



~~12~~ ~~11~~ 10 (TEN) ANGRY
OREGONIANS: OREGON AND THE
NON-UNANIMOUS JURY

HISTORY OF THE JURY SYSTEM

- 1066: William the Conqueror
- System of witnesses swear under oath, give testimony before court of law
- “Juror” comes from Old French “*jurer*”, “to swear”
- By 12th Century: Henry II instituted “*assizes*” :
12 “free and lawful men”

MAGNA CARTA

- 1215: Charter of rights agreed to by King John of England
- Conditions one's loss of liberty to the “lawful judgment of his peers”



BRITISH HISTORY

- 1367: Earliest recorded unanimous jury verdict
- By late 14th Century: preference for unanimity among 12 jurors
- Jury unanimity is the norm in colonies.



CONSTITUTION

- James Madison's draft Sixth Amendment included "the requisite of unanimity for conviction"

- Wording ultimately removed; but in practice generally accepted

OREGON CONSTITUTION

- Or. Const. art. I, § 11 (Rights of Accused in Criminal Prosecution)
- Originally provided for unanimous jury verdicts in all criminal cases.
- After 1934 amendment, unanimity is required only for first degree murder; if a criminal case has 12 jurors, the verdict can be decided by the agreement of 10 out of the 12 jurors:
- “[I]n 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.”



A BRIEF HISTORY OF OREGON'S STRUGGLES WITH RACE

- 1844 Exclusion Act
- Banned slavery and freed existing slaves
- Prohibited African Americans from residing within the Oregon Territory, with harsh penalties for violating act
- 1849 amendment provided some amnesty but prohibited further immigration

UPRISINGS

Fear of native uprisings

Fear of African American and native
collusions against white interest

Statutes of Oregon (1855)

ARTICLE 1, SECTION 35

- “No free negro, or mulatto, not residing in this State at the time of the adoption of this Constitution, shall come, reside, or be within this State, or hold any real estate, or make any contracts, or maintain any suit therein; and the Legislative Assembly shall provide by penal laws, for the removal, by public officers, of all such negroes, and mulattoes, and for their effectual exclusion from the State, and for the punishment of persons who shall bring them into the state, or employ, or harbor them.”
 - **Adopted September 18, 1857**
- Adopted at the same time as Article I, Section 34 (which banned slavery in Oregon)
 - Article 35 received more Yes votes than Article 34
- Repeal efforts were defeated by voters in 1900, 1901, 1903, 1915, & 1916
- Finally repealed in **1927**

PROHIBITION ON PARTICIPATION IN COURTS

130

OF EVIDENCE.

TITLE I.

CHAPTER IV.

OF EVIDENCE.

TITLE I. *Of the Competency of Witnesses.*

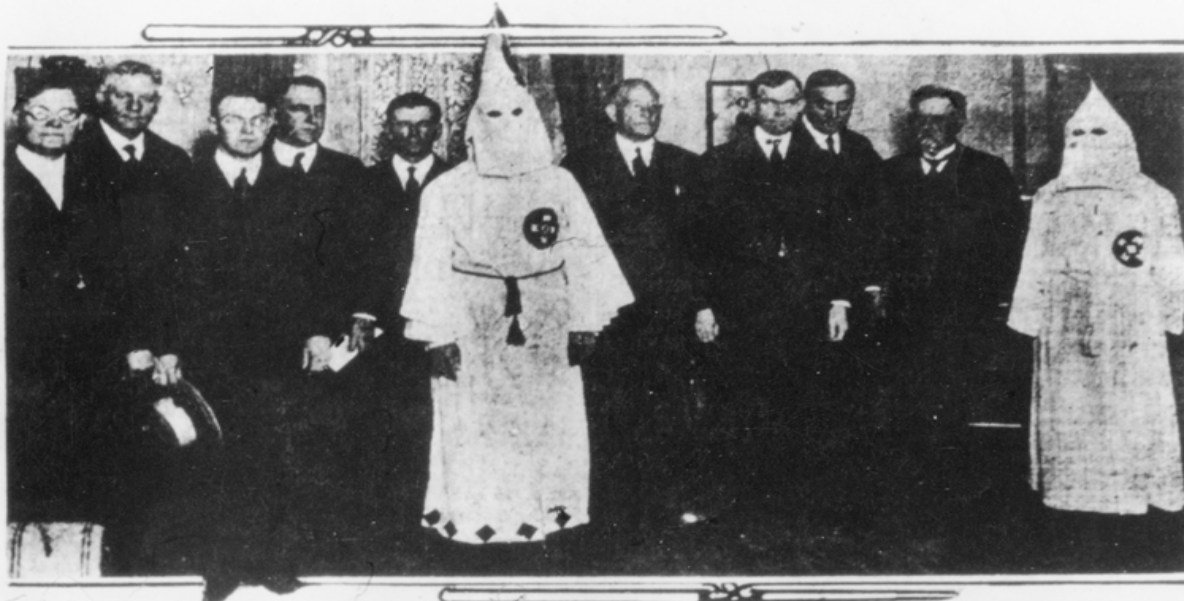
SEC. 5. The following persons shall not be competent to testify :

1. Those who are of unsound mind, or intoxicated at the time of their production for examination ;
2. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly ;
3. Negroes, mulattoes and Indians, or persons having one-half or more of Indian blood, in an action or proceeding to which a white person is a party.

Statutes of Oregon (1855)

EUGENICS, THE KKK AND OREGON

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



MORAL and political clean-up will be the object of Ku Klux Klan's first campaign, the King Kleagle, ranking officer for Oregon, told a group of citizens at a meeting yesterday to which his guests were summoned by mysterious telephone messages. The King Kleagle is the sheeted figure in the center of the group. *U. O. Photo of the National Safety*

Oregon Historical Society Research Library

THE MASSIE AFFAIR (HONOLULU)

- Racially charged trial in 1932 of white Navel officer, Thomas Massie and two enlisted men in Hawaii for the murder of a local boxer Joseph Kahahawai, who had been wrongly accused of raping Massie's wife, Thalia.
- American politicians and publications were sympathetic to white defendants and racist articles were widespread.
- Clarence Darrow in his last case defended the men by taking the position that the murder was a justified "honor killing." As such, he contended, customary "unwritten law" demanded that the accused should go free.
- Despite compelling evidence of murder, the men were convicted of manslaughter. The sentences were commuted by the territorial governor.

SILVERMAN TRIAL DATA

- Sensational press coverage of 1933 trial
- Portland mobster accused of murder
- “Compromise” verdict of manslaughter
- Jewish collusion between holdout juror and Silverman

BALLOT MEASURE 302-33 (1934)

The language appeared on the ballot as:

Constitutional Amendment - Referred to the People by the Legislative Assembly

CRIMINAL TRIAL WITHOUT JURY AND NON-UNANIMOUS VERDICT CONSTITUTIONAL AMENDMENT - Purpose: To provide by constitutional amendment that in criminal trials 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.

Vote YES or NO

202 Yes I vote for the proposed amendment

BALLOT MEASURE 302-33 (1934) CONTINUED

The results:

Election Results

Oregon Measure 2 (May 1934)		
RESULTS	VOTES	PERCENTAGE
Yes	117,446	58.47%
No	83,430	41.53%

With the passage of Measure 2, Oregon allowed non-unanimous jury convictions for anything except first degree murder. The legislature referred to voters following murder trial of Jacob Silverman that was deadlocked on a murder charge with a lone juror hold-out.

CONSTITUTIONALITY (FEDERAL)

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

- Oregon's nonunanimous jury framework for criminal cases does not violate the Sixth Amendment jury trial right (as incorporated against the states via the Fourteenth Amendment)
- May be called into question in light of *McDonald c. City of Chicago*, 561 U.S.

MINORITIES IN OREGON JURIES

- Oregon is 87.6% white and 12.4% non-white
 - *Representative jury – 10 white jurors, 2 non-white*
- But Oregon juries don't match census data
 - Methods of juror selection lead to overrepresentation of certain demographics

WHAT'S THE VERDICT? (OJIN DATA)

- Sampling of indigent appeal requests from OPDS appellate division
- 65.5% of felony jury verdicts were non-unanimous on at least one count

GROUP THINK

Empirical Studies show non-unanimity leads to:

- Hastier deliberations
- Jurors with minority views participating less

“[Juror #6] (foreperson to the bailiff): I have a question, a procedural question. If one juror disagrees with the others, does that person have to stay? We have enough of a consensus for a verdict, but we’re arguing on some points, but there’s one person who didn’t agree with the verdict that we came to a consensus with. Does that person have to stay or can he be excused or do we all have to be here?”

[The bailiff confirms that the juror will stay and then leaves the jury room]:

“[Juror #6] (to Juror #4): All right, no offenses, but we are going to ignore you.”

Shari Seidman Diamond et. Al., *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 Nw U L Rev 201 (2006)