In 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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. (U.S. Const.)

THE RISE AND FALL OF THE RIGHT TO A JURY TRIAL

By: James Baehr
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The Sixth Amendment establishes the right to a jury trial in criminal cases. While the Amendment ranks as one of the longest in the Bill of Rights, its protections can be categorized into three "clusters of rights" which each protect different interests: 1) a right to a speedy trial, which protects physical liberty, reputation, and reliability, 2) a right to a public trial which features an impartial jury of people who come from the community where the crime occurred, and 3) a right to a fair trial, with notice of the accusation, the opportunity to confront prosecution witnesses, compel defense witnesses, and enjoy the assistance of counsel (Amar, 1996). The right to a jury trial is both an individual right, protecting individual defendants, and a structural right, allocating power to the citizenry. (Amar, 1991).

The founding generation was passionately committed to the principle of trial by jury in criminal matters, as jury trials had an ancient English lineage. Sir Edward Coke, for example, had written approvingly in 1642 of giving prisoners "full and speedy justice" (Spalding, et. al., 2014). A commitment to protect the right had also preceded the Jamestown settlement as a provision of the Virginia Company Charter in 1606 (Alschuler & Deiss, 1994). But jury trials took on an added dimension in the colonial period as the colonists used this right to resist unjust British laws. John Peter Zenger, tried for seditious libel in 1735, had no legitimately recognized legal defense, but his attorney convinced a colonial jury to acquit him of the charges (Alschuler & Deiss, 1994). Importantly, "Zenger's trial was not an aberration; during the pre-Revolutionary period, juries and grand juries all but nullified the law of seditious libel in the colonies" and the colonists likewise resisted customs laws in the same way (Alschuler & Deiss, 1994). The British response was to draft or revise laws to bring more cases to non-jury admiralty courts and transfer British officials and colonists accused of treason back to England for trial (Alschuler & Deiss, 1994). The Declaration of Independence thus condemns the King's abrogation of the "benefits of trial by jury" in its list of grievances, and the right was included in both the U.S. Constitution and the bill of rights of twelve states by the time it was repeated in the U.S. Bill of Rights (Alschuler & Deiss, 1994). While the Founders emphasized the democratic and local nature of the jury, early jury pools were restricted in various cases to men, landowners, or white men by statute, a situation which only changed slowly over time (Alschuler & Deiss, 1994).

Ironically, as the ability to sit on a jury expanded for all Americans over the years, the right to have a jury trial for criminal defendants was exercised less (Alschuler & Deiss, 1994). What was originally a hallowed right for all criminal trials has now become nearly extinct: 97 percent of federal felony convictions and 94 percent of state convictions come not from trials

but from guilty pleas (Spalding, et. al., 2014). The once discouraged practice of prosecutorial plea bargaining (Sir William Blackstone called it "very backward") was not upheld as fully voluntary by the Supreme Court until 1970 (Spalding, et. al. 2014; *Brady v. United States*, 397 U.S. 742 (1970)).

Some legal scholars place the blame for this shift at the foot of the Supreme Court led by Chief Justice Earl Warren, which promulgated a wide array of additional procedural requirements for criminal defendants unrooted in the text of the Constitution or longstanding tradition (Stuntz, 2011). "In a series of landmark decisions between 1961 and 1969, Warren's Supreme Court imposed a new set of procedural limits on state and local law enforcement – in Judge Henry Friendly's apt words, the Court 'crafted a new constitutional code of criminal procedure'" – including opinions like *Mapp v. Ohio* (1961) and *Miranda v. Arizona* (1966) with manifold new requirements for state prosecutions (Stuntz, 2011). These endeavors may have been well-intentioned but made trials so difficult and unwieldy to conduct that they resulted in a measurable increase in crime and public backlash. As scholar William Stuntz wrote, "if anything invites a political backlash, expanding criminal defendants' rights in a period of steeply rising crime and rapidly falling punishment does so." These policies, Stuntz argues, led to the enactment of mandatory minimum sentencing measures and the proliferation of a prosecutorial regime pressing for plea bargains across the board. Despite the promise of the Sixth Amendment, "[o]nly a shadow of the communitarian institution the Framers wished to preserve has survived into the twenty-first century" (Spalding, et. al, 2014).

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