

# Offbeat Oregon History No. 515: Thanks to notorious murder case, jury verdicts need not be unanimous

By Finn J.D. John  
For The Sentinel

It's ironic that Norman Rockwell's famous painting "The Holdout" appeared on the front cover of the Saturday Evening Post on, of all days, Feb. 14, 1959. That date was Oregon's centennial — the 100th anniversary of the founding of our state — and "The Holdout" depicts a scene that can't happen here.

That's because in Oregon, unlike every other state except Louisiana, a unanimous verdict is not necessary in jury trials. It's been like that since the law was changed, back in 1933. (An exception was made for first-degree murder charges, but not for less serious forms of homicide.)

And Oregon's law was changed specifically to prevent the exact scene shown in "The Holdout" — although in the case that inspired it, instead of the lone woman on the jury holding out against a "guilty" verdict, it was the lone Jew.

The law was changed in the aftermath of the 1933 trial of a local small-time gangster named Jake Silverman, who happened to be Jewish.

Silverman's crime was the topic of an Offbeat Oregon History column back in October 2013. Here's the story in a nutshell: A fresh-from-the-pen crook named Jimmy Walker had blown into small-time gang leader Shy Frank Kodat's boardinghouse-speakeasy and moved in on Shy Frank's girlfriend, Edith McClain.

One thing led to another, and angry words had been exchanged, and Shy Frank had turned his back on him and left the room, and then Jimmy's gun had gone off and the bullet had gone through the wall and hit Shy Frank in the back. It was an accident, and it wasn't fatal to Shy Frank; but Shy Frank intended that it should be fatal to Jimmy, and Jake Silverman was tasked with the job of "taking Jimmy for a ride" and making it so.

So Jake borrowed his wife's maroon 1929 Studebaker President limousine and, posing as a getaway driver who would take Jimmy out of town so he

could go into hiding, picked up Jimmy at the cheap hotel where he was hiding out. Edith accompanied Jimmy on what they both thought would be a ride into exile.

They learned different when Jake stopped the car in the middle of nowhere near Scappoose, marched them out of the car at gunpoint, made them stand over the ditch so that they would fall into it, and gave each of them two in the back of the head with Shy Frank's .38.

That, at least, was the story on which Jake Silverman was convicted.

But he was not convicted of murder. One of the jurors was not convinced — or claimed not to be.

The evidence had been copious, but circumstantial. Most damning was the car, which several neighbors had seen driving out toward Scappoose and parking by the road just before the gunshots were heard. Very few people could afford maroon Studebaker limousines in 1933, so the chances that it wasn't Silverman were very slim.

Then, too, a rogues' gallery of seedy underworld characters worthy of a Silver Age Batman comic had been dragged into the trial to testify for and against him, and the overall impression was that he'd almost certainly done the job and that if he hadn't, it wasn't because he wouldn't have jumped at the chance to.

And Silverman's gallingly insouciant behavior in court made it even worse.

But this one juror just didn't find it convincing enough to send Jake to the gallows for it. Or even to send him up for a life sentence on a second-degree murder rap. So, finally, a compromise was reached: Jake would be found guilty of manslaughter instead.

Manslaughter was good for a three-year sentence, which was something at least.

The public, when it heard the verdict, howled with outrage, led by the Portland Morning Oregonian.

"Obviously, Silverman was not guilty of manslaughter," the newspaper opined. "Either he murdered Walker or he was

not involved."

Unspoken, but understood by most, was the assumption that the lone holdout had been a fellow Jew, and he or she had held out not based on the evidence, but based on tribal loyalties.

And so the Oregonian led the charge to "reform the jury system" by making it possible to disregard one or two dissenting votes when necessary.

Now, to be fair, the paper wasn't overtly advocating for the right to suppress minorities. The case they were making was that many fresh immigrants from countries with authoritarian traditions didn't have the right mindset to fully function as an autonomous person in a democracy, and that it needed to be possible to overrule one or two my-com-patriot-right-or-wrong types lest millions of dollars be wasted on multiple jury trials.

They were also mindful of the fact that gangsters sometimes try to get to jurors and, through bribes or threats, get them to vote to acquit.

But, as a practical matter, the change radically altered the distribution of justice for minority defendants in Oregon courts. For instance, if a Chinese person was on trial for a serious felony, and the jury was composed of 10 non-Chinese and two Chinese Oregonians — how much more likely would the defendant be to get convicted if the two Chinese jurors could simply be outvoted by the others?

And would that be a bad thing, or a good thing? (People in the 1930s would likely have said it was good, because the Chinese jurors would, they'd claim, vote to acquit no matter what. People today would mostly say it was bad, because people naturally empathize more with people who look like themselves.)

The entire problem, of course, is nicely illustrated in Normal Rockwell's painting — or in the 1957 film "Twelve Angry Men" starring Henry Fonda, in which 11 of 12 jurors are eager to convict a vaguely-ethnic inner-city teen accused of a stabbing and the lone holdout turns out to be right.

Good or bad, it soon became law. Responding to the pressure, the state Legislature drafted a bill and passed it on for public vote using the Oregon referendum system: Except for capital murder cases, conviction could be secured on a 10-2 vote. The measure passed comfortably.

Over the years since 1933, there have periodically been challenges to the rule from defendants who were convicted by non-unanimous juries. Concerns about the law are especially noticeable in cases where the one or two dissenting votes were the only jurors who shared the ethnicity of the defendant.

Most recently, in early 2018, the state's prosecuting attorneys proposed ditching the law as part of a deal that would have repealed defendants' right to opt for a jury trial rather than just a hearing before a judge. From civil-libertarians' perspective, that looked like a poison pill, and the effort collapsed when it became clear that they would oppose it.

Meanwhile, it remains true that unless you're on trial for murder or aggravated murder, you'll have to convince three jurors of your innocence to avoid being convicted, rather than just one. And Oregon remains the only state in the union, other than Louisiana, where that's the case.

(Sources: Kaplan, Aliza. "Non-Unanimous Jury Law in Oregon." oregonencyclopedia.org, 17 Mar 2018; Wilson, Conrad. "Oregon Prosecutors Back Off Plan to Do Away with Non-Unanimous Juries," opb.org (Oregon Public Broadcasting), 30 Jan 2018; Kavanaugh, Shane D. "Dirty Secret of Oregon Jury System Could Go Before U.S. Supreme Court," Portland Oregonian, 21 Sep 2017)

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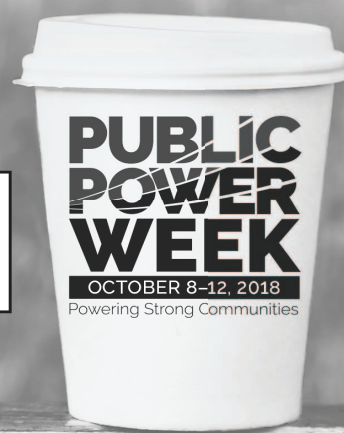
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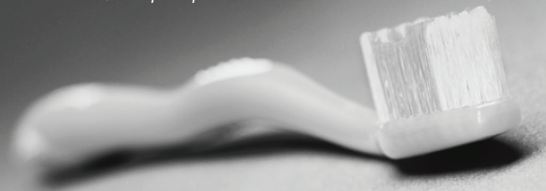
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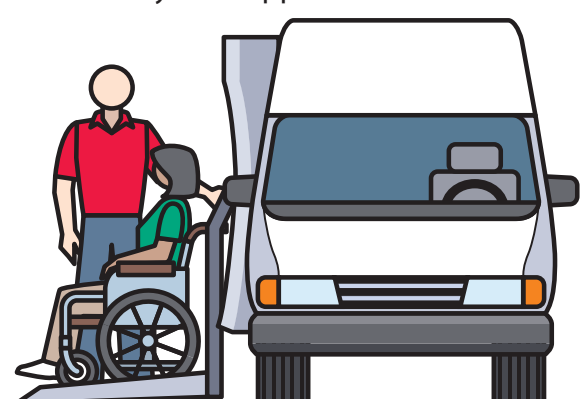
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