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**Commentary:
A Response to Professor Berger**

**The Right to Confrontation: Not a Mere
Restraint on Government**

Randolph N. Jonakait*

Professor Berger and I agree that the Supreme Court has misconstrued the role of the Confrontation Clause. According to the Court, "the mission of the Confrontation Clause is to advance . . . the accuracy of the truth-determining process."¹ This interpretation of the provision's purpose has reduced confrontation from an important constitutional right to "a minor adjunct of evidence law."² We also agree that confrontation cannot be properly interpreted by looking at the Clause in isolation. Its true meaning can be determined only by examining its context: the Sixth Amendment.³

At this point, however, our paths diverge. Professor Ber-

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1. *Dutton v. Evans*, 400 U.S. 74, 89 (1970).

2. Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 622 (1988). As I have argued earlier:

[The Supreme Court's] accepted primary purpose for confrontation now coincides with the central object of evidence law. This causes the constitutional provision's subordination to evidence law

The confrontation clause, in spite of its actual words extending a right to the accused, no longer expressly safeguards the accused. Instead, it is a protection which everyone in society, as represented by the prosecutor, can demand. . . . If the Court's assessment of the clause's mission is correct, the confrontation clause can no longer be understood as a right protecting the accused.

Id. at 580-81.

Professor Berger concludes that the Supreme Court "has transformed a constitutional guarantee [of confrontation] into an evidentiary doctrine. . . ." Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 557 (1992).

3. See Berger, *supra* note 2, at 559-61; see also Jonakait, *supra* note 2, at 581 ("The Court . . . has divined [confrontation's] purpose . . . by examining it in isolation. . . . The confrontation clause, however, does not sit by itself in the Constitution. It has a context; it is but one provision of the sixth amendment.").

ger sees confrontation as directly curbing the government's secret generation of evidence.⁴ Government abuses, of course, are part of the reason for the Sixth Amendment. Abuses can be prevented not only by directly restraining the government, but also by affirmatively granting rights to the people. The Sixth Amendment follows that latter path. It operates not as a direct restraint on abusive governmental practices, but as a grant of positive rights to those charged with a crime.

A brief look at the Sixth Amendment should illustrate that provision's basic framework. For example, the counsel provision does not merely restrain the government. Instead, it affirmatively grants a right to the accused. As *Gideon v. Wainwright*⁵ establishes, the Sixth Amendment is violated not just when the government prevents an accused from being represented by an attorney, but also when an accused who cannot afford a lawyer does not have one.⁶ Since the right to counsel is an affirmative grant to the accused and not just a restraint on government, the court must appoint an attorney for the indigent.⁷

The Sixth Amendment jury trial right, too, is not just a re-

4. See, e.g., Berger, *supra* note 2, at 586. Professor Berger states, "Thus, two hundred years ago when the Bill of Rights was enacted, the right to confrontation was viewed in conjunction with the other procedural rights surrounding trial by jury. Confrontation was part of an arsenal designed not only to ensure accurate results in criminal trials but also to restrain the government in criminal trials from acting in a covert, repugnant manner that would be concealed from the people." *Id.*

5. 372 U.S. 335 (1963).

6. *Id.* at 344 (precedents, reason, and reflection "require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.").

7. The Sixth Amendment's right to counsel remains an affirmative grant to the accused even though *Gideon* has been limited so that indigents charged with misdemeanors and not sentenced to jail are not entitled to the appointment of counsel. See *Scott v. Illinois*, 440 U.S. 367 (1979) (clarifying the Court's holding in *Argersinger v. Hamlin*, 407 U.S. 25 (1972)).

The Supreme Court's interpretation of a component of the counsel guarantee, the right to effective assistance of counsel, further illustrates that point. The Court has explained:

Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense. Counsel, however, can also deprive a defendant of the right to effective assistance, simply by failing to render 'adequate legal assistance.'

Strickland v. Washington, 466 U.S. 668, 686 (1984) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980) (citations omitted)). The accused is entitled to effective assistance even if the government was not the cause of the ineffective assistance.

straint on the government. The prosecution could not win an appeal by arguing: "We agree that the defendant did not get a jury trial as he wished, but that was not our fault." The question is not what the prosecution did, but whether the accused got a trial by jury. The guarantee is a positive one; under the Sixth Amendment the accused is affirmatively granted the right to a trial by jury.⁸

Compulsory process is also an affirmative grant to the accused. This provision gives a defendant the right to produce witnesses. It does not merely forbid governmental interference with the accused's attempt to produce his witnesses. Compulsory process is not merely a restraint on the government. It is an affirmative right of the accused.⁹

As these rights illustrate, and as a comprehensive examination would confirm,¹⁰ the Sixth Amendment is not a collection of negatives. Instead, the provision grants positive guarantees to the accused.¹¹ We measure these rights not from the govern-

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

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

This alternative phrasing, however, states nothing different than that the Sixth Amendment affirmatively grants rights to the accused. If the government has a duty to give the accused something, such as a jury trial, then the accused has a right to it. A provision that imposes an affirmative duty on the government to furnish a right is not the same as a provision that restrains odious governmental behavior.

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

11. These affirmative rights could be phrased as a restraint on government because the state is prevented from convicting an accused unless the accused has a jury trial, a lawyer, been given notice, and so forth. See, e.g., *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980) ("The right to counsel prevents the States from conducting trials at which persons who face incarceration must defend themselves without adequate legal assistance."). Although semantics allows this phrasing, the *Cuyler* Court treated a Sixth Amendment provision as an affirmative right. *Id.* The Court considered whether different standards for retained and appointed counsel should be employed to determine ineffective assistance of counsel. *Id.* Since the state plays a greater role when counsel is appointed than when counsel is privately retained, a governmental restraint model should lead to stricter standards for appointed counsel. If effective assistance of counsel is an affirmative grant to the accused, the appointed or retained status of counsel does not matter. The Court correctly treated the right to effective assistance of counsel as an affirmative right. It stated: "Since the State's conduct of a criminal trial itself implicates the State

ment's viewpoint, but from the defendant's. The controlling question is not what did the government do, but what did the defendant get. Did he get a jury? Did he get an attorney? Did he get notice? Did he get the chance to produce witnesses? and so on.

If confrontation is to be truly a constitutional right, it must be treated the same way as the other Sixth Amendment rights. The Court has not treated it as such.¹² Similarly, because Professor Berger does not treat confrontation as a right affirmatively granted to the accused, her proposal would also make confrontation inconsistent with other Sixth Amendment guarantees.

Confrontation, correctly interpreted, is a much broader and more powerful guarantee than the restraint model would have it. For example, the restraint model would be concerned with a co-conspirator declaration elicited by a government agent.¹³ It would not examine the same declaration reported by a person who, after the hearsay was uttered, cut a deal with the prosecution. The restraint model would find a different constitutional treatment for a child's abuse accusation depending on whether the statement was made to a government doctor or to the family physician or, perhaps, to a public or private school nurse. The admissibility of an excited utterance could depend on whether it was made to a civilian bystander or to a police officer. Since, however, the Sixth Amendment grants rights to the accused requiring an analysis from the accused's perspective, the same framework should apply to each of those paired statements. They are not fundamentally different for Sixth Amendment purposes.

In *Idaho v. Wright*,¹⁴ for example, the child did not testify. Instead, the child's accusations against the defendant were presented to the jury through a doctor, who testified about statements the child made to him. Professor Berger, to fit

in the defendant's conviction, we see no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers." *Id.* at 344-45.

Once the state has chosen to prosecute, the Sixth Amendment affirmatively grants rights to the accused. Indeed, the opening words of the amendment indicate precisely this scheme: "In all criminal prosecutions, the accused shall enjoy the right to . . ." U.S. CONST. amend. VI. (emphasis added).

12. See Jonakait, *supra* note 2, at 580-81; Berger, *supra* note 2, at 557-60.

13. Berger, *supra* note 2, at 561 ("Hearsay statements procured by agents of the prosecution or police should . . . stand on a different footing than hearsay created without governmental intrusion.").

14. 110 S. Ct. 3139 (1990).

Wright into her framework, concludes that the doctor "functioned as an agent of the prosecution,"¹⁵ although there was no finding to this effect in the case.

From the accused's perspective, however, the functional status of the doctor is irrelevant. Assume that the girl was in a private day care center and a worker there thought the girl was being abused by the accused. If the worker takes her to the school's doctor, who then interviews the child in precisely the same way that the doctor in *Wright* did—that is in a "suggestive manner,"¹⁶ as the Idaho Supreme Court concluded, and focusing "exclusively on the child's activities with" the accused,¹⁷ as Professor Berger puts it—precisely the same evidence would be generated as was presented in the actual case.

To the defendant, the evidence is the same in each situation, and whether "the accused . . . enjoy[ed] the right . . . to be confronted with witnesses against him . . . ,"¹⁸ as the Sixth Amendment commands, must be the same in both situations. Determining whether the doctor was acting as a government agent or as a private party tells us nothing important about whether the accused was allowed to confront the child. To treat them differently is to treat confrontation as something other than a Sixth Amendment right.¹⁹

Professor Berger's historical examination does not convince me otherwise. A confrontation history relying primarily on English political trials is incomplete at best. Although they have failed to do so, confrontation scholars must also examine the development of criminal procedure in colonial America.²⁰ This is necessary because American criminal law and procedure took a sharply different course from that of the English. The American path led to the Sixth Amendment, which does not simply incorporate English common law, but instead, in crucial ways, rejects it.

15. Berger, *supra* note 2, at 603.

16. *Wright*, 110 S. Ct. at 3152.

17. Berger, *supra* note 2, at 603.

18. U.S. CONST. amend. VI.

19. This conclusion, of course, does not tell us how the statements of the child should be treated or more generally what the right to confrontation is. I have concluded elsewhere that confrontation must be read with the right to notice, counsel, and compulsory process, and that together these rights "guarantee to an accused that he can defend himself through our adversary system." Jonakait, *supra* note 2, at 582.

20. I fall into this category of having analyzed confrontation without having examined this relevant history. My comments here can only suggest historical areas that ought to be explored.

England viewed criminal violations as a private matter between individuals. Except for political offenses, which were crimes against the king, the victim or his friends or relatives prosecuted a case, not the government.²¹ The king's attorney prosecuted political offenses and, not surprisingly, the law developed differently in such cases than in other criminal matters: Many more protections were granted an accused in political trials than in ordinary felony prosecutions.²²

Colonial America, on the other hand, viewed crimes not as matters between individuals, but as offenses against the state.²³ Ordinary criminal cases and political trials were treated alike, not as two separate entities as in England. As was only natural in a society that viewed all crimes as fundamentally the same, Americans were seriously concerned with preventing injustices in all criminal cases, not just political trials. The Sixth Amendment reflects this by stating in its opening words that it applies to all criminal prosecutions.

An accurate understanding of the historical origins of the Confrontation Clause requires study of the protections Americans thought necessary in ordinary American criminal trials. Nothing indicates that the secret generation of evidence by the

21. See JOAN E. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* 8 (1980). Jacoby explains:

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

Id.

22. See *id.* In treason trials, the accused was entitled to notice of the charges ten days before trial; in the ordinary criminal cases notice was not given until the beginning of trial. In treason trials, the accused had the right to counsel; in felony trials, the accused did not have right to counsel for the fact-determination stages. He could have counsel's assistance only on points of law. The judge, however, had no duty to inform the accused of this limited right and defense counsel almost never appeared. See *THE LAW PRACTICE OF ALEXANDER HAMILTON* 685-87 (Julius Goebel, Jr. ed., 1964) (briefly describing criminal procedure at English common law).

23. The replacement in America of private prosecution by public prosecution indicates this:

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

JACOBY, *supra* note 21, at 10.

prosecution was of concern in these cases. Americans, however, did feel that some criminal convictions were unjust. We need to examine these cases to understand how Americans of the constitutional generation thought that such injustices might be prevented.²⁴ Those thoughts about non-treason trials in America were certainly reflected in the Sixth Amendment.²⁵ Until this American history is examined, our understanding of the development of the Confrontation Clause will be incomplete.

24. The cases to be examined have not been cataloged, but they should include proceedings such as the Salem witch trials. Only a short time after the executions of the "witches" in 1692, the public generally saw the convictions as unjust. By 1697, one of the magistrates and twelve of the jurors had repented their part in the proceedings, and in 1710, a committee was set up to award compensation for the survivors. See *THE PUBLIC CONSCIENCE* 4-8 (Donald S. Thomas, ed., 1972) (briefly describing the proceedings).

The generation that formed the Constitution was aware of and still concerned by these trials, as indicated by Thomas Hutchinson's publication in 1750 of the *History of the Province of Massachusetts Bay*, which presented the documents of the Salem witch hunt along with a commentary. THOMAS HUTCHINSON, *HISTORY OF THE PROVINCE OF MASSACHUSETTS BAY*, reprinted in *THE PUBLIC CONSCIENCE*, *supra*, at 8-51. Hutchinson, who later became governor of Massachusetts, told his readers that the trials were unfair even though the accusers faced the accused in open court and even though the trials were not based on depositions or other evidence secretly generated by the government. Even so, the procedures were "absurd and dangerous," at least in part because "[i]nstead of suspecting and shifting the witnesses, and suffering them to be cross-examined, the authority, to say no more, were imprudent in making use of leading questions, and thereby putting words into their mouths or suffering others to do it." *Id.* at 15, 18-19.

The examinations, although before a jury, were all done by a magistrate. Hutchinson's description suggests that the generation of the constitutional framers concluded that this mode of proceeding did not provide sufficient protections to the accused. The remedy that evolved, it can be argued, was to grant the accused an attorney and the right to cross-examine. We needed a system different from the English system of ordinary criminal trials where the accused is dependent on the authorities to develop the facts.

25. My tentative conclusions are that in the 18th century America, to produce fairer prosecutions, replaced the English trial system, which was inquisitorial-accusatorial, with an adversary system. The most telling evidence of this is that America granted a right to counsel in all criminal cases while England did not until 1836. *THE LAW PRACTICE OF ALEXANDER HAMILTON*, *supra* note 22, at 686. Americans, however, did not grant counsel in isolation. Instead, they invariably adopted it with other rights because together they were all seen as integrally necessary for a more just way of trying cases. Counsel was tied with notice, confrontation, and compulsory process because together it was thought these rights produced a fairer criminal justice system. In other words, I believe, that the history will reveal that a portion of the Sixth Amendment was meant to constitutionalize what we now call the adversary system.

