ARTICLES

DISENTANGLING THE SIXTH AMENDMENT*

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INTRODUCTION

The Bill of Rights, framed in an atmosphere of great mistrust of a potentially oppressive government,[1] not only enunciates broad principles limiting the powers of the federal government, such as due process of law,[2] but also includes more particularized rules to safeguard individual liberty. The Sixth Amendment, for example, guards against unjustified deprivations of life and liberty[3] by mandating that the federal government provide seven specific procedural protections to all those accused of committing a crime.[4]

Over the course of the two centuries since its ratification, but particularly during the last few decades, the scope and meaning of the Sixth Amendment's procedural protections have undergone significant development. While the Warren Court era was marked by the incorporation of the Sixth Amendment and by largely expansive readings of the Sixth Amendment, the Burger and Rehnquist Courts adopted decidedly more restrictive readings of the Amendment.

During the course of this jurisprudential development, the Court has adopted a number of constructions of the Sixth Amendment that plainly contravene its text and are increasingly less protective of individual liberty. For example, contrary to the textual mandate that defendants in "all" criminal prosecutions be provided the seven procedural protections, the Court has held that the rights to jury trial and

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1 *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1140 (1992) (describing the fear of Anti-Federalists that the government would be controlled by the aristocracy and would rule through corruption and force); Erik G. Luna, *The Models of Criminal Procedure*, 2 BUFF. CRIM. L. REV. 389, 398 (1999) ("[A]ll criminal procedure rights share a common purpose—limiting the means by which government can investigate, prosecute, and punish crime."); George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145, 157 (2001) ("Fear of a powerful central government led the drafters to give the new government specific powers, with the idea that all other powers and functions remained with the States.").

2 *See* Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 769 (1991) ("[O]ne need not be a radical deconstructionist to believe that the open-ended phraseology of many of the Constitution's most litigated provisions resists determinate interpretation."); Geoffrey R. Stone, *The Roberts Court, Stare Decisis, and the Future of Constitutional Law*, 82 TUL. L. REV. 1533, 1556 (2008) ("[I]n drafting the Constitution, the Framers were not enacting a series of specific and predetermined rules. . . . [D]ue process [was] not designed as [a] crabbed, narrow-minded ordinance[] like [a] speed limit[]. Rather, [it was] intended to serve as [an] open-ended aspiration[] that would gain meaning and vitality over time.").

3 *See, e.g.*, Singer v. United States, 380 U.S. 24, 31 (1965) ("The [jury trial] clause was clearly intended to protect the accused from oppression by the Government . . . ." (citation omitted)).

4 U.S. CONST. amend. VI.

counsel need to be provided only in a limited subset of criminal prosecutions, and that too in differing subsets. Even the Court's textually inconsistent expansive readings of the rights to public trial and compulsory process, extending the former to pre-trial proceedings and including in the latter a right to have witnesses testify, have ironically opened the door to textually inconsistent restrictive readings of the Sixth Amendment.

The textually inconsistent, restrictive interpretations of the Sixth Amendment pose a significant problem irrespective of what theory of constitutional interpretation one ascribes to because constitutional text is a necessary beginning point.[5] While the text, including that of the Sixth Amendment, is not always unambiguously clear, where it is, that plain meaning constitutes a minimal baseline in protection of individual liberty.[6] Whatever one might think about the propriety of the Court's finding that the Sixth Amendment provides greater protections of individual liberty than the text might seem to suggest, it is

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5 This Article does not claim that the Sixth Amendment's text provides the means to resolve all interpretive issues. Indeed, as scholars have noted "[t]he text did not come with a user's guide or a set of instructions for interpretation. As noted by Judge Richard Posner, 'The Constitution does not say, "Read me broadly," or, "Read me narrowly."'" Luna, *supra* note 1, at 422 (footnote omitted). In fact, "[s]cholars generally agree that a number of tools are available to interpret the Constitution, including the text itself, original intent, constitutional structure, judicial precedents, and contemporary values." *Id.* at 394. This Article, however, does begin with the premise that the text is the proper starting point in constitutional interpretation. *See* Akhil Reed Amar, *Textualism and the Bill of Rights*, 66 GEO. WASH. L. REV. 1143, 1143 (1998) (stating that "lawyers and judges must often go beyond the letter of the law, but the text itself is an obvious starting point of legal analysis"); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1223 (1995) (calling "for an unabashed return to rigor and precision in the interpretive process—for a commitment to take text and structure seriously"); *see also* Steven G. Calabresi, *Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling* Planned Parenthood of Southeastern Pennsylvania v. Casey, 22 CONST. COMMENT. 311, 327 (2005) ("Textualists think the constitutional text is the 'touchstone' of constitutional meaning . . ." (citation omitted)); Jack M. Balkin, *Alive and Kicking: Why No One Truly Believes in a Dead Constitution*, SLATE, Aug. 29, 2005, http://www.slate.com/id/2125226 (arguing that a "living Constitution requires that judges faithfully apply the constitutional text, given the meanings the words had when they were first enacted, applying those words to today's circumstances").

6 This primacy of the plain meaning of the text is contingent on its being consistent with the history and purposes of the Sixth Amendment. Where a plain reading of the text conflicts with the history or purposes of the Amendment, adopting a purely textual interpretation might be unwise. *See* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 153 (1997) (noting that a purely textual argument sometimes must yield to arguments based on history, structure, precedent, or practicality). None of the textual readings of the Sixth Amendment offered in this Article are inconsistent with the purposes or history of the Sixth Amendment.

difficult to claim that the Sixth Amendment provides lesser protections of individual liberty than that evident from a plain reading of the text.

The Court's problematic textually inconsistent restrictive readings of the Sixth Amendment can be traced to the interplay between the Sixth Amendment and the Fourteenth Amendment's Due Process Clause. In some instances, the Court has entangled the two constitutional provisions in the process of incorporating the Sixth Amendment through the Fourteenth Amendment's Due Process Clause, leading the Court to adopt some textually inconsistent restrictive readings arguably in order to mitigate the impact of incorporation on the states. In other instances, the Court has entangled the two constitutional provisions by improperly locating expansive procedural protections in the rules of the Sixth Amendment as opposed to deriving the same rights from the general principle of Due Process, ironically opening the door to possible restrictive reading of the Sixth Amendment in the future. Finally, the Court has entangled the two constitutional provisions by improperly using Due Process interpretative methodologies to give meaning to the Sixth Amendment, leading to textually inconsistent restrictive readings.

In addition to providing a doctrinal framework for the textually inconsistent restrictive readings of the Sixth Amendment, this Article proposes alternate, textually sound constructions in light of the recent noteworthy development in the Court's criminal procedure jurisprudence.[7] While commentators have celebrated or decried two

7 This Article only addresses those instances of entanglement where there is a compelling textual alternative. There remain other entanglements not addressed here. For example, in determining whether the right to counsel applies at pre-trial proceedings, the Court has adopted a "critical stages" test. *See* United States v. Ash, 413 U.S. 300, 317–21 (1973); Coleman v. Alabama, 399 U.S. 1, 7–10 (1970). Under the "critical stages" test, the right to counsel applies to "those pretrial procedures that would impair defense on the merits if the accused is required to proceed without counsel." Gerstein v. Pugh, 420 U.S. 103, 122 (1975). Put somewhat differently, the Sixth Amendment right to counsel applies at "any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." United States v. Wade, 388 U.S. 218, 226 (1967). Under these formulations, the Sixth Amendment right to counsel is limited to stages where the defendant's defense would be impaired or where the fair trial may be derogated. Impairment and derogation of a fair trial, however, are due process concerns. Similarly, the Court has entangled the Sixth Amendment in the context of the right to counsel during interrogations. The Court has held that the government may not deliberately elicit statements from an indicted defendant in the absence of counsel. Massiah v. United States, 377 U.S. 201, 206 (1964). However, the scope of this protection has been limited to interrogations pertaining to the same offense. To define which offenses are the same, the Court has imported its Fifth Amendment double jeopardy jurisprudence. *See* Texas v. Cobb, 532 U.S. 162, 172–73 (2001); McNeil v. Wis-

landmark opinions—*Apprendi v. New Jersey*[8] and *Crawford v. Washington*[9]—and their progeny as having affected fundamental change in the Court's sentencing and Confrontation Clause jurisprudence respectively, the Article suggests that these seminal decisions are more properly understood as being part of a common enterprise—the Court's commitment to disentangle the Sixth and Fourteenth Amendments and to reclaim the textual core of the Sixth Amendment.

In Part I, the Article sets forth a historical account of the Court's Sixth Amendment jurisprudence, highlighting the Court's recent expansive and restrictive readings of the various procedural protections that have led to the entanglement of the Sixth Amendment. In Part II, the Article discusses the two recent seminal developments in the Court's criminal procedure jurisprudence that have entailed disentangling the Sixth Amendment from the Due Process Clause. In Part III, this Article identifies the remaining textually inconsistent readings of the Sixth Amendment that can be traced to the Court's entanglement of the Sixth Amendment and proposes alternate readings, ones that are more faithful to the text of the Sixth Amendment and more protective of individual liberty.[10]

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consin, 501 U.S. 171, 175–76 (1991). The importation of the double jeopardy test set forth in *Blockburger v. United States*, 284 U.S. 299, 304 (1932), however, is an unnecessary entanglement of the Sixth Amendment right to counsel. A more intellectually appealing alternative to the *Blockburger* rule would be to view a criminal prosecution as including all the acts or transactions that are "closely related" to the instant prosecution. *See Cobb*, 532 U.S. at 186 (Breyer, J., dissenting) ("We can, and should, define 'offense' in terms of the conduct that constitutes the crime that the offender committed on a particular occasion, including criminal acts that are 'closely related to' or 'inextricably intertwined with' the particular crime set forth in the charging instrument."); *see also* Melissa Minas, Note, *Blurring the Line: Impact of Offense-Specific Sixth Amendment Right to Counsel*, 93 J. CRIM. L. & CRIMINOLOGY 195, 218–22 (2002) (arguing that the Court unnecessarily reduced the Sixth Amendment protections by replacing the workable "closely related" test with the more restrictive *Blockburger* test).

8 530 U.S. 466 (2000) (holding that due process requires that any fact increasing criminal penalty beyond the statutory maximum must be submitted to a jury and proved beyond reasonable doubt).

9 541 U.S. 36 (2004) (holding that the Confrontation Clause prohibits the admission of a testimonial hearsay statement unless the witness is unavailable and was previously subject to cross-examination).

10 While this Article suggests that various rights, such as the right to public pre-trial proceedings, have been improperly located in the Sixth Amendment, it does not advocate that these rights lack constitutional bases. On the contrary, these rights are properly located in the Due Process Clauses of the Fifth and Fourteenth Amendments. *See generally* Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807 (1997) (arguing that some interpretative problems in the Court's double jeopardy jurisprudence can be avoided by locating those rights in the Due Process Clause); Donald Dripps, *Akhil Amar on*

I. THE PATH TRAVELLED: A HISTORICAL ACCOUNT OF THE COURT'S SIXTH AMENDMENT JURISPRUDENCE

The Sixth Amendment, proposed by James Madison in 1789 and ratified in 1791,[11] requires the federal government to provide seven specific procedural protections to all those it accuses of committing a crime: the right to a speedy trial; the right to a public trial; the right to a trial before an impartial jury drawn in a prescribed manner; the right to notice; the right of confrontation; the right to compulsory process; and the right to assistance of counsel.[12]

Despite the broad reach of these procedural safeguards, there were relatively few Supreme Court cases of significance involving the Sixth Amendment for over a century after its ratification.[13] In fact, the only provision of the Sixth Amendment that the Court dealt with during this period was the right to a jury trial: in a series of decisions towards the end of the nineteenth century, the Court circumscribed the scope of the right to a jury trial, finding that the right did not extend to the trial of petty crimes.[14]

The dearth of Sixth Amendment cases during this period is not surprising. Since most crimes were prosecuted by states, to whom the Bill of Rights did not apply,[15] and since there was a significant limita-

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Criminal Procedure and Constitutional Law: "Here I Go Down That Wrong Road Again," 74 N.C. L. REV. 1559 (1996) (arguing for a robust reading of the Due Process Clause and advocating for due process of law as the appropriate means for resolving uncertainty in constitutional criminal procedure).

11 Penny J. White, *"He Said," "She Said," and Issues of Life and Death: The Right to Confrontation at Capital Sentencing Proceedings*, 19 REGENT U. L. REV. 387, 397 n.46 (2007) (describing the history of the Sixth Amendment and the development of its language).

12 U.S. CONST. amend. VI.

13 Jonathan F. Mitchell, Apprendi*'s Domain*, 2006 SUP. CT. REV. 297, 342 ("[T]here was very little case law interpreting the Sixth Amendment in the eighteenth and nineteenth centuries . . . .").

14 *See generally* District of Columbia v. Clawans, 300 U.S. 617 (1937); Schick v. United States, 195 U.S. 65 (1904); Natal v. Louisiana, 139 U.S. 621 (1891); Callan v. Wilson, 127 U.S. 540 (1888).

15 *See* Barron *ex rel.* Tiernan v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833) (holding that the Fifth Amendment only limits the federal government and is not applicable to state governments). There were also significant procedural hurdles preventing state court defendants from using collateral proceedings to appeal to the Supreme Court. Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 465 (1963) ("[U]ntil 1867 (and with exceptions not relevant here) there was no federal habeas jurisdiction to inquire into detentions pursuant to state law. Further, even after the act of 1867 established such a jurisdiction, the Supreme Court could make no pronouncements in cases of state detention because the Court's appellate jurisdiction under the act of 1867 was removed in 1868 and not reestablished until 1885. Thus dur-

tion on a defendant's ability to challenge a federal conviction,[16] there was little occasion for the Court to interpret the mandates of the Sixth Amendment. This was true even during the Reconstruction Era despite the enactment of a statute geared at expanding state defendants' access to federal courts.[17]

While the first few decades of the twentieth century witnessed a marked evolution in the Court's willingness to apply Due Process limits on state criminal procedures and practices,[18] this jurisprudential change did not involve the Sixth Amendment, whose provisions remained unincorporated.[19] There were only two significant developments, both involving the right to counsel—the Court read the right to counsel expansively to include an obligation for the federal gov-

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ing the first century of the Constitution the Court had no occasion to deal with the scope of the habeas jurisdiction for state prisoners." (footnotes omitted)).

16 *See* Bator, *supra* note 15, at 473 n.75 ("Until 1889 federal criminal cases were reviewable by the Supreme Court only when there was a division of opinion in the circuit court on a question of law.").

17 *See id.* at 478–93 (discussing the early cases involving habeas corpus jurisdiction for state prisoners); Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2337–38 (1993) ("[O]ne of the most significant enactments of the Reconstruction era, the Habeas Corpus Act of 1867, extended that jurisdiction to cases in which petitioners charged they were unlawfully detained by state officials. . . . In the wake of Reconstruction, habeas helped shape the relations between the federal government and the states." (footnotes omitted)); *id.* at 2339–40 ("Still, as late as the notorious Leo Frank case, *Frank v. Mangum*, the Court repeated the confused boilerplate that had attached itself to the writ over the preceding century. . . . [and] federal habeas was open only if the state court had exceeded its jurisdiction—if it had ceased to act *as a court*." (footnotes omitted)).

18 During the early years of the twentieth century, even as the Court was reading the Fourteenth Amendment's Due Process Clause broadly to strike down state economic regulations, it did not take the same robust view of the Due Process Clause to intervene in state criminal prosecutions. *See* David E. Bernstein, Lochner *Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 10 (2003) ("If the *Lochner* era unofficially began in 1897 . . . and ended in 1937 . . . , then twenty-six Justices served on the *Lochner* era Court over a period of forty years. The vast majority of these Justices were at least moderate Lochnerians in the sense that they believed the Court should engage in meaningful review of regulatory legislation that interfered with the liberty of contract to ensure that such legislation was constitutionally valid as an exercise of the states' police powers."). This changed over time, perhaps due to the shocking legacy of thousands of lynchings and mob trials, and the Court issued a series of decisions overturning state convictions. *See* Brown v. Mississippi, 297 U.S. 278 (1936) (coerced confessions); Norris v. Alabama, 294 U.S. 587 (1935) (discrimination in juries); Mooney v. Holohan, 294 U.S. 103 (1935) (perjury); Powell v. Alabama, 287 U.S. 45 (1932) (counsel in capital cases); Tumey v. Ohio, 273 U.S. 510 (1927) (financially-biased judge); Moore v. Dempsey, 261 U.S. 86 (1923) (mob-dominated trials); *see also* Klarman, *supra* note 2, at 764 ("The vast majority of the Court's first constitutional interventions in state criminal procedure involved the Jim Crow 'justice' southern states meted out to black defendants."); Yackle, *supra* note 17, at 2341 ("The meaning of due process developed rapidly between the two world wars.").

19 *See* Yackle, *supra* note 17, at 2341.

ernment to appoint counsel for indigent defendants[20] and to include the requirement that the assistance provided by counsel be effective.[21]

It was not until the Warren Court era that the Court's Sixth Amendment jurisprudence witnessed significant development.[22] Perhaps most importantly, over the course of several years, the Court incorporated the various provisions of the Sixth Amendment,[23] finding for the most part that the Fourteenth Amendment's Due Process Clause guaranteed defendants in state courts the same fundamental procedural protections guaranteed by the Framers to defendants in federal courts.[24] Ironically, this process of incorporation, properly

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20 Johnson v. Zerbst, 304 U.S. 458 (1938) (holding that indigent criminal defendants in federal court are entitled by the Sixth Amendment to court-appointed counsel).

21 Glasser v. United States, 315 U.S. 60, 69–70 (1942) (holding that "the 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests"). This reading of the Sixth Amendment was reiterated by the Court in subsequent cases. *See* McMann v. Richardson, 397 U.S. 759, 771 (1970) (reasserting that "defendants facing felony charges are entitled to the effective assistance of competent counsel").

22 The Warren Court's "criminal procedure revolution" can be seen as a reaction both to "pervasive legislative abdication of criminal procedure rulemaking"—for example, for more than two decades Congress failed to take any action to implement the Court's decision requiring the appointment of counsel for indigent defendants—and to "disparate class and racial impact" of criminal prosecutions. Klarman, *supra* note 2, at 764–67.

23 Duncan v. Louisiana, 391 U.S. 145 (1968) (jury trial); Washington v. Texas, 388 U.S. 14 (1967) (compulsory process); Klopfer v. North Carolina, 386 U.S. 213 (1967) (speedy trial); Pointer v. Texas, 380 U.S. 400 (1965) (confrontation); Gideon v. Wainwright, 372 U.S. 335 (1963) (counsel). While the Court's earlier opinions in *In re Oliver*, 333 U.S. 257 (1948), and *Cole v. Arkansas*, 333 U.S. 196 (1948), do not make this clear, in later years the Court has seen them as having incorporated the Sixth Amendment's rights to public trial and notice, respectively. *See* Herring v. New York, 422 U.S. 853, 857 n.7 (1975) (citing the two cases as having incorporated the respective Sixth Amendment rights); *see also* Donald A. Dripps, *Miscarriages of Justice and the Constitution*, 2 BUFF. CRIM. L. REV. 635, 647 (1999) ("The Warren Court cases indeed worked a revolution in the administration of justice in the states. The revolution, however, took the doctrinal form of incorporating the Bill of Rights into the Fourteenth Amendment.").

24 There have been only two exceptions to this "jot-for-jot" approach to incorporation. First, despite the long-standing understanding that the right to a jury trial meant the right to a unanimous jury verdict, Andres v. United States, 333 U.S. 740, 748 (1948) ("Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply."), the Court has held that this unanimity requirement is not applicable to state prosecutions, Apodaca v. Oregon, 406 U.S. 404 (1972). Similarly, the Court held that while a twelve-person jury was required in federal prosecutions, juries in state prosecutions could be composed of fewer than twelve persons. Williams v. Florida, 399 U.S. 78 (1970). In a series of subsequent decisions, the Court set forth the due process limitations on jury size and anonymity in state prosecutions. In particular, the Court subsequently held that juries in state courts must be comprised of a minimum of six persons, Ballew v. Georgia, 435 U.S. 223 (1978), and that non-unanimous verdicts in state prosecutions would be unconstitutional if they were the product of six-person juries, Burch v. Louisiana, 441 U.S. 130 (1979).

seen as an expansive reading of the Due Process Clause as opposed to an expansive reading of the Sixth Amendment, provided the impetus for later restrictive readings of the Sixth Amendment.[25]

The Court's Sixth Amendment jurisprudence was also significantly affected by the Warren Court's removal of the jurisprudential handcuffs that had been imposed on the federal courts' ability to remedy constitutional violations through the great writ of habeas corpus.[26] The Court's subsequent decision to subject constitutional violations—not violations of mere ordinances or rules or statutes, but violations of the Constitution—to harmless error analysis[27] too had an important effect on the Sixth Amendment.[28]

In addition to these procedural developments affecting the Sixth Amendment, the Warren Court era was marked by expansive substantive readings of the Sixth Amendment. For instance, the Court read the Confrontation Clause to prohibit the use, in a joint trial, of a nontestifying co-defendant's confession notwithstanding the trial court's cautionary instructions that the confession was being admitted against the co-defendant only.[29] It also read the right to counsel expansively, extending its scope to pre-trial proceedings such as arraignments,[30] some post-arrest[31] and post-indictment interrogations,[32]

Therefore, while both 9-3 and 5-1 jury verdicts are unconstitutional in federal prosecutions, only the latter are unconstitutional in state prosecutions.

25 *See, e.g.*, Williams v. Florida, 399 U.S. 78, 129 (1970) (Harlan, J., concurring) (arguing that the Court's opinion "dilute[d] a federal guarantee in order to reconcile the logic of 'incorporation,' the 'jot-for-jot and case-for-case' application of the federal right to the States, with the reality of federalism").

26 *See* Stephen F. Smith, *Activism as Restraint: Lessons from Criminal Procedure*, 80 TEX. L. REV. 1057, 1066 (2002) (describing the Warren Court's efforts to improve oversight of state courts by expanding state prisoners' rights to challenge their convictions in federal court).

27 Chapman v. California, 386 U.S. 18 (1967) (allowing courts to deny relief even if a defendant demonstrates a constitutional violation if the government proves, beyond a reasonable doubt, that the violation did not affect the jury's verdict).

28 While the development of harmless error analysis might be viewed as a restrictive development from an ex post perspective insofar as it limits the universe of defendants who would be entitled to relief upon a showing of a constitutional violation, from an ex ante perspective it is arguably an expansive development. This is because it makes more likely that courts will deem offending state practices to be unconstitutional—a court after all could find that a violation occurred, but need not worry that resources would be needlessly expended by mandating a retrial of a clearly guilty defendant—which in turn enhances the prescriptive value of the constitutional rule, making future compliance with that rule more likely.

29 Bruton v. United States, 391 U.S. 123 (1968).

30 Hamilton v. Alabama, 368 U.S. 52, 53–54 (1961).

31 Escobedo v. Illinois, 378 U.S. 478 (1964).

and post-indictment lineups,[33] finding that it applied irrespective of a defendant's request for counsel,[34] and creating a per se exclusionary rule prohibiting the use of testimony of some uncounseled identifications.[35] Finally, the Court read expansively the right to compulsory process and struck down a statute that created a per se rule against the admissibility of testimony by persons who had participated in the crime with the defendant.[36]

This is not to say that the Warren Court read all Sixth Amendment provisions broadly. For example, notwithstanding the Sixth Amendment's text that provides that the right to a jury trial is to be provided "In all criminal prosecutions," when the Court incorporated the right to jury trial, it cited prior precedent to hold that the right applies only to trials of non-petty crimes.[37] While the Court subsequently read the right to jury trial to include criminal contempt proceedings, it excluded "petty" contempt proceedings.[38] Nevertheless, overall, the Warren Court is properly seen as having taken an expansive approach to the Sixth Amendment.[39]

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32 Massiah v. United States, 377 U.S. 201 (1964). *But see* Texas v. Cobb, 532 U.S. 162, 168 (2001) ("[A] defendant's statements regarding offenses for which he had not been charged [are] admissible notwithstanding the attachment of his Sixth Amendment right to counsel on other charged offenses."); Moran v. Burbine, 475 U.S. 412, 431 (1986) ("[Although] the government may not deliberately elicit incriminating statements from an accused out of the presence of counsel . . . [,] evidence concerning the crime for which the defendant had not been indicted . . . would be admissible at a trial limited to those charges." (citation omitted)); Maine v. Moulton, 474 U.S. 159, 180 n.16 (1985) ("Incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses.").

33 United States v. Wade, 388 U.S. 218, 236–37 (1967).

34 Carnley v. Cochran, 369 U.S. 506, 513 (1962).

35 Gilbert v. California, 388 U.S. 263, 273–74 (1967).

36 Washington v. Texas, 388 U.S. 14 (1967).

37 Duncan v. Louisiana, 391 U.S. 145 (1968). The Burger and Rehnquist Courts reaffirmed this reading of the right to jury trial. *See* Blanton v. City of N. Las Vegas, 489 U.S. 538 (1989) (holding that any offense, even one deemed "serious" like a DUI, is still "petty" if the authorized maximum sentence is six months or less); Baldwin v. New York, 399 U.S. 66, 69 (1970) (plurality opinion) (deciding that no offense can be labeled "petty" if more than a six-month sentence is authorized).

38 Bloom v. Illinois, 391 U.S. 194, 210 (1968); *see also* Frank v. United States, 395 U.S. 147, 149–50 (1969) (holding that there is no right to jury trial for criminal contempt proceeding where actual sentence imposed was less than six months).

39 While the Warren Court's expansive approach to the procedural protections granted by the Sixth Amendment reflected a commitment to safeguarding individual liberty, the same "proceduralism . . . reflected an avoidance and suppression of the substantive conflicts underlying many of its great cases." Kimberlé Crenshaw & Gary Peller, *The Contradictions of Mainstream Constitutional Theory*, 45 UCLA L. REV. 1683, 1713 (1998) (arguing that while the Warren Court's decision in *Goldberg v. Kelly*, 397 U.S. 254 (1970), granted

There was a fundamental shift in the Court's criminal procedure jurisprudence during the Burger Court era from one that stressed ensuring governmental compliance with the procedural protections guaranteed to defendants by the Sixth Amendment to one that was increasingly deferential of law enforcement efforts.[40] This fundamental realignment of the Court's jurisprudential approach was evident not only in its imposition of significant obstacles with regard to the ability of federal courts to remedy constitutional violations in habeas proceedings,[41] but also in its more restrictive view of constitutional procedural protections in criminal cases.[42]

The Court's restrictive construction of the Sixth Amendment manifested itself in different forms. In some cases, the restrictive construction was a result of the Court's limitation of the *scope* of the right. For example, the Burger Court narrowed the class of cases to which the right to jury trial applies, finding that it did not apply to probation revocation hearings,[43] juvenile court proceedings,[44] or contempt proceedings where the sentences imposed were subsequently reduced to the equivalent of a single term of six months.[45] The Court similarly narrowed the scope of the right to counsel: while the Court rejected states' efforts to limit the right to counsel for petty crimes,[46] it restricted the right to felonies and those misdemeanor cases where

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welfare recipients the right to a hearing if their benefits were reduced or eliminated, the decision did not address the underlying problem of economic disempowerment).

40 *See generally* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968) (describing the competing due process and crime control models of American criminal procedure); Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185 (1983) (arguing that the Burger Court's treatment of the Warren Court's major criminal procedure decisions reflected an ideological shift toward a "crime control" theory of the criminal justice system); Donald A. Dripps, *Beyond the Warren Court and Its Conservative Critics: Toward a Unified Theory of Constitutional Criminal Procedure*, 23 U. MICH. J.L. REFORM 591 (1990) (providing a critique of the modern conservative perspective on the major Warrant Court criminal procedure decisions); *see also* Luna, *supra* note 1, at 400 (noting that while neither model identified by Packer "corresponds to reality[,] they . . . provide a serviceable method of discussing a context-specific system that fluctuates on a daily basis").

41 *See* Smith, *supra* note 26, at 1070 (arguing that limiting federal habeas corpus review was a "top priority" for the Burger Court).

42 *Id.* ("[M]any Warren Court precedents were curtailed or at least not significantly extended, and the Court's application of Warren-era precedents began to take on a distinctly more prosecution-friendly flavor.").

43 Minnesota v. Murphy, 465 U.S. 420, 435 n.7 (1984).

44 McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971).

45 Taylor v. Hayes, 418 U.S. 488, 495–96 (1974).

46 Argersinger v. Hamlin, 407 U.S. 25, 40 (1972).

the defendant is imprisoned.[47] The Court also limited the scope of the right to counsel by finding that it did not apply to parole or probation revocation hearings[48] or to post-arrest lineups conducted before the initiation of adverse judicial proceedings.[49]

In other instances, the restrictive reading was due to the Burger Court's incorporation within the definitional elements of a constitutional right of a requirement that defendants show that they were harmed; the absence of harm precluded the finding of a constitutional violation, in essence making these rights turn on the defendant's potential guilt or innocence.[50] For example, one of the four factors set forth by the Court for determining whether the right to speedy trial is violated is whether the defendant can demonstrate that the delay was prejudicial.[51] Similarly, irrespective of how deficient an attorney's performance is, a defendant generally cannot establish a violation of the right to counsel without demonstrating that the counsel's deficient performance was prejudicial.[52]

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47 Scott v. Illinois, 440 U.S. 367 (1979); *see also* Baldasar v. Illinois, 446 U.S. 222, 223 (1980) (holding that an uncounseled misdemeanor conviction cannot be used to enhance the sentence of a subsequent misdemeanor conviction to include incarceration), *overruled on other grounds by* Nichols v. United States, 511 U.S. 738 (1994).

48 Gagnon v. Scarpelli, 411 U.S. 778, 787 (1973).

49 Kirby v. Illinois, 406 U.S. 682, 689 (1972) (plurality opinion).

50 While the Warren Court, too, had required a showing of harm through the adoption of the harmless error doctrine, that came into play only with regard to remedies—that is, only after defendants established a constitutional violation were courts to consider whether that error was harmful enough to warrant relief. By incorporating the harm element into the definition of the constitutional right, the Burger Court made it more difficult to establish a violation of the right, which had the effect not only of reducing the normative value of the right, but also of making the same textual right more meaningful for innocent defendants than for those who might be guilty. In addition, the Burger Court's approach shifted the burden of proof—rather than have the state bear the burden of showing that the constitutional violation was harmless as required by the Warren Court's harmless error doctrine, the Burger Court required the defendant to show the harmfulness of the violation.

51 Barker v. Wingo, 407 U.S. 514 (1972); *see also* United States v. Loud Hawk, 474 U.S. 302, 316 (1986).

52 Strickland v. Washington, 466 U.S. 668 (1984) (requiring a defendant to show that counsel's performance was deficient and that the defendant was prejudiced by that deficient performance); United States v. Morrison, 449 U.S. 361, 365 (1981) (finding that relief was not warranted for a violation of the right to counsel in a case, despite a deliberate government intrusion into the attorney-client relationship, because the defendant failed to show "demonstrable prejudice, or substantial threat thereof"). *But see* United States v. Cronic, 466 U.S. 648 (1984) (holding that prejudice may be presumed when counsel is completely absent, is prevented from assisting the accused during a critical stage of the proceeding, or fails to subject the state's case to adversarial testing); Geders v. United States, 425 U.S. 80 (1976) (finding no showing of prejudice is required when counsel was not permitted to consult with defendant during an overnight recess).

In a similar vein, the Burger Court read the right of confrontation restrictively by incorporating within its definitional elements a showing of unreliability. In particular, the Court held that the use of out-of-court statements offered for the truth of the matter asserted, i.e. hearsay statements, did not offend the Confrontation Clause despite the lack of opportunity for the defendant to confront the source of the underlying statement not only if the statement fell within a firmly rooted hearsay exception, but also if the statement bore particularized indicia of reliability.[53]

The foregoing is not to suggest that the Burger Court uniformly read Sixth Amendment rights restrictively. On the contrary, there were numerous notable expansive readings of the Sixth Amendment during this period. For example, the Court enunciated a broad vision of the right to a jury trial, finding that it included a right to have the jury venire—the pool of potential jurors from which the petit jury is selected—reflect a fair cross-section of society.[54] The Court also read the right to jury trial broadly to require that the trial court ask race-specific questions during voir dire in some cases.[55] It also read the Public Trial Clause expansively to include pre-trial proceedings.[56] In addition, the Court reaffirmed the primacy of the Confrontation Clause by finding that a state's policy interest in protecting the confidentiality of juvenile delinquency records did not supersede the right to cross-examine witnesses.[57] The Court also read the right to counsel expansively[58] to extend to critical stages prior to trial,[59] post-

53 Ohio v. Roberts, 448 U.S. 56 (1980), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004).

54 Duren v. Missouri, 439 U.S. 357 (1979); Taylor v. Louisiana, 419 U.S. 522 (1975). The Rehnquist Court subsequently held that this fair cross-section requirement is limited to the venire from which the jury is selected; it does not extend to the actual jury seated. Holland v. Illinois, 493 U.S. 474 (1990).

55 Turner v. Murray, 476 U.S. 28 (1986) (finding in an interracial capital case that the trial court erred in failing to inform prospective jurors of the victim's race and questioning them on issues of racial bias); Ham v. South Carolina, 409 U.S. 524 (1973) (finding that the trial court erred in not asking race-related questions in a case where civil rights issues were raised). *But see* Rosales-Lopez v. United States, 451 U.S. 182 (1981) (using supervisory powers to require that federal courts ask race-related questions in non-capital, interracial cases where there is a "reasonable probability" that racial or ethnic prejudice will bias the jury); Ristaino v. Ross, 424 U.S. 589 (1976) (finding no error in failure to ask race-related questions in a non-capital case involving an interracial crime because race was not integral to the issues in the case).

56 Waller v. Georgia, 467 U.S. 39 (1984) (finding that the closure of a suppression hearing violated a defendant's right to public trial).

57 Davis v. Alaska, 415 U.S. 308 (1974).

58 The Court, however, restrictively construed the remedy for a violation of this right, holding that the denial of counsel at critical stages would be subject to harmless error analysis

arraignment interrogations,[60] post-indictment conversations with police informants,[61] and pre-trial psychiatric examinations;[62] to include the right to conflict-free representation;[63] to include the right of the defendant to self-representation;[64] and to be the proper subject of a claim for habeas relief even regarding an attorney's incompetent representation with respect to a Fourth Amendment issue.[65] Finally, the Court read the Speedy Trial Clause expansively in holding that the only remedy for a speedy trial violation is the dismissal of the indictment with prejudice.[66]

Nevertheless, while the Burger Court did read some provisions expansively, there was a discernible shift towards a restrictive reading of the Sixth Amendment. Indeed, paradoxically, a number of the Burger Court's expansive readings actually opened the door to future restrictive readings of the Sixth Amendment.[67]

The Rehnquist Court, while imposing significantly greater procedural hurdles than the Burger Court with regard to the ability of federal courts to effectively remedy constitutional violations in habeas proceedings,[68] largely mirrored the Burger Court's jurisprudential

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rather than result in automatic reversal. *See* Coleman v. Alabama, 399 U.S. 1, 10–11 (1970) (remanding the case to the trial court for determination of whether denial of counsel was harmless error).

59 *Id.*

60 Brewer v. Williams, 430 U.S. 387, 399 (1977). A defendant may, however, be questioned after invoking the right to counsel if the defendant initiates the communication. Michigan v. Jackson, 475 U.S. 625, 636 (1986).

61 Maine v. Moulton, 474 U.S. 159, 176 (1985); United States v. Henry, 447 U.S. 264, 274–75 (1980) (holding it is a violation of the right to counsel when police placed a paid informant in the same jail cell as defendant for purposes of obtaining a statement).

62 Estelle v. Smith, 451 U.S. 454, 469–71 (1981).

63 Cuyler v. Sullivan, 446 U.S. 335, 350 (1980) (holding that prejudice is presumed when counsel is burdened by an actual conflict of interest); Holloway v. Arkansas, 435 U.S. 475, 484–85 (1978) (holding that no showing of prejudice is required when, despite defense counsel's pretrial warnings of conflict, the trial court failed to inquire into counsel's conflict of interest).

64 Faretta v. California, 422 U.S. 806, 821 (1975).

65 Kimmelman v. Morrison, 477 U.S. 365, 385 (1986).

66 Strunk v. United States, 412 U.S. 434, 440 (1973); Barker v. Wingo, 407 U.S. 514 (1972).

67 *See* discussion of the entanglement of the Compulsory Process Clause *infra* Part III.B and discussion of the entanglement of the Public Trial Clause *infra* Part III.C.

68 *See* Smith, *supra* note 26, at 1076 ("Although habeas corpus remains available for relitigation of the constitutionality of state-court convictions, reversal on habeas has become a prospect that state courts simply need not be concerned with in the vast majority of cases.").

approach to the Sixth Amendment—while the Court read some provisions expansively, it read many other provisions restrictively.[69]

In a pair of decisions during the earlier years of the Rehnquist Court, the Court read the Compulsory Process Clause restrictively, subjugating it to policy considerations. First, the Court held that the exclusion of testimony as a sanction for defense counsel's deliberate failure to comply with a discovery request did not deny the defendant's Compulsory Process right to have witnesses testify because "[t]he Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system."[70] Second, the Court held that this right was not violated by the exclusion of evidence of the defendant's prior sexual relationship with the witness because of the defendant's failure to comply with the notice and hearing requirement of the state rape-shield statute.[71] Ironically, these restrictive readings of Compulsory Process were predicated on the earlier expansive reading of this clause by the Burger Court.[72]

Just a year after the Rehnquist Court read the Sixth Amendment expansively in finding that the Confrontation Clause was violated when a screen shielded a child witness from the defendant during testimony,[73] a sharply divided Court read the right to confrontation restrictively in a similar situation. Specifically, holding that a defendant's right to face-to-face confrontation must give way when "necessary to further an important public policy and only where the reliability of the testimony is otherwise assured," the Court held that the clause was not violated by a statute that allowed a witness to be examined in a separate room from the defendant, with the testimony being televised to the courtroom.[74]

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69 Scholars have pointed to a number of external factors as possible explanations for the Burger and Rehnquist Courts' adoption of a restrictive view of the Sixth Amendment. Some have pointed to increased crime and increased politicization of crime. *See* Yackle, *supra* note 27, at 2349 ("The crime rate was rising, people were frightened, and society needed someone or something to blame. Eyes fell on the Court, which was suspected of abusing its authority to protect the rights of criminal suspects and placing law-abiding citizens at risk."). Others have alluded to other socioeconomic developments. *See* Thomas, *supra* note 1. Still others have attributed the change in jurisprudence to the natural consequences of a change in the Court's personnel, reflecting a change in judicial philosophy or ideology, such as increased sensitivity to federalism concerns. *See* Archibald Cox, *Federalism and Individual Rights Under the Burger Court*, 73 NW. U. L. REV. 1 (1978).

70 Taylor v. Illinois, 484 U.S. 400, 412–13 (1988) (emphasis omitted) (quoting United States v. Nobles, 422 U.S. 225, 241 (1975)).

71 Michigan v. Lucas, 500 U.S. 145, 152 (1991).

72 *See* discussion of the entanglement of the Compulsory Process Clause *infra* Part III.B.

73 Coy v. Iowa, 487 U.S. 1012, 1021 (1988).

74 Maryland v. Craig, 497 U.S. 836, 850 (1990).

The Rehnquist Court largely read the right to counsel restrictively, with some notable expansive readings of the right during the final years of the Court. The Court read the Sixth Amendment narrowly with respect to the right to effective assistance of counsel,[75] the right to conflict-free representation,[76] the right to elicit statements using informants,[77] the imposition of hurdles in the defendant's ability to pay counsel's fees,[78] and the scope of the right to counsel.[79] At the same time, particularly towards the end of the Court's era, the Rehnquist Court did read the right to counsel broadly with respect to the scope of the right to counsel,[80] effective assistance of counsel,[81] and use of statements elicited in violation of the right to counsel.[82]

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75 Yarborough v. Gentry, 540 U.S. 1, 4–5 (2003) (per curiam) (holding counsel was not ineffective because decisions to omit certain arguments and to mention defendant's bad character traits to show their irrelevance was a reasonable tactical approach); Bell v. Cone, 535 U.S. 685, 700 (2002) (finding that counsel was not ineffective because of a failure to recall witnesses, and determining that the waiver of a final statement was a strategic decision because counsel was fearful that presenting mitigating evidence would give the prosecution opportunity for a damaging attack).

76 Mickens v. Taylor, 535 U.S. 162, 172–74 (2002) (holding that the trial court's failure to inquire into a known potential conflict of interest did not warrant reversal of conviction because the defendant did not show that the conflict adversely affected counsel's performance); Michigan v. Harvey, 494 U.S. 344, 348–49 (1990) (holding that while statements obtained in violation of right to counsel are inadmissible as evidence in the prosecution's case-in-chief, they are admissible for purposes of impeachment); Wheat v. United States, 486 U.S. 153 (1988) (finding that the right to counsel was not violated by a failure to grant the defendant a waiver of the right to conflict-free counsel and by a refusal to permit the defendant's proposed substitution of attorneys, because courts have an independent duty to protect against potential conflicts of interest); Burger v. Kemp, 483 U.S. 776, 783 (1987) (finding that concurrent representation is not per se a violation of the right to effective assistance of counsel).

77 Kuhlmann v. Wilson, 477 U.S. 436, 440, 460–61 (1986) (holding that there is no violation of the right to counsel, because the government merely placed the informant in the cell, the conversation was entirely spontaneous, the informant asked no questions, and the police told the informant only to listen for the identities of the accomplices).

78 Caplin & Drysdale v. United States, 491 U.S. 617, 626 (1989) (finding that the right to counsel was not violated by a forfeiture statute that prevented the payment of attorneys' fees); United States v. Monsanto, 491 U.S. 600, 615 (1989) (finding that the right to counsel was not violated by freezing assets that the defendant wanted to use to pay attorneys' fees).

79 McNeil v. Wisconsin, 501 U.S. 171, 173–74 (1991) (finding that the right to counsel is offense-specific and does not provide any protection for unrelated, uncharged offenses).

80 Alabama v. Shelton, 535 U.S. 654 (2002) (finding that the right to counsel applies even if the sentence imposed is suspended); Texas v. Cobb, 532 U.S. 162 (2001) (noting that the right to counsel extends to uncharged offenses that are considered the same under the *Blockburger* test).

81 Rompilla v. Beard, 545 U.S. 374, 377 (2005) ("[E]ven when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sen-

The Rehnquist Court's expansive readings were most pronounced in the context of the right of confrontation, particular as to the use of hearsay evidence,[83] the right to cross-examination,[84] and the use of a non-testifying confession at a joint trial.[85] The Court also read the Speedy Trial Clause expansively by finding a violation even where the defendant could not show particularized harm due to the delay.[86] In contrast to these expansive readings of the Sixth Amendment, the Court largely read the right to jury trial restrictively.[87]

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tencing phase of trial."); Wiggins v. Smith, 539 U.S. 510, 519 (2003) (finding that counsel's decision not to present mitigating evidence must be based on reasonable investigation); Glover v. United States, 531 U.S. 198, 203–04 (2001) (holding that counsel's error at the sentencing phase, which resulted in a sentence increase of six to twenty-one months, could be sufficiently prejudicial to constitute ineffective assistance, provided that counsel's performance was unreasonable); Williams v. Taylor, 529 U.S. 362, 395, 397 (2000) (finding that the defendant was denied effective assistance by counsel's failure to investigate and present evidence of defendant's "nightmarish childhood"); Roe v. Flores-Ortega, 528 U.S. 470, 483–84 (2000) (holding that prejudice is presumed when the defendant demonstrates reasonable probability that counsel would have filed a timely appeal but for counsel's deficient failure to consult defendant about the appeal).

82 Fellers v. United States, 540 U.S. 519, 524–25 (2004) (finding that the defendant's right to counsel was violated by the use of inculpatory statements made during voluntary discussion in his home, because the discussion took place after the indictment and without an informed waiver of right to counsel); Powell v. Texas, 492 U.S. 680, 686 (1989) (per curiam) (holding that the right to counsel was violated because psychiatric examination by state experts to determine future dangerousness of the defendant was conducted without notice to the defense counsel); Satterwhite v. Texas, 486 U.S. 249, 256 (1988) (finding that the right to counsel was violated when a psychiatric evaluation was conducted without adequate notification to the defense counsel). *But see* Buchanan v. Kentucky, 483 U.S. 402, 424 (1987) (declining to find a violation of the right to counsel for the prosecution's use of the defendant's psychiatric evaluation, because the defense counsel had requested the evaluation and presumably informed the defendant about the nature of the exam).

83 Crawford v. Washington, 541 U.S. 36, 68 (2004).

84 Olden v. Kentucky, 488 U.S. 227, 231 (1988) (per curiam) (holding that the Confrontation Clause was violated because the defendant was not permitted to cross-examine the complainant regarding cohabitation with her boyfriend).

85 Gray v. Maryland, 523 U.S. 185, 192 (1998) (finding that the Confrontation Clause was violated by the admission of a redacted confession that had blank space wherever defendant's name appeared, and the officer who read confession in court said "deleted" or "deletion" instead of the defendant's name); Cruz v. New York, 481 U.S. 186, 193 (1987) (holding that at a joint trial a non-testifying co-defendant's confession must be excluded, even if it is corroborated by the defendant's own confession). *But see* Richardson v. Marsh, 481 U.S. 200, 211 (1987) (finding that at a joint trial a non-testifying co-defendant's confession is admissible if it is redacted to eliminate any references to the existence of someone whom jury would know to be the defendant).

86 Doggett v. United States, 505 U.S. 647 (1992).

87 Lewis v. United States, 518 U.S. 322 (1996) (holding that the right to a jury trial in criminal contempt cases is determined by aggregating the penalties actually imposed); Holland v. Illinois, 493 U.S. 474 (1990) (finding that the fair cross section requirement applies to venire only, not to a seated jury); Blanton v. City of N. Las Vegas, 489 U.S. 538

Finally, while it is far too early in the Roberts Court's tenure to authoritatively evaluate its approach to the Sixth Amendment, its initial decisions contravene the popular characterization of the Court as being less protective of individual liberty in criminal prosecutions. While such a reputation might well be reflected in the Court's Fourth Amendment jurisprudence[88] or its jurisprudence in capital cases,[89] the Court decidedly has read the Sixth Amendment expansively in a number of decisions involving the right to confrontation,[90] compulsory process,[91] and counsel.[92] It remains, however, far from clear whether this limited jurisprudence evidences a deeply rooted commitment to an expansive reading of the Sixth Amendment or simply a historical accident due to the particular issues raised by the first set of Sixth Amendment cases to come before the Court.[93]

It is, thus, evident that after a long period of dormancy, the Court's Sixth Amendment jurisprudence underwent significant change during the Warren, Burger, and Rehnquist Courts, with the scope and meaning of the provisions of the Sixth Amendment witnessing a series of expansive and restrictive readings. During the course of this jurisprudential change, the Court adopted several textually inconsistent readings of the Sixth Amendment. For example, contrary to the textual mandate that its procedural protections be provided in "all" prosecutions, the Court had held that the rights to counsel and jury trial only apply in subsets of prosecutions, and that too in differing subsets.[94] Moreover, going beyond the text, the Court has expanded the scope of the Compulsory Process Clause to include

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(1989) (reaffirming that the right to a jury trial exists only in the prosecutions for serious crimes).

88 *See* John D. Castiglione, Hudson *and* Samson*: The Roberts Court Confronts Privacy, Dignity, and the Fourth Amendment*, 68 LA. L. REV. 63, 64 (2007) (discussing the Supreme Court's "curtailing of generally accepted Fourth Amendment protections" after the departure of Justice O'Connor).

89 *See* Kenneth C. Haas, *The Emerging Death Penalty Jurisprudence of the Roberts Court*, 6 PIERCE L. REV. 387, 388 (2008) (arguing that, even as societal concerns with the death penalty have grown, the Roberts Court's jurisprudence in these cases "has loosened the standards for evaluating the competence of capital defense attorneys, strengthened the hands of capital prosecutors, and upheld strict and constitutionally vulnerable statutory and procedural roadblocks to the appellate review of capital sentences").

90 Giles v. California, 128 S. Ct. 2678 (2008).

91 Holmes v. South Carolina, 547 U.S. 319 (2006).

92 Rothgery v. Gillespie County, 128 S. Ct. 2578 (2008); Indiana v. Edwards, 128 S. Ct. 2379 (2008); United States v. Gonzalez-Lopez, 548 U.S. 140, 146 (2006).

93 *See* Stone, *supra* note 2, at 1534 (opining that the Roberts Court is not protecting fundamental constitutional values).

94 *See* discussion of the entanglement of the Predicate Clause *infra* Part III.A.

a right to have witnesses testify and has expanded the scope of the right of public trials to include the right to public pre-trial proceedings.[95] Furthermore, by requiring that defendants show some harm in order to demonstrate a violation the Speedy Trial, Confrontation, and Counsel Clauses, the Court contravened the textual mandate that these provisions apply in all prosecutions, including those of persons who might well be guilty.[96]

Following a discussion in Part II of the Court's two recent seminal decisions disentangling the Sixth Amendment, in Part III, this Article discusses each of the Court's textually inconsistent readings, explaining how each is the result of the Court's entanglement of the Sixth Amendment with the Fourteenth Amendment's Due Process Clause.

II. AT A CROSSROADS: THE RECENT DISENTANGLEMENT OF THE SIXTH AMENDMENT

The past few years have witnessed two particularly critical developments in the Court's Sixth Amendment jurisprudence. Commentators have celebrated or decried *Apprendi v. New Jersey*[97] and *Crawford v. Washington*[98] and their progeny, noting the important changes they marked in the Court's sentencing and Confrontation Clause jurisprudences respectively. As discussed below, however, these two lines of cases are better seen as part of the same effort to disentangle the Sixth Amendment from the Fourteenth Amendment and revert to a more textually-grounded jurisprudence.

A. The "All Criminal Prosecutions" Predicate

In *Apprendi v. New Jersey*, the Supreme Court, citing both the Due Process Clause and the Sixth Amendment, struck down a state sentencing statute that authorized a higher penalty if the sentencing judge, rather than a jury, found that the defendant had committed a hate crime.[99] Since the Sixth Amendment right to jury trial was pre-

95 See *infra* Parts III.B, III.C, which discuss the entanglement of the Compulsory Process and Public Trial Clauses, respectively.

96 See *infra* Parts III.D, III.E, III.F, which discuss the entanglement of the Speedy Trial, Confrontation, and Counsel Clauses, respectively.

97 530 U.S. 466 (2000).

98 541 U.S. 36 (2004).

99 *Apprendi*, 530 U.S. at 490. The Court subsequently struck down sentencing guideline schemes that required the sentencing judge to impose a higher sentence than that which would automatically follow the jury's verdict at trial. *See* Cunningham v. California, 549 U.S. 270 (2007) (striking down California's Determinate Sentencing Law); United States

viously understood to apply only at trials,[100] *Apprendi* and its progeny have been both celebrated and criticized by scholars for having extended that right to a subset of sentencing proceedings.[101] These cases, however, are better understood as an attempt to define the contours of the Sixth Amendment's unambiguous, but often forgotten predicate—namely that its procedural protections, including the right to a jury trial, apply to "all criminal prosecutions."[102] In other words, as discussed below, rather than extending the right to a jury trial to sentencing proceedings, *Apprendi* and its progeny are better viewed as having disentangled the Sixth and Fourteenth Amendments, locating some sentencing proceedings—those that constitute "criminal prosecutions"—within the scope of the Sixth Amendment.

Prior to, and for a period shortly following, the adoption of the Sixth Amendment, the underlying criminal conviction and the resulting sentence were strictly connected, with the legislature having specified fixed punishments for every crime.[103] Since the trial judge automatically imposed a pre-determined fixed sentence after the conviction, there were no meaningfully distinct sentencing proceedings.[104] In other words, a criminal prosecution included both the conviction and sentence. As such, the procedural protections of the Sixth Amendment applied to determinations of sentence as much as they applied to determinations of guilt.

The fundamental shift in sentencing policy in the nineteenth century, however, led to the development of distinct sentencing proceed-

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v. Booker, 543 U.S. 220, 231 (2005) (striking down mandatory federal sentencing guidelines); Blakely v. Washington, 542 U.S. 296 (2004) (striking down Washington's mandatory sentencing guidelines).

100 Spaziano v. Florida, 468 U.S. 447, 459 (1984) (noting that the Sixth Amendment never has been thought to guarantee a right to a jury's determination of the appropriate punishment to be imposed on an individual); *see also* Alan C. Michaels, *Trial Rights at Sentencing*, 81 N.C. L. REV. 1771 (2003) (discussing which rights are protected at the sentencing stage).

101 *See generally* Ronald J. Allen & Ethan A. Hastert, *From* Winship *to* Apprendi *to* Booker*: Constitutional Command or Constitutional Blunder?*, 58 STAN. L. REV. 195, 216 (2005); Kyron Huigens, *Solving the* Apprendi *Puzzle*, 90 GEO. L.J. 387, 389 (2002); Benjamin J. Priester, *Constitutional Formalism and the Meaning of* Apprendi v. New Jersey, 38 AM. CRIM. L. REV. 281 (2001); Keven R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082, 1122 (2005); Stephen A. Saltzburg, *Due Process, History, and* Apprendi v. New Jersey, 38 AM. CRIM. L. REV. 243 (2001).

102 U.S. CONST. amend. VI.

103 *See Apprendi*, 530 U.S. at 478–79 .

104 *See* Susan N. Herman, *The Tail That Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289, 302 (1992) ("The facts on which sentencing was based were decided by the jury, so there was little need for a separate proceeding.").

ings. More than a century preceding modern sentencing reforms, states adopted indeterminate sentencing schemes, affording trial judges considerable discretion in fashioning a sentence.[105] Under these schemes, whose goal was the rehabilitation of offenders, judges were to make individualized sentencing decisions that could be based on factors not involved in the determination of guilt, such as defendants' criminal history and personal characteristics.[106]

It was not until the mid-twentieth century that the Court confronted the question of what constitutional rights were implicated by these distinct sentencing proceedings. In *Williams v. New York*,[107] the Court faced a constitutional challenge to New York's sentencing procedures. A New York jury had convicted the defendant of first-degree murder and had recommended a life sentence; the judge, however, overrode the jury's recommendation and imposed a death sentence, finding that the defendant was a "menace to society."[108] Since the judge's conclusions at sentencing were based on evidence that had not been presented to the jury (including hearsay allegations of the defendant's "morbid sexuality" and that the defendant, although not convicted, had been involved in thirty other crimes), the defendant challenged both the lack of notice about this additional evidence and the lack of a meaningful opportunity to cross-examine adverse witnesses.[109]

Since *Williams* was a state case, it was not surprising that the defendant, and the Court, viewed these constitutional claims solely through the lens of the Fourteenth Amendment's Due Process Clause. After all, the Sixth Amendment, which since the time of the adoption of the Bill of Rights had been understood to apply only to the federal government, had not yet been incorporated via the Fourteenth Amendment and made applicable to the states.[110] In finding that the imposition of the death sentence in *Williams* did not violate the Due Process Clause, the Court distinguished between determinations of guilt and determinations of sentence, finding that the latter properly were governed by different rules.[111]

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105 Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reforms*, 58 STAN. L. REV. 277, 278 (2005).

106 *Id.*

107 337 U.S. 241 (1949).

108 *Id.* at 242–44.

109 *Id.*

110 See *infra* text accompanying note 23, which discusses the incorporation of the Sixth Amendment by the Warren Court in the 1960s.

111 337 U.S. at 252.

The Court's provision of lesser rights at sentencing in state courts in *Williams* was consonant with traditional Due Process analysis, whereby the extent of procedural protections granted by the Due Process Clause was calibrated to the type of proceeding and interest involved.[112] This does not mean that the outcome of *Williams* was proper—indeed, since the right to notice is one of the most basic, elemental components of even minimal due process, an argument can be made that the Court erred in denying the constitutional claim in *Williams*. But, for purposes of this Article, the important point is not that the outcome in *Williams* might or might not be proper, but rather that the Court relied on traditional Due Process analysis, not the Sixth Amendment, in bifurcating the underlying determinations of guilt from determinations of sentence and granting lesser protections in the latter.[113]

Distinct sentencing proceedings remained the norm even as the country veered back to determinate sentencing. Beginning in the 1960s, concerns began to be raised about both the goals of punishment and the methods of sentencing. Specifically, "[r]esearchers and commentators contended that efforts to rehabilitate the offenders had proved largely ineffective and that broad judicial sentencing discretion produced unjustifiable differences in the sentence meted out to similar defendants."[114] These concerns led to a shift towards the retributive goals of punishment and determinate sentencing, with many states, and the federal government, adopting "new determinate

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112 *See* Todd Meadow, Note, Almendarez-Torres v. United States*: Constitutional Limitations on Government's Power to Define Crimes*, 31 CONN. L. REV. 1583, 1583 (1999) ("The level of protection an accused receives under the Due Process Clause often varies with the type of proceeding at issue and depends on the interests a criminal defendant has at stake."). For example, administrative hearings implicate a less robust construction of due process. Mathews v. Eldridge, 424 U.S. 319 (1976). Importantly, in recent years, the Court has rejected the *Mathews* approach for determining whether the Fourteenth Amendment's Due Process Clause was violated during a state criminal trial. *See* Medina v. California, 505 U.S. 437, 443 (1992) (stating that the *Mathews* test is not the proper framework to use when assessing the validity of state procedural rules which are part of the criminal process). Instead of using a balancing analysis, the Court now asks whether the state practice in question "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," *id.* at 445, or whether it "transgresses any recognized principle of 'fundamental fairness' in operation," *id.* at 448.

113 This left open the question of whether sentencing proceedings in federal court would continue to be bound by the Sixth Amendment, as at the time of the Founding, or whether they would fall instead within the scope of the Fifth Amendment's Due Process Clause.

114 Berman, *supra* note 105, at 279.

sentencing systems based on 'guidelines' that would help to channel the discretion of the sentencer."[115]

Almost four decades after *Williams*, the Court addressed the implication of constitutional rights by the new determinate sentencing schemes. *McMillan v. Pennsylvania* involved a constitutional challenge to a state statute that required a judge to impose a mandatory minimum sentence if a defendant possessed a firearm during the commission of certain felonies.[116] Under the statute, the requisite factfinding of firearm possession was to be made not by the jury at the guilt phase, but rather by the judge at sentencing.[117] While the defendants raised Due Process claims regarding burdens and standards of proof, they also raised a Sixth Amendment claim that the state scheme violated the right to a jury trial. In summarily rejecting this claim, the Court stated simply: "[W]e need only note that there is no Sixth Amendment right to jury sentencing . . . ."[118]

The Court's decision in *McMillan*, thus, adopted the earlier, Due Process-based, bifurcation of guilt and sentencing proceedings in the context of the Sixth Amendment, entangling the two clauses. What was a perfectly appropriate Due Process analysis in *Williams* had now been adopted in the Sixth Amendment context, with no discussion of the text or history of the Sixth Amendment. While the Court's holding in *McMillan* dealt with state sentencing proceedings, this entanglement had important implications for federal sentencing proceedings. As noted earlier, since a "criminal prosecution" at the time of the Founding involved both determinations of guilt and determinations of sentence, all provisions of the Sixth Amendment applied at that time to federal sentencing proceedings. By now finding that the right to a jury trial did not apply to sentencing proceedings, the Court in *McMillan* essentially held that sentencing proceedings fall outside the scope of criminal prosecutions. In other words, a criminal prosecution terminates with the determination of guilt; the subsequent determination of sentence in federal court is governed only by the Fifth Amendment's Due Process Clause.

The Court in *McMillan*, moreover, adopted a formalistic distinction between factfindings to be made by the jury during determinations of guilt and those that could be made by the judge at sentenc-

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115 Joseph L. Hoffman, Apprendi v. New Jersey*: Back to the Future?*, 38 AM. CRIM. L. REV. 255, 265 (2001).

116 477 U.S. 79, 81 (1986).

117 *Id.* at 81 (citing 42 PA. CONS. STAT. § 9712 (1982)).

118 *McMillan*, 477 U.S. at 93.

ing proceedings. Finding itself unable "to lay down any 'bright line' test,"[119] the Court gave heavy weight to whether the legislature labeled the fact an "element of the crimes" or a "sentencing factor."[120] While it acknowledged that "there are constitutional limits to the State's power in this regard," the Court concluded that "the state legislature's definition . . . is usually dispositive."[121]

The *McMillan* majority's formalistic approach for determining whether a factual determination is part of the "criminal prosecution" or part of a sentencing proceeding, while in keeping with the Rehnquist Court's emphasis on federalism, drew dissents from Justices Marshall, Brennan, Blackmun, and Stevens, who objected to the Court's abdication of its responsibility to define the scope of constitutional protections. These Justices argued that undue deference to legislatures would permit states to circumvent constitutional requirements, including the protections of the Sixth Amendment, by simply labeling essential facts as being "sentencing factors."[122]

Over time, other members of the Court began to voice similar concerns. For example, in *Almendarez-Torres v. United States*, Justice Scalia, in a dissent joined by Justices Stevens, Souter, and Ginsburg, found the deference to the legislature inappropriate where the statute did not expressly indicate that the fact at issue was a "sentencing enhancement" and in fact seemed to indicate the opposite.[123] The following year, in *Jones v. United States*, the Court went further—even though the structure of the statute had led both the district court and the court of appeals to find that the facts at issue were "sentencing enhancements" and not "elements of offenses," the majority found that it was not an adequate indicium of legislative intent.[124]

It was in dictum in *Jones* that the Court first articulated the principle by which it would independently distinguish (without undue deference to the legislature) between "elements of offenses" and "sentencing factors." In a footnote, the majority stated that "any fact (other than prior conviction) that increases the maximum penalty for

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119 *Id.* at 91.

120 *Id.* at 85–86. If gun possession belonged in the former category, it would be part of a "'criminal prosecution,'" subject to the Sixth Amendment's right to jury trial and would need to be proved beyond a reasonable doubt by the prosecutor; if it belonged to the latter category, it would fall outside the scope of the Sixth Amendment. This formalistic reliance on the label assigned by the legislature mirrored the approach the Court had taken in distinguishing between elements of offenses and affirmative defenses.

121 *Id.* at 86.

122 *Id.* at 93–94 (Marshall, J., dissenting); *id.* at 95–104 (Stevens, J., dissenting).

123 523 U.S. 224, 249 (1998) (Scalia, J., dissenting).

124 526 U.S. 227, 231–34 (1999).

a crime" must comply with the notice and jury trial guarantees of the Sixth Amendment.[125]

This principle formed the basis for the Court's decision in *Apprendi v. New Jersey* to strike down a statute that permitted the imposition of a higher sentence if the sentencing judge found that the underlying crime was also a hate crime.[126] While the New Jersey legislature had set forth unambiguously the hate crime provision in the statutory section titled "Sentencing," the Court refused to defer to the legislature. Instead, the Court, recognizing its obligation to define independently the scope of constitutional provisions, adopted the principle announced in dictum in *Jones* and held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[127]

While the majority opinion in *Apprendi* relied on historical and policy grounds to justify its holding, the concurring opinions provided a textual grounding for the *Apprendi* rule. Justice Thomas, in an opinion joined by Justice Scalia, tethered the issue to the word "crime" because three constitutional provisions were predicated on this word: (1) the Sixth Amendment right "to be informed of the nature and cause of the accusation"; (2) the Fifth Amendment right in federal cases to a grand jury indictment; and (3) the Sixth Amendment right to jury trial.[128] Since "[a]ll of these constitutional protections turn on determining which facts constitute the 'crime'—that is, which facts are the 'elements' or 'ingredients' of a crime," Justice Thomas explained, "it is critical to know which facts are elements."[129]

The textual tether for the *Apprendi* rule provided by Justice Thomas, while on the right track, missed the mark. For example, the word "crime" arises in the Sixth Amendment's Jury Trial Clause only insofar as to indicate the appropriate jurisdiction from which the jury should be drawn; it does not have any implication for the scope of the jury's factfinding task at the trial. Instead, Justice Scalia alluded

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125 *Id.* at 243 n.6.

126 530 U.S. 466 (2000).

127 *Id.* at 490. In subsequent cases, the Court interpreted the "statutory maximum" penalty in a restrictive manner and struck down state and federal mandatory sentencing guideline schemes to the extent they required the sentencing judge to impose a sentence higher than that which could be imposed based solely on the facts reflected in the jury verdict or admitted by the defendant. *See, e.g.*, Cunningham v. California, 549 U.S. 270, 288–89 (2007); United States v. Booker, 543 U.S. 220, 231 (2005); Blakely v. Washington, 542 U.S. 296, 301 (2004).

128 *Apprendi*, 530 U.S. at 499 (Thomas, J., concurring).

129 *Id.* at 500.

to the proper textual tether for the *Apprendi* rule when he concluded in his concurring opinion that "the guarantee that '*[i]n all criminal prosecutions*, the accused shall enjoy the right to . . . trial, by an impartial jury,' has no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury."[130] Plainly stated, the Sixth Amendment's predicate clause— "in all *criminal* prosecutions" —presupposes prosecutions of "crimes" and as such, facts that constitute elements of crime are properly adjudicated as part of the "prosecution" subject to the procedural protections granted to defendants by Sixth Amendment. In other words, irrespective of legislative labeling, facts that increase the statutory maximum penalty are part of the initial "criminal prosecution," not the subsequent "sentencing."

Apprendi and its progeny, thus, are best seen not as having extended the Sixth Amendment right to jury trial to a subset of sentencing proceedings, but rather as a reclamation of that subset of sentencing proceedings within the scope of the Sixth Amendment's "all criminal prosecutions" predicate clause.

B. Right of Confrontation

The Sixth Amendment provides that "In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him."[131] This Confrontation Clause, which has been understood to involve at its core four procedural safeguards (in person testimony by witnesses; testimony given under oath; testimony that is subject to cross-examination; and testimony where the jury can observe the witness's demeanor),[132] has broad implications for the use of out-of-court statements that are presented in support of the truth of the matter asserted—i.e., hearsay evidence. At one extreme, the clause could be read as precluding any evidence that a defendant is unable to confront personally, resulting in the exclusion of all hearsay evidence;[133] at the other extreme, it could be read narrowly as applying only to persons who are offering testimony in court, allowing the use of any hearsay consistent with rules of evidence.[134] As discussed below, prior to the landmark decision in *Crawford v. Washing-*

130 *Id.* at 499 (Scalia, J., concurring) (first emphasis added).

131 U.S. CONST. amend. VI.

132 Maryland v. Craig, 497 U.S. 836, 845–46 (1990).

133 Philip Halpren, *The Confrontation Clause and the Search for Truth in Criminal Trials*, 37 BUFF. L. REV. 165, 165 (1988–89).

134 *Id.* at 165–66.

ton,[135] the manner in which the Supreme Court attempted to steer a middle course led to the needless entanglement of Sixth Amendment jurisprudence with Due Process considerations.

The path to entanglement began over a century ago in *Mattox v. United States* when the Court rejected a defendant's Confrontation Clause claim in a case in which prior testimony from two witnesses was admitted at a subsequent trial that occurred after these witnesses had died.[136] Since the defendant had been afforded a full opportunity to confront these witnesses at the initial trial, the Court felt that "considerations of public policy and the necessities of the case" required that the prior recorded testimony be admitted despite the strict requirements of the Confrontation Clause.[137] Notably, in dictum, the Court drew an analogy to the admissibility of "dying declarations," a category of hearsay evidence that traditionally has been admitted despite obvious Confrontation Clause problems.[138]

The *Mattox* Court's linking, albeit in dictum, of the Confrontation Clause and the rules of evidence paved the way for the future entangling of the Sixth Amendment with due process concerns by affirming the ability of courts to "admit out-of-court statements that were just as reliable as those covered by the traditional exceptions without finding a constitutional violation."[139] In *Dutton v. Evans*,[140] for example, "Justice Stewart's plurality opinion brought the reliability theme to center stage."[141] The Court upheld the defendant's conviction even though the trial court had admitted the hearsay testimony of a jailhouse snitch, finding that there were sufficient "indicia of reliability."[142] Notably, Justice Stewart claimed that "the mission of the Confrontation Clause is to advance a practical concern for the *accuracy* of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.'"[143]

A decade later, the Court fully embraced the centrality of reliability concerns in resolving Confrontation Clause claims in *Ohio v. Rob-*

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135 541 U.S. 36 (2004).

136 156 U.S. 237 (1895).

137 *Id.* at 243–44.

138 *Id.*

139 John G. Douglass, *Beyond Admissibility: Real Confrontation, Virtual Cross-Examination, and the Right to Confront Hearsay*, 67 GEO. WASH. L. REV. 191, 202 (1999).

140 400 U.S. 74 (1970).

141 Douglass, *supra* note 139, at 203.

142 *Dutton*, 400 U.S. at 89 (plurality opinion).

143 *Id.* (emphasis added) (quoting California v. Green, 399 U.S. 149, 161 (1970)).

erts.[144] In approving the use of transcribed testimony from a prior preliminary hearing where the defendant had been provided an opportunity to cross-examine the witness, the Court restated its narrow view of the "underlying purpose" of the Confrontation Clause as being merely "to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence."[145] The Court then explored the relationship between the Confrontation Clause and hearsay evidence and identified two principles at work. First, for hearsay evidence to be admissible, the declarant generally must be unavailable at trial.[146] Second, the hearsay evidence must bear "adequate indicia of reliability," such as "fall[ing] within a firmly rooted hearsay exception" or having "particularized guarantees of trustworthiness."[147] As one scholar concluded: "Reliability has become the surrogate for cross-examination. 'Firmly rooted' hearsay exceptions are the surrogate for reliability. The Confrontation Clause is simply an exclusionary rule for unreliable hearsay, and the law of evidence largely defines the rule."[148]

While the Court used this reliability framework subsequently to resolve several Confrontation Clause cases,[149] some members of the Court began to voice misgivings about the Court's approach.[150] In a prescient concurring opinion in *White v. Illinois*, Justice Thomas, who was joined in the opinion by Justice Scalia, noted that "Confrontation Clause jurisprudence has evolved in a manner that is perhaps inconsistent with the text and history of the Clause itself."[151] The Court's approach, Justice Thomas added, had led to the entangling of the

144 448 U.S. 56 (1980), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004).

145 *Id.* at 65.

146 *Id.*

147 *Id.* at 65–66.

148 Douglass, *supra* note 139, at 206; *see also* Akhil Reed Amar, Foreword, *Sixth Amendment First Principles*, 84 GEO. L.J. 641 (1996); Richard D. Friedman, *Confrontation: The Search for Basic Principles,* 86 GEO. L.J. 1011, 1015 (1998) ("[T]he Supreme Court's subsequent treatment of this framework has tended to make confrontation doctrine resemble ordinary hearsay law."); Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment,* 35 UCLA L. REV. 557, 622 (1988) ("[E]vidence law now controls the content of the confrontation clause . . . .").

149 *See, e.g.*, Lilly v. Virginia, 527 U.S. 116 (1999); White v. Illinois, 502 U.S. 346 (1992); Idaho v. Wright, 497 U.S. 805 (1990); United States v. Inadi, 475 U.S. 387 (1986).

150 Scholars also criticized the Court's approach. As one scholar noted, the Court had attempted to "achieve harmony" between two opposing interpretations of the clause "by rendering the preservation of procedural fairness subservient to the pursuit of substantive justice in the form of accurate verdicts." Halpren, *supra* note 133, at 200.

151 502 U.S. at 358 (Thomas, J., concurring).

Sixth Amendment jurisprudence with Due Process: "[r]eliability," Justice Thomas noted, "is more properly a due process concern."[152]

A little over a decade later, Justice Thomas's position gained majority support in *Crawford v. Washington*.[153] In an opinion written by Justice Scalia, the Court disentangled the Confrontation Clause from due process considerations, stating that while "the Clause's ultimate goal is to ensure reliability of evidence, . . . it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[154]

Having disentangled the Sixth Amendment, the Court then offered a new approach to Confrontation Clause issues. Drawing on the historical background of the clause,[155] the Court concluded that the use of testimonial[156] hearsay evidence would be permissible under the Confrontation Clause only if the declarant was unavailable and the defendant had been provided a prior opportunity for cross-examination;[157] non-testimonial hearsay evidence, on the other hand, would not be regulated by the Confrontation Clause and would, instead, be subject only to state rules of evidence.[158]

Crawford, thus, "represents a sea change in the Supreme Court's interpretation of the Sixth Amendment Confrontation Clause."[159] It marks a clear effort by the Court to disentangle the Sixth Amendment from Due Process considerations and to revert to an approach more consistent with the clause's text.

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152 *Id.* at 363–64.

153 541 U.S. 36 (2004).

154 *Id.* at 61.

155 *Id.* at 42–56. In charting this new course, the Court found that the Amendment's text was not helpful because it was susceptible to a number of reasonable, competing interpretations. *Id.* at 42.

156 *Id.* at 68–69. In *Davis v. Washington*, 547 U.S. 813, 822 (2006), the Court drew the following distinction between testimonial and nontestimonial statements:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

157 The Court noted that the dying declaration hearsay exception has long been recognized. Without reaching the question of whether the Sixth Amendment incorporates such an exception to the Confrontation Clause, the Court stated that "[i]f this exception must be accepted on historical grounds, it is sui generis." *See Crawford*, 541 U.S. at 56 n.6.

158 *Id.* at 68.

159 W. Jeremy Counseller & Shannon Rickett, *The Confrontation Clause After* Crawford v. Washington*: Smaller Mouth, Bigger Teeth*, 57 BAYLOR L. REV. 1, 22 (2005).

III. THE ROAD AHEAD: ENTANGLEMENTS YET TO BE UNDONE

The Court's adoption of textually inconsistent readings of the Sixth Amendment over the course of the past few decades can be traced to the interplay between the Sixth Amendment and the Fourteenth Amendment's Due Process Clause. As discussed in Part III.A below, the Court entangled the two constitutional provisions in the process of incorporating the Sixth Amendment, leading to a textually inconsistent restrictive reading of the scope of the right to counsel. Parts III.B and III.C, which address the Compulsory Process and Public Trial Clauses respectively, discuss how the Court entangled the Sixth Amendment by improperly locating expansive procedural protections in the particularized rules of the Sixth Amendment as opposed to deriving the same rights from the general principle of due process. Finally, as discussed in Parts III.D, III.E, and III.F, the Court entangled the Sixth Amendment with the Due Process Clause by using interpretative methodologies suitable for the Due Process Clause to give meaning to the Sixth Amendment's text. Each of the entanglements discussed below has led to a more restrictive reading of the Sixth Amendment, rendering it less protective of individual liberty.

A. The "All Criminal Prosecutions" Predicate

The Sixth Amendment unequivocally mandates that its seven procedural protections be provided to defendants "in *all* criminal prosecutions."[160] Despite this unbound predicate, the Court has read into the text a limitation about the scope of the right to assistance of counsel, finding that this right is available only in limited subsets of federal (and state) prosecutions. This construction of the right to counsel, arguably the unintended result of incorporation, is all the more problematic in light of the Court's earlier erroneous limitation of the right to a jury trial to a different subset of federal (and state) prosecutions. Thus, while the Sixth Amendment's common predicate continues to mean in *all* criminal prosecutions for five procedural rights, it has come to mean only in *some* criminal prosecutions for two procedural rights, and this *some* varies according to which of the two procedural rights is involved. As discussed below, this textually inconsistent construction can be traced to the entanglement of the Sixth Amendment with the Due Process Clause.

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160 U.S. CONST. amend. VI. (emphasis added).

Since its ratification in 1791, the Sixth Amendment has guaranteed defendants in all criminal prosecutions in federal court the right to the assistance of counsel.[161] With respect to state court prosecutions, on the other hand, prior to 1963, the Court had rejected the claim that this right to counsel was applicable to the states via the Fourteenth Amendment;[162] the Court had instead conducted a case-specific review to determine whether a state's failure to appoint counsel violated a defendant's due process rights.[163] The Court changed direction during the early years of the Warren Court, holding in *Gideon v. Wainwright* that the right to the assistance of counsel was so "fundamental and essential to a fair trial" that it was applicable to the states through the Fourteenth Amendment's Due Process Clause.[164]

Less than a decade after *Gideon*, the Court reaffirmed its clarion call by rejecting states' attempts to limit its scope to serious (that is, non-petty) offenses in *Argersinger v. Hamlin*.[165] In doing so, however, the Court used problematic language. Perhaps with a desire to achieve unanimity—there was not a single dissent in *Argersinger v. Hamlin*—the Court held that "no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."[166]

Argersinger's post hoc focus on whether the defendant is imprisoned after a trial without counsel was noteworthy not only for its failure to provide meaningful pre-conviction guidance to state courts on

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161 This right has long been found to include the right of indigent defendants in federal cases to have the government provide them with an attorney. *See* Johnson v. Zerbst, 304 U.S. 458, 467–68 (1938). Even during the common law, while indigent defendants had no right to have attorneys appointed, and indeed no defendant had the right to have the assistance of counsel, "[i]t was dogma that the court was meant to serve as counsel for the prisoner." John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1049–50 (1994). It should be noted, however, that this entitlement to the assistance of the trial judge as defense counsel at the common law was limited to matters of law: "[T]he judges would protect defendants against illegal procedure, faulty indictments, and the like." *Id.* at 1051. As to issues of fact, judges did not "help the accused to formulate a defense or act as their advocates[, although] judges did intervene on occasion to help the defendant in the realm of fact, mainly by cross-examining a suspicious prosecution witness when the defendant appeared ineffectual." *Id.* at 1051–52.

162 *See* Betts v. Brady, 316 U.S. 455, 461–73 (1942) (holding that there is no right to counsel under the Fourteenth Amendment).

163 *See* Powell v. Alabama, 287 U.S. 45, 60 (1932) (discussing English common law and state application of right).

164 372 U.S. 335, 342–45 (1963).

165 407 U.S. 25 (1972).

166 *Id.* at 37.

whether to provide defendants with counsel,[167] but also because it also opened the door seven years later to a retrenchment of the right to counsel. In a 5-4 decision, the Court in *Scott v. Illinois* held that the Sixth Amendment right to counsel did not apply to *all* prosecutions in state courts, but only to those cases in which the defendant was actually imprisoned.[168]

Mindful perhaps of *Scott*'s tortured reasoning, a differently constituted, yet similarly split, Court later found in *Alabama v. Shelton* that the Sixth Amendment not only applies to those misdemeanor cases in state courts in which the defendant is actually imprisoned, but also in those cases where the defendant, while not actually imprisoned, was sentenced to imprisonment and that sentence was suspended.[169]

The Court's approach in *Argersinger*, *Scott*, and *Shelton* would pose no issue in terms of entanglement of the Sixth Amendment if it were limited to state prosecutions. While it is true that as a general matter, the substance of each of the Sixth Amendment's procedural protections is identical in state and federal prosecutions,[170] the same need not be true of the predicate "in all criminal prosecutions" clause. This predicate clause speaks not to the substantive meaning of the Sixth Amendment's procedural protections, but to their scope. The Framers of the Sixth Amendment were acutely concerned about the powers of a central government, quite the opposite of the concerns driving the adoption of the Fourteenth Amendment. So, the Court could have held that, while the substantive meaning of the right to counsel is identical in federal and state prosecutions, the right to counsel applies to different sets of prosecutions: while it applies to all federal prosecutions, it only applies to a subset of state prosecutions, those where its presence is essential to a fair trial.[171] Such a disentan-

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167 *See* Steven Duke, *The Right to Appointed Counsel:* Argersinger *and Beyond*, 12 AM. CRIM. L. REV. 601, 604 (1975); Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419, 2426 n.31 (1996).

168 440 U.S. 367, 373–74 (1979) ("[T]he central premise of Argersinger . . . warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel.").

169 535 U.S. 654, 657, 674 (2002). *See generally* Rinat Kitai, *What Remains Necessary Following* Alabama v. Shelton *to Fulfill the Right of a Criminal Defendant to Counsel at the Expense of the State?*, 30 OHIO N.U. L. REV. 35 (2004).

170 *See* Thomas, *supra* note 1, at 183 (noting that once a procedural right is incorporated, "the Court treats the Fourteenth Amendment right and the Bill of Rights right as identical protections"); *id.* (noting other than the size and unanimity of juries, the substance of all provisions of the Sixth Amendment that have been incorporated to the states are identical in federal and state prosecutions.)

171 *See* Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1260–84 (1992) (discussing the theory of refined incorporation).

gled reading would have allowed the Court to adopt the current approach to state prosecutions and would not have changed federal practice much since the overwhelming majority of federal prosecutions are for felonies.[172]

The Court, however, has failed to limit its *Argersinger*, *Scott*, and *Shelton* approach to state prosecutions. While not expressly addressing the issue, the Court in *Nichols v. United States* implicitly assumed that an uncounseled misdemeanor conviction in federal court is constitutional.[173] Overturning its earlier decision in *Baldasar v. Illinois*,[174] the Court held in *Nichols* that an uncounseled misdemeanor conviction can be used in a later counseled criminal proceeding to enhance a defendant's sentence in federal prosecutions.[175]

The Court's failure to disentangle the right to counsel, thus, has led to a textually inconsistent construction of the Sixth Amendment: while the text unambiguously extends the right to counsel to "all criminal prosecutions" in federal court, the Court has not extended the right to those misdemeanor prosecutions where the defendant is not sentenced to a term of imprisonment.

The Court's textually inconsistent reading also is not faithful to the history of the right to counsel. Under the common law, while a person charged with a felony or treason was denied the assistance of counsel, the right to counsel was guaranteed in civil cases and misdemeanors.[176] The colonists also extended the right to misdemeanor cases—in almost every instance, the colonies adopted provisions guaranteeing the right to the assistance of counsel in *all* criminal

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172 *See* Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 253, 254 n.4 (1982) ("The number of federal misdemeanor prosecutions (including both 18 U.S.C. § 3401 misdemeanors and 18 U.S.C. § 1(3) petty offenses), however, is so low—approximately 100,000 in 1980—that one can safely say that state prosecutions account for more than 98% of all misdemeanor prosecutions.").

173 511 U.S. 738 (1994). There is some question about the continued viability of *Nichols* in some circumstances. As noted earlier, the Court has since held that facts that lead to punishment beyond the statutory maximum must be found by a jury beyond a reasonable doubt. *See supra* Part II. While the Court has exempted prior convictions from this rule, those cases have all involved jury findings of guilt beyond a reasonable doubt. *See* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). In uncounseled misdemeanor cases where the authorized punishment is less than six months (and therefore where there is no right to a jury trial), there would be no initial jury finding beyond a reasonable doubt. As a result, the future use of such a conviction may well require that a jury in the subsequent proceeding make a finding of the predicate facts underlying the misdemeanor conviction beyond a reasonable doubt.

174 446 U.S. 222 (1980).

175 *Nichols*, 511 U.S. at 746–47.

176 Powell v. Alabama, 287 U.S. 45, 61 (1932).

proceedings.[177] The Framers undoubtedly were familiar with the extension of the right to counsel to misdemeanors under the common law and in the colonies when they adopted the "in all criminal prosecutions" predicate in the Sixth Amendment.

The Court's textually inconsistent construction of the right to counsel proves all the more problematic when considered in conjunction with the Court's construction of the predicate clause with regard to the other Sixth Amendment rights. Specifically, the Court has held that the right to jury trial does not apply to petty crimes—that is, crimes for which the potential punishment is six months or less.[178] At the same time, the Court has not qualified the predicate clause with respect to the other five procedural rights in the Sixth Amendment. As such, the same text has been endowed with three different meanings. "In all criminal prosecutions" means the following: in the context of the right to counsel, it means "in felony prosecutions and misdemeanor prosecutions where the defendant is actually sentenced to a term of imprisonment"; in the context of the right to jury trial, it means "in non-petty criminal prosecutions"; and in the context of the rights to a public trial, a speedy trial, notice, confrontation and compulsory process, it continues to mean "in all criminal prosecutions."

Furthermore, insofar as the Court drew inspiration from its earlier jurisprudence limiting the Predicate Clause in the jury trial context, such reliance was misplaced. This is because the Court's jury trial jurisprudence was fundamentally flawed. In concluding that the petty trials fell outside the scope of the right to jury trial, the Court had focused on the word "criminal" in the predicate clause.[179] Referring to Blackstone's definition of a "crime," the Court found that the word had two meanings: while a broad reading of the word covered all criminal activity, including misdemeanors, a narrow reading of the word covered only "offenses . . . of a deeper and more atrocious

177 *See id.* at 61–64. Colonies that had constitutional provisions guaranteeing counsel in all criminal prosecutions were Maryland, Massachusetts, New Hampshire, New York, Pennsylvania, Delaware, and New Jersey. *Id.* North Carolina and South Carolina did not have constitutional provisions, but each adopted this guarantee by statute. *Id.* Virginia had no constitutional guarantee but had an act that permitted the accused in a capital case to have counsel. Connecticut did not have a constitutional provision but expressly rejected the English rule. *Id.* The practice in Georgia is unclear prior to the adoption of the U.S. Constitution. Rhode Island had a statute that permitted an indicted person to employ counsel. *Id.*

178 Baldwin v. New York, 399 U.S. 66, 73–74 (1970) (plurality opinion).

179 Schick v. United States, 195 U.S. 65 (1904).

dye."[180] "[S]maller faults and omissions of less consequence," on the other hand, "are comprised under the gentler name of 'misdemeanors' only" under the narrow reading.[181] The Court then discussed the adoption of the right to a jury trial in Article III, noting that the text of the jury trial provision in Article III[182] had been changed at the Constitutional Convention from "'the trial of all criminal offenses . . . shall be by jury'" to "'the trial of all crimes.'"[183] In other words, by adopting "crimes" instead of "all criminal offenses," the Court found that the Framers intended to adopt the narrow definition of "crime," the one that excluded misdemeanor offenses from its scope.

The Court's reading of the text, however, was fundamentally flawed. First, "Blackstone himself impeache[d] [the narrow definition] as improper and [gave] full recognition to the broad meaning of the word."[184] Indeed, since the narrow definition was used perhaps occasionally, with the broad definition of "crime" being used more regularly, the use of narrow definition would have been clear only if it was juxtaposed in the text with a word such as "misdemeanors."[185] Moreover, even if the word "crime" had two viable meanings and even if the Framers had selected the narrow definition at the Constitutional Convention, the Framers did no such thing when it came to the Sixth Amendment. Instead, the Sixth Amendment's "criminal prosecutions" language mirrors the original "criminal offenses" language in Article III, which the Court had seen as embodying the broader definition of "crime." Finally, the use of the word "all" in the Sixth Amendment predicate also undermines the notion that the predicate was meant to be limited to a subset of prosecutions.[186]

In addition, the Court's problematic interpretation of the predicate clause in the jury trial context also stemmed from the Court's misreading of the historical record. In a series of cases long before the right to a jury trial was incorporated to the states, the Court had

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180 *Id.* at 69–70 (quoting WILLIAM BLACKSTONE, 4 COMMENTARIES *5).

181 *Id.* at 70 (quoting BLACKSTONE, *supra* note 180, at *5).

182 U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . .").

183 *Schick*, 195 U.S. at 70. Such a reading of the actions at the Constitutional Convention was also set forth in an influential article by Felix Frankfurter and Thomas G. Corcoran a couple of decades later. *See* Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 978–79 (1926) (citing *Schick*, 195 U.S. at 70).

184 George Kaye, *Petty Offenders Have No Peers!*, 26 U. CHI. L. REV. 245, 260 (1959).

185 *Id.* at 258–59.

186 *Id.* at 259–60.

noted, often in dicta, that the common law and the practices of the colonies and early states showed that petty trials were often tried summarily and that the right to a jury trial, therefore, was not meant to extend to petty crimes.[187] The historical record, however, does not support such a thesis. While it is undoubtedly true that petty crimes were subject to summary trials during the common law, so were non-petty crimes.[188] Moreover, as far as the colonies go, many either had no constitutional right to a jury trial or had limited that right to serious crimes or even capital cases.[189] Furthermore, where summary trials did take place, the "power to dispense with the criminal jury had been reserved to the legislature . . . ."[190]

Most importantly, whatever the practice of the common law, colonies or early states, the concerns that led to the adoption of the Bill of Rights were directed narrowly at a central government, one that was feared might become potentially oppressive or tyrannical. That is, the federal government stood on different footing and, even if states, which were primarily responsible for crime and safety, retained the power to dispense with juries for petty crimes, such power would not have been warranted for the federal government. In fact, none of the federal crimes in existence when the Sixth Amendment was ratified was petty.[191]

Nor is the Court's textually inconsistent construction of the predicate clause defensible on policy grounds. It is evident that the Court's desire to limit the scope of the predicate clause in the counsel and jury trial contexts was motivated by a desire to minimize the costs on states.[192] The Court could certainly have imposed such a re-

187 District of Columbia v. Clawans, 300 U.S. 617, 624–29 (1937); Schick v. United States, 195 U.S. 65, 70 (1904); Natal v. Louisiana, 139 U.S. 621, 624 (1891); Callan v. Wilson, 127 U.S. 540, 552 (1888); *see also* Duncan v. Louisiana, 391 U.S. 145, 160 (1968) ("So-called petty offenses were tried without juries both in England and in the Colonies . . . ."); Frankfurter & Corcoran, *supra* note 183, at 978.

188 Kaye, *supra* note 184, at 246–47.

189 *Id.* at 248–57.

190 *Id.* at 257.

191 *See infra* Appendix A.

192 *See* Baldwin v. New York, 399 U.S. 66, 75 (1970) (Black, J., concurring) (explaining that the Court was "weighing the advantages to the defendant against the administrative inconvenience to the State inherent in a jury trial and magically concluding that the scale tips at six months' imprisonment"); *Duncan*, 391 U.S. at 188–89 (Harlan, J., dissenting) ("It is a cumbersome process, not only imposing great cost in time and money on both the State and the jurors themselves, but also contributing to delay in the machinery of justice. Untrained jurors are presumably less adept at reaching accurate conclusions of fact than judges, particularly if the issues are many or complex. And it is argued by some that trial by jury, far from increasing public respect for law, impairs it: the average man, it

striction on state prosecutions under a theory of refined incorporation—it could have expressly chosen to not incorporate the "in all criminal prosecutions" predicate and instead to require the rights to jury trial and counsel are fundamental only in subsets of criminal prosecutions in state courts.[193] With respect to federal prosecutions, however, this type of "weighing" had already been done by the Framers, who "decided that the value of a jury trial far outweighed its costs for 'all crimes' and '[i]n all criminal prosecutions.'"[194]

Perhaps it was this poor textual interpretation and historical record that led Justice Black to conclude that, by reading a six month limitation into the jury trial right, the Court was engaging in "judicial mutilation of our written Constitution"[195] and simply legislating "that 'all crimes' did not mean 'all crimes,' but meant only 'all serious crimes.'"[196]

Since the Court's entangled reading of the "all criminal prosecutions" clause is neither textually supported nor historically faithful, the Court should disentangle this clause. This would mean that all seven procedural rights of the Sixth Amendment, including the rights to jury trial and counsel, would apply to all federal prosecutions. For state prosecutions, since the predicate clause need not be incorporated to the states, the Court's current limitations on the scope of the rights to jury trial and counsel would remain valid.

B. The Right to Compulsory Process

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor."[197] While this text speaks plainly to the "process" for calling witnesses to the trial, not to the

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is said, reacts favorably neither to the notion that matters he knows to be complex are being decided by other average men, nor to the way the jury system distorts the process of adjudication." (footnotes omitted)); *see also* Dripps, *supra* note 10, at 1568–69 ("While the states struggled to accommodate the new rules, the Court—even with Earl Warren still serving as Chief Justice—began to qualify the Bill of Rights guarantees that had been forced on the states. . . . The Burger and Rehnquist Courts accelerated the process of retrenchment . . . ."); Lawrence Herman & Charles A. Thompson, Scott v. Illinois *and the Right to Counsel: A Decision in Search of a Doctrine?*, 17 AM. CRIM. L. REV. 71, 76–77 (1979) (arguing that the Court in *Argersinger* and *Scott* was motivated primarily by a desire not to financially overburden states).

193 *See* Amar, *supra* note 171, at 1260–84 (discussing the theory of refined incorporation).

194 *Baldwin*, 399 U.S. at 75 (Black, J., concurring).

195 *Id.*

196 *Id.*

197 U.S. CONST. amend. VI.

regulation of witnesses' testimony after they come to court, the Court has read the right more broadly to include the defendant's right to put on witnesses and the defendant's right to testify. As discussed below, this expansive interpretation has resulted in the entangling of the Sixth Amendment with due process concerns, paradoxically opening the door to a potentially restrictive and textually inconsistent reading of the clause in the future.

The entanglement of the Compulsory Process Clause can be traced to the Court's decision four decades ago in *Washington v. Texas*.[198] In *Washington*, the Court was faced with a Texas statute that imposed a per se bar against the use of testimony by persons who participated in the crime with the defendant.[199] As indicated by Justice Harlan's concurring opinion, the Court could have easily resolved this case on due process grounds because the Fourteenth Amendment has traditionally been the source of constitutional constraints on a state's evidentiary rules.[200] Indeed, the Court noted that "the most basic ingredients of due process of law" include the right "to be heard in [one's] defense,"[201] which in turn includes "[t]he right to offer the testimony of witnesses."[202] Nevertheless, after determining that the Sixth Amendment right to compulsory process was applicable to the states via the Fourteenth Amendment,[203] the Court read the Compulsory Process Clause expansively to include not only the right to the "process" for compelling the attendance of witnesses in court, but also the substantive right to have those witnesses testify.[204] As

198 388 U.S. 14 (1967).

199 *Id.* at 23.

200 *Id.* at 24–25 (Harlan, J., concurring) (stating that the Texas statute is unconstitutional because due process forbids the arbitrary exclusion of relevant and competent evidence).

201 *Id.* at 18 (majority opinion).

202 *Id.* (quoting *In re* Oliver, 333 U.S. 257 (1948)).

203 *Id.* at 17–18 (noting that the Court had previously found that the Sixth Amendment rights to counsel, speedy trial, public trial and confrontation were "so fundamental and essential to a fair trial that [they were] incorporated in the Due Process Clause of the Fourteenth Amendment" and holding that the right to compulsory process "stands on no lesser footing").

204 *Id.* at 14–15. As the Court has subsequently explained, it is reluctant to read new rights into the Due Process Clause:

> In the field of criminal law, we "have defined the category of infractions that violate 'fundamental fairness' very narrowly" based on the recognition that, "[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation." The Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order. . . . "[I]t has never been

such, the Court located the right to have witnesses testify in both the Due Process and Compulsory Process Clauses thereby entangling the Sixth Amendment.[205]

The Court's entangled reading of the Compulsory Process Clause contravenes the clause's text and history.[206] The Sixth Amendment's text speaks narrowly of the "process" for obtaining witnesses—that is, the issuance of subpoenas; it says nothing about the regulation of the witnesses' testimony after they come to court. Such a restrictive reading of the text is consonant with the clause's history. The Framers had soundly rejected a proposal that the compulsory process language be expanded to include the right to a continuance if the process had been granted but not served—the proposal mustered support of less than a fifth of the Framers.[207] As a Framer noted, "[I]f process was issued, 'the Government did all it could; the remainder must lie in the discretion of the court.'"[208] The *Washington* Court addressed neither the limited nature of the text nor the clause's history. Instead, the Court first engaged in a lengthy, but inapposite, discussion of common law principles concerning restrictions on the testimony of defense witnesses.[209] The Court then stated that "[t]he Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use"[210] and accordingly struck down the Texas statute. The Court's conclusion, however, was misguided be-

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> thought that [decisions under the Due Process Clause] establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure."

Medina v. California, 505 U.S. 437, 443–44 (internal citations omitted). As this Article demonstrates, however, the impulse to provide a more concrete bearing for a constitutional right by locating it in the Sixth Amendment may ironically work to undermine the Sixth Amendment's procedural protections.

205 In subsequent years, the Court, citing to its decision in *Washington*, similarly entangled the Compulsory Process Clause with due process issues in *Crane v. Kentucky*, 476 U.S. 683 (1986), and *Holmes v. South Carolina*, 547 U.S. 319 (2006).

206 The Court's entangled reading of the Compulsory Process Clause also was inconsistent with the structure of the Bill of Rights. As the Court had noted, the most elemental notions of due process included the substantive right to have defense witnesses testify. In locating the same right in the Compulsory Process Clause, the Court failed to give independent meaning to the Fifth/Fourteenth Amendment and the Sixth Amendment.

207 JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES 1192 (3d ed. 2006).

208 *Id.* (citing 1 ANNALS OF CONG. 756 (1789)).

209 The discussion of common law principles, while relevant to the (due process) question of whether it was permissible for a state to create per se rules excluding entire classes of defense testimony, was not relevant to the underlying question of whether the Compulsory Process Clause included two rights: the right to issue subpoenas and the right to have the witnesses actually testify.

210 Washington v. Texas, 388 U.S. 14, 23 (1967).

cause it ignored the role of the Due Process Clause that, as the Court itself had recognized, included the right to have witnesses testify. As a result, the Framers did not commit a "futile act": while the Compulsory Process Clause only gave defendants the narrow right to the issuance of subpoenas for the production of witnesses and documents,[211] the Due Process Clause granted defendants the ability to use such testimonial and documentary evidence.[212]

The Court's entanglement of the Compulsory Process Clause has also occurred in the context of a defendant's right to testify. In *Rock v. Arkansas*, the Court was called upon to determine the constitutionality of an Arkansas evidentiary rule that prohibited hypnotically refreshed testimony.[213] The defendant was hypnotized and wanted to take the stand after her memory had been refreshed.[214] Although relying principally on the Due Process Clause to find that the total exclusion of the hypnotic testimony was unconstitutional, the Court also held that there is a compulsory process right to testify on one's own behalf.[215]

Finally, the Court entangled the Compulsory Process Clause in the context of an accused's right to offer a defense. In *Holmes v. South Carolina*, the Court faulted the trial court for excluding the defendant's evidence that a third party had committed the crime.[216] Since the right to be heard is a critical element of due process,[217] the Court could have based its decision on the Due Process Clause. But the Court did not do so. Instead, it cited both the Due Process Clause and the Sixth Amendment's Compulsory Process Clause.[218]

The danger posed by the Court's entanglement of the Confrontation Clause is illustrated by *Taylor v. Illinois*.[219] In *Taylor*, the trial court

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211 United States v. Burr, 25 F. Cas. 30, 33 (1807) ("[A]ny person charged with a crime in the courts of the United States has a right, before as well as after indictment, to the process of the court to compel the attendance of his witnesses.").

212 This is not to suggest that due process grants defendants an unlimited right to have witnesses testify. The admissibility and use of evidence are governed by state and federal rules of evidence, which in turn are bounded by due process considerations.

213 483 U.S. 44, 45 (1987).

214 *Id.* at 46–47.

215 *See id.* at 52–53 (arguing that there is also a Fifth Amendment right to testify on one's own behalf).

216 547 U.S. 319 (2006).

217 Washington v. Texas, 388 U.S. 14, 18–19 (1967) (citing *In re* Oliver, 333 U.S. 257 (1948)).

218 *Holmes*, 547 U.S. at 324 ("Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" (citation omitted)).

219 484 U.S. 400 (1988).

had excluded a defense witness's testimony as a penalty for the defense counsel's willful violation of a state discovery rule.[220] As the state had argued, the Court could easily have held that the exclusion did not violate the defendant's compulsory process right because the defendant was not denied the government's assistance in compelling the witness' attendance at trial.[221] Such an approach would have been consistent with the plain meaning of the text and the clause's history. Instead, the Court adhered to its broad reading of the clause, reiterating that it also gives defendants the right to present a defense.[222] The Court, however, found that the Compulsory Process Clause had not been violated because the right to present a defense is not absolute; it must be balanced against "[t]he integrity of the adversary process, which depends both on the presentation of reliable evidence and the rejection of unreliable evidence, the interest in the fair and efficient administration of justice, and the potential prejudice to the truth-determining function of the trial process."[223] The Court, thus, incorporated a limitation into a textually unqualified right to compulsory process.

The Court's incorporation of a limiting principle has opened the door to a future restrictive reading of the Confrontation Clause. Consistent with current jurisprudence, the Court could find that a trial court's refusal to issue a subpoena does not violate the Confrontation Clause if, using a balancing approach, the trial court had deemed the potential witness to be unreliable. That is, the same rationale that has allowed the Court to expand the meaning of the Confrontation Clause turns out to be the means for a potential contraction of the clause.

To avoid such a potential undermining of the express, unlimited language of the Compulsory Process Clause, the Court should disentangle the Sixth Amendment and revert to a narrow reading of the Compulsory Process Clause, leaving the resolution of all evidentiary issues to the Due Process Clause. Under such a reading, while the

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220 *Id.* at 418.

221 This does not mean, however, that the trial court's actions were constitutionally acceptable. On the contrary, a credible argument can be made that the Court should have overturned the conviction and ordered a new trial under a robust reading of the Due Process Clause: if the evidence being offered was relevant and reliable, its exclusion would violate the defendant's right to present a defense and to be heard, especially since there were alternate means of addressing any harm from the discovery violation, such as granting a continuance, and since it was possible to punish the attorney personally for the discovery violation instead of punishing the client.

222 *Taylor*, 484 U.S. at 408–09.

223 *Id.* at 414–15.

Compulsory Process Clause gives defendants the right to the issuance of subpoenas for compelling a witness's attendance in court, once that witness shows up, it is the Due Process Clause that addresses whether the witness will be allowed to testify. Although such disentanglement would not result in a different outcome in any of the Court's Compulsory Process Clause decisions (because due process principles would support the same resolution by the Court), it would safeguard against future contraction and lead to a doctrine that is more faithful to the text and more historically sound.

Such a disentangled approach is reflected in the Court's decision in *Pennsylvania v. Ritchie* where the Court was asked to decide whether the Compulsory Process Clause requires the state to disclose possible exculpatory evidence.[224] The Court chose to resolve the defendant's claim using due process principles "[b]ecause 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."[225]

C. The Right to a Public Trial

The Sixth Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial."[226] Despite this unequivocal guarantee,[227] the Court has opened the door to the possibility that a trial may be held in closed proceedings over a defen-

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224 480 U.S. 39, 42–43 (1987).

225 *Id.* at 56. The Court added that "[a]lthough we conclude that compulsory process provides no *greater* protections in this area than those 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." *Id.*

226 U.S. CONST. amend. VI. Aron Goldschneider notes that "[t]he public trial clause applies to the states through the Fourteenth Amendment." *See* Aron Goldschneider, *Choose Your Poison: A Comparative Constitutional Analysis of Criminal Trial Closure v. Witness Disguise in the Context of Protecting Endangered Witnesses at Trial*, 15 GEO. MASON U. CIV. RTS. L.J. 25, 30 n.22 (2004) (citing Duncan v. Louisiana, 391 U.S. 145, 148 (1968)). He also adds that the *Oliver* Court argued that "without exception all courts have held that an accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he is charged." *Id.* (quoting *In re* Oliver, 333 U.S. 257, 271–72). Additionally, Amar has argued that under the Anglo-American tradition, a trial that is not public is no trial at all. *See* Amar, *supra* note 148, at 678.

227 This is not to say that all parts of trials must be open to the public and press. "[C]ertain portions of a trial, such as sidebar conferences and in-chambers conferences, may routinely be kept confidential." *Sixth Amendment at Trial*, 35 GEO. L.J. ANN. REV. CRIM. PROC. 608, 614 (2006).

dant's objection.[228] As discussed below, this textually inconsistent, and entirely avoidable, result stems from an improper entanglement of the Sixth Amendment with due process considerations.

The Court's entanglement of the Public Trial Clause can be traced to its decision in *Waller v. Georgia*, where the Court was asked to consider whether "the accused's Sixth Amendment right to a public trial extend[s] to a suppression hearing conducted prior to the presentation of evidence to the jury."[229] The answer should have been a simple "No." The Sixth Amendment's text after all unambiguously states that the right to public proceedings has to be provided at "trial." There is nothing in the text that provides for this right to public proceedings prior to or after a trial.

Instead, in an opinion written for a unanimous Court by Justice Powell, the Court held that the Sixth Amendment right to a public trial does extend to pre-trial proceedings.[230] In doing so, the Court drew support from a line of First Amendment cases that recognized that the press and public had a qualified First Amendment right to attend a criminal trial, including voir dire proceedings during jury selection.[231] The Court then used a simple syllogism: since the press and public have a qualified right to attend pretrial suppression hearings under the First Amendment, and since the Sixth Amendment public trial right is at least as protective as the First Amendment rights of the press and public, therefore the Sixth Amendment public trial right applies to suppression hearings.[232] The Court also noted that its holding is consistent with the purposes of the right to a public trial, namely that it allows the public to see that the defendant "is fairly dealt with and not unjustly condemned," that it encourages the "judge and prosecutor [to] carry out their duties responsibly," and

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228 A corollary issue raised by the public trial guarantee is whether a trial can be held in open proceedings over a defendant's objection—that is, whether defendants have unlimited ability to waive public trials. While the Court has held that trials may indeed be held open over the defendant's objection, this jurisprudence is not inconsistent with constitutional text. This is because the issue implicates not only a defendant's Sixth Amendment rights but also the First Amendment rights of the press and the public. In light of competing textual mandates, the Court properly held that a resolution of the issue should be predicated on a balancing of the two constitutional provisions. Singer v. United States, 380 U.S. 24, 35 (1965).

229 467 U.S. 39, 43 (1984).

230 *Id.* at 48.

231 *Id.* at 44–45 (citing Press-Enter. Co. v. Superior Court (*Press-Enterprise I*), 464 U.S. 501 (1984); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); Gannett Co. v. DePasquale, 443 U.S. 368 (1979)).

232 *Id.* at 44–46.

that it "encourages witnesses to come forward and discourages perjury."[233] Finally, the Court pointed to the similarities in benefits from open proceedings at suppression hearings and trials.[234]

Completely absent from the Court's reasoning was any discussion of the plain limiting language of the Sixth Amendment that the right is to a public "trial." This is not surprising because the text proves to be an insurmountable obstacle. Since the right to a public proceeding is limited to a "trial," the only way to ground the decision in the text would be to argue that a "trial" includes pre-trial proceedings. Such a position, however, is not tenable. In addition to the right to a public trial, two other Sixth Amendment rights are expressly limited to the context of trials—the rights to speedy trial and jury trial. It is unimaginable that the Court would agree that these rights could be extended to pre-trial proceedings, by holding either that defendants are entitled to have pre-trial proceedings occur in a speedy manner or that pre-trial proceedings ought to be conducted before juries. The only alternative for the Court would have been to find some limiting principle that would allow it to extend one trial-specific right to pre-trial proceedings while not extending the others. There is no such limiting principle. Simply put, not only is there no textual support in the Sixth Amendment for the Court's decision, but the text of the Sixth Amendment actually undermines the Court's holding.

This is not to say that there are no constitutional bases for requiring that pre-trial or post-trial proceedings be open. There are. These can be found in the Due Process Clauses of the Fifth and Fourteenth Amendments. The Court, relying on practically the same grounds already laid out in its opinion, could have held that due process, rather than the right to a public trial, requires that suppression hearings and other pre-trial proceedings be conducted in the open.[235] After all, the public trial interests identified by the Court—ensuring that defendants are dealt with fairly, encouraging proper conduct by judges and prosecutors, encouraging witnesses to come forward and

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233 *Id.* at 46 (internal citations omitted).

234 *Id.* at 46–47; *see also* Lewis F. Weakland, *Confusion in the Courthouse: The Legacy of the* Gannett *and* Richmond Newspapers *Public Right to Access Cases*, 59 S. CAL. L. REV. 603, 615 (1986) (arguing that the Court employed a functional analysis without even considering whether pretrial suppression hearings were traditionally open).

235 While it is true that a free-standing Fourteenth Amendment due process claim was not raised by the parties, the Court has in the past resolved cases on grounds not raised by the parties. In any event, the Court could have asked the parties for further briefing on this issue had it wanted to.

testify truthfully[236]—are all consonant with fundamental due process interests of ensuring a fair hearing before a neutral decisionmaker.[237]

This argument—that the Court erred in locating its ruling in the Sixth Amendment instead of the Fourteenth Amendment—is not a matter of mere semantics. There is a real danger in the Court's entangling a due process issue with the Sixth Amendment. This is because the Court has adopted the First Amendment "balancing of interests" jurisprudence in holding that there are circumstances in which the right to public pre-trial proceedings may be overridden.[238] That is, notwithstanding the fact that the Sixth Amendment does not in any way qualify the right to a public trial, the Court held that pre-trial proceedings may be closed in certain circumstances. Now, had the Court limited this qualification of the right to a public hearing to pre-trial proceedings and kept the right to public trial unfettered, there would have been little issue. But, the Court drew no such line. Therefore, notwithstanding the absence of any limiting language in the text of the Sixth Amendment, the Court's balancing of interests approach allows for a closure of trials over the defendant's objection as much as it allows the closure of pre-trial proceedings.[239] The fear of this textually inconsistent construction of the Sixth Amendment is

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236 *Waller*, 467 U.S. at 46.

237 *See* Morgan v. Illinois, 504 U.S. 719, 727 (1992) ("The failure to accord an accused a fair hearing violates even the minimal standards of due process." (internal citation omitted)); *In re* Murchison, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process.").

238 *Waller*, 467 U.S. at 47 ("[W]e hold that under the Sixth Amendment any closure of a suppression hearing over the objections of the accused must meet the tests set out in *Press-Enterprise* and its predecessors."). In the First Amendment context, the Court has held that the presumption that the trial be open to the press and public may be overridden "by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise I*, 464 U.S. 501, 510 (1984). The Court has subsequently added that there are "two complementary considerations"—"whether the place and process have historically been open to the press and general public" and "whether public access plays a significant positive role in the functioning of the particular process in question." Press-Enter. Co. v. Super. Ct. of Cal. (*Press-Enterprise II*), 478 U.S. 1, 8 (1986).

239 *See* Thomas G. Stacy, *The Constitution in Conflict: Espionage Prosecutions, the Right to Present a Defense, and the State Secrets Privilege*, 58 U. COLO. L. REV. 177, 251 (1987) ("*Waller* implicitly holds that, as in the first amendment context, a prospective witness' or juror's privacy interests may overcome a defendant's qualified sixth amendment right to a public trial in certain circumstances."). Instead of this textually inconsistent approach, the Court should recognize that defendants have an absolute right to insist on a public trial and that the denial of this right would be a structural error, one that is not amenable to harmless error analysis. *See* State v. Washington, 755 N.E.2d 422, 426 (Ohio Ct. App. 2001) ("The violation of the constitutional right to a public trial is a structural error, not subject to harmless error analysis.").

not a merely theoretical concern. Already, state and lower federal courts have applied the First Amendment standard to close portions of trials in clear contravention of the plain language of the Sixth Amendment.[240]

The danger stemming from the Court's introduction of a new balancing of interests is accentuated by the factors that are involved in the balancing process. As noted earlier, not all balancing of interests is alien to the Sixth Amendment. For instance, when a defendant seeks to waive the right to a public trial, there arises a conflict between two constitutional provisions—the defendant's Sixth Amendment rights and the First Amendment rights of the public and the press to attend trials. In such circumstances, a balancing of competing constitutional interests is unavoidable. The Court's decision in *Waller*, however, involves balancing of a different type. Under the *Waller* framework, a defendant's right to a public trial may be denied after balancing that constitutional right against non-constitutional interests.[241]

Thus, the unnecessary entanglement of the Sixth Amendment right to a public trial with due process considerations has opened the door to a contraction of an otherwise robust procedural protection afforded by the Sixth Amendment. The Court's failure to ground the right to public pre-trial proceedings in the Due Process Clause led it

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240 *See, e.g.*, Ayala v. Speckard, 131 F.3d 62, 69–72 (2d Cir. 1997) (employing the *Press-Enterprise I* standard to uphold the trial court's closure of the trial during the testimony of a witness); *Washington*, 755 N.E.2d at 424–25 (ordering a new trial after finding that the trial court improperly applied the *Press-Enterprise I* standard to close the courtroom during the testimony of one witness at trial); *see also Sixth Amendment at Trial*, *supra* note 227, at 612–14 ("Federal courts have expanded the applicability of the *Press-Enterprise I* test beyond the *voir dire* and trial stages. . . . Courts have applied the *Press Enterprise I* [sic] test to closures of suppression hearings and post-trial examinations of jurors for potential misconduct. Courts have also applied the *Press Enterprise I* [sic] test to the sealing of documents, including those that support search warrants and plea agreements, as well as documents stemming from electronic surveillance. In addition, courts have applied the *Press Enterprise I* [sic] test to the sealing of records of criminal proceedings, including post-trial motions." (footnotes omitted)); Goldschneider, *supra* note 226, at 37 ("Closure of criminal trials in New York is exceedingly commonplace . . . ."); Randolph N. Jonakait, *Secret Testimony and Public Trials in New York*, 42 N.Y.L. SCH. L. REV. 407, 407 (1998) ("New York leads the country in denying public trials.").

241 As the *Waller* Court recognized, First Amendment cases make clear "that the right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." *Waller*, 467 U.S. at 45. The Court has also clarified that in this balancing process, "the interests of those other than the accused may be implicated. The protection of victims of sex crimes from the trauma and embarrassment of public scrutiny may justify closing certain aspects of a criminal proceeding." *Press-Enterprise II*, 478 U.S. at 9 n.2.

needlessly to locate that right in the Sixth Amendment. While the Court's concurrent adoption of First Amendment balancing of interests jurisprudence to allow for the closure of pre-trial proceedings in some circumstances would not have posed a problem under due process analysis,[242] its use in the Sixth Amendment is fundamentally at odds with the unqualified text of the Amendment and leads to an undermining of a critical safeguard of liberty.

D. The Right to a Speedy Trial

The Sixth Amendment guarantees all defendants the right to a speedy trial.[243] Despite the fact that this text speaks solely to the timeliness of the trial, the Court has held that, notwithstanding the length or reasons for the delay, there may likely be no violation of the right to a speedy trial unless a defendant has been prejudiced by the delay.[244] As discussed below, this textually inconsistent result is a consequence of an improper entanglement of the Sixth Amendment.

Prior to entanglement, the Court held that the speedy trial right was meant to guard against "undue and oppressive incarceration" and the "anxiety and concern accompanying public accusation."[245] To protect this "impairment of liberty," federal courts, prior to incor-

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242 Due process considerations have traditionally involved the weighing of all interests, including non-constitutional interests. *See, e.g.,* Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261, 279 (1990) ("[D]etermining that a person has a 'liberty interest' under the Due Process Clause does not end the inquiry; 'whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests.'" (footnote omitted)); Superintendent, Mass. Corr. Inst. at Walpole v. Hill, 472 U.S. 445, 454 (1985) ("The requirements of due process are flexible and depend on a balancing of the interests affected by the relevant government action.").

243 U.S. CONST. amend. VI.

244 Barker v. Wingo, 407 U.S. 514, 519 (1972). The Court also held that another factor involved in determining a speedy trial claim is whether the defendant asserted that right. *Id.* As the Court recognized, the inclusion of this factor constitutes a departure from the general rule against the use of silence to infer waiver of a constitutional right. *Id.* For example, the Court has held that the right to counsel applies regardless of the defendant's request for the assistance of counsel. *See* Brewer v. Williams, 430 U.S. 387, 404 (1977) ("[T]he right to counsel does not depend upon a request by the defendant . . . ."); Carnley v. Cochran, 369 U.S. 506, 513 (1962) ("[W]here the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request."); *see also* Johnson v. Zerbst, 304 U.S. 458, 464 (1938) ("'[C]ourts indulge every reasonable presumption against waiver' of fundamental constitutional rights and . . . we 'do not presume acquiescence in the loss of fundamental rights.'" (footnote omitted)). Since the use of this factor does not involve entanglement issues, a discussion of its merits is beyond the scope of this Article.

245 United States v. Marion, 404 U.S. 307, 320 (1971).

poration, imposed a mechanical rule for speedy trial violations.[246] This rule applied irrespective of the reasons for the delay or whether the defendant was prejudiced.[247]

However, during the early years of the Burger Court, the Court in *Barker v. Wingo* adopted a four-part balancing test and altered the focus of the speedy trial right from the protection of liberty to the preservation of reliable and accurate verdicts.[248] In *Barker*, the Court held that the delay of five and one-half years between the period of arrest and trial did not violate the defendant's Sixth Amendment speedy trial right.[249] The Court's remarkable[250] finding that a multiple-year delay was speedy might be explained by two factors. First, *Barker* is a case where "bad facts make bad law."[251] The first section of the Justice Powell's majority opinion begins with a summary of the crime: "On July 20, 1958, in Christian County, Kentucky, an elderly couple was beaten to death by intruders wielding an iron tire tool."[252] Second, although suggesting that the remedy for a violation of the right to a speedy trial—dismissal of the indictment with prejudice[253]—is an "unsatisfactorily severe remedy," the *Barker* Court nevertheless accepted that that "it is the only possible remedy."[254] To avoid the possibility that a defendant convicted of a brutal murder would walk free, the Court had to construct a constitutional justification, which came from the adoption of a due process prejudice requirement.[255]

Writing for a unanimous Court, Justice Powell began by asserting that the speedy trial right is "generically different" from any other

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246 *See* Thomas, *supra* note 1, at 153 (discussing United States v. Fox, 3 Mont. 512 (1880)).

247 *Id.*

248 *Barker*, 407 U.S. at 530–33.

249 *Id.* at 536.

250 *See* Anthony G. Amsterdam, *Speedy Criminal Trial: Rights and Remedies*, 27 STAN. L. REV. 525, 538 (1975) ("To debate the question whether the sixth amendment has been violated in such egregious cases as these . . . is itself to make a feeble farce of the amendment.").

251 Doggett v. United States, 505 U.S. 647, 659 (1992) (Thomas, J., dissenting).

252 *Barker*, 407 U.S. at 516.

253 *See* Strunk v. United States, 412 U.S. 434, 438 (1973) (holding that the dismissal of the indictment is the remedy for a violation of the speedy trial right).

254 *Barker*, 407 U.S. at 522.

255 Commentators have noted that the intersection of these two factors may well explain why the Court held that a five and one-half year period did not violate the defendant's right to a speedy trial. Thomas, *supra* note 1, at 227–28 ("Apparently recognizing the difficulty in classifying as 'speedy' a trial that occurs five and one-half years after Barker was arrested, the unanimous Court spoke mostly in terms of whether the delay caused doubt about the accuracy of the outcome, about whether the defendant's case was prejudiced by the delay.").

constitutional right.[256] The uniqueness of the right, according to Justice Powell, lies in its vagueness, amorphous nature, remedy, and the fact that the public benefits from the right adversely to the defendant.[257] The Sixth Amendment, however, "contains a number of items which the defendant might willingly forego and upon which the state might insist."[258] The truer sense of the uniqueness to which Justice Powell refers is the remedy, which he finds "unsatisfactory when viewed in the light of the 'amorphous quality of the right.'"[259]

Prior to setting out the standard for a speedy trial violation, Justice Powell rejected two "rigid" attempts made by lower courts to provide certainty to the otherwise "slippery" right.[260] The first suggested approach would require the Court to adopt a mechanical time limit, which Justice Powell rejected out of hand, as it would require the Court to "engage in legislative or rulemaking activity."[261] The second suggested approach was the "demand-waiver doctrine," which would require waiver unless the defendant demands a speedy trial.[262] Justice Powell also rejected this suggestion as inconsistent with the Court's holdings that waiver of a constitutional right may not be waived without consent.[263] Although rejecting these two approaches, the Court nonetheless incorporated each in its four-part balancing standard.[264]

Under the adopted *Barker* standard, the consideration of a violation is "trigger[ed]" by a lengthy delay considered "presumptively prejudicial" lengthy delay.[265] Whether the length of delay is presumptively prejudicial will, according to the Court, vary depending on the "peculiar circumstances of the case."[266] If the length triggers this presumption, a court must then consider the reason for the delay.[267] Next, a court must consider whether the defendant asserts the right, because, as Justice Powell argues, the more that a defendant is prejudiced by the delay, the more likely she will make a demand for a

256 *Barker*, 407 U.S. at 519.

257 *Id.* at 519–22.

258 H. Richard Uviller, Barker v. Wingo*: Speedy Trial Gets a Fast Shuffle*, 72 COLUM. L. REV. 1376, 1379 (1972) (calling into question the asserted uniqueness of the speedy trial right).

259 *Id.* at 1381.

260 *Barker*, 407 U.S. at 522.

261 *Id.* at 523.

262 *Id.* at 525.

263 *Id.*

264 *Id.* at 530.

265 *Id.*

266 *Id.* at 530–31.

267 *Id.* at 531.

speedy trial.[268] Finally, a court should consider whether the delay prejudiced the defense.[269]

The adoption of the prejudice requirement signaled a radical shift in the Court's speedy trial jurisprudence. As noted above, prior to *Barker* the Court had held that the purpose of the speedy trial right is to protect a defendant's liberty interests.[270] Although Justice Powell acknowledges this purpose, he nevertheless claims that "the most serious" interest is to "limit the possibility that the defense will be impaired," which if not protected, "skews the fairness of the entire system" and affects the outcome.[271] Prejudice, however, is "a rationale that has as its goal accuracy rather than simply the provision of the 'speedy trial' the Sixth Amendment guarantees."[272] By relying on "accuracy" and "prejudice," therefore, the Court entangled the Sixth Amendment speedy trial right with traditional due process concerns.

A more faithful interpretation of the speedy trial right would require eliminating *Barker's* prejudice requirement.[273] Such an approach is suggested by Justice Souter's majority and Justice Thomas's dissenting opinions in *Doggett v. United States*.[274] In *Doggett*, the Court found that the defendant's Sixth Amendment speedy trial right was violated when, unbeknownst to the defendant, more than eight years lapsed between the time of his indictment and the time of his arrest.[275] Writing for the majority, Justice Souter relied on both the

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268 *Id.* at 531–32.

269 *Id.* at 532.

270 *See supra* text accompanying note 245.

271 *Barker*, 407 U.S. at 532.

272 Thomas, *supra* note 1, at 163.

273 Professor Thomas has a similar thesis in which he calls for disentangling the Sixth Amendment criminal procedure guarantees from the Due Process Clause. *Id.* at 231. However, Professor Thomas argues that this disentanglement should only occur at federal trials, as opposed to state trials, which he argues should be decided solely under the Due Process Clause. *Id.* at 232. In other words, Professor Thomas proposes that the same procedural rights have different meanings in federal courts and in state courts. This Article suggests instead that each of the Sixth Amendment's seven procedural provisions means the same thing in any context. The Article, does, however, suggest that the predicate clause preceding the seven procedural protections in the Sixth Amendment, which speaks only to the scope of the rights not to their substantive meaning, need not have been incorporated along with the procedural right. So, for example, it would have been proper for the Court to hold that the right to counsel applies to all federal prosecutions as the text of the Sixth Amendment demands, but only applies to state prosecutions for felonies and those misdemeanors that result in the imposition of a term of imprisonment because, under due process, the right to counsel is only critical to fundamental fairness in these state court proceedings.

274 Doggett v. United States, 505 U.S. 647 (1992).

275 *Id.* at 649–50.

length between indictment and arrest and the government's negligence in prosecuting the defendant.[276] Although the defendant was unable to show specific prejudice from the delay, the Court made its holding consistent with *Barker* by "invent[ing] a presumptive prejudice arising from a delay of that length,"[277] which, Justice Souter argued, "compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify."[278] Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia in dissent, however, proposed a more fundamental shift in the Court's speedy trial jurisprudence. They argued that the prejudice requirement, which is more properly the concern of the Due Process Clause,[279] should be eliminated and that the protection of liberty be restored as the principal protection of the speedy trial.[280]

Under a disentangled reading of the Speedy Trial Clause, therefore, a violation would rest on the showing that the state failed to prosecute the accused[281] in a speedy fashion and the reason for the delay was not prompted by the defendant's request.[282] Once a defendant makes this showing, the burden should shift to the prosecution to show that the violation was harmless beyond a reasonable doubt. Such a test would have the virtue of comporting with other Sixth Amendment rights and mitigating the seemingly unjustifiable remedy of dismissing an indictment with prejudice. Moreover, by removing the prejudice requirement, the Court could restore the plain meaning of the right to a speedy trial and disentangle the speedy trial right from the Due Process Clause, which would apply solely to preaccusation delays.[283]

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276 *Id.* at 657–58.

277 Thomas, *supra* note 1, at 229; *see also Doggett*, 505 U.S. at 655 ("Thus, we generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify.").

278 *Doggett*, 505 U.S. at 655.

279 *See id.* at 666 (Thomas, J., dissenting).

280 *See id.* at 660–61. Ultimately, Justice Thomas would have denied relief because the defendant suffered no harm to his liberty interest. *Id.* at 666 n.4.

281 *See* United States v. Marion, 404 U.S. 307, 313 (1971) (holding that the right attaches when "the putative defendant in some way becomes an 'accused'"); *see also Doggett*, 505 U.S. at 662 (Thomas, J., dissenting) (arguing that the prejudice standard should govern the period between crime and trial).

282 The use of the word speedy indicates that the length of time should vary with the factors involved in individual prosecutions, rather than establishing a one size fits all approach to every type of prosecution. Professor Thomas makes a similar argument; however, he would rest a violation solely on a showing of delay, "within six months or so." Thomas, *supra* note 1, at 228.

283 *See* Amsterdam, *supra* note 250, at 528.

E. The Right to Confrontation

The Sixth Amendment provides that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him."[284] This Confrontation Clause has been understood to involve at its core four procedural safeguards, including the right to a face-to-face confrontation.[285] The Court, however, has held that the right to face-to-face confrontation is not absolute and that public policy considerations may supersede the constitutional right in some circumstances.[286] As discussed below, this elevation of public policy over the plain text of the Sixth Amendment has been the result of an entanglement of the Confrontation Clause with due process concerns of reliability of the verdict.[287]

The groundwork for the Court's entanglement of this aspect of the Confrontation Clause was laid in the Court's decision in *Coy v. Iowa*.[288] In *Coy*, the Court considered a statute that permitted a court to place a screen between the victim of sexual abuse and the defendant that, once adjustments to the lighting were made, allowed the defendant to see the witness but the witness not to see the defendant.[289] Arguing that the "irreducible literal meaning of the Clause" is to ensure face-to-face confrontation, the Court held that the use of the screen violated the Confrontation Clause.[290] While Justice O'Connor wrote a concurring opinion recognizing exceptions to this rule,[291] the majority opinion by Justice Scalia noted that "[w]e leave for another day, however, the question whether any exceptions exist."[292]

Two years later, in *Maryland v. Craig*, the Court directly addressed exceptions to the Confrontation Clause's requirement of face-to-face

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284 U.S. CONST. amend. VI.

285 Maryland v. Craig, 497 U.S. 836, 845–46 (1990).

286 *See id.* at 849–50.

287 *See* Penny J. White, *Rescuing the Confrontation Clause*, 54 S.C. L. REV. 537, 539 (2003) ("[T]he Court's present interpretation of the Confrontation Clause is inconsistent, undisciplined, and result-oriented. That indictment is largely due to the Court's decisions which ultimately replaced a fundamental constitutional right with a rule of evidence. This approach resulted in the virtual elimination of a crucial constitutional guarantee.").

288 487 U.S. 1012 (1988).

289 *Id.* at 1014–15.

290 *Id.* at 1021.

291 *See id.* at 1022 (O'Connor, J., concurring) (arguing that Confrontation rights are not absolute but "rather may give way in an appropriate case to other competing interests so as to permit the use of certain procedural devices designed to shield a child witness from the trauma of courtroom testimony").

292 *Id.* at 1021 (majority opinion).

confrontation.[293] In *Craig*, the Court was asked to decide the constitutionality of a Maryland statute that permitted the trial judge, after finding that the witness would be traumatized by testifying in open court, to allow that witness, a victim of child abuse, to testify in a separate room.[294] In addition, although the defendant was excluded from that room, attorneys from both sides were permitted to question the witness and the witness' testimony was televised to the courtroom through a one-way closed circuit television.[295] Writing for the majority, Justice O'Connor held that the Maryland statute did not violate the Confrontation Clause.[296] Justice O'Connor stated that the Confrontation Clause expresses only a "preference"[297] for face-to-face confrontation and that the underlying purpose of such an encounter and of the other three elements of the Confrontation Clause (oath taking, cross-examination, and jury observance of witness demeanor) is to ensure reliability of the evidence admitted against the accused.[298] Justice O'Connor concluded that if the trial is reliable, then a strict requirement of all of these elements would needlessly impede important public policies.

The Court's opinion in *Craig*, which used public policy considerations to limit the scope of an otherwise textually and historically unbounded constitutional provision, has been the subject of considerable criticism. Justice Scalia issued one of his more scathing dissents in *Craig*. He attacked the majority's analysis, which he argued "abstracts from the right to its purposes, and then eliminates the right."[299] Commentators have argued that Justice O'Connor's opinion in *Craig* undermines the presumption of innocence;[300] misses the forest for the trees by improperly balancing the costs of wrongful convic-

293 497 U.S. 836 (1990).

294 *Id.* at 840–43.

295 *Id.*

296 *Id.* at 860.

297 *Id.* at 849 (quoting Ohio v. Roberts, 448 U.S. 56, 63 (1980), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004)).

298 *Id.* at 846.

299 *Id.* at 862 (Scalia, J., dissenting); *see* Thomas, *supra* note 1, at 226 (arguing that the Court's tortured opinion "read the requirement of confrontation to be coextensive with its rationale—to permit the defendant to challenge the testimony of prosecution witnesses").

300 *See generally* Ralph H. Kohlmann, *The Presumption of Innocence: Patching the Tattered Cloak After* Maryland v. Craig, 27 ST. MARY'S L.J. 389 (1996) (arguing that the Supreme Court's creation of an exception to the right to face-to-face confrontation in *Craig* has undermined the presumption of innocence which is a key element of the due process right to a fair trial).

tion against the benefits of eliminating face-to-face confrontation;[301] and fails to narrowly tailor the exception to important state interests.[302]

More importantly, however, the Court's analysis has led to the entanglement of the Sixth Amendment. As Justice Scalia pointed out in his dissenting opinion, "the Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to *assure* reliable evidence, undeniably among which was 'face-to-face' confrontation."[303] Reliability, on the other hand, is quintessentially a due process concern.[304]

Disentangling the Confrontation Clause by reverting to the bright-line requirement of face-to-face confrontation would restore the plain meaning and full protection of the Confrontation Clause.[305]

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301 *See generally* Peter T. Wendel, *A Law and Economics Analysis of the Right to Face-to-Face Confrontation Post-*Maryland v. Craig*: Distinguishing the Forest from the Trees*, 22 HOFSTRA L. REV. 405, 489 (1993) ("While the Court's holding in *Maryland v. Craig* may be defensible from a macro level point of view, the Court's opinion attempts to rationalize the holding solely from a micro level point of view. From a law and economics perspective, the outcome is a highly questionable result-oriented opinion which provides little guidance as to what is left of the right to face-to-face confrontation.").

302 *See generally* Brian L. Schwalb, Note, *Child Abuse Trials and the Confrontation of Traumatized Witnesses: Defining "Confrontation" to Protect Both Children and Defendants*, 26 HARV. C.R.-C.L. L. REV. 185 (1991) (evaluating the strength of competing views of confrontation enunciated in *Craig* and *Coy* in light of the underlying purposes of the Sixth Amendment).

303 *Craig*, 497 U.S. at 862 (Scalia, J., dissenting); *see* Thomas, *supra* note 1, at 226 (arguing that the Court's tortured opinion "read the requirement of confrontation to be coextensive with its rationale—to permit the defendant to challenge the testimony of prosecution witnesses").

304 White v. Illinois, 502 U.S. 346, 363–64 (1992) (Thomas, J., concurring) ("[R]eliability is more properly a due process concern."); *see* Thomas, *supra* note 1, at 226 (arguing that while the Court's analysis would have been acceptable if it was deciding a due process claim, it is problematic in the context of a Confrontation Clause claim because the Sixth Amendment "does not talk about due process, or fairness, or reliable outcomes. It talks about confrontation").

305 *See* Thomas, *supra* note 1, at 227. Professor Thomas argues that such disentanglement need only happen with respect to federal prosecutions; state prosecutions could continue to be governed by the *Craig* rule because state actions are limited by the Fourteenth Amendment's Due Process Clause, not the Sixth Amendment's Confrontation Clause. This Article proposes an alternate approach. While it adheres to the traditional approach that those provisions of the Bill of Rights that have been incorporated have identical meanings under the Fourteenth Amendment, it recognizes that the Sixth Amendment's "in all criminal prosecutions" predicate is not a substantive protection, but only one that goes to the scope of cases in which the procedural protections apply. As such, since the concerns about a potentially oppressive or tyrannical government were directed more at the federal government than the states, it is entirely proper that when the provisions of the Sixth Amendment are made applicable to the states, the Court may circumscribe the universe of cases to which the provisions will apply. In particular, the rights to a jury trial

The prospect for such disentanglement appears more likely given the Court's recent decision in *Crawford v. Washington* where Justice Thomas wrote, while "the [Confrontation] Clause's ultimate goal is to ensure reliability of evidence, . . . it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner . . . ."[306] This principle is equally applicable to the Court's decision in *Craig*.

F. The Right to Assistance of Counsel

The Sixth Amendment provides that all defendants have the right to assistance of counsel[307] and this right to counsel has been recognized as being "the right to the effective assistance of counsel."[308] This is because an ineffective counsel is "not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[309] Prior to the incorporation of the right to counsel, the Court had used the Fourteenth Amendment to require that, in cases where due process required the appointment of counsel, counsel provide effective assistance.[310] Since the Court's landmark decision in *Gideon v. Wainwright*, the denial of effective assistance has been recognized as a violation of the Sixth Amendment.[311] As discussed below, however, the Court has entangled this right to effective assistance by requiring that defendants demonstrate—not for purposes of determining whether relief is warranted once a violation is proved, but for purposes of determining whether the constitutional provision in fact has been violated—that the attorney's performance affected the reliability of the verdict.

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and counsel should apply without exception in all federal cases, but properly can be required only in a subset of prosecutions in state courts.

306 Crawford v. Washington, 541 U.S. 36, 61 (2004).

307 U.S. CONST. amend. VI.

308 McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).

309 Strickland v. Washington, 466 U.S. 668, 687 (1984).

310 *See* Reece v. Georgia, 350 U.S. 85, 90 (1955) ("The effective assistance of counsel in such a case is a constitutional requirement of due process which no member of the Union may disregard."); Avery v. Alabama, 308 U.S. 444, 446 (1940) (noting that "the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham"); Powell v. Alabama, 287 U.S. 45, 57 (1932) (holding that due process was violated not only by the failure to give defendants an adequate opportunity to retain counsel, but by the appointment of counsel in such a manner as to preclude effective assistance). The same right appears to have been provided in federal court prosecutions by the Sixth Amendment. *See* Glasser v. United States, 315 U.S. 60, 69–70 (1942).

311 *See* United States v. Gonzalez-Lopez, 548 U.S. 140, 146–47 (2006); *Strickland*, 466 U.S. at 686; *McMann*, 397 U.S. at 771 n.14.

During the last years of the Burger Court, the Supreme Court elaborated on the elements of the right to effective assistance of counsel in *Strickland v. Washington*, establishing a two-pronged standard for ineffective assistance of counsel claims. The first prong requires the defendant to "show that counsel's performance was deficient," and provides that counsel's performance be evaluated using "prevailing professional norms," that there should be a "strong presumption" of counsel's reasonableness, and that, in reviewing strategic decisions, courts should apply a "heavy measure of deference to counsel's judgments."[312] While much criticism has been directed as this prong of the *Strickland* test,[313] it is not the focus of this Article because it does not involve any issue of entanglement.

Rather, it is the second prong of the *Strickland* standard that is the source of the entanglement of the right to counsel. This prong requires the defendant to show that counsel's deficiency was prejudicial to the defense.[314] While prejudice may be presumed in some limited cases, as a general matter the defendant must "affirmatively prove prejudice,"[315] which requires the defendant to demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[316]

Strickland's prejudice prong is problematic for purposes of this Article because it entangles the Sixth Amendment with traditional due process concerns. Writing for the majority, Justice O'Connor stated that since "the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial,"[317] to satisfy the prejudice prong the defendant must show "counsel's errors

312 *Strickland*, 466 U.S. at 687–91.

313 *See* Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9, 82 (1986) (arguing that Justice O'Connor's concerns about handcuffing defense counsel are unpersuasive and "[a]ppropriately rigorous professional standards for appraising counsel's conduct should not discourage the type of attorney one wants to attract from accepting in forma pauperis assignments"); Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 B.Y.U. L. REV. 1 (arguing that it has weakened criminal defense lawyering and that *Strickland*'s presumption's are too burdensome).

314 *Strickland*, 466 U.S. at 692. ("Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.")

315 *Id.* at 693.

316 *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

317 *Id.* at 684.

were so serious as to deprive the defendant of a fair trial."[318] This reasoning led to the entanglement of the Sixth Amendment not only because the right to a fair trial has been seen as a distinctly due process right,[319] but also because, rather than understanding a fair trial as being one in which the procedures used were fair, Justice O'Connor defined a fair trial as "a trial whose result is reliable."[320] Therefore, to establish a Sixth Amendment claim, the Court required defendants to demonstrate the unreliability of the verdict or sentence,[321] a quintessentially due process consideration.[322]

This entanglement has led to a textually challenged and historically unsound construction of the right to counsel. While the text of the Sixth Amendment provides that the assistance of counsel be provided to defendants "in all criminal prosecutions," the second prong effectively means that the assistance of counsel need only be provided in those prosecutions where there is a reasonable probability that defendants will receive a favorable verdict at guilt or sentencing.

In addition, the Court's entangled approach has reduced the prescriptive value of the right to counsel. Whatever might be said of the Court's approach in *Strickland* from an ex post perspective, the approach is deeply problematic from an ex ante perspective. By failing to require an ex ante inquiry into whether "the defense is institutionally equipped to litigate as effectively as the prosecution"[323] and by al-

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318 *Id.* at 687.

319 *See, e.g.*, United States v. Agurs, 427 U.S. 97, 107 (1976) (considering "the defendant's right to a fair trial mandated by the Due Process Clause of the Fifth Amendment to the Constitution"); *In re* Murchison, 349 U.S. 133, 136 (1955) (stating that "[a] fair trial is a basic requirement of due process"); Spencer v. Texas, 385 U.S. 554, 563–64 (1967) (observing that "[c]ases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial"); Betts v. Brady, 316 U.S. 455, 473 (1942) (noting that "the Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right").

320 *Strickland*, 466 U.S. at 687.

321 *See* Richard L. Gabriel, Comment, *The* Strickland *Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process*, 134 U. PA. L. REV. 1259, 1266 (1986) (noting that the Court elevated the "correct" result above the procedural means by which that result was achieved).

322 *See* White v. Illinois, 502 U.S. 346, 363–64 (1992) (Thomas, J., concurring) ("Reliability is more properly a due process concern."); William S. Geimer, *A Decade of* Strickland*'s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 145–47 (1995) (arguing that the Court's approach has deincorporated the right to counsel, making it in essence solely a creature of the Due Process Clause); Thomas, *supra* note 1, at 226 ("The Sixth Amendment does not talk about due process, or fairness, or reliable outcomes.").

323 *See* Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an* Ex Ante *Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 243 (1997). *See generally* Bruce A. Green, *Lethal*

lowing reviewing courts to avoid assessing counsel's competence by considering prejudice before performance,[324] the Court has minimized the guidance provided by the right to counsel jurisprudence to members of the bar.[325]

Moreover, limiting the right to counsel to those defendants who might be innocent is inconsistent with the fact the "Framers of the Bill of Rights intended them to be formidable barriers to the successful federal prosecution of criminal defendants, whether guilty or innocent."[326]

It is not surprising then that the Court's approach has been roundly criticized for permitting horrendous lawyering;[327] for making it difficult for defendants to prove violations in those cases where counsel failed miserably;[328] for being too forgiving of failures to investigate or present mitigating evidence;[329] and for producing arbitrary

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Fiction: The Meaning of "Counsel" in the Sixth Amendment, 78 IOWA L. REV. 433, 433 (1993) (arguing for a narrower construction of "counsel" which would "include only those attorneys who are *qualified* to render legal assistance to a person accused of a crime").

324 *See* Dripps, *supra* note 323, at 243; Martin C. Calhoun, Note, *How to Thread the Needle: Towards a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413, 458 (1998) (providing statistics on circuit court findings of prejudice and bad performance under the *Strickland* ineffective assistance of counsel analysis); *see also* WAYNE R. LAFAVE ET AL., 3 CRIMINAL PROCEDURE § 11.10(d) (2d ed. 1999) ("The *Strickland* Court also noted that the question of the adequacy of counsel's performance need not be considered before examining the issue of prejudice, and lower courts clearly have been influenced by that suggestion.").

325 *See* Duncan, *supra* note 313, at 6; *id.* at 20 ("Encouraging the disposition of ineffectiveness claims without a discussion of deficient performance provides a disservice to legal professionalism.").

326 Thomas, *supra* note 1, at 152.

327 *See, e.g.*, Stephen B. Bright, *Counsel for the Poor: The Death Seuteuce Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1836 (1994) (arguing that "[p]oor people accused of capital crimes are often defended by lawyers who lack the skills, resources, and commitment to handle such serious matters"); Geimer, *supra* note 321, at 148 (asserting that "many instances of dreadful lawyering are found to be acceptable" under *Strickland*); Edward M. Kennedy, *The Promise of Equal Justice*, THE CHAMPION 22 (Jan./Feb. 2003), *available at* http://www.nacdl.org/public.nsf/championarticles/A0301p22?OpenDocument (arguing that the Supreme Court has failed to assure defendants a meaningful right to assistance of counsel and discussing cases including that of Wallace Fugate, who was executed in Georgia).

328 *See, e.g.*, Richard Klein, *The Constitutionalization of* In*effective Assistance of Counsel*, 58 MD. L. REV. 1433, 1467 (1999) (asserting that the record and transcript may not reflect what counsel ought to have done, and that there may be no remedy for the "clearly guilty" defendant).

329 *See generally* Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life And Liberty Are at Stake*, 1997 ANN. SURV. AM. L. 783, 792 (discussing an American Bar Association study that found Tennessee attorneys had failed to offer mitigating evidence "in approximately one-quarter of all the death sentences affirmed by the Tennessee Supreme Court since the Tennessee legislature promulgated its current

reviews in capital cases;[330] for putting reviewing courts in the difficult position of having to determine from a cold record whether an outcome during the penalty phase would have been different;[331] for creating an framework that allows reviewing courts to conflate the trial and sentencing phases under the prejudice analysis;[332] for creating "an almost insurmountable hurdle for defendants claiming ineffective assistance";[333] and for overemphasizing factual innocence.[334]

The prospect for disentangling the right to counsel are bright[335] in light of the Court's recent decision in *United States v. Gonzalez-Lopez*, a case in which the Court was asked to "decide whether a trial court's erroneous deprivation of a criminal defendant's choice of counsel entitles him to a reversal of his conviction."[336] In response to the government's claim that the defendant should be required to show that

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death penalty statute"); *Carter Center Symposium on the Death Penalty*, 14 GA. ST. U. L. REV. 329, 379 (1998) (discussing a *National Law Journal* study of capital cases in six Southern states that found that "capital trials often were completed in one to two days [and the] penalty phase, a capital trial's most important part, usually started immediately after a guilty verdict and lasted only several hours and, in at least one case, just fifteen minutes"); Stephen Henderson, *Defense Often Inadequate in 4 Death-Penalty States*, MCCLATCHY, Jan. 23, 2007, *available at* http://www.mcclatchydc.com/201/story/15394.html (reviewing 80 death sentences issued in Georgia, Mississippi, Alabama, and Virginia between 1997 and 2004 and finding that "[i]n 73 of the 80 cases, defense lawyers gave jurors little or no evidence to help them decide whether the accused should live or die. The lawyers routinely missed myriad issues of abuse and mental deficiency, abject poverty and serious psychological problems").

330 *See* Amy R. Murphy, Note, *The Constitutional Failure of the* Strickland *Standard in Capital Cases Under the Eighth Amendment*, 63 LAW & CONTEMP. PROBS. 179, 179 (2000) (arguing that the broad discretion for review of ineffective assistance of counsel claims sanctioned by the *Strickland* Court "leads to arbitrary determination in capital cases").

331 *See* Jeffery Levinson, Note, *Don't Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel*, 38 AM. CRIM. L. REV. 147, 169 (2001) (pointing out that the outcome of the penalty phase "will turn on substantive facts" which are difficult to determine for an appellate judge who is "removed from the context of the decision").

332 *See id.* at 170 (illustrating "the undifferentiated application of the prejudice prong to both" the "guilt/innocence phase" and the "sentencing phase," and the resulting conflation of those phases).

333 *See* Calhoun, *supra* note 324, at 427.

334 *See* Duncan, *supra* note 313, at 19 ("[A]s a result of *Strickland*, an ineffective assistance of counsel claim is essentially rendered a viable claim available only to the truly innocent criminal defendant."). *But see* Kimmelman v. Morrison, 477 U.S. 365, 380 (1986) (declining "to hold either that the guarantee of effective assistance of counsel belongs solely to the innocent or that it attaches only to matters affecting the determination of actual guilt").

335 *See The Supreme Court, 2005 Term—Leading Cases*, 120 HARV. L. REV. 125, 207–08 (2006) [hereinafter *2005 Term*] (arguing that "incongruity between the counsel of choice doctrine [in *Gonzalez-Lopez*] and the effective assistance of counsel doctrine as established in *Strickland*" should be resolved by eliminating the prejudice prong from *Strickland*).

336 United States v. Gonzalez-Lopez, 548 U.S. 140, 142 (2006).

the substituted counsel's performance prejudiced the defendant, i.e. that the defendant did not receive a fair trial, Justice Scalia, writing for the majority, answered that the Sixth Amendment right to counsel of choice, "commands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be best."[337] Justice Scalia further argued for disentanglement by claiming that "the right at stake here is the right to counsel of choice, not the right to a fair trial; and that right was violated because the deprivation of counsel was erroneous."[338]

In his *Gonzalez-Lopez* opinion, Justice Scalia also criticizes the Court's earlier method of outlining the limits of certain Sixth Amendment rights from their purpose to provide a fair trial.[339] As examples, Justice Scalia cites *Ohio v. Roberts*, in which the Court reasoned that the Confrontation Clause was not violated as long as the purpose of ensuring reliability was satisfied,[340] and *Maryland v. Craig*, in which the Court "abstract[ed] from the right to its purposes, and then eliminate[d] the right."[341] Justice Scalia concedes that "the purpose of the rights set forth in [the Sixth] Amendment is to ensure a fair trial."[342] However, he concludes that "it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair."[343] Instead, the Sixth Amendment rights have independent meaning and significance distinct from their purpose—the right to a fair trial.[344]

In the ineffective assistance context, disentanglement would mean that prejudice should be eliminated from the showing necessary to establish a violation of the right to counsel.[345] Instead, a showing of ineffective assistance of counsel should rest solely on demonstrating

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337 *Id.* at 146.

338 *Id.*

339 Curiously, Justice Scalia noticed the tension between the Court's ruling in *Gonzalez-Lopez* and its holding in *Strickland*, but dismissed the problem by focusing on the fair trial purpose of the right to effective assistance of counsel. *Id.* at 146–48.

340 448 U.S. 56, 65–66 (1980) (describing the "indicia of reliability" requirement which the Court has formulated), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004).

341 497 U.S. 836, 862 (1990) (Scalia, J., dissenting).

342 *Gonzalez-Lopez*, 548 U.S. at 145.

343 *Id.*

344 *See id.* at 146 ("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." (citing Strickland v. Washington, 466 U.S. 668, 684–85 (1984)).

345 *See 2005 Term*, *supra* note 335, at 210 ("Eliminating the prejudice prong from the *Strickland* test would thus bring the right to effective assistance of counsel more in line conceptually with the other Sixth Amendment rights.").

that the counsel's performance was constitutionally deficient.[346] Once the defendant has made such a showing, the court should then address the issue of whether relief should be granted using its traditional approach to these issues. That is, the court should apply the harmless error rule set forth in *Chapman v. California*.[347] It bears emphasizing here that although the *Chapman* rule normally applies only on direct appeal, it should apply to all initial claims of ineffective assistance of counsel, irrespective of the procedural posture of the case.[348] This is because courts have not only held that defendants may properly bring an ineffective assistance claim for the first time on collateral attack,[349] but in fact have required that such claims not be raised until collateral proceedings.[350] Once the *Chapman* standard has been applied at the first collateral review, whether in state post-conviction or in federal habeas corpus proceedings, then courts could use the standard set forth in *Brecht v. Abrahamson*.[351]

Using this approach will not only result in a textually sound and historically grounded disentangled reading of the right to counsel, but it would also lead to a proper realigning of the burdens of proof. While the *Strickland* approach places the burden on the defendant for establishing that the counsel's deficient performance was prejudicial, under the harmless error approach, the burden would be on the government.[352] Such an approach would be consistent with the Court's

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346 *See* Gabriel, *supra* note 321 at 1284 (suggesting that "once a defendant meets the burden of proof with respect to counsel's actions, the defendant need not prove more"); Geimer, *supra* note 322, at 139 (arguing that "a presumption of relief should arise" if the claimant did not receive "that which the Constitution promises").

347 386 U.S. 18, 24 (1967) (requiring the government to prove that constitutional errors were harmless beyond a reasonable doubt).

348 *See* United States v. DeCoster, 487 F.2d 1197, 1204 (D.C. Cir. 1973) (stating that "[i]f a defendant shows a substantial violation of any of these requirements" of effective counsel, the burden shifts to the government to establish a lack of prejudice).

349 Massaro v. United States, 538 U.S. 500, 504 (2003) (finding that the objectives of the "general rule that claims not raised on direct appeal may not be raised on collateral review" are not promoted by requiring a defendant to raise ineffective assistance of counsel claims on direct appeal and that "[t]he better-reasoned approach is to permit ineffective-assistance claims to be brought in the first instance in a timely motion in the district court under § 2255").

350 *See, e.g.*, United States v. Smith, 450 F.3d 856, 861 (8th Cir. 2006) ("In general, an ineffective assistance of counsel claim is not cognizable on direct appeal.").

351 507 U.S. 619, 623 (1993) (holding that on federal habeas corpus of constitutional errors, the standard is whether the error "had substantial and injurious effect or influence in determining the jury's verdict" (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

352 *See 2005 Term*, *supra* note 335, at 212 (indicating that harmless error review "would shift the heavy burden of showing no prejudice onto the government").

general approach to other non-structural constitutional errors,[353] including non-structural violations of the right to counsel in other contexts.[354]

CONCLUSION

The Sixth Amendment, framed amidst deep misgivings about a potentially oppressive central government, mandates that the federal government provide all defendants seven fundamental procedural protections. Over the course of the past few decades, the Supreme Court's expansive and restrictive readings of the Sixth Amendment have led to constructions that are inconsistent with the Amendment's text. These problematic readings, caused by entanglements of the Sixth Amendment with the Due Process Clause, have led to diminished procedural protections against infringement of individual liberty.

The Court's recent Sixth Amendment jurisprudence bears signs of the Court's willingness to disentangle the Sixth Amendment and return to a textually grounded reading of the Amendment. Were the Court to continue this project and disentangle the various entanglements identified in this Article, it would do much to restore the Sixth Amendment's robust role in protecting individual liberty as envisioned when it was adopted.

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353 *See, e.g.*, Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986) (holding that Confrontation Clause errors, including the improper denial of defendant's opportunity to impeach a witness for bias, are subject to harmless-error analysis); Crane v. Kentucky, 476 U.S. 683, 691 (1986) (holding the harmless error rule applies to the unconstitutional restriction on a defendant's right not to testify).

354 *See* Satterwhite v. Texas, 486 U.S. 249, 258 (1988) (holding that the harmless error rule applies to the admission of psychiatric testimony in violation of the right to counsel); Moore v. Illinois, 434 U.S. 220, 232 (1977) (holding the *Chapman* harmless error rule applies to violation of the right to counsel at pretrial corporeal identification); Coleman v. Alabama, 399 U.S. 1, 11 (1970) (holding the *Chapman* harmless error rule applies for denial of counsel at preliminary hearing); Burgett v. Texas, 389 U.S. 109, 115 (1967) (applying the harmless error test to the admission of a constitutionally infirm prior criminal conviction).

APPENDIX A: FEDERAL CRIMES AT THE TIME THE SIXTH AMENDMENT WAS RATIFIED[355]

Crime	1790 Punishment	Current Punishment	Current Code
Treason	Death	Death; 5 years, $10,000	18 U.S.C. § 2381
Murder	Death	First degree: Death or life; Second degree: Term or life	18 U.S.C. § 1111
Piracy and felony	Death	Life	18 U.S.C. § 1651
Accessories to piracy before the fact	Death	n/a	n/a
Forgery and counterfeiting	Death	20 years	18 U.S.C. § 471
Rescue of a person convicted of a capital crime	Death	25 years, fine	18 U.S.C. § 753
Misprision of treason	7 years, $1,000	7 years, fine	18 U.S.C. § 2382
Misprision of murder or felony	3 years, $500	3 years, fine	18 U.S.C. § 4
Manslaughter	3 years, $1,000	Voluntary: 10 years, fine; Involuntary: 6 years, fine	18 U.S.C. § 1112
Accessories to piracy after the fact	3 years, $500	n/a	n/a
Confederacy to become pirates	3 years, $1,000	3 years, fine	18 U.S.C. § 1657

355 An Act for the Punishment of Certain Crimes Against the United States, ch. 9, 1 Stat. 112 (1790).

Crime	1790 Punishment	Current Punishment	Current Code
Maiming on Unites States' property or on the high seas	7 years, $1,000	20 years, fine	18 U.S.C. § 114
Stealing or falsifying a record or process	7 years, $5,000, 39 stripes	5 years, fine	18 U.S.C. § 1506
Perjury	3 years, $800, 1 hour in the pillory	5 years, fine	18 U.S.C. § 1621
Obstruction of process	1 year, $300	1 year, fine	18 U.S.C. § 1509
Rescue of a person before trial	1 year, $500	5 years, fine	18 U.S.C. § 752
Suing an ambassador or foreign minister	3 years, fine at court's discretion	n/a	n/a
Violation of safe conduct, or violence to ambassador or minister	3 years, fine at court's discretion	3 years, fine	18 U.S.C. § 112
Larceny on United States' property or on the high seas	4 times the value of goods, 39 stripes	5 years if more than $1,000; 1 year if $1,000 or less	18 U.S.C. § 661
Receiving stolen goods	4 times the value of goods, 39 stripes	3 years if more than $1,000; 1 year if $1,000 or less	18 U.S.C. § 662
Bribery of a judge	Fine and imprisonment at the discretion of the judge	1 year if not willful; 5 years if willful	18 U.S.C. §§ 203, 216