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The Constitution and the courts make possible criminal justice reform

George Will

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Passions sloshing through city streets this year briefly propelled reform of the criminal justice system onto the nation's agenda. Wednesday morning, in the Supreme Court's tranquility, oral arguments might advance this agenda more than perishable passions can.

At issue is whether the court will make retroactive a rule it affirmed in April when it overturned the second-degree murder conviction of a Louisiana man, who was sentenced to life imprisonment without the possibility of parole.

In 48 other states and in federal courts, his case would have ended in a mistrial, because the jury vote was 10-to-2 for conviction. Louisiana then was (it has subsequently mended its ways) one of two states that permitted — Oregon was the other — non-unanimous jury verdicts.

The Supreme Court held that the original public meaning of the Sixth Amendment's guarantee of a defendant's right, when charged with a serious criminal offense, to a jury trial requires jury unanimity. William Blackstone, the British jurist whose "Commentaries on the Laws of England" powerfully influenced practices in the American colonies and the Founders' thinking, said "the truth of every accusation . . . should . . . be confirmed by the unanimous suffrage of twelve of his equals." When in 1789 the proposed Sixth Amendment came to the Senate from the House, it contained an explicit unanimity provision. The Senate deleted this, but last April the court surmised that the Senate assumed that the right to a unanimous verdict was widely considered implicit in a right to a jury trial.

The court also noted the unsavory origins of Louisiana's and Oregon's practices. Louisiana affirmed non-unanimous jury verdicts in its 1898 constitution, which (said a committee chairman, as reported in the Official Journal of the Proceedings of the Constitutional Convention) was written to "establish the supremacy of the white race." Oregon's non-unanimous jury verdicts date from a 1934 referendum following public outrage about a trial in which a Jewish defendant was convicted of manslaughter after the jury split 11-1 on a first-degree murder charge. Endorsing the ballot measure, the *Morning Oregonian* deplored the "vast immigration into America from southern and eastern Europe, of people" — the newspaper was too delicate to stipulate its disapproval of Jews and Catholics — "untrained in the jury system,"

which made the principle of unanimity for 12-person juries “unsatisfactory.” (Oregon’s tradition of extremism, exemplified today by Portland’s “anti-fascist” mobs violently searching for scarce fascists, has a long pedigree: See Linda Gordon’s “The Second Coming of the KKK: The Ku Klux Klan of the 1920s and the American Political Tradition.”)

Before last April, only an outlier Supreme Court ruling from 1972 — which the court in April called “gravely mistaken” — had prevented the complete “incorporation” of the Sixth Amendment unanimity principle, through the 14th Amendment’s Due Process Clause, to apply to the states. The court having undone that mistake last spring in the case of Evangelisto Ramos, a Louisiana man convicted of second-degree murder, Wednesday’s arguments will concern whether the rule should apply retroactively to another Louisianan, Thedrick Edwards, and to others similarly situated. Edwards, an African American, was convicted of various serious crimes by 10-2 or 11-1 jury votes.

The court must decide if the unanimity rule is a “watershed rule” of criminal procedure — fundamental to the accuracy of a trial’s result — and therefore entitled to retroactive application. The court did this with the 1963 ruling that extended to state proceedings the Sixth Amendment right of defendants to appointed counsel. It is apt to do so regarding jury unanimity because the Founders considered it foundational. (John Adams: “It is the unanimity of the jury that preserves the rights of mankind.”) And because abundant social-science research strongly indicates that unanimity is crucial to the fairness of judicial proceedings.

The findings about “the truth-promoting role of the unanimous-jury requirement,” as summarized by an amicus brief from the American Civil Liberties Union and an ideologically diverse army of other organizations (e.g. the Cato Institute), are that unanimous juries “(1) tend to deliberate longer; (2) ensure that each individual juror has a voice in the deliberations; (3) more frequently correct factual errors during deliberations and engage more frequently in evidence-driven (as opposed to result-oriented) deliberations; and (4) tend to be more confident in their results.” Louisiana, in constructing the Jim Crow system in the 1890s, and Oregon, in expressing its 1920s and 1930s anti-immigrant fevers, put aside jury unanimity in order to isolate, and make it easy to ignore, troublesome, usually minority, jury members, thereby making it easier to convict African American and other despised defendants.

Wednesday’s arguments will illustrate something that refutes the libel that the nation is “systemically” prejudiced: Resources for reforms often are inherent in longstanding norms and existing laws.