THE SIXTH AMENDMENT

By Stephanos Bibas and Jeffrey L. Fisher

The Sixth Amendment guarantees a cluster of rights designed to make criminal prosecutions more accurate, fair, and legitimate. But the institutions of American criminal justice have changed markedly over the past several centuries, forcing courts to consider how old rights apply to new institutions and procedures.

At the time of the Founding, there were local sheriffs but no professionalized police forces; instead, ordinary men took turns serving as constables or night watchmen. Criminal cases were almost always brought by victims, not public prosecutors. At trial, neither side typically had a lawyer, so both victims and defendants represented themselves. Trials were like shouting matches, in which victims and defendants argued and brought other live witnesses to tell their stories. They lasted minutes or hours, not days.

Juries of twelve ordinary men were central players in this system. They were local citizens who often knew the victim, defendant, and other people and places involved. They also knew which charges subjected defendants to the death penalty (as many felonies did), and which did not. Jurors looked witnesses in the eye and debated both whether a defendant was factually guilty and whether he deserved mercy. They checked the government's power to punish and applied the conscience of the community in the public eye, assuring everyone that justice had been done swiftly, impartially, and fairly.

The Framers of the Sixth Amendment sought to strengthen this vigorous adversarial process. Continental Europe had long used an inquisitorial system, in which magistrates investigate crimes and judges take leading roles in framing the issues, digging up evidence, and questioning witnesses. The Anglo-American system that the Sixth Amendment codified, by contrast, leaves it to each side to conduct its own investigation, present its own evidence, and argue one side of the story in open court.

Most of the institutions of criminal justice changed greatly over the decades after the Sixth Amendment was enacted. Professional police forces came into being and took charge of investigating crime and arresting suspects. Public prosecutors steadily displaced victims, and then defendants who could afford to increasingly hired lawyers to level the playing field. In some communities, charities or local governments set up public defender offices, offering free lawyers to all or some defendants accused of sufficiently serious crimes. Judges developed rules of evidence and procedure and gave the lawyers a say in selecting and instructing juries, so trials grew longer and more complex.

To avoid the time and expense of jury trials and clear courts' busy dockets, prosecutors and defense lawyers also increasingly plea bargained. That meant that most defendants avoided trial and pled guilty in exchange for lower charges or sentences. So by the mid-twentieth century, juries resolved only a small fraction of criminal cases.

Around the same time, the Supreme Court ruled that virtually every aspect of the Sixth Amendment applies not only to federal but also to state prosecutions. This vastly expanded the Amendment's reach, because most criminal prosecutions occur in state court. This "incorporation" of the Sixth Amendment against the states has also required the Court, over the past half-century, to spell out the Amendment's protections and apply them to the variety of criminal justice systems across the Nation.

Perhaps the Supreme Court's most significant work has involved implementing the right to counsel. The Court has confirmed that a defendant with enough money generally has the right to be represented by the lawyer of his choice. The accused also has an implied right to forego counsel entirely and defend himself. But what if the defendant wants a lawyer but cannot afford to hire one? In *Gideon v. Wainwright* (1963), the Court held that such defendants facing possible prison time are entitled to court-appointed lawyers, paid for by the government. Furthermore, such appointed lawyers (usually public defenders) must deliver "effective" assistance to defendants—meaning

that they must adequately advise the defendants of the potential consequences of pleading guilty and provide a reasonably competent defense if defendants choose to go to trial. But the test for effectiveness is quite lax. Courts routinely condone mediocre lawyering, often because the conviction seems to have been inevitable no matter what the lawyer did.

The Court also has fleshed out the Sixth Amendment's other requirements. Starting with the right to a "speedy and public" trial, the Court has held that the failure to begin a trial in a timely manner requires dismissing the prosecution entirely. Perhaps because that remedy is drastic, the Court has interpreted the term "speedy" quite leniently; delays of several years are sometimes permissible. The Court has enforced the "public" aspect of the trial right much more strictly. Criminal proceedings may be closed to the public and the media only for "overriding" reasons, such as national security, public safety, or a victim's serious privacy interests.

The Compulsory Process Clause, the Court has confirmed, lets defendants subpoena witnesses to force them to testify at trial. This Clause (combined with other constitutional provisions) also now impliedly guarantees defendants the right to testify in their own defense if they wish. The Confrontation Clause requires prosecution witnesses to testify under oath and subject to cross-examination; except for small children who would be traumatized by the process, they must also testify in court and in the presence of the defendant. To preserve the integrity of these confrontation requirements, the Court also held in *Crawford v. Washington* (2004) that the prosecution may not introduce out-of-court statements by nontestifying witnesses when those statements are "testimonial"—that is, when the statements were made primarily to establish facts for the criminal prosecution. So if, for example, the police investigate a crime and a witness identifies the defendant in order to have him arrested and charged, the prosecution cannot use that statement as evidence in court against the defendant, unless the witness is brought to court so that the defendant can cross-examine him. Finally, the Compulsory Process and Confrontation Clauses guarantee the defendant's

right to be present in the courtroom throughout his trial (though he can forfeit this right by behaving badly).

That leaves the right to trial by "an impartial jury." The Court has held that this right applies whenever the accused faces more than six months' imprisonment, and it applies to any fact (other than a prior conviction) that would affect the permissible sentencing range. A jury must come from a pool representing a fair cross-section of the local community. Despite the history to the contrary, a jury may consist of as few as six members (though nearly all states require the traditional twelve). The Jury Trial Clause, combined with the Due Process Clauses of the Fifth and Fourteenth Amendments, also forbids conviction unless the prosecution proves every element of the crime beyond a reasonable doubt. And the jury's verdict must be unanimous though the Court declined in 1972 to enforce this requirement against the States. Louisiana and Oregon, therefore, have continued to allow non-capital convictions by 11-1 and 10-2 votes.

Consistent with its historical purpose, a jury retains the power to acquit regardless of the strength of the prosecution's case or to return logically inconsistent verdicts to mitigate punishment. Yet the Supreme Court has refused to hold that the Sixth Amendment entitles defendants to have juries instructed about that power or even advised about the sentencing consequences of the charges. Thus, while juries have continued to serve the role as fact-finders, they are left today to perform their traditional role as "circuit-breaker in the State's machinery of justice" largely in the dark.