# THE RIGHT TO BE FREE FROM UNCOUNSELED INTERROGATION: A SIXTH AMENDMENT DOCTRINE IN SEARCH OF A RATIONALE

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## I. INTRODUCTION

In a series of cases beginning with *Massiah* v. *United States*,[1] the United States Supreme Court has held that, under the Sixth Amendment,[2]

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[1] 377 U.S. 201 (1964); *see infra* notes 20–36 and accompanying text.

statements "deliberately elicited"[3] by the government after adversary proceedings have begun cannot be used as evidence against the defendant in the government's case in chief.[4] However, recently in *Kansas* v. *Ventris*, the Court concluded that such statements are admissible for impeachment purposes should such defendants take the stand to testify at their trials.[5] In addition to resolving the issue of impeachment use, the *Ventris* Court addressed the theretofore unresolved question of precisely when the Sixth Amendment violation occurs in *Massiah* cases, holding that the violation occurs at the time the government interrogates rather than when the evidentiary fruits of interrogation are used against the defendant at trial.[6]

[2] The Sixth Amendment provides in full:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI. *See also* Rothgery v. Gillespie Cnty., 554 U.S. 191, 194, 198 (2008) (Defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of "adversary judicial proceedings"); Brewer v. Williams, 430 U.S. 387, 398 (1977) (holding that a person's Sixth Amendment counsel rights attach when "judicial proceedings have been initiated against him 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment'"); Kirby v. Illinois, 406 U.S. 682, 688, 690 (1972) (interpreting the Sixth Amendment limitation to "criminal prosecutions" as generating a right to counsel only "at or after the time that adversary judicial proceedings have been initiated"); *see infra* notes 37–48 and accompanying text. Moreover, when the trial process is completed, the "prosecution" ends and the Sixth Amendment counsel provision becomes inapplicable either by acquittal or sentencing. CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE 984 (5th ed. 2008).

[3] *See* Kuhlman v. Wilson, 477 U.S. 436, 457 (1986); United States v. Henry, 447 U.S. 264, 270 (1980), discussed in detail *infra* notes 66–70 and accompanying text; Brewer v. Williams, 430 U.S. 387, 399–400 (1977); *Massiah*, 377 U.S. at 204, 206; *cf.* Maine v. Moulton, 474 U.S. 159, 177 n.13 (1985), discussed in detail *infra* notes 158–162 and accompanying text.

[4] *See, e.g.*, *Moulton*, 474 U.S. at 177 n.13; *Henry*, 447 U.S. at 270; *Brewer*, 430 U.S. at 399–400; *Massiah*, 377 U.S. at 204, 206.

[5] *See* 129 S. Ct. 1841, 1847 (2009). This article focuses on exploring the underpinnings of the substantive right to be free from interrogation, *see infra* notes 6–7 and accompanying text, and not on exclusionary rule issues.

[6] *See Ventris*, 129 S. Ct. at 1846.

The Court, in parting company with an array of leading commentators[7] and with virtually no explanation, stated the matter as follows: "[T]he *Massiah*

[7] *See, e.g.*, James J. Tomkovicz, *An Adversary System Defense of the Right to Counsel Against Informants: Truth, Fair Play, and the* Massiah *Doctrine*, 22 U.C. DAVIS L. REV. 1, 36–37 (1988) [hereinafter Tomkovicz, *Right to Counsel Against Informants*] ("[The] substantive sixth amendment protection [of] *Massiah* [and its progeny] is radically different than the substance of prospective fourth amendment shelter. The prohibition against 'unreasonable' searches would provide a *limited* safeguard *against the informant surveillance itself*. The *Massiah* right, on the other hand, raises an [*a*]*bsolute* barrier not to the surveillance, but *to the use of its products at trial*.").

Professor Tomkovicz later observed that "[n]o violation of the sixth amendment occurs until the fruits of uncounseled elicitation are used in court." James J. Tomkovicz, *The* Massiah *Right to Exclusion: Constitutional Premises and Doctrinal Implications*, 67 N.C. L. REV. 751, 775 (1989) [hereinafter Tomkovicz, *The* Massiah *Right to Exclusion*.]

Along similar lines, Professor Loewy sees all Sixth Amendment protections as "procedural" with no substantive component, thus seeing violations of those protections occurring only when they are used against the possessor of the protection. *See* Arnold H. Lowey, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907, 909–11, 939 (1984).

Furthermore, Professor Schulhofer makes the following observations about Sixth Amendment *Massiah* claims:

> [T]he *Massiah* "exclusionary rule" . . . is not intended to deter any pretrial behavior whatsoever. Rather, *Massiah* explicitly permits government efforts to obtain information from an indicted suspect, so long as that information is not used "as evidence against *him* at his trial." The failure to exclude evidence, therefore, cannot be considered *collateral* to some more fundamental violation. Instead it is the admission at trial that in itself denies the constitutional right.

Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 889 (1981) (footnotes omitted).

However, some commentators do maintain that Sixth Amendment violations may occur even though the government never utilizes the fruits of uncounseled elicitations against the suspect. *See, e.g.*, Joseph D. Grano, Rhode Island v. Innis: *A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 Am. Crim. L. Rev. 1, 35 (1979). In discussing *Brewer v. Williams*, Professor Grano states:

> The whole point of *Massiah* is the prevention of the state from taking advantage of an uncounseled defendant once sixth amendment rights attach. The Christian burial speech [case] was an attempt to take advantage of Williams. The attempt itself is what *Massiah* prohibits. The attempt itself violates the constitutional mandate that the system proceed, after some point, only in an accusatorial manner.

*Id.*

right is a right to be free of uncounseled interrogation[8] . . . infringed at the time of the interrogation."[9] On this view, the uncounseled interrogation itself is deemed impermissible governmental activity, presumably subjecting it to sanction through suit for violation of the suspect's civil rights whether or not the interrogation yields a statement sought to be used in evidence against him at trial.[10]

In breaking new Sixth Amendment ground with its recognition of a right to be free from uncounseled interrogation, the Court failed to articulate any underlying interest to support its holding.[11] Such failure is perhaps not

[8] *Ventris*, 129 S. Ct. at 1846. The Court's use of the term "interrogation," a central requirement for *Miranda* violations under the Fifth Amendment, is curious in light of the longstanding understanding that it is "deliberate elicitation" of information (not necessarily "interrogation") that triggers *Massiah* violations. For a full discussion of the distinction between *Miranda* "interrogation" and *Massiah* "deliberate elicitation," see Yale Kamisar, Brewer v. Williams, Massiah *and* Miranda, *What is "Interrogation"? When Does it Matter?*, 67 GEO. L.J. 1 (1978). The Court has held that questioning, "interrogation," may constitute "deliberate elicitation" under *Massiah* even though it does not constitute "custodial interrogation" under *Miranda*. *See* Fellers v. United States, 540 U.S. 519, 524–25 (2004) (violation of Sixth Amendment where law enforcement officers questioned an indicted accused about his involvement in the indicted crime in his home and outside the presence of his counsel). The Court had earlier observed: "The definitions of 'interrogation' under the Fifth and Sixth Amendments . . . are not necessarily interchangeable, since the policies underlying the two constitutional protections are quite distinct." Rhode Island v. Innis, 446 U.S. 291, 300 n.4 (1980). For discussion of the policies underlying the Fifth and Sixth Amendments respectively, *see infra* Part IV.

[9] *Ventris*, 129 S. Ct. at 1846.

[10] *See infra* text accompanying notes 90–93, 125–62, 222–32.

[11] The *Ventris* holding may be in tension with the Court's own caselaw. *See* United States v. Morrison, 449 U.S. 361, 365 (1981); *see also* discussion in detail *infra* notes 132–137 and accompanying text, where the Court refused to dismiss proceedings against an indicted accused who had been approached by law enforcement officials outside the presence of her counsel. The officials, among other things, urged the accused to cooperate in a related investigation. *Morrison*, 449 U.S. at 361. The accused made no statement to the officials and the Court, while assuming a Sixth Amendment violation without determining the issue, refused dismissal in the absence of a showing of "demonstrable prejudice." *See id.* at 361, 365. *But see infra* notes 158–64 and accompanying text for a discussion of Maine v. Moulton, 474 U.S. 159 (1985) (suggesting precedent for the *Ventris* holding).

A variety of lower courts have held that governmental interrogations of officially charged defendants outside the presence of counsel do not constitute Sixth Amendment violations where no evidence obtained therefrom is used against the defendants either at trial or in other prejudicial ways. *See, e.g.*, United States v. Glover, 596 F. 2d 857, 864 (9th Cir. 1979) (no Sixth Amendment violation where FBI agents outside the presence of counsel, interviewed officially charged persons

surprising in light of Professor Akhil Amar's observation that "scholars, lawyers, and judges have often lost their way" in understanding the scope and underlying values of the Sixth Amendment counsel right.[12]

While the right to be free from uncounseled interrogation rests on unexplained foundations, it also stands in stark contrast to the situation in the analogous area of custodial interrogation under the *Miranda* decision. There the Court has recently held that the Fifth Amendment affords no right per se to be free from interrogation conducted contrary to the requirements of *Miranda*, but only a right to free from the use of the fruits of the interrogation at trial.[13] The *Ventris* Court offered no account for the disparate timing triggers of the Fifth and Sixth Amendments respectively.[14]

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who made no statements).

The Ninth Circuit subsequently summarized the *Glover* holding as requiring some unfair use of evidence obtained by the government as necessary for Sixth Amendment violations:

> From *Weatherford* [see *infra* notes 145–56 and accompanying text for a detailed discussion] and *Glover* and the cases they interpret, it is apparent that mere government intrusion into the attorney-client relationship, although not condoned by the court, is not of itself violative of the Sixth Amendment right to counsel. Rather, the right is only violated when the intrusion substantially prejudices the defendant. Prejudice can manifest itself in several ways. It results when evidence gained through the interference is used against the defendant at trial. It also can result from the prosecution's use of confidential information pertaining to the defense plans and strategy, from government influence which destroys the defendant's confidence in his attorney, and from other actions designed to give the prosecution an unfair advantage at trial.

United States v. Irwin, 612 F.2d 1182, 1186–87 (9th Cir. 1980) (footnotes omitted); *see also* Willis v. Bell, 687 F. Supp. 380, 385 (N.D. Ill. 1988) (holding that the Sixth Amendment was not violated by police questioning of accused outside the presence of counsel because no results of the confrontation were obtained which could possibly prejudice accused's fair rights). *But see* Martin R. Gardner, *The Sixth Amendment Right to Counsel and its Underlying Values: Defining the Scope of Privacy Protection*, 90 J. CRIM. L. & CRIMINOLOGY 397, 449–52 (2000) [hereinafter Gardner, *The Sixth Amendment Right to Counsel*] for a discussion of lower court cases arguably supporting the *Ventris* holding.

[12] Akhil R. Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 641 (1996).

[13] *See Ventris*, 129 S. Ct. at 1845. The *Miranda* cases are explored in detail *infra* Part IV. Prior to the Court's recent holding, I had argued for a similar position in Martin R. Gardner, *Section 1983 Actions Under* Miranda*: A Critical View of the Right to Avoid Interrogation*, 30 AM. CRIM. L. REV. 1277 (1993) [hereinafter Gardner, *Section 1983 Actions Under* Miranda].

[14] *See Ventris*, 129 S. Ct. at 1845.

This article assesses underlying constitutional values in offering an account of the right to be free from interrogation under the Sixth Amendment. I will argue that the right can best, perhaps only, be accounted for by the presence of a unique and latent privacy interest[15] underlying the Sixth Amendment *Massiah* line of cases. The absence of this, or any other substantive interest, explains the Court's rejection of a right to be free from interrogation under *Miranda*.

The article proceeds in Part II by tracing Sixth Amendment doctrinal development from *Massiah* to *Ventris*. Part III explores the possible presence of a privacy interest unique to the Sixth Amendment. Once identified, the privacy value will be shown to provide the most plausible *raison d'etre* for the *Massiah/Ventris* line of cases. This argument will be further supported in Part IV by a comparison of *Miranda* interrogation caselaw, which holds that violations of the Fifth Amendment occur only when evidence coerced from the accused is used in evidence against him, and not when the evidence is obtained. Thus, the presence of Sixth Amendment privacy protection provides the basis for a violation of a substantive interest occurring at interrogation, while no such Fifth Amendment interest exists prior to usage of tainted evidence. Part IV concludes with a critique of the *Ventris* right and argues that it lacks adequate constitutional foundation and thus, along with *Massiah* itself, should be rejected.

## II. *MASSIAH* TO *VENTRIS*: THE "DELIBERATE ELICITATION" PROHIBITION

The first major Supreme Court discussion of the Sixth Amendment right to counsel occurred in the 1932 opinion, *Powell v. Alabama*.[16] Since that time, the Court has decided numerous cases raising a variety of issues,[17] including whether defendants have a right to have counsel present during

[15] *See infra* notes 124–79 and accompanying text. I have previously examined the role of privacy protection in Sixth Amendment jurisprudence. *See* Gardner, *The Sixth Amendment Right to Counsel*, *supra* note 11.

[16] 287 U.S. 45, 73 (1932) (upholding right to counsel for indigent defendants in capital punishment case); 3 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 11.1(a), at 567 (3d ed. 2007) ("The first major Supreme Court discussion of the constitutional right to counsel came in *Powell v. Alabama*.").

[17] *See, e.g.*, WHITEBREAD & SLOBOGIN, *supra* note 2, at 515–22, 971–1045.

pretrial custodial interrogation.[18] Even though the right to counsel originally applied only to trial proceedings,[19] in *Massiah v. United States* the Court eventually extended it to certain pretrial contexts, even noncustodial ones.[20]

### *A.* Massiah *and Its Progeny*

Massiah had been indicted for several federal offenses, was free on bail, and was riding with his co-defendant in the latter's car.[21] Unbeknownst to Massiah, the co-defendant was cooperating with the authorities and had secretly installed a radio transmitter under the seat of the car which allowed federal authorities to overhear damaging admissions by Massiah made after the co-defendant had invited him to discuss their pending case.[22] Although Massiah had retained a lawyer prior to being released on bail, the lawyer was not present in the car at the time of the conversations with the co-defendant.[23] The incriminating statements were subsequently used against Massiah at trial.[24]

The case eventually reached the Supreme Court, which held:

> [T]hat [Massiah] was denied the basic protections of [the Sixth Amendment] when there was used against him at his trial evidence of his own incriminating words, which federal officials had deliberately elicited from him after he had been indicted and in the absence of his counsel. It is true that . . . here the damaging testimony was elicited from [Massiah] without his knowledge while he was free on bail. But . . . "if . . . a rule is to have any efficacy, it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse. In this case, Massiah was more

[18] *See* LAFAVE ET AL., *supra* note 16, at § 11.2(e), at 659–661 (discussing cases under both due process and Sixth Amendment right to counsel).

[19] *See* Tomkovicz, *The* Massiah *Right to Exclusion*, *supra* note 7, at 754.

[20] 377 U.S. 201, 205–06 (1964).

[21] *See id.* at 202–03.

[22] *See id.*

[23] *See id.*

[24] *See id.* at 203.

> seriously imposed upon . . . because he did not even know that he was under interrogation by a government agent."[25]

The Court added that basic due process concepts contemplate an indictment followed by a trial affording counsel rights.[26] Such guarantees "surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extrajudicial proceeding."[27] This is because "[a]nything less . . . might deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him.'"[28]

As to when the violation of Massiah's rights actually occurred, the Court was equivocal. On the one hand, the Court characterized "secret interrogations" of indicted, uncounseled defendants as contraventions of the "basic dictates of fairness in the conduct of criminal cases and the fundamental rights of persons charged with crime,"[29] suggesting that Massiah's rights were violated when the interrogations in the car occurred.[30] On the other hand, however, the Court also declared that "[w]e hold that [Massiah] was denied the basic protections of the [Sixth Amendment] when there was used against him at his trial" evidence which federal officials "deliberately elicited from him after he had been indicted and in the absence of his counsel,"[31] implying that Massiah's rights were not violated until his statements were used against him.

The *Massiah* Court offered little support for its holding, concluding simply that Sixth Amendment interests in assuring fair trials would be compromised if Massiah's statements were admissible evidence.[32] If his

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[25] *Id.* at 206 (quoting *Massiah*, 307 F.2d 62, 72–73 (2d Cir. 1962) (Hays, J., dissenting), *rev'd*, 377 U.S. 201 (1964)).

[26] *See id.* at 204 (citing Spano v. New York, 360 U.S. 315, 327 (1959) (Stewart, J., concurring)).

[27] *Id.*

[28] *Id.* at 205 (quoting *Spano*, 360 U.S. at 326 (Douglas, J., concurring)).

[29] *Id.* (quoting People v. Waterman, 175 N.E.2d. 445, 448 (N.Y. 1961)).

[30] *See id.*

[31] *Id.* at 206.

[32] *See id.* at 207. The *Massiah* Court appealed to two prior cases, *Spano*, 360 U.S. at 315, and *Powell v. Alabama*, 287 U.S. 45 (1932), for authoritative support. In *Spano*, the Court reversed a state criminal conviction because a confession obtained by direct police interrogation had wrongly been admitted against the defendant at his trial. *See* 360 U.S. at 323–24. The *Massiah* Court focused on the theory of the concurring Justices in *Spano* that "the Constitution required reversal of the conviction upon the sole and specific ground that the confession had been deliberately

pretrial statements were admissible, Massiah's right to counsel at trial would be of little value.[33]

*Massiah* was controversial from its inception and has been roundly criticized ever since.[34] Professor Amar has characterized the opinion as

elicited by the police after the defendant had been indicted, and therefore at a time when he was clearly entitled to a lawyer's help." *Massiah*, 377 U.S. at 204 (citing *Spano*, 360 U.S. at 327 (Stewart, J., concurring)). The *Massiah* Court noted that our system contemplates that "an indictment be followed by a trial, 'in an orderly courtroom, presided over by a judge, open to the public, and protected by all the procedural safeguards of the law.'" *Id.* The Court apparently saw little relevance in the fact that the defendant in *Spano* was aware that he was being interrogated by the police at the time he confessed while the defendant in *Massiah* was oblivious to the fact that he was being "interrogated" by the police, or at least by one working with the police. *See id.* at 206.

The *Massiah* Court's reliance on the *Powell* case was fleeting. The Court merely quoted *Powell*'s proposition that "during perhaps the most critical period of the proceedings . . . that is . . . from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation [are] vitally important, the defendants . . . [are] as much entitled to [aid of counsel] during that period as at the trial itself." *Id.* at 205 (quoting *Powell*, 287 U.S. at 57).

Even proponents of *Massiah* admit decades after the decision that the Court failed to adequately support its holding. "The Court has yet to proffer an in-depth constitutional justification for the *Massiah* right." Tomkovicz, *Right to Counsel Against Informants*, *supra* note 7, at 22.

[33] *See Massiah*, 377 U.S. at 206

[34] *See id.* at 208–13 (White, J., dissenting). Three Justices dissented in *Massiah*, objecting to the majority's exclusion of "relevant, reliable and highly probative" evidence obtained outside the context of any "inherent danger of police coercion justifying the prophylactic effect of another exclusionary rule." *Id.* at 208, 213. The dissenters further questioned the exclusion of Massiah's statements in a context where Massiah "was not prevented from consulting with counsel as often as he wished, [where] [n]o meetings with counsel were disturbed or spied upon, [and where] preparation for trial was in no way obstructed." *Id.* at 209.

The dissenters focused on the absence of governmental coercion in gathering its evidence:

> Applying the new exclusionary rule is peculiarly inappropriate in this case. At the time of the conversation in question, [Massiah] was not in custody but free on bail. He was not questioned in what anyone could call an atmosphere of official coercion. What he said was said to his partner in crime who had also been indicted. There was no suggestion or any possibility of coercion. What [Massiah] did not know was that Colson [Massiah's co-defendant] had decided to report the conversation to the police. Had there been no prior arrangements between Colson and the police, had Colson simply gone to the police after the conversation had occurred, his testimony relating Massiah's statements would be readily admissible at the trial, as would a recording which he might have made of the conversation. In such event, it would simply be said

"upside-down," excluding reliable evidence of guilt[35] for no good reason,[36] effectively helping the guilty to win.[37] Others agree, finding that *Massiah* "inhibit[s] the discovery of truth for reasons that not only cannot be deemed compelling but . . . must be considered ill-founded,"[38] and seeing the Sixth Amendment "misapplied as an artificial device of cloture on government efforts to obtain cognitive evidence."[39] Justice Rehnquist would eventually lament that the "doctrinal underpinnings of *Massiah* have been largely unexplained"[40] resulting in a decision "difficult to reconcile with the traditional notions of the role of an attorney."[41]

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> that Massiah risked talking to a friend who decided to disclose what he know of Massiah's criminal activities. But, if, as occurred here, Colson had been cooperating with the police prior to his meeting with Massiah, both his evidence and the recorded conversation are somehow transformed into inadmissible evidence despite the fact that the hazard to Massiah remains precisely the same – the defection of a confederate in crime.

*Id.* at 211.

[35] *See* Amar, *supra* note 12, at 674–75.

[36] *See id.* at 642 (identifying the "deep principles" underlying the Sixth Amendment as "the protection of innocence and the pursuit of truth."). Assuming that the government in *Massiah* gathered truthful statements from a guilty offender speaking freely, there were no Sixth Amendment reasons to exclude the statements.

[37] *See id.* at 675.

[38] Joseph D. Grano, *Remembering the Past of Criminal Procedure*, 22 U. MICH. L.J. REFORM 395, 410 (1989).

[39] H. Richard Uviller, *Evidence from the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 COLUM. L. REV. 1137, 1138 (1987).

[40] United States v. Henry, 447 U.S. 264, 290 (1980) (Rehnquist, J., dissenting).

[41] *Id.* Justice Rehnquist saw those "traditional notions" specifically as the ability to hold private unencumbered lawyer client consultations as often as desired, interests in no way offended in *Massiah*. *See id.*

As to why attorneys are necessary in the first place, Rehnquist explained:

> Historically and in practice, in our country at least, [a hearing] has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires

Of course, *Massiah* is not without its proponents. A leading defender has sought to identify the unexplained underpinnings of the case, finding it to be a case righting the wrong of "imbalanced" contests between the power of the government and the weakness of individuals accused of crime.[42] On this view, the aim of the Sixth Amendment is to promote:

> [R]espect for individual worth, dignity, independence, and autonomy by according defendants opportunities to construct defenses and to protect themselves against state power and authority. [The right to counsel enables us to] derive satisfaction, strength and self-respect from staunch refusal to take advantage of a lesser opponent and from the willingness to grant to all the chance to contest charges and to defend against accusation. Equalization of the accused represents, and gives content to, several of our societal commitments. Counsel ensures that the state will carry the burden in a balanced fight played according to neutral rules. Counsel imposes limits on the government's power over citizens. Counsel gives content to the belief that all deserve treatment as worthwhile members of society and that no individual should be exploited.[43]

These fundamental values would arguably be denied if the government adversary were free to deliberately elicit incrimination without affording the accused an opportunity to consult with counsel.[44]

However controversial, the Supreme Court has seen fit to invoke *Massiah* as the basis for deciding several subsequent cases. Two require brief mention here.

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> the guiding hand of counsel every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

*Id.* at 291–92 (Rehnquist, J., dissenting) (quoting Powell v. Alabama, 287 U.S. 45, 68–69 (1932)).

[42] *See* James J. Tomkovicz, *The Truth About* Massiah, 23 U. MICH. J.L. REFORM 641, 672–73 (1990) [hereinafter Tomkovicz, *The Truth About* Massiah].

[43] *Id.* at 673 (quoting Tomkovicz, *Right to Counsel Against Informants*, *supra* note 7, at 49–50).

[44] *See id.*

*Brewer v. Williams*[45] is probably the most controversial case in the *Massiah* line.[46] Williams, an escapee from a mental institution, was arraigned in Davenport, Iowa several days after Christmas on suspicion of abducting a ten-year-old girl on Christmas Eve from a Des Moines, Iowa YMCA.[47] Williams obtained counsel in Davenport and had been given *Miranda* warnings several times.[48] The Des Moines police, under the direction of Detective Leaming, drove to Davenport to transport Williams to Des Moines.[49] Leaming, who suspected Williams of murdering the child, knew of Williams's mental problems, and also knew that Williams saw himself as a deeply religious man.[50] Prior to embarking on their trip to Des Moines, Williams invoked his right to counsel and informed Leaming that he did not wish to speak to the police.[51] Leaming in turn promised Williams and his counsel that he would not interrogate Williams while the two rode together.[52] During the ride of several hours, Leaming and Williams engaged in conversation including the subject of religion, and Leaming delivered the now famous "Christian burial speech."[53] Even

[45] 430 U.S. 387 (1977).

[46] *See* Uviller, *supra* note 39, at 1161. Professor Uviller has described *Brewer v. Williams* as "perhaps the most notorious of *Massiah*'s progeny." *Id.* For a sample of criticism directed at the *Brewer* case, *see, e.g.*, Linda S. Buethe, Note, *The Right to Counsel and the Strict Waiver Standard*, 57 NEB. L. REV. 543 (1978); Phillip E. Johnson, *The Return of the "Christian Burial Speech" Case*, 32 EMORY L.J. 349 (1983); Saundra T. Brewer, Note, Brewer v. Williams*: The End of Post-Charging Interrogation?*, 10 Sw. U. L. Rev. 331 (1978).

[47] *See Brewer*, 430 U.S. at 390.

[48] *See id.* at 390, 391. Williams was thus informed that he had a right to remain silent, that if he spoke his words may be used against him in evidence, that he had a right to the presence of counsel during interrogation should he choose to speak, and that counsel would be provided him if he were indigent. *See id.*

[49] *Id.* at 391.

[50] *See id.* at 392.

[51] *See id.* at 391–92.

[52] *See id.* at 391.

[53] *See id*. at 392. The briefs and oral arguments referred to Leaming's words as the "Christian burial speech." *See id.* at 400. Addressing Williams as "Reverend," Leaming said:

> I want to give you something to think about while we're traveling down the road . . . . Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may

though Leaming told Williams not to respond to the speech but simply to think about it,[54] Williams directed Leaming to the place where the girl's dead body was hidden.[55]

After being convicted of murder, Williams pursued habeas corpus relief claiming, inter alia, that his statements directing Leaming to the body were inadmissible in violation of his Sixth Amendment right to counsel.[56] The Supreme Court agreed, finding that through the vehicle of the Christian burial speech Leaming had "deliberately elicited" the incriminating statements contrary to *Massiah*.[57]

The *Williams* Court saw its case as indistinguishable from the "clear rule of *Massiah* that once adversary proceedings have commenced against an individual, he has a clear right to legal representation when the government interrogates him."[58] The Court criticized Leaming for his "use of psychology," seeing the Christian burial speech as a clear attempt "to elicit incriminating statements" from a vulnerable suspect who had expressly asserted his right to counsel.[59] Apart from a reference to the Sixth Amendment as "indispensable to the fair administration of our adversary system" even at the "pretrial stage," the Court offered no explanation of any Sixth Amendment value offended by Leaming's actions.[60] A cite to *Massiah* was sufficient to decide the case.[61]

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> be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it all.

*Id.* at 392–93.

For a detailed examination of Leaming's speech and the implications of the *Brewer* case generally, see Kamisar, *supra* note 8.

[54] *Brewer*, 430 U.S. at 393. After making the speech, Leaming stated: "I do not want you to answer me. I don't want to discuss it any further. Just think about it as we're riding down the road." *Id.*

[55] *Id.* at 393.

[56] *See id.* at 394–95.

[57] *See id.* at 400, 405.

[58] *Id.* at 401.

[59] *Id.* at 403, 405.

[60] *Id.* at 398.

[61] *See id.* at 400–01.

Four Justices dissented in *Williams*, finding that, among other things, Williams had waived his *Massiah* right[62] and that suppression of his statements was not required to promote traditional Sixth Amendment fair trial considerations.[63] Three dissenters anticipated the *Ventris* holding, complaining that "the only . . . conceivable basis for the majority's holding is the implicit suggestion . . . that the right involved in *Massiah* . . . is a right not to be *asked* any questions in counsel's absence,"[64] a "right" they found nowhere in the Constitution.[65]

Neither the *Massiah* nor *Williams* Courts attempted to explain or give content to the "deliberate elicitation" standard employed in those cases. The meaning of the standard was expanded, however, in the jailhouse informant case, *United States v. Henry*,[66] where the Court found that an undercover informant "deliberately elicited" incriminating information from

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[62] *See id.* at 433–34 (White, J., dissenting).

[63] *See id.* at 426 (Burger, C.J., dissenting). Chief Justice Burger expressed his disagreement as follows:

> [T]he fundamental purpose of the Sixth Amendment is to safeguard the fairness of the trial and the integrity of the factfinding process. In this case, where the evidence of how the child's body was found is of unquestioned reliability, and since the Court accepts Williams's disclosures as voluntary and uncoerced, there is no issue either of fairness or evidentiary reliability to justify suppression of truth. It appears suppression is mandated here for no other reason than the Court's general impression that it may have a beneficial effect on future police conduct; indeed, the Court fails to say even that much in defense of its holding.

*Id.* Justices White, Blackmun, and Rehnquist offered the following objections to the majority's position:

> The consequence of the majority's decision is, as the majority recognizes, extremely serious. A mentally disturbed killer whose guilt is not in question may be released. Why? Apparently the answer is that the majority believes that the law enforcement officers acted in a way which involves some risk of injury to society and that such conduct should be deterred. However, the officers' conduct did not, and was not likely to, jeopardize the fairness of respondent's trial or in any way risk the conviction of an innocent man—the risk against which the Sixth Amendment guarantee of assistance of counsel is designed to protect.

*Id.* at 437 (White, J., dissenting).

[64] *Id.* at 435–36.

[65] *Id.* at 438. For the dissenters, "[q]uestions, unanswered, have no significance at all." *Id.* at 436.

[66] *See* 447 U.S. 264, 275–76 (1980).

Henry, who had been indicted and jailed awaiting trial.[67] The FBI had placed the informant in the same cell block as Henry and instructed him not to question Henry about his alleged crimes.[68] Nevertheless, the informant engaged Henry in conversations during which he made incriminating disclosures, which the government subsequently used against Henry at trial.[69] In assessing the constitutionality of the situation, the Court offered a gloss on the deliberate elicitation standard and concluded: "By intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry's Sixth Amendment right to counsel."[70]

The *Henry* Court offered no explanation of any Sixth Amendment value that was offended by the Government's "impermissible interference with the right to the assistance of counsel."[71] The dissenters saw no infringement of any constitutionally protected interest.[72]

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[67] *See id.* at 270, 274.

[68] *Id.* at 271.

[69] *Id.*

[70] *Id.* at 274. The Court noted that the informant had managed to gain Henry's confidence after he had requested the informant to assist in his plan to escape incarceration. *See id.* at 266 n.2.

In a subsequent jail informant case, Kuhlmann v. Wilson, 477 U.S. 436, 456, 459–60 (1986), the Court distinguished passive from active informant listeners on facts similar to *Henry*, and found that the undercover informer, unlike the one in *Henry*, did not actively elicit information from the accused but merely listened as the accused revealed incriminating details of his pending crime. *Id.* at 459–60.

[71] 447 U.S. at 275.

[72] *See id.* at 281 (Blackmun, J., dissenting) ("[A]bsent an active, orchestrated ruse, I have great difficulty perceiving how canons of fairness are violated when the Government uses statements flowing from a 'wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.'" (quoting Hoffa v. United States, 385 U.S. 293, 302 (1966))).

In a separate dissent, Justice Rehnquist concluded that "*Massiah* constitutes such a substantial departure from the traditional concerns that underlie the Sixth Amendment guarantee that its language, if not its actual holding, should be re-examined." *Id.* at 290 (Rehnquist, J., dissenting). Justice Rehnquist explained his position:

> "Deliberate elicitation" after formal proceedings have begun is thus not by itself determinative. . . .If the event is not one that requires knowledge of legal procedure, involves a communication between the accused and his attorney concerning investigation of the case or the preparation of a defense, or otherwise interferes with the attorney-client relationship, there is in my view simply no constitutional prohibition

## *B.* Ventris: *The Right to Be Free from Uncounseled Interrogation*

The *Ventris* facts are similar to the *Henry* facts.[73] An undercover informant concededly elicited incriminating statements from Ventris in violation of the Sixth Amendment while the two were in a holding cell.[74] The State agreed that under *Massiah* and *Henry* the statements were inadmissible in the prosecution's case in chief against Ventris, but sought to use the statements to impeach him when he took the stand to testify at his trial.[75] The Supreme Court agreed that the statements were admissible for impeachment purposes.[76]

The Court identified the "core" of the counsel right as "the opportunity for a defendant to consult with an attorney and to have him investigate the case and prepare a defense for trial."[77] In acknowledging that pretrial

> against the use of incriminating information voluntarily obtained from an accused despite the fact that his counsel may not be present.
>
> . . . .
>
> . . . [T]here is nothing in the Sixth Amendment to suggest, nor does it follow from the general accusatory nature of our criminal scheme, that once the adversary process formally begins the government may not make any effort to obtain incriminating evidence from the accused when counsel is not present. The role of counsel in an adversary system is to offer advice and assistance in the preparation of a defense and to serve as a spokesman for the accused in technical legal proceedings. And the Sixth Amendment, of course, protects the confidentiality of communications between the accused and his attorney. But there is no constitutional or historical support for concluding that an accused has a right to have his attorney serve as a sort of guru who must be present whenever an accused has an inclination to reveal incriminating information to anyone who acts to elicit such information at the behest of the prosecution.

*Id.* at 293–96.

[73] Kansas v. Ventris, 129 S. Ct. 1841, 1847 (2009).

[74] *See id.*

[75] *Id.*

[76] *Id.* The Court distinguished Fifth Amendment principles which forbid use at trial, even for impeachment, of coerced confessions from the prophylactic Sixth Amendment rules forbidding pretrial police conduct. *See id.* at 1846. Justices Stevens and Ginsburg dissented, rejecting the prophylactic views of the majority and argued that the statements should be inadmissible for all purposes. *Id.* at 1847–48 (Stevens, J., dissenting).

[77] *Id.* at 1844–45 (majority opinion) (quoting Michigan v. Harvey, 494 U.S. 344, 348 (1990)). The Court twice described the fair trial right as "the core of the right to counsel." *Id.* at 1844, 1845.

interactions—such as those occurring in *Massiah*—were not at the Sixth Amendment core,[78] the Court appeared to assign penumbral status to violations occurring in the *Massiah* line. Indeed, the Court seemingly characterized *Massiah* as manifesting a Sixth Amendment "prophylactic rule" forbidding pretrial police conduct in order "to ensure that police manipulation does not render counsel entirely impotent," thus denying effective representation at a stage where crucial interests of the defendant are at stake.[79]

The Court concluded that the Sixth Amendment exclusionary rule operates to deter police misconduct and is thus, as in the Fourth Amendment, not a "substantive guarantee."[80] Unlike the constitutionally mandated Fifth Amendment exclusionary rule, which necessitates exclusion of coerced confessions for all purposes,[81] the Sixth Amendment exclusionary rule is constitutionally contingent and is aimed at deterring undesirable pretrial activity in much the same way that the exclusionary rule deters invasions of privacy in Fourth Amendment cases.[82]

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[78] *See id.* at 1845.

[79] *Id.* In his majority opinion, Justice Scalia referred to "Fifth and Sixth Amendment prophylactic rules," seemingly referring to *Miranda* and *Massiah*. *See id.*

[80] *See id.*

[81] *See id.*

[82] *See id.* at 1845. The Court has identified the Fourth Amendment exclusionary rule as aimed exclusively at deterring the police from illegally invading privacy interests of the citizenry. *See, e.g.*, United States v. Janis, 428 U.S. 433, 446 (1976) ("[T]he 'prime purpose' of the rule, if not the sole one, is to 'deter future unlawful police conduct.'" (quoting United States v. Calandra, 414 U.S. 338, 347 (1974))). While the Court has deemed the exclusionary rule as generally the best available remedy to achieve its deterrent purposes, it is constitutionally contingent in the sense that it could theoretically be replaced by an alternative remedy that proved to be a better deterrent. Martin R. Gardner, *The Emerging Good Faith Exception to the* Miranda *Rule*, 35 HASTINGS L.J. 429, 439–68 (1984) [hereinafter Gardner, *The Emerging Good Faith Exception to the* Miranda *Rule*] (discussing the contingent aspect of the Fourth Amendment exclusionary rule as distinguished from the constitutionally necessary Fifth Amendment exclusionary rule). For a similar discussion, see Tomkovicz, *The* Massiah *Right to Exclusion*, *supra* note 7, at 755–62.

This understanding of *Ventris* thus raises the question of whether statements obtained through illegal deliberate elicitation might nevertheless be admitted against the accused, even in the case in chief against him, if an adequate alternative remedy to the exclusionary rule would deter future illegal elicitations. Gardner, *The Sixth Amendment Right to Counsel*, *supra* note 11, at 426–31. Such an argument was presented by dissenters in Maine v. Moulton, 474 U.S. 159, 184–192 (1985), discussed in detail in Gardner, *The Sixth Amendment Right to Counsel*, *supra* note 11, at 426–31.

Thus, the *Ventris* Court concluded that "the *Massiah* right is a right to be free from uncounseled interrogation and is infringed at the time of the interrogation."[83] The Court considered it "illogical" to say that the right is not violated until trial[84] when "counsel's task of opposing conviction has been undermined by the statement's admission into evidence."[85] The right to counsel is "not worth much" in the eyes of the Court if that is all it means.[86] It is rather the deprivation of counsel occurring at the "critical stage" which produced the inculpatory evidence which "demands a remedy."[87] The Court concluded by observing that "we have never said . . . that officers may badger counseled defendants . . . so long as they do not use information they gain. The constitutional violation occurs when the uncounseled interrogation is conducted."[88]

If "badgering" the defendant is the evil, it seems immaterial whether or not the government obtains evidence therefrom or uses it against the suspect.[89] Thus, for example, in the *Williams* case, if Detective Leaming had given the Christian burial speech and Williams had said nothing, Williams would be entitled to remedial relief in the form of an action for

Justice Scalia, the author of the *Ventris* opinion, also authored a recent opinion holding that the exclusionary rule need not be applied to redress violations of Fourth Amendment "knock and announce" requirements in executing search warrants. *See* Hudson v. Michigan, 547 U.S. 586, 594 (2006). In his opinion for the Court, Scalia argued that 42 U.S.C. § 1983 now provides a robust alternative to the exclusionary rule in effectively deterring violation of the knock and announce requirement. *See id.* at 594–95, 603; *see also infra* note 90, for the text of Section 1983.

[83] 129 S. Ct. at 1846.

[84] *Id.* The Court offered no explanation of the illogic. *See id.*

[85] *Id.*

[86] *See id.*

[87] *See id.*

[88] *Id.* at 1846. From the Court's language, and the logic of its opinion, there appears no basis for limiting the right to be free from uncounseled interrogation to situations where the interrogation yields evidentiary fruits. *See id.* The absence of such limitation was inherent in *Massiah* all along. *See id.* As one commentator observed in discussing *Massiah*: "[An unconstitutional] invasion occurred when the informant sought incriminating statements from the accused . . . . The interest protected there is that of being free from certain types of government exploitation . . . regardless of whether inculpatory evidence is obtained and used." Philip Halpern, *Government Intrusion into the Attorney-Client Relationship: An Interest Analysis of Rights and Remedies*, 32 BUFF. L. REV. 127, 143 (1983).

[89] *See supra* note 88.

violation of his civil rights under Section 1983,[90] assuming of course that the speech constituted a Sixth Amendment "interrogation."[91] If the right not to be "badgered" is the relevant interest at stake, once adversarial proceedings have been initiated, rights to counsel are violated if the government merely attempts to elicit evidence from the accused outside the presence of counsel.[92] The justification offered for redressing such violations as the penumbra of the Sixth Amendment would appear to be to deter the government from conduct threatening the core fair trial value underlying the right to counsel.

But does this really make sense? If protecting trial fairness is really the concern, why not simply rely on the right to counsel to assure that illegally obtained evidence under *Massiah* is excluded at trial? That, after all, is the way the Constitution protects trial fairness when the government coerces

[90] 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

*See* 42 U.S.C. § 1983 (2006); *see also* Halpern, *supra* note 88, at 146 (contending that a victim of a *Massiah* violation should be able to sue for damages to redress injuries).

[91] *See supra* note 8 (discussing the issue of "interrogation" as opposed to "deliberate elicitation"). The seeds of a cognizable § 1983 action were planted prior to *Ventris*. In *United States v. Morrison*, 449 U.S. 361, 363–64 (1981), discussed in detail *infra* notes 129–41 and accompanying text, the Court assumed a Sixth Amendment violation in a case in which the indicted accused suffered no actual interference with her right to counsel but law enforcement agents attempted to influence her to obtain a different lawyer from the one she had retained and to cooperate in a related investigation. The accused declined to cooperate and informed her lawyer. *Morrison*, 449 U.S. at 363. The government thus gained nothing from their attempts. *See id.* Nevertheless, the Court assumed a violation of the right to counsel but denied the dismissal remedy urged by the accused deeming it too drastic. *See id.* at 367. However, the Court appeared sympathetic to granting damages or injunctive relief had the accused raised such claims under Section 1983 in stating: "[W]e do not condone the egregious behavior of the Government agents. Nor do we suggest that in cases such as this, a Sixth Amendment violation may not be remedied in other proceedings." *Id.* at 367; *see also* Halpern, *supra* note 88, at 129–30,148–49.

[92] *See* WHITEBREAD & SLOBOGIN, *supra* note 2, at 488 (stating that "the phrase 'deliberate elicitation' [in the *Massiah* line of cases] . . . suggests that the Sixth Amendment is implicated by any government attempt, after formal charging, to get information from the defendant in the absence of counsel.").

confessions from suspects.[93] Can it seriously be argued that a per se right not to be "badgered" is necessary to protect fair trials?

If the Sixth Amendment does embody a right to be free from uncounseled interrogation independent from the use of incriminating evidence against the accused, the right must be bottomed by some interest not identified by the *Ventris* Court. As I hope to show in the next section, a privacy interest unique to the Sixth Amendment is the best candidate for the value underlying the right.

## III. IN SEARCH OF THE VALUE(S) UNDERLYING THE RIGHT TO BE FREE FROM UNCOUNSELED INTERROGATION

Whatever one's philosophy of constitutional interpretation, in order to give meaning to a given constitutional text it is necessary to appreciate the enduring values that underlie the text.[94] Unfortunately, the Court has failed to support its decisions in the *Massiah* line by an explanation of the values underlying the decisions.[95]

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[93] *See infra* notes 46–221 and accompanying text. One commentator has identified "the most valuable benefit of trial counsel" as "the prevention of evidentiary damage to the defense." Tomkovicz, *The* Massiah *Right to Exclusion*, *supra* note 7, at 767. He adds that "[w]ithout *use* of . . . uncounseled disclosures in the criminal process, there is no cognizable harm to constitutional interests in adversarial fair play." *Id.* at 771. It would thus appear that if no evidentiary damage is done, as in the case of interrogation that yields no evidentiary fruits, no fair trial interest is implicated. I examine more fully in the next section why the trial fairness interest inadequately supports the right to be free from interrogation.

[94] *See* Oliver v. United States, 466 U.S. 170, 186 (1984) (Marshall, J., dissenting) (observing that "the Bill of Rights was . . . designed not to prescribe with 'precision' permissible and impermissible activities, but to identify . . . fundamental human libert[ies]"). At the other end of the philosophical judicial spectrum, Judge Robert Bork observed:

> [I]t is the task of the judge in this generation to discern how the framers' values, defined in the context of the world they knew, apply to the world we know. . . . The fourth amendment was framed by men who did not foresee electronic surveillance. But that does not make it wrong for judges to apply the central value of that amendment to electronic invasions of personal privacy. . . . The evolution of doctrine to accomplish that end [i.e., making the framers' values effective] contravenes no postulate of judicial restraint.

Ollman v. Evans, 750 F.2d 970, 995–96 (D.C. Cir. 1984) (en banc) (Bork, J., concurring) (newspaper column protected by first amendment against libel suit).

[95] Tomkovicz, *The Truth About* Massiah, *supra* note 42, at 645 n.19.

A leading commentator has lamented that "[t]he Supreme Court has done an abominable job of explaining the premises of *Massiah*."[96] That situation remains unchanged with the *Ventris* Court's recognition of a right to be free from uncounseled interrogation.[97] As mentioned above and developed more fully below, the Court's defense of the right in terms of traditional fairness values is unsatisfactory. Moreover, the right is not explicable in terms of the other leading right to counsel interest explicitly identified by the Court: the interest in autonomously conducting one's trial.[98] Thus if *Ventris* is to be justified at all in terms of Sixth Amendment values, one must search for a yet unidentified interest. This section conducts that search and discovers privacy protection as a latent interest, implicit in several of the Court's cases.

## *A. Fairness*

Clearly the most prominent value underlying the right to counsel is the ideal of assuring that defendants are subjected to fair proceedings.[99]

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[96] *Id.*

[97] *See* Kansas v. Ventris, 129 S. Ct. 1841, 1845 (2009) (applying the *Massiah* "deliberate elicitation" standard but failing to explain the underlying premise).

[98] *See infra* notes 119–23 and accompanying text. However, the recognition of an interest in protecting "dignity" in the *pro se* cases may provide a link to the privacy protection interest which does appear to be the value underlying the *Ventris* right to be free from interrogation. *See infra* text accompanying note 124.

[99] *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963). In extending the Sixth Amendment to the States and holding that indigent defendants are entitled to counsel at state expense, the Court observed that:

> [R]eason 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. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries . . . . From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every

Commentators have identified two kinds of fairness interests:[100] fair trials[101] and fair fights,[102] both of which are said to be at stake in the pretrial contexts of *Massiah* and its progeny.[103] The fair-trial interest is aimed at preventing an eradicable injustice,[104] while the fair-fight interest is directed at ameliorating the inherent disadvantage of defendants who are unevenly matched against the powerful forces of the state.[105]

To the extent that the *Ventris* Court offered an explanation of the rationale of its decision, it appealed to the fair-fight interest. The Court's conclusion that the right to counsel is "not worth much" unless it is afforded pretrial recognition[106] echoes Professor Kamisar's famous allusion to the

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> defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

*Id.*

In addition to the deliberate elicitation cases in the *Massiah* line, the Court has extended the right to counsel to a variety of pretrial situations occurring after the "initiation of adversarial proceedings," ordinarily requiring a formal commitment of the government to prosecute as evidenced by the filing of charges. WHITEBREAD & SLOBOGIN, *supra* note 2, at 984. Once a "criminal prosecution" is triggered, the Court has held that the right to counsel applies to "critical stages" of the prosecution as well as to "trial-like confrontations." *Id.* at 979–81. Thus, the Court has found that an accused has the right to counsel at first judicial appearances, *see* Rothgery v. Gillespie Cnty., 554 U.S. 191, 194 (2008); at arraignments where defenses not there raised are abandoned by law, *see* Hamilton v. Alabama, 368 U.S. 52, 53–54 (1961); at post-indictment lineups, *see* United States v. Wade, 388 U.S. 218, 236–37 (1967); at preliminary hearings, *see* Coleman v. Alabama, 399 U.S. 1, 9–10 (1970); and as discussed above, in situations where the government seeks to elicit inculpatory statements, *see supra* notes 20–92 and accompanying text. *See also supra* note 2. *But see* United States v. Ash, 413 U.S. 300, 321 (1973) (no right to counsel at police initiated photo identification).

[100] *See* Uviller, *supra* note 39, at 1173.

[101] *See supra* note 2. The right to counsel, as well as a cluster of other Sixth Amendment rights, serves to promote fair trials, the aim of which is to protect the innocent and pursue truth. Amar, *supra* note 12, at 642.

[102] *See supra* note 43 and accompanying text; Tomkovicz, *Right to Counsel Against Informants*, *supra* note 7, at 39–62.

[103] *See* Uviller, *supra* note 39, at 1169–76.

[104] *See id.* at 1169. For example, in order to prevent innocent suspects from being falsely identified at pretrial lineups, a situation not easily redressed at later trial proceedings, the Court has extended the right to counsel to post indictment lineups. United States v. Wade, 388 U.S. 218, 236–37 (1967).

[105] *See* Uviller, *supra* note 39, at 1173. *See supra* text accompanying note 43.

[106] *See supra* text accompanying notes 85–87. The Court's rationale is similar to that offered by the *Massiah* Court. *See supra* notes 25–33 and accompanying text.

police station "gatehouse" and the trial "mansion."[107] Unless suspects are protected from the inquisitional tactics utilized in the gatehouse, they will be induced to provide self-incriminating evidence which will render the blessings of the mansion irrelevant.[108] Having counsel at trial is "not worth much" if the prosecution already possesses an admissible confession obtained from a suspect at a "critical stage" during which counsel could have protected his rights.[109]

This fair fight rationale for *Ventris* is unconvincing, however. In the first place, the rationale proves too much in cases like *Ventris* where suspects incidentally do provide the government incriminating evidence.[110] The Court has unequivocally limited the Sixth Amendment right to counsel to situations where the government has officially initiated adversarial proceedings by way of indictment or other formal proceeding.[111] Surely Ventris would have been equally prejudiced had his statement been elicited prior to his indictment. Anytime the government deliberately elicits inculpatory statements from a suspect, it compromises the suspect's ability to have a meaningful visit to the fair-trial mansion, regardless of whether or not adversarial proceedings have officially begun at the time of the elicitation.[112]

Secondly, the fair-fight rationale makes no sense in explaining violations of the right to be free from interrogation in cases where

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[107] *See* YALE KAMISAR ET. AL., CRIMINAL JUSTICE IN OUR TIME 19–36 (1965).

[108] *Id.*

[109] *See supra* notes 84–87 and accompanying text.

[110] *Cf.* Uviller, *supra* note 39, at 1169–73 (discussing the fair trial interest as "prov[ing] too much" in terms equally applicable to fair fight concerns). *See also* Kamisar, *supra* note 8, at 80–83, 91.

[111] *See supra* note 99.

[112] *See* Uviller, *supra* note 39, at 1173. Professor Uviller has observed:

> Whatever else might be said of the leap from "need" to "right," the moment of formal accusation, upon which the sixth amendment is hinged, is an extraneous factor in assessing need. A case may be indelibly imprinted with a mistaken identification, a seemingly damaging declaration, or any action suggesting culpability as readily before as after the filing of a complaint or indictment, and with equally devastating effect upon the defense. The defendant has as much need for professional assistance before the formal charge as after.

*Id.*

interrogated suspects make no statements.[113] Whatever the evil of such interrogations, it is far-fetched to see it as the fear of compromising fair-trial rights. Seeing such could only be, as Professor Kamisar has said in describing *Massiah* itself, "a 'symbolic response' to the violation of the symbol of a fair trial."[114]

Not only does *Ventris* raise no genuine fair-fight concerns, but no fair-trial issues were at stake either. In the absence of any governmental coercion,[115] Ventris voluntarily made statements which, while incriminating, constituted presumably reliable evidence of guilt.[116] Little risk of eradicable injustice would have occurred if his statements had been admitted in evidence, even in the prosecution's case in chief against him.[117]

While fair-trial interests make little sense as justifications for the right to be free from uncounseled interrogation where the suspect makes a statement, they make no sense where he says nothing.[118] No risk of injustice, eradicable or otherwise, exists in situations where the government attempts to elicit information from silent suspects. Fairness interests thus do not adequately explain the *Ventris* right.

### *B. Dignity and Autonomy*

The fairness interests just discussed are clearly instrumental values aimed at avoiding undesirable outcomes and imbalances in the trial

[113] *See supra* notes 88–92 and accompanying text.

[114] *See* Kamisar, *supra* note 8, at 92. Only tortured reasoning would claim that trial fairness is risked unless a remedy is afforded for violation of the right to be free from interrogation in situations where the accused remains silent. The only basis for such a remedy would appear to be to deter the police from future interrogations where the accused might make statements which may actually call trial fairness into question.

[115] *See id.* at 45–63 (It is clear, as in *Ventris*, that if a suspect does not know he is being interrogated, no governmental coercion exists.); s*ee also supra* note 34.

[116] *See* Uviller, *supra* note 39, at 1170–72. *But see* Tomkovicz, *The Truth About* Massiah, *supra* note 42, at 663 & n.145 (arguing that undercover informants in cases like *Massiah*, *Henry*, and *Ventris* might provide unreliable information to the government, thus risking a possible unjust conviction of the suspect).

[117] *See* Uviller, *supra* note 39, at 1170–72. The *Williams* case provides a vivid example of this point. *See supra* notes 45–65 and accompanying text. Williams's statements leading Detective Leaming to the body of the murder victim clearly evidenced that Williams had killed the little girl. *Id.* Admitting his statements against him risked little possibility of convicting an innocent person. *Id.*

[118] *See supra* notes 84–87, 114.

process.[119] However, other Sixth Amendment values are intrinsic in nature, valuable in themselves without regard to issues of fairness.[120] Thus, the Court has held that defendants who "knowingly and intelligently" forego their right to be represented by counsel are entitled to conduct their own defenses[121] even though trial fairness issues will almost certainly be sacrificed thereby.[122] The Court has recognized "the dignity and autonomy of the accused" as the interests underlying the right to proceed pro se.[123]

Given their different factual setting, the pro se cases themselves offer little help in clarifying the underpinnings of the *Massiah* cases. But by identifying intrinsic Sixth Amendment values, the pro se cases do invite the search for the Sixth Amendment underpinnings of the right to be free from uncounseled interrogation to occur outside the context of the instrumental fairness values which appear so inadequate to the task.

It does not appear that the mere act of a governmental agent directing a question to an uncounseled accused involves any infringements of autonomy interests. On the other hand, if the dignity interest somehow entails a "right to be left alone," a privacy interest, under the circumstances of post-indictment uncounseled interrogation, we have likely discovered the Sixth Amendment value which underlies the right to be free from uncounseled interrogation.[124]

### *C. A Sixth Amendment Right to Privacy?*

The Supreme Court has never explicitly recognized privacy protection as a value supporting the Sixth Amendment right to counsel. Nevertheless, given *Massiah*'s inexplicable underpinnings, a few commentators have

[119] *See* Halpern, *supra* note 88, at 133.

[120] *See id.*

[121] *See* Farretta v. California, 422 U.S. 806, 835 (1975). The Court grounded its recognition of the right to proceed *pro se* on the "inestimable worth of free choice" entailed as an inherent Sixth Amendment value. *Id.* at 834.

[122] *See* McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984). "[T]he right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant." *Id.*

[123] *Id.* at 176–77.

[124] Martin R. Gardner, *Sniffing for Drugs in the Classroom—Perspectives on Fourth Amendment Scope*, 74 NW. U. L. REV. 803, 844–52 (1980) (exploring the close relationship of Fourth Amendment personal privacy protection to basic concerns for maintaining respect for human dignity).

sought to understand it as a case reflecting a unique privacy interest generated by the invocation of adversary proceedings against the accused. Thus, Professor Dix wondered early on whether *Massiah* created "a general right of privacy that is violated by any undercover surveillance that occurs after the *Massiah* right becomes applicable."[125] Professor Uviller expressed similar ideas in suggesting that the Sixth Amendment might protect "individual immunity from hostile state incursion" into the "contents of the defendant's mind" once "investigation [is] hardened [into] adversarial alignment."[126] Such views reflect the basic premise of our adversarial system that the State construct its case "at arm's length from the mind of the suspect."[127] Thus, whether or not the suspect says anything, it is inappropriate for the government to even attempt to elicit evidence from him once adversarial proceedings have officially begun.[128]

[125] George E. Dix, *Undercover Investigations and Police Rule-Making*, 53 TEX. L. REV. 203, 227 (1975).

[126] Uviller, *supra* note 39, at 1176. Uviller ultimately argues that the deliberate elicitation cases actually raise no Sixth Amendment interests at all and should be dealt with under the privacy protection apparatus of the Fourth Amendment. *Id.* at 1154–95.

[127] *Id.* at 1176.

[128] *See* Halpern, *supra* note 88, at 143. Professor Halpern expressed the matter this way in describing the violation of the right to counsel in *Massiah*: "[An] invasion occurred when the informant sought incriminating statements from the accused . . . . The interest protected there is that of being free from certain types of governmental exploitation and deception, regardless of whether inculpatory evidence is obtained and used." *Id.* Halpern sees this invasion as a violation of an intrinsic Sixth Amendment interest "antecedent and distinct" from the instrumental fair trial interests violated when Massiah's statements were used against him at trial. *See id.*

I suggest that the interest described by Professor Halpern and by Professor Uviller in notes 126–27 and the accompanying text essentially amounts to a Sixth Amendment privacy interest. Whether the interest is truly "intrinsic" is not entirely clear. Halpern admits that the "intrinsic interests protected by *Massiah*" sometimes have "utilitarian benefit for the administration of justice." Halpern, *supra* note 88, at 143 n.82 (discussing the benefits of lawyers being able to rely on commitments from law enforcement authorities in advising their clients as manifested by the *Williams* case). Similarly, Uviller's reference to a right to "individual immunity from hostile state incursion" is expressed as a function of our "adversarial system." Uviller, *supra* note 39, at 1176. Our preference for our "accusatorial" system over alternative inquisitional models suggests that some benefit derives from honoring individual immunity from hostile state incursion. *But see id.* at 1177, 1183 (for examples of inquisitional aspects tolerated within our system and describing the "true basis for *Massiah* and its brood probably is judicial discomfort with the anomalous inquisitorial component in the adversary [system]"). On the other hand if one sees the adversarial system as itself intrinsically valuable, the individual immunity interest may arguably also be an intrinsic value.

Such views essentially constitute "privacy interests" unique to the Sixth Amendment.[129] They obviously appear more promising than the fairness concerns discussed above in providing the foundation for the *Ventris* right to be free from being badgered by the government after being officially accused of a crime.[130] Before attending to *Ventris* specifically, however, it is necessary to explore whether this yet unarticulated Sixth Amendment right to privacy can indeed be found implicit within the logic of the Court's right to counsel cases.

### 1. A Latent Privacy Interest

While the Court has never explicitly appealed to privacy protection as a Sixth Amendment value, the idea lurks in several cases. *United States v. Morrison* provides perhaps the clearest example of an implied right to Sixth Amendment privacy.[131] In *Morrison*, law enforcement officers encountered an indicted accused who had retained counsel and, outside counsel's presence, urged the accused to cooperate in a related investigation.[132] The accused declined to cooperate, made no statement to the officers, and immediately notified her lawyer who eventually argued that the indictment against the accused should by be dismissed on the ground that the actions of the law enforcement officials constituted a violation of her Sixth Amendment right to counsel.[133]

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Whether or not Sixth Amendment privacy is a truly intrinsic interest, it is clear that it is an interest antecedent to and independent from the fair trial interests implicated when illegally obtained evidence is used at trial. *See* Halpern, *supra* note 88, at 143. A violation of Sixth Amendment privacy occurs when one officially accused is interrogated outside the presence of his counsel even if the accused remains silent. *See* cases cited *supra* note 3. The questioning, the "badgering," the invasion of the accused's privacy, constitutes the violation. Halpern, *supra* note 88, at 143.

[129] *See* Uviller, *supra* note 39, at 1176.

[130] *See supra* notes 88–92 and accompanying text.

[131] 449 U.S. 361 (1981).

[132] *Id.* at 362. The officers also promised benefits to the accused if she cooperated, threatened a jail term if she failed to cooperate, disparaged her counsel, and urged her to obtain better and less costly counsel from the public defender. *Id.*

Because it is not clear whether the officers were seeking self-incriminating information from the accused, it is uncertain whether the officers were attempting to deliberately elicit incriminating evidence under the *Massiah* standard or to "induce her to make incriminating statements" under the *Henry* gloss. *See supra* text accompanying note 70.

[133] *See Morrison*, 449 U.S. at 362–63.

The Supreme Court granted certiorari to consider whether the extraordinary remedy of dismissal was appropriate in the absence of some adverse consequence to the representation the accused received or to the fairness of the proceedings brought against her.[134] The Court assumed arguendo that a Sixth Amendment violation had occurred,[135] but concluded that without a showing of prejudice to the accused, dismissal of the charges was inappropriate.[136] Nevertheless, the Court saw the presumptive constitutional violation as a product of "egregious" governmental misconduct that might "be remedied in other proceedings."[137]

The Court did not elaborate on the nature of the Sixth Amendment interest involved nor on why the actions of the law enforcement officers were "egregious."[138] The clear implication of the case, however, is that the intrusion of the officials, in and of itself, constituted the evil against the accused who was constitutionally insulated from such intrusion.[139] In other words, the accused enjoyed a right to privacy[140] from such intrusion as a consequence of the initiation of adversarial proceedings under the Sixth Amendment.[141]

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[134] *See id.*

[135] *See id.* at 364. While early in its opinion the *Morrison* Court specifically assumed a Sixth Amendment violation, the Court expressed a more tentative view later in the opinion by noting that "[t]he Sixth Amendment violation, if any, accordingly provides no justification for interfering with the criminal proceedings against . . . Morrison, much less the drastic relief [dismissal] granted by the Court of Appeals." *Id.* at 366–67.

[136] *Id.* at 367.

[137] *Id.*; *see supra* note 92.

[138] *See Morrison*, 449 U.S. at 363.

[139] *See id.*

[140] *See id.* While the *Morrison* Court alluded to a Sixth Amendment right to privacy, clearly the Court has not recognized that an accused has an absolute right to be "let alone" by the government once adversarial proceedings have been initiated against him. *See id.* at 364. Indeed, the Court has expressly permitted "passive" efforts by the government to obtain incriminating evidence from an officially charged accused while counsel is not present. *See, e.g.*, Kuhlmann v. Wilson, 477 U.S. 436, 456–60 (1986), discussed *supra* note 70.

[141] *See Morrison*, 449 U.S. at 362. From the facts of *Morrison*, it appears that the accused met voluntarily with the law enforcement officials. *See id.* Thus no Fourth Amendment privacy interests were implicated through the consensual meeting. *See* Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (per curiam) (finding no Fourth Amendment "seizure of the person" where parolee voluntarily consented to a meeting with police who suspected that he had committed additional crimes).

If a Sixth Amendment privacy interest exists, the most obvious place to look for its recognition would be in cases where the government purposely infiltrates actual attorney-client conferences.[142] While the Court has granted relief in such cases,[143] at least one case calls into question whether governmental infiltration of an attorney-client communication constitutes a cognizable violation of constitutionally protected privacy, independent of governmental use of information gained from the communication against the accused client.[144] In *Weatherford v. Bursey*, an undercover governmental agent participated in conferences between an accused and his counsel.[145] The agent had obtained the confidence of the accused by feigning participation in a joint criminal action.[146] The agent was invited by the accused and his counsel to the conferences and attended in order not to alert the accused of the agent's undercover status.[147] The agent conveyed no information from the conference to the government.[148] When the accused eventually discovered the facts of the infiltration,[149] he brought a Section 1983 action alleging a violation of his right to counsel.[150]

The Supreme Court denied the claim and held that while attorney-client privacy is a basic Sixth Amendment value,[151] the accused's interest in a fair trial was in no way offended by the agent's access to the accused's meeting with his lawyer,[152] thus suggesting that trial fairness rights either trump or

[142] *See, e.g.*, O'Brien v. United States, 386 U.S. 345 (1967) (per curiam); Black v. United States, 385 U.S. 26 (1966) (per curiam).

[143] *See, e.g.*, *O'Brien*, 386 U.S. at 345; *Black*, 385 U.S. at 26 (in which the Court ordered new trials upon discovering that federal agents, using electronic devices, had intercepted attorney-client communications during trial preparations).

[144] *See* Weatherford v. Bursey, 429 U.S. 545, 547–48 (1977).

[145] *Id.*

[146] *Id.* at 547.

[147] *Id.* at 547–48.

[148] *Id.*

[149] *Id.* at 549 (The accused discovered the facts of the infiltration when the agent testified against him at trial.).

[150] *Id.*

[151] *Id.* at 554 n.4 (quoting Brief for United States at 71, Hoffa v. United States, 385 U.S. 293 (1966) (Nos. 32–35)) (The Court noted that "the Sixth Amendment's assistance-of-counsel guarantee can be meaningfully implemented only if a criminal defendant knows that his communications with his attorney are private and that his lawful preparations . . . are secure against intrusion by the government, his adversary in the criminal proceeding.").

[152] *See id.* at 554.

altogether swallow privacy interests.[153] The Court emphasized, however, that the agent's infiltration of the conferences was not purposely aimed at learning the accused's defense strategy but was instead a response to invitations from the accused and his counsel and was thus necessary to avoid suspicion of his informant status.[154] The Court therein implied that had the agent acted in bad faith by purposely infiltrating the attorney-client conferences in order to discover defense strategy, the privacy rights of the accused would have been violated even if the government obtained no strategic advantage through the infiltration.[155]

*Weatherford*'s apparent distinction between good faith and bad faith governmental action is at home with the requirement in the *Massiah* cases of active, "deliberate" governmental attempts to gather evidence.[156] Inadvertent or good faith intrusions by the government into attorney-client conversations do not per se violate Sixth Amendment privacy interests any more than did the "passive" encounter with the undercover jailhouse informant violate a protected privacy interest of the accused in the *Kuhlmann* case.[157]

One other case supports the bona fides of privacy protection as the best candidate for an underlying value for the *Ventris* right to be free interrogation.[158] *Maine v. Moulton* involved a situation similar to *Massiah* in which the police utilized an undercover informant to obtain evidence from Moulton who had been indicted and was free on bail.[159] As in *Massiah*, the informant had also been indicted and was secretly wired with a recording device to capture Moulton's conversations.[160] The police claimed that the wire was necessary to protect the informant should

[153] *Id.*

[154] *Id.*

[155] *Id. But see* Gardner, *The Sixth Amendment Right to Counsel*, *supra* note 11, at 417–18 (discussing *Weatherford* and implying that attorney-client privacy might not be a Sixth Amendment value independent from trial fairness.)

[156] *See* Gardner, *The Sixth Amendment Right to Counsel*, *supra* note 11, at 413–18.

[157] *See supra* notes 66–70 and accompanying text for a discussion of the *Kuhlmann* case. For a discussion of problems inherent in employing the good faith/bad faith distinction in the *Weatherford* context, see Gardner, *The Sixth Amendment Right to Counsel*, *supra* note 11, at 413–18.

[158] *See* Maine v. Moulton, 474 U.S. 159, 162–63 (1985).

[159] *See id.* at 163.

[160] *See id.* at 163–64.

Moulton discover his undercover status.[161] Further justification rested on the claim by the police that, based on information provided them by the informant, the wire constituted a legitimate means of gathering evidence against Moulton for an inchoate plan to kill a witness to the indicted offenses.[162] During conversations between Moulton and the informant, the police obtained evidence of the pending charges, but little evidence relevant to the possible future homicide.[163] After discovering the ruse, Moulton argued that the evidence obtained therefrom was inadmissible under *Massiah,* notwithstanding the arguments by the government that the use of the wire was employed in good faith.[164] The Supreme Court agreed with Moulton and held the evidence inadmissible.[165]

Unlike the Court in *Massiah*, the *Moulton* Court offered a lengthy discussion of Sixth Amendment case law and underlying values.[166] In addition to the usual fairness concerns, the Court added interests more at home with privacy protection.[167] With the initiation of criminal charges, an accused enjoys "the right to rely on counsel as a 'medium' between him and the State."[168] Suggesting that this "medium" insulated Moulton from state contact, the Court found that the government violated Moulton's Sixth Amendment rights "when it arranged to record conversations between

[161] *Id.* at 183–84.

[162] *Id.* at 178.

[163] *See id.* at 177 n.13.

[164] *See id.* at 159.

[165] *Id.* The Court suggested, however, that had the police obtained evidence of the future homicide, such would have been admissible; otherwise the government would have been precluded from investigating possible criminal activity for which Moulton had not been indicted. *See id.* at 179. See *infra* note 222 for a discussion of the "offense specific" nature of the Sixth Amendment counsel rights.

[166] *See Moulton*, 474 U.S. at 170–76.

[167] *Id.* The Court explained how fairness interests required that counsel rights be applied to certain pretrial proceedings because the "results [there] might well settle the accused's fate and reduce the trial itself to a mere formality." *Id.* at 170 (quoting United States v. Wade, 388 U.S. 218, 224 (1967)). Once adversarial proceedings have begun, the "defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural . . . law." *Id.* (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)). Moreover, "the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." *Id.* at 171.

[168] *Id.* at 176.

Moulton and its undercover informant . . . ."[169] Thus, Moulton possessed a "right . . . not to be confronted by an agent of the State regarding matters as to which the right to counsel has attached without counsel being present."[170]

### 2. The Insignificance of the Absence of Counsel

In each of the deliberate elicitation cases discussed above (*Massiah*, *Williams*, *Henry*, *Ventris*, and *Moulton*), the Court noted the fact that counsel was absent at the time the government engaged in the respective confrontations.[171] While such absence may appear on the surface to be of a significant contributing factor in leading the Court to find denials of the right to counsel in the *Massiah* cases, it turns out that just the opposite is true.[172]

It is really the right "not to be confronted,"[173] to be left alone, to enjoy privacy protection per se, that is at stake in the *Massiah* cases. The absence of counsel is irrelevant as the following thought experiment makes clear: Suppose defense lawyers had been present in the *Massiah* cases at the time the various governmental agents had gathered their evidence in those cases. Suppose further that none of the lawyers said anything as their clients engaged in conversations with the governmental agents. Would the presence of the lawyers in these situations have solved the Sixth Amendment problems? While everyone agrees that it would not,[174] discerning the reasons why it would not get us to the crux of the matter. Some see the basis for the violations in these hypothetical cases as an infringement of the right to effective assistance of counsel manifested through a failure of the lawyers to advise their clients not to say anything lest the third persons involved happen to be undercover informants.[175] With

[169] *Id.*

[170] *Id.* at 177–78 n.14.

[171] *See supra* text accompanying notes 25 (*Massiah*), 58 (*Williams*), 70 (*Henry*), 84 (*Ventris*), 170 (*Moulton*).

[172] *See supra* text accompanying notes 25 (*Massiah*), 58 (*Williams*), 70 (*Henry*), 84 (*Ventris*), 170 (*Moulton*).

[173] *See supra* text accompanying note 170.

[174] *See, e.g.*, Tomkovicz, *The Truth About* Massiah, *supra* note 42, at 674 n.187; Uviller, *supra* note 39, at 1161–62.

[175] Tomkovicz, *The Truth About* Massiah, *supra* note 42, at 674 n.187. Of course, the *Williams* case posed no risk of an undercover informant since Williams knew he was conversing with Detective Leaming, a known police officer. *See supra* note 48 and accompanying text. In

the exception of the *Williams* case, which did not involve an undercover informant, had lawyers been present in the other *Massiah* cases when informants did their evidence gathering, that would not have solved the problems. It would actually have made Sixth Amendment matters worse, but not, however, on ineffective assistance grounds. The presence of lawyers in these hypothetical scenarios would raise the attorney-client privacy issues at stake in *Weatherford*.[176] To the extent *Weatherford* presented Sixth Amendment problems,[177] they centered on problems inherent in illicit governmental conduct[178] and not on the effectiveness of counsel.[179] It is what the government does in intruding into protected areas that constitutes the violations of the right to counsel, not the failure of the hypothetical lawyers to warn their clients.[180] Thus, it is the violation of the accused's Sixth Amendment privacy alone that bottoms *Massiah* and its offspring, the absence of counsel being irrelevant.

If this is true, the Sixth Amendment would apparently have been violated had lawyers been present in the *Massiah* cases and all the respective lawyers as well as all the indicted suspects had remained silent in response to the informants' attempts to elicit incriminating information.[181] Moreover, violations would seem to have occurred even if the hypothetical lawyers in the *Massiah* cases had advised their clients not to speak,[182] thus

that case, the hypothetical lawyer in the car might be criticized for not advising Williams to remain silent after Leaming delivered the Christian burial speech. *See supra* note 53 and accompanying text. On the other hand, such advice might be deemed unnecessary in light of the fact that Leaming specifically told Williams to say nothing after Leaming delivered the speech. *See supra* note 54 and accompanying text.

[176] *See* Weatherford v. Bursey, 429 U.S. 545, 547–49, 554 (1977).

[177] *See supra* notes 151–55 and accompanying text, discussing dicta supporting a Sixth Amendment violation if government purposely infiltrates attorney-client conferences in the bad faith attempt to gather evidence against the client.

[178] *Id.*

[179] In the *Weatherford* case, *supra* notes 148–57 and accompanying text, the lawyer representing the accused twice invited the undercover informant to participate in attorney-client meetings despite the fact that the accused and the lawyer both suspected that an undercover informant was operating behind the scenes. 429 U.S. at 547–48. Nonetheless, the *Weatherford* Court rejected an ineffective assistance claim. *Id.* at 558–59.

[180] *See supra* notes 148–57 and accompanying text.

[181] *See supra* notes 88–92 and accompanying text, for the view that the right to be free from interrogation is offended even though the accused makes no incriminating statements.

[182] *Id.*; *see supra* notes 175–81 and accompanying text.

fully performing the role of competent, effective counsel under the circumstances.[183] Again, it seems clear that it is the conduct, in and of itself, of the government in seeking incriminating evidence from an officially charged accused at a time when she has a right to be left alone that is constitutionally offensive and not the presence or absence of counsel, effective or otherwise.[184]

While this privacy interest is never explicitly so described by the Court, it is, as I have shown, latent in the Court's various right to counsel cases and provides the best explanation of the underpinnings of the *Ventris* right to be free from uncounseled interrogation. It is because such interrogation of an officially charged accused offends her right to Sixth Amendment privacy that the interrogation, "the badgering"[185] is itself unconstitutional.

## IV. THE RIGHT TO BE FREE FROM INTERROGATION AS A VIOLATION OF SIXTH AMENDMENT PRIVACY: A CRITIQUE

Having identified the *Ventris* right to be free from uncounseled interrogation as a right grounded in Sixth Amendment privacy, it remains to consider whether the Court was on firm ground in articulating the right. Such consideration is enhanced by assessing the *Ventris* right in comparison to the Court's recent denial of a similar right in *Miranda* contexts under the Fifth Amendment.[186] This comparison raises a fundamental question: if a suspect possesses no right to be free from custodial interrogation in *Miranda* cases, why should he enjoy the right, even if he is not in custody, simply because he has been officially accused of criminal offenses?

From this comparison, I will argue that the Court was on firm ground in denying the right not to be interrogated in the Fifth Amendment context and that it should have reached the same conclusion in *Ventris*. I will show that

[183] If the clients had disregarded counsels' advice and gave incriminating statements, the statements may or may not be admissible depending on whether the "fruit of the poisonous tree" doctrine applies in the context of violations of Sixth Amendment rights. The exclusionary rule issues involved are complicated and beyond the scope of this article. For a pre-*Ventris* examination of aspects of this question, see James J. Tomkovicz, *Saving* Massiah *from Elstad: The Admissibility of Successive Confessions Following a Deprivation of Counsel*, 15 WM. & MARY BILL RTS. J. 711 (2007).

[184] See *supra* notes 88–92 and accompanying text.

[185] *See supra* text accompanying notes 87–89.

[186] Chavez v. Martinez, 538 U.S. 760, 760 (2003). See *infra* notes 217–21 and accompanying text for a detailed discussion of this case.

the presence of the implicit recognition of privacy protection in *Ventris*, and the Court's denial of that or any other substantive interest in the *Miranda* context, explains the disparate treatment of the right not to be interrogated under the Fifth and Sixth Amendments respectively. I conclude by arguing that privacy protection plays only a limited role in Sixth Amendment jurisprudence, one that is too narrow to bottom the *Ventris* right to be free from interrogation.

### *A. The Right to Be Free from Interrogation Under* Miranda

In *Miranda v. Arizona*,[187] the Supreme Court held that evidence obtained from a suspect subjected to the "inherently coercive" atmosphere of "custodial interrogation"[188] is inadmissible under the Fifth Amendment privilege against self-incrimination[189] unless the governmental interrogators issue certain warnings.[190] If after being warned, a suspect asserts either his right to remain silent or his right to counsel, the "interrogation must cease."[191] While the *Miranda* Court made clear that evidence obtained in

[187] 384 U.S. 436, 444, 553 (1966). *Miranda* was grounded in the Fifth Amendment privilege against self-incrimination which provides that "no person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V. The Fifth Amendment embodies a principle borrowed from the common law and derived from centuries of struggle against tyranny. *See* L. LEVY, ORIGINS OF THE FIFTH AMENDMENT (1968) (The history of the Fifth Amendment is well documented.).

[188] *Miranda*, 384 U.S. at 444, 467, 553. The *Miranda* Court made numerous references to the coerciveness inherent in custodial police interrogation. *See, e.g.*, *id.* at 455, 461, 467, 468; *see also id.* at 533 (White, J., dissenting). The Supreme Court has recognized that given this coercive atmosphere, exercise of the privilege against self-incrimination at trial would be ineffective unless special procedural protections were applied to station house interrogation:

> Without the protection flowing from adequate warnings and the rights of counsel, "all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police."

*Id*. at 466 (quoting Mapp v. Ohio, 367 U.S. 643, 685 (1961) (Harlan, J., dissenting)).

[189] *See supra* note 187.

[190] *Miranda*, 384 U.S. at 444. The now-famous warnings require the interrogator to inform the suspect of her right to remain silent, that any statement she makes may be used in evidence against her, and that she has a right to counsel during interrogation, at state expense if she is indigent. *Id.*

[191] *Id.* at 473–74. The Court also stipulated that if the suspect indicates in any way that she

violation of these commands must be excluded, the Court did not address whether continued interrogation after the point at which it "must cease" may itself be an actionable violation of the suspect's right "to cut off questioning."[192] It was thus unclear whether *Miranda* recognized a substantive right to be free from interrogation independent of its remedial exclusionary rule requirement.

While the Supreme Court would eventually reject a *Miranda* right to be free from interrogation,[193] some lower courts recognized the right and granted Section 1983 relief for its violation.[194] The cases arose in contexts where the suspects made statements—not used in criminal proceedings[195]—after police either failed to give the warnings altogether[196] or continued interrogating after the suspect asserted his rights.[197] The courts awarded relief in hopes of deterring the "shocking" police misconduct[198] manifested by interrogations in violation of the suspect's perceived right to be free from such. It was never exactly clear what was "shocking" in Fifth Amendment terms about the police merely questioning a suspect without obtaining anything to be used against him.[199]

A search for the core values underlying the privilege against self incrimination[200] that might provide an underpinning for a substantive right

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wants to speak with a lawyer, "there can be no questioning." *Id.* at 444–45. Likewise, the police "may not question" the suspect if she states that she does not wish to be interrogated. *Id.*

[192] *Id.* at 474.

[193] *See supra* note 186; *infra* notes 217–21 and accompanying text.

[194] *See, e.g.*, Martinez v. City of Oxnard, 270 F.3d 852, 855, 857–58 (9th Cir. 2001); Cooper v. Dupnik, 963 F.2d 1220, 1236–37 (9th Cir. 1992) (en banc).

[195] Thus, the cases raised no exclusionary rule issues. *Martinez*, 270 F.3d at 857–58; *Cooper*, 963 F.2d at 1237.

[196] *Martinez*, 270 F.3d at 857–58.

[197] *Cooper*, 963 F.2d at 1229.

[198] *Id.* at 1248–50.

[199] *See* Gardner, *Section 1983 Actions Under* Miranda, *supra* note 13, at 1304–06. I have explored the *Miranda* right to be free from interrogation in detail, criticizing the *Cooper* case and that court's assessment of "shocking" police misbehavior. *Id.* at 1294–1308.

[200] The search is made difficult by the Court's tendency to provide broad lists of "fundamental values" and "noble aspirations" reflected through the privilege, including:

> [O]ur unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a

not to be interrogated reveals essentially three possible candidates: (1) protecting the suspect from invasions of privacy;[201] (2) protecting the suspect's "dignity" interests;[202] and (3) preserving the accusatorial nature of

> fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load;" our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life;" our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter for the guilty," is often "a protection to the innocent."

Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) (citations omitted).

Unfortunately, such lists are not particularly helpful given the vagueness of some of the listed concepts. For example, one wonders how "the inviolability of the human personality" is supposed to promote understanding of the privilege. *See id.* An appeal to such concepts prompted one commentator to describe the Fifth Amendment privilege as "an ultimate article of faith." Monrad G. Paulsen, *The Constitutional Domestication of the Juvenile Court*, 1967 SUP. CT. REV. 233, 238. While another suggested that the underpinnings of the privilege result in treating it with "almost religious adulation." *See* Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 681 (1968).

[201] *See* Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 416 (1966) (the privilege "stands as a protection of . . . the right of each individual to be let alone"); United States v. Grunewald, 233 F.2d 556, 581–82 (2d Cir. 1956) (Frank, J., dissenting in part) (the privilege safeguards the individual's "right of privacy, a right to a private enclave where he may lead a private life"); Mark Berger, *The Unprivileged Status of the Fifth Amendment Privilege*, 15 AM. CRIM. L. REV. 191, 213 (1978) ("human dignity" and "individual privacy" are two equally important values that should be protected by the privilege against self-incrimination); Robert B. McKay, *Self-Incrimination and the New Privacy*, 1967 SUP. CT. REV. 193, 209–11 (the "real reasons" for the privilege are to preserve the integrity of the accusatorial system and to protect "individual privacy").

[202] Protecting human dignity is often viewed as an intrinsically valuable interest underlying the privilege. Robert S. Gerstein, *Privacy and Self-Incrimination*, 80 ETHICS 87, 88 (1970). Thus, obtaining, or attempting to obtain, a self-incriminating statement from a suspects is sometimes viewed as an evil quite apart from any subsequent use of evidence obtained:

> [T]here seems to be a feeling that although obtaining a self-incriminating statement from a person in an impermissible way is a violation of his inherent dignity, using that statement to the person's disadvantage is a significantly incremental violation of that dignity. This feeling is consonant with the notions underlying the privilege against compelled self-incrimination, which abhor not only the application of coercion itself but also the use of compelled testimony. . . . [T]his feeling is a largely intuitive notion and is based upon the perceived offensiveness of causing a person to participate in a process leading to his own detriment . . . .

George E. Dix, *Mistake, Ignorance, Expectation of Benefit, and the Modern Law of Confessions*,

the criminal justice system.[203] None of these individual interests themselves nor their combination provides an adequate foundation for a right to be free of interrogation under *Miranda*.

Privacy protection can quickly be eliminated. While for a time the Court recognized privacy protection as a Fifth Amendment value,[204] the Court has now relegated such protection to other constitutional contexts.[205]

While privacy protection does not provide the substantive interest to support a right to be free from interrogation under *Miranda*, some might find the interest satisfied by an appeal to the Fifth Amendment concern for protecting human dignity. For those who see the very process of incommunicado police interrogations of suspects, hidden away in the confines of police stations, as inherent affronts to human dignity reminiscent of the evils associated with inquisitional systems,[206] a right to

1975 WASH. U. L. Q. 275, 337. The last sentence of the quoted material suggests a close relationship between the interest in protecting "dignity" and the desire to maintain an "accusatorial system." *See infra* note 203 and accompanying text.

[203] Garner v. United States, 424 U.S. 648, 655 (1976) ("[T]he fundamental purpose of the Fifth Amendment [is] the preservation of an adversary system of criminal justice."); Geoffrey R. Stone, *The* Miranda *Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 156.

In an earlier article, I identified the three interests listed in the text as the core values historically thought to underlay the Fifth Amendment privilege. Gardner, *The Emerging Good Faith Exception to the* Miranda *Rule*, *supra* note 82, at 443–45. I also identified a fourth interest, ensuring evidentiary reliability. *Id.* This interest is generally inapposite in cases like those described at *supra* notes 194–98 and accompanying text, where no evidence is obtained. *But see* Gardner, *Section 1983 Actions Under* Miranda, *supra* note 13, at 1313 (discussing how reliability considerations might be relevant even in cases of custodial interrogation that yields no evidence).

[204] *See supra* note 201.

[205] Fisher v. United States, 425 U.S. 391, 400 (1976). The Court disavowed privacy protection as a Fifth Amendment value, placing it within the confines of the Fourth Amendment:

> The Framers addressed the subject of personal privacy directly in the Fourth Amendment. They struck a balance so that when the State's reason to believe incriminating evidence will be found becomes sufficiently great, the invasion of privacy becomes justified and a warrant to search and seize will issue. They did not seek in still another amendment—the Fifth—to achieve a general protection of privacy but to deal with the more specific issue of compelled self-incrimination.

*Id.* Of course if the discussion in *supra* Part III, is correct, privacy protection also plays a role in Sixth Amendment right to counsel jurisprudence.

[206] *See, e.g.*, YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 4 (1980) ("I share the view that not many *innocent* men . . . are likely to succumb to [police interrogation]. But how many *innocent* men are likely to be *subjected* to [standard police

be free of such interrogations per se might be apparent. However, others join Justice Harlan in believing that "peaceful interrogation is not one of the dark moments of the law."[207] In fact, it may even be seen as a relatively bright one assuming the interrogation is indeed peaceful and legally sufficient grounds for suspicion exist. As I have noted elsewhere in drawing on Professor Greenawalt's views:

> Police interrogation of suspects may, in certain circumstances, be perceived as morally permissible if not required. So long as the police do not apply undue pressure or "browbeat suspects, play on their weaknesses, deceive them as to crucially relevant facts . . . or keep them in a hostile setting," when the police have "strong grounds to suspect [a person] of wrongdoing, [police action] laying the ground of [their] suspicion before [the person] and asking for an explanation is not only morally appropriate action, it is more respectful of [the person's] dignity and autonomy than most alternative approaches to discovering the truth."[208]

Such interrogation of guilty suspects, which encourages them to admit responsibility for their wrongdoing, is not an affront to human dignity.[209] Neither is the dignity of innocent suspects offended when they stand silent in the face of police inducements to speak.[210] Such suspects may even be

interrogation] methods? How 'tough' would the American lawyer's reaction be if he had some notion of the price we pay in terms of human liberty and individual dignity?"); *see also id.* at 27–40 (discussing the disparity between protection against self-incrimination in the courtroom and in the police station). *See* Edwin D. Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42, 61 (1968) (police interrogation even with *Miranda* warnings should be forbidden altogether because of its power in "influencing [the] behavior" of suspects).

[207] Miranda v. Arizona, 384 U.S. 436, 517 (1966) (Harlan, J., dissenting).

[208] Gardner, *Section 1983 Actions Under* Miranda, *supra* note 13, at 1318–19 & n.267 (quoting R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 24, 40 (1981–1982)).

[209] *See id.* at 1318–19.

[210] This does not mean, of course, that the police can resort to inhumane interrogations. Police tactics that are "so brutal and so offensive to human dignity" that they "shock the conscience" violate the Due Process Clause. Rochin v. California, 342 U.S. 165, 172, 174 (1952). Moreover, if the police act in a manner "revolting to the sense of justice," they offend the right of the due process rights of those subjected to the actions. Brown v. Mississippi, 297 U.S. 278, 286 (1936).

said to stand in dignified silence in these circumstances.[211] Thus, it is difficult to see how protecting the dignity interests of the accused could provide a foundation for a Fifth Amendment right to be free from interrogation.[212]

The final possible Fifth Amendment foundation is the interest in maintaining an accusatorial system of criminal justice. As I have observed elsewhere: "The accusatorial model preserves an official morality by 'impos[ing] limits on governmental authority [that reduce] the temptation to take evidentiary shortcuts, and minimize[ ] the appearance of unfairness' in order to protect the sovereignty of the individual."[213] The accusatorial system protects individual sovereignty by putting the onus on the government to prove alleged crimes without relying on the accused to provide evidence against herself through governmental inquisition. As Professor Uviller put it, "[W]here the mind of the [accused] is the repository [of evidence of self-incrimination], the inquisitorial method of dislodging the evidence offends deeply ingrained notions of individual immunity from hostile state incursion."[214] Such antipathy to inquisitional tactics could arguably support prohibiting all police interrogation, at least in the absence of counsel.

The fact of the matter is, of course, that our system is not a pure accusatorial model. The Court has permitted inquisitional aspects, particularly police interrogation.[215] The *Miranda* case itself presented the opportunity to altogether forbid custodial police interrogation, but the Court chose to merely regulate its practice.[216]

In light of these considerations, it is difficult to see a Fifth Amendment

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[211] Greenawalt, *supra* note 208, at 21 (persons sometimes remain silent in the face of accusations, choosing "not to dignify" the accusation with an answer).

[212] For a more extensive discussion of the inadequacy of the dignity value to support the right to be free from interrogation, *see* Gardner, *Section 1983 Actions Under* Miranda, *supra* note 13, at 1316–20.

[213] *Id*. at 1314 (citations omitted) (quoting Joseph D. Grano, Rhode Island v. Innis*: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 AM. CRIM. L. REV. 1, 23 (1979)).

[214] Uviller, *supra* note 39, at 1176.

[215] Grano, *supra* note 213, at 23 ("Police interrogation . . . is basically an inquisitional procedure . . . ."). *See also* Uviller, *supra* note 39, at 1177 ("We tolerate a significant inquisitional component in our system of justice.").

[216] *See* Miranda v. Arizona, 384 U.S. 436, 445–58 (1966).

basis for a claim that an accused has a right to be free from interrogation. The Supreme Court agreed in *Chavez v. Martinez*[217] by holding that interrogation contrary the requirements of *Miranda*[218] is not itself unconstitutional.[219] The Court found that the Fifth Amendment is violated only when evidence obtained from an interrogation contrary to *Miranda* is actually used as evidence against the suspect.[220] The Court thus rejected a *Martinez* dissenter's plea for recognition of a "right to be spared from self-incriminating interrogation."[221]

The meaning of *Martinez* is clear. No substantive interest—not privacy protection, not protection of human dignity, nor assuring an accusatorial model—functions as a value independent of the procedural protection of the Fifth Amendment's exclusionary rule, which forbids use of coerced testimony against an accused. Thus, no violation of the Fifth Amendment occurs prior to the use of tainted evidence against the accused.

### *B. Calling* Ventris *into Question*

With *Ventris* and *Martinez* in mind, it must again be asked, why is there a right to be free from interrogation under the Sixth but not the Fifth Amendment? To highlight the question, suppose Detective Leaming in the *Williams* case had given his Christian burial speech but Williams had remained silent. Why should Williams have a viable Section 1983 action simply because he had been arraigned,[222] but have no Fifth Amendment

[217] 538 U.S. 760 (2003).

[218] *Id.* at 764–65 (Police interrogated Martinez without giving *Miranda* warnings while he was in the hospital suffering from gunshot wounds. Martinez answered questions in response to the interrogation but he was never charged with a crime and his answers were never used against him in any criminal prosecution.).

[219] *Id.* at 772. The Court thus rejected Martinez's § 1983 claim that the interrogation in and of itself violated his Fifth Amendment rights under *Miranda*. *Id.*

[220] *Id.* at 772.

[221] *Id.* at 802 (Ginsburg, J., dissenting).

[222] Interestingly, if the *Williams* case arose today under doctrinal expansion occurring since *Williams*, Leaming would probably not have violated Williams's Sixth Amendment rights because the Christian burial speech concerned an attempt to elicit information about Williams's involvement in the murder of the little girl but Williams had been arraigned on an abduction charge. *See supra* notes 45–60 and accompanying text. In post-*Williams* cases, the Court has held that the Sixth Amendment right to counsel is "offense specific" and applies only to crimes for which an accused has been officially charged. McNeil v. Wisconsin, 501 U.S. 171, 175 (1991). The Court later held, however, that "when the Sixth Amendment right to counsel attaches, it does

remedy, even though Leaming attempted to extract evidence after being taught by *Miranda* that "interrogation must cease" once Williams asserted his right to counsel?[223] This disparate recognition of a right to be free from interrogation results from the assumption in *Ventris* of a substantive Sixth Amendment value, identified as privacy protection in the above analysis, that is present whether or not any evidence is ever obtained or used through its violation. *Martinez*, on the other hand, denies the existence of any substantive interest to be offended prior to the use of tainted evidence against an accused.

I suggest that the mere initiation of adversarial proceedings does not represent a sufficiently distinct situation from the context of *Martinez* to justify constitutionally a right to be free from interrogation unique to the Sixth Amendment. While there is a role for privacy protection underlying aspects of the right to counsel,[224] it is not broad enough to sustain the

encompass offenses that, even if not formally charged, would be considered the same offense under the *Blockburger* test." Texas v. Cobb, 532 U.S. 162, 173 (2001). The *Blockburger* test is: "[T]he test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Blockburger v. United States, 284 U.S. 299, 304 (1932). Under the *Blockburger* test, murder and abduction are not the "same offense," therefore as a Sixth Amendment matter (but not under *Miranda*) Leaming could freely question Williams about the homicide, but not the abduction. *See id.*

Given these developments and the possibility that "a single criminal transaction can be characterized . . . as a number of offenses all just different enough from one another to satisfy the *Blockburger* test," Michael J. Howe, *Tomorrow's* Massiah*: Towards a "Prosecution Specific" Understanding of the Sixth Amendment Right to Counsel*, 104 COLUM. L. REV. 134, 149–50 (2004), the *Ventris* right to be free from interrogation may prove to be a rather narrow one.

[223] *See supra* note 191 and accompanying text.

[224] As I have argued earlier, purposeful and unjustified or excused governmental intrusions into actual attorney-client conferences sometimes violate protected Sixth Amendment privacy:

> *Governmental Intrusions Into Attorney-Client Conferences*
>
> (1) Ad hoc governmental intrusions into the attorney-client relationship of an accused do not violate Sixth Amendment privacy if the intrusions were unknown to either the accused or his counsel at the time of attorney-client communications.
>
> (2) Systematic governmental intrusions into attorney-client relationships of accused persons violate, or presumably violate, Sixth Amendment privacy if the particular accused claiming a violation shows that at the time of the alleged violation he was aware of the pattern of governmental intrusions and that the intrusions were of a kind that posed a reasonable risk of inhibiting communication with his counsel, whether or not the government actually intruded into the attorney-client conferences of the accused

*Ventris* right to be free from uncounseled interrogation. If in the Fifth Amendment context maintaining the accusatorial model is not risked by interrogation of suspects prior to the initiation of adversarial proceedings,[225] why should the instigation of formal accusation magically insulate an accused, particularly when he can still be interrogated regarding other offenses closely related to the ones formally charged?[226] Interrogation of formally charged persons, whether in situations like *Williams* where the accused knows he is being interrogated or in ones like *Massiah* and *Ventris* where he is unaware of governmental interrogation, entails intrusions permissible under the Fourth Amendment[227] and (with the exception of *Williams*)[228] under *Miranda*.[229] Surely the appeal to Sixth Amendment

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and his counsel.

(3) Any governmental intrusion, either ad hoc or systematic, into the attorney-client relationship of an accused violates Sixth Amendment privacy if the particular accused claiming a violation shows that the intrusion posed a reasonable risk of inhibiting attorney-client communication and did in fact inhibit free communication between the accused and his counsel.

*Governmental Confrontations of Officially Charged Persons Outside the Presence of Their Attorneys*

(4) Sixth Amendment privacy is violated only where a governmental confrontation of an accused outside the presence of counsel is intended, or is reasonably likely, to induce deterioration of an existing attorney-client relationship of an accused and his counsel and where the confrontation actually induces a deterioration of the attorney-client relationship.

*See* Gardner, *The Sixth Amendment Right to Counsel*, *supra* note 11, at 457–58 (footnotes omitted).

[225] *See supra* notes 212–15 and accompanying text.

[226] *See supra* note 222.

[227] Williams turned himself in to the police and thus no question of a "seizure" of the person contrary to the Fourth Amendment existed. *See* Brewer v. Williams, 430 U.S. 387, 390 (1977). While in custody he enjoyed minimal Fourth Amendment privacy protection. *See* Hudson v. Palmer, 468 U.S. 517, 525–26 (1984) (confined prisoners have no privacy protections in their cells). In *Massiah* and *Ventris*, no Fourth Amendment searches or seizures occurred through the interrogation by secret informants. *See* Hoffa v. United States, 385 U.S. 293, 302–03 (1966) (no illegal search or seizure where undercover informant secretly gathered incriminating evidence from suspect during conversations after being invited into the suspect's hotel room).

[228] Williams was in custody and knew he was conversing with the police. *See Brewer*, 430 U.S. at 392–93. Therefore, *Miranda* was applicable. *See* Kamisar, *supra* note 8, at 51–55.

[229] *See* Illinois v. Perkins, 496 U.S. 292, 300 (1991) (*Miranda* inapplicable where suspect in

privacy provides at best a shallow basis for the right to be free from interrogation which is clearly unjustified in terms of the Amendment's "deep values:" protection of the innocent and the pursuit of truth.[230] It is thus difficult to see how interrogation per se of an officially charged suspect constitutes a Sixth Amendment evil.

In addition to theoretical concerns with the *Ventris* right to be free from uncounseled interrogation, recognition of the right raises a variety of practical issues. Presumably Section 1983 actions will now be brought as the remedy for violating the right to be free from interrogation under *Ventris*. The point of the actions will be to deter the police from engaging in such interrogation. But will the Section 1983 remedy be effective to achieve its purposes? What damages occur when the police, secretly or otherwise, direct a question or two to an officially charged accused outside the presence of his lawyer, particularly if the accused says nothing? If damages in such situations are minimal as seems likely,[231] the police will likely be undeterred from routinely conducting such interrogations in the future.[232] The costs, both in time and money, of introducing this new and likely ineffective remedy clearly outweigh any benefits derived thereby.

Of course many of the reasons for rejecting the right to be free from interrogation under *Ventris* lead to rejecting *Massiah* itself. There simply appears no good reason for continuing the tortured line of deliberate elicitation cases. The genuine evils of coercive interrogation are addressed in *Miranda* and its progeny.[233] I therefore join the chorus of others in

custody is interrogated by an unknown informant secretly planted in the suspect's cellblock); Kamisar, *supra* note 8, at 48, 50.

[230] *See supra* note 36. There is every reason to believe that all the accused parties in the *Massiah* cases provided truthful evidence evidencing their actual guilt. *See Massiah*, 377 U.S. at 212–13.

[231] *See* Hudson v. Michigan, 547 U.S. 586, 609–11 (2006) (Breyer, J., dissenting) (noting that in the *Hudson* context Section 1983 actions provide mere nominal damages at best, thus inadequately deterring violations of privacy resulting from violations of "knock-and-announce" requirements for search warrants). Because the invasions entailed in the knock-and-announce failures generally involve intrusions into the home, they may actually constitute greater damage to protected privacy than those occurring when police merely interrogate in violation of *Ventris*.

[232] This is particularly true in light of the fact that any incriminating evidence obtained through the interrogation is admissible for impeachment purposes under *Ventris*. *See* Kansas v. Ventris, 129 S.Ct. 1841, 1846 (2009).

[233] *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966). The Fourth Amendment also plays a role for interrogations occurring outside the "custodial" requirement of *Miranda*. *See* U.S.

urging that *Massiah* should be abandoned and with it, the *Ventris* right to be free from interrogation.[234]

## V. CONCLUSION

In this article I have discussed the Supreme Court's recent recognition in the *Ventris* case of a Sixth Amendment right to be free from uncounseled interrogation. The right flows from the Court's conclusion that violations in *Massiah* cases occur at the time governmental agents interrogate officially accused suspects outside the presence of their counsel, and not at the time evidence obtained therefrom is used against the accused.

In an attempt to understand the constitutional foundation for the *Massiah* cases, I demonstrated that the cases can best, perhaps only, be understood as embodiments of an obscure privacy interest embodied in Sixth Amendment jurisprudence. In this process, I contrasted the Court's recent *Martinez* case that denies a right to be free from interrogation in the *Miranda* context. I concluded that the presence of the privacy value in *Ventris* and its absence, or that of any other substantive interest in *Martinez*, accounts for the recognition of the right to be free from interrogation in *Massiah*, but not in *Miranda*, cases.

The recognition in *Ventris* of a right to be free from interrogation extends the logic of *Massiah* and exposes its previously latent privacy underpinnings. This exposition makes clear once and for all that *Massiah* has always rested on a foundation of sand. If under *Ventris* asking a simple question or two to an uncounseled accused violates his right to counsel, but only if he happens to be officially accused, the situation is clearly constitutionally amiss. It is time to abandon the "upside down" world of

CONST. amend. IV. Non-custodial interrogations are impermissible if they are the product of an illegal seizure of the person, including a minimally intrusive "Terry stop." *See, e.g.*, United States v. Santillanes, 848 F. 2d 1103, 1109 (10th Cir. 1988) (Fourth Amendment violated where police stopped an accused known to be under indictment to question him in an airport about possible violation of pretrial release conditions). Even if a *Terry*-stop is permissible, if it escalates into a full fledged arrest, it becomes illegal unless supported by probable cause. *See, e.g.*, Florida v. Royer, 460 U.S. 491, 491 (1983) (permissible stop of passenger in airport escalated into illegal arrest when detectives escorted passenger from airport concourse into a small room for questioning).

[234] *See, e.g.*, *supra* notes 34–41 and accompanying text; *see also* Sherry F. Colb, *Why the Supreme Court Should Overrule the* Massiah *Doctrine and Permit* Miranda *Alone to Govern Interrogations*, FINDLAW (May 9, 2001), http://writ.news.findlaw.com/colb/20010509.html.

*Massiah* and the *Ventris* right to be free from uncounseled interrogation which it has spawned.[235]

[235] *See supra* notes 34–37 and accompanying text.