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## *Articles*

ALIZA B. KAPLAN\* AND AMY SAACK†

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\* Professor and Director, Criminal Justice Reform Clinic, Lewis & Clark Law School, Co-Founder, Oregon Innocence Project. J.D., Northeastern University School of Law, B.A. The George Washington University. Thank you to Brittney Plesser for her great suggestions and to Katherine Gipson-McLean (Willamette Law School J.D. 2017) for the terrific research assistance. And thank you G for your light, my parents for your encouragement, and S, E, and M for your love.

† J.D. Candidate, 2017, Lewis & Clark Law School; B.A. University of Washington. I would like to thank Professor Kaplan for giving me the opportunity to work with her on this Article. And thank you, Andrew, for your endless support.

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## INTRODUCTION

In 1934, Oregon amended its Constitution to allow, “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 for first degree murder, which shall be found only by unanimous verdict.”<sup>1</sup> Oregon became the second

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<sup>1</sup> OR. CONST. art I, § 11. Passage of the amendment inserted the following language just before the period at the end of article I, section 11:

[P]rovided, 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[.]

As originally ratified, article I, section 11, of the Oregon Constitution stated:

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.

OR. CONST. of 1857, art. I, § 11.

state, after Louisiana, to allow nonunanimous juries in criminal cases. Louisiana's "Majority Rule," passed in 1880, three years after Reconstruction when white landowners sought to replace black slave labor.<sup>2</sup> The new law allowed juries to convict defendants without a unanimous vote and was deliberately designed to create more convicts to increase the labor force.<sup>3</sup> Making convictions easier meant more prisoners, especially freed blacks, and more prisoners meant more labor to lease for profit.<sup>4</sup> Passed some fifty-four years later and under different circumstances, Oregon's history is also shameful.<sup>5</sup> Oregon's law was a reaction to the notorious trial of Jacob Silverman, which took place after a state simmering with anti-immigrant xenophobia (predominantly anti-Semitism and anti-Catholicism) became outraged when a twelve-person jury unanimously convicted Silverman of manslaughter rather than first-degree murder in a case involving the death of Jimmy Walker.<sup>6</sup> Oregonians became angry that a Jewish man accused of killing a Protestant was spared a murder conviction and death sentence because a single juror held out for manslaughter. While this reaction may be surprising to today's Oregonians, it is important to understand the historical context at the time.

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<sup>2</sup> Marjorie R. Esman, *Nonunanimous Jury Verdicts Steeped in Racist Past*, THE ADVOCATE (Jan. 28, 2016), [http://www.theadvocate.com/baton\\_rouge/opinion/our\\_views/article\\_e9fefca4-c278-57f6-a0fa-24eb1c93d2fd.html](http://www.theadvocate.com/baton_rouge/opinion/our_views/article_e9fefca4-c278-57f6-a0fa-24eb1c93d2fd.html).

<sup>3</sup> THOMAS AIELLO, JIM CROW'S LAST STAND: NONUNANIMOUS JURY VERDICTS IN LOUISIANA 12 (2015). Three years after the end of the civil war, the leasing of convict labor was privatized in Louisiana in 1868. *Id.* at 10. Southern economies depended on cotton, and convict labor made production more affordable. See *Inequality and the Punishment of Minor Offenders in the Early 20<sup>th</sup> Century*, 27 L. & SOC'Y REV. 313, 314–15 (1993). Lessees of convict labor lobbied to change criminal laws to increase the availability of young black men. Ahmed A. White, *Rule of Law and the Limits of Sovereignty: The Private Prison in Jurisprudential Perspective*, 38 AM. CRIM. L. REV. 111, 128–29 (2001).

<sup>4</sup> AIELLO, *supra* note 3, at 12.

<sup>5</sup> James Kachmar, *Silencing the Minority: Permitting Nonunanimous Jury Verdicts in Criminal Trials*, 28 PAC. L.J. 273, 278 (1996) (noting the passage of the amendment allowing nonunanimous verdicts to the Oregon Constitution in 1934).

<sup>6</sup> For a good read about the passing of Oregon's statute, see Clayton M. Tullios, *Non-Unanimous Jury Trials in Oregon*, OCDLA LIBRARY OF DEFENSE (Sept. 29, 2014), [https://libraryofdefense.ocdla.org/Blog:Main/Non-Unanimous\\_Jury\\_Trials\\_in\\_Oregon](https://libraryofdefense.ocdla.org/Blog:Main/Non-Unanimous_Jury_Trials_in_Oregon).

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 deliberation, with a sentence of manslaughter.

*Id.* "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." *Id.* (citing OR. CODE ANN. § 14-213 (1930)).

The late 1920s and early 1930s found Oregon deep in recession and caught up in “the growing menace of organized crime and the bigotry and fear of minority groups.”<sup>7</sup> This followed more than a decade of a powerful Ku Klux Klan<sup>8</sup> that was welcomed by an overwhelmingly white, native-born, and Protestant society. A society where “[r]acism, religious bigotry, and anti-immigrant sentiments were deeply entrenched in the laws, culture, and social life.”<sup>9</sup> This was the backdrop during Silverman’s 1934 murder trial.

The State charged Jacob Silverman with first-degree murder for the fatal shooting of Jimmy Walker, who was suspected of shooting Silverman’s friend.<sup>10</sup> The bodies of both Jimmy Walker and Edith McClain were discovered on a Saturday morning in April of 1933.<sup>11</sup> The police arrested Silverman that same afternoon.<sup>12</sup> At trial, witnesses testified to seeing a man resembling Silverman get into a car with a small woman and three men.<sup>13</sup> The State theorized that one of these three men shot Walker and McClain and that Silverman aided and abetted in that crime by driving the vehicle.<sup>14</sup>

The local newspaper, *The Morning Oregonian*, immersed the trial in publicity, reporting on everything from questions asked by the defense in voir dire,<sup>15</sup> to testimony of the State’s witnesses at trial,<sup>16</sup> and even the evidence that ultimately convinced the majority of the jury—“plaster of paris casts taken April 22 of tire tracks found close to the bodies . . . admitted over the strenuous and heated objection” of the defense.<sup>17</sup> Despite this, a lone “holdout” juror—perhaps not convinced

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<sup>7</sup> AIELLO, *supra* note 3, at 39.

<sup>8</sup> In 1922 the Klan in Oregon boasted membership of over 14,000 men, with 9000 of them living in Portland. And they were setting the state aflame. There were frequent cross burnings on the hills outside Portland and around greater Oregon. AIELLO, *supra* note 3, at 39; Michael J. Nove, *Deliver Us from Evil*, OR. STATE BAR BULL., 1996, at 37–38.

<sup>9</sup> Eckhard Toy, *Ku Klux Klan*, THE OR. ENCYCLOPEDIA, [http://oregonencyclopedia.org/articles/ku\\_klux\\_klan/#.Vx\\_mZGOePJo](http://oregonencyclopedia.org/articles/ku_klux_klan/#.Vx_mZGOePJo) (last visited Feb. 5, 2017).

<sup>10</sup> Tullos, *supra* note 6, at 21.

<sup>11</sup> State v. Silverman, 148 Or. 296, 297 (1934).

<sup>12</sup> *Id.* at 299.

<sup>13</sup> *Id.* at 301.

<sup>14</sup> *Id.* at 303–04.

<sup>15</sup> *Silverman Trial Begins*, THE MORNING OREGONIAN, Oct. 31, 1933.

<sup>16</sup> Herbert S. Lampman, *Witness Says Car Driven by Accused*, THE MORNING OREGONIAN, Nov. 7, 1933.

<sup>17</sup> *Silverman Guilty of Manslaughter*, THE MORNING OREGONIAN, Nov. 17, 1933. Interestingly, today, “impression evidence” like the cast of tire tracks might be repudiated as “junk science,” one of many factors contributing to wrongful convictions. See Sabra Thomas, Comment, *Addressing Wrongful Convictions: An Examination of Texas’s New*

beyond a reasonable doubt by the State's evidence—did not wish to convict Silverman for first-degree murder.<sup>18</sup> The jury returned a verdict of manslaughter, and the holdout juror unwittingly became the poster child for Oregon Ballot No. 302-03.<sup>19</sup>

Less than a month after Silverman's sentencing for manslaughter, where he received three years in prison and a \$1000 fine, far less time than the maximum sentence due,<sup>20</sup> the Oregon Legislature proposed a constitutional amendment allowing nonunanimous verdicts to be voted upon in the 1934 Special Election.<sup>21</sup> In describing the new ballot measure, *The Morning Oregonian* published that "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."<sup>22</sup> Another article opined that "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."<sup>23</sup> The author then pointed to a "mixed murder jury" in Honolulu that demonstrated a "complete lack of a sense of responsibility," in its failure to convict a non-white defendant.<sup>24</sup>

*The Morning Oregonian* further espoused that "no person's rights can conceivably be impaired by the decision of ten out of twelve jurors," and implied that corrupt jurors might be the cause of hung juries.<sup>25</sup> Other editorials decried the "increased urbanization of American life," stating that "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."<sup>26</sup> This represents the type of rhetoric that flooded the

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*Junk Science Writ and Other Measures for Protecting the Innocent*, 52 HOUS. L. REV. 1037, 1039–46 (2015).

<sup>18</sup> P.J. STADELMAN, SECRETARY OF STATE, OFFICIAL REPUBLICAN VOTER'S PAMPHLET 7 (May 18, 1934).

<sup>19</sup> *Id.*

<sup>20</sup> The judge in the case said, "[m]ore convincing evidence would be necessary to justify a severe sentence." Tullos, *supra* note 6.

<sup>21</sup> *Id.*

<sup>22</sup> *Jury Reform Up to Voters*, THE MORNING OREGONIAN, Dec. 11, 1933. In December of 1933 the Oregon Legislature held a special second session that introduced Senate Joint Resolution 4 to amend the Oregon Constitution. *Id.*

<sup>23</sup> *Debauchery of Boston Juries*, THE MORNING OREGONIAN, Nov. 3, 1933.

<sup>24</sup> *Id.*

<sup>25</sup> Tullos, *supra* note 6; *see also Verdicts by Ten*, THE MORNING OREGONIAN, Mar. 27, 1934.

<sup>26</sup> *One Juror Against Eleven*, THE MORNING OREGONIAN, Nov. 25, 1933.

public discourse before Oregonians voted on Ballot No. 302-03 to allow nonunanimous jury verdicts in criminal cases.

The relevant part of the Voter Pamphlet explained the measure like this:

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. 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 . . . . 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.<sup>27</sup>

This “unreasonable juror” theory faced no organized opposition, and it explicitly invoked *State v. Silverman* as an example of one juror forcing a compromise.<sup>28</sup> The only argument against the amendment discussed higher pay for district attorneys (who supported the measure) as an alternative to passing an amendment that would make it easier for the State to convict criminal defendants.<sup>29</sup> The proposed amendment to the Oregon Constitution allowing 10–2 verdicts passed, with 46,745 votes for the amendment and 27,988 against.<sup>30</sup> Ballot No. 302-03 and its passage was a direct result of the *Silverman* case and the socio-political climate at the time.

Today, Oregon and Louisiana remain the only two states that permit convictions on less-than-unanimous jury verdicts, 10–2, in non-first-degree murder criminal cases.<sup>31</sup> All other states and the federal government require that jurors reach a verdict unanimously.

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<sup>27</sup> Stadelman, *supra* note 18, at 7.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 8 (discussing “adequate compensation” for district attorneys overburdened with cases).

<sup>30</sup> *Official Counts Issued*, THE MORNING OREGONIAN, June 1, 1934. By comparison, 368,808 Oregonians voted in the 1932 Presidential election just two years earlier. See U.S. ELECTION ATLAS, *Oregon Results for 1932*, <http://uselectionatlas.org/RESULTS/compare.php?year=1932&fips=41&f=0&off=0&elect=0&type=state&all=1> (last visited Feb. 5, 2017). This indicates that around only twenty percent of Oregon voters voted on the proposed change to the Oregon Constitution.

<sup>31</sup> OR. CONST. art. I, § 11; OR. REV. STAT. § 136.450(1) (2015); LA. CONST. art. I, § 17 (requiring the concurrence of at least 10 of 12 jurors in criminal matters); see also *State v. Bertrand*, 6 So. 3d 738, 743 (La. 2009) (upholding the constitutionality of nonunanimous verdicts); *State ex rel. Smith v. Sawyer*, 501 P.2d 792, 793 (Or. 1972) (same). Note that

In *Duncan v. Louisiana*, the Supreme Court recognized that the right to a jury trial in criminal cases, enshrined in the Sixth Amendment,<sup>32</sup> is a fundamental right to be incorporated against the states by the Fourteenth Amendment.<sup>33</sup> The Court recognized the purpose of the jury trial was “to prevent oppression by the Government.”<sup>34</sup> Criminal convictions were to “be confirmed by the unanimous suffrage of twelve of [the defendant’s] equals and neighbours.”<sup>35</sup> Indeed, when the Court recognized the incorporation of the right to a jury trial, it assumed unanimity and the requirement of proof beyond a reasonable doubt to be characteristics of the Sixth Amendment criminal jury trial.<sup>36</sup>

Nonetheless, just four years later, in *Apodaca v. Oregon*, a plurality of Justices concluded that the Sixth Amendment does not mandate unanimity in state jury trials.<sup>37</sup> Remarkably, *Apodaca* was a fractured 4–1–4 decision where both groups of four Justices agreed that the rule should be the same for federal and state trials.<sup>38</sup> Four Justices found unanimity not constitutionally required in either federal or state trials.<sup>39</sup> Four Justices found that unanimity is a constitutional guarantee in both

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Oklahoma uses nonunanimous verdicts, but only in misdemeanor trials, and thirty-four states allow nonunanimous verdicts in civil trials.

<sup>32</sup> The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.” U.S. Const. amend. VI.

<sup>33</sup> *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

<sup>34</sup> *Id.* at 155.

<sup>35</sup> *Id.* at 152 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769)).

<sup>36</sup> See *Allen v. United States*, 164 U.S. 492, 501 (1896) (stating “[t]he very object of the jury system is to secure unanimity by a comparison of views, and by arguments of the jurors themselves”); *Rasmussen v. United States*, 197 U.S. 516, 535 (1905) (assuming a criminal conviction by a nonunanimous jury was not in compliance with the Fifth and Sixth Amendments); *Patton v. United States*, 281 U.S. 276, 288–90 (1930) (discussing unanimity as a required and essential element of a trial by jury in a criminal case); *In re Winship*, 397 U.S. 358, 364, 367 (1970) (holding that all elements of a crime must be proven beyond a reasonable doubt, regardless of whether the defendant is tried as an adult or a juvenile).

<sup>37</sup> *Apodaca v. Oregon*, 406 U.S. 404 (1972).

<sup>38</sup> *Id.* at 411–14 (plurality) (finding that unanimity is not “constitutionally essential to the continued operation of the jury system” and therefore is not applicable against the states through the Fourteenth Amendment); *id.* at 414 (Stewart, J., dissenting) (stating that the Sixth Amendment jury trial clearly guarantees a unanimous verdict); *Johnson v. Louisiana*, 406 U.S. 356, 369 (Powell, J., concurring in *Apodaca*) (stating that the Sixth Amendment right to a jury trial need not “be identical in every detail to the concept required in federal courts”).

<sup>39</sup> *Apodaca*, 406 U.S. at 406 (White, J., joined by Burger, C.J., Blackmun, J., and Rehnquist, J.).

federal and state trials.<sup>40</sup> One concurring Justice, Justice Powell, determined that while history mandated unanimity in federal criminal trials, this same protection did not extend to state criminal trials.<sup>41</sup> In recent years, however, the Court has acknowledged that the “Sixth Amendment right to trial by jury requires a unanimous jury verdict.”<sup>42</sup> The Court’s reaffirmation of an incorporation approach to Bill of Rights protections, its commitment to reasonable doubt, and current research indicating that nonunanimous verdicts may affect jury deliberations and public confidence in the criminal justice system, seriously undermines the reasoning in *Apodaca*. Yet, Justice Lewis Powell believed otherwise and, as the swing vote, his position defined the law.

This Article argues that criminal convictions in state courts should be subject to the same unanimity requirements that the Sixth Amendment imposes on federal criminal convictions. Part I of this Article provides an overview of the U.S. Supreme Court’s jurisprudence on jury size and nonunanimity. Part I includes a discussion of *Apodaca v. Oregon* and *Johnson v. Louisiana*, the Court’s 1972 decisions holding that the Sixth and Fourteenth Amendments did not require jury unanimity in state court criminal jury trials even though federal law requires that federal juries must reach criminal verdicts unanimously.<sup>43</sup> This is followed by a summary of many of the recently denied certiorari petitions that have pressed the Court to reconsider the jury unanimity issue in light of changing Sixth Amendment jurisprudence and social science evidence. Part II explains how the Court’s recent jurisprudence contradicts its 1972 *Apodaca* and *Johnson* rulings under the doctrine of incorporation. Specifically, applying the Court’s 2010 *McDonald v. City of Chicago* incorporation approach to Oregon’s and Louisiana’s nonunanimous jury law signifies that overturning *Apodaca* should be easy, and in fact indicates that the Court should incorporate the few unincorporated provisions of the Bill of Rights. In addition to the incorporation doctrine, Part III argues that nonunanimous verdicts undermine the reasonable doubt requirement of

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<sup>40</sup> *Id.* at 414 (Stewart, J., joined by Brennan, J., and Marshall, J., dissenting); *Johnson*, 406 U.S. at 380 (Douglas, J., joined by Brennan, J., and Marshall, J., dissenting).

<sup>41</sup> *Johnson*, 406 U.S. at 369 (Powell, J., concurring in *Apodaca*).

<sup>42</sup> *McDonald v. City of Chicago*, 561 U.S. 742, 766 n.14 (2010); see *Blakeley v. Washington*, 542 U.S. 296, 301 (2004) (“[T]he ‘truth of every accusation’ against a defendant ‘should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours.’”) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769)).

<sup>43</sup> *Apodaca*, 406 U.S. 404; *Johnson*, 406 U.S. 356.



the right to a jury trial and that the Court's own case law prior to and since *Apodaca* and *Johnson* confirms this right to unanimity, which ensures that the burden of proof beyond a reasonable doubt as a component has been met. Part IV sets forth the current research that shows that unanimity is essential to the purposes of the fair cross section and complete deliberation requirements of the Sixth Amendment. Part V addresses how nonunanimous verdicts contribute to convicting innocent defendants, and Part VI discusses how nonunanimous verdicts disproportionately affect both minority jurors and minority defendants in Oregon. Finally, this Article concludes by recommending that the Supreme Court overturn *Apodaca v. Oregon*, as the law and current research supports that unanimous juries should be required in all criminal cases. Moreover, even if the Supreme Court does not act, Oregon's citizenry and Legislature should support amending the state constitution to abolish majority verdicts in all criminal cases. Such an amendment would serve to protect innocent defendants and end a rule that was founded to silence minority viewpoints.

## I

### SUPREME COURT JURISPRUDENCE ON JURY SIZE AND NONUNANIMITY

In the 1970s, the Supreme Court came up with a number of seemingly random rules about what constitutes a legal jury trial under the Sixth Amendment. The Court ruled, for example, that a jury of six is constitutional<sup>44</sup> but a jury of five is not.<sup>45</sup> The Court also ruled that in a jury of six, the conviction must be unanimous,<sup>46</sup> but in a jury of twelve (in state court but not federal court), the conviction does not have to be unanimous.<sup>47</sup> After abandoning the historic roots defining the jury system, the Supreme Court struggled to delineate the constitutional jury requirements in the 1970s. In a series of sparsely reasoned opinions, the Court divined both the quantity of jurors and the proportion of guilty votes that the Constitution required to sustain a criminal conviction. Of course, the size of the jury and the requirement

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<sup>44</sup> *Williams v. Florida*, 399 U.S. 78, 85 (1970).

<sup>45</sup> *Ballew v. Georgia*, 435 U.S. 223, 243 (1978).

<sup>46</sup> *Burch v. Louisiana*, 441 U.S. 130, 134 (1979).

<sup>47</sup> *Johnson*, 406 U.S. at 362; *Apodaca*, 406 U.S. at 414. At the time of these decisions, Louisiana required a 9–3 vote to convict in noncapital cases, which the court upheld as constitutional. The state has since changed its threshold to 10–2. LA. CONST. art. I, § 17.

of unanimity are intimately linked. Allowing majority rather than unanimous jury decisions has the functional effect of reducing jury size, and thus some of the same concerns about jury size apply to nonunanimous juries.<sup>48</sup> Hence, no discussion about nonunanimous juries would be appropriate without first discussing the law with regard to jury size.

### *A. Permissible Jury Sizes*

In 1970, in *Williams v. Florida*, the defendant-petitioner challenged a Florida statute allowing six-person juries in state criminal cases.<sup>49</sup> Williams argued that the statute was inconsistent with the Sixth Amendment guarantee of trial by jury.<sup>50</sup> Abandoning hundreds of years of common-law precedent,<sup>51</sup> the Supreme Court ruled that six-person juries were constitutional.<sup>52</sup> Because the Sixth Amendment does not discuss the number of jurors required, the Court examined whether a twelve-person jury was a constitutional necessity of trial by jury, finding that “the 12-man [sic] panel is not a necessary ingredient of ‘trial by jury’” and in fact constituted nothing more than an “historical accident.”<sup>53</sup> The Court determined that, historically, “the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen.”<sup>54</sup> The jury’s role, the Court continued, is “to prevent oppression by the Government,” specifically, “the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.”<sup>55</sup> But, as it

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<sup>48</sup> Justice Douglas’s dissent in *Johnson* observed that getting rid of the unanimity requirement diminishes verdict reliability just like smaller juries because, “nonunanimous juries need not debate and deliberate as fully as must unanimous juries.” *Johnson*, 406 U.S. at 388 (Douglas, J., dissenting).

<sup>49</sup> *Williams v. Florida*, 399 U.S. 78 (1970).

<sup>50</sup> *Id.* at 80.

<sup>51</sup> *Id.* at 122–24 (Harlan, J., dissenting in part and concurring in part). Until *Williams*, the Court had defined jury to mean a twelve-person jury. See *Duncan v. Louisiana*, 391 U.S. 145 (1968) (applying the Sixth Amendment to the states and holding that state criminal prosecutions of non-petty offenses required twelve-person juries).

<sup>52</sup> *Williams*, 399 U.S. at 86.

<sup>53</sup> *Id.* at 86–89. Justice Harlan criticized the Court for determining that twelve persons “is a historical accident—even though one that has recurred without interruption since the 14th century—and is in no way essential to the ‘purpose of the jury trial’ . . .” *Baldwin v. New York*, 399 U.S. 119, 125 (1970) (Harlan, J., dissenting and concurring). Justice Marshall similarly criticized the Court’s departure from “an unbroken line of precedent going back over 70 years.” *Williams*, 399 U.S. at 117 (Marshall, J., dissenting in part).

<sup>54</sup> *Williams*, 399 U.S. at 101.

<sup>55</sup> *Id.* at 100 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968)).

explained, preventing oppression by the Government “is not a function of the particular number” of jurors.<sup>56</sup>

To support its decision, the Court referenced “a ‘functional analysis’ [or functional equivalence test] of the performance of smaller juries (that is, empirical examination of the behavior of different-sized juries).”<sup>57</sup> This functional analysis or functional equivalence test, as the Court explained, “must be the function that the particular feature performs and its relation to the purposes of the jury trial.”<sup>58</sup> The Court looked at various purposes of the jury and analyzed whether smaller juries could perform those functions as well as twelve-person juries.<sup>59</sup> It noted that the size “should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community.”<sup>60</sup> According to Professor Michael Saks, “[t]he Court relied on (1) what it claimed were empirical studies (specifically: ‘experiments’) but which were not, in fact, empirical studies; (2) actual studies, the findings of which the Court read exactly backwards; and (3) its own speculation.”<sup>61</sup> As this description indicates, the Court’s decision in *Williams* generated considerable criticism along with new research from both legal and scientific scholars.<sup>62</sup> In fact, Hans Zeisel, whose work the Court cited in *Williams* to support its conclusion,<sup>63</sup> stated that his “findings were quite different” from the Court’s interpretation.<sup>64</sup> He also explained that the other studies the Court relied on provided “scant evidence by any standards” for the Court’s proposition that “no discernable difference” existed between six and twelve-person juries.<sup>65</sup>

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<sup>56</sup> *Id.*

<sup>57</sup> Alisa Smith & Michael J. Saks, *The Case for Overturning Williams v. Florida and the Six-Person Jury: History, Law, and Empirical Evidence*, 60 FLA. L. REV. 441, 441 (2008).

<sup>58</sup> *Williams*, 399 U.S. at 99–100.

<sup>59</sup> *See id.* at 100–01.

<sup>60</sup> *Id.* at 100.

<sup>61</sup> Smith & Saks, *supra* note 57, at 455. For a detailed criticism, see *id.*

<sup>62</sup> *See, e.g.*, Joan B. Kessler, Note, *An Empirical Study of Six- and Twelve-Member Jury Decision-Making Processes*, 6 U. MICH. J.L. REFORM 712 (1973); William R. Pabst, Jr., *Statistical Studies of the Cost of Six-Man Versus Twelve-Man Juries*, 14 WM. & MARY L. REV. 326 (1972); Hans Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710 (1971).

<sup>63</sup> *Williams*, 399 U.S. at 101 n.49 (citing HARRY KALVEN & HANS ZEISEL, *THE AMERICAN JURY* 462–63, 488–89 (1966)).

<sup>64</sup> Zeisel, *supra* note 62, at 719.

<sup>65</sup> *Id.* at 715.

While the *Williams* Court did not directly address the issue of jury unanimity, “in holding that a six-person jury would suffice for a state trial, [it] found that the necessary consequence of the decision is that twelve-member juries are not constitutionally mandated in federal criminal trials either,” and it further “noted that a six-person jury can fulfill the constitutionally mandated duties and purposes of a jury just as well as a twelve-person jury, ‘particularly if the requirement for unanimity was retained.’”<sup>66</sup> Just two years later, the Court again overturned hundreds of years of precedent and tradition. Instead of relying on the functional analysis, reasoning, and empirical studies from *Williams*, the Court held that the Constitution permits nonunanimous juries in state criminal trials.<sup>67</sup>

### *B. Nonunanimous Jury Verdicts in State Court*

#### *1. Clarifying Apodaca v. Oregon and Johnson v. Louisiana*

The Supreme Court directly addressed the issue of nonunanimous juries on May 22, 1972, ruling on two cases: *Johnson v. Louisiana*<sup>68</sup> and *Apodaca v. Oregon*.<sup>69</sup> In *Johnson v. Louisiana*, the defendant challenged his robbery conviction by a 9–3 verdict as unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, asserting that “guilt cannot be said to have been proved beyond a reasonable doubt when one or more of a jury’s members at the conclusion of deliberation still possesses such a doubt.”<sup>70</sup> A majority of the Court found that “the disagreement of three jurors does not alone establish reasonable doubt,” in the face of a substantial

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<sup>66</sup> Kate Riordan, *Ten Angry Men: Unanimous Jury Verdicts in Criminal Trials and Incorporation After McDonald*, 101 J. CRIM. L. & CRIMINOLOGY 1403, 1409 (2011).

<sup>67</sup> Since *Williams*, the Supreme Court has not addressed a direct challenge to the six-person jury. In *Ballew v. Georgia*, 435 U.S. 223 (1978), abandoning the functional equivalence test, the Court held that a Georgia state statute authorizing criminal conviction upon the unanimous vote of a jury of five was unconstitutional. And in *Burch v. Louisiana*, 441 U.S. 130 (1979), the Court found Louisiana’s law that allowed criminal convictions on 5–1 votes by a six-person jury violated the Sixth Amendment. Ironically, the Court in *Burch* looked to “the near-uniform judgment of the Nation . . . in delimiting the line between those jury practices that are constitutionally permissible and those that are not.” *Id.* at 138. Ostensibly, if the Court had employed this same reasoning in *Apodaca* five years earlier, addressing nonunanimous verdicts in only two states, there would not be a need for this Article.

<sup>68</sup> 406 U.S. 356 (1972).

<sup>69</sup> 406 U.S. 404 (1972).

<sup>70</sup> *Johnson*, 406 U.S. at 356–60.

majority of jurors voting to convict.<sup>71</sup> The Court found it likely that nine jurors finding guilt beyond a reasonable doubt would only outvote a minority when that minority “continue[d] to insist upon acquittal without having persuasive reasons in support of its position,” essentially buying into the “unreasonable juror” theory that led to Oregon’s constitutional amendment.<sup>72</sup> Inherent in this reasoning is the assumption that allowing nonunanimous verdicts would not affect the thoroughness of jury deliberation, and consequently, the accuracy of the verdict.

Justice Harry Blackmun joined in the Court’s opinion and judgment but wrote separately to question the wisdom of the “split-verdict system.”<sup>73</sup> Justice Powell authored a concurring opinion, noting that Johnson was prevented from using the “fundamental fairness” language of *Duncan* because *Duncan* did not apply retroactively.<sup>74</sup> Four Justices dissented. Justices William Douglas, William Brennan, Potter Stewart, and Thurgood Marshall dissented in an opinion applying to both *Apodaca* and *Johnson*.<sup>75</sup> Justice Stewart wrote that “the Fourteenth Amendment alone clearly requires that if a State purports to accord the right of trial by jury in a criminal case, then only a unanimous jury can return a constitutionally valid verdict.”<sup>76</sup>

In sum, *Duncan* incorporated the Sixth Amendment right to a jury trial for criminal defendants, *Johnson* decided whether the “reasonable doubt” standard required unanimous verdicts under the Fourteenth Amendment, and *Apodaca*, issued the same day as *Johnson*, addressed whether a state defendant’s Sixth Amendment right to a jury trial included the right to a unanimous verdict.

Even though *Johnson* and *Apodaca* dealt with similar issues at approximately the same time, *Apodaca* resulted in a fractured plurality opinion.<sup>77</sup> In *Apodaca*, three Oregon defendants challenged their

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<sup>71</sup> *Id.* at 362.

<sup>72</sup> *Id.* at 361–62.

<sup>73</sup> *Id.* at 365–66 (Blackmun, J., concurring).

<sup>74</sup> *Id.* at 367 (Powell, J., concurring). In 1968, the Court held in *Duncan* that the Sixth Amendment right to a trial by jury in a criminal case was “among those ‘fundamental principles of liberty and justice which lie at the base of all our civil and political institutions’” and it incorporated that right against the states through the Fourteenth Amendment. *Duncan*, 391 U.S. at 148.

<sup>75</sup> *Id.* at 380 (Douglas, J., with whom Brennan, J., and Marshall, J., concur, dissenting) (stating that the opinion also applies to No. 69-5046, *Apodaca et al. v. Oregon*, post, p. 404).

<sup>76</sup> *Id.* at 397.

<sup>77</sup> See *supra* note 40 (explaining the division of Justices in *Apodaca*).

convictions of burglary, grand larceny, and assault by a deadly weapon by less than unanimous jury verdicts.<sup>78</sup> Two of the defendants were convicted by jury verdicts of 11–1 and the third defendant by a 10–2 jury verdict.<sup>79</sup>

The petitioner-defendants reasoned that “a Sixth Amendment ‘jury trial’ made mandatory on the States by virtue of the Due Process Clause of the Fourteenth Amendment . . . require[s] a unanimous jury verdict in order to give substance to the reasonable-doubt standard otherwise mandated by the Due Process Clause.”<sup>80</sup> The petitioner-defendants also maintained that nonunanimous verdicts would undermine the Fourteenth Amendment requirement that the jury “reflect a cross section of the community,” by allowing the majority to reach a decision without considering the arguments of a minority member.<sup>81</sup>

In each of the three cases addressed in *Apodaca*, the juries took less than fifty-one minutes to assemble in the jury room, elect a foreman, deliberate, and inform the court of its verdict.<sup>82</sup> While the State recognized full jury deliberation as an “essential ingredient[] of trial by jury guaranteed by the Constitution,” it advocated for a minimum deliberation period of two hours before acceptance of a nonunanimous jury verdict to ensure adequate deliberation.<sup>83</sup> The Supreme Court, however, did not address a requirement for a minimum deliberation period. In a plurality decision, it affirmed the convictions in *Apodaca* with Justice Powell concurring in the result yet disagreeing with the plurality’s rationale.<sup>84</sup>

Justices Byron White, Warren Burger, Harry Blackmun, and William Rehnquist found that the Sixth Amendment guarantee of a jury trial did not require unanimity under the Fourteenth Amendment because “[a] requirement of unanimity . . . does not materially contribute” to the purpose of trial by jury, which “is to prevent oppression by the Government by providing a ‘safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.’”<sup>85</sup> Justice White contended that the Sixth Amendment jury trial, which developed separately from the due process reasonable

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<sup>78</sup> *Apodaca v. Oregon*, 406 U.S. 404, 406 (1972).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 411 (citing *In re Winship*, 397 U.S. 358, 363–64 (1970)).

<sup>81</sup> *Id.* at 412–13.

<sup>82</sup> Reply Brief for Petitioners at 2, *Apodaca*, 406 U.S. 404 (No.69-5046).

<sup>83</sup> *Id.* at 1–2.

<sup>84</sup> *Johnson*, 406 U.S. at 366 (Powell, J., concurring).

<sup>85</sup> *Apodaca*, 406 U.S. at 410 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968)).

doubt standard constitutionally required in *In re Winship*, “does not require proof beyond a reasonable doubt at all.”<sup>86</sup> Justice White also rejected the idea that being outvoted by a majority of jurors would silence the voice of a juror representing a minority group.<sup>87</sup>

Justice White referenced Kalven and Zeisel’s *The American Jury*, published in 1966, to find that unanimity “would obviously produce hung juries in some situations where nonunanimous juries will convict or acquit.”<sup>88</sup> The conclusion that nonunanimous verdicts are “functionally equivalent” to unanimous verdicts, however, does not appear to be based on any data or even reasoning. The plurality simply stated that “[i]n terms of this function we perceive no difference between juries required to act unanimously and those permitted to convict or acquit by votes of [ten] to two or [eleven] to one.”<sup>89</sup>

Justice Powell (supplying the fifth vote) wrote a concurring opinion, finding that “unanimity is one of the indispensable features of a *federal* jury trial,” because “[a]t the time the Bill of Rights was adopted, unanimity had long been established as one of the attributes of a jury conviction at common law.”<sup>90</sup> However, he also found that not “all of the elements of jury trial within the meaning of the Sixth Amendment are necessarily embodied in or incorporated into the Due Process Clause of the Fourteenth Amendment.”<sup>91</sup> Justice Powell cited Kalven and Zeisel’s *The American Jury*, published in 1971, to support the proposition that “the jury-trial protection is not substantially affected by less-than-unanimous verdict requirements.”<sup>92</sup>

Justices William Douglas, William Brennan, and Thurgood Marshall dissented, and Justice Potter Stewart wrote a separate dissenting opinion.<sup>93</sup> The dissenting Justices found that the Sixth Amendment right to a jury trial clearly required jury unanimity, citing *Andres v. United States* and stating, “[u]nanimity in jury verdicts is

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<sup>86</sup> *Id.* at 411 (applying *In re Winship*, 397 U.S. 358 (1970)).

<sup>87</sup> *Id.* at 413.

<sup>88</sup> *Id.* at 411.

<sup>89</sup> *Id.*

<sup>90</sup> *Johnson v. Louisiana*, 406 U.S. 356, 369–71 (1970) (Powell, J., concurring in both *Johnson* and *Apodaca*) (emphasis in original).

<sup>91</sup> *Id.* at 369 (Powell, J., concurring).

<sup>92</sup> *Id.* at 374 (Powell, J., concurring in *Apodaca*).

<sup>93</sup> *Id.* at 380 (Douglas, J., joined by Brennan, J., and Marshall, J., dissenting in both *Apodaca* and *Johnson*).

required where the Sixth and Seventh Amendments apply.”<sup>94</sup> Justice Stewart’s dissenting opinion noted that *Duncan v. Louisiana* “squarely held that the Sixth Amendment right to trial by jury in a federal criminal case is made wholly applicable to state criminal trials by the Fourteenth Amendment.”<sup>95</sup> Justice Douglas wrote in his joint *Apodaca-Johnson* dissenting opinion that “it is almost inconceivable that anyone would have questioned whether proof beyond a reasonable doubt was in fact, the constitutional standard. And, indeed, when such a case finally arose, we had little difficulty disposing of the issue.”<sup>96</sup> The dissents further equated the Court’s decision to allow nonunanimous verdicts in criminal cases to giving the states the power to experiment with the civil rights of its most vulnerable citizens.<sup>97</sup>

While Justice Powell agreed with the dissenters that the Sixth Amendment right to jury trial required unanimity, he declined to apply the basic incorporation doctrine. Thus, even though five Justices agreed that the Sixth Amendment requires unanimity in trials, and eight Justices agreed that the Sixth Amendment should apply the same in state court as it does in federal court,<sup>98</sup> the Court upheld the defendants’ nonunanimous convictions.<sup>99</sup> Accordingly, the result of *Apodaca* is that while federal criminal jury trials require unanimity, state juries may deprive a criminal defendant of his liberty by returning a nonunanimous verdict.

Effectively, this means that since 1972 criminal defendants in Oregon and Louisiana are convicted and imprisoned, even in felony cases that carry a potential sentence of life, by nonunanimous juries. These same defendants could have been acquitted<sup>100</sup> if they were

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<sup>94</sup> *Apodaca*, 406 U.S. at 414 (Stewart, J., with whom Brennan, J., and Marshall, J., join, dissenting); *id.* at 380–83 (Douglas, J., with whom Brennan, J., and Marshall, J., concur, dissenting) (stating that the opinion also applies to No. 69-5046, *Apodaca et al. v. Oregon*, post, p. 404).

<sup>95</sup> *Apodaca*, 406 U.S. at 414 (Stewart, J., dissenting).

<sup>96</sup> *Johnson*, 406 U.S. at 381 (Douglas, J., dissenting).

<sup>97</sup> *Id.* at 387 (Justice Douglas, dissenting).

<sup>98</sup> “These [eight] Justices were simply and properly applying *Duncan* and standard incorporation doctrine that once a clause of the Bill of Rights is deemed sufficiently ‘fundamental’ to be incorporated against the states, it applies identically to the states with all its interpretative precedent.” Stephen Kanter, *Sleeping Beauty Wide Awake: State Constitutions as Important Independent Sources of Individual Rights*, 15 LEWIS & CLARK L. REV. 799, 814 (2011).

<sup>99</sup> *Apodaca*, 406 U.S. at 414 (affirming the judgment below).

<sup>100</sup> These cases would be considered hung juries and the state would have the opportunity to retry the defendants.



prosecuted in a federal court or in any of the other forty-eight states in the United States.

## *2. The Court's Failure to Review Apodaca and Johnson Leaves Dangerous Precedent Alive*

Despite a flurry of petitions in the past several years, the Supreme Court continues to deny certiorari to cases from Louisiana and Oregon seeking clarity on the issue of the nonunanimous jury rule.<sup>101</sup> In these cases, the State convicted defendants by nonunanimous juries of 10–2 or 11–1.<sup>102</sup> This represents more than a theoretical harm caused by legal ambiguity because, even though one or two jurors did not believe the State proved its case beyond a reasonable doubt, defendants have been sentenced to decades of imprisonment, life sentences, and hard labor.<sup>103</sup>

For example, a nonunanimous jury convicted Alonso Herrera in Oregon State Court.<sup>104</sup> The State charged Mr. Herrera with unauthorized use of a vehicle and possession of a stolen vehicle after police arrested him for borrowing a car from a friend and failing to return it.<sup>105</sup> Mr. Herrera asked for a jury instruction that the verdict be unanimous, but the trial court denied the request.<sup>106</sup> Although eleven jurors voted to acquit Mr. Herrera of the stolen vehicle charge, ten

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<sup>101</sup> See *O'Dowd v. Louisiana*, 135 S. Ct. 1858 (2015) (cert. denied); *Parker v. Louisiana*, 135 S. Ct. 1714 (2015) (cert. denied); *Dorsey v. Louisiana*, 135 S. Ct. 1495 (2015) (cert. denied); *Huey v. Louisiana*, 135 S. Ct. 1507 (2015) (cert. denied); *Scott v. Louisiana*, 135 S. Ct. 2812 (2015) (cert. denied); *Blueford v. Louisiana* (2015) (cert. denied); *Webb v. Louisiana*, 135 S. Ct. 1719 (2015) (cert. denied); *Mosley v. Louisiana*, 136 S. Ct. 40 (2015) (cert. denied); *Fields v. Louisiana*, 135 S. Ct. 121 (2014) (cert. denied); *Jackson v. Louisiana*, 134 S. Ct. 1950 (2014) (cert. denied); *Hankton v. Louisiana*, 135 S. Ct. 195 (2014) (cert. denied); *McElveen v. Louisiana*, 133 S.Ct. 1237 (2013) (cert. denied); *Herrera v. Oregon*, 562 U.S. 1135 (2011) (cert. denied). This is not an exhaustive list.

<sup>102</sup> *O'Dowd*, 135 S. Ct. 1858; *Parker*, 135 S. Ct. 1714; *Dorsey*, 135 S. Ct. 1495; *Huey*, 135 S. Ct. 1507; *Scott*, 135 S. Ct. 2812; *Blueford*, 135 S.Ct. 1900; *Webb*, 135 S. Ct. 1719; *Mosley*, 136 S. Ct. 40; *Fields*, 135 S. Ct. 121; *Jackson*, 134 S. Ct. 1950; *Hankton*, 135 S. Ct. 195; *McElveen*, 133 S. Ct. 1237; *Herrera*, 562 U.S. 1135.

<sup>103</sup> See *State v. Parker*, No. 17543, 2014 La. App. Unpub. LEXIS 99 (1st Cir. Feb. 20, 2014) (exemplifying a case in which the defendant was convicted of manslaughter by a 10–2 jury and sentenced to thirty-five years of hard labor); *State v. Dorsey*, 137 So. 3d 651 (2014) (exemplifying a case in which, after a mistrial due to a deadlocked jury, defendant was tried again, convicted by a nonunanimous jury verdict, and sentenced to life imprisonment at hard labor without parole).

<sup>104</sup> Petition for Writ of Certiorari at 5, *Herrera*, 562 U.S. 1135 (No. 10-344).

<sup>105</sup> Brief for Respondent State of Oregon in Opposition at 1, *Herrera*, 562 U.S. 1135 (No. 10-344).

<sup>106</sup> *Id.* at 1–3; *Herrera*, 562 U.S. 1135.

jurors voted to convict him of the unauthorized use charge.<sup>107</sup> This resulted in a conviction for unauthorized use of a vehicle, a Class C felony that carries a maximum prison term of up to five years.<sup>108</sup> Oregon courts and the Supreme Court declined to review Mr. Herrera's nonunanimous conviction.<sup>109</sup>

Jurors also disagree in more serious cases. In Louisiana, a less-than-unanimous jury convicted Joseph Blueford of aggravated battery and possession of a firearm by a convicted felon.<sup>110</sup> One of the State's witnesses admitted to lying to the police about seeing Mr. Blueford firing the gun.<sup>111</sup> Two other witnesses had pretrial contact with an assistant district attorney but at trial denied discussing their testimony with the State or even meeting with the district attorney.<sup>112</sup> Furthermore, during deliberation, one of the jurors admitted she had not heard or understood anything said during trial.<sup>113</sup> Both the State and the defense counsel agreed not to excuse the juror, and the court relied on the jury's ability to return a nonunanimous verdict.<sup>114</sup> The juror who had not heard any of the evidence simply voted with the majority.<sup>115</sup> Even so, the jury did not return a unanimous verdict.<sup>116</sup> Mr. Blueford is now serving a life sentence with hard labor and a concurrent sixty-five-year hard labor term.<sup>117</sup>

In forty-eight other states and in federal court, the nonunanimous verdicts in these cases and many others could have a different outcome.

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<sup>107</sup> Brief for Respondent State of Oregon in Opposition, *supra* note 105, at 2.

<sup>108</sup> See OR. REV. STAT. § 164.135(2) (2015); OR. REV. STAT. § 161.605(3) (2015). Although this may seem to some like a suitably minor punishment for a minor crime, there are collateral consequences for even "minor" felony convictions. Someone convicted of a felony in Oregon loses the right to vote while incarcerated and is unable to receive public benefits once he or she is released. Anyone convicted of a felony is ineligible to possess a firearm. Additionally, obtaining a job with a felony conviction will likely prove to be a difficult or impossible task. See OR. REV. STAT. § 166.270 (2015); COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION, AMERICAN BAR ASS'N, <http://www.aba.collateralconsequences.org/search/?jurisdiction=40> (last visited Feb. 5, 2017).

<sup>109</sup> Brief for Respondent State of Oregon in Opposition, *supra* note 105, at 2.

<sup>110</sup> *State v. Blueford*, 137 So. 3d 54, 55, 66 (2d Cir. 2014).

<sup>111</sup> *Id.* at 56.

<sup>112</sup> *Id.* at 57.

<sup>113</sup> *Id.* at 66.

<sup>114</sup> *Id.* at 66–67 (instructing the jurors, after discovering that one juror had not heard the evidence at trial, that "the provisions or charge still say that at least ten of you must agree on the same verdict on each count. It requires ten of the twelve agreeing on each count. So that is my response to you").

<sup>115</sup> *Id.* at 67.

<sup>116</sup> *Id.* at 65–66.

<sup>117</sup> *Id.* at 55.

Research indicates that nonunanimous verdicts are rendered in over forty percent of all felony jury verdicts in Oregon.<sup>118</sup> These cases, evidencing a surprisingly high rate of nonunanimous verdicts, may have otherwise resulted in unanimous verdicts after further deliberation. Without being required to fully deliberate, however, jurors may grasp at the opportunity to quickly return to their everyday lives.

Unlike felony cases, someone accused of a misdemeanor in Oregon is entitled to a unanimous vote of six.<sup>119</sup> This means that an Oregon defendant facing a potential sentence of a year or less will be accorded a unanimous verdict, while the State need only convince a majority of the jury when an Oregon defendant faces a life sentence. This incongruity could be multiplied across the nation while the failure to revisit and clarify *Apodaca* leaves the door open for other states to adopt nonunanimous jury verdicts in criminal cases. In the wake of *Apodaca*, several states tried to amend their constitutions to allow nonunanimous jury verdicts.

In the 1980s the California Senate rejected a bill, sponsored by a former district attorney, proposing nonunanimous verdicts in criminal trials.<sup>120</sup> In 1995, two bills proposing a constitutional amendment allowing 10–2 and 11–1 jury votes were presented to the California legislature.<sup>121</sup> Similarly, the Washington State Legislature received a proposed amendment to the constitution along with a proposed act allowing 10–2 verdicts in criminal trials in 1997.<sup>122</sup> In 2001, HB 1397 proposed to allow 10–2 criminal jury verdicts in Mississippi.<sup>123</sup> In 2003, a New York resolution proposed a state constitutional amendment requiring only three-fourths of the jurors to agree on a

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<sup>118</sup> OFFICE OF PUB. DEFENSE SERVS., ON THE FREQUENCY OF NON-UNANIMOUS FELONY VERDICTS IN OREGON 4–5 (May 21, 2009).

<sup>119</sup> Adam Liptak, *Guilty by a 10-2 Vote: Efficient or Unconstitutional?*, N.Y. TIMES (July 6, 2009), <http://www.nytimes.com/2009/07/07/us/07bar.html>; OR. REV. STAT. § 136.210(2) (2015).

<sup>120</sup> Jeremy Osher, *Jury Unanimity in California: Should it Stay or Should it Go*, 29 LOY. LA. L. REV. 1319, 1337–38 (1996).

<sup>121</sup> *Id.* at 1323.

<sup>122</sup> H.J.R. 4205, H. Comm. Law & Justice, 1997 Reg. Sess. (Wash. 1997); H.B. 1295, 55th Legis., 1997 Reg. Sess. (Wash. 1997).

<sup>123</sup> H.B. No. 1397, Miss. Leg., 2001 Reg. Sess. (Miss. 2001) (introduced by Andrew Ketchings, the bill died in committee). Ketchings introduced the bill again in the 2002 Regular Session, H.B. 611, which also died in committee. See H.B. No. 611, Miss. Leg., 2002 Reg. Sess. (Miss 2002), <http://billstatus.ls.state.ms.us/2002/pdf/history/HB/HB0611.htm>.

verdict in felony cases, although a five-sixths verdict was required in civil or misdemeanor cases.<sup>124</sup> The purpose of the New York amendment was to “produce more convictions and put more criminals behind bars.”<sup>125</sup>

Despite the Constitutional requirement of unanimous verdicts in federal court, even Congress has not been immune to proposals for nonunanimous jury verdicts in criminal cases. In 1995, Senator Strom Thurman introduced a bill to amend the Federal Rules of Criminal Procedure to allow a verdict agreed upon by five-sixths of the jury.<sup>126</sup>

While all of these proposed amendments ultimately failed, they demonstrate how regularly the unanimous verdict requirement comes under attack in light of the confusing precedent of *Apodaca*. While the proposed amendments generally allowed for 10–2 verdicts, states could arguably propose and adopt a constitutional amendment allowing nine out of twelve jurors to reach a verdict.<sup>127</sup> While only two states allow nonunanimous verdicts in criminal trials currently, state constitutions appear to be most vulnerable to changes in the unanimous verdict requirement following a highly publicized criminal trial.<sup>128</sup> Whether or not the public outcry that results from the extensive media coverage of a criminal trial is justified, it is not a sound basis for altering the protections accorded to *every* criminal defendant charged with *any* crime.

## II

### CURRENT SUPREME COURT LAW DIRECTLY CONTRADICTS THE APPROACH USED BY JUSTICE POWELL IN *APODACA V. OREGON*

Ironically, despite the agreement of eight Justices that unanimity rules should apply equally to juries in state and federal trials, Justice Powell’s opinion in *Apodaca* concluding that the Fourteenth

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<sup>124</sup> Matthew Tulchin, *An Analysis of the Development of the Jury’s Role in a New York Criminal Trial*, 13 J.L. & POL’Y, 425, 425 n.1 (2005).

<sup>125</sup> *Id.* at 425–26 (2005) (quoting NEW YORK STATE ASSEMBLY MEMORANDUM IN SUPPORT OF LEGISLATION, Assemb. 4469, 226th Leg. Sess. (N.Y. 2003)).

<sup>126</sup> S. 1426, 104th Cong. (1995). Senator Thurman is well known for his twenty-four hour and eighteen minute filibuster in 1957 in opposition to desegregation. See Kevin R. Johnson, Book Review Essay, *The Legacy of Jim Crow: The Enduring Taboo of Black-White Romance*, 84 TEX L. REV. 739, 744 (2006).

<sup>127</sup> In *Johnson v. Louisiana*, the defendant was convicted by a 9–3 verdict, which was upheld by the Supreme Court.

<sup>128</sup> Osher, *supra* note 120, at 1321–22 (noting the highly publicized trial of O.J. Simpson). As stated above, the 1934 trial of Jacob Silverman led to the constitutional amendment in Oregon allowing nonunanimous criminal verdicts.

Amendment does not incorporate the Sixth Amendment unanimous jury requirement became the law. Indeed, recent Supreme Court decisions involving incorporation have completely undermined Powell's two-track approach to unanimity in criminal trials. The Supreme Court's 2010 decision in *McDonald v. City of Chicago* unambiguously rejected the concept of a "watered-down, subjective version of the individual guarantees of the Bill of Rights," that would allow different standards between the states and the federal government for the protection of fundamental rights.<sup>129</sup> As Professor Eugene Volokh has correctly argued, "*Apodaca*'s 'watered-down' incorporation of the Jury Trial Clause is thus a constitutional anomaly, based on logic that this Court has repudiated in *McDonald*, and that was inconsistent with prior precedent even at the time of *Apodaca* itself."<sup>130</sup>

The incorporation doctrine is the process by which American courts have applied portions of the Bill of Rights to the states through the Due Process Clause of the Fourteenth Amendment.<sup>131</sup> Prior to 1925, the Bill of Rights was held to apply only to the federal government. Today, most of the Bill of Rights have been incorporated. Only the Fifth Amendment right to an indictment by a grand jury,<sup>132</sup> the Seventh Amendment right to a jury trial in civil lawsuits,<sup>133</sup> the Eighth Amendment's prohibition of excessive fines,<sup>134</sup> the Third Amendment's protection against quartering soldiers,<sup>135</sup> and, the subject of this Article, the Sixth Amendment's right to a unanimous jury verdict, remain unincorporated.<sup>136</sup>

Prior to the ratification of the Fourteenth Amendment and the development of the incorporation doctrine, the Supreme Court held in *Barron v. Baltimore*<sup>137</sup> that the Bill of Rights applied only to the federal

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<sup>129</sup> *McDonald v. City of Chicago*, 561 U.S. 742, 765 (2010) (citing *Malloy v. Hogan*, 378 U.S. 1, 10–11 (1964)).

<sup>130</sup> Petition for Writ of Certiorari, *supra* note 104, at 11.

<sup>131</sup> See *McDonald*, 561 U.S. at 759–61.

<sup>132</sup> *Id.* at 765 n.13.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> See *Engblom v. Carey*, 677 F.2d. 957, 961 (2d Cir. 1982) (finding the Third Amendment incorporated against the states and noting its rare use as the reason for there being no precedent incorporating it).

<sup>136</sup> See *Apodaca v. Oregon*, 406 U.S. 404 (1972).

<sup>137</sup> 32 U.S. 243 (1833).

government but not any state governments.<sup>138</sup> Even years after the ratification of the Fourteenth Amendment in 1876, the Supreme Court in *United States v. Cruikshank* still held that the First and Second Amendments did not apply to state governments.<sup>139</sup> However, beginning with the Slaughter House Cases in 1873<sup>140</sup> and then in the through a series of opinions in the 1920s, the Supreme Court has gradually interpreted the Fourteenth Amendment to incorporate most of the provisions of the Bill of Rights, making them enforceable against state governments.<sup>141</sup> The Court explicitly began<sup>142</sup> recognizing incorporation of various provisions of the Bill of Rights in 1925 in *Gitlow v. New York*, which incorporated the First Amendment's freedom of speech clause.<sup>143</sup> In 1947, in *Adamson v. California*,<sup>144</sup> Justice Hugo Black argued in his dissent that the Court should pursue total incorporation of the Bill of Rights. Yet instead, over the following twenty-five years, the Supreme Court has employed a doctrine of selective incorporation.<sup>145</sup> By the second half of the twentieth century, nearly all of the rights in the Bill of Rights had been applied to the states. The ad hoc process of incorporation continues to this day. Most recently, in 2010, the Court reaffirmed its commitment to incorporation in *McDonald v. City of Chicago*.<sup>146</sup>

In *McDonald v. Chicago*, the Supreme Court considered whether the Second Amendment right to carry firearms applies to state and local governments.<sup>147</sup> In a 5–4 decision, the Court ruled that the right of an individual to “keep and bear arms” protected by the Second

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<sup>138</sup> *Id.* at 247.

<sup>139</sup> 92 U.S. 542, 552–53 (1875).

<sup>140</sup> 83 U.S. 36 (1873).

<sup>141</sup> The Supreme Court began a process called “selective incorporation” by gradually applying selected provisions of the Bill of Rights to the states through the Fourteenth Amendment Due Process Clause.

<sup>142</sup> The first case of incorporation was in *Chicago, Burlington, & Quincy Railroad Co. v. Chicago*, 166 U.S. 226 (1897), in which the Supreme Court required just compensation for property appropriated by state or local authorities (applying the Fifth Amendment in the Bill of Rights).

<sup>143</sup> 32 U.S. 243 (1833).

<sup>144</sup> 332 U.S. 46, 74–75 (Balck, J., dissenting) (1947).

<sup>145</sup> *McDonald*, 561 U.S. at 758–59.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* In 2008, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court struck down similar District of Columbia legislation on the grounds that it violated an individual's Second Amendment right to keep and bear firearms for lawful uses such as self-defense in one's home. But the Court declined to say whether this Second Amendment right applies to the states and local governments and not just the District of Columbia, which is under federal jurisdiction. The Court answered this question in *McDonald v. Chicago*.

Amendment is incorporated by the Due Process Clause of the Fourteenth Amendment and thus applies to states in addition to the federal government.<sup>148</sup> Writing for the majority, Justice Samuel Alito observed: “[I]t is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.”<sup>149</sup> In reaching its decision, the Court held that “[t]he relationship between the Bill of Rights’ guarantees and the States must be governed by a single, neutral principle” and “incorporated Bill of Rights protections ‘are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.’”<sup>150</sup> The Court explained what it meant for a right to be “of such a nature” as to be “included in the conception of due process of law.”<sup>151</sup> Such rights, the Court explained include “immutable principles of justice which inhere in the very idea of free government . . . ,”<sup>152</sup> principles “so rooted in the traditions and conscience of our people as to be ranked as fundamental,”<sup>153</sup> and values “essential to a fair and enlightened system of justice.”<sup>154</sup> Essentially, the *McDonald* Court applied the *Duncan v. Louisiana* incorporation standard it used in the 1960s to incorporate the right to jury trial under the Sixth Amendment.<sup>155</sup> The Court explained that the *Duncan* standard constituted a departure from the less-encompassing test that had been used in incorporation cases since the late nineteenth century—namely, whether the right is of “the very essence of a scheme of ordered liberty”<sup>156</sup> or a “principle of natural equity, recognized by all temperate and civilized governments.”<sup>157</sup>

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<sup>148</sup> *McDonald*, 561 U.S. at 791.

<sup>149</sup> *Id.* at 778.

<sup>150</sup> *Id.* at 788, 765 (internal quotation and citation omitted).

<sup>151</sup> *Id.* at 759 (quoting *Twining v. New Jersey*, 211 U.S. 78, 99 (1908)).

<sup>152</sup> *Id.* at 760 (quoting *Twining*, 211 U.S. at 102).

<sup>153</sup> *Id.* (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

<sup>154</sup> *Id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)) (internal quotation marks omitted).

<sup>155</sup> *Duncan v. Louisiana*, 391 U.S. 145, 148-49 (1968) (holding that incorporation of a right is based on whether it is “among those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, whether it is ‘basic in our system of jurisprudence,’ and whether it is a fundamental right, essential to a fair trial”) (internal quotations and citations omitted).

<sup>156</sup> *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

<sup>157</sup> *Chicago, Burlington, & Quincy Railroad Co. v. Chicago*, 166 U.S. 226, 238 (1897).

In *McDonald*, the Court acknowledged the anomaly of *Apodaca* as “one exception to this general rule.”<sup>158</sup> The *McDonald* Court made clear that *Apodaca* “was the result of an unusual division among the Justices, not an endorsement of the two-track approach to incorporation.”<sup>159</sup> It further explained that *Apodaca* does not “undermine the well-established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government.”<sup>160</sup> Some courts view this as an affirmation of *Apodaca*.<sup>161</sup> But even when *Apodaca* was decided, Justice Powell himself acknowledged that his opinion of incorporation conflicted with *Duncan v. Louisiana*.<sup>162</sup> Indeed, most of the Sixth Amendment’s provisions were incorporated to the states prior to *Apodaca*,<sup>163</sup> and in the intervening years between *Apodaca* and *McDonald*, Sixth Amendment jurisprudence has continuously applied an approach to incorporation similar to the one used in *McDonald*.<sup>164</sup> As *McDonald* expressly acknowledged, in effect, *Apodaca* is a jurisprudential orphan,

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<sup>158</sup> *McDonald*, 561 U.S. at 766 n.14.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* The *McDonald* Court’s footnote even quotes a portion of Justice Brennan’s dissent that eight of the nine Justices agreed with, which argued that the Sixth Amendment’s guarantees provide an “identical application against both State and Federal Governments.” *Id.*

<sup>161</sup> See *State v. Webb*, 133 So. 3d 258, 285 (4th Cir. 2014) (“The Court in [*McDonald*] recently affirmed the continuing viability of its holding in *Apodaca* that the use of nonunanimous juries in state criminal trials is not prohibited by the Sixth and Fourteenth Amendments.”).

<sup>162</sup> *Johnson v. Louisiana*, 406 U.S. 356, 375 (1972) (Powell, J., concurring); see *Duncan v. Louisiana*, 391 U.S. 145 (1968) (“[T]he Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment guarantee.”).

<sup>163</sup> See *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (incorporating right to speedy trial); *Parker v. Gladden*, 385 U.S. 363 (1966) (incorporating right to trial by impartial jury); *In re Oliver*, 333 U.S. 257 (1948) (right to public trial); see also *Rabe v. Washington*, 405 U.S. 313 (1972) (right to notice of accusations); *Pointer v. Texas*, 380 U.S. 400 (1965) (right to confront adverse witnesses). The Supreme Court applied the Sixth Amendment right to counsel to capital cases in *Powell v. Alabama*, 287 U.S. 45 (1932); to felony cases in *Gideon v. Wainwright*, 372 U.S. 335 (1963); and to imprisonable misdemeanors in *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

<sup>164</sup> See, e.g., *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (ruling that the Sixth Amendment right to a jury trial, incorporated against the states through the Fourteenth Amendment, prohibited judges from enhancing criminal sentences beyond statutory maximums based on facts other than those decided by the jury beyond a reasonable doubt); *Blakely v. Washington*, 542 U.S. 296 (2004) (applying *Apprendi* and holding the Sixth Amendment right to a jury trial prohibited judges from enhancing criminal sentences based on facts other than those decided by the jury or admitted by the defendant); *Cunningham v. California*, 549 U.S. 270 (2007) (applying *Apprendi* and *Blakely* to California’s Determinate Sentencing Rule).



stranded from the rationales employed by the Court in all other incorporation cases.<sup>165</sup> The implication of *McDonald* is that overturning *Apodaca* should be easy and, in fact, suggests that the Court should incorporate the few unincorporated fundamental provisions of the Bill of Rights.

Jury unanimity meets the *McDonald* incorporation standard as it is rooted in common law and history signifying that the Founders considered jury unanimity a fundamental right.<sup>166</sup> The earliest documentation of a unanimous jury verdict dates back to 1367;<sup>167</sup> by the late fourteenth century, there was a widespread preference for unanimous verdicts,<sup>168</sup> and it was “an accepted feature of the common-law jury by the 18th century.”<sup>169</sup> While its origins have never been clear,<sup>170</sup> prior to the ratification of the Constitution in 1786, John Adams indicated “it is the unanimity of the jury that preserves the rights of mankind.”<sup>171</sup> Moreover, James Madison included “the requisite of unanimity for conviction” in the draft of the Sixth Amendment that he proposed.<sup>172</sup> Although the Constitution does not refer to unanimous juries,<sup>173</sup> as the plurality in *Apodaca* noted, unanimity quickly obtained

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<sup>165</sup> *McDonald*, 561 U.S. at 765 n.14.

<sup>166</sup> See Petition for Writ of Certiorari, *supra* note 104, at 12–17. (“The unanimity requirement was indeed not just an ‘accidental,’ ‘superfluous’ detail, but an ‘essential element[]’ of the jury trial. It was a part of ‘our [English] constitution’ that protected ‘the liberties of England’ (Blackstone), and that was then accepted in America (as Story stressed). It ‘preserve[d] the rights of mankind’ (Adams). It was ‘of indispensable necessity’ (Wilson), ‘indispensable’ to a criminal jury verdict (Story), part of the American design of ‘the several powers of government’ (Tucker), and part of the trial by jury secured by ‘all our constitutions’ (Dane).”). *Id.* at 17.

<sup>167</sup> Osher, *supra* note 120, at 1326; see also Riordan, *supra* note 66, at 1419; Comment, *A Constitutional Renvoi: Unanimous Verdicts in State Criminal Trials*, 41 FORDHAM L. REV. 115 (1972).

<sup>168</sup> Osher, *supra* note 120, at 1326–27; see also Riordan, *supra* note 66, at 1419 (“Even in fourteenth century Parliaments (where the numbers were such that a unanimity requirement was vastly more impractical than for a jury), there is evidence that a majority vote was deemed insufficient to bind the community or its individual members to a legal decision.”); *A Constitutional Renvoi: Unanimous Verdicts in State Criminal Trials*, *supra* note 167.

<sup>169</sup> *Apodaca v. Oregon*, 406 U.S. 404, 407(1972) (White, J., plurality opinion).

<sup>170</sup> *A Constitutional Renvoi: Unanimous Verdicts in State Criminal Trials*, *supra* note 167, at 115.

<sup>171</sup> JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES 376 (3d ed. 1797).

<sup>172</sup> *Apodaca*, 406 U.S. at 408 (White, J., plurality opinion) (quoting 1 ANNALS OF CONG. 435 (Joseph Gales ed., 1789)).

<sup>173</sup> Some say it was purposefully left out because it was “implicit in the very concept of the jury,” *Apodaca*, 406 U.S. at 409–10, while others argue that the Framers knew what they

general acceptance “as Americans became more familiar with the details of English common law and adopted those details in their own colonial legal systems.”<sup>174</sup> In the nineteenth century, Justice Joseph Story explained that “[a] trial by jury is generally understood to mean . . . , a trial by a jury of twelve men, impartially selected, who must unanimously concur in the guilt of the accused before a legal conviction can be had.”<sup>175</sup> And throughout the years, the Supreme Court has continuously reaffirmed that unanimity in federal jury verdicts is required under the Sixth Amendment.<sup>176</sup>

The Court’s *McDonald* approach to incorporation directs incorporation of jury unanimity by relying on its roots in common-law and history. Furthermore, it is important to point out that the *Apodaca* plurality incorrectly analyzed the issue under the Sixth Amendment by considering the “function served by the jury in contemporary society” rather than its historical foundation.<sup>177</sup> In fact, in its more recent opinions, the Court has recognized the necessity of examining the “Framers’ paradigm for criminal justice,” and not “whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice.”<sup>178</sup> For example, in *Apprendi v. New Jersey*,<sup>179</sup> the Court found that the Sixth Amendment right to a jury trial incorporated against the states through the Fourteenth Amendment, prohibited judges from increasing criminal sentences beyond statutory maximum based on facts other than those decided by the jury beyond a reasonable doubt.<sup>180</sup> The Court there recognized that “historical foundation for our

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wanted to include, and the exclusion as purposeful, perhaps to avoid “forc[ing] another affirmative duty upon those states.” Osher, *supra* note 120, at 1327–28; *see also Apodaca*, 406 U.S. at 410. (White, J., plurality opinion). Others contend that there was disagreement to the vicinage requirement of his language, that the Sixth Amendment right to trial, “by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction . . . .” Riordan, *supra* note 66, at 1419 (citing James Madison, 1 ANNALS OF CONG. 435 (1789)).

<sup>174</sup> *Apocada*, 406 U.S. at 408 n.3 (White, J., plurality opinion).

<sup>175</sup> JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 559 n.2 (5th ed., 1891).

<sup>176</sup> *See, e.g., Andres v. United States*, 333 U.S. 740 (1948); *Patton v. United States*, 281 U.S. 276, 288 (1930); *Maxwell v. Dow*, 176 U.S. 581 (1900).

<sup>177</sup> *Apodaca*, 406 U.S. at 406–10 (White, J., plurality opinion); *see* Petition for Writ of Certiorari at 9–19, *Miller v. Louisiana*, 133 S. Ct. 1238 (2013) (No. 12-162); Petition for Writ of Certiorari at 11, *Lee v. Louisiana*, 555 U.S. 823 (2008) (No. 07-1523). This functional analysis first applied in *Williams* has not only been discredited but was abandoned . . . *see* above discussion on *Williams* by Smith & Saks, *supra* note 57.

<sup>178</sup> *Blakely v. Washington*, 542 U.S. 296, 313 (2004).

<sup>179</sup> 530 U.S. 466 (2000).

<sup>180</sup> *Id.* at 490.

recognition [of rights in the Sixth and Fourteenth Amendments] extends down centuries into the common law”<sup>181</sup> and that history indicates that “trial by jury has been understood to require that ‘the truth of every accusation . . . should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant’s] equals and neighbours.”<sup>182</sup> In fact, the Court has emphasized that the Framers purposely did not leave the role of the jury to the government but rather included the “jury-trial guarantee in the Constitution . . . [because] they were unwilling to trust government to mark out the role of the jury.”<sup>183</sup>

Proponents of nonunanimous verdicts counter that sentencing cases hold no weight when assessing the constitutionality of the nonunanimous jury rule.<sup>184</sup> However, in the years since deciding *Apprendi*, the Court has applied its holding, regarding sentencing, to “instances involving plea bargains, sentencing guidelines, criminal fines, mandatory minimums, and capital punishment,”<sup>185</sup> thus, conclusively demonstrating that the logic of *Apprendi* applies beyond the narrow issue that it decided. Further, the Court has been clear that “stare decisis does not compel adherence to a decision whose ‘underpinnings’ have been ‘eroded’ by subsequent developments of constitutional law.”<sup>186</sup> Indeed, the Court’s most recent jurisprudence indicates that *Apodaca* not only got it wrong, but also that jury unanimity is the only way to satisfy *McDonald’s* incorporation approach; it is rooted in common law, and history reveals that the Founders considered jury unanimity a fundamental right.

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<sup>181</sup> *Id.* at 477–83 (reviewing the common law at the time of the framing to determine how sentencing should apply under the Sixth Amendment); *see also Blakely*, 542 U.S. at 305 (ruling that sentencing factors that increase defendant’s sentence must be proven beyond a reasonable doubt); *Crawford v. Washington*, 541 U.S. 36 (2004) (reformulating the standard for determining when the admission of hearsay statements in criminal cases is permitted under the Confrontation Clause of the Sixth Amendment by looking to history of the clause).

<sup>182</sup> *Apprendi*, 406 U.S. at 477 (quoting 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769)); *see also id.* at 498 (Scalia, J., concurring) (stating that charges must be determined “beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens”); *United States v. Booker*, 543 U.S. 220, 238–39 (same).

<sup>183</sup> *Blakely*, 542 U.S. at 308.

<sup>184</sup> Brief in Opposition to the Petition for Certiorari, *supra* note 177, at 10 (stating “*Apprendi* did not address the issue of unanimous verdicts”).

<sup>185</sup> *Hurst v. Florida*, 136 S. Ct. 616, 621 (2016) (stating that decisions must “survive the reasoning of *Apprendi*”) (internal citations omitted) (citing *Blakely*, 542 U.S. 296); *Alleyne v. United States*, 133 S. Ct. 2151 (2013); *S. Union Co. v. United States*, 132 S. Ct. 2344 (2012); *Booker*, 543 U.S. 220; *Ring v. Arizona*, 536 U.S. 584 (2002).

<sup>186</sup> *Hurst*, 136 S. Ct. at 623.

### III MAJORITY VERDICTS IN CRIMINAL TRIALS UNDERMINE THE REQUIREMENT THAT GUILT BE PROVEN BEYOND A REASONABLE DOUBT

A true examination of the functional approach that the *Apodaca* plurality claimed to embrace also calls for a unanimous jury requirement. The importance of requiring a defendant to be proven guilty of a crime beyond a reasonable doubt<sup>187</sup> cannot be overstated—it “is the highest level of certainty an individual can have in the absence of absolute certainty.”<sup>188</sup> In practice, the entire purpose of using the standard (along with the presumption of innocence), is “to test the prosecution’s claim of guilt” and it ostensibly works to ensure “that only guilty defendants are convicted” and to acquit whenever “the possibility of [ ] innocence remains after trial.”<sup>189</sup> Because reasonable doubt is meant to safeguard innocent defendants from conviction, weakening that standard in any form not only increases the chance that innocent defendants will be convicted, but is contradictory to both our historical and practical norms.<sup>190</sup>

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<sup>187</sup> Proof beyond a reasonable doubt is the legal standard by which someone may be convicted of a crime at trial. OR. REV. STAT. § 10.095 (2015); OR. REV. STAT. § 136.415 (2015). The burden to prove guilt beyond a reasonable doubt lies with the prosecution and thus every defendant is presumed innocent unless a judge or jury believes they are guilty beyond a reasonable doubt. *See id.* While not defined by statute or caselaw, Oregon’s uniform jury instructions say this about reasonable doubt:

Reasonable doubt is doubt based on common sense and reason. Reasonable doubt is not an imaginary doubt. Reasonable doubt means an honest uncertainty as to the guilt of the defendant. You must return a verdict of not guilty if, after careful and impartial consideration of all the evidence in the case, you are not convinced beyond a reasonable doubt that the defendant is guilty.

OR. UNIF. CRIM. JURY INSTRUCTIONS 1009 (2012).

<sup>188</sup> Henry L. Chambers, Jr., *Reasonable Certainty and Reasonable Doubt*, 81 MARQ. L. REV. 655, 662–63 (1998).

<sup>189</sup> *Id.* at 659. *But see* JAMES Q. WHITMAN, THE ORIGINS OF “REASONABLE DOUBT” 4 (2005); James Q. Whitman, *The Origins of “Reasonable Doubt”*, Faculty Scholarship Series, Paper 1 (2005), [http://digitalcommons.law.yale.edu/fss\\_papers/1/](http://digitalcommons.law.yale.edu/fss_papers/1/) (last visited Feb. 5, 2017) (“The purpose of the ‘reasonable doubt’ instruction was to address this frightening possibility, reassuring jurors that they could convict the defendant without risking their own salvation, as long as their doubts about guilt were not ‘reasonable.’”).

<sup>190</sup> *See In re Winship*, 397 U.S. 358, 363–64 (1970) (“It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.”); Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457, 458 (1989) (“This deliberate imbalance [that the reasonable doubt standard creates] in favor of the defendant is a societal judgment that an individual’s liberty interest transcends the state’s interest in obtaining a criminal conviction . . .”).

While the Court in *Apodaca* and *Johnson* indicated that unanimity and reasonable doubt are not the same, over time and with usage, the unanimous jury has become the manifestation of the reasonable doubt standard. It is so deeply established in our criminal jury trial<sup>191</sup> that it is understood that, to overcome reasonable doubt, all of the jurors must be convinced of a defendant's guilt. When more than one conclusion can be drawn from the same evidence, jurors may have opposing opinions about the guilt of a defendant. Jurors, who could have been excused in voir dire for any inability to rationally decide the case, are then responsible for reconciling inapposite conclusions. A nonunanimous verdict demonstrates the existence of reasonable doubt that could not be explained during the deliberation of twelve vetted jurors and shows that the government has failed to meet its burden of proof. Yet, in *Apodaca*, Justice White said: "That rational men disagree is not itself equivalent to a failure of proof by the State, nor does it indicate infidelity to the reasonable-doubt standard."<sup>192</sup> The Court's analyses in *Apodaca* and *Johnson* finding "no difference between juries required to act unanimously and those permitted to acquit or convict by votes of ten to two or eleven to one,"<sup>193</sup> significantly weakens the reasonable doubt standard and diminishes its purpose altogether.<sup>194</sup> As Justice Marshall explained, "it cuts the heart out of two of the most important and inseparable safeguards the Bill of Rights offers a criminal defendant . . . . After today, the skeleton of these safeguards remains, but the Court strips them of life and of meaning."<sup>195</sup>

Moreover, the Court's own case law prior to *Apodaca* and *Johnson* and since then, confirms this right to proof beyond a reasonable doubt through jury unanimity as a component of the jury trial guarantee. Like most of the jury trial guarantees provided by the Sixth Amendment, the phrase "reasonable doubt" does not actually appear anywhere in the Constitution, and the Court has expressed that while the rule did not

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<sup>191</sup> *Johnson v. Louisiana*, 406 U.S. 399, 399 (Marshall, J., dissenting) (discussing "the nature of the 'jury' that is guaranteed by the Sixth Amendment").

<sup>192</sup> *Id.* at 362.

<sup>193</sup> *Apodaca*, 406 U.S. at 411; *see also id.* at 412 ("We are quite sure, however, that the Sixth Amendment itself has never been held to require proof beyond a reasonable doubt in criminal cases."); *Johnson*, 406 U.S. at 361 (finding that three hold out jurors "does not in itself demonstrate that, had the nine jurors of the majority attended further to reason and the evidence, all or one of them would have developed reasonable doubt").

<sup>194</sup> In fact, Justice White conceded that "the State's proof could perhaps be regarded as more certain if it had convinced all 12 jurors instead of only nine." *Johnson*, 406 U.S. at 362.

<sup>195</sup> *Id.* at 399 (Marshall, J., dissenting).

actually “crystalliz[e] . . . until as late as 1789,” it did “read the familiar standard of proof into our Constitution” in 1970.<sup>196</sup> And “[s]ince then, the Court has insisted unwaveringly on the fundamental importance of the requirement of ‘proof beyond a reasonable doubt’ even at the cost of throwing American sentencing law into ‘far reaching . . . and disturbing’ confusion.”<sup>197</sup> In *In re Winship*,<sup>198</sup> the Supreme Court confirmed the reasonable doubt standard was constitutionally required. There, the Court explained that “[e]xpressions in many opinions of this Court indicate that it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required.”<sup>199</sup> Moreover, the Court explained that the reasonable doubt standard “provides concrete substance for the presumption of innocence—that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law.”<sup>200</sup> In other words, the presumption of innocence only has value if the State can overcome it by meeting the most demanding standard possible.

More recently, the Court has explained the importance of the reasonable doubt standard. In *Jones v. United States*<sup>201</sup> in 1999, the Court held that the Sixth Amendment right to jury trial guarantees the right to have any fact that is an element of an offense “be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt.”<sup>202</sup> And in *Apprendi*, the Court found that the Sixth Amendment right to a jury trial requires all elements of the crime to be proved beyond a reasonable doubt in state criminal trials.<sup>203</sup> Reaffirming this two years later in *Ring v. Arizona*,<sup>204</sup> the Court stated: “If a State makes an increase in a defendant’s authorized punishment on the contingent of a finding of fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt.”<sup>205</sup> The Court has continuously confirmed that proof beyond a reasonable doubt is a requirement in all criminal jury trials.<sup>206</sup>

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<sup>196</sup> *In re Winship*, 397 U.S. 358, 374 (1970); Whitman, *supra* note 189, at 2.

<sup>197</sup> Whitman, *supra* note 189, at 2 (stating that “it is inconceivable that we could abandon our American commitment to the ‘reasonable doubt’ standard of proof”).

<sup>198</sup> 397 U.S. 358 (1970).

<sup>199</sup> *Id.* at 362.

<sup>200</sup> *Id.* at 363.

<sup>201</sup> 526 U.S. 227 (1999).

<sup>202</sup> *Id.* at 252.

<sup>203</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000).

<sup>204</sup> 536 U.S. 584 (2002).

<sup>205</sup> *Id.* at 602.

<sup>206</sup> *Cunningham v. California*, 549 U.S. 270, 281 (2007); *Blakely*, 542 U.S. at 313–14.

Moreover, weakening the right to a Sixth Amendment jury trial by canceling out jurors with minority opinions, those “unreasonable juror[s],”<sup>207</sup> “does not turn on the relative rationality, fairness, or efficiency of potential factfinders,”<sup>208</sup> it merely relies on weakening the reasonable doubt standard. The very fact that Oregon and Louisiana require unanimous juries in first-degree murder/capital cases shows that both states chose greater certainty by not weakening the reasonable doubt standard in their most serious cases.<sup>209</sup> The Oregon Supreme Court has said so much by declaring that the state’s nonunanimous jury law is “to make it easier to obtain convictions.”<sup>210</sup> The right to jury trial demands that we do not make it easier to convict; “the prosecutor in a criminal case must actually overcome the presumption of innocence, all reasonable doubts to guilt, and the unanimous verdict requirement.”<sup>211</sup> As the late Justice Antonin Scalia wrote of the jury trial, “it has never been efficient; but it has always been free.”<sup>212</sup>

The *Apodaca* and *Johnson* rulings that left nonunanimous jury rules standing in Oregon and Louisiana deprive criminal defendants of the right to have dissenting jurors’ views count against unreliable evidence, proof of innocence, or anything else that creates reasonable doubt,<sup>213</sup> and the analyses from those cases have been repeatedly rejected by the Court’s own jurisprudence. The reasonable doubt requirement is not only “self-evident,”<sup>214</sup> but it applies equally in state proceedings.<sup>215</sup>

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<sup>207</sup> Brief of Amicus Curiae the Federal Public Defender for the District of Oregon in Support of Petitioner at 20–22, *Herrera v. Oregon*, 562 U.S. 1135 (2011) (No. 10-344).

<sup>208</sup> *Ring*, 536 U.S. at 607 (2002).

<sup>209</sup> *Riordan*, *supra* note 66, at 1426 (citing Reply Brief for Petitioner on Petition for Writ of Certiorari at 7–8, *Bowen v. Oregon*, 558 U.S. 815 (2009) (No. 08-1117)); *see also In re Winship*, 397 U.S. 358, 363–64 (“[E]very individual going about his ordinary affairs [must] have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with the utmost certainty.”).

<sup>210</sup> *Riordan*, *supra* note 66, at 1427; *State ex rel. Smith v. Sawyer*, 263 Or. 136, 138 (1972) (en banc) (stating “[i]t clearly appears from the argument in the Voters’ Pamphlet that the amendment was intended to make it easier to obtain convictions”).

<sup>211</sup> *Billeci v. United States*, 184 F.2d 394, 403 (D.C. Cir. 1950).

<sup>212</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000).

<sup>213</sup> *Johnson v. Louisiana*, 406 U.S. 380, 381 (1972) (Douglas, J., dissenting) (referring to *Winship*, “it is almost inconceivable that anyone would have questioned whether proof beyond a reasonable doubt was in fact the constitutional standard. And, indeed, when such a case finally arose we had little difficulty disposing of it”).

<sup>214</sup> *Sullivan v. Louisiana*, 508 U.S. 275, 277–78 (1993).

<sup>215</sup> “[A]s the great bulwark of [our] civil and political liberties, trial by jury has been understood to require by the truth of every accusation . . . should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant’s] equals and neighbors.” *United States v. Booker*, 543 U.S. 220, 239 (2005) (citing *Apprendi*, 530 U.S. at 477).

## IV

CURRENT RESEARCH INDICATES THAT UNANIMITY IS ESSENTIAL TO  
THE PURPOSES OF THE FAIR CROSS SECTION REQUIREMENT AND  
COMPLETE DELIBERATION REQUIRED BY THE SIXTH AMENDMENT

The Court in *Taylor v. Louisiana* confirmed that the fair cross section requirement is fundamental to a criminal defendant's Sixth Amendment right to a jury because it "guard[s] against the exercise of arbitrary power."<sup>216</sup> In *Apodaca*, however, Justice White and Justice Powell believed that unanimity did not affect the jury's ability to perform its "safeguarding function," as long as the jury was still composed of a cross section of the community and given a full opportunity to deliberate.<sup>217</sup> When *Apodaca* and *Johnson* were decided in the 1970s, little research was available on juror diversity and interaction.<sup>218</sup> The Court based its opinion concerning the fair cross section requirement on the most current available research in 1972, which had been conducted a decade earlier.<sup>219</sup>

The Justices relied in part on *The American Jury*, a study of jury verdicts in 3500 civil and criminal trials, to reach their decision in *Apodaca*.<sup>220</sup> Presumably, the Court experienced difficulty gauging whether minority viewpoints would be discarded under a nonunanimous verdict rule when the only available studies on jurors had been conducted in the late 1950s, at a time when most jurors were likely to be white males.<sup>221</sup> After the controversial decisions in *Apodaca* and *Johnson*, increased interest in juries led to new research about jury deliberation, decision-making, and juror bias.<sup>222</sup> This

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<sup>216</sup> *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

<sup>217</sup> *Id.*

<sup>218</sup> See Dennis J. Devine et. al., 7 PSYCH. PUB. POL. & L. 622, 623 (2001) (noting that only isolated studies were conducted before World War II and the first systematic research study did not begin until 1953).

<sup>219</sup> *Apodaca v. Oregon*, 406 U.S. 404, 401 n.5; *Johnson v. Louisiana*, 406 U.S. 356, 373–74 (1972) (citing H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* (Phoenix ed. 1971), and noting that "Oregon's practice may result in verdicts in some 2.5% more of the cases"). Justice Powell reasoned that "given the large number of causes to which this disparity might be attributed . . . it is impossible to conclude that this percentage represents convictions obtained under standards offensive to due process." *Johnson*, 406 U.S. at 374–75 n.12; see Devine et. al., *supra* note 218, at 622–23 (stating that the Chicago Jury Project began in 1953 and that Kalven and Ziesel's book *The American Jury* stemmed from that project).

<sup>220</sup> *Id.*; see also Devine et. al., *supra* note 218, at 623.

<sup>221</sup> See Erin York Cornwell & Valerie P. Hans, *Representation Through Participation: A Multilevel Analysis of Jury Deliberations*, 45 LAW & SOC'Y REV. 667, 670 (2011) (stating that "[t]he earliest studies lacked racial variation in jury composition").

<sup>222</sup> See Devine et. al., *supra* note 218.



research demonstrates how the nonunanimous verdict rule may deprive a criminal defendant of the right to a jury that both represents the community and is given the opportunity to fully deliberate.<sup>223</sup>

For example, the Court could not have weighed the then unknown effects of implicit bias on the jury in arriving at its decision to allow nonunanimous verdicts. Implicit bias is when “people possess attitudes over which they have little or no conscious, intentional control.”<sup>224</sup> These implicit biases, racial or otherwise, unconsciously affect how jurors view the defendant and the facts. To be clear, having an implicit racial bias does not mean someone is racially prejudiced; people who have an implicit racial bias may, in fact, renounce prejudice.<sup>225</sup> It is, instead, an unconscious reflection of societal stereotypes.<sup>226</sup>

Current research on jurors consistently shows that jurors who are similar to the defendant in “some salient respect” are biased in favor of the defendant.<sup>227</sup> A result of “jury-defendant similarity bias” is that white-majority juries are more likely to convict minority defendants than white defendants, simply because they are unlike the defendants.<sup>228</sup> Additionally, jurors may unknowingly engage in “implicit memory bias,” affecting how they remember important facts from the trial.<sup>229</sup> In one study, participants “had an easier time successfully recalling aggressive facts when the actor was African American compared to when the actor was Caucasian.”<sup>230</sup> In sum, recent research indicates that jurors sympathize with “similar” defendants while unconsciously reinforcing social stereotypes against “different” defendants.

Of course, the purpose of gathering twelve of the defendant’s peers together is to allow them to discuss and compare alternate views of the evidence presented at trial. When two of those voices may be ignored, however, there is no guarantee of a full and fair deliberation. This is partly because nonunanimous juries are more likely “to adopt a verdict-

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<sup>223</sup> Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1272–74 (2000).

<sup>224</sup> Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 354 (2007) (internal quotations omitted).

<sup>225</sup> *Id.* at 360.

<sup>226</sup> *See id.* at 363.

<sup>227</sup> Devine et al., *supra* note 218, at 673–74.

<sup>228</sup> *Id.*

<sup>229</sup> Levinson, *supra* note 224, at 345–46.

<sup>230</sup> *Id.* at 398–99.

driven deliberation style” instead of an evidence-driven style.<sup>231</sup> A verdict-driven jury will stop deliberating when a consensus is reached. Thus, if ten members on an Oregon state jury agree at the outset, no deliberation concerning the facts need take place. An evidence-driven jury will start by discussing and comparing views on the evidence. Accordingly, a verdict driven jury is unlikely to correct faulty memory due to implicit bias because the jury is likely to “skip the early story stages,” and focus on getting a verdict.<sup>232</sup> A unanimous verdict requirement, which provides no incentive for early polling that may lead to a verdict-driven deliberation style, is necessary to promote an evidence-driven deliberation style that will result in more thorough and inclusive deliberations.<sup>233</sup> Additionally, deliberating through disagreements instead of ceasing deliberation when consensus is reached promotes accuracy of the verdict reached by the jury.

Furthermore, the nonunanimous rule may play a greater role when the strength of the State’s evidence is “not particularly weak or strong.”<sup>234</sup> As Professor Michael Saks has explained, “[j]uries rarely hang unless a wide division of opinion existed at the outset. And nothing leads to differences of opinion among jurors better than ambiguity in the evidence, or plausible alternative interpretations of the evidence.”<sup>235</sup> This directly contradicts the theory that “unreasonable” jurors are the cause of hung juries; instead, an insufficiency of evidence presented by the State may be the cause of dissenting jurors. If unreasonable jurors are not the leading cause of hung juries, the nonunanimous verdict rule only exists to convict defendants without the requisite proof.

The Court assumed in *Apodaca* that the nonunanimous verdict rule would not affect jury deliberation, but it is now clear that “verdict-driven” juries engage in less deliberation, and that juries are more likely to reach an accurate decision the longer they deliberate.<sup>236</sup> This research, unavailable to the Court in 1972, highlights the importance of

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<sup>231</sup> Angela A. Allen-Bell, *How The Narrative About Louisiana’s Nonunanimous Criminal Jury System Became a Person of Interest in the Case Against Justice in the Deep South*, 67 MERCER L. REV. 585, 607 (2016).

<sup>232</sup> Levinson, *supra* note 224, at 388.

<sup>233</sup> See Nancy S. Marder, *Gender Dynamics and Jury Deliberations*, 96 YALE L.J. 593, 602 (1987).

<sup>234</sup> See Devine et. al., *supra* note 218, at 669.

<sup>235</sup> Michael J. Saks, *What do Jury Experiments Tell us About How Juries (Should) Make Decisions?*, 6 S. CAL. INTERDISC. L.J. 1, 41 (1997).

<sup>236</sup> Thomas L. Brunell et. al., *Factors Affecting the Length of Time a Jury Deliberates: Case Characteristics and Jury Composition*, 5 REV. L. & ECON., 555, 576 (2009).

unanimous verdicts, giving weight to the viewpoint of minority members to combat implicit biases in the criminal justice system. Nonunanimous verdicts, on the other hand, give juries the choice to ignore the memories of two of their peers and limits the jury members' ability to confront their own implicit biases through group discussion. Ultimately, this impacts the jury's ability to function as a jury—that is, to ensure that the State is not arbitrarily punishing citizens without sufficient evidence. As the Supreme Court explained in 1896, a criminal defendant starts “with the presumption of innocence in his favor. That stays with him until it is driven out of the case . . . when the evidence shows, beyond a reasonable doubt, that the crime as charged has been committed.”<sup>237</sup> In Oregon and Louisiana, however, the State need only convince eighty-three percent of the jurors (ten of twelve) in order to “drive out” this presumption of innocence.<sup>238</sup>

The Supreme Court theorized in *Apodaca* that a majority of the jury would carefully consider the objections of minority jurors before overruling minority opinions.<sup>239</sup> Jury operation in practice, which is carefully screened off from the public, makes the practical effect of *Apodaca* hard to identify or prove. Although jury data on nonunanimous juries is sparse, the next case example illustrates how the nonunanimous verdict rule can affect the jury.

In 2016, an Oregon jury reached a nonunanimous verdict to convict Olan Jermaine Williams, a black male accused of two counts of sodomy in the first degree, over the objections of the only black juror.<sup>240</sup> Mr. Williams is a married Howard University graduate with a Master's Degree.<sup>241</sup> The jury was composed of three men and nine women; nine of the jurors were white, two were Asian, and one juror was black.<sup>242</sup>

After hearing the State's evidence against Mr. Williams, the jury quickly and unanimously voted Mr. Williams not guilty as to the second count. On the first count however, relating to the performance

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<sup>237</sup> *Allen v. United States*, 164 U.S. 492, 500 (1896).

<sup>238</sup> *Esmán*, *supra* note 2.

<sup>239</sup> *Apodaca v. Oregon*, 406 U.S. 404, 413 (1972).

<sup>240</sup> Sentencing Transcript at 469, *State v. Williams*, No. 15 CR 58698 (2016) (on file with the author).

<sup>241</sup> Trial Transcript at 311, 366, *State v. Williams*, No. 15 CR 58698 (2016) (on file with the author).

<sup>242</sup> E-mail from Ryan Scott, attorney for Mr. Williams, to author (Aug. 25, 2016, 16:04 PST) (on file with author); e-mail from Ryan Scott, attorney for Mr. Williams, to author (Sept. 6, 2016, 13:32 PST) (on file with author).

of oral sex, the jury split: eight jurors believed Mr. Williams to be guilty, three jurors believed Mr. Williams to be innocent, and one was on the fence. After some deliberation, the jury split 9–3.<sup>243</sup>

In the next four hours of deliberation, the majority jurors mainly focused on swaying the only black juror. One white juror in the majority did not find the black defendant credible. One Asian juror told the black juror that in believing and advocating for the defendant's innocence, the black juror was condoning rape in general.<sup>244</sup>

When the court clerk came in to ask when the jury would be back the next day in order to finish deliberating, the majority jurors began focusing their efforts on reaching enough of a consensus (10–2) to avoid returning the next day.<sup>245</sup> The black juror and one white juror remained steadfast that the defendant was innocent.<sup>246</sup> Another juror expressed that she did not wish to come back the next day, and could not stay late because of her childcare arrangement; she switched her vote.<sup>247</sup> Because of this last minute swing vote, pressured by majority jurors, and the nonunanimous verdict rule in Oregon, Mr. Williams is now a convicted sex offender who will spend time in prison.<sup>248</sup>

## V

### CONTINUED RELIANCE ON *APODACA* RISKS WRONGFUL CONVICTIONS

Nonunanimous jury guilty verdicts create an unacceptable risk of convicting the innocent. At the time of writing this Article, there are 1888 known exonerations in the United States; these are cases in which a person was wrongly convicted of a crime and later cleared of the

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<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> Sentencing Transcript at 469, *State v. Williams*, No. 15 CR 58698 (2016) (on file with the author).

<sup>248</sup> *Id.* Mr. Williams brought a motion for new trial in circuit court arguing that as applied to his trial, Oregon's nonunanimous jury rule violated his rights under the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. *Williams*, 15 CR 58698 at 5–6 (order denying a new trial) (on file with the author). Although the court ultimately ruled that it could not grant a new trial because of the defendant's failure to articulate a remedy sufficient to prevent a similar occurrence in a subsequent jury trial and on other evidentiary grounds, it addressed the long history of racial discrimination in the Oregon criminal justice system, *id.* at 8–15, and found that "race and ethnicity was a motivating factor in the passage of [the nonunanimous jury rule in Oregon]," *id.* at 16.

charges based on new evidence of innocence.<sup>249</sup> These documented cases provide valuable information about the causes of wrongful conviction; which include eyewitness misidentification, false confessions, invalidated or improper science, inadequate defense, and government misconduct.<sup>250</sup> In each of these cases, there are a variety of factors that led to each wrongful conviction from mistakes to intentional wrongdoing to issues of race and class.<sup>251</sup> Unless significant changes are made to our criminal justice system, these system failures will continue to contribute to criminal defendants, especially those who are poor, being wrongfully convicted.<sup>252</sup>

Due to Oregon and Louisiana's nonunanimous jury rules, defendants in these states also face the added possibility of being convicted of a crime they did not commit. While having a unanimous jury does not automatically ensure that an innocent person will not be wrongfully convicted, a nonunanimous jury certainly eliminates the most obvious scenario of preventing a wrongful conviction: that someone on the jury believes in the defendant's innocence or that the State has not met its burden of proving its case beyond a reasonable doubt. In the forty-eight other states, having a unanimous jury could prevent a wrongful conviction from occurring at trial. A majority verdict not only deprives a defendant from being spared by the one or two jurors believing in either his innocence or that the State has not met its burden, but it also deprives the jurors of having their dissenting voices count as a safeguard against unreliable evidence, government misconduct and/or system failures. As discussed above, it is difficult to understand how a

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<sup>249</sup> *Exoneration Registry*, THE NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/featured.aspx> (last visited Feb. 5, 2017); *Glossary*, THE NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/glossary.aspx> (last visited Feb. 5, 2017).

<sup>250</sup> *Glossary*, THE NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/glossary.aspx>.

<sup>251</sup> *Exonerations by Race and Crime*, THE NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/ExonerationsRaceByCrime.aspx> (last visited Feb. 5, 2017); *Basic Patterns*, THE NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/Basic-Patterns.aspx> (last visited Feb. 5, 2017).

<sup>252</sup> *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*, 2004 A.B.A. STANDING COMMITTEE ON LEGAL AID & INDIGENT DEFENDANTS 3-4, 7 (2004), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_bp\\_execsummary.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_execsummary.authcheckdam.pdf) (reporting that thousands of suspects who are unable to afford lawyers are wrongfully convicted because they are pressured into plea deals or have incompetent representation).

jury can meet the standard of “guilty proof beyond a reasonable doubt” when one or two jurors find reasonable doubt in the State’s case.

In Oregon, one of the ten documented exonerations was based on a nonunanimous jury conviction.<sup>253</sup> In 1999, Pamela Reser was convicted by a nonunanimous jury of seventeen counts of first-degree rape, eight counts of sodomy, and four counts of first-degree sex abuse, as a result of allegations made by her own children.<sup>254</sup> She was sentenced to 116 years in prison.<sup>255</sup> In 2002, two of her children recanted to their foster parent, which spurred a new investigation into the case by the Oregon State Police.<sup>256</sup> Ultimately, all four children recanted and passed polygraph tests.<sup>257</sup> After the State and the defendant filed a joint motion for a new trial, the charges against Ms. Reser were dismissed, and she was released from prison.<sup>258</sup>

Interestingly, while not convicted by a nonunanimous jury, Oregon exoneree Christopher Boots’ case is precedent setting in the area of jury concurrence.<sup>259</sup> As noted above, article I, section 11, of the Oregon Constitution<sup>260</sup> requires that, for crimes other than first-degree/capital murder, at least ten jurors must agree on the factual occurrences that constitute the crime in order to render a guilty verdict.<sup>261</sup> As a result, when the State has presented evidence of multiple specific incidents that could support a charge against a defendant, the court must instruct the jury on “the necessity of agreement on all material elements of a charge in order to convict.”<sup>262</sup> The required instruction is often referred to as a concurrence or “*Boots*” instruction.<sup>263</sup>

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<sup>253</sup> *Exoneration Detail List*, THE NAT’L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/detailist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=ST&FilterValue1=OR> (last visited Feb. 5, 2017); OR. INNOCENCE PROJECT, <http://ojrc.info/oregon-innocence-project/> (last visited Feb. 5, 2017). Importantly, most of the Oregon exonerees were not subject to nonunanimous juries at trial because of the seriousness of the crimes involved.

<sup>254</sup> *Pamela Sue Reser*, THE NAT’L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3571> (last visited Feb. 5, 2017).

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *See State v. Boots*, 780 P.2d 725, 731 (Or. 1989).

<sup>260</sup> OR. CONST. art. I, § 11 (2015).

<sup>261</sup> *State v. Rodriguez-Castillo*, 151 P.3d 931, 940 (Or. Ct. App. 2007), *rev’d*, 188 P.3d 268 (Or. 2008).

<sup>262</sup> *State v. Lotches*, 17 P.3d 1045, 1057 (Or. 2000).

<sup>263</sup> *See Boots*, 780 P.2d at 728 (explaining the concurrence requirement).

In 1983, Mr. Boots was arrested and charged with murder and first-degree robbery as a result of the death of a nineteen-year-old convenience store clerk.<sup>264</sup> These charges were dropped due to insufficient evidence.<sup>265</sup> The case was reopened a few years later and he was subsequently tried and convicted of aggravated murder in 1987; he was sentenced to life in prison.<sup>266</sup> Mr. Boots was charged with aggravated murder based on two different theories: (1) that he committed the homicide in the course of committing robbery in the first degree, and (2) that he committed the homicide to conceal the identity of the perpetrators of the robbery.<sup>267</sup> At trial, the court instructed the jury that it was not necessary for them to agree on the theory of aggravated murder.<sup>268</sup> The Oregon Supreme Court however concluded that the trial court erred in instructing the jury that their agreement was not required:

Like the “reasonable doubt” standard, which was found to be an indispensable element in all criminal trials in *In re Winship*, the unanimous jury requirement “impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.” The unanimity rule thus requires jurors to be in substantial agreement as to just what a defendant did as a step preliminary to determining whether the defendant is guilty of the crime charged. Requiring the vote of twelve jurors to convict a defendant does little to insure that his right to a unanimous verdict is protected unless this prerequisite of jury consensus as to the defendant’s course of action is also required.<sup>269</sup>

Interestingly, in reaching its decision, the Oregon Supreme Court spoke passionately about both the reasonable doubt standard and unanimous jury requirement. Following the 1989 ruling, Boots was retried (in a limited trial) and convicted of aggravated murder by a

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<sup>264</sup> *Christopher Boots*, THE NAT’L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3034> (last visited Feb. 5, 2017).

<sup>265</sup> *Id.*

<sup>266</sup> *State v. Boots*, 767 P.2d 450, 450 (Or. Ct. App), *rev’d*, 780 P.2d 725 (Or. 1989).

<sup>267</sup> *Boots*, 780 P.2d at 727.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at 730–31 (quoting *United States v. Gipson*, 553 F.2d 453, 457–58 (5th Cir. 1977)) (internal citations omitted). Accordingly, in distinguishing between facts that require jury agreement and those that do not, the Court explained: “We are not speaking here of factual details, such as whether a gun was a revolver or a pistol and whether it was held in the right or the left hand. We deal with facts that the law (or the indictment) has made essential to a crime.” *Id.* at 730.

unanimous jury.<sup>270</sup> Mr. Boots was exonerated in 1995 after the real killer confessed to the murder in a recorded conversation with a police informant, and DNA testing led to a reinvestigation of the case, which revealed he was convicted based on shoddy forensics.<sup>271</sup>

Unlike in Oregon, in Louisiana, “a jury is not constitutionally required to agree on a single theory to convict a defendant where it is instructed as to alternative theories. Thus, a conviction can be upheld if there is sufficient evidence based on either of the alternate theories with which the jury is charged.”<sup>272</sup> Of the forty cases in Louisiana that have resulted in exonerations, twenty of them were tried in a manner that allowed conviction by nonunanimous jury verdicts.<sup>273</sup> In nine of these twenty cases, the guilty verdict was returned by a nonunanimous jury and these nine individuals served a total of 131.5 years of hard labor for crimes they did not commit.<sup>274</sup> In at least these nine cases, nonunanimous verdicts allowed jurors who justifiably did not vote to convict the defendant to be overruled by the majority. While it is impossible to say how the outcome would have changed had the jury been required to reach a unanimous verdict, it is clear that the nonunanimous verdict rule played a role in their wrongful conviction.

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<sup>270</sup> *Christopher Boots*, THE NAT’L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3034> (last visited Feb. 5, 2017).

<sup>271</sup> *Id.*

<sup>272</sup> *State v. Patorno*, 822 So. 2d 141, 149 (La. Ct. App. 2002) (internal citations omitted).

<sup>273</sup> *State v. Cheryl Beridone*, Terrebone Parish Case No. 78,042; *State v. Gene Bibben*, East Baton Rouge Parish Case No. 2-87-979; *State v. Gregory Bright*, Orleans Parish Case No. 252-514; *State v. Earl Truvia*, Orleans Parish Case No. 252-514; *State v. Dennis Brown*, St. Tammany Parish Case No. 128-634; *State v. Gerald Burge*, St. Tammany Parish Case No. 147,175; *State v. Vernon Chapman*, St. Tammany Parish Case No. 71,385; *State v. Clyde Charles*, Terrebonne Parish Case No. 106,980; *State v. Glenn Davis*, Jefferson Parish Case No. 92-4541; *State v. Larry Delmore*, Jefferson Parish Case No. 92-4541; *State v. Terrence Meyers*, Jefferson Parish Case No. 92-4541; *State v. Douglas Dilosa*, Jefferson Parish Case No. 87-105; *State v. Travis Hayes*, Jefferson Parish Case No. 97-3780; *State v. Willie Jackson*, Jefferson Parish Case No. 87-205; *State v. Henry James*, Jefferson Parish Case No. 81-4366; *State v. Anthony Johnson*, Washington Parish Case No. 89-CRC-39701; *State v. Craig Johnson*, Orleans Parish Case No. 380-395; *State v. Rickey Johnson*, Sabine Parish Case No. 30,770; *State v. John Thompson*, Orleans Parish Case No. 306-526; *State v. Michael Anthony Williams*, Jackson Parish Case No. 20,387. Out of the twenty remaining, thirteen were tried as first degree murder cases and thus were not eligible for nonunanimous juries, four had bench trials, and two pled guilty. Brief of Innocence Project New Orleans as Amicus Curiae in Support of Petitioner at 11, *Jackson v. Louisiana*, 134 S. Ct. 1950 (2014) (No.13-1105).

<sup>274</sup> Brief of Innocence Project New Orleans as Amicus Curiae in Support of Petitioner, *supra* note 273, at 12; e-mail from Emily Maw, Director, Innocence Project New Orleans, to Aliza Kaplan (June 13, 2016, 17:16 PDT) (on file with author).



For example, a nonunanimous jury convicted Rickie Johnson in 1983 and sentenced him to life in prison without parole.<sup>275</sup> Tests conducted by the Shreveport Crime Lab determined that evidence collected from the victim included sperm from the perpetrator, and serological testing showed that Johnson—and thirty-five percent of the African American population—could have been the contributor.<sup>276</sup> The victim also identified Johnson as the perpetrator, even though he had a prominent gold tooth that was never part of her description of her attacker.<sup>277</sup> In 2008, after serving twenty-five years in prison, Johnson became the first person exonerated based on mini-STR technology, which allows labs to accurately test degraded or small samples of DNA.<sup>278</sup>

In 1986, Gene Bibbins was convicted by a nonunanimous jury of the aggravated rape of a teenage woman in Baton Rouge. Bibbins, who lived in the same apartment complex as the victim, was found near the scene of the crime with a radio belonging to the victim, which he had coincidentally found outside, in between their buildings.<sup>279</sup> The police brought him to the apartment building where the crime occurred; he remained in the car with a flashlight illuminating his face while the victim identified him.<sup>280</sup> The State relied heavily on this identification at trial.<sup>281</sup> At the time of the crime, Bibbins could not be excluded by the limited DNA technology available. However, sixteen years later in 2002, Bibbins became the first inmate in Louisiana to gain access to biological evidence under the State's post-conviction DNA testing statute.<sup>282</sup> This new testing exonerated Bibbins.<sup>283</sup>

In 1993, Glenn Davis, Larry Delmore, and Terrence Meyers were convicted of second-degree murder by a nonunanimous jury verdict, and sentenced to life in prison without parole.<sup>284</sup> Their convictions

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<sup>275</sup> *Rickie Johnson*, THE INNOCENCE PROJECT (2016), <http://www.innocenceproject.org/cases/rickie-johnson/> (last visited Feb. 5, 2017).

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> *Gene Bibbins*, THE INNOCENCE PROJECT (2016), <http://www.innocenceproject.org/cases/gene-bibbins/> (last visited Feb. 5, 2017).

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> *Larry Delmore*, INNOCENCE PROJECT NEW ORLEANS, <http://www.ip-no.org/exonoree-profile/larry-delmore> (last visited Feb. 5, 2017).

were based on the testimony of just one witness, who identified them as the perpetrators and also admitted to have smoked crack an hour before the crime occurred.<sup>285</sup> The defendants were convicted despite two of the jurors finding reasonable doubt in the witness' credibility.<sup>286</sup> In 2004, the three men were released on bond shortly after the discovery of exculpatory evidence, including the confession of the real killer.<sup>287</sup> An appellate court set aside the verdicts and ordered a new trial.<sup>288</sup> The State eventually dismissed all charges against the trio in 2010, after they had served more than seventeen years in prison.<sup>289</sup>

These are just a few examples of the known individuals who were convicted by nonunanimous juries and proven innocent years later. Likely, there have been other innocent people who were convicted by nonunanimous juries in Oregon and Louisiana, but unfortunately, they will probably not be able to prove their innocence. In general, it is extremely difficult for a wrongfully convicted person to prove his innocence by simply arguing that he is innocent. In fact, without DNA evidence that directly proves innocence, even in cases that involve the known causes of wrongful conviction,<sup>290</sup> the likelihood of a court actually reviewing a claim for innocence is exceedingly rare.<sup>291</sup> So, not only are defendants convicted by nonunanimous juries in Oregon and Louisiana facing convictions that they may not have received in forty-eight states, if they are innocent, they will have a hard time proving it. Unlike some of the other causes contributing to wrongful conviction, the nonunanimous verdict rule is easily identifiable and could be eliminated without prejudicing the State. Furthermore, arguments

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<sup>285</sup> *Id.*

<sup>286</sup> Kyle R. Satterfield, *Circumventing Apodaca: An Equal Protection Challenge to Nonunanimous Jury Verdicts in Louisiana*, 90 TUL. L. REV. 693, 703 (2016). "Both of the jurors who did not vote for conviction were black and were two of only three black jurors serving on the jury." *Id.*

<sup>287</sup> Glenn Davis, THE NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3158> (last visited Feb. 5, 2017).

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> The known causes of wrongful convictions are eyewitness misidentification, junk science, false confessions, government misconduct, snitches, and bad lawyering. *Causes of Wrongful Convictions*, UNIV. OF MICH., <https://www.law.umich.edu/clinical/innocenceclinic/Pages/wrongfulconvictions.aspx>. (last accessed Feb. 5, 2017).

<sup>291</sup> In 2011, Professor Brandon Garrett examined whether judicial remedies helped 250 of the first DNA exonerees. He found that of those who challenged their convictions in court prior to DNA testing, more than ninety percent failed. BRANDON GARRETT, *CONVICING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* (Harvard Univ. Press 2012).

concerning efficiency fall short in the face of the tragedy of imprisoning an innocent person.

## VI

### THE NONUNANIMOUS VERDICT RULE FURTHER HARMS MINORITIES ALREADY EXPERIENCING DISCRIMINATION IN OREGON'S CRIMINAL JUSTICE SYSTEM

According to Justice Stewart, dissenting in *Johnson v. Louisiana*, a further problem with nonunanimous juries is that the jurors in the majority “can simply ignore the views of their fellow panel members of a different race or class.”<sup>292</sup> As discussed above, the original purposes of Oregon’s nonunanimous rule was in fact to silence the views of minorities and make it easier to convict defendants—while demographics may have changed some, these original intentions are still at play today.

Historically, in Oregon and around the country, minorities were denied the opportunity to sit on juries<sup>293</sup> and more recently, studies show that discrimination still exists in Oregon’s criminal justice system, including its jury system. For example, in the 1990s, an Oregon study acknowledged that “[t]oo few minorities are called for jury duty, and even fewer minorities actually serve on Oregon juries” and that “[p]eremptory challenges . . . are used solely because of the race or ethnic background of prospective jurors.”<sup>294</sup> And as discussed above, studies support that nonunanimous juries make it likely that minority jury members’ viewpoints can easily be silenced.<sup>295</sup> But even when Oregon prosecutors comply with the law<sup>296</sup> by permitting blacks and

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<sup>292</sup> *Johnson v. Louisiana*, 406 U.S. 356, 397 (1972) (Stewart, J., dissenting).

<sup>293</sup> Rose Jade, *Voter Registration Status as a Jury Service Employment Test: Oregon’s Retracted Endorsement Following Buckley v. American Constitutional Law Foundation, Inc.*, 39 WILLAMETTE L. REV. 557, 562–74 (2003); Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 884–85 (1994).

<sup>294</sup> THE OREGON SUPREME COURT TASK FORCE ON RACIAL/ETHNIC ISSUES IN THE JUDICIAL SYSTEM, MAY 1994 REPORT (1994), [http://courts.oregon.gov/OJD/docs/osca/cpsd/courtimprovement/access/rac\\_eth\\_tfr.pdf](http://courts.oregon.gov/OJD/docs/osca/cpsd/courtimprovement/access/rac_eth_tfr.pdf) (last visited Feb. 5, 2017) [hereinafter 1994 REPORT].

<sup>295</sup> AM. BAR ASS’N, PRINCIPLES FOR JURIES AND JURY TRIALS WITH COMMENTARY 24 (2005), [http://www.americanbar.org/content/dam/aba/administrative/american\\_jury/final\\_commentary\\_july\\_1205.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/american_jury/final_commentary_july_1205.authcheckdam.pdf) (“A non-unanimous decision rule allows juries to reach a quorum without seriously considering minority voices, thereby effectively silencing those voices and negating their participation.”).

<sup>296</sup> *Batson v. Kentucky*, 476 U.S. 79 (1986); 1994 REPORT, *supra* note 294.

other minority citizens to serve as jurors, due to the nonunanimous jury rule, a majority of jurors can still easily dismiss the votes of minority jurors should they vote against conviction. Oregon not only has a population with few racial and ethnic minorities and a history of institutionalized racism, it also has documented structural racial disparity in its criminal justice system.<sup>297</sup> Allowing nonunanimous jury verdicts not only contributes to perpetuating the structural racism in Oregon's criminal justice system, but it leaves little faith in our deliberative jury process.

Understanding how the nonunanimous jury rule contributes to perpetuating structural racism in Oregon requires an appreciation of the state's tarnished history in regards to systemic racial prejudices—this history is deep and covers all aspects of society.<sup>298</sup> As not to stray too far off the subject of criminal justice, here are some historical highlights. In 1859, Oregon became the only state admitted to the Union with an exclusion law written into the state's constitution, which prevented African Americans from settling or owning property in the state.<sup>299</sup> In 1868, the Oregon legislature rescinded their ratification of the Fourteenth Amendment of the United States Constitution.<sup>300</sup> In 1883, Oregonians voted down an amendment that would have granted black suffrage, despite the fact that the issue had already been rendered moot by the ratification of the Fifteenth Amendment to the United States Constitution.<sup>301</sup>

As noted above, in 1922, following World War I and an influx in minority communities in Oregon, the Ku Klux Klan was formed.<sup>302</sup> Throughout the 1920s Klan membership flourished and its influence grew in Oregon.<sup>303</sup> In 1926, with the passage of Measure 3, Oregonians finally voted to remove the exclusionary language from the Bill of

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<sup>297</sup> See 1994 REPORT, *supra* note 294.

<sup>298</sup> For a good and recent article about discriminatory practices in Oregon outside the criminal justice system, see Alana Semuels, *The Racist History of Portland, the Whitest City in America*, THE ATLANTIC (July 22, 2016), <http://www.theatlantic.com/business/archive/2016/07/racist-history-portland/492035/>.

<sup>299</sup> OR. CONST. art. I, § 35 (1857).

<sup>300</sup> Douglas H. Bryant, *Unorthodox and Paradox: Revisiting the Ratification of the Fourteenth Amendment*, 53 ALA. L. REV. 555, 564 (2002).

<sup>301</sup> *Diversity & Inclusion: Making Us Stronger—1638-1899*, OREGON STATE BAR, <https://storywall.osbar.org/1638-1899/> (last visited Feb. 5, 2017).

<sup>302</sup> See *supra* note 8 and accompanying text.

<sup>303</sup> David Horowitz, *Social Morality and Personal Revitalization: Oregon's Ku Klux Klan in the 1920s*, 90 OR. HIST. Q. 4, 365, 369 (1989).

Rights in the Oregon Constitution.<sup>304</sup> In addition to these major instances of systemic inequities, the time period from statehood until the 1950s was checkered with segregation, anti-miscegenation, indigenous relocation, racially discriminatory taxes, redlining, property ownership restrictions, and the list goes on.<sup>305</sup>

The late 1950s saw the beginning of the elimination of statutory discrimination with, among others, the passage of the Oregon Fair Housing Act, the ratification of the Fifteenth Amendment, and desegregation orders.<sup>306</sup> However, many unofficial discriminatory practices still persisted. For example, many cities and towns in Oregon had “Sundown Laws” which warned blacks and people of color to be out of town by sundown.<sup>307</sup> Additionally, even though redlining rules had been officially removed from the Oregon Real Estate code, many of those practices were unofficially continued for decades.<sup>308</sup> Throughout the 1970s and 1980s, urban decay took its hold on Portland’s minority communities, as was the case for many cities in the United States at the time.<sup>309</sup> These areas experienced a significant decline in standard of living and an increase in crime and gang activity.<sup>310</sup>

In 1973, Oregon legislators noticed, surprisingly, that the state had never officially ratified the Fourteenth Amendment.<sup>311</sup> Subsequently, as a result of the hard work of William McCoy, the first African American elected to the Oregon Legislature, House Joint Resolution 13 passed overwhelmingly, and Oregon officially ratified the Fourteenth

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<sup>304</sup> *Oregon Repeal on Forbiddance on “Free Negro and Mullato” People, Measure 3* (1926), BALLOTOPEDIA, [https://ballotpedia.org/Oregon\\_Repeal\\_of\\_Forbiddance\\_on\\_%22Free\\_Negro\\_and\\_Mullato%22\\_People,\\_Measure\\_3\\_\(1926\)](https://ballotpedia.org/Oregon_Repeal_of_Forbiddance_on_%22Free_Negro_and_Mullato%22_People,_Measure_3_(1926)) (last visited Feb. 5, 2017).

<sup>305</sup> Elaine Rector, *Looking Back in Order to Move Forward: An Often Untold History Affecting Oregon’s Past, Present, and Future*, THE CITY OF PORTLAND BUREAU OF PLANNING AND SUSTAINABILITY, <https://www.portlandoregon.gov/bps/article/412697> (last revised May 16, 2010).

<sup>306</sup> *Id.*

<sup>307</sup> Alex Notman, *Oregon’s Hidden History Exposed*, EUGENE WKLY., Feb. 27, 2014, <http://eugeneweekly.com/20140227/news-briefs/oregon%E2%80%99s-hidden-history-exposed>.

<sup>308</sup> Dr. Mark Strong, *Displacement in North and Northeast Portland—An Historical Overview*, PORTLAND HOUSING BUREAU, <https://www.portlandoregon.gov/phb/article/517236> (last visited Feb. 5, 2017).

<sup>309</sup> It is important to note that the vast majority of people of color living in Oregon, lived and continue to live in Portland.

<sup>310</sup> *Id.*

<sup>311</sup> Cheryl A. Brooks, *Race, Politics, and Denial: Why Oregon Forgot to Ratify the Fourteenth Amendment*, 83 OR. L. REV. 731, 752 (2004).

Amendment on May 21, 1973.<sup>312</sup> However, this ratification was never officially reported, as the historical notes in the annotated United States Code only note the rescission and not the ratification.<sup>313</sup> More recent studies<sup>314</sup> show that “black families lag far behind whites in the Portland region in employment, health outcomes, and high-school graduation rates. They also lag behind black families nationally.”<sup>315</sup>

Minorities have fared similarly in Oregon’s criminal justice system. Throughout the 1980s and 1990s, following the same parallels as the rest of the country, the Oregon constituency and the Oregon Legislature began passing “tough on crime” laws.<sup>316</sup> These laws have had disproportionately negative direct and indirect effects on people of color around the country, including Oregon.<sup>317</sup> In 1988, Measure 4 was passed which required full sentences without parole or probation for certain felonies.<sup>318</sup> In 1994, Measures 10 and 11 were passed, which required mandatory minimum sentences for certain offenses and restricted the legislature’s ability to reduce voter approved sentence without a two-thirds vote.<sup>319</sup> In 1997, Measure 49 passed, which amended the constitution to state that inmates have no legal right, and no legally enforceable cause of action, to a job or work, or training and

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<sup>312</sup> *Id.* at 752–53.

<sup>313</sup> *Id.* at 754.

<sup>314</sup> See generally L. BATES, A. CURRY-STEVENS & COAL. OF CMTYS OF COLOR, THE AFRICAN-AMERICAN COMMUNITY IN MULTNOMAH COUNTY: AN UNSETTLING PROFILE (2014), <http://static1.squarespace.com/static/5501f6d4e4b0ee23fb3097ff/t/556d3996e4b09da5e9a521df/1433221526152/African-American-report-FINAL-January-2014.pdf>.

<sup>315</sup> Semuels, *supra* note 298.

<sup>316</sup> For example, Oregon passed Ballot Measure 11 in 1994, establishing mandatory minimum sentencing for some crimes.

<sup>317</sup> Carrie Johnson, *20 Years Later, Parts Of Major Crime Bill Viewed As Terrible Mistake*, NPR (Sept. 12, 2014, 3:32 AM), <http://www.npr.org/2014/09/12/347736999/20-years-later-major-crime-bill-viewed-as-terrible-mistake>; CAMPAIGN FOR YOUTH JUSTICE & P’SHP FOR SAFETY AND JUSTICE, MISGUIDED MEASURES: THE OUTCOMES AND IMPACTS OF MEASURE 11 ON OREGON’S YOUTH 39–50 (2011), [http://www.campaignfor-youthjustice.org/documents/Misguided\\_Measures\\_July\\_2011.pdf](http://www.campaignfor-youthjustice.org/documents/Misguided_Measures_July_2011.pdf).

<sup>318</sup> *Oregon Certain Felons to Serve Full Sentences, Measure 4 (1988)*, BALLOTPEDIA, [https://ballotpedia.org/Oregon\\_Certain\\_Felons\\_to\\_Serve\\_Full\\_Sentences,\\_Measure\\_4\\_\(1988\)](https://ballotpedia.org/Oregon_Certain_Felons_to_Serve_Full_Sentences,_Measure_4_(1988)) (last visited Feb. 5, 2017).

<sup>319</sup> *Oregon Legislature Cannot Reduce Voter-Approved Sentence Without Supermajority, Measure 10 (1994)*, BALLOTPEDIA, [https://ballotpedia.org/Oregon\\_Legislature\\_Cannot\\_Reduce\\_Voter-Approved\\_Sentence\\_Without\\_Supermajority,\\_Measure\\_10\\_\(1994\)](https://ballotpedia.org/Oregon_Legislature_Cannot_Reduce_Voter-Approved_Sentence_Without_Supermajority,_Measure_10_(1994)) (last visited Feb. 5, 2017); *Oregon Certain Felons to Serve Full Sentences, Measure 4 (1988)*, BALLOTPEDIA, [https://ballotpedia.org/Oregon\\_Mandatory\\_Sentences\\_for\\_Listed\\_Felonies,\\_Measure\\_11\\_\(1994\)](https://ballotpedia.org/Oregon_Mandatory_Sentences_for_Listed_Felonies,_Measure_11_(1994)) (last visited Feb. 5, 2017).

educational programs.<sup>320</sup> In 1999 a few measures were passed: Measure 71 limited a judge's discretion in pretrial release decisions;<sup>321</sup> Measure 74 constitutionally adopted 1988's Measures 3 and 4,<sup>322</sup> and Measure 75 restricted people from serving on grand juries and criminal trial juries that either had a felony conviction in the past fifteen years or certain misdemeanor convictions in the past five years.<sup>323</sup> Finally, in 2008, Measure 57 increased sentences for high-quantity or repeat drug crimes and repeat property crimes under certain circumstances.<sup>324</sup> These crimes are usually committed by people using drugs, and not drug traffickers.<sup>325</sup>

In 1989, the Oregon Supreme Court Chief Justice Edwin Peterson attended a national conference for state supreme court chief justices where he saw many of his colleagues report on racial bias and inequities in their jurisdictions.<sup>326</sup> This spurred Justice Peterson to establish his own task force on racial/ethnic issues in Oregon's judicial system.<sup>327</sup> This task force released a comprehensive report in May 1994.<sup>328</sup> Some of the major findings of that task force included: too few minorities are called for jury duty, and even fewer minorities actually serve on Oregon juries; peremptory challenges are used solely because of the race or ethnic background of prospective jurors; in the criminal justice area, the evidence suggests that, as compared to other similarly situated non-minorities, minorities are more likely to be

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<sup>320</sup> *Oregon State Prisoner Employees' Rights and Interstate Commerce, Measure 49 (May 1997)*, BALLOTPEdia, [https://ballotpedia.org/Oregon\\_State\\_Prisoner\\_Employees\\_%27\\_Rights\\_and\\_Interstate\\_Commerce,\\_Measure\\_49\\_\(May\\_1997\)](https://ballotpedia.org/Oregon_State_Prisoner_Employees_%27_Rights_and_Interstate_Commerce,_Measure_49_(May_1997)) (last visited Feb. 5, 2017).

<sup>321</sup> *Oregon Limited Pretrial Release of Accused Violent Felons, Measure 71 (1999)*, BALLOTPEdia, [https://ballotpedia.org/Oregon\\_Limited\\_Pretrial\\_Release\\_of\\_Accused\\_Violent\\_Felons,\\_Measure\\_71\\_\(1999\)](https://ballotpedia.org/Oregon_Limited_Pretrial_Release_of_Accused_Violent_Felons,_Measure_71_(1999)) (last visited Feb. 5, 2017).

<sup>322</sup> *Oregon Term of Imprisonment to be Fully Served, Measure 74 (1999)*, BALLOTPEdia, [https://ballotpedia.org/Oregon\\_Term\\_of\\_Imprisonment\\_to\\_be\\_Fully\\_Served,\\_Measure\\_74\\_\(1999\)](https://ballotpedia.org/Oregon_Term_of_Imprisonment_to_be_Fully_Served,_Measure_74_(1999)) (last visited Feb. 5, 2017).

<sup>323</sup> *Oregon Felons Banned from Serving on Juries, Measure 75 (1999)*, BALLOTPEdia, [https://ballotpedia.org/Oregon\\_Felons\\_Banned\\_from\\_Serving\\_on\\_Juries,\\_Measure\\_75\\_\(1999\)](https://ballotpedia.org/Oregon_Felons_Banned_from_Serving_on_Juries,_Measure_75_(1999)) (last visited Feb. 5, 2017).

<sup>324</sup> *Oregon Criminal Sentence, Measure 57 (2008)*, BALLOTPEdia, [https://ballotpedia.org/Oregon\\_Criminal\\_Sentence,\\_Measure\\_57\\_\(2008\)](https://ballotpedia.org/Oregon_Criminal_Sentence,_Measure_57_(2008)) (last visited Feb. 5, 2017).

<sup>325</sup> *List of Oregon Ballot Measures*, BALLOTPEdia, [https://ballotpedia.org/List\\_of\\_Oregon\\_ballot\\_measures](https://ballotpedia.org/List_of_Oregon_ballot_measures) (last visited Feb. 5, 2017).

<sup>326</sup> Casey Parks, *Oregon State Bar Diversity: Racial Bias Report 'true today just as it was in 1994,' Chief Justice says*, THE OREGONIAN (Jan. 14, 2015), [http://www.oregonlive.com/portland/index.ssf/2015/01/oregon\\_state\\_bar\\_diversity\\_rac.html](http://www.oregonlive.com/portland/index.ssf/2015/01/oregon_state_bar_diversity_rac.html).

<sup>327</sup> *Id.*

<sup>328</sup> 1994 REPORT, *supra* note 294.

arrested, charged, convicted and incarcerated, and less likely to be released on bail or put on probation.<sup>329</sup> The task force also recommended that an implementation committee be formed that would oversee the implementation of the recommendations made by the task force.<sup>330</sup> This Committee met and released progress reports through 2006.<sup>331</sup> A close look at these progress reports reveals that no substantive progress was made in the implementation of the recommendations.<sup>332</sup>

One major area addressed in the 1994 report was minority representation on juries.<sup>333</sup> This is a major issue in the discussion of fairness and nonunanimous juries. In the report, Recommendation 7-1 stated that the Chief Justice should increase the number of minorities on the source list and implement changes permissible under the law.<sup>334</sup> In the Implementation Progress Report, released in 1996, Recommendation 7-1 was determined to be unnecessary in the future because the lack of minority representation on juries was more directly related to the summons process and juror experience.<sup>335</sup> As a result, the Implementation Committee turned its focus toward helping draft and support legislation that would improve juror experiences by increasing compensation, providing compensation for childcare, and providing travel reimbursements. Unfortunately, the Legislature was not on the

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<sup>329</sup> *Id.*

<sup>330</sup> *Id.* at 2.

<sup>331</sup> The Oregon Supreme Court then established the Oregon Supreme Court Implementation Committee to oversee implementation of the recommendations of the Racial/Ethnic Issues Task Force. The Implementation Committee worked from June 1994 to January 1996 to determine the status of each task force recommendation. Committee members met with all justice system entities to which the Task Force directed its recommendations and offered its help. First and foremost, the Implementation Committee recommended that the Oregon Judicial Department take responsibility for coordinating a long-term effort to monitor implementation, collect data, and help initiate new programs to implement Task Force recommendations. To this end, Chief Justice Carson established the Access to Justice for All Committee in March 1997.

OR. JUDICIAL DEP'T, ABOUT THE ACCESS COMMITTEE, <http://courts.oregon.gov/OJD/OSCA/cpsd/courtimprovement/access/pages/aboutus.aspx> (last visited Feb. 5, 2017).

<sup>332</sup> OR. JUDICIAL DEP'T, ACCESS COMMITTEE PROGRESS UPDATES, <http://courts.oregon.gov/OJD/OSCA/cpsd/courtimprovement/access/pages/progress.aspx> (last visited Feb. 5, 2017).

<sup>333</sup> See 1994 REPORT, *supra* note 294, at ch.7.

<sup>334</sup> *Id.* at 75.

<sup>335</sup> OR. JUDICIAL DEP'T, OREGON SUPREME COURT IMPLEMENTATION COMMITTEE: A COMMITMENT TO FAIRNESS at 128 (Jan. 1996), [http://courts.oregon.gov/OJD/docs/osca/cpsd/courtimprovement/access/ic\\_report.pdf](http://courts.oregon.gov/OJD/docs/osca/cpsd/courtimprovement/access/ic_report.pdf) (last visited Feb. 5, 2017) [hereinafter 1996 PROGRESS REPORT].



same page and many of these legislative efforts failed.<sup>336</sup> Given that it has been over twenty years since the initial findings and the progress reports findings were published, it appears that a reevaluation of our system is well over due.

This year, the Racial and Ethnic Disparities (RED) Report, which compared the experiences of minorities to that of whites in Multnomah County's (Portland) criminal justice system found that black people are overrepresented in each stage of the county's adult criminal justice system.<sup>337</sup> The RED Report shows that those disparities are highest among blacks and Latinos.<sup>338</sup> Some of the Report's findings included: blacks are 4.2 times more likely to be referred to the district attorney and they are less likely to receive a citation in place of arrest.<sup>339</sup> Blacks are also 4.1 times more likely to have their case accepted for prosecution than whites.<sup>340</sup> Blacks are 4.1 times more likely to have their case continued.<sup>341</sup> Blacks and Native Americans are less likely to have their cases dismissed than whites, the difference being most significant for Native Americans. In addition, blacks and Native Americans are more likely to receive a conviction than whites.<sup>342</sup> Blacks are 7 times more likely to be sentenced to prison, 4.3 times more likely to be sentenced to jail, 3.7 times more likely to be sentenced to probation, 3.7 times more likely to have a conditional discharge, and 4 times more likely to have a monetary judgment, than whites.<sup>343</sup> Finally,

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<sup>336</sup> OR. JUDICIAL DEP'T, ACCESS COMMITTEE PROGRESS UPDATES, <http://courts.oregon.gov/OJD/OSCA/cpsd/courtimprovement/access/pages/progress.aspx> (last Feb. 5, 2017). For example, today juror daily compensation is as follows: Days 1&2 = \$10/day, 3rd & Subsequent = \$25/day. OR. REV. STAT. § 10.061 (2015). Previously, the Implementation Committee had gotten the legislature to agree to an increase in 2001, but that increase was cut short as a result of a financial crisis, that rate was as follows: Days 1&2 = \$10/day, 3rd & Subsequent = # of hours x statutory min. wage, not be less than \$10/day and not to be more than \$50/day. So, from 1953 to 1971 the rate was \$7.50/day and from 1971 to 2001 the rate was \$10/day. Also, mileage reimbursement has not changed since 1953, which is .08 cents a day. OR. REV. STAT. § 10.065 (2015).

<sup>337</sup> SAFETY AND JUSTICE CHALLENGE, RACIAL AND ETHNIC DISPARITIES AND THE RELATIVE RATE INDEX (RRI), at 7 (2016), [http://www.aclu-or.org/sites/default/files/RED\\_Report\\_Mult\\_Co.pdf](http://www.aclu-or.org/sites/default/files/RED_Report_Mult_Co.pdf).

<sup>338</sup> ACLU OF OREGON, *Damning Report Reveals Racial and Ethnic Disparities in Multnomah County's Criminal Justice System* (Feb. 11, 2016), <http://www.aclu-or.org/content/damning-report-reveals-racial-and-ethnic-disparities-multnomah-county%E2%80%99s-criminal-justice-sys> (last visited Feb. 5, 2017).

<sup>339</sup> SAFETY AND JUSTICE CHALLENGE, *supra* note 337.

<sup>340</sup> *Id.* at 11.

<sup>341</sup> *Id.* at 18.

<sup>342</sup> *Id.* at 19.

<sup>343</sup> *Id.* at 26.

blacks are more likely to receive a parole or probation violation that results in a jail stay than whites.<sup>344</sup> Also this year, a report published by The Sentencing Project<sup>345</sup> found that African Americans are incarcerated by the states at five times the rate of whites across the nation.<sup>346</sup> In Oregon, the ratio is slightly higher: 5.6 to 1.<sup>347</sup> In fact, in Oregon in 2014, one in twenty-one of all African American adult males were in prison.<sup>348</sup> Oregon has the seventh-highest incarceration rate of African Americans in the nation.<sup>349</sup>

Unfortunately, these results should not be too surprising considering that they are not much different than the overall findings of the Oregon Supreme Court's 1994 Oregon Task Force on Racial/Ethnic Issues in the Judicial System. In fact, Chief Justice Edwin Peterson, who led the 1994 Task Force, recently acknowledged that, "It's true today just as it was in 1994."<sup>350</sup> Peterson explained, "If you look at arrest rates, search rates, pretrial release rates, rate of conviction and rate of persons put on probation, people of color continue to represent a disproportionately large group of people who suffer from the disparity in these various rates."<sup>351</sup>

The historical trauma of economic and cultural discrimination that people of color have faced throughout the entirety of Oregon's history continues to permeate through our schools, housing, policing, and criminal justice system.<sup>352</sup> Both the RED Report and The Sentencing Project report show clearly that racial discrimination continues to be commonplace and pervasive today. As "Oregon has been slow to dismantle racist policies,"<sup>353</sup> allowing nonunanimous juries is just one more policy that contributes to the systemic inequities that persist in Oregon today. Not only do nonunanimous juries silence minority

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<sup>344</sup> *Id.* at 27–30. It is yet to be announced whether any sort of follow-up committee or policy changes will be enacted as a result of this report, let alone whether anything would come of it.

<sup>345</sup> THE SENTENCING PROJECT, *THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS* (2016), <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

<sup>346</sup> *Id.* at 3, Key Findings Section.

<sup>347</sup> *Id.* at 17, tbl.C.

<sup>348</sup> *Id.* at 5, tbl.2.

<sup>349</sup> *Id.*

<sup>350</sup> Parks, *supra* note 326.

<sup>351</sup> *Id.*

<sup>352</sup> See Semuels, *supra* note 298; Daniel Donner, *Oregon's Not-so-Pretty Racist Past is not yet History*, DAILY KOS ELECTIONS (Jan. 23, 2015, 10:33 AM), <http://www.dailykos.com/story/2015/1/23/1359413/-Oregon-s-not-so-pretty-past-is-not-yet-history>.

<sup>353</sup> BATES, CURRY-STEVENS & COAL. OF CMTYS. OF COLOR, *supra* note 314.

viewpoints, but for black (and other minority) criminal defendants in Oregon (and Louisiana), it separates them from defendants in the forty-eight other states by preventing hold-out jurors from sparing those defendants believed innocent or preventing conviction when the government has not made its case.

#### CONCLUSION

The Supreme Court should revisit the holding in *Apodaca* that allows nonunanimous verdicts in state criminal trials. As discussed above, Court's recent jurisprudence contradicts its 1972 *Apodaca* and *Johnson* rulings under the doctrine of incorporation. Specifically, applying the Court's 2010 *McDonald v. City of Chicago* incorporation approach to Oregon and Louisiana's nonunanimous jury laws signifies that overturning *Apodaca* should be easy, and in fact suggests that the Court should incorporate the few unincorporated provisions of the Bill of Rights. Moreover, majority verdicts undermine the reasonable doubt requirement the right to a jury trial and the Court's own case law prior to *Apodaca* and *Johnson* and since then, confirms this unanimous right to proof beyond a reasonable doubt as a component of the jury trial guarantee. Finally, current research shows that unanimity is essential to the purposes of the fair cross section requirement and complete deliberation required by the Sixth Amendment. Defense attorneys in Oregon (and Louisiana) should preserve their objections to nonunanimous instructions at the trial level to allow for eventual review by both the state appellate courts and the Supreme Court.

Beyond a judicial remedy to ending nonunanimous juries, the Oregon Legislature and its citizenry should vote to amend the state constitution to provide for unanimous verdicts. This is not evidence of being "soft on crime" but instead shows that the State takes seriously its burden of proving guilt beyond a reasonable doubt. It further demonstrates to minority members of our community that Oregon will no longer support a rule that disparately impacts minorities. Additionally, such an amendment to the state constitution would show a commitment to protecting innocent defendants. Oregon district attorneys should support such a change in the law, as prosecutors have a special ethical responsibility as "a minister of justice and not simply that of an advocate."<sup>354</sup> This requires a prosecutor to ensure the

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<sup>354</sup> MODEL RULES OF PROF'L CONDUCT, r. 3.8, cmt.1 (CTR. FOR PROF'L RESPONSIBILITY 2016).

“defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.”<sup>355</sup> Unanimous jury verdicts ensure that the State meets its burden of proof in the few criminal cases that proceed to trial.

Finally, Oregonians should learn about the nonunanimous verdict requirement and how it affects jury verdicts in the state. A surprising number of Oregonians are not aware that we allow ten members of a twelve-person jury to convict a criminal defendant. Even if a reader disagrees with the conclusions reached in this Article, discussion regarding criminal justice system reform policies will both help protect innocent defendants from being wrongfully convicted and move Oregon past its discriminatory history.

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<sup>355</sup> *Id.*