. 585 (2016); Thomas Aiello, *Jim Crow's Last Stand: Nonunanimous Criminal Jury Verdicts in Louisiana* (2015).

[15] *See Louisiana v. United States*, 380 U.S. 145, 149 (1965).

[16] Z. Melissa Lawrence, *Constitutional Revision by Amendment—A Louisiana Tradition*, 51 La. Law Rev. 849, 850 (1991).

Oregon's racial history is not much more pleasant than Louisiana's. Oregon is the only non-slave state admitted to the union with an exclusionary clause prohibiting African Americans from residing or owning property there. Oregon's law arose in the early 1930s when the "Klu Klux Klan was very popular around the state with a lot of....political power."[17] Oregon's switch to a non-unanimous jury system occurred in 1934 in direct response to a single case where it was believed that a single hold-out juror prevented a second degree murder conviction (causing a manslaughter conviction).[18] The murdered victim was Protestant and the defendant was a Jewish man suspected of mob ties.[19] In short, anti-immigrant and anti-Jewish sentiments underlined Oregon's switch to a non-unanimous jury system, as introduced there by a Louisianian familiar with that state's system.[20]

Unlike Louisiana, Oregon's system originated by a constitutional vote of the people. A 1933 Oregon voter pamphlet explicitly said the vote to change from a unanimous system to a non-unanimous system was "to prevent one or two...from controlling the verdict and causing disagreement."[21]

In a December 2016 opinion, an Oregon Circuit Court concluded that Oregon's law discriminates against minorities after observing that "race and ethnicity was a motivating factor in the passage of....[Oregon's non-unanimous jury law], and that the measure was intended, at least in part, to dampen the influence of racial, ethnic and religious minorities on Oregon juries."[22]

Contributes to Mass Incarcerations & Adversely Impact Voting Rights

Louisiana's notorious high incarceration rate, with its disproportionate impact on communities of color, is exacerbated by the non-unanimous jury law. By its intent, the jury provision makes felony convictions easier and drives

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[17] Conrad Wilson**,** *Even When Juries Can't Agree, Convictions Are Still Possible In Oregon, OPB.org, Dec.* 12, 2016, *available at* http://www.opb.org/news/article/critics-challege-oregon-non-unamious-jury-law/ (last visited 02/19/18). It should be noted that the KKK was introduced in Oregon by a man who moved there from Louisiana.

[18] *See* Clayton M. Tullos, *Non-Unanimous Jury Trials in Oregon*, The Oregon Defense Attorney (08-10/2014), *available at* http://claytontullos.com/wp-content/uploads/2014/11/Non-Unanimous-Jury-Trials-in-Oregon-Published.pdf (last visited 02/19/18) (Discussing the *State v. Silverman* case).

[19] *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 Oregon Law Review 1, 3 (2016).

[20] *Id.* at 3-4 (2016).

[21] *See State v. Sagdal*, 356 Or. 639, 647 (2015).

[22] *State v. Williams*, 15-58698, p. 16 (2016).

not just convictions but plea bargains. In turn, this has consequences for voting rights and for the fundamental concept of representative democracy.

The Louisiana Constitution bars anyone from voting while "under an order of imprisonment for conviction of a felony."[23] Louisiana law defines "order of imprisonment" as a "sentence of confinement, whether or not suspended, whether or not the subject of the order has been placed on probation, with or without supervision, and whether or not the subject of the order has been paroled."[24] In other words, even those who never spent a day in prison are denied the right to vote while on probation—and many in Louisiana have sentences consisting solely of probation.

In September 2017, Louisiana had 39,220 probationers and 30,929 parolees, or roughly 70,000 people not incarcerated but ineligible to vote.[25] Of those, roughly 60% of parolees and 50% of probationers were defined as African American, in a state with an African American population of approximately 31%. Louisiana's restrictive felon re-enfranchisement laws therefore disproportionately disenfranchise African American voters.

Historical records support the assertion that the non-unanimous jury provision of the Louisiana Constitution, whether intended or not, did increase felony convictions of African American men.[26] Because a collateral consequence is the reduction of voting power among that same population, the non-unanimous jury must be seen as part of a larger voting rights issue with racial overtones.

In Oregon, unlike Louisiana, voting rights are restored upon release from incarceration.[27] While non-unanimous juries in Oregon increase the incarceration rate by making convictions easier, the impact on the rights of Oregonians to vote is not as severe as in Louisiana, where the franchise is more broadly denied.

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[23] Article I, Section 10(A).

[24] *See* La. R.S. 18.2 (8).

[25] *See* Louisiana Department of Public Safety and Corrections, Fact Sheet, Sept. 20, 2017, *available at* http://www.doc.la.gov/media/1/Briefing%20Book/Oct%2017/prob.and.par.demo.oct.17.pdf (last visited (02/19/18).

[26] *See* http://www.theadvocate.com/baton_rouge/news/courts/article_16fd0ece-32b1-11e8-8770-33eca2a325de.html Black people make up roughly one-third of the population in Louisiana, but they comprise two-thirds of state prisoners and three-fourths of inmates serving life without parole. Louisiana leads the nation by far in these life sentences, nearly all of them the result of jury verdicts. The newspaper's analysis found that 40 percent of trial convictions came over the objections of one or two holdouts. When the defendant was black, the proportion went up to 43 percent, versus 33 percent for white defendants. In three-quarters of the 993 cases in the newspaper's database, the defendant was black.

[27] *See* Or. Rev. Stat. 137.281.

Marginalizes Women and People of Color

Women were not included in regular jury service until recently. In Oregon, on the heels of gaining the right to vote in 1912,[28] woman suffrage turned to focusing on exercising the rights of citizenship including the right to sit on a jury. Legislation in Oregon did not grant women the right to sit on juries until 1921.[29] It was not until 1975 that the Supreme Court held in *Taylor v. Louisiana*[30] that it was unlawful to exclude women as a class from jury service in Louisiana. Yet the non-unanimous jury laws in Oregon and Louisiana allow the voice and vote of a woman (or person of color) to be effectively eliminated if they disagree with the white male juror majority. This undermines the goals of diversity and equity inherent in the Sixth Amendment legal doctrine that juror diversity promotes justice.

Numerous legal scholars have reviewed the effects of race and sex on jury trials and concluded that race and sex of judges, victims, and defendants can affect trial outcomes.[31] The process of selecting juries and the exclusion of individuals based on race, sex, and other personal characteristics also has been studied in detail.[32] Statistics on the sex and race of jurors are not regularly reported in a consistent manner. Selecting a jury that is representative of one's peers either by state or county population composition or registered voter lists have not yielded representative juries in terms of sex, race, age or other personal characteristics.[33]

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[28] *See* Kimberly Jensen, *Neither Head nor Tail to the Campaign': Esther Pohl Lovejoy and the Oregon Woman Suffrage Victory of 1912.*, 108 OR. HIST. Q. 350 (2007).

[29] *See* Abigail Scott Duniway, *Path Breaking: An Autobiographical History of the Equal Suffrage Movement in Pacific Coast States* (1971).

[30] *See Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

[31] *See* Jee-Yeon K. Lehmann & Jeremy Blair Smith, *A Multidimensional Examination of Jury Composition, Trial Outcomes, and Attorney Preferences*, (2013) (unpublished manuscript), *available at* http://www.uh.edu/~jlehman2/papers/lehmann_smith_jurycomposition.pdf) (last visited 02/19/18) (provides an empirical analysis of 351 felony jury trials in four major county courts across the U.S.); Samuel R. Sommers & Phoebe E. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research,* 2 SOC. ISSUES & POL. REV. 65 (2003) (Provides a literature review of the effects of race in criminal jury trials); J.D. Lieberman & B.D. Sales, *Scientific Jury Selection* (2007); David C. Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner, & Barbara Broffitt, *The use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis,* 3 U. PA. J. CONST. L. 171 (2001) (Discussing the effects of gender on juries).

[32] *See* Shamena Anwar, Patrick Bayer, & Randi Hjalmarsson, *The Impact of Jury Race in Criminal Trials*, 127 Q. J. ECON. 1017 (2012) (Looking at race and gender with an empirical analysis from actual trials); Moses Shayo & Zussman, *Judicial Ingroup Bias in the Shadow of Terrorism*, 126 Q. J. ECON. 1447 (2011); Alberto F. Alesinea & Eliana La Ferrara, *A Test of Racial Bias in Capital Sentencing* (NAT'L BUREAU OF ECON. RES., WORKING PAPER NO. 17887) (2011), and David Abrams, Marianne Bertrand, & Sendhil Mullainathan, *Do Judges Vary in their Treatment of Race?* 41 J. Legal Stud. 347 (2011) (Providing further evidence that race and sex can affect trial outcomes).

[33] Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy,* 78 CHI.-KENT L. REV. 1033 (2003); Kenneth J. Melilli, Baston *in Practice: What We Have*

Even when women and non-white individuals are included in the pool of potential jurors, through the jury selection process,[34] and participate in a jury verdict, the non-unanimous jury system allows the majority one last way to silence the voice of minority representation by discounting the voice of these women and non-white jurors completely.

Results in Differing Standards Between States & The Federal Government

Louisiana and Oregon's non-unanimous jury laws result in different Sixth Amendment standards between federal courts (which require unanimous verdicts in criminal cases), and the other forty-eight states' criminal courts (which require unanimous verdicts) on the one hand, and the Louisiana and Oregon state courts (which allow non-unanimous juries), on the other. This makes consistency impossible and can undermine confidence in state criminal courts, make convictions easier by design, and the rights of defendants thereby less protected.

Non-Unanimous Juries are at Odds With ABA Standards

In 1972 when *Apodoca* was decided, the 1968 ABA standard allowed for non-unanimous verdicts. In 1976, the ABA changed its standard to affirm that a jury verdict in criminal trials should be unanimous. In 2005, this was reiterated by the ABA in its Principles for Juries & Jury Trials. The ABA's official position, consistent with the scientific evidence, is that non-unanimous verdicts reduce the reliability of jury determinations, silence minority viewpoints, erode confidence in the criminal justice system, and do not significantly contribute to a reduction in hung juries and retrials. Further details are set forth in the next section of this report.

Existing ABA Resolutions and/or Standards

In 1972, when Apodaca was decided, Standard 1.1 of the 1968 Criminal Justice Standards provided, in pertinent part:

> 1.1 Right to jury trial.
> Defendants in all criminal cases should have the right to be tried by a jury of twelve whose verdict must be unanimous, except that where not barred by applicable constitutional provisions, the right to jury trial may be limited in one or more of the following ways:

Learned about Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447 (1996); Albert W. Alschuler, *Racial Quotas and the Jury*, 44 DUKE L.J. 704 (1995); Albert W. Slschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. *153 (1989); Karen M. Bray, Reaching the Final Chapter in the Story of Peremptory Challenges*, 40 UCLA L. Rev. 517 (1992).

[34] In *Batson v. Kentucky*, the Court addressed peremptory challenges based on race that systematically removed African American jurors from a petit jury. *Edmonson v. Leesville Concrete Co.* extended *Batson's* applicability to jury selection in civil cases. *See Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991). However, *Batson* and *Edmonson* have been unable to live up to the promise of their respective holdings.)

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(d) by permitting less than unanimous verdicts, without regard to the consent of the parties.

In the Commentary to the 1968 Criminal Justice Standard 1.1, the Advisory Committee reviewed current thinking on jury unanimity and "concluded that the minimum standards should recognize the propriety of less than unanimous verdicts, as now permitted in six states." The 1968 Standards for Criminal Justice, Trial by Jury, was but one volume - volume 15 - of the seventeen volumes that comprised the ABA's Project on Standards for Criminal Justice.

In 1976, another ABA commission, the Commission on Standards of Judicial Administration, published its final draft of the Standards Relating to Trial Courts (hereinafter "1976 Judicial Standards"). Standard 2.10 stated, in pertinent part, "The verdict of the jury [in criminal cases] should be unanimous." In the Commentary to its 1976 Judicial Standard 2.10, the Commission acknowledged that this was an enlargement of the scope of the jury trial right stated in the 1968 Criminal Justice Standard 1.1, but concluded, "If the question of jury trial in criminal cases is considered from a long range viewpoint, placing the present exigencies of the trial courts in proper perspective, these qualifications [in 1968 Standard 1.1] appear to be both unnecessary and unwarranted by our legal traditions." The 1976 Judicial Standards were adopted at the ABA's Midyear Meeting in February 1976. In the course of their adoption, the ABA also authorized amendment to the 1968 Criminal Justice Standards to conform to the 1976 Judicial Standards, specifically affirming that, "[i]n criminal cases, the verdict of the jury should be unanimous." Any support that the ABA's 1968 Trial Court Standards had lent to a position that permitted non-unanimous verdicts had thus ended, by 1976.

When the 1978 edition of Volume 15 of the Standards for Criminal Justice (hereinafter "1978 Criminal Justice Standards") was published, its Introduction stated: "Incorporating the ABA Standards of Judicial Administration, this updated standard [15-1.1] has been changed by deletion of ... (1) recogni[tion] [of] the propriety of nonunanimous jury verdicts." 1978 Criminal Justice Standards, Introduction at 15.4

Most recently, in 2004, the ABA established the American Jury Project, the result of which was the promulgation of nineteen core jury trial principles that defined the ABA's "fundamental aspirations for the management of the jury system." Principle 4.B provides that "[a] unanimous decision should be required in all criminal cases heard by a jury."

Conclusion

Despite plurality permission from the Supreme Court to accept the non-unanimous vote of selected jurors, forty-eight states chose to afford full Sixth Amendment protections to felony defendants. That's not because unanimity is a neglected topic. Over the years, a number of states have considered abandoning their unanimity requirements. In every instance, after much study and deliberation, change has been rejected and a unanimous verdict system was maintained.[35] The Louisiana State Bar Association has done its part by adopting policy on June 9, 2016, urging the Louisiana legislature to adopt legislation amending Article 1, Section 17 of the Louisiana Constitution, "to require all juries in criminal cases to render a unanimous verdict." Justice dictates that Louisiana and Oregon restore Sixth Amendment rights to their residents and, in so doing, return to a unanimous jury system in non-capital, criminal cases.[36] Let's stand with our Louisiana colleagues and support our Oregon fellow members of the bar by insisting on unanimous verdicts in all felony cases rendered by the American justice system.

Respectfully submitted,

Morris (Sandy) Weinberg, Jr.
Chair, Criminal Justice Section

August 2018

[35] *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 Oregon Law Review 1, 19-20 (2016). (Discussing failed proposals in California, Washington State, Mississippi and New York).

[36] "In a remarkable move, Oregon's powerful district attorneys group appears to now not only side with reform advocates but wants to assume a primary role in reversing the law — which could reduce the number of convictions won by prosecutors and increase the number of hung juries." Shane Dixon Kavanaugh, Campaign to Repeal Oregon's Unusual Non-Unanimous Jury System Begins, The Oregonian, Jan. 10, 2018, available at http://www.oregonlive.com/portland/index.ssf/2018/01/campaign_to_repeal_oregons_unu.html (last visited 02/23/18).

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GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section

Submitted By: Morris (Sandy) Weinberg, Jr., Chair

1. Summary of Resolution(s).

   The resolution urges Louisiana and Oregon to require unanimous juries to determine guilt in felony criminal cases and reject the use of non-unanimous juries where currently allowed in felony cases.

2. Approval by Submitting Entity. This resolution was passed by the Criminal Justice Council at the Spring Meeting in Tampa, FL, in April 2018.

3. Has this or a similar resolution been submitted to the House or Board previously?

   Yes. A resolution urging the use of unanimous verdicts in Federal criminal courts was enacted in August 1974. In February 1976, the House enacted the Commission on Standards of Judicial Administration's Standards Relating to Trial Courts; Standard 2.10 stated, "The verdict of the jury [in criminal cases] should be unanimous." The 1978 Criminal Justice Standards affirmed unanimous jury verdicts. In 2004, the ABA established the American Jury Project, the result of which was the promulgation of nineteen core jury trial principles that defined the ABA's "fundamental aspirations for the management of the jury system." Principle 4.B provides that "[a] unanimous decision should be required in all criminal cases heard by a jury."

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

   See response to #3, above. This resolution is consistent with long-standing ABA policy.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

   Not applicable.

6. Status of Legislation. (If applicable)

   The Louisiana legislature adopted legislation in 2018 to amend Article 1, Section 17 of the Louisiana Constitution, "to require all juries in criminal cases to render a unanimous verdict." The proposed amendment will go before Louisiana voters on November 6, 2018.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

   This policy will be used as a basis of advocacy in those few states where a non-unanimous verdict is permitted in felony criminal cases.

8. Cost to the Association. (Both direct and indirect costs)
   No cost to the Association.

9. Disclosure of Interest. (If applicable)
   Not applicable

10. Referrals. Concurrent with the filing of this resolution and Report with the House of Delegates, the Criminal Justice Section is sending the resolution and report to the following entities and/or interested groups:

    Commission on Veteran's Legal Services
    Legal Aid & Indigent Defense
    Commission on Disability Rights
    Special Committee on Hispanic Legal Rights & Responsibilities
    Commission on Homelessness and Poverty
    Center for Human Rights
    Commission on Immigration
    Racial & Ethnic Diversity
    Racial & Ethnic Justice
    Commission on Youth at Risk
    Young Lawyers Division
    Civil Rights and Social Justice
    Government and Public Sector Lawyers
    International Law
    Federal Trial Judges
    State Trial Judges
    Law Practice Division
    Science & Technology
    Health Law
    Litigation
    National Conference of Bar Presidents

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11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution urges Louisiana and Oregon to require unanimous juries to determine guilt in felony criminal cases and reject the use of non-unanimous juries where currently allowed in felony cases.

2. Summary of the Issue that the Resolution Addresses

Louisiana and Oregon currently allow felony conviction by a less than unanimous jury. The resolution would require unanimous juries for all felonies in both states, thus affording defendants accused of felonies their Sixth Amendment Right to a jury trial as applied to the states by the Fourteenth Amendment.

3. Please Explain How the Proposed Policy Position Will Address the Issue

The proposed policy continues longstanding adherence to the principle that a jury verdict should be unanimous.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified.

None.