

The Right to a Fair Trial



The image is an old one in Western history: accuser versus accused, each summoning witnesses publicly in front of a judge to present their different versions of the truth. If the contest is equal and the judge impartial, then we deem the outcome fair and the verdict just, one that speaks the truth.

An adversarial process is central to our notion of criminal justice, and it extends deep into our past. In Anglo-Saxon England, one person would accuse another person publicly, and representatives of the community decided what form of trial would best determine the truth. The choices involved oaths by witnesses, a physical test known as an ordeal, or a winner-take-all physical contest or battle. Beginning with the arrival of William the Conqueror in 1066, the system became more formal: a grand jury investigated a crime and issued an indictment, or formal accusation, government prosecutors presented evidence supporting the accusation, and a trial jury determined the defendant's guilt or innocence. Procedures developed to ensure fairness and to protect the innocent. Among these rules was a guarantee that the accused could confront witnesses against him and challenge their testimony.

Colonists brought these rights with them to the New World and expanded them. By the time of the American Revolution, the list of procedural rights guaranteed in charters and statutes was more extensive than its English counterpart. Chief among them were rights to ensure that accused persons could defend themselves in court, including the right to know the charges against them, to confront their accusers, to challenge jurors, and to compel witnesses to testify. The colonists regarded these procedures as part of their birthright as English citizens and objected when new imperial regulations in the mid-eighteenth century threatened to limit or eliminate them. The rights were considered essential to due process of law, the most ancient and best guarantee of liberty, so their violation justified independence.

“THAT in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favour, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, nor can he be compelled to give evidence against himself; that no man be deprived of his liberty except by the law of the land, or the judgment of his peers.”

—Virginia Declaration of Rights (1776)

Protections for the accused received major emphasis in the new nation's Bill of Rights. Four of the ten amendments addressed matters of criminal process so completely that scholars have called them a miniature code of criminal procedure. The Sixth Amendment was especially important for a fair trial. In addition to its guarantee of a speedy and public trial by an impartial local jury, the amendment requires defendants "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 in his defense." This constellation of rights embodies basic notions of fairness and balance. It gives the defendant the same rights as the government. For instance, the state uses a lawyer to prosecute; the accused can have a lawyer to assist in the defense. The prosecuting attorney can compel witnesses to testify; so can the defendant.

In making rights to a fair trial so prominent, the framers were not inventing new principles of justice—earlier English laws had included such things as compulsory process for the accused—but they were proclaiming them fundamental to liberty itself. History warned against the dangers of arbitrary government. Despotism flourished when government could act in secret and outside the law. The founding generation relied in part upon public trials and fair process—procedures that balanced the power of government with the rights of individuals—as safeguards against tyranny.

During the nineteenth century, criminal justice was primarily the responsibility of the states, not the central government. State constitutions incorporated similar guarantees, such as trial by jury and protections against warrantless search and seizure. Before the Civil War, judges were especially alert to attempts by state legislatures to erode these protections in efforts to control crime. Elaborate rules governed such things as subpoenas (legal orders used to compel witnesses to testify) and the language of indictments. Soon, criminal procedure was a highly specialized subject, with separate courses of study and treatises to explain its complex rules to lawyers. The rules were specific to each state, which meant that the rights of the accused were to a large extent dependent upon geography. A person charged with the same crime in Alabama and New Jersey might have the same rights in theory, but the court procedures protecting these rights could vary widely. Criminal law in some states, for example, allowed courts to assign an attorney to assist poor defendants, whereas in other states it imposed no such obligation. The rules in practice reflected as well the individual decisions of thousands of local officers and courts, as well as the expectations and prejudices of the people they served. The right to a fair trial also often depended on who you were and where you lived.

This situation changed in the twentieth century when the Supreme Court began to interpret the Fourteenth Amendment's due process clause as a limit on the power of the state, as well as federal, governments. Due process, the justices decided, included many of the specific provisions of the Bill of Rights. This process of incorporation, as it is called, began early in the century but reached its highpoint in the 1960s. In what became known as the "due process revolution," the Bill of Rights became a national code of criminal procedure. The promise of a fair trial applied equally to all citizens everywhere.

Television series and reality shows, such as those on Court TV, highlight the adversarial nature of criminal justice, but they sometimes obscure how constitutional guarantees of a fair trial work in ordinary cases. Instead of a dramatic

“Whatever disagreement there may be as to the scope of the phrase ‘due process of law’ there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard.”

—Justice Felix Frankfurter,
Malinski v. New York (1945)

clash of good versus evil, what happens in most courtrooms often appears boring and uneventful; the vast majority of cases are not sufficiently compelling for television. Sometimes, the routine nature of many trials hides the way constitutional guarantees shape the administration of justice. Close examination reveals a complicated picture, one nearer to the founding generation’s conception of rights at trial in some ways and further from it in others, as illustrated by a murder trial from New York.

In a South Bronx subway station on June 28, 1972, John Skagen, a white off-duty policeman, without apparent provocation, stopped James Richardson, a twenty-eight-year-old black man on his way to work at a local hospital, and ordered him to get against a wall and put his hands up. Maybe he thought Richardson was one of the unlicensed street peddlers that area merchants had complained about; perhaps it was the snub-nosed .32-caliber revolver Richardson had tucked into his pants. Whatever the reason, Skagen pocketed his badge and began a search. Suddenly, Richardson turned, his gun drawn. The two men faced each other for a split second, followed by four shots in quick succession—two bullets hit Skagen’s shoulder, one struck Richardson in the groin, and the fourth lodged in a bystander’s forearm.

Richardson fled down the street, yelling “He’s shooting. A crazy man’s shooting at me.” Skagen appeared at the top of the stairs and fired, hitting Richardson in the shoulder but not halting him. A nearby patrolman, not recognizing his fellow officer, fired at Skagen, not stopping until his clip was empty. Richardson continued to run, now with several cops in pursuit, and threw his gun away before finally being slammed against a fence and handcuffed. Skagen was rushed to a hospital—the one where Richardson worked—but his wounds were fatal. In searching the scene, officers discovered a blue leather case Richardson had discarded before running. On it was a gold correction officer’s badge stolen in the robbery of a bar several days earlier.

Few crimes stir more public response than the killing of a policeman. Such cases are rich in symbolism: the officer represents law and order; the accused, violent disorder. Coming as it did so soon after the urban riots of the late 1960s, this case offered authorities good opportunity to slight the procedures that define a fair trial.

But this did not happen. Richardson received all the rights guaranteed under the U.S. Constitution. Each time he was questioned at the hospital, an officer read him his rights, the so-called Miranda warning (“you have the right to remain silent”) based on the Fifth Amendment. His arrest was based on probable cause, or a reasonable belief that he committed a crime, which is a Fourth Amendment requirement. The district attorney took the evidence before a grand jury, which issued an indictment with seven counts, or criminal acts the government alleged Richardson had committed. (The Fifth Amendment requires a grand jury for capital crimes in federal courts, so in this state case the right to a grand jury came from the New York constitution.) The indictment provided Richardson with several important protections. It told him what the prosecution would try to prove. Each crime had a precise legal meaning, and the government would have to demonstrate beyond a reasonable doubt that his actions met this definition. Also, the indictment fixed a legal boundary around the case; at trial, the prosecutor could not attempt to prove other crimes. The indictment, formally provided to Richardson at his arraignment, satisfied the Sixth Amendment’s stipulation that the accused “be informed of the nature and cause of the accusation.”

Within days, a James Richardson Defense Committee had formed in the South Bronx, where the suspect lived along with many of the city's African Americans. The case's notoriety attracted the attention of William Kunstler, a skillful yet flamboyant lawyer who had won a national reputation for defending individuals from what he believed was government persecution: the idea of "one cop killing another cop, and then charging a black bystander with the crime," as he put it, appealed to his sense of injustice. Kunstler asked to be the court-appointed counsel for the indigent Richardson, a right the Sixth Amendment guaranteed. He successfully lobbied for lower bail—the Eighth Amendment forbids excessive bail—but it still took seven months before Richardson's supporters could raise the \$10,000 required for his release while awaiting trial. The trial clearly would not be speedy, as the Sixth Amendment prescribed, but the delay was not unusual; urban courts faced a flood of crimes and typically took eighteen months to move a case from arraignment to verdict. In this instance, it took twenty-seven months, in part because the defense requested more time to prepare.

During the interim, the prosecutor, Stephen Phillips, a young assistant district attorney who was trying one of his first cases, met with Kunstler to learn if Richardson would be willing to enter into a plea bargain, or plead guilty in exchange for a lesser sentence. He was not. If he had accepted the prosecutor's offer, Richardson would have waived the public trial required by the Sixth Amendment. During these negotiations, Phillips revealed the state's case. Under the Supreme Court's interpretation of the Fourteenth Amendment's due process clause, the prosecutor has to disclose exculpatory evidence, that is, evidence that could be interpreted to demonstrate the defendant's innocence. Phillips did not have to reveal all the evidence, however, although in this instance he did.

Further protection for the accused came later at a pretrial hearing. Judge Ivan Warner, an experienced and scrupulously fair jurist, examined the evidence to determine if it had been gathered properly; this step protects the defendant from police abuses. William Kunstler argued that the statements Richardson made in the hospital were forced confessions, illegal under the Fifth Amendment, because his client was in too much pain to understand his rights. After hearing testimony from the attending policemen and doctors, including Kunstler's cross-examination, which he would repeat at trial, the judge concluded that six of the seven statements met the constitutional test for allowable evidence and could be admitted at trial. Richardson had been in trouble with the law on earlier occasions, and the prosecution wanted to use several outstanding warrants for his arrest to suggest that Skagen might have stopped him for this reason. But the prosecutor could not prove the policeman knew about these warrants, so Judge Warner excluded this evidence. Introducing it might prejudice the jurors against Richardson.

Both the prosecutor and defense counsel took part in the selection of the jury. They considered two hundred potential jurors. Each side challenged several for cause, claiming that something in their background or their answers demonstrated that they could not reach a just verdict. Each lawyer could have dismissed up to twenty potential jurors, the number allowed by New York law, without offering a reason at all. The goal of this process, known as *voir dire* (from the French, meaning "to say the truth"), is to seat an impartial jury, as mandated by the Sixth Amendment. Kunstler used all of his twenty peremptory challenges, as they are called, to exclude jurors he believed would automatically

favor a police version of events. Phillips used fourteen of his challenges to keep people with antigovernment attitudes off the panel. Finally, after eight days, the two sides settled on the twelve jurors and four alternates who would hear the case and reach a verdict.

The trial took two weeks. A full courtroom first heard witnesses for the prosecution—police officers, bystanders, doctors, and others—describe what happened, as they remembered it. To prove the primary count, murder, Phillips had to demonstrate that Richardson, acting with premeditation, fired the fatal shot. Ballistics evidence was inconclusive; Skagen had bled to death and one of the defendant's bullets had nicked an artery, but the officer might have died from shots fired by his fellow officer. Other counts described lesser offenses and had other standards of proof. Through his attorney, the defendant could confront the witnesses, a Sixth Amendment guarantee, and challenge their testimony. Kunstler's cross-examination tried to suggest a racially motivated police conspiracy to protect the officer who shot Skagen. Following the prosecution's presentation, Kunstler called witnesses for the defense—bystanders, acquaintances, and doctors who testified to a different view of the crime. Phillips, in turn, had the opportunity to cross-examine these witnesses. Richardson did not testify in his own defense, which was his right under the Fifth Amendment.

Judge Warner's roles were to enforce the rules of procedure and to establish the official record of the case. He allowed neither the prosecution nor defense to wander from the charges or the testimony because he knew that his actions could be reviewed by a higher court upon appeal. Once, he stopped Kunstler from asking whether the officer who shot Skagen felt remorse over a black man's death in another notorious police-shooting case, a question that had nothing to do with the charge against Richardson. The judge also had two other important roles. After testimony had ended, he had to decide if the evidence established all the legal elements of the crime. If it did not, then he had an obligation to dismiss the case. In this instance it did, so the jury would decide if the prosecution had proven guilt beyond a reasonable doubt. Then Judge Warner charged the jury, a second role he played during the trial. He reminded jurors that the indictment was merely an accusation and that the state had the burden of proof. Richardson did not have to prove his innocence. Warner also instructed them on the law involved in the case, including a definition of reasonable doubt, so they could determine whether or not the evidence, as they believed it, supported the indictment.

The jury found Richardson guilty of three of the seven counts—second-degree manslaughter, felony possession of a handgun, and possession of stolen property. The state had not proven the charge of murder or the other three counts; there was no conclusive evidence that Richardson fired the fatal shot or that he acted with premeditation. The jurors had taken their time in reaching a decision. It had taken them three days of long, intense deliberations, and several times they had returned to court to have Judge Warner explain the law again or to hear particular parts of the court record.

Sentenced to a prison term of up to ten years, Richardson remained free on bail while pursuing an appeal. Appeal of a conviction is not a constitutional right, but federal and state laws typically provide at least one review of the case by a higher court that looks only at the record of the case to determine if serious, irreversible errors occurred. In an appeal, the burden of proof—the responsibility for proving a claim—shifts from the state to the convicted defendant. Rich-

ardson no longer was assumed to be innocent. He had been convicted, so now he had to prove that serious errors had occurred at trial. He was able to do this, but only in part. He convinced the judges that his reckless conduct did not cause Skagen's death and therefore it did not meet the legal definition of manslaughter. Although the court reversed his conviction on this charge, it affirmed the felony-gun and stolen-property verdicts and sent the case back for re-sentencing. The court rejected the claim that Richardson had been denied a fair trial.

On May 27, 1976, almost four years after the death of John Skagen, James Richardson was sentenced to three years in the state prison. The Fifth Amendment's prohibition against double jeopardy prevented the state from retrying him for murder.

A criminal trial is a search for truth, but, as *People v. Richardson* demonstrates, truth is not the only value at stake. The need to uphold public order and to punish wrongdoing also are important. Overriding these values, however, is the requirement to protect individual liberty. The Bill of Rights especially insists that government respect the rights of individuals. Nowhere do we see these limits on official power more clearly than in criminal trials.

Individuals charged with crimes stand alone against the enormous power of the state. They face a loss of liberty or, in extreme cases, life. Our sense of justice rejects this imbalance of power as unfair. It provides too much opportunity for this power to be used improperly, and it holds too much potential for punishing the innocent, an unacceptable outcome. Over time, therefore, we have devised elaborate procedures to guard the defendant's rights and make the contest between government and citizen more equal. In doing so, we trust that only the guilty will suffer a loss of freedom.

James Richardson's trial operated under these rules. At every stage of the process, constitutional protections of his liberty came into play. Occasionally, people voice concerns that strict adherence to these rights results in injustice because it "lets criminals go free" or it violates the interests of victims who, quite naturally, want their attacker punished. We all are concerned with public safety, but what is noteworthy is that protecting the rights of James Richardson did not result in his freedom. In fact, most criminal trials end in conviction. Numerous studies reveal that the chances of a lasting conviction increase greatly when police and prosecutors pay strict regard to the procedures that define a fair trial.

People v. Richardson was unusual because it went to trial. The vast majority of prosecutions today end with plea bargains. The Supreme Court has decided that, properly administered, plea negotiations are an acceptable part of modern criminal justice. Caseloads are too high to try every case, and most defendants, in truth, are guilty. But to satisfy the constitutional definitions of due process, plea agreements must be voluntary. The defendant waives, or does not claim, several important protections—the right against self-incrimination, the right to a jury trial, and confrontation of witnesses, among others—which is one reason the Court in the 1960s extended the right to assistance of counsel to all parts of the criminal process, and not simply the courtroom alone. Although the presence of counsel helps to ensure fair process, it is no guarantee that the defendants receive all their constitutional rights, especially if they are poor. Most court-appointed attorneys or public defenders, lawyers whose job it is to represent indigent defendants, are overworked and underpaid. They also work in an environment where the normal assumptions about innocence and guilt are turned on their head: plea bargaining presumes guilt, not innocence. Although plea

bargaining may be efficient or even necessary, it has the potential to foster two systems of justice—one for the middle and upper classes, with legal protections for defendants, and one for the lower class, where the right to a fair trial is a paper promise. In the criminal process of a free society, a proper concern for fair procedures—a fair trial—is crucial. Individual liberty is especially vulnerable to arbitrary governmental power, and without freedom from official capriciousness, no other human right can exist. The founding generation was especially alert to the need to protect the rights of defendants, which is why they devoted so much of the Bill of Rights to guarantees of a fair trial. They were realistic men who did not expect these rights to prevent all injustices. But they expected, at a minimum, that the formal expression of these rights, especially the guarantee of a fair trial, would serve, in the words of James Madison, as a “good ground for an appeal to the sense of the community” when threatened by arbitrary government or oppressive majorities. But Madison also recognized how communities could be seized by their concerns for safety, so he also trusted courts and judges to consider themselves “in a peculiar manner the guardian of these rights.”

It is worth considering whether we still accept this view. After all, we live in a different world from the framers. Murders, robberies, assaults, and other threats to our safety and the security of our property are unfortunate facts of our daily lives. In response, numerous people call for stricter law enforcement and demand that lenient judges quit hamstringing the police and prosecutors by coddling criminals. It seems like such an easy solution—until we consider whether or not we want to be without these rights in the event we are accused. The rights that define a fair trial are available to individuals charged with driving under the influence, possessing banned drugs, breaking the tax laws, or being an accessory after the fact, as much as they are to defendants accused of first-degree murder. Rights rarely appear important until we need them.

Law and order. Fair trial. Many people see these slogans at opposite ends of an ideological spectrum, but in truth they both are part of what we expect in a democratic society. Throughout our history, we have learned that one depends upon the other. Fairness in our criminal process and respect for the rights of the accused are the things that persuade us to follow the law, which in turn assures us of the order we need to live freely and without fear. Our rights, ultimately, are the best guarantees of our liberty and our security. By honoring them, even when it is most difficult to do so, we all become the greatest defenders of our freedom and the servants of our highest ideals of justice.

A Heritage of Rights

In 1641, the Puritan colony of Massachusetts Bay adopted a code of laws called the Body of Liberties that spoke in terms of rights of citizens rather than restrictions on them. The list of liberties was comprehensive for its time. Blending Puritan theology and English common law, many of its guarantees anticipated the protections contained over a century later in the federal Bill of Rights. A primary protection of the Body of Liberties was the right to a fair trial, which included the right of counsel, trial by jury, right of appeal, and right to bail.

Every man that findeth himselfe unfit to plead his owne cause in any Court shall have Libertie to employ any man against whom the Court doth not except, to helpe him, Provided he give him noe fee or reward for his paines. This shall not exempt the partie him selfe from Answering such Questions in person as the Court shall thinke meete to demand of him. . . .

In all Actions at law it shall be the libertie of the plantife and defendand by mutual consent to choose whether they will be tried by the Bench or by a Jurie, unlesse it be where the law upon just reason hath otherwise determined. The like libertie shall be granted to all persons in Criminall cases. . . .

It shall be in the libertie of every man cast condemned or sentenced in any cause in any Inferior Court, to make their Appeale to the Court of Assistants, provided they tender their appeale and put in securitie to prosecute it before the Court be ended wherein they were condemned, And within six days next ensuing put in good securitie before some Assistant to satisfie what his Adversarie shall recover against him; And if the cause be of a Criminall nature, for his good behaviour, and appearance, And everie man shall have libertie to complaine to the Generall Court of any Injustice done him in any Court of Assistants or other.

Obstacles to a Speedy Trial

*The right to a fair trial includes the right to a speedy trial, as guaranteed by the Sixth Amendment. In modern America, increased crime, crowded courts, and the need to honor all other constitutional rights (such as the right to counsel) has lengthened considerably the time from indictment, the formal accusation of a crime, to trial. The U.S. Supreme Court has addressed this issue on several occasions, including *Barker v. Wingo* (1972), in which Justice Lewis Powell outlined the reasons why trials experience delays and offered a balancing test to determine when the right to a speedy trial has been denied. This passage from the *Barker* opinion reveals the complexity of American criminal justice and the difficulty of applying rights of the accused according to a mechanical formula.*

The right to a speedy trial is generically different from any of the other rights enshrined in the Constitution for the protection of the accused. In addition to the general concern that all accused persons be treated according to decent and fair procedures, there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused. The inability of

courts to provide a prompt trial has contributed to a large backlog of cases in urban courts which, among other things, enables defendants to negotiate more effectively for pleas of guilty to lesser offenses and otherwise manipulate the system. In addition, persons released on bond for lengthy periods awaiting trial have an opportunity to commit other crimes. . . . Moreover, the longer an accused is free awaiting

trial, the more tempting becomes his opportunity to jump bail and escape. Finally, delay between arrest and punishment may have a detrimental effect on rehabilitation.

If an accused cannot make bail, he is generally confined. . . . This contributes to the overcrowding and generally deplorable state of those institutions. Lengthy exposure to these conditions “has a destructive effect on human character and makes the rehabilitation of the individual offender much more difficult.” At times the result may even be violent rioting. Finally, lengthy pretrial detention is costly. . . . In addition, society loses wages which might have been earned, and it must often support families of incarcerated breadwinners.

A second difference between the right to speedy trial and the accused’s other constitutional rights is that deprivation of the right may work to the accused’s advantage. Delay is not an uncommon defense tactic. As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade. . . . Thus, unlike the right to counsel or the right to be free from compelled self-incrimination, deprivation of the right to speedy trial does not per se prejudice the accused’s ability to defend himself.

Finally, and perhaps most importantly, the right to speedy trial is a more vague concept than other procedural rights. It is, for example, impossible to determine with precision when the right has been denied. . . . As a consequence, there is no fixed point in the criminal process when the State can put the defendant to the choice of either exercising or waiving the right to a speedy trial. . . .

A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant’s assertion of his right, and prejudice to the defendant.

The length of the delay is to some extent a triggering mechanism. Until there is some delay which

is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance.

. . . . Closely related to length of delay is the reason the government assigns to justify the delay. . . . A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily. . . .

Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay. . . .

Whether and how a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain. . . .

A fourth factor is prejudice to the defendant. Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown. . . .

[T]hese factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused’s interest in a speedy trial is specifically affirmed in the Constitution.