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Notes for a Consistent and Meaningful Sixth Amendment

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SUPREME COURT REVIEW

FOREWORD: NOTES FOR A CONSISTENT AND MEANINGFUL SIXTH AMENDMENT

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I. INTRODUCTION

A strain of Supreme Court reasoning uses a due process analysis to decide Sixth Amendment claims. This approach deprives Sixth Amendment guarantees of independent meaning and makes them superfluous.

This Foreword suggests that the Sixth Amendment, instead of being meaningless, was designed to play a central role in the constitutional structure created by the Bill of Rights. A meaningful Sixth Amendment jurisprudence requires viewing that amendment as part of an integrated Bill of Rights; requires reading each of its specific clauses not in isolation, but as part of one integrated Sixth Amendment; and requires recognition of the Sixth Amendment's distinctive nature as a collection of personal, affirmative guarantees.

These principles have not been consistently recognized and applied by the Supreme Court. If they were, specific Sixth Amendment claims would have to be resolved using standards and approaches different from those now applied. This Foreword will suggest what some of the criteria for a meaningful and consistent Sixth Amendment might be.

II. DUE PROCESS ANALYSIS AND SIXTH AMENDMENT CLAIMS

A. *MU'MIN V. VIRGINIA*

Mu'Min v. Virginia,[1] decided last term, illustrates a due process analysis controlling Sixth Amendment rights. Dawud Majid Mu'Min

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[1] 111 S. Ct. 1899 (1991).

was charged with a highly publicized murder.[2] This publicity contaminated the jury pool; of the twenty-six prospective jurors who were examined, sixteen stated that they had heard about the crime. Not surprisingly, the notoriety reached those picked for trial. Eight of the twelve had learned about the case before becoming jurors; all, however, still claimed impartiality. They said that they had neither formed an opinion about the case nor held a prejudice against the accused.[3]

Mu'Min, however, protested the method by which the trial court determined that the jurors were impartial. He objected that none of the sixteen who professed advance knowledge about the case was asked during jury selection about the source of that information. As a result, the accused claimed that his Sixth Amendment right to an impartial jury was violated.[4]

He lost, even though the majority, in an opinion by Chief Justice Rehnquist, conceded that the accused's argument that such questions would "materially assist in obtaining a jury less likely to be tainted by pretrial publicity . . . [had] a common sense appeal. . . ."[5] The Court nevertheless rejected the reasoning, holding

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[2] Mu'Min, who was serving a 48-year prison sentence for murder, escaped from a work detail, went to a shopping center, and with a weapon that he had made on the work detail, robbed and murdered a woman who owned a carpet store. Newspaper articles revealed the accused's prior criminal record including a report of his prior murder conviction, that the death penalty was not available at that prior conviction, that Mu'Min had repeatedly been denied parole, and that he had confessed to the murder of the carpet store owner. These articles, which were published during and shortly after the 1988 presidential election, also contained criticisms of the lax security in the prison work gang system. *Id.* at 1901-02. *See also id.* at 1910-12 (Marshall, J., dissenting), for a fuller description of the publicity.

[3] *Id.* at 1902-03.

[4] The Supreme Court majority stated that Mu'Min was contending "that his Sixth Amendment right to an impartial jury and his right to due process under the Fourteenth Amendment were violated because the trial judge refused to question further prospective jurors about the specific contents of the news reports to which they had been exposed." *Id.* at 1901. Justice O'Connor, concurring, decided a different issue: "The only question before us is whether the trial court erred by crediting the assurances of eight jurors that they could put aside what they had read or heard and render a fair verdict based on the evidence." *Id.* at 1909 (O'Connor, J., concurring).

[5] *Id.* at 1905. The Court continued, "Undoubtedly, if counsel were allowed to see individual jurors answer questions about exactly what they had read, a better sense of the juror's general outlook on life might be revealed, and such a revelation would be of some use in exercising peremptory challenges. . . . Such questions might also have some effect in causing jurors to re-evaluate their own answers as to whether they had formed any opinion about the case, but this is necessarily speculative." *Id.*

The dissent concluded that content questioning is necessary once potential jurors admit exposure to pretrial publicity to determine whether, even though they claim impartiality, the extent of the exposure should disqualify the prospective juror as a matter of law. *Id.* at 1913 (Marshall, J., dissenting). Furthermore, "content questioning . . . is essential to give legal depth to the trial court's finding of impartiality." *Id.* at 1914.

that helpfulness was not the controlling constitutional standard: "To be constitutionally compelled . . . it is not enough that such questions might be helpful. Rather, the trial court's failure to ask these questions must render the defendant's trial fundamentally unfair."[6] Fundamental fairness, the Court concluded, did not require asking each potential juror in this case what he had read, and thus, Mu'Min's constitutional rights were not infringed.[7]

Mu'Min had claimed a Sixth Amendment violation of his guarantee to an "impartial jury." Even so, the standard employed to determine whether his rights had been violated—whether the trial court's failure to inquire make the trial fundamentally unfair—was the same one that would have been used if the Sixth Amendment did not even apply. It is the standard of due process. Its application in *Mu'Min* made the specific Sixth Amendment guarantee superfluous.

B. A DUE PROCESS ANALYSIS

Before the protections of the Sixth Amendment were incorporated into the Fourteenth Amendment's due process clause, the only constitutional constraint on state criminal proceedings came from the general concept of due process, as *Betts v. Brady* made clear:

> The due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment, although a denial by a State of rights or privileges specifically embodied in that and others of the first eight amendments may, in certain circumstances, . . . operate, in a given case, to deprive a litigant of due process of law in violation in the Fourteenth.[8]

This due process protection, unlike the Sixth Amendment, does not impose definite prescriptions or proscriptions. Instead, each individual case has to be examined as a whole.[9] A constitutional violation will be found not just because some specific guarantee of the Sixth Amendment has occurred, but only if the trial has been fundamentally unfair: "As we have said, the Fourteenth Amendment pro-

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Finally, content questioning is necessary to assure that the trial court has the essential information to assess accurately the credibility of potential jurors who claim impartiality. *Id.* at 15.

6 *Id.* at 1905.

7 *Id.* at 1908.

8 Betts v. Brady, 316 U.S. 455 (1942), *overruled by* Gideon v. Wainwright, 372 U.S. 335 (1963).

9 Due process of law . . . formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. *Id.*

hibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right. . . ."[10]

Mu'Min applied the same standard as had the *Betts* Court. Even though the right to an impartial jury is a Sixth Amendment right, *Mu'Min's* analysis deprived the Sixth Amendment of independent force. If the Sixth Amendment did not exist or did not apply to the states, the result would have been the same. In effect, then, *Mu'Min's* analysis proceeded as if the Constitution did not contain an applicable, specific, impartial jury command, but only a due process clause. Indeed, the Court's concluding comment does not even indicate that the Sixth Amendment was at stake: "For the reasons previously stated, we hold that the Due Process Clause of the Fourteenth Amendment does not reach this far, and that the *voir dire* examination conducted by the trial court in this case was consistent with that provision."[11]

Mu'Min is not the only Sixth Amendment case that uses an analysis submerging distinctive Sixth Amendment protections into the generality of due process. Indeed, this due process strain has infected various Sixth Amendment areas.

C. EFFECTIVE ASSISTANCE OF COUNSEL

Strickland v. Washington[12] provides a prime example of the Court's standards depriving the Sixth Amendment of separate meaning. *Strickland* enunciated the criteria for determining whether an accused has been denied his Sixth Amendment right of effective assistance of counsel. The Court, in an opinion by Justice O'Connor, first drew distinctions between due process and the Sixth Amendment:

> [T]he Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause. . . . Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues decided in advance of the proceeding.[13]

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[10] *Id.* at 473. *Betts* went to hold that "while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel." *Id.*

[11] 111 S. Ct. at 1908.

[12] 466 U.S. 668 (1984).

[13] *Id.* at 684-85.

This explanation of the differences between due process and the Sixth Amendment led in reality to a union of the two. The Court, in essence, stated that the true constitutional right granted the accused is the fair trial assured by due process. *Strickland*, then, figuratively drops a footnote explaining that the essential elements of a fair trial are listed in the Sixth Amendment. In this construct, the Sixth plays only a supporting role to the starring Due Process Clause.

While such reasoning could lead to the conclusion that a trial satisfying the commands of the Sixth Amendment is a fair one for due process purposes, the Court's framework, giving centrality to the fair trial guarantee of due process, easily leads to the converse: a trial that is fair for due process purposes is a trial that satisfies the Sixth Amendment. And, in essence, it is this latter approach that *Strickland v. Washington* adopted.

The Court's lodestar made this path inevitable: "In giving meaning to the requirement [of effective assistance of counsel] . . ., we must take its purpose—to ensure a fair trial—as the guide."[14] Courts, in assessing this right to counsel claim, must concentrate on this one point: "[T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged."[15] Consequently, the accused, in order to prevail, must not only show flawed lawyering, but also an unfair trial: "[T]he defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial. . . ."[16] Finally, the Court concluded that since the proceeding afforded Washington was "not fundamentally unfair,"[17] he was not deprived of his Sixth Amendment right to the effective assistance of counsel.

Of course, if the proceeding had been fundamentally unfair, Washington would have been denied due process as defined by *Betts v. Brady*. In other words, to establish a denial of the Sixth Amendment effective assistance guarantee, an accused must also show a due process violation. If, however, the accused can show the denial of due process, he does not need the Sixth Amendment. The specific right of the Sixth, then, gives an accused nothing not already granted in the general protection of due process.

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14 *Id.* at 686.

15 *Id.* at 696.

16 *Id.* at 687.

17 *Id.* at 700.

D. INCORPORATION AND THE SIXTH AMENDMENT

Both *Mu'Min* and *Strickland* make particular provisions of the Sixth Amendment superfluous. Neither opinion explores the reason that a due process standard should control Sixth Amendment analyses, but the explanation might be found in the history of the Bill of Rights' application to the states. From 1932, when the Supreme Court first held that the due process clause of the Fourteenth Amendment restricted a state's exercise of its criminal justice power, until the 1960's, when the Supreme Court selectively incorporated specific provisions of the Bill of Rights into the Fourteenth Amendment, only the general notion of due process limited the state power.[18] Due process, as *Betts v. Brady*[19] indicated, contained fewer protections than the specific guarantees of the Bill of Rights.[20] Incorporation changed this. When the Supreme Court held that a particular provision of the Bill of Rights was incorporated into the Fourteenth Amendment's Due Process Clause, it was holding that the commands of that provision applied to the states in the same way as they are applied to the federal government.[21] The states were constrained after incorporation not merely by the generalities

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18 Until the Reconstruction Amendments were adopted, the Constitution placed no limitations on state criminal justice powers. *See* Martin Bahl, Comment, *The Sixth Amendment as Constitutional Theory: Does Originalism Require that* Massiah *Be Abandoned?*, 82 J. OF CRIM. L. AND CRIMINOLOGY 423, 425 (1991):

> For nearly eighty years after the Constitution was ratified, no federal constitutional limitations on the states' administration of criminal justice were recognized; the Bill of Rights only constrained the actions of the federal government. The Reconstruction amendments . . . altered the relationship between the federal government and the states, because, for the first time, national constitutional protection was provided fundamental individual rights against state aggression.

It was another six decades before the Supreme Court first held that the Fourteenth Amendment constrained state criminal authority. Powell v. Alabama, 287 U.S. 45 (1932). *See* Bahl, *supra* at 426 ("for the first sixty years of the Fourteenth Amendment's existence, all claims of infringement on individual rights by a state's criminal procedures were rejected.")

19 316 U.S. 455 (1942).

20 *See* Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319, 1326-27 (1977):

> Prior to the 1960's, the Supreme Court had held that the due process clause of the Fourteenth Amendment . . . afforded to state defendants some of the guarantees contained in the Bill of Rights. The Court also had held, however, that those guarantees did not necessarily have the same content in their application to state proceedings under the Fourteenth Amendment as they had in their application to federal criminal proceedings under the Bill of Rights. The Fourteenth Amendment due process clause applied only to rights deemed to be "fundamental" to the achievement of justice. While a particular guarantee found in the Bill of Rights, such as the Sixth Amendment right to counsel . . . could be viewed as fundamental, application of its full content ordinarily would not be necessary to achieve fundamental fairness.

21 *See id.* at 1327 ("Under [the selective incorporation] doctrine, once it is decided that a particular guarantee is fundamental, that guarantee is incorporated into the Four-

of due process, which offered less protection than the specific prescriptions and proscriptions of the Bill of Rights, but by the more expansive, explicit guarantees instead.

Once the decision to incorporate a definite right was made, many determinations about that right were relatively easy. If the right had been fully explicated in the federal context, the guarantee was simply applied to the states in the same way as it was in federal trials.[22] When, however, the federal right had not yet been clarified and the Court had only considered analogous cases from state proceedings, the situation became more complex. Although those early precedents were interpreting only the Due Process Clause, cases after incorporation sometimes relied on the previous decisions as if they had defined specific Bill of Rights guarantees. When this was done without a careful analysis of the differences between due process and the specific protections, a blurring of the separate provisions resulted.

This model fits the Court's cases like *Mu'Min* concerning voir dire and publicity. Those decisions have never clearly distinguished between the Sixth Amendment right to an impartial jury and the related due process concern.

E. VOIR DIRE, PUBLICITY, AND AN IMPARTIAL JURY

In 1968, the Supreme Court first held that the jury trial provision of the Sixth Amendment was incorporated and applied directly to the states.[23] Seven years earlier, however, the Court in *Irvin v. Dowd*[24] had reversed a state conviction because the publicity about the crime had prevented the selection of an impartial jury. Although the Court was then formally interpreting only due process, it seemed to equate the Sixth Amendment's impartial jury right with the related due process concern: "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of

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teenth Amendment 'whole and intact' and is enforced against the states by the same standards applied to the federal government.")

22 *See id.* at 1329:

> Once that decision [to incorporate a right] was reached, the issue before the Court could readily be resolved in the defendant's favor by referring to prior decisions applying the particular right in federal proceedings. Thus, in *Gideon [v. Wainwright*, 372 U.S. 335 (1963)], once the Court decided that the Sixth Amendment right to counsel was fully incorporated in the Fourteenth Amendment, it could readily resolve the issue of providing appointed counsel for an indigent state felony defendant by reference to *Johnson v. Zerbst*, [304 U.S. 458 (1938)], where the Court had held that the Sixth Amendment right required such an appointment in all federal felony prosecutions.

23 Duncan v. Louisiana, 391 U.S. 145 (1968).

24 366 U.S. 717 (1961).

impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process."[25]

Due process requires a fair hearing, and a fair hearing requires impartial jurors. Thus, due process requires impartial jurors. That, at least, was the formal logic, but it is easy to read the opinion with its stress on the necessity for impartial jurors and assume that *Irvin* was discussing the Sixth Amendment.

Murphy v. Florida[26] apparently made that assumption. *Murphy*, decided after the jury trial clause was incorporated, affirmed a state conviction over the claim that pretrial publicity made that verdict unconstitutional. Even though at the time of *Murphy* the Sixth Amendment and not just due process could be used to measure the state proceeding, the Court simply adopted *Irvin's* language of impartial, indifferent jurors without any discussion of whether the intervening jury incorporation decision compelled any different or additional analysis.[27] Without a consideration of the distinctions, if any, between the Sixth Amendment right and due process, the two inevitably got blurred together. *Mu'Min* indicates this by citing *Murphy* for the proposition that the accused could only succeed if the rejection of the voir dire questions "render[ed] the defendant's trial fundamentally unfair."[28]

In addition to cases concerning the effect of publicity on impartial juries, *Mu'Min* also relied on decisions determining whether the Constitution required specific voir dire questions to be asked of potential jurors. This line of cases, too, has not analyzed the distinctions, if any, between the Sixth Amendment guarantee and the related due process concern. *Ham v. South Carolina*,[29] the first such case, reversed a conviction because the trial court refused to ask prospective jurors about their possible racial bias concerning the accused. Although the case was decided in 1973, well after the jury trial provision of the Sixth Amendment was incorporated into the Fourteenth Amendment, the Court, through then Justice Rehnquist, did not mention the impartial jury provision of the Sixth Amend-

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25 *Id.* at 722.

26 421 U.S. 794 (1975).

27 *Id.* at 799. Similarly a decade later in Patton v. Yount, 467 U.S. 1025 (1984), the Court, in considering again the effects of publicity on a state criminal conviction, framed the issue as whether "pretrial publicity so infected a state criminal trial as to deny the defendant his Sixth Amendment right to an 'impartial jury.' " *Id.* at 1026. The Court, however, then went on to discuss and distinguish *Irvin* without any discussion whether a Sixth Amendment analysis which the Court said it was doing and the due process analysis of *Irvin* differed.

28 Mu' Min v. Virginia, 111 S. Ct. 1899, 1905 (1991).

29 409 U.S. 524 (1973).

ment. *Ham*, instead, merely concluded that "the essential fairness required by the Due Process Clause of the Fourteenth Amendment requires that under the facts shown by this record the petitioner be permitted to have the jurors interrogated on the issue of racial bias."

A few years later, the Court in *Ristaino v. Ross*,[30] again confronted the question of whether the Constitution required the asking of specific voir dire questions. This case continued the melding of the Sixth Amendment into due process as the Court without analysis indicated that the due process and a Sixth Amendment analysis were the same: "A criminal defendant in a state court is guaranteed an 'impartial jury' by the Sixth Amendment as applicable to the States through the Fourteenth Amendment. . . . Principles of due process also guarantee a defendant an impartial jury."[31]

As these converging lines of precedent indicate, *Mu'Min's* adoption of a due process test to decide a Sixth Amendment impartial jury claim is well supported. The wellspring for *Mu'Min* began before incorporation and cases since that time have eschewed analysis of whether the Sixth Amendment and due process protections ought to be different.

F. EFFECTIVE ASSISTANCE OF COUNSEL AND INCORPORATION

The effective assistance of counsel jurisprudence might seem to fit the same pattern.[32] The Court's mention of this right can be traced back to *Powell v. Alabama*[33] and, therefore, to a time before the right to counsel provision was made applicable to the states.[34] On closer examination, however, this rationalization does not explain why the effective assistance of counsel guarantee has been made superfluous by due process. While the initial allusions to this right preceded incorporation, the Court did not truly grapple with the meaning of effective assistance until recently, as *Strickland v.*

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30 424 U.S. 589 (1976).

31 *Id.* at 595 n.6. On the facts presented, *Ristaino* held that the voir dire questions were not constitutionally required. *See also* Turner v. Murray, 476 U.S. 28, 36 n.9 (1986) ("The right of an impartial jury is guaranteed by both the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, and by principles of due process.").

32 *Cf.* Bahl, *supra* note 18, at 425 ("The doctrinal history of the constitutional right to counsel largely has been shaped by the vicissitudes of selective incorporation.")

33 287 U.S. 45 (1932). *See* Thomas Hagel, *Toward a Uniform Statutory Standard for Effective Assistance of Counsel: A Right in Search of Definition after* Strickland, 17 LOY. U. CHI. L.J. 203, 204 (1986) ("The Supreme Court first articulated a constitutional right to effective assistance of counsel in *Powell v. Alabama* . . . .").

34 *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

Washington recognized.[35] *Mu'Min's* submersion of a Sixth Amendment right into due process might stem from the twisting constitutional path that has constrained state powers in criminal cases, but that history did not cause the similar submersion by *Strickland*. Instead, *Strickland's* result could have been produced only by the modern Court's views about the Sixth Amendment.

G. COMPULSORY PROCESS AND DUE PROCESS

A recent interpretation of the compulsory process clause reinforces the conclusion that the modern Court's jurisprudence alone makes specific Sixth Amendment guarantees superfluous. Unlike the impartial jury provision and the right to effective assistance of counsel, the Court had almost never considered compulsory process claims in either the federal or state context before 1967 when the right was made applicable to the states.[36] Even though pre-incorporation history cannot explain the result, the Court in *Pennsylvania v. Ritchie*[37] interpreted compulsory process so that it, too, offered no more protection than the general due process provisions.

Ritchie, charged with sexually abusing his daughter, contended that his constitutional rights were violated because neither he nor his attorney was allowed access to the records of Children and Youth Services, a state agency that investigated claims that he had mistreated his children. The Pennsylvania Supreme Court, in finding for the accused, held that the state thereby had violated Ritchie's compulsory process right.[38] The Supreme Court, however, saw no need to follow this lead. Without analysis or citation, the Court simply pronounced that general due process offered Ritchie at least as much protection as that Sixth Amendment guarantee.

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35 *See* Strickland v. Washington, 466 U.S. 668, 683 (1984) ("The petition presents a type of Sixth Amendment claim that this Court has not previously considered in any generality."). In *Powell*, the Court held that due process required the appointment of counsel in state capital cases and that "(this) duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case." 287 U.S. at 71. The Court did not explain what it meant by "effective aid." For the development of the notion of effective assistance of counsel from *Powell* to *Strickland*, see Hagel, *supra* note 33, at 204-07.

36 In 1986, the Supreme Court stated, "This Court has had little occasion to discuss the contours of the Compulsory Process Clause." Pennsylvania v. Ritchie, 480 U.S. 39, 55 (1986). *Ritchie* also noted, "The pre-1967 cases that mention compulsory process do not provide an extensive analysis of the Clause." *Id.* at 55 n.12. Washington v. Texas, 388 U.S. 14 (1967), held that the compulsory process clause applied to the states.

37 480 U.S. 39 (1986).

38 "The Pennsylvania Supreme Court held that Ritchie, through his lawyer, has the right to examine the full contents of the CYS records. The court found that this right of access is required by both the Confrontation Clause and the Compulsory Process Clause." *Id.* at 51.

> Because the applicability of the Sixth Amendment to this type of case is unsettled, and because our Fourteenth Amendment precedents addressing the fundamental fairness of trials establish a clear framework for review, we adopt a due process analysis for purposes of this case. Although we conclude that compulsory process provides no *greater* protections in this area than afforded by due process, we need not decide today whether and how the guarantees of the Compulsory Process Clause differ from those of the Fourteenth Amendment. It is enough to conclude that on these facts, Ritchie's claims more properly are considered by reference to due process.[39]

Although Ritchie claimed, and the state court had found, a violation of his Sixth Amendment right, he, like Mu'Min and Washington, could enforce this right only by first establishing a violation of due process. Once again, the Sixth Amendment had no independent force and was made superfluous by due process.

III. THE SIXTH AMENDMENT AS AN INTEGRAL PART OF THE BILL OF RIGHTS

Not all Sixth Amendment cases submerge that amendment's specific protections into the general waters of due process,[40] but the

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[39] *Ritchie*, 480 U.S. at 56. The Court preceded this conclusion by stating:

> This Court has never squarely held that the Compulsory Process Clause guarantees the right to discover the *identity* of witnesses, or to require the government to produce exculpatory evidence. . . . Instead, the Court traditionally has evaluated claims such as those raised by Ritchie under the broader protections of the Due Process Clause of the Fourteenth Amendment.

Id.

[40] Speedy trial disputes could be resolved in much the same fashion as effective assistance or impartial juror claims. The standard could require the determination of whether the delay caused a fundamentally unfair trial. If so, of course, this specific Sixth Amendment protection would also become engulfed by due process. The Supreme Court, however, has adopted a much different test—one that requires balancing "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." Barker v. Wingo, 407 U.S. 514, 530 (1972).

The Court has not employed what is essentially a due process test for the speedy trial right because the Court has recognized that this Sixth Amendment guarantee serves important goals other than impairment of the defense: "The Sixth Amendment right to a speedy trial is . . . not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is protected primarily by the Due Process Clause and by statutes of limitations." United States v. MacDonald, 456 U.S. 1, 8 (1982). *See also* United States v. Marion, 404 U.S. 307, 320 (1971): "Inordinate delay between arrest, indictment, and trial may impair a defendant's ability to present an effective defense. But the major evils protected against by the speedy trial guarantee exist quite apart from the actual or possible prejudice to an accused's defense."

MacDonald went on to state, "The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges." 456 U.S. at 8. *Cf.* United States v. Loud Hawk, 474 U.S. 302, 312 (1986) ("the Speedy Trial Clause's core concern is impairment of liberty. . . .") Consequently,

view that makes the Sixth Amendment superfluous is prevalent. It has been used to define a number of those guarantees over a considerable period of time. Is that approach correct? Can a due process analysis simply be dropped a rung in the Bill of Rights to define the contents of the Sixth Amendment?

An interpretation that makes specific rights redundant—a reading that a person can only receive protection under a provision by concomitantly showing protection under another provision—ought to be suspect. Why are there Sixth Amendment rights to an impartial jury and effective assistance of counsel and compulsory process if a due process violation must be shown to have them enforced? What is the point to a specific Sixth Amendment right if it does nothing beyond the restrictions of due process? Why was there a struggle over incorporation if the explicit provisions of the Sixth guranteed nothing not already protected by due process?

Each part of the Bill of Rights ought to serve a function. Indeed, "it is difficult to imagine anything more at odds with a framer's intention than that the constitutional provision she has just helped to enact will be meaningless and unenforced."[41] If the specific provisions of the Sixth Amendment are to be meaningful and enforced, then, they must do something in addition to or different from what the Due Process Clause already does. Since due process clearly entitles the accused to a fundamentally fair trial, Sixth Amendment protections must offer something more or something other than this fairness. In trying to determine what that more or other is, in trying to develop a meaningful Sixth Amendment, several principles should be consistently applied.

First, the Sixth Amendment is not isolated and should not be treated in isolation. It has a context and that context is the Bill of Rights as a whole. Unless interpretations of the Sixth Amendment properly consider the connections and contrasts with the rest of the Bill of Rights, those readings are likely to be misinformed. While this proposition may seem obvious, it has seldom been followed.[42]

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a speedy trial claimant, to be successful, not only does not have to show that a trial was fundamentally unfair, he does not even have to show prejudice. Moore v. Arizona, 414 U.S. 25 (1973), expressly rejected the contention that a showing of prejudice was essential for a successful speedy trial claim. *Moore* also stated, "Moreover, prejudice to a defendant caused by delay in bringing him to trial is not confined to the possible prejudice to his defense in those proceedings." *Id.* at 26-7. *Cf.* Waller v. Georgia, 467 U.S. 39, 49-50 (1984)(noting "[t]he consistent view of the lower federal courts that the defendant should not be required to prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee . . ." and concluding, "We agree with that view. . . .").

41 Gene R. Nichol, Jr., *Bork's Dilemma*, 76 VA. L. REV. 337, 342 (1990).

42 *Cf.* Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1132

If it were, the Sixth Amendment would be seen as having a central role in our constitutional structure. The Sixth Amendment is at the heart of an integrated Bill of Rights because its jury trial guarantee contains the paradigmatic right of the first ten amendments.

A. THE CENTRAL ROLE OF THE SIXTH AMENDMENT

The importance of juries to the generation that drafted the Constitution can hardly be overstated. Immediately after independence all the states placed a jury trial protection in their constitutions. Indeed, the guarantee of a jury trial in criminal cases was the only right granted in all the state constitutions adopted before 1787.[43]

Professor Amar has contended that juries were seen as a crucial cornerstone in the edifice that allowed the common person to control government.

> Spanning both civil and criminal proceedings, the key role of the jury was to protect ordinary individuals against governmental overreaching. Jurors would be drawn from the community; like the militia they were ordinary Citizens, not permanent government officials on the government payroll. Just as the militia could check a paid professional

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(1991)("To my knowledge no legal academic in the twentieth century has attempted to write in any comprehensive way about the Bill of Rights as a whole. So too, today's scholars rarely consider the rich interplay between the original Constitution and the Bill of Rights.").

Professor Amar attempts to do that and challenges the conventional wisdom that the Bill of Rights was largely designed to protect individual and minority rights against the majorities. He concludes:

> Of course, individual and minority rights did constitute a motif of the Bill of Rights—but not the sole, or even dominant, motif. A close look at the Bill reveals structural ideas tightly interconnected with language of rights; states' rights and majority rights alongside individual and minority rights; and protection of various intermediate associations—church, militia, and jury—designed to create an educated and virtuous electorate. The main thrust of the Bill was not to downplay organizational structure, but do deploy it; not to impede popular majorities, but to empower them.

Id. *See also* Howard W. Gutman, *Academic Determinism: The Division of the Bill of Rights*, 54 S. CAL. L. REV. 295, 327-29 (1981):

> Despite the fact that the Constitution, including the Bill of Rights, has been the ultimate authority regulating the relation between the State and its citizens for nearly two hundred years, these ten amendments have virtually never been studied and taught together, within one compartment and by one category of specialists. . . . Part of the explanation behind the failure to study the Bill of Rights as a whole is that, for the past eighty years, parts of the Bill of Rights have not been studied at all. . . . The more important reason for the failure to study the Bill of Rights as a unit . . . is that parts of the Bill of Rights have been characterized differently and therefore divided into separate compartments. The jury trial clause of the seventh amendment has been characterized as part of the trial process within the study of Civil and Criminal Procedure. The compulsory process and confrontation clauses have also been characterized as part of the trial process, but within the bounds of Evidence.

[43] LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 227 (1985).

standing army, so too the jury could thwart overreaching by powerful and ambitious government officials.[44]

The prominence of juries in the constitutional scheme is perhaps best indicated by the fact that they are specifically granted in three amendments, while concerns about juries affected other amendments.[45] And, of course, the core of the Sixth Amendment is the right to jury trials in criminal cases.[46]

This recognition of the Sixth Amendment's central role should shape its interpretation. A central role is not granted by niggardly readings. The intended centrality is denied by results that submerge Sixth Amendment guarantees into due process. Instead, it

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[44] Amar, *supra* note 42, at 1183. *See also* Taylor v. Louisiana, 419 U.S. 522, 530 (1975)("The purpose of the jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge."). *Cf.* Baldwin v. New York, 399 U.S. 66, 72 (1970):

> ([T]he primary purpose of the jury is to prevent the possibility of oppression by the Government; the jury interposes between the accused and his accuser the judgment of laymen who are less tutored perhaps than a judge or panel of judges, but who at the same time are less likely to function or appear as but another arm of the Government that has proceeded against him.)

Professor Amar has argued that an integrated examination of the Bill of Rights reveals that the dominant motif was not the protection of individual or minority rights, but was the empowerment of majorities to control the federal government and that juries played a crucial role in this scheme.

> [T]he Bill of Rights protected the ability of local governments to monitor and deter federal abuse, ensured that ordinary citizens would participate in the federal administration of justice through various jury-trial provisions, and preserved the transcendent sovereign right of a majority of the people themselves to alter or abolish government and thereby pronounce the last word on constitutional questions.

Amar, *supra* note 42, at 1133.

[45] *See* Amar, *supra* note 42, at 1183("Guaranteed in no less than three amendments, juries were at the heart of the Bill of Rights. The Fifth safeguarded the role of the grand jury; the Sixth, the criminal petit jury; and the Seventh, the civil jury.")

According to Amar's analysis, the central role of juries is also indicated because of the effect juries had on other amendments.

> Not only was [the jury] featured in three separate amendments . . . , but its *absence* strongly influenced the judge-restricting doctrines underlying three other amendments (the First, Fourth, and Eighth). So too, the double jeopardy clause, which makes no explicit mention of juries, should be understood to safeguard not simply the individual defendant's interest in avoiding vexation, but also the integrity of the initial petit jury's judgment. . . . The due process clause also implicated the jury, for its core meaning was to require lawful indictment or presentment.

Id. at 1190.

[46] The Sixth Amendment states:

> 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. amend. VI.

can best be accomplished, of course, by expansive readings of the Sixth Amendment.[47]

B. THE SIXTH AMENDMENT RIGHTS AS FUNDAMENTAL GUARANTEES

A court viewing the Sixth Amendment as part of an integrated Bill of Rights would also have to confront whether the standards that have been applied to other constitutional rights should also be applied to the Sixth Amendment. The impartial juror right interpreted in *Mu'Min* provides an illustration of what this might mean.

Placed in its proper perspective, the jury required by the Sixth

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[47] A number of other reasons also appear supporting an expansive reading of the Sixth Amendment when it is contrasted with other Bill of Rights provisions. For example, the contemporary Supreme Court has "repeatedly cited the importance of accurate adjudication as a reason to interpret restrictively rights that can be called 'truth-impairing,' that is, rights withholding relevant evidence of guilt from the adjudicative process." Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369, 1370 (1991). Rights that are not truth-impairing, then, must be interpreted more liberally. *Cf. id.* at 1370-71 ("This logic implies that the Court should broadly construe rights that put exculpatory evidence before juries and that the Court has itself described as 'truth-furthering.' "). Since the Sixth Amendment guarantees of counsel, confrontation, and compulsory process can all be considered part of a right to present exculpatory evidence, *see id.* at 1373 n.11, these rights should be read expansively.

The contrast with what has been described by Professor Joseph D. Grano as "prophylactic constitutional rules" also supports an expansive reading of the Sixth Amendment. "A prophylactic constitutional rule . . . is a rule that functions as a preventive safeguard to insure that constitutional violations will not occur. What distinguishes a prophylactic rule from a true constitutional rule is the possibility of violating the former without actually violating the Constitution." Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 105 (1985). As an example, Grano gives the warnings mandated in Miranda v. Arizona, 384 U.S. 436 (1966). Grano, *supra* at 106-11.

Rights stemming directly from the Constitution, then, should be read more expansively than rights coming out of such prophylactic rules. An infringement of a provision like the right to counsel or an impartial jury is a direct constitutional violation, as Grano recognizes:

> [T]he primary purpose of [the] right [to counsel] is to assure the defendant a fair trial. Yet denial of counsel at trial is unconstitutional even if the trial is otherwise fair. . . . [O]nce the Court determines that the Sixth Amendment right to counsel is applicable, a trial in derogation of that right is unconstitutional even though it is otherwise fair.

Id. at 115-18. Indeed, the Court has resisted adopting what might be seen as prophylactic Sixth Amendment rules. For example, in deciding what is constitutionally ineffective assistance of counsel, the Court adopted a general test ("whether counsel's assistance was reasonable considering all the circumstances") and refused to require any specifically enunciated duties. Strickland v. Washington, 466 U.S. 668, 688 (1984) ("Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable, but they are only guides.").

Similarly, in adopting a four-part balancing test for determining Sixth Amendment speedy trial claims, Barker v. Wingo, 407 U.S. 514, 523 (1972), first rejected the "suggestion . . . that we hold that the Constitution requires a criminal defendant to be offered a trial within a specified time period."

Amendment is not just a factfinding device, but an essential part of the constitutional structure inhibiting governmental overreaching.[48] This structure mandates not just any jury, but a jury with certain attributes. Thus, the founders required local jurors.[49] Local jurors, however, also present a special danger because they might have information which could be misused. Consequently, "impartial" found its way into the Sixth Amendment:

> [T]he draftsmen of the Sixth Amendment were concerned about the possible abuse of personal knowledge of the case by the jurors. Hence, the Sixth Amendment was drafted to provide that the jury be "impartial" and that witnesses be confronted. . . . The . . . demand is that the jurors be impartial and decide the case on the evidence presented during the trial . . . .[50]

Seen this way, the impartial juror requirement functions much as other provisions do that are part of the fundamental checks and

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[48] Accurate factfinding, of course, can help check overreaching by the government. *Cf.* Drew L. Kershen, *Vicinage*, 30 OKLA. L. REV. 1, 79 (1977) ("While ascertainment of truth may not be the only, or primary, goal of a criminal trial, assuredly if the trial is to be perceived as a rational process, then the ascertainment of truth must be a highly valued goal."). Factfinding, however, was only one function of the jury in our constitutional structure. Juries were mandated "to find the facts, to apply the law to the facts, and to serve as the conscience of the community." *Id.* at 75. The last two are interrelated:

> Unless the jury applies the law to the facts so as to articulate the community sense of justice, there is justifiable fear that the jury will not feel responsibility for the verdict rendered. Unless the jury renders a verdict in which the community sense of justice is articulated, an accused may not feel that he has been judged, but rather may feel he has been processed. Although expertise, uniformity, and certainty are worthwhile goals for a legal system, assuredly these goals must be of lesser importance than the goal of an articulation of the community sense of justice in a criminal verdict.

Id. at 83.

[49] *See* Amar, *supra* note 42, at 1186:

> The jury was not simply a popular body, but a local one as well. Indeed, the Sixth Amendment explicitly guaranteed a jury 'of the State and district wherein the crime shall have been committed,' going a step beyond the language of Article III, which required only that jury trials be held somewhere within *the state* were the crime occurred. . . . Just as state legislators could protect their constituents against central oppression, so too jurors could obviously 'interpose' themselves against central tyranny through the devices of presentments, nonindictments, and general verdicts. As with the militia, the jury would be composed of Citizens from the same community and its actions were expected to be informed by community values.

See also Kershen, *supra* note 48, at 75-94 (discussing how local jurors serve the purposes of the jury better than other jurors).

For similar reasons, trials also had to be public:

> Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.

In re Oliver, 333 U.S. 257, 270 (1948).

[50] Kershen, *supra* note 48, at 77.

balances placed into our constitutional structure. If this right is fundamental, should it be measured by standards different from those by which other essential guarantees are measured?[51] The crucial issue might be whether a "strict scrutiny," or "compelling state interest," or a "least restrictive alternative" test should be used to decide Sixth Amendment disputes just as such formulations are used to assess other constitutional claims.[52] If such tests were used, the Court would have to address very different questions from those that it has addressed in deciding a Sixth Amendment case like *Mu'Min*. There the Court decided whether the trial judge's refusal to make the voir dire inquiry denied the accused a fair trial. If this Sixth Amendment issue had been seen as other constitutional issues are, however, the Court might instead have asked whether there was a compelling state interest in the refusal of the voir dire questions? Whatever the right answer might be to that question in a particular case, its use as a controlling standard would greatly change the Sixth Amendment because it is a question fundamentally different from the due process standard of whether a trial was fair. If this kind of question had

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[51] *See* Susan Bandes, *Taking Some Rights Too Seriously: The State's Right to a Fair Trial*, 60 S. CAL. L. REV. 1019, 1056 (1987) ("For reasons that are not apparent, the field of constitutional criminal procedure has not always incorporated the modes of analysis generally employed in constitutional cases.").

[52] Professor Bandes maintains that the strict scrutiny test applied to other constitutional rights is not, but ought to be, applied to the criminal procedure rights:

> The strict scrutiny standard of judicial review is the appropriate standard for evaluating state rules or enactments which are alleged to burden the fundamental trial-related rights of those accused of crimes. The strict scrutiny test is familiar: it demands that when political choices burden fundamental rights, the means employed must be the least restrictive available to achieve the desired end. Additionally, the ends themselves must be sufficiently compelling to justify infringement. To a troubling degree, the strict scrutiny test is not used to evaluate state rules which are alleged to burden fundamental criminal rights.

Id. at 1050-51. *See also* Gutman, *supra* note 42, at 344, who first concludes that the dominant test in the Bill of Rights requires "a compelling state interest and the nonexistence of less restrictive means before a state can abridge an individual's rights." He then notes about one specific Sixth Amendment right:

> Although by its terms the guarantee of confrontation seems as fundamental today as the right to speech, religion, association, nondiscrimination and the host of interests grouped under substantive due process, no scholar or judge has ever suggested reliance on the compelling state interest test to assess the constitutional validity of abridgements of the right of confrontation. Even conceding arguendo that the right of confrontation is less fundamental than the other interests, no court or writer has ever applied the minimum rationality test, currently employed in mediating the state's interest with regard to less fundamental interests.

Id. at 344-45. After surveying how the standards for confrontation deviate from the more usual constitutional tests, Gutman concludes, "The mediation of conflicting constitutional rights and governmental interests is never easy; yet, the 'hard' question of mediating the right to confrontation and the state's interest cannot even be pondered until the issue is constitutionally framed." *Id.* at 347.

controlling status, Sixth Amendment guarantees would not necessarily be submerged into due process.

C. THE AFFIRMATIVE NATURE OF THE SIXTH AMENDMENT

While a proper constitutional interpretation would acknowledge that the Sixth Amendment plays a central role in the structure of the Bill of Rights, it would also need to recognize that the Sixth Amendment has important characteristics that set it apart. Most important among these is that the Sixth Amendment is not a collection of negatives restraining government, but consists of a series of positive guarantees.

A dominant constitutional theory maintains that the Constitution does not require the government to act, but only curbs the government from acting wrongly. As Judge Posner has stated, the Constitution

> is a charter of negative rather than positive liberties. . . . The men who wrote the Bill of Rights were not concerned that Government might do too little for the people but that it might do too much to them. The Fourteenth Amendment, adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by state government, not to secure them basic governmental services.[53]

This distinction between positive and negative rights drives due process analyses. Chief Justice Rehnquist asserts, "[T]he Due Process Clauses generally confer no affirmative right to governmental aid . . . ." [54]

The Sixth Amendment, however, is different; it affirmatively grants rights. Certainly its wording, at least when contrasted with the Fourteenth Amendment's Due Process Clause, indicates the Sixth Amendment's positive nature. While that due process provision is stated negatively, "nor shall any State" deprive,[55] the Sixth

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[53] Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir.), *cert. denied*, 465 U.S. 1049 (1983). *See also* Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2272 (1990):

> No inquiry is more central to constitutional jurisprudence than the effort to delineate the duties of government. The courts' approach to this complex subject has been dominated by reliance on a simple distinction between affirmative and negative responsibilities. Government is held solely to what courts characterize as a negative obligation: to refrain from acts that deprive citizens of protected rights. Obligations that courts conceive to be affirmative — duties to act, to provide or to protect — are not enforceable constitutional rights.

[54] DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 196 (1989).

[55] *See* David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 865 (1986):

> Like so many of the provisions of the Bill of Rights, from which it was copied, the due process clause is phrased as a prohibition, not an affirmative command: "nor

Amendment is stated affirmatively, "the accused shall enjoy."[56]

Furthermore, an examination of the constituent parts of the Sixth Amendment clearly reveals that they are not negative liberties. For example, no one suggests that the proper way to interpret the impartial jury requirement is for the government to tell the accused, You are entitled to a trial decided by impartial jurors. We won't stand in your way in finding them. If you round them up, you can have such a trial. If you don't produce this group, however, since we have not deprived you of the right, you can be validly tried under the Sixth Amendment without impartial jurors.

This argument is not advanced because the right to a jury is obviously an affirmative grant to the accused. The question is not whether the prosecutor or some other instrument of the state did something to deny a trial by jury; rather, the question is whether the accused did in fact get the mandated jury trial. The jury trial guarantee is a positive right.[57]

Compulsory process also illustrates this. Compulsory process does not merely forbid governmental interference with the accused's attempt to produce his witnesses. Instead, this provision enables the accused to call on the coercive power of the state to enable him to produce witnesses in his favor. An affirmative right forces the government to act, and that is precisely the essence of compulsory process.[58]

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shall any State" is the equivalent of "a State shall not." Moreover, what the states are forbidden to do is to "deprive" people of certain things, and depriving suggests aggressive state activity, not mere failure to help.

Currie goes on to conclude, "[G]iven the absence of evidence in the debates, it is hard to believe the due process clause of the Fourteenth Amendment was meant to have a radically different effect from that of the fifth."). *Id.* at 866.

56 *See id.* at 873-74, noting the affirmative nature of the Sixth Amendment's right to counsel guarantee and contrasts its language with that of other constitutional rights. "The due process clauses explicitly require government deprivation, the first amendment requires government abridgement; the 'right' to assistance of counsel is not so negatively phrased."

57 *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 157-58 (1968) ("[I]n the American States, as in the federal judicial system, a general grant of jury trial for serious offenses is a fundamental right . . . .").

58 Instead of labelling the Sixth Amendment components as affirmative rights of the accused, the amendment could be said to place duties on the government. For example, compulsory process places a duty on the government to assist the accused in producing witnesses. *See* Barker v. Wingo, 407 U.S. 514, 527 (1972) ("A defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process.")

This alternative phrasing, however, states nothing different than that the Sixth Amendment affirmatively grants rights to the accused. If a constitutional provision places a duty on the government to give the accused something, such as a jury trial, then the right is fundamentally different than one that just restrains governmental behavior.

Perhaps the Court's most striking recognition of the positive nature of a Sixth Amendment provision has been in the right to counsel area. As *Gideon* establishes, the Sixth Amendment is violated not just when the government prevents the accused from being represented by an attorney, but also when the accused who cannot afford a lawyer is not furnished one.[59] If the government is going to prosecute, it must act affirmatively to make sure that the indigent is represented by competent counsel.[60]

As these rights illustrate, and as a comprehensive examination would confirm,[61] the Sixth Amendment is a collection of affirmative rights.[62] The positive nature of the Sixth makes it fundamentally different from due process,[63] and this elemental difference should

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59 Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (precedents, reason, and reflection "require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."). *See* Currie, *supra* note 55, at 873 ("The Court has long held that [the right to counsel] imposes an affirmative duty on the government to provide legal assistance if the defendant cannot afford it.").

60 Even though *Gideon* has been limited so that indigents charged with misdemeanors and not sentenced to jail are not entitled to the appointment of counsel, *See* Argersinger v. Hamlin, 407 U.S. 25 (1972); Scott v. Illinois, 440 U.S. 367 (1979); the point remains: when the Sixth Amendment right to counsel applies, it is not merely a restraint on government, but an affirmative grant to the accused.

The Supreme Court's interpretation of a component of the counsel guarantee, the right to effective assistance of counsel, further illustrates that point. "Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense. . . . Counsel, however, can also deprive a defendant of the right to effective assistance, simply by failing to render 'adequate legal assistance.' " Strickland v. Washington, 466 U.S. 668, 686 (1984) (quoting Cuyler v. Sullivan, 446 U.S. 335, 344 (1980)). The accused is entitled to effective assistance even if the government was not the cause of the ineffective assistance.

61 *See, e.g.*, In re Oliver, 333 U.S. 257, 266 (1948) (referring to the "accepted practice of guaranteeing a public trial to an accused . . . . ").

62 *Cf.* Bandes, *supra* note 53, at 2276 ("Some constitutional provisions clearly mandate affirmative governmental conduct. For example, the Sixth Amendment requires government to provide an accused a speedy public trial, compulsory process, assistance of counsel, and the opportunity to be informed of the nature of the accusation and confronted with the witnesses against him."). *See also* Currie, *supra* note 55, at 874 n.57 ("The right to counsel also appears in tandem with other 'rights,' such as those to compulsory process and a jury trial, which unmistakably require affirmative action . . . .").

63 These affirmative rights could be phrased as a restraint on government; that is, the state is prevented from convicting an accused unless the accused has a jury trial, a lawyer, been given notice, and so forth. *See, e.g.*, Cuyler v. Sullivan, 446 U.S. 335, 344 (1980) ("The right to counsel prevents the States from conducting trials at which persons who face incarceration must defend themselves without adequate legal assistance.") *Cf.* Currie, *supra* note 55, at 874 ("[T]o characterize the right to assigned counsel as involving an affirmative government duty is to look at only a part of the transaction. In convicting an individual of crime, the government reaches out to deprive him of life, liberty, or property by execution, jail, or fine.").

Although semantics allow a negative phrasing of the Sixth Amendment, these rights

lead to different standards for due process and the Sixth Amendment. In other words, a consistent and meaningful constitutional interpretation cannot just submerge the Sixth Amendment into due process. The negative guarantee of the Fifth and Fourteenth simply cannot make superfluous the affirmative rights of the Sixth.

D. THE SIXTH AMENDMENT AS PERSONAL RIGHTS

A meaningful Sixth Amendment jurisprudence must also recognize that the Sixth Amendment grants personal rights in addition to affirmative rights. While the Sixth Amendment may be a central facet of a constitutional structure that protects all of us from governmental overreaching, the Sixth does this not by granting a right to society or even a collective right. It, instead, grants a right directly to the accused, and the accused only, as its explicit language indicates—"*the accused* shall enjoy."[64] Just as interpretations should give effect to the Sixth Amendment's central role and to its construct as a collection of affirmative guarantees, the analyses should also give effect to its construct as personal rights of the accused. When the Sixth Amendment is interpreted to grant the accused nothing dis-

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are not restraints focusing on what the government did, as *Cuyler* itself indicates. *Cuyler* considered whether different standards for retained and appointed counsel should determine ineffectiveness of counsel. Since the state plays a greater role when counsel is appointed than when counsel is privately retained, a governmental restraint model should lead to stricter standards for appointed counsel. If effective assistance of counsel is an affirmative grant to the accused, the appointed or retained status of counsel does not matter. The Court correctly treated effective assistance as an affirmative right. "Since the State's conduct of a criminal trial itself implicates the State in the defendant's conviction, we see no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers." *Cuyler*, 446 U.S. at 344-45.

Once the state has chosen to prosecute, the Sixth Amendment affirmatively grants rights to the accused. These protections do not come into play until the person becomes an accused. Indeed, they could not. We can have an omnipresent right to free speech, but an ever-present right to a jury trial makes no sense. A jury trial right is only meaningful in a dispute-resolution context. The Sixth Amendment puts no restraints on the government before a person becomes accused. After the person becomes an accused, the Sixth Amendment grants affirmative rights. For example, the speedy trial right begins when a person becomes accused in the criminal process. United States v. Marion, 404 U.S. 307, 320 (1971) ("[I]t is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.") Before the Sixth Amendment trial right applies, a person is only protected by due process. *Id.* at 325.

64 *See, e.g.*, Gannett Co. v. DePasquale, 443 U.S. 368, 380 (1979) ("Our cases have uniformly recognized the public trial guarantee as one created for the benefit of the defendant.") *Cf.* Amar, *supra* note 42, at 1175 (contending that the use of the terms "the people" or "the militia" in the Constitution indicated collective rights, while use of the terms "man" or "person" indicated individual rights.). U.S. CONST. amend. IV.

tinct from what others are entitled to, then part of the Sixth Amendment disappears.[65]

Analyses like *Mu'Min's* do not recognize the personal and affirmative natures of the Sixth Amendment. *Mu'Min* found that the right to an impartial jury was not violated because the failure to ask the voir dire questions did not prevent a fundamentally unfair trial. The issue for the Sixth Amendment, however, was not whether a fair trial was denied, but instead whether the accused was granted the personal right to an impartial jury. Even if the resulting trial was "fair," the Sixth Amendment was violated if an impartial jury did not decide the case.

Aware of this, a court might recast the issue to ask whether the rejected voir dire questions were necessary for an impartial jury. This formulation, however, does not truly treat the right as an affirmative one either. When an affirmative guarantee is at stake, is it sufficient to conclude that the question was not absolutely essential to assure an impartial jury? The Court's standard essentially requires the accused to demonstrate that his jury was not impartial. Since, however, this is a right that government must affirmatively satisfy, if we are in doubt about whether the jury was impartial or not, the accused should win his claim. Only when the court affirmatively concludes that the jury was impartial can the positive, personal guarantee of the Sixth Amendment be satisfied.

E. THE INTEGRATED PROTECTIONS OF THE SIXTH AMENDMENT

Finally, just as the Sixth Amendment should be read as part of an integral Bill of Rights, each Sixth Amendment guarantee should be interpreted in light of the rest of the Sixth Amendment. Unless

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65 The Sixth Amendment right to confrontation has been interpreted so that it is not a personal right of the accused. *See* Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 580-81 (1988) (alteration added):

> According to the Court, [the confrontation clause] merely grants the defendant the right to the most accurate truth-determining process. Granting the defendant this right allows him nothing not given the prosecution. The prosecution's only legitimate desire in a criminal trial is to achieve the best truth-determination. . . . In asserting his confrontation rights the defendant is no longer claiming a protection from the prosecution, but is seeking exactly what the prosecution can also claim. The confrontation clause, in spite of its actual words extending a right to the accused, no longer expressly safeguards the accused. Instead, it is a protection which everyone in society, as represented by the prosecutor, can demand.

See also Bandes, *supra* note 51, at 1045 ("[T]he state cannot claim to represent the accused's rights. The state can, of course, represent its own interests, but these must be weighed on their own merits, and not be imbued with the borrowed weight of those of the accused. The state's interests are distinct from the accused's interests."). Professor Bandes also notes, "The Constitution makes no mention of the state's right to a fair or impartial trial." *Id.* at 1022-23.

each grant was randomly dropped into the Sixth, the clauses should not be read in isolation. The individual guarantees, however, do fit together to serve broader purposes than those served by each separately. Thus, the Sixth Amendment does not just grant the accused a jury trial. It goes on to mandate a local, impartial jury for a trial that is to be both public and speedy. These are not separable guarantees. Instead, they dovetail to construct a forum that will not only find facts, but will also be a check on governmental overreaching.[66]

The Court has also recognized, at least some of the time, that the remaining provisions—notice, confrontation, compulsory process, and assistance of counsel—must also be read together:

> The Sixth Amendment includes a compact statement of the rights necessary to a full defense. . . . [T]hese rights are basic to our adversary system of criminal justice. . . . The rights to notice, confrontation, and compulsory process, when taken together, guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice—through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence. In short, the Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it.[67]

If the purpose of this portion of the Sixth Amendment is to grant the accused an adversary process,[68] then these rights must be read together:

> Defense counsel is necessary for the fair conduct of an adversarial trial, but an adversarial trial would still be denied if that counsel could not present favorable witnesses or test adverse evidence. Granting the accused the opportunity to cross-examine witnesses can be meaningless if the accused does not have skilled counsel conduct the questioning. An accused can be granted a compulsory process right, but we do not have our adversary system if the accused does not also have the right to confront adverse witnesses. All the rights assuring the adversary process must be read together. . . .[69]

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66 *See supra* sections II.E.-G. for how the jury trial, speedy trial, impartial jury, and local jury requirements all act as checks on governmental overreaching. *See also* In re Oliver, 333 U.S. 257, 270 (1948) (A public trial furthers accurate factfinding by increasing the possibility of witnesses coming forward, but in addition "the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.").

67 Faretta v. California, 422 U.S. 806, 818 (1975).

68 *Cf.* Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 73, 179 (1974) ("All of the various procedural rights in the Bill of Rights are implicitly designed to strengthen the adversary posture of the accused. Indeed, in pursuit of their common end they overlap and complement one another.").

69 Jonakait, *supra* note 65, at 583.

Each Sixth Amendment right must be interpreted taking into consideration its Sixth Amendment context.[70] Such an integrated view can lead to conclusions different from those reached if each clause is read as if the rest of the amendment did not exist. An opinion in the Court's most recent confrontation case illustrates this.

In *White v. Illinois*[71] the Supreme Court held that the prosecution did not have to show the unavailability of the declarant before using out-of-court statements that fell into the well-established spontaneous declaration and medical examination hearsay exceptions. The majority, through Chief Justice Rehnquist, found this result compelled by precedent.

Justice Thomas, with Justice Scalia, concurred, but objected that "[t]he Court unnecessarily rejects, in dicta, the United States' suggestion that the Confrontation Clause in general may not regulate the admission of hearsay evidence."[72] Justice Thomas continued that the text of the confrontation clause makes the phrase "witnesses against him" the crucial portion for determining the correct outcome of *White*.[73] Thomas then quoted a recent opinion by Justice Scalia that noted that the confrontation clause does not contain an explicit hearsay prohibition.

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[70] *Cf.* Gutman, *supra* note 42, at 379 ("(i)t is impossible to understand the meaning of the right to confrontation without focusing on the entire Sixth Amendment.") *See also* Jonakait, *supra* note 65, at 581:

> Confrontation is meaningless as a fundamental right if it has the mission the Court ascribes to it. The Court, however, has divined this purpose for the clause by examining it in isolation. . . . The confrontation clause, however, does not sit by itself in the Constitution. It has a context; it is but one provision of the Sixth Amendment. If the clause is interpreted in that context, as part of the Sixth Amendment, a different mission for the clause is apparent.

[71] 112 S. Ct. 736 (1992).

[72] *Id.* at 744 (Thomas, J., with whom Scalia, J. joins, concurring in part and concurring in the judgment). The majority had rejected the position offered by the United States as *amicus curiae*. The federal government argued that the Sixth Amendment's confrontation clause was only meant to prevent a "particular abuse common in 16th and 17th century England: prosecuting a defendant through the presentation of *ex parte* affidavits, without the affiants ever being produced at trial." *Id.* at 740. The United States concluded that the confrontation clause should only affect hearsay "in the character of an *ex parte* affidavit, *i.e.*, where the circumstances surround the out-of-court statement's utterance suggest that the statement has been made for the principal purpose of accusing or incriminating the defendant." *Id.* at 741.

The majority noted that reading would virtually eliminate confrontation's role in restricting hearsay while Supreme Court precedents for a century have concluded that confrontation does place more limits on hearsay than that suggested by the government. The Court concluded, "We think that the argument presented by the Government comes too late in the day to warrant reexamination . . . ." *Id.*

[73] *Id.* at 744 (Thomas, J., concurring) (quoting U.S. CONST. amend. VI) ("The Confrontation Clause provides simply that '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . . It is plain that the critical phrase within the Clause for purposes of this case is 'witnesses against him.' ").

Scalia had asserted that the noun "witness" could mean two things—a person who knew or saw something or a person who testified in a judicial proceeding. He concluded, "The former meaning (one 'who knows or sees') would cover hearsay evidence, but is excluded in the Sixth Amendment by the words following the noun: 'witness *against him*.' The phrase obviously refers to those who give testimony against the defendant at trial."[74]

In other words, in this view the text in essence reads that the accused can confront those who have testified at trial against the accused. The Confrontation Clause, then, would place no limits on hearsay.[75]

Neither Scalia nor Thomas in these opinions, however, considers the Confrontation Clause in its Sixth Amendment context. What seems so obvious in isolation seems less so when the words after the Confrontation Clause are also examined. The Sixth Amendment continues by guaranteeing the accused the right "to have compulsory process for obtaining witnesses in his favor. . . ." If compulsory process and confrontation are read as part of one Sixth Amendment, it can hardly make sense for "witnesses" to have one meaning for confrontation and a different one for compulsory process. If, however, "witness" only refers to one who testifies at a judicial proceeding, then the Compulsory Process Clause makes no sense. According to Thomas and Scalia's interpretation, compulsory process would have to mean that the accused has the right to compel the presence and testimony of those who have testified at the proceeding in the accused's favor. But, of course, if the witness has already testified in the accused's favor, then the accused has no need to have compulsory process.[76] The "obvious" reading of an

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74 Maryland v. Craig, 110 S. Ct. 3157 (1990) (Scalia, J., dissenting.)

75 Justice Thomas finally suggests a confrontation standard that is inconsistent with the Sixth Amendment text as he reads it, but which he says is both faithful to the provision's words and history: "The federal constitutional right of confrontation extends to any witness who actually testifies at trial, but the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." *White*, 112 S. Ct. at 747.

76 The problems do not disappear if the Scalia-Thomas approach decided that "witness" meant "one who testifies or who will testify in a judicial proceeding." This definition means that the Confrontation Clause could be satisfied by granting confrontation before a person testifies. Indeed, the constitutional right could be satisfied by allowing the accused to confront the witness before trial. This new definition would create new problems for interpreting the Confrontation Clause, and the Compulsory Process Clause would still make no sense. An accused does not need or desire compulsory process for a person "who will testify." Granting the accused the right to compulsory process for those who will testify is to create a tautology. An accused needs compulsory process for "witnesses" who would not testify without being compelled. *Id.* at 748.

isolated Confrontation Clause is plainly troublesome when read in its Sixth Amendment context, and a meaningful and consistent Sixth Amendment requires integrated readings.

F. ADVERSARY OR ADVOCACY RIGHTS?

Does the Sixth Amendment grant criminal defendants an adversary system? In a previous article, as the quotation above indicates,[77] I agreed with the Court opinions concluding that parts of the Sixth Amendment work together to assure an adversary system. As I read more about the development of English common law and criminal procedure, however, I have started to believe that that conclusion should perhaps be modified.

The usual assumption has been that the Sixth Amendment incorporated common law protections[78] that arose largely in reaction to abuses occurring in English political trials.[79] This reliance on state trials,[80] which were largely treason cases, might be a misleading, or at least an incomplete, way of looking at the origins of the Sixth Amendment.[81]

Perhaps the most significant reason to be dubious of too much dependence on the state trials as the source of the Sixth Amendment is that English criminal procedure developed differently in state trials than in ordinary criminal trials. The accused was granted meaningful protections in treason trials that were denied in ordinary cases. Most important, treason defendants were granted by statute a right to counsel in 1696, and the same right was not granted in ordinary criminal cases until 1836.[82]

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77 *See* Jonakait, *supra* note 65, at II B.

78 *See, e.g.*, Daniel Shaviro, *The Confrontation Clause Today in Light of its Common Law Background*, 26 VAL. U. L. REV. 337, 343 (1991) ("[T]he framers of the Sixth Amendment, when they chose to guarantee what was by then the well-developed English common law mode of trial . . . .").

79 *See, e.g., id.* at 341 ("The Confrontation Clause often is described as a reaction to the perceived injustice of the treason trial of Sir Walter Raleigh in 1603. . . . Trials such as that of Raleigh . . . did prompt the subsequent common law response that led to . . . the Confrontation Clause.").

80 "By 'State Trials' is meant trials of state, that is, affairs of state—cases involving high politics." John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 265 (1978).

81 *Cf. id.* at 266 ("Not only are the State Trials to some extent unreliable, they are grossly unrepresentative as well. Yet from these few hundred cases of mostly political crime we have derived our historical picture of the criminal trial.").

82 "Among the principal reforms of the Treason Act of 1696, [7 & 8 Wil. 3, c. 3, § 1 (1696)] was the extension of the right to counsel to the accused. This and other safeguards in the act applied exclusively to treason defendants, and not persons charged with ordinary felony." Langbein, *supra* note 80, at 309 (alteration added). Similarly, notice of the charges in treason cases had to be given ten days in advance of trial, but in

Trials at early eighteenth century common law in ordinary felony cases differed sharply from modern trials. They were not proceedings fueled by advocates and adversaries. Instead, judges basically did all the examination and cross-examination of witnesses and, thus, dominated the presentation of information to the jury.[83]

Trials in ordinary felony cases did change during the eighteenth century. The most significant factor was the increasing presence in ordinary criminal trials of defense attorneys, which did not occur on any regular basis until close to the time of our Constitution's adoption.[84] Attorneys, when permitted, however, were limited in their

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the ordinary cases, notice was not given until the trial began. *See* THE LAW PRACTICE OF ALEXANDER HAMILTON 685-87 (Julius Goebel, Jr. et al. eds., 1964). *See also* Langbein, *supra* note 80, at 283 (contending that although a privilege against self-incrimination may have existed in state trials by the early eighteenth century, it did not exist in ordinary felony prosecutions).

Counsel was not fully extended to the accused in England until the passage of the Prisoner's Counsel Act in 1836. 6 & 7 Wm. IV, c. 114 (1836). For the history of the passage of this statute, see J. M. Beattie, *Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries*, 9 LAW & HIST. REV. 221, 250-58 (1991).

[83] *See* Beattie, *supra* note 82, at 221-23:

> Accused felons might seek a lawyer's advice on points of law, but if they wanted to question the prosecution evidence or to put forward a defense, they had to do that on their own behalf. The victim of a felony (who most often acted as prosecutor in a system that depended fundamentally on private prosecution) was free to hire a lawyer to manage the presentation of his or her case. But in fact few did so. The judges were generally the only participants in felony trials with professional training. They dominated the courtroom and orchestrated the brief confrontation between the victim and the accused that was at the heart of the trial. . . .
>
> The facts at issue were normally presented orally by the victim of the offense, supported by witnesses who, like the victim, gave their evidence briefly and generally under the questioning of the judge. The judge acted as examiner and cross-examiner—although the defendant and jurors could ask question and often did so by blurting them out . . . .
>
> The accused could not compel the attendance of witnesses. At the trial itself, accused felons had to speak in their defense and to respond to prosecution evidence as it was given, and as they heard it for the first time. If they did not or could not defend themselves, no one would do it for them.

See also Langbein, *supra* note 80, at 282-83:

> What we today think of as the lawyers' role was to some extent filled by the other participants in the trial, especially the judge. But a lot of what lawyers now do was left undone . . . . [W]e can be confident that there was much less probing of witnesses' statements than we expect in modern counsel-conducted trials.

[84] *See* Langbein, *supra* note 80, at 263 ("Whereas much of our trial procedure has medieval antecedents, prosecution and defense counsel cannot be called regular until the second half of the eighteenth century.") Professor Langbein finds the first recorded presence of defense attorneys in ordinary cases in the 1730's. *Id.* at 311-12. He also sees the breakdown of the rule preventing attorneys from representing accused felons as one of the most significant changes in English criminal procedure. *Id.* at 307. *See also* Beattie, *supra* note 82, at 233-34 (citation omitted) (finding that by the 1780's defense attorneys saw themselves as advocates for the accused and concluding, "It was in this area that the criminal trial changed most manifestly in the eighteenth century, in practice and in intention.").

role. Most important, defense lawyers could not formally address the jury.[85] The attorney's presence was largely felt through the cross-examination of witnesses testifying against the accused.[86]

That the increasing use of counsel and cross-examination developed together does support the argument that the Sixth Amendment right to counsel should be read not in isolation, but together with other rights.[87] This joint evolution in England, however, did not evolve in response to an adversary system. The accused, in practice, seldom faced a prosecutorial adversary in these common law trials. The prosecution's case was rarely presented by an advocate for the prosecution.[88] Instead, as discussed above,[89] the factual development at trial, until the rise of defense attorneys, had been controlled by the judges.[90] The increased presence of defense at-

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85 *See* Beattie, *supra* note 82, at 230-31 (citation omitted):

> [D]efense [lawyer's were constrained] in such a way that the accused were forced to continue to speak for themselves in court. The right to full defense by counsel was not granted until the passage of the Prisoner's Counsel Act of 1836. . . . In particular, counsel were not allowed to speak to the jury on their client's behalf or to offer a defense against the facts put in evidence. Until 1836, prisoners who said that they wished to leave their defense to counsel were told that that was not possible and that they must speak for themselves.

See also Langbein, *supra* note 80, at 313 ("The prohibition upon defense counsel addressing the jury in summation continued to be enforced until it was abolished by statute in 1836.").

86 *See* Stephen Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 CORNELL L. REV. 497, 535 (1990):

> Over the course of the [eighteenth] century, counsel most particularly developed the art of interrogating adverse witnesses. Because defense counsel's role was limited in other regards, it is not surprising that barristers defending those accused of felonies focused their attention on cross-examination, a mechanism that offered the broadest latitude for the development of persuasive proof with a minimum of restrictions. Through cross-examination, defense counsel could present his theory of the case, refute an opponent's claims, develop favorable proof, discredit opposing witnesses, and generally advance his client's position before the jury.

See also Beattie, *supra* note 82, at 233 ("Undoubtedly the greatest opportunities [for defense attorneys] to help their clients were provided by cross-examination . . . .").

87 This joint development, perhaps, also tells us something significant about what Sixth Amendment "confrontation" might mean.

88 Beattie, *supra* note 82, at 227 ("[N]ot more than ten percent of defendants are likely to have had counsel through the middle decades of the eighteenth century, and significantly fewer prosecutors.") He estimates that in the 1780's, twice as many defense counsel appeared as did prosecuting attorneys. *Id.* at 229. Indeed, even well into the next century, few prosecuting attorneys appeared at felonies in London. Beattie calculates that such attorneys appeared in 8 percent of the cases in 1830 and in 4.3 percent in 1840. *Id.* at 260 n.20.

89 *See supra* pp. 738-43.

90 If those prosecuting a crime in eighteenth century England wanted an attorney to present the case, they had to pay for the services. Beattie suggests that this furnishes a reason why there were few prosecuting attorneys, but continues:

> Reluctance to engage [prosecution] counsel also perhaps arose from victims' perception of the process of prosecution and trial, particularly from the deeply entrenched notion that it was the magistrate's duty as the king's agent to organize the

torneys along with the concomitant defense cross-examination in ordinary trials, then, did not check a prosecutorial adversary, but instead checked or counterbalanced the judicial development of facts at trial.[91] Looked at this way, the "adversary rights" were not really adversary. Instead, they were the rights of an advocate given to the accused to restrain the power of judges.[92]

Looking at counsel, confrontation, and compulsory process not as rights to balance an adversary, but as limitations on judges, makes the separate sections of the Sixth Amendment consistent with each other. Just as the jury trial provisions can be seen as largely a check on judicial authority to determine the facts, counsel, confrontation, and compulsory process can also be seen as a check on the authority of judges to control the information that the jury can consider.

Even if further historical probing does support these tentative views of the common law, too much reliance can be placed on English law as a source of the Sixth Amendment. The colonial American history must also be examined and factored in for at least two reasons. First, Americans from an early stage viewed criminal law in a manner distinct from how the English viewed it. England saw criminal violations as a private matter between individuals.[93] Colonial Americans, on the other hand, conceived of crimes as offenses against the state.[94] If the Americans held distinctive views about

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prosecution. Most victims who chose to initiate a prosecution must have thought that the old system was adequate and that it would be enough if they came to court and told their stories to the judge and jury.

Beattie, *supra* note 82, at 229.

91 *See, e.g.*, Langbein, *supra* note 80, at 306 ("[V]arious factors, in particular the rise of the lawyers, . . . cost the judges their commanding role . . . .") A central feature of this dominant role was judicial interrogation. "Such questioning tended to concentrate power in the court's hands, and made it possible for English judges to act like inquisitors . . . . [Judicial inquisition] maximizes judicial power while holding to a minimum the parties' opportunity to develop the proof." Landsman, *supra* note 86, at 513. As cross-examination by defense attorneys presented an alternative source of information for the jury, judicial authority became checked. Landsman concludes, "The adversary system grew as a consequence of the steady narrowing of judicial authority. Lawyers supplanted judges as managers of the courtroom contest." *Id.* at 604.

92 *Cf.* Beattie, *supra* note 82, at 254, who in discussing the debates that led to the English legislation of 1836 granting the right of counsel, states that "the proponents of the legislation increasingly upheld the value of advocacy."

93 *See* JOAN JACOBY, THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY 8 (1980):

English common law did not make the sharp distinction between civil wrongs and criminal wrongs. . . . All violations of law were committed by an individual against an individual. . . . A violation of the King's rights were prosecuted by the King's Attorney. Violations of individual rights were pursued through the courts by the victim or by his friend or relatives.

94 *See id.* at 10:

Although the system of private prosecution prevailed in the English world at the

crime, then it is reasonable to believe that they also developed distinctively different views of criminal procedure. If so, of course, the Sixth Amendment is at least as likely to reflect those American conceptions as it does the English common law.

Furthermore, English law cannot be seen as the sole source of the Sixth Amendment because clearly the Sixth Amendment rejects at least some of that law. It rejected it by mandating the same guarantees in all criminal prosecutions and by failing to treat political prosecutions differently from other cases. It also rejected English law in granting a right to the full assistance of counsel in all those cases, a right that did not then exist in England and did not come into being there until almost a half century later. Surely the development of this early guarantee of the right to counsel in all cases in America is crucial for a proper understanding of the Sixth Amendment.

The proper historical background of the Sixth Amendment must include more than just English political trials and more than the development of criminal procedure in ordinary English felony trials. The American history must also be considered. What I have concluded elsewhere about the confrontation clause applies generally to the Sixth Amendment rights to notice, counsel, confrontation, and compulsory process:

> An accurate understanding of the historical origins of the confrontation clause . . . requires study of the protections Americans thought were necessary in ordinary American criminal trials. . . . Americans . . . did feel that some criminal convictions were unjust. We need to examine these cases to understand how Americans of the constitutional generation thought that such injustice might be prevented. Those thoughts about non-treason trials in America no doubt became reflected in the Sixth Amendment. Until this American history is examined, our understanding of the development of the confrontation clause will be incomplete.[95]

This inquiry could be significant. It might give us a better historical idea of the content of the procedures that were adopted by the constitutional generation. The importance of this examination, however, can be overstated. Whatever such study reveals, the basic proposition will remain. Whether they are labeled adversary rights or the rights of the advocate; whether they were seen as a counter-

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time of the establishment of the first American colonies . . . , it quickly vanished in America. . . . [Private prosecution's] basic supposition [is] that crime is essentially a private concern between the aggressor and the victim. . . . [T]he American system conceives of the criminal act to be a public occurrence and of society as a whole the ultimate victim.

95 Randolph N. Jonakait, *The Right to Confrontation: Not a Mere Restraint on Government*, 76 MINN. L. REV. 501, 506-07 (1992).

balance to the prosecutor or a restraint on judicial authority; the Sixth Amendment granted the accused rights so that the accused could inform the jury from the accused's perspective of the facts and arguments concerning the charges.

IV. A RETURN TO *MU'MIN*

The precepts that all the Sixth Amendment protections were meant to operate as a restraint on judicial authority and that the amendment grants rights so that the accused can inform the jury from his perspective once again suggest a different way to approach the problem presented in *Mu'Min*. The question of whether a juror is impartial is, of course, not a jury decision; the trial judge has to make it. While the Sixth Amendment does tell us that the jury is to be informed from the accused's perspective, it does not tell us anything directly on how the trial court is to be informed in making its constitutional determination of whether a juror is impartial. *Mu'Min*, however, should have considered the significance of the similarities between the trial judge's determination and the jury's.

First, the decision of whether a jury is impartial is a factual question of precisely the same sort juries are asked to decide. As the Supreme Court has recognized, whether a juror is impartial "is plainly one of historical fact: did a juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed."[96] Furthermore, a federal reviewing court must treat this factfinding in much the same way it would treat a jury decision and defer to it as long as it is reasonable.[97] Finally, just as the Sixth Amendment indicates that a jury cannot render a constitutionally correct verdict unless it is properly informed, a trial court cannot make a constitutionally correct decision on juror impartiality unless it is properly informed.

> "*Voir dire* plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled."[98]

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96 Patton v. Yount, 467 U.S. 1025, 1036 (1984).

97 The Supreme Court has held that the trial court's ruling of juror impartiality should be treated with "special deference," *id.* at 1038, and sustained if "there is fair support in the record for the state courts' conclusion that the jurors . . . would be impartial." *Id.*

98 Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981) (White, J., for the plurality).

A proper question in *Mu'Min*, then, might have been whether the Sixth Amendment speaks to how this factfinder, the trial court, must be informed in making this Sixth Amendment decision. Since the accused has a Sixth Amendment right to inform the jury from his perspective, does he have an analogous right to have this factfinder similarly informed? An affirmative answer would be consistent with the purposes and structure of the Sixth Amendment considered as a whole.[99] At a minimum, the Court should have been concerned with whether giving the trial judge virtually unfettered discretion over the factual decision and the elicitation of information upon which that determination rested comports with the purposes and structure of the Sixth Amendment considered as a whole.

V. General Principles of the Sixth Amendment

Whatever the particular questions or analogies that should be used to resolve specific Sixth Amendment disputes, two principles emerge whose application are generally necessary if the Sixth Amendment is to be interpreted in a consistently meaningful manner. First, the Sixth Amendment does not prevent fundamentally unfair trials. Instead, it affirmatively guarantees the accused a certain sort of trial. The Sixth Amendment grants the criminal defendant a public, speedy trial decided by impartial jurors who are informed from a defense advocate's viewpoint.

This grant is not simply coequal to a fair trial. A trial in derogation of the Sixth Amendment can also be fundamentally fair. For example, the Sixth Amendment guarantees a jury trial, but certainly a bench trial can also be fundamentally fair. Indeed, as the Supreme Court has stated, "[a] criminal process which was fair and equitable but used no juries is easy to imagine."[100] Even though a bench trial can be a fair one, the accused is denied his Sixth Amendment rights if he is not affirmatively granted a jury trial. And so it goes for the other Sixth Amendment rights. Due process and the Sixth Amendment may overlap, but due process does not make the Sixth redundant.

Similarly, the Sixth Amendment guarantees the accused not the

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99 An affirmative answer does not mean that the accused has an unfettered right to elicit information from prospective jurors. Just as limitations can be placed on the accused's right to elicit information at a trial, they can also be placed here. Perhaps the most appropriate Sixth Amendment cases to examine would have been the confrontation decisions concerning whether the accused's attempt to elicit information from a trial witness could be limited. *See, e.g.*, Davis v. Alaska, 415 U.S. 308 (1974).

100 Duncan v. Louisiana, 391 U.S. 145, 150 n.14 (1968).

most reliable truth-determining forum, but a particular process for resolving criminal charges.[101] The accused is entitled to an impartial jury informed from the accused's perspective about the evidence and the event even if some other method would determine the facts better or just as well. Thus, even if a judge would determine the facts better than a jury, the accused is entitled to have the jury make the determination. Even if the jury could decide the dispute just as well with only an inquisitorial presentation, the accused is granted the right to inform the jury from his perspective about the charge.[102]

When the Court decides a Sixth Amendment claim by determining whether the trial was "fair" or by determining whether the outcome was "reliable,"[103] the Court is not properly interpreting the Sixth Amendment. The Court must instead determine whether the particular process constitutionalized in the Sixth Amendment has been affirmatively granted to the accused.

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101 *Cf.* Jonakait, *supra* note 65, at 585 ("Neither a defendant nor society is given the Sixth Amendment right to the best truth-determining process. The amendment only guarantees the accused one particular process . . . .").

102 *Cf id.*

> [T]he accused is guaranteed an adversary criminal trial even if that is not the best truth-determining process for him. Just as the state cannot deny an accused a jury trial by establishing that a nonjury trial was the better way to determine the facts, the accused cannot be denied an adversary criminal trial even if an inquisitorial proceeding would have determined the truth better in the accused's case.

103 The Court has equated fairness and reliability. In setting the standard for ineffective assistance of counsel, the Court concluded that the accused must show his counsel's deficient performance deprived him "of a fair trial, a trial whose result is reliable." Strickland v. Washington, 466 U.S. 668, 687 (1984). If fairness equals reliability, than a reliable outcome should mean that the trial was fair. Presumably an accurate outcome is a reliable one. The Court's logic means as long as the verdict is "correct," the procedures used to obtain it had to have been fair. The procedures, then, do not truly matter as long as we conclude that the verdict was "right."

Such reasoning would not truly be an interpretation of the Sixth Amendment in our Bill of Rights. The Sixth Amendment constitutionalizes procedures, a process, not the correct determination. The innocent person who is convicted after a speedy, public trial to an impartial jury where the accused had the rights to counsel, confrontation, and compulsory process has not been denied his Sixth Amendment rights. Similarly, however, the guilty person convicted in a trial where he has not been affirmatively granted all that the Sixth Amendment guarantees has been convicted in violation of the constitution, even though the outcome is accurate or reliable or fair.

We may hope that accurate factfinding results from a valid trial under the Sixth Amendment, but accuracy is not what is guaranteed. *Cf.* Jonakait, *supra* note 65, at 585-86:

> [W]hile confrontation, in its service to the adversary system, may concomitantly advance the truth-determining process, confrontation's mission, like the mission of other Sixth Amendment rights, is to help guarantee the adversary system. The advancement of the truth-determining process is merely the incidental benefit from confrontation's real purpose of guaranteeing the adversary system as set forth in the Sixth Amendment.

VI. CONCLUSION

The Supreme Court has frequently interpreted the Sixth Amendment so that an accused must show a due process violation to win a Sixth Amendment claim. This makes the Sixth Amendment protection superfluous and is an incorrect way to interpret the Constitution.

For a consistent and meaningful Sixth Amendment, courts must view the Sixth Amendment as holding a central place in the Bill of Rights; must recognize that Sixth Amendment rights are affirmative, personal guarantees to the accused; and must interpret the rights in their Sixth Amendment context. When this is done, it is clear that the Sixth Amendment guarantees neither a fair trial nor a reliable outcome, but grants the accused a particular trial process, which does specify a way to determine facts, but which is also intended to check governmental overreaching.