



Improving the Jury System

Nonunanimous Verdicts

by Margo Hunter

In civil cases in California courts, a jury can render a verdict if 3/4ths of the jurors agree. In both felony and misdemeanor criminal cases, however, the jury must be unanimous. If the jury cannot reach a unanimous verdict, it is said to be "hung," and the case is dismissed, leaving the prosecutor free to try the case again, if he or she decides that the chance of a conviction warrants the expense of a retrial.

Some observers of the jury system have suggested that the unanimous decision rule should be changed in criminal trials. This suggestion is largely motivated by concerns about cost of trying cases over again. It is also, however, motivated by a concern that justice is not accomplished if the cost of a retrial or the passage of time results in a decision not to retry a defendant some think was guilty. Finally, it is argued, hung juries undermine the public's support for the jury system when they result in unpopular decisions.

At the same time, the suggestion is controversial, because the unanimity requirement is at the heart of the jury system. The idea of a lone juror holding out to exonerate an innocent defendant, and ultimately persuading his fellow jurors is a part of the lore of the jury that captures the public's imagination. The unanimity requirement assures that there will be no conviction if a reasonable doubt remains, and forces jurors to deliberate and confront minority or unpopular views, rather than simply outvoting them.

I. Background and Function of the Traditional Rule

Although historians do not on how the practice began, unanimous verdicts were required at English common law as early as the mid- to late fourteenth century. That, too, was the case in the United States, until 1972.

In 1972, the Supreme Court re-examined this long-standing requirement in the case in [*Apodaca v. Oregon*](#). [1] In *Apodaca*, the Court concluded that the Sixth Amendment, which guarantees the right to a jury trial in criminal cases, does not require that the jury's verdict be unanimous. Rather, the Court said, the key question is whether a nonunanimous jury can fulfil the essential function of the jury. The Court found that jury's function of protecting defendants from government oppression by interposing the common sense judgment of the community in the judicial process would not be detrimentally affected. Thus, nonunanimous verdicts are permissible in state, non-death penalty trials. However, unanimity of verdicts is still required in federal criminal trials.

By contrast, the California Constitution explicitly addresses the use of unanimous verdicts. Article I, section 16 states that, "[t]rial by jury is an inviolate right and shall be

secured to all, but in a civil cause, three-fourths of the jury may render a verdict." The California Supreme Court interpreted this section to imply that unanimity is required in criminal cases. [2]

Despite the Supreme Court's decision in Apodaca, only three states allow the use of nonunanimous verdicts in criminal cases:

Louisiana requires unanimous verdicts in death penalty trials and cases where the punishment may be confinement at hard labor, but in cases where the punishment necessary is confinement at hard labor, a 10-12 decision can be rendered.

In Oklahoma, a decision rule is permitted in misdemeanor trials where the authorized punishment is six months or less.

Finally, Oregon provides for a 5/6 rule in both misdemeanor and felony trials, except for murder trials which require a unanimous verdict.

In terms of civil cases, most states permit or require the use of a nonunanimous decision rule.

II. Arguments in favor of nonunanimous verdicts.

Most of the positive consequences advanced for changing to a nonunanimous decision rule in criminal cases are based on efficiency and cost. California's criminal courts are increasingly suffering from large caseload volumes, delay and congestion. Several high profile cases such as the Menendez case have focused the spotlight on the hung jury and its affect on the criminal justice system. Many commentators believe that allowing nonunanimous juries in criminal cases will decrease the incidence of the hung jury, thereby diminishing the costs of to re-trying cases and freeing up courtrooms for other trials.

III. Arguments against nonunanimous verdicts.

Despite the potential gains of using a nonunanimous decision rule in criminal jury trials, many scholars and researchers believe that the hung jury serves an important function within our criminal justice system. The hung jury can serve to affirm the value of each individual juror, preserve the jury's independence form the court's influence, affirm the reasonable doubt standard, and ensure that the verdict expresses the conscience of the entire community.

IV. Empirical Research.

Most researchers agree that the incidence of hung juries is higher in juries that require unanimity of verdict. A 1967 study estimated that the rate of hung juries decreased from 5/6% with unanimous verdicts to only 2.5% with nonunanimous verdicts.

Researchers have also studied whether the "lone hold-out juror" causes unanimous juries to hang in inappropriate cases. The majority of researchers have concluded that the "lone hold-out juror" is not a significant problem with hung juries. Juries that hang almost always have a sizable minority voice, not just one hold-out. In addition, most juries seem

to hang because the case is difficult and ambiguous. In the cases where a single juror did hold-out, most of the other jurors relinquish their positions because of self-doubt and not based on an irrational, hold-out juror.

Another result of using a majority verdict rule is that the jury would spend less time deliberating. This, in turn, would lead to greater efficiency because trials would take less time and more could be heard. However, some researchers have noted the shorter deliberation time is the result of incomplete deliberations. Without a unanimity requirement, many fear that deliberation will end as soon as the requisite majority is reached to decide the case. As a result, the concerns of the dissenters on the jury may not be fully addressed during deliberations. Thus, unanimous verdicts are more likely to be representative of the community because the opinions of minority members on a unanimous jury can not be ignored or disregarded.

The effects of unanimity and majority decision rules on deliberations is important if jury deliberations affect the outcomes of verdicts. Researchers with the Chicago Jury Project estimated that deliberations only affected verdicts in approximately 10% of all cases. Those cases which were affected tended to be ones where the minority position was stronger and where there were important societal implications.

Although the affect of majority verdicts on deliberations and in turn on outcomes appears to be small, many scholars and researchers have asserted that the affect of majority verdicts on community confidence could be substantial. According to this idea, the community and the losing party are more likely to consider the verdict fair and accurate if it is based on a unanimous decision. Finally, some researchers have found that juror satisfaction decreases with majority verdicts, and this negative juror sentiment can also affect public confidence.

Sources and Further Information

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Notes

[1] 406 U.S. 404 (1972). ([return to text](#))

[2] People v. Feagley, 14 Cal. 3d 338, 350 fn. 10 (1975). ([return to text](#))