Non-Unanimous Jury Trials in Oregon

by Clayton M. Tullos

Introduction

In 1934 Oregon voters approved Ballot Measure 2, joining with Louisiana to become the only states that allow non-unanimous jury verdicts in felony trials. The ballot measure changed the Oregon Constitution[1] in two significant ways: first, it provided for defendants in non-capital cases to waive jury trial and be tried by a judge alone, and second, it allowed juries to deliver felony verdicts of acquittal or conviction by votes of ten-to-two, eleven-to-one, or twelve-to-zero.

Ballot Measure 2 was a radical step away from the tradition of requiring unanimity in felony jury verdicts. It remains controversial today, and the United States Supreme Court's docket reveals repeated recent attempts to challenge the constitutionality of non-unanimous felony verdicts. Yet the ballot measure itself was not the product of well-considered public debate. Instead, it stemmed from inflamed public reaction to a notorious 1930s trial – "the Silverman case" – that resulted in a publicly unpopular compromise verdict of manslaughter.

The history of Ballot Measure 2 provides an interesting and valuable lesson about the power of public passion regarding criminal justice. This article will trace an historical analysis of the measure and the concept of jury unanimity in Oregon at the time. The article will detail the Silverman case, the outcome of the trial and its effect on the Oregon congress and media in the months leading up to the 1934 Special Election.

The Silverman Case

Looking First at the Aftermath

Before examining the facts of the Silverman case, the reader might find it helpful to review arguments for and against Ballot Measure 2. First the argument in favor, presented by an Oregon congressional committee, which appeared in the 1934 Republican Special Election Voters Pamphlet. The argument did not address waiver of jury trial, but instead focused primarily on "one unreasonable juror" and his effect on the outcome of the Silverman murder trial:

> The laws of Oregon now prohibit the court from commenting on the fact that the accused in a criminal case has failed to take the witness stand and testify in his own defense, and the judge is also prevented from commenting on the value of the evidence introduced on behalf of the defendant no matter how flimsy the defense of the accused may be. Our laws also require that the evidence against the defendant must be so conclusive as to the culprit's guilt that the jury must be convinced beyond any reasonable doubt or to a moral certainty of that guilt before it is privileged to find a verdict of guilty. Twelve jurors trying a criminal case must be unanimous in their decision before the defendant may be found guilty.
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> The proposed constitutional amendment is to prevent one or two jurors from controlling the verdict or causing a disagreement. The amendment has been endorsed by the district attorney's association of this state and is approved by the commission appointed by the governor to make recommendations amending criminal procedure.
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> Disagreements not only place the taxpayers to the expense of retrial which may again result in another disagreement, but congest the trial docket of the courts.
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> The amendment provides that a jury of ten may return a verdict save and except in first degree murder. A notable incident of one juror controlling the verdict is found in the case of State v. Silverman recently tried in Columbia county. In this case 11 jurors were for a verdict of murder in the second degree. One juror was for acquittal. To prevent disagreement 11 jurors compromised with the one juror by returning a verdict of manslaughter. This they were compelled to do to prevent large costs of retrial.
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> Disagreements occasioned by one or two jurors refusing to agree with 10 or 11 other jurors is a frequent occurrence. One unreasonable juror of the 12, or one not understanding the instructions of the court can prevent a verdict either of guilt or innocence. We believe that the people of Oregon will clearly see the reasonableness of

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> the proposed change and vote favorably for this measure, which certainly is a step in the right direction. [2]

The argument against Ballot Measure 2, appearing in the Oregon Republican Voters Pamphlet by former district attorney Richard Deich, was primarily used as a platform to argue for increased pay for district attorneys in order to attract better qualified district attorneys. The last three sentences summarize Deich's non-opposition: "I am against the amendment not because I feel it is an ill-advised move. It is a weak and ill-advised attempt to correct an evil that will be abortive because it will not get the results sought for. It is an attempt to repair the engine in your automobile by patching up a hole in the exhaust pipe."[3]

The Silverman Trial[4]

To understand why the Silverman murder trial had such an effect on the media and electorate, one needs to look into the background of the crime. The story begins with the shooting of Frank Kodat. Kodat was a 50-year-old ex-safecracker who, after being released from prison early due to numerous health complications, opened up a speakeasy and halfway house for ex-convicts. Kodat would feed and clothe those who came into his home and succeeded in putting some on the right path – the path away from prison. He operated his home as a halfway house for a few years before meeting Jimmy Walker. Walker was released from prison after serving a five-year sentence for burglary in March 1933; soon afterward, he moved in with Kodat. Jimmy Walker was no stranger to the prison system after having spent time in the Wisconsin and Kansas state prisons.

On Thursday, April 20, 1933, Frank Kodat accused Walker of stealing a watch belonging to another person and forced him to return the watch. Kodat ordered Walker to leave his house and never return. Walker returned early the next morning, however, to insist about his return and quarreled with Kodat. Unbeknownst to Kodat, Walker picked up Kodat's gun and carried the gun into the next room. Walker stood on the opposite side of the wall from Kodat and shot him in the back through the plaster wall. Walker then fled and later checked into a hotel with Edith McClain posing as his wife.

Jake Silverman, a friend of Kodat's with a checkered past (he was once an affluent merchant then spent time in jail), learned of the shooting later the same morning after three or four days of consuming significant quantities of alcohol. Kodat was not expected to live (though he would later recover).

After the shooting, Kodat's bartender, Abe Levine, was taken into custody for questioning. Silverman succeeded in obtaining Levine's release from police custody later the same day on the condition that they search for Walker. Levine and Silverman located Walker and McClain and convinced them to get into Silverman's Studebaker and go for a ride.

The ride ended around seven p.m. when Walker and McClain were forced from the car on the remote, isolated, and mountainous Dutch Canyon Road. Walker exited the car with McClain's suitcase in hand and was shot twice—once in the head and once in the chest. McClain either ran away or was led from the car to a spot around twenty feet from the road where she raised up her arms in a defensive position. She was shot twice—the first shot went through her arm, breaking it, and struck her face, and the second shot struck her face again. The bodies were found early the next morning and police quickly focused on Mr. Silverman.

Jake Silverman was charged with first degree murder for the death of Jimmy Walker, and the district attorney announced his intention to seek the death penalty. On the first day of trial, each of the juror's names was printed in *The Morning Oregonian*, which would be both peculiar and frowned upon today, particularly due to the increased chances of juror harassment and intimidation. Of the numerous witnesses presented by the state, three presented the most damning evidence against Silverman. One witnessed Walker and McClain getting into a vehicle which matched the defendant's at approximately five p.m. on the day of their deaths. He also testified that the driver resembled Silverman.

The second witness knew the defendant for over two years, was standing across the street and witnessed four men and a woman enter the defendant's car; he further testified that Silverman was in the driver's seat. The third witness lived several hundred feet away from where the bodies were recovered. He testified that he heard three shots and soon after saw the car drive by at a high rate of speed. The state presented tire track comparisons with corresponding expert testimony, stating that Silverman's vehicle was at the scene of the crime. Silverman described the trial as a "joke" and "farce" and repeatedly stated "there wasn't enough evidence to convict him."

The jury emerged from deliberations twice to ask a question of the court. The first question was what time the sun set on April 21, 1933—presumably to determine if the third witness was able to see the occupants of the vehicle. The second question was for further jury instruction regarding Silverman's principal liability for the actions of his co-conspirators.[5] Eleven of the twelve jurors wanted to convict on a second-degree murder charge and one wanted to acquit. A second-degree murder charge would have resulted in a statutory sentence of life in jail. Instead of forcing a mistrial and likely subsequent repeat trial the jurors compromised, after nearly seventeen hours of deliberations, with a sentence of manslaughter. According to the trial judge the law favors compromise verdicts. In the 1930s a manslaughter sentence allowed for significant judicial discretion; the judge could sentence anywhere from one to fifteen years and a maximum fine of $5000.[6]

At sentencing, the prosecutor in the case pointed out that the defendant barely squeaked past a second-degree murder conviction and as such should be sentenced to the maximum sentence allowed by law—$3000 fine and a sentence of fifteen years in the penitentiary. The defense attorney balked at the manslaughter verdict and said if his client "was guilty of anything it was murder." The judge did not impose the maximum verdict allowed by law;

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Silverman was sentenced to three years in the penitentiary and a $1000 fine; this sentence would be well below the Measure 11 equivalent mandatory sentence today of either ten years for first degree manslaughter or six years three months for second degree manslaughter. The judge stated, "More convincing evidence would be necessary to justify a severe sentence," citing circumstantial evidence as his basis for the light sentence. Further, Silverman's defense attorney announced his intention to seek a new trial and appeal, and Silverman was released on bail pending appeal.

After voters approved the ballot measure allowing non-unanimous juries, the Oregon Supreme Court affirmed the manslaughter conviction, describing the weight of the evidence in the case to be substantial and that the evidence "strongly indicates that [Silverman] was present and concerned in the commission of the crime."[7]

Both the "unreasonable juror" and judge appeared to have ignored overwhelming circumstantial evidence of Silverman's guilt. If the juror had followed the evidence and agreed with the majority by voting to convict Silverman of second-degree murder, Silverman would have been sentenced to a mandatory life sentence in prison.[8] If the judge sentenced Silverman to the maximum sentence for manslaughter of fifteen years—five times what he received—I strongly doubt the negative reaction to the verdict would have been as intense.

The Reaction to the Silverman Case

Reaction to the verdict was not aimed at the absurdly light sentence the judge imposed, or how a mistrial was an ignored option, but instead concentrated on the lone "unreasonable" juror who wanted to acquit. Six days after Silverman's sentencing *The Morning Oregonian* published an editorial writhing in disappointment and anger at the one juror, with a tinge of racism:

> Jake Silverman of Portland, held responsible for the killing of James Walker in Dutch Canyon last April, has been found guilty only of manslaughter. Such incidents always result in the accumulation of a new batch of letters on the editorial desk, complaining about the miscarriage of criminal justice under the jury system.
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> Objections have been especially pointed in the Silverman case, since it has been alleged and apparently with authority, that a few hours after the case went to the jury, the vote stood eleven for conviction on second degree charges and one opposed. The one opposition vote is said to have remained unchanged during the remaining eighteen hours that the jury was out, finally forcing the compromise verdict of manslaughter.
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> 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.
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> 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 American from southern and eastern Europe, of people untrained in the jury system, have combined to make the jury of twelve increasingly unwieldy and unsatisfactory. . . .*
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> Ultimately, conviction will have to be made possible with less than a unanimous vote of the twelve jurors. But that change will not be made until miscarriages of justice have become so flagrant that the people cannot deny them. The public is so attached to the present safe-guards thrown around defendants that it will not make the change willingly, and, as far is Oregon is concerned, the reorganization will require an amendment to the state constitution.[9] (Emphasis mine.)

Less than a month after Silverman was sentenced and three weeks after the above editorial, the Oregon legislature recommended that a constitutional amendment authorizing trial by judge and non-unanimous jury verdicts, be put before the voters of Oregon for the May 1934 Special Election. *The Morning Oregonian* was fervently behind Ballot Measure 2; they stated when the ballot measure was announced:

> If, after the elapse of five months, the people of Oregon are still as indignant over the miscarriage of criminal justice as they are today it is probable that this state will adopt the plan of permitting ten members of a criminal jury to return a verdict, in all except for capital cases.
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> The late legislature, though full of lawyers… and consequently a bit slow to act on court reform, nevertheless was sufficiently influenced by the wave of public indignation to refer to the people, for decision at the special election in May, a measure authorizing the jury change.… [T]he Silverman case in Oregon…came at exactly the right time to bring unprecedented pressure to bear upon the legislature. Now it becomes a matter for the voters to decide for themselves.
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> Without question, the change would greatly expedite justice and save the state much money now spent on retrials. Likewise, the argument that unanimous decision is necessary for the protection of the defendant is just so much talk.
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> The voters, we believe, are at the moment convinced. It is to be hoped they will bear the matter in mind until next May.[10]

The Register Guard also supported Ballot Measure 2, stating the following after recommending its readers vote yes on the measure: "The measure is obviously common sense, it has the support of

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progressive jurists and lawyers."[11] Perhaps ironically, also appearing in *The Register Guard* on the page following the endorsement of the measure was a *Little Orphan Annie* comic about a corrupt Judge Cogg. The first words spoken in the comic are, "Nice work, Judge. Those nine jurors we've picked so far would find any man like Warbucks guilty of any crime without a trial."[12]

A well-respected publication for understanding voter intent, *The Oregon Voter*[13] stated the following in urging its readership to vote yes on Ballot Measure 2:

> Progressive opinion, however, strongly favors abrogation of the ancient unanimous-agreement feature of our jury system. Expected benefits ramify in several directions. The unanimous verdict arrangement plays into the hands of criminals, crooks and their lawyers. Next to acquittal, the objective of the criminal's lawyer is a hung jury. The system lends itself readily to jury-hanging, by fair means and foul. Provision for five-sixths and 11-vote verdicts will help greatly to end both the hanging and fixing of juries. Unnecessary costs of re-trails and deadlocked juries will be substantially reduced, to benefit taxpayers. Clogging of court dockets will be trifle eased; court cases a bit speeded. [14]

This author was unable to find an argument against Ballot Measure 2 from the period. Ballot Measure 2 was approved by the voters and has been a part of the Oregon Constitution for the past 80 years.

Endnotes

1 OR. CONST. of 1859, art. IV, §1 (1902). (Allowing the Oregon Constitution and statutes to be modified by ballot measure; potential amendments to the Constitution are placed on the ballot by either legislative referral or petition signed by eight percent of the voters who voted in the last Oregon gubernatorial election.)

2 Ashby C. Dickson, Frank H. Hilton, & F. H. Dammash, *Republican Voters' Pamphlet*, P.J. Stadelman, Secretary of State, 1934, at 7 (argument in favor of jury trial waiver and non-unanimous verdicts presented by a joint committee of the thirty-seventh Oregon congress in full).

3 Richard Deich, *Republican Voters' Pamphlet*, P.J. Stadelman, Secretary of State, 1934, at 8 (argument in opposition of jury trial waiver and non-unanimous verdicts presented by a state representative).

4 The details of the crimes and trial are taken from the following newspaper articles and from *State v. Silverman*, 148 Or. 296, 297 (1934):
"Gangsters Slay 2 Near Portland," *Morning Oregonian*, Apr. 23, 1933, at 1, 6.
"Violence Feared by Gang's Victim," *Morning Oregonian*, Apr. 24, 1933, at 1, 3.
"Silverman to Face Charge of Murder," *Morning Oregonian*, Sept. 14, 1933.
"Silverman Jury Chosen," *Morning Oregonian*, Nov. 3, 1933, at 1, 4.
"Silverman Trial Rests," *Morning Oregonian*, Nov. 5, 1933, at 13 (the article title is a bit of a misnomer, the trial merely went into recess for the weekend).
"Tire Track Casts Shown to Jurors," *Morning Oregonian*, Nov. 8, 1933, at 18.
"Silverman Guilty of Manslaughter," *Morning Oregonian*, Nov. 17, 1933, at 1.
"Portland Mobster Gets Short Term," *Register Guard*, Nov. 18, 1933, at 1.
"Jacob Silverman Gets 3-Year Term," *Morning Oregonian*, Nov. 19, 1933, at 11.
Editorial, "One Juror Against Eleven," *Morning Oregonian*, Nov. 25, 1933, at 8.

5 *Silverman*, 148 Or. at 304-305. (Full text of instruction: "I instruct you that all persons concerned in the commission of a crime, whether it be a felony or misdemeanor, or whether they directly commit the act constituting the offense or aid and abet in its commission, or, not being present, have advised and encouraged its commission are principles in any case so committed. For one person to abet another in the commission of a criminal offense simply means to knowingly and with criminal intent aid, promote and encourage or instigate by act or counsel or both by act and counsel the commission of said offense."

6 OR. CODE. ANN. § 14-213 (1930).

7 *Silverman*, 148 Or. at 305.

8 OR. Code. Ann. § 14-212 (1930).

9 Editorial, "One Juror Against Eleven."

10 Editorial, "Jury Reform Up To Voters," *Morning Oregonian*, Dec. 11, 1933, at 6.

11 Editorial, "Other State Wide Issues," [*sic*] *Register Guard*, May 16, 1934, at 6.

12 Harold Gray, Little Orphan Annie Comic Strip, "Judge Cogg," *Register Guard*, May 16, 1934, at 7. See Figure 1.

13 *Lipscomb v. State Bd. of Higher Ed.*, 305 Or. 472, 482.

14 Editorial, "Ten Jury Verdict," *Oregon Voter*, May 19, 1934, at 7–8.

Figure 1.