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An Adversary System Defense of the Right to Counsel Against Informants: Truth, Fair Play, and the *Massiah* Doctrine

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INTRODUCTION

Our premier legal educator[1] has consistently instructed that the right to counsel's assistance is indispensably fundamental to the American

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[1] Many have recognized the Supreme Court's educational role. *See, e.g.*, Hazelwood School Dist. v. Kuhlmeier, 108 S. Ct. 562, 580 (1988) (Brennan, J., dissenting) ("[I]nstead of 'teach[ing] children to respect the diversity of ideas that is fundamental to the American system,' . . . and 'that our Constitution is a living reality, not parchment preserved under glass,' the Court today 'teach[es] youth to discount important principles of our government as mere platitudes.' " (citations omitted)); New Jersey v. T.L.O., 469 U.S. 325, 373 (1985) (Stevens, J., dissenting) (maintaining that " 'overall educative effect' of Court's exclusionary rule adds important symbolic force to" its "utilitarian" impacts (citation omitted)); Doe v. Renfrow, 451 U.S. 1022, 1027-28 (Brennan, J., dissenting from denial of certiorari) (contending that Court should "grant certiorari to teach petitioner [a] lesson: that the Fourth Amendment protects '[t]he right of the people to be secure' "); Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths — A Dead End?*, 86 COLUM. L. REV. 9, 115 (1986) (observing that "the Court as teacher" has an obligation "to speak thoughtfully and candidly

criminal justice system.[2] The Court has also taught that undercover investigative informants are essential to effective law enforcement.[3] Whenever fundamental and essential principles conflict, controversy is inevitable. The conflict between the right to counsel and the use of undercover informants is no exception. This clash has generated complex legal issues, caustic emotional debates, enigmatic doctrine, and surprising outcomes.

The Court's first attempt to reconcile the right to counsel with informants was *Massiah v. United States*.[4] The appearance of *Miranda*[5] shortly after *Massiah* eclipsed *Massiah* doctrine and precipitated eleven dormant years.[6] *Miranda*'s subsequent waning, among other events, ended *Massiah*'s dormancy.[7] In 1977 a vital *Massiah* doctrine

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about the issues"); Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in CRIMINAL JUSTICE IN OUR TIME 91 (A. Howard ed. 1965) (describing Court as our greatest educational institution).

[2] *See, e.g.*, Maine v. Moulton, 474 U.S. 159, 168-69 (1985) ("The right to the assistance of counsel guaranteed by the Sixth and Fourteenth Amendments is indispensable to the fair administration of our adversarial system of criminal justice." (footnote omitted)); United States v. Cronic, 466 U.S. 648, 653-54 (1984) (stating that accused's right to counsel is "pervasive" and "a fundamental component of our criminal justice system"); Brewer v. Williams, 430 U.S. 387, 398 (1977) (stating that sixth amendment is "indispensable to the fair administration of our adversary system of criminal justice"); Argersinger v. Hamlin, 407 U.S. 25, 31 (1972) ("The assistance of counsel is often a requisite to the very existence of a fair trial."); Johnson v. Zerbst, 304 U.S. 458, 462 (1938) (finding that sixth amendment counsel guarantee is necessary to insure fundamental rights).

[3] *See, e.g.*, Weatherford v. Bursey, 429 U.S. 545, 557 (1977) (noting that Court has long recognized the unfortunate necessity and value of undercover work); United States v. Russell, 411 U.S. 423, 445 (1973) (Stewart, J., dissenting) (asserting that many crimes would go undetected without use of informants); Hoffa v. United States, 385 U.S. 293, 315 (1966) (Warren, C.J., dissenting) (stating that there are many situations in which law cannot be enforced without use of undercover agents); United States v. Dennis, 183 F.2d 201, 224 (2d Cir. 1950) (arguing that use of informants is especially warranted when crime is inchoate and criminals are covertly proceeding), *aff'd*, 341 U.S. 494 (1951); *see also* Dix, *Undercover Investigations and Police Rulemaking*, 53 TEX. L. REV. 203, 210 (1975) (observing that without informants successful prosecution would be impossible in some cases); Kamisar, Brewer v. Williams, Massiah *and* Miranda: *What Is "Interrogation"? When Does It Matter?*, 67 GEO. L.J. 1, 69 (1978) (stating that "by concealing its agents' true identities the government can gather evidence that it would not be able to acquire if these agents had to go unmasked").

[4] 377 U.S. 201 (1964).

[5] Miranda v. Arizona, 384 U.S. 436 (1966).

[6] *See* Grano, Rhode Island v. Innis: *A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 AM. CRIM. L. REV. 1, 7 & n.45 (1979) (noting that *Massiah* got lost in and swamped by *Miranda*).

[7] *Cf.* Kamisar, *supra* note 3, at 80 (stating that, in light of weakening of *Miranda*,

reemerged in *Brewer v. Williams*.[8] In five significant decisions during the eleven years since *Williams*, the *Massiah* doctrine has begun to find its long-postponed maturity.[9]

Massiah is certainly a rare anomaly in these conservative times.[10] Against a backdrop of erosion and decline for criminally accused individuals' constitutional rights,[11] of solicitous Court attention to prosecutorial needs and law enforcement wants,[12] and of infrequent de-

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sixth amendment counsel could be major obstacle in way of return to "voluntariness" standard); White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581, 590 (1979) [hereafter White, *Police Trickery*] (asserting that *Miranda*'s narrowing enhances *Massiah* right's significance); White, Rhode Island v. Innis: *The Significance of a Suspect's Assertion of His Right to Counsel*, 17 AM. CRIM. L. REV. 53, 69-70 (1979) [hereafter White, *Suspect's Assertion*] (noting that Court presently seems to be "extremely uncomfortable" with *Miranda* doctrine).

[8] The *Massiah* doctrine was given new life in Brewer v. Williams, 430 U.S. 387 (1977). This infamous Iowa case involved the "Christian Burial Speech," designed to elicit the location of a young murder victim's body before the then falling snow could conceal it. *See id.*

[9] *See* Patterson v. Illinois, 108 S. Ct. 2389 (1988); Kuhlmann v. Wilson, 477 U.S. 436 (1986); Michigan v. Jackson, 475 U.S. 625 (1986); Maine v. Moulton, 474 U.S. 159 (1985); United States v. Henry, 447 U.S. 264 (1980); Brewer v. Williams, 430 U.S. 387 (1977).

[10] *See* Uviller, *Evidence From the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 COLUM. L. REV. 1137, 1155 (1987) (calling *Massiah* "strangely durable").

[11] In virtually every domain, the landmark opinions of the 1960s have been limited or narrowly reinterpreted during the 1970s and 1980s. *See, e.g.*, New York v. Quarles, 467 U.S. 649 (1984) (restricting *Miranda's* scope), Michigan v. Mosley, 423 U.S. 96 (1975) (same); Illinois v. Gates, 462 U.S. 213 (1983) (shrinking fourth amendment protection), New York v. Belton, 453 U.S. 454 (1981) (same); United States v. Ash, 413 U.S. 300 (1973) (restrictively interpreting sixth amendment protection in identification contexts), Kirby v. Illinois, 406 U.S. 682 (1972) (same); Manson v. Brathwaite, 432 U.S. 98 (1977) (confining due process clause safeguard against erroneous eyewitness identification); Oregon v. Elstad, 470 U.S. 298 (1985) (curbing operation of fourth and fifth amendment exclusionary rules), United States v. Leon, 468 U.S. 897 (1984) (same), Rakas v. Illinois, 439 U.S. 128 (1979) (same), Harris v. New York, 401 U.S. 222 (1971) (same).

[12] *See* Colorado v. Connelly, 479 U.S. 157, 184 n.5 (1986) (Brennan, J., dissenting) (accusing the Court of appearing to be both a champion and an arm of the prosecution); New Jersey v. T.L.O., 469 U.S. 325, 374-75 (1985) (Stevens, J., dissenting) (discussing Court's tendencies to grant prosecutors relief from suppression orders with "distressing regularity," and to "rely on grounds not advanced by the parties in order to protect evidence from exclusion"); Solem v. Stumes, 465 U.S. 638, 667 (1984) (Stevens, J., dissenting) ("The Court is understandably concerned about the conduct of private lawbreakers, . . . [but] that concern should not . . . divert its attention from the overriding importance of requiring strict obedience to the law by those officials who are entrusted with its enforcement . . . ."); United States v. Place, 462 U.S. 696, 720 (1983)

fense victories,[13] the *Massiah* right to counsel has survived.[14] As if immune to the passing of the Warren Court, it has even had the audacity to expand. The *Massiah* entitlement has been the one constitutional

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(Brennan, J., concurring) (stating that Court has used the balancing approach of Terry v. Ohio, 392 U.S. 1 (1968), to justify its submission to pressure to " 'water down constitutional guarantees and give police the upper hand' ").

[13] The Court's long line of *Miranda* decisions provides a fitting illustration of the infrequency of successful defense claims. In sixteen exemplary decisions between 1975 and 1987, the prosecution prevailed thirteen-and-a-half times. *See* Arizona v. Mauro, 107 S. Ct. 1931 (1987) (defendant's claim failed for lack of "interrogation"); Colorado v. Connelly, 479 U.S. 157 (1986) (invalid waiver claim unsuccessful because of lack of official coercive conduct); Moran v. Burbine, 475 U.S. 412 (1986) (waiver's validity not affected either by failure to inform suspect of attorney's attempts to contact him or by state's deception of attorney); Oregon v. Elstad, 470 U.S. 298 (1985) (despite taint on initial admission following failure to deliver proper *Miranda* warnings, confession following subsequent correct warnings bore no presumptive taint and was admissible); Berkemer v. McCarty, 468 U.S. 420 (1984) (claim partially unsuccessful because ordinary traffic stop did not constitute "custody"); New York v. Quarles, 467 U.S. 649 (1984) (failure to give warnings was excused by "public safety exception" to *Miranda* doctrine); California v. Beheler, 463 U.S. 1121 (1983) (claim lacked merit because suspect at police station was not in "custody"); Oregon v. Bradshaw, 462 U.S. 1039 (1983) (ambiguous comment sufficient to "initiate" further communications and to cancel effects of earlier invocation of right to counsel); California v. Prysock, 453 U.S. 355 (1981) (juvenile's claim that warnings were inadequate rejected because substance of warnings was effectively conveyed); Rhode Island v. Innis, 446 U.S. 291 (1980) (government successful because officer's remarks about "handicapped little girl" did not amount to "interrogation"); North Carolina v. Butler, 441 U.S. 369 (1979) (defense contention rejected because waiver need not be express but can be inferred from all circumstances); Oregon v. Mathiason, 429 U.S. 492 (1977) (defendant not in "custody" despite presence in police station); Beckwith v. United States, 425 U.S. 341 (1976) (suspect not in "custody"; fact that he was "focus" of investigation insufficient to trigger *Miranda*); Michigan v. Mosley, 423 U.S. 96 (1975) (claim failed because officer who resumed interrogation following suspect's invocation of right to remain silent "scrupulously honored" suspect's right to cut off questioning).

Defendants scored half a victory in *McCarty* (holding *Miranda* doctrine equally applicable to misdemeanors). They scored complete victories in Edwards v. Arizona, 451 U.S. 477 (1981) (finding defendant's invalid waiver claim meritorious because officers "initiated" communications following defendant's assertion of right to counsel), and Estelle v. Smith, 451 U.S. 454 (1981) (concluding that *Miranda* was applicable to court-ordered pretrial competency examination by psychiatrist and that doctrine controls even though statements were only used to determine penalty). As a doctrinal matter, the *Edwards* victory was all but nullified within two years by the Court's *Oregon v. Bradshaw* decision which constrictively defined and applied the concept of "initiation." The winning percentage for *Miranda* defendants is clearly quite low.

[14] *See* Uviller, *supra* note 10, at 1190 (asserting that although Court is generally "unsympathetic" to interpretations that shield guilty criminals from uncoerced admissions, it has "resoundingly" reaffirmed *Massiah*).

right that has consistently furnished criminal defendants with support for victorious claims.[15]

The reasons for *Massiah*'s phenomenal endurance are uncertain. The Court majority might be influenced by an almost mystical reverence for sixth amendment counsel that does not require, and even defies, rational explanation.[16] A cynical realist, however, might suspect that *Massiah* doctrine has been spared because it poses a relatively impotent impediment to law enforcement.[17] It is even possible that the

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[15] There have been eight major decisions in the *Massiah* line. *See* Patterson v. Illinois, 108 S. Ct. 2389 (1988); Kuhlmann v. Wilson, 477 U.S. 436 (1986); Michigan v. Jackson, 475 U.S. 625 (1986); Moran v. Burbine, 475 U.S. 412 (1986); Maine v. Moulton, 474 U.S. 159 (1985); United States v. Henry, 447 U.S. 264 (1980); Brewer v. Williams, 430 U.S. 387 (1977); and Massiah v. United States, 377 U.S. 201 (1964). Defendants have prevailed in five of those cases, and in two "minor" *Massiah*-based decisions. *See* Beatty v. United States, 389 U.S. 45 (1967) (per curiam); McLeod v. Ohio, 381 U.S. 356 (1965) (mem. per curiam). Moreover, two of the defense losses were somewhat "limited." In *Wilson*, the Court majority had already decided that the defendant should lose on procedural (habeas corpus) grounds, before it concluded, in dictum, that his substantive *Massiah* claim also lacked merit. In *Burbine*, the sixth amendment portion of the Court's opinion, though doctrinally significant, was overshadowed by its controversial conclusions concerning the *Miranda* doctrine.

In *Patterson*, the Court demonstrated that its enthusiasm for the *Massiah* right has limits. This most recent *Massiah* doctrine opinion rejected a plausible contention that sixth amendment waiver standards are always more demanding than *Miranda* waiver standards. Still, the Court did note that "a distinct set of constitutional standards" would apply to waivers after counsel was retained or appointed. 108 S. Ct. at 2393 n.3. The majority also concluded that, unlike *Miranda* waivers, *Massiah* "waiver[s] would not be valid" if accused defendants were not told of their lawyers' attempts to reach them during questioning. *Id.* at 2397 n.9.

[16] The Court's reverence for counsel is evinced by the intensity of the language it has chosen in praising the right. *See, e.g.*, United States v. Cronic, 466 U.S. 648, 653-54 (1984) (describing accused's right to counsel as "pervasive" and "a fundamental component of our criminal justice system"); Argersinger v. Hamlin, 407 U.S. 25, 31 (1972) ("The assistance of counsel is often a requisite to the very existence of a fair trial."); Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (concluding that counsel is a necessity, not a luxury, and that "the right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours"); Powell v. Alabama, 287 U.S. 45, 68-69 (1932) (declaring that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel [and that a layman] requires the guiding hand of counsel at every step in the proceedings against him"). This Article does not suggest that such devotion to the counsel guarantee is unjustified, but only that it has a force of its own that can influence the Court's decisions. One risk of such high esteem is the substitution of rhetoric for principled analysis.

[17] The impact of the current *Massiah* right is diminished by two significant doctrinal limitations. First, the right does not attach prior to the formal initiation of proceedings. *See infra* notes 66 & 253-56 and accompanying text. Second, an unaided layperson can

Court's consistent failure to explain *Massiah*'s constitutional rationale has protected the right. An ill-defined, out of focus target is more difficult to strike. For whatever reasons, the *Massiah* right remains relatively healthy amid a sea of ailing relatives.[18]

The *Massiah* right is certainly not the most substantial constitutional protection afforded criminal defendants.[19] *Massiah* is, however, theoretically and symbolically significant to the understanding and appreciation of the constitutional right to counsel.[20] Because it resides at the sixth amendment's outer border,[21] the *Massiah* right provides unique opportunities to examine the significance of the counsel guarantee. Identification of the boundaries of counsel's control requires in-depth exploration of the objectives and general principles that inspired the Framers to constitutionalize counsel. Such an exploration is unavoid-

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surrender the *Massiah* right. *See Patterson*, 108 S. Ct. at 2397-99 (holding that standards governing unassisted defendant's waiver of *Massiah* right are no more stringent than those governing waiver of *Miranda* counsel); *Williams*, 430 U.S. at 405-06 (recognizing possibility that an accused without counsel can knowingly and voluntarily waive sixth amendment *Massiah* right).

[18] Since their zeniths in the late 1960s, both the fourth amendment and *Miranda*'s interpretation of the fifth amendment privilege against compulsory self-incrimination, to take two prominent examples, have lost much of their vitality. *See supra* note 11.

[19] Still, the right reflects one of only three limited, official constitutional roles that the Court has accorded counsel in extrajudicial pretrial proceedings. The other two roles are counsel as an observer-assistant at pretrial confrontations for identification, *see* United States v. Ash, 413 U.S. 300 (1973); United States v. Wade, 388 U.S. 218 (1967), and counsel as conductor of the pretrial preparation necessary to defend at trial, *see* Powell v. Alabama, 287 U.S. 45 (1932) (describing preparatory role).

[20] *Massiah* has been criticized as a mere symbol that furnishes little practical benefit to defendants. *See* Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 892 (1981) (describing Professor Kamisar's feelings about *Massiah*'s minimal worth). While there may be some truth in this sentiment, there are reasons not to be quite so pessimistic about the right. First, development of a clear vision of the *Massiah* right and the refinement of its doctrine, consistent with its underlying premises, could augment its substance and enhance its symbolic stature. Moreover, constitutional symbols play vital societal roles; ultimately, they have considerable substantive impact. *See* New Jersey v. T.L.O., 469 U.S. 325, 373 (1985) (Stevens, J., dissenting) ("Those of us who revere the flag and the ideals for which it stands believe in the power of symbols [and] cannot ignore that rules of law also have a symbolic power that may vastly exceed their utility."); Schulhofer, *supra*, at 893 (observing that "[o]n the symbolic level . . . the Court has every reason to continue operating on the 'high ground' of concern for those individual liberties threatened by increasingly complex and powerful social institutions").

[21] *See* United States v. Henry, 447 U.S. 264, 281-82 (1980) (Blackmun, J., dissenting) (describing *Massiah* as "the decision in which Sixth Amendment protections have been extended to their outermost point").

ably legal, philosophical, and ethical.[22]

The Court's explorations of the *Massiah* right have failed to justify adequately the constitutional recognition of a counsel safeguard against informants' attempts to secure incriminating admissions.[23] Consequently, many have questioned the *Massiah* entitlement's viability and right to exist.[24] Whether *Massiah* has defensible constitutional roots, and whether these roots are in the sixth amendment, are significant questions. If the *Massiah* right is an unprincipled, reflexive response to distaste for government informants,[25] the Court should reveal and rethink it, or bury it. If the right is constitutionally supportable, however, it deserves better treatment, greater respect, and more protection.[26]

Massiah doctrine is anything but the picture of clarity.[27] It is a com-

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[22] *See* W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 225 (1955) (stating that questions regarding whether or not to accord counsel are "ethical or philosophical").

[23] *See* Note, *Application of the Impeachment Exception to the Sixth Amendment Exclusionary Rule: Seeking a Resolution Based on the Substance of the Right to Counsel*, 50 ALB. L. REV. 343, 373 (1986) (stating that although *Massiah* rule is "relatively clear," its constitutional theory is "somewhat obscure"); *infra* notes 143-56 and accompanying text; *see also* Berger, *supra* note 1, at 115 (criticizing Court's "visions" of counsel as "incoherent" and "cynical"); Dix, *supra* note 3, at 228 (challenging Court's failure to specify what interest *Massiah* is supposed to safeguard).

[24] *See infra* notes 114-42 and accompanying text. Some present day challenges to *Massiah*'s legitimacy have been quite intemperate. In a recent article, portions of which will be addressed later, Professor Uviller introduced *Massiah* as a "villain" before proceeding to disparage it mercilessly. *See* Uviller, *supra* note 10, at 1138, 1154-55, 1162-64, 1168, 1183, 1190, 1195, 1212. In a noteworthy recent opinion, a federal trial court could not refrain from swiping at *Massiah* while reversing a conviction as required by that doctrine. *See* McCleskey v. Kemp, 42 Crim. L. Rep. (BNA) 2302, 2303 (N.D. Ga. Dec. 23, 1987) (observing that "investigator(s) violated clearly established case law, however artificial or ill-conceived it might have appeared").

[25] *See* Dix, *supra* note 3, at 208-10 (suggesting that the public views informants "with distaste" and that *Massiah* is a manifestation of a similar judicial attitude).

[26] *Cf.* Grano, *supra* note 6, at 3 (stating that "major premises" supporting judicial "inferences" (such as *Massiah*) must be connected to "written Constitution" that is their source of legitimacy). If *Massiah* is not "connected to" the Constitution, it will remain vulnerable to its critics' broadsides. *See infra* notes 114-42 and accompanying text. Moreover, logically consistent doctrine can only be derived from a comprehensible theoretical foundation.

[27] *See* Muehleman v. Florida, 108 S. Ct. 39, 39 (1987) (mem.) (Marshall, J., dissenting from denial of certiorari) (complaining about the "potential for misunderstanding" and the "uncertainty created by [the Court's *Massiah*] holdings"); Sweat v. Arkansas, 469 U.S. 1172, 1177 (1985) (mem.) (Brennan, J., dissenting from denial of certiorari) (recognizing that there has "occasionally been disagreement as to the precise formulation of the relevant standard"); Rhode Island v. Mattatall, 525 A.2d 49, 51 (R.I. 1987) (stating that *Massiah* doctrine contains a "maze of fine distinctions" that

bination of lucid lines, vague contours, and positively blurred and unknown areas. If the right is to survive, the Court needs to refine, explain, and clarify its standards. Judges, prosecutors, defendants, and police deserve improved guidance.[28]

The *Massiah* right's remarkable stamina and growth, its theoretical importance, and its deficiencies of rationale and doctrine have inspired the analyses that follow. The primary goals of this Article are to assess *Massiah*'s proper place in our law and in our criminal justice system, to furnish a constitutional defense of the *Massiah* right, and to answer its quite vocal critics. In pursuit of those objectives the Article highlights the value choices implicit in determining the proper sphere of sixth amendment operation.

Part I traces *Massiah*'s historical development and explains its present status.[29] Part II suggests rationales for the *Massiah* right and outlines the debate over *Massiah*'s legitimacy.[30] Part III critically evaluates the right to counsel against undercover informants and proffers conceptions of the sixth amendment guarantee by which to judge and upon which to found *Massiah*.[31] Finally, Part IV investigates the doctrinal ramifications of rethinking *Massiah*.[32]

I. The Origins and Current State of *Massiah* Doctrine

This Part of the Article sketches the background and development of the *Massiah* right to counsel and describes the current doctrine. After a brief pre-*Massiah* review, *Massiah* itself is considered. Then, the developments of the past eleven years are reviewed, and the ambiguities left for lower court resolution are noted.

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are "extremely subtle"); Cluchey, Maine v. Moulton: *The Sixth Amendment and "Deliberate Elicitation": The Defendant's Position*, 23 Am. Crim. L. Rev. 43, 49 (1985) (calling *Massiah* doctrine unclear); Dix, *supra* note 3, at 235 (suggesting that it may be the case that "no logical doctrinal development" is "possible").

[28] The Court's duty to furnish guidance has been a recurrent topic in other areas. *See, e.g.*, New York v. Quarles, 467 U.S. 649, 679 (1984) (Marshall, J., dissenting) (suggesting that *Miranda* doctrine should provide concrete guidelines); New York v. Belton, 453 U.S. 454, 458-59 (1981) (stating that Court has duty to provide clear fourth amendment doctrinal guidance for law enforcement). Recently, Justice Marshall observed that the Court has a similar obligation in the *Massiah* area. *See* Muehleman v. Florida, 108 S. Ct. 39, 42 (1987) (Marshall, J., dissenting from denial of certiorari) ("We owe it to law enforcement officials and the courts to establish clearly the line across which constitutional error lies.").

[29] *See infra* notes 33-93 and accompanying text.

[30] *See infra* notes 94-142 and accompanying text.

[31] *See infra* notes 143-247 and accompanying text.

[32] *See infra* notes 248-346 and accompanying text.

*A. The Pre-*Massiah *Right to Counsel*

The right to counsel does not have the illustrious Anglo-American heritage one might expect.[33] Our British ancestors did not view counsel as an essential safeguard for the criminally accused. They denied felons the right to assistance, reserving the entitlement for those accused of the least serious crimes.[34] By statute and by constitutional provision, American colonists abandoned the hostile, restrictive approach to counsel of their British forebears.[35] Still, the colonial attitude toward lawyers was far from positive.[36] Even at the time of the Constitution's adoption and the clamor for a Bill of Rights, Americans did not revere the right to counsel. Counsel was not considered to be one of the vital entitlements granted by the initial amendments.[37] Moreover, the right thought to be extended to the accused by the sixth amendment was

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[33] *See* Crooker v. California, 357 U.S. 433, 439 (1958) (stating that right to counsel is "not firmly fixed in our common-law heritage"); F. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 9-10 (1951) (stating that denying counsel to and hampering defense of felon were applauded by public opinion in early England). According to Heller, American colonies' early statutes prohibited employment of professional counsel, declaring, for example, that " 'it shall be a base and vile thing to plead for money and reward.' " *Id.* at 18-19 (citation omitted).

[34] *See* W. BEANEY, *supra* note 22, at 8-9; F. HELLER, *supra* note 33, at 9-10. Rejection of the right to counsel for felons was justified on several grounds, including the beliefs that the impartial judge would protect the accused, that a criminal proceeding was simple enough for anyone to understand, that an indicted defendant was clearly half guilty, and that the relatively weak state could better ensure the security of society if the felon was left unaided. *See* W. BEANEY, *supra* note 22, at 11.

[35] *See* United States v. Ash, 413 U.S. 300, 306-07 (1973) (explaining that colonial statutes rejected British common law rule because it was "absurd and illogical" and because, without legal assistance, a layman could not cope with complex legal technicalities). England also gradually moved away from the strict common law rule as courts made exceptions to it and eventually came to allow counsel on a discretionary basis. *See* Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 311-14 (1978); Post, *The Admissibility of Defense Counsel in English Criminal Procedure*, J. LEGAL HIST., Dec. 1984, at 23. Finally, in 1836, England abandoned the common-law approach by statute, and granted a *right* to counsel for felons equal to that accorded misdemeanants. W. BEANEY, *supra* note 22, at 11, 225.

[36] *See supra* note 33.

[37] Several states' ratifying conventions demanded that our Constitution be amended by adding a Bill of Rights, but the right to counsel does not seem to have been an important motivation. *See* W. BEANEY, *supra* note 22, at 22-23. In fact, only two states included counsel among the amendments they proposed. *Id.* Other rights may have been considered "of greater importance and more worthy of demand" than counsel because of the assumption that most criminal prosecutions would continue to be conducted by states according to existing systems of procedure (including counsel) which the states found satisfactory. *Id.* at 23.

quite modest by modern standards. The constitutional "right to the assistance of counsel" referred simply to *trial* assistance by a *retained* lawyer.[38]

The right to counsel incorporated into our fundamental charter pales in comparison to its modern counterpart. Time, experience, and our criminal justice system's evolution have greatly enhanced the sixth amendment grant's legal stature, significance, and scope. First, criminal proceedings developed judicial phases prior to trial. Counsel followed defendants into these "critical stages" of the proceedings to assist, as at trial, with substantive and procedural legal matters and to counter the personification of governmental power — the public prosecutor.[39] Gradually, American systems of investigation and prosecution evolved further, developing additional, nonjudicial pretrial stages. In these stages, police and prosecutors attempted to secure inculpatory information from accused or suspected individuals.[40] The natural question was when, if ever, individuals involved in such confrontations were entitled to the guiding presence of counsel.

Official interrogation was one of the "informal" contexts that posed the question.[41] By the late 1950s the enduring menace of coerced confessions had grown ripe for further legal constraint. A troubled Court was being urged to find a better constitutional solution than the frustratingly ineffectual due process-voluntariness test.[42]

In two *Massiah* precursors, *Crooker v. California*[43] and *Cicenia v. LaGay*,[44] uncharged state suspects asked the Court to conclude that the

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[38] *See* W. BEANEY, *supra* note 22, at 226.

[39] *See Ash*, 413 U.S. at 310-11; United States v. Wade, 388 U.S. 218, 224-25 (1967). The recognition of a right to counsel for the arraignment in Hamilton v. Alabama, 368 U.S. 52 (1961), exemplifies this process of extension to pretrial judicial phases.

[40] *See Ash*, 413 U.S. at 310; *Wade*, 388 U.S. at 224-25; *see also* Note, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 YALE L.J. 1000, 1041 (1964) [hereafter Note, *Historical Argument*]; Note, *Inanimate Listening Devices: A Violation of Sixth Amendment Right to Counsel*, 14 LOY. U. CHI. L.J. 359, 364-65 (1983) [hereafter Note, *Inanimate Devices*].

[41] The current practice of police interrogation did not exist for centuries. When the law enforcement community undertook the interrogation of suspects and accused individuals, it was assuming functions previously assigned to the judiciary. *See* Kamisar, *supra* note 1, at 29-30.

[42] *See* Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 557-59 (5th ed. 1980) [hereafter MODERN PROCEDURE]; W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE 268-69 (1985).

[43] 357 U.S. 433 (1958).

[44] 357 U.S. 504 (1958).

denial of counsel at their interrogations violated due process. A divided Court declined.[45] Soon thereafter, however, in *Spano v. New York*,[46] it became evident that at least five members of the Court were prepared to extend counsel to indicted individuals subjected to interrogation.[47] Nevertheless, because the *Spano* majority was content to rely upon the due process-coerced confession doctrine in reversing the defendant's conviction, counsel remained on the threshold of informal pretrial processes.

B. The Arrival of Massiah

Spano, a police interrogation case, set the stage for counsel's initial introduction into extrajudicial processes in the role of coercion preventer. In *Massiah*,[48] however, the Court wrote counsel into a scene of the extrajudicial drama that posed little risk of coercion.[49] Counsel's surprising initial appearance was as a buffer between the accused and the unknown government informant.[50] The *Massiah* majority unveiled a counsel entitlement that operated whenever a government agent "deliberately elicited" inculpatory words from an indictee.[51] It then an-

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[45] *Crooker* was a 5-4 decision, and *Cicenia* was decided by a 5-3 vote. Although the majorities deemed denials of counsel and requests for counsel as relevant in due process-coerced confession analysis, they refused to make either factor dispositive. *See Crooker*, 357 U.S. at 439 (holding that "state refusal of a request to engage counsel" at the pre-proceedings stage violates due process only if accused is "so prejudiced thereby as to infect his subsequent trial with an absence of . . . fundamental fairness. . ."); *Cicenia*, 357 U.S. at 509 (reiterating that "defendant's lack of counsel [is] one pertinent element in determining from all the circumstances whether a conviction was attended by fundamental unfairness").

[46] 360 U.S. 315 (1959).

[47] *See* MODERN PROCEDURE, *supra* note 42, at 561 (observing that after *Spano* five Justices were on record as prepared to extend the right to counsel to interrogations).

[48] 377 U.S. 201 (1964).

[49] Nevertheless, the *Massiah* Court traced the roots of its holding to the *Spano* concurrences. *See id.* at 204. The modern Court continues to trace the origins of the *Massiah* doctrine to *Spano*, a classic police coercion case. *See* Kuhlmann v. Wilson, 477 U.S. 436, 456-57 (1986).

[50] Professor Uviller has correctly described the arrival of *Massiah* as Justice "Stewart, with an intrepid majority, set[ting] off on a new adventure." Uviller, *supra* note 10, at 1156.

[51] *See Massiah*, 377 U.S. at 206. The deliberate elicitation in *Massiah* consisted of holding "a lengthy conversation" in which Massiah "made several incriminating statements" while a law enforcement officer listened electronically. *Id.* at 203. Earlier in the opinion, the Court's language had intimated that mere "surreptitious . . . listening to incriminating statements" could be enough to violate the sixth amendment. *Id.* at 201. The later reliance upon "deliberate elicitation," however, suggested that more than

nounced that the sixth amendment prohibited trial use of admissions deliberately elicited in counsel's absence.[52] In essence, the Court declared the pretrial event that was of concern in *Massiah* — a confrontation with somewhat vague boundaries seeming to encompass intentional efforts to prompt defendants to divulge their guilt — a "critical stage."[53]

The *Massiah* majority's language[54] assumed that counsel also had a role in interrogations.[55] Approximately one month after *Massiah*, in

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mere listening might be required. The latter position ultimately prevailed in the Supreme Court. *See infra* notes 84-87 and accompanying text.

[52] *Massiah*, 377 U.S. at 207.

[53] *See* Uviller, *supra* note 10, at 1159 ("*Massiah*'s major contribution . . . was to . . . expand the postaccusation 'critical stage' into new precincts whose dimensions are ill-defined and not readily ascertainable.").

The "critical stage" terminology is the Court's doctrinal designation for any event or proceeding at which a defendant is entitled to sixth amendment counsel. *See* Moss & Kilbreth, Maine v. Moulton: *The Plain Meaning of "Deliberate Elicitation": The State's Position*, 23 AM. CRIM. L. REV. 59, 63 (1985). The criteria for determining whether a stage is critical have never been precise and have not remained static. In an early "critical stage" case, the Court held an arraignment to be within the category because "[w]hat happens there may affect the whole trial." *See* Hamilton v. Alabama, 368 U.S. 52, 54 (1961). In United States v. Wade, 388 U.S. 218, 227 (1967), the "critical stage" determination was said to hinge upon "whether potential substantial prejudice to defendant's rights inheres" in a situation, and whether counsel has "the ability . . . to help avoid that prejudice." In other words, a stage is critical if "counsel's absence at [that] stage might derogate from [the defendant's] right to a fair trial." *Id.* at 228. Later, the Court narrowed the doctrine by suggesting that a critical stage can arise only when an accused physically confronts the government in a context requiring expert legal assistance in coping with the legal system or with the prosecution. *See* United States v. Ash, 413 U.S. 300, 314-17 (1973). The *Ash* criteria and standards are the Court's latest word on the general attributes of and prerequisites for a "critical stage."

[54] *See Massiah*, 377 U.S. at 206 (an effective postindictment right to counsel must apply not only to official police interrogations, but also to surreptitious elicitations).

[55] This Article uses "interrogation" to refer only to face-to-face questioning by a known law enforcement officer or the "functional equivalent" of such questioning. *See* Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980). The term is not used to describe surreptitious techniques regulated by the *Massiah* doctrine.

Despite its efforts to do so, the Court seems unable to rid itself of the propensity to suggest that *Massiah* regulates "interrogation." The Court first created confusion by observing, in Brewer v. Williams, 430 U.S. 387, 400 (1977), that no sixth amendment right would have attached absent interrogation. Later, however, the author of that opinion suggested that interrogation may not be an "apt" description of the entire category of sixth amendment violative activity. *See Innis*, 446 U.S. at 300 n.4. In 1986 the Court further reinforced that suggestion with the observation that once the sixth amendment is operational, "police may no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper" earlier. Michigan v. Jackson, 475 U.S. 625, 632 (1986).

Escobedo v. Illinois,[56] the Court turned that assumption into holding. The *Escobedo* majority found that the denial of counsel in a traditional interrogation room setting violated the sixth amendment. *Escobedo*'s surprising aspect was not counsel's appearance at interrogation, but rather, her appearance prior to the commencement of formal proceedings.[57] Within two years, however, *Miranda*'s privilege against self-incrimination counsel stole the show, casting serious doubt upon *Escobedo*'s sixth amendment validity and a long shadow of uncertainty over the future of sixth amendment protection in any extrajudicial setting.[58]

In the same year, however, the Court again found itself unable to resist the "inapt" terminology of "interrogation." In Kuhlmann v. Wilson, 477 U.S. 436, 457 (1986), the Court noted that its concern in *Massiah* had been "interrogation or investigative techniques that were equivalent to interrogation." The Court added that "the primary concern of the *Massiah* line of decisions [was] secret interrogation by investigatory techniques that are the equivalent of direct police interrogation." *Id.*; *see also* Maine v. Moulton, 474 U.S. 159, 177 n.13 (1985) (concluding that informant's participation in conversation with defendant was " 'the functional equivalent of interrogation' " (quoting United States v. Henry, 447 U.S. 264, 277 (1980) (Powell, J., concurring))).

Despite the vacillations in terminology, the Court's holdings prove that *Massiah* doctrine does not require actual interrogation of the sort demanded by *Miranda* doctrine (*i.e.*, questioning or conduct that generates compulsion). *See Innis*, 446 U.S. at 300 & n.4. Nevertheless, clarity would be enhanced if the Court acknowledged, once and for all, that interrogation is not an appropriate term for the general *Massiah*-regulated category of activity or the actions that undercover agents should avoid, but is simply one type of conduct that falls within the bounds of the larger "deliberate elicitation" category. *See Henry*, 447 U.S. at 271 (stating that affirmative interrogation is sufficient, but not necessary, for *Massiah* doctrine to apply).

[56] 378 U.S. 478 (1964).

[57] *Escobedo*'s recognition of a sixth amendment right prior to the commencement of proceedings is unique. Subsequently, the Court has retracted that temporal extension of counsel, suggesting that *Escobedo* either did so in the service of another constitutional right or was an erroneous interpretation of the sixth amendment. *See* Moran v. Burbine, 475 U.S. 412, 429-30 (1986); Kirby v. Illinois, 406 U.S. 682, 689 (1972). For a discussion of the current temporal limitation on sixth amendment operation, see *infra* notes 253-56 and accompanying text.

[58] *See supra* notes 5-6 and accompanying text; *see also* W. LAFAVE & J. ISRAEL, *supra* note 42, at 275. Professors LaFave and Israel observe that *Escobedo* appeared to be a sixth amendment landmark destined to expand. *Id.* They conclude that the expansion did not occur because, just two years later, the Court instead, in *Miranda v. Arizona*, "adopted a broader rule based upon the Fifth Amendment privilege against self-incrimination." *Id.* Later, the Court decided to treat *Escobedo* as a " 'false start' toward" *Miranda*. *Id.*

*C. Post-*Massiah *Developments*

Eleven years later the *Massiah* right emerged from the shadow.[59] In *Brewer v. Williams*[60] the Court confirmed that, at least in postproceeding interrogation contexts, sixth amendment counsel stood beside *Miranda*'s fifth amendment adjunct counsel.[61] The *Williams* Court reaffirmed the vitality of counsel in the *Spano-Escobedo* role. At the same time, however, it raised doubt about the life of counsel's *Massiah* role.[62] There was reason to suspect that *Escobedo* might not have been the only 1964 sixth amendment misstep by a Court that had been groping for a cure for intolerable confession practices.[63]

In 1980 the Court dispelled that suspicion with a vengeance.[64] In *United States v. Henry*,[65] the Court reinvigorated the *Massiah* role, proving that the right to counsel initially recognized was not a poorly-conceived, ill-designed, anti-coercion device fit only for the interrogation room. Instead, *Massiah* counsel was a true sixth amendment "assistant" empowered and expected to intercede between defendant and undercover agent. Moreover, *Henry* did more than simply reaffirm *Massiah*. In an opinion considerably more complex than its progenitor, the Court developed, yet blurred, *Massiah*'s uncomplicated doctrine.

The *Henry* majority apparently intended to establish two independent preconditions for a sixth amendment violation by a surreptitious investigator.[66] First, the informant must *actually elicit* the defendant's

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[59] Actually, on at least one occasion after *Miranda* the Court did provide evidence that *Massiah* was still vital by reversing and remanding a case simply on the authority of *Massiah*. *See* Beatty v. United States, 389 U.S. 45 (1967) (per curiam).

[60] 430 U.S. 387 (1977).

[61] *See* White, *Suspect's Assertion*, *supra* note 7, at 69 (stating that Court revived and extended *Massiah* in *Williams*, and reaffirmed commitment to constitutional control of confession practices).

[62] This doubt was engendered by an apparent doctrinal demand for "interrogation." *See Williams*, 430 U.S. at 400-01; *see also supra* note 55 (discussing meaning of interrogation).

[63] *See* Comment, United States v. Henry: *Constitutional Limitations on the Use of Government Informants Once Criminal Proceedings Have Commenced*, 7 NEW ENG. J. PRISON L. 117, 142 (1981) (observing that "several commentators had previously questioned the continued significance of *Massiah* after" *Miranda*).

[64] *See id.* (claiming that *Henry* "put to sound rest" the "speculation" that *Miranda* had supplanted and eliminated *Massiah*).

[65] 447 U.S. 264 (1980).

[66] There is an important third condition for a sixth amendment violation — the initiation of formal judicial proceedings. *See* Tomkovicz, *Standards for Invocation and Waiver of Counsel in Confession Contexts*, 71 IOWA L. REV. 975, 983-85 & n.37 (1986). By the time of *Henry*, the Supreme Court had evinced its intent to impose an

disclosures.[67] In addition, the entire undercover scenario, including the relationships and interactions between government and informant and between informant and defendant, must provide a basis to charge the government with "intentionally creating a situation likely to induce [the accused] to make incriminating statements without the assistance of counsel."[68]

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initiation prerequisite for attachment of the right to counsel. *See* Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859, 939 (1979) (observing, in 1979, that Court adheres to "initiation" criterion for attachment of right to counsel). However, some still questioned whether formal initiation was an absolute precondition. *See* Tomkovicz, *supra*, at 983-84 n.37. Today, there can be no doubt about the Court's intention. Initiation is an uncompromisable necessity under current sixth amendment doctrine. *See* Moran v. Burbine, 475 U.S. 412, 428-32 (1986) (rejecting counsel deprivation claim because no formal initiation and even refusing to recognize accused's ability to acquire pre-initiation sixth amendment right by forming relationship with lawyer); United States v. Pace, 833 F.2d 1307, 1312 (9th Cir. 1987) (concluding that filing complaint, issuance of warrant, and subsequent arrest did not trigger sixth amendment right, which attached only upon indictment); United States v. Ammar, 714 F.2d 238, 260-61 (3d Cir.) (adhering rigidly to initiation requirement for *Massiah* right), *cert. denied sub. nom* Stillman v. United States, 464 U.S. 936 (1983). *But see* United States v. Yunis, 681 F. Supp. 909, 928-29 (D.D.C. 1988) (opining that test is whether government is committed to prosecute and concluding that all facts of pre-initiation setting demonstrated commitment to take defendant to trial at time of arrest).

[67] In *Henry* it was sufficient for the Court that the informant had engaged the defendant in conversation. *See Henry*, 447 U.S. at 270-71.

[68] *Id.* at 274. The ultimate standard is the Court's. The conclusions that the "relationships and interactions" among the three main players (the accused, the informant, and the police officer or prosecutor) are important and that the "entire scenario" is relevant are mine. These conclusions are derived from the factors that the Court found pertinent in resolving *Henry* and *Maine v. Moulton*, 474 U.S. 159 (1985), and from the fact that there is no suggestion in any opinion of a closed universe of relevant factors. *See* State v. Currington, 113 Idaho 538, 544, 746 P.2d 997, 1003 (Ct. App. 1987) (relying upon government's knowledge of the relationship between defendant and informant).

Although the structure of the *Henry* majority opinion did not clearly establish the dual nature of the doctrinal demands, there was ample evidence that mere deliberate elicitation by the undercover agent was not enough. If an informant's deliberate elicitation were sufficient, the Court's discussion could have ended with the observation that the informant had deliberately conversed with Henry. There would have been no need to rely upon the contingent fee arrangement, the custodial status of Henry, and the false fellow inmate appearance of the informant. *See Henry*, 447 U.S. at 270. Dissenting Justice Blackmun pointed out the dual nature of the standard by dividing his responsive opinion into sections entitled "Likely to Induce" and "Prompting." *See id.* at 282-89 (Blackmun, J., dissenting). Still, lower courts have not always accurately perceived *Henry*'s complete doctrinal structure. *See* Lightbourne v. Dugger, 829 F.2d 1012, 1020 (11th Cir. 1987) (stating that for *Massiah-Henry* violations, "accused must show that (1) a fellow inmate was a government agent; and (2) the inmate deliberately

The second condition is important but has not been fully appreciated.[69] The basic *Massiah* doctrine seemed only to demand elicitation by a government informant. *Henry* goes further, adding a demand for some basis beyond state sponsorship to attribute the informant's conduct to the "regular government," *i.e.*, the police or prosecutor.[70] By adding the "basis for attribution" demand to the "deliberate elicitation" standard, *Henry* created an opportunity for the government to enjoy the fruits of its informants' labors without risking sixth amendment liability for their actions.[71]

On two recent occasions, the Court has addressed *Henry's* ambiguities.[72] In *Maine v. Moulton*,[73] the Court rejected two distinct govern-

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elicited incriminating statements").

[69] In some respects *Henry* is a surprisingly protective throwback to the Warren Court era. *See* Note, *Recruited Government Informants: When Does the Right to Counsel Attach?* — United States v. Henry, 8 FLA. ST. U.L. REV. 797, 797, 802 (1980) [hereafter Note, *Recruited Informants*] (calling *Henry* "a decision reminiscent of the Warren Court" that is "surprising" and that "has the appearance of an abrupt turnabout" for the Burger Court); Note, United States v. Henry: *The Further Expansion of the Criminal Defendant's Right to Counsel During Interrogations*, 8 PEPPERDINE L. REV. 451, 451, 469-71 (1981) [hereafter Note, *Further Expansion*] (contending that in *Henry*, "the Burger Court expanded the rights of a criminal defendant further than did the Warren Court in" *Massiah* and "extended the criminal defendant's right to counsel" in a way inconsistent with "the conservative history of the Burger Court") (footnote omitted). It is doubtful, however, that commentators would be so eager to celebrate *Henry* as a Warren Court revival if they accurately perceived the character of its doctrinal addition to *Massiah* law and the constricting potential of that addition. Instead they might see it as something of a "wolf in sheep's clothing." For further discussion of the *Henry* refinements and modifications of *Massiah* doctrine, see *infra* notes 279-97 and accompanying text.

[70] In effect, the majority seems to have adopted a watered-down version of the government's argument in *Henry* that it should be responsible only for informants it fails to instruct properly. *See* Note, *Further Expansion*, *supra* note 69, at 467-68 (noting that government's brief contained such an argument).

[71] Lower court opinions suggest that this peril has not yet been realized with any frequency. Still, the *Henry* doctrine has led to the denial of sixth amendment protection. *See* United States v. Taylor, 800 F.2d 1012, 1015-16 (10th Cir. 1986) (stating that although elicitor placed in defendant's cell was "[g]overnment informant," other *Henry* factors show that he was not a "[g]overnment agent"). Moreover, the opportunity for resourceful, creative law enforcement agencies to insulate themselves from liability remains open. *See* State v. Currington, 113 Idaho 538, 544, 746 P.2d 997, 1003 (Ct. App. 1987) (reversing trial court which had accepted government's argument that "attribution" factors were different than those in *Henry* or *Moulton*).

[72] The ambiguity and uncertainty engendered by *Henry* have not escaped notice. *See* Cluchey, *supra* note 27, at 43. *Henry*'s lack of clarity is also evinced by the disparate readings of its intent and effects. *Compare* Wilson v. Henderson, 742 F.2d 741, 747 (2d Cir. 1984) (*Henry* merely applied *Massiah* to new facts and did not "fundamen-

ment arguments against the application of *Massiah* doctrine. First, the *Moulton* majority held that *Massiah* does not require intentional governmental arrangement of the opportunity for the informant's elicitation. *Massiah* is satisfied if the state knowingly exploits an opportunity that the accused has initiated and arranged.[74] "Intentional creation" and "knowing exploitation" of situations are constitutionally equivalent. Both are grounds to attribute an informant's conduct to the state.

The *Moulton* majority also held that the fact that admissions have been elicited during a good faith investigation of a separate, uncharged crime does not exempt those admissions from *Massiah*'s ban.[75] The government still cannot use such admissions to prove a charge pending at the time of elicitation. In effect, the Court refused to recognize a "good faith, separate investigation" exception to the sixth amendment right.[76]

Moulton is noteworthy for its vague, far-reaching language.[77] The decision also provides important confirmation of the two-pronged structure of *Henry*'s augmented *Massiah* doctrine. The *Moulton* informant's actual, purposeful elicitation (pursuant to a "deal" with the govern-

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tally restructure[ ]" *Massiah*), *rev'd sub nom* Kuhlmann v. Wilson, 477 U.S. 436 (1986) *with* Note, *Inanimate Devices*, *supra* note 40, at 381-82 (*Henry* changed *Massiah* into "new and more encompassing" standard) *and* Comment, *Sixth Amendment* — Massiah *Revitalized*, 71 J. CRIM. L. & CRIMINOLOGY 601, 601, 604 (1980) (stating that *Henry* established a new test).

[73] 474 U.S. 159 (1985).

[74] *Id.* at 176.

[75] *Id.* at 180. Of course, the government must be responsible for "intentional creation" or "knowing exploitation" of a situation in which its informant is likely to induce. In other words, as to the pending charge, the government must meet the always applicable *Henry-Moulton* standard for attribution of the informant's conduct to the state. *See id.* The majority concluded that "incriminating statements . . . are inadmissible at trial of [pending] charges, notwithstanding" good faith investigation of "other crimes, *if, in obtaining this evidence, the State . . . knowingly circumvent[ed] the accused's right to the assistance of counsel.*" *Id.* (footnote omitted) (emphasis added).

[76] The dissenters did not think that the majority had refused to shrink *Massiah*'s territory. They contended that the Court had improperly extended a doctrine that already stretched sixth amendment boundaries. *See id.* at 190 (Burger, C.J., dissenting).

[77] *See id.* at 176. The sixth amendment guarantees an accused the "right to rely on counsel as a 'medium' between him and the State." *Id.* This guarantee includes the state's "affirmative obligation not to act in a manner that circumvents" protections afforded by the right. *Id.* at 171, 176. Thus, the state breaches its obligation by "knowing exploitation" of, or by "knowingly circumventing," an accused's right to have counsel present at confrontations with state agents. *Id.* at 176, 180.

ment[78]) was undeniable.[79] If such elicitation was sufficient, the Court could have quickly ended its opinion. Instead, the Court devoted considerable attention to the government's involvement in the informant-accused meeting.[80] The only reason for this attention was that *Henry* had imposed the need to decide whether the "regular government" should be held responsible for its agent's acts. The *Moulton* Court concluded that if the state knows[81] that its informant is likely to induce incriminating statements from the accused and proceeds to "exploit" the situation, the state is responsible for the elicitation.[82] *Moulton*'s unavoidable import is that *unless* the "regular government" has such knowledge, there is no official infringement of the sixth amendment.[83]

In 1986 *Kuhlmann v. Wilson*[84] answered a question that both the *Henry* and *Moulton* Courts had specifically reserved:[85] Does a passive

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[78] *See id.* at 163.

[79] The informant spoke extensively and feigned forgetfulness in order to induce Moulton to voice incriminating details. *Id.* at 165-66. His conduct provided much more specific and clear evidence of deliberate elicitation than the informants' conduct in both *Henry* and *Massiah*.

[80] *See id.* at 174-77.

[81] The Court declared that because "[d]irect proof" of "knowledge will seldom be available[,] . . . proof that the State 'must have known' . . . suffices . . . ." *Id.* at 176 n.12 (quoting *Henry*, 447 U.S. at 271). By this "must have known" language in *Henry* and *Moulton*, the Court may have intended to prescribe an "objective" standard that would make what a "reasonable person would or should have known" controlling. *See* Comment, Massiah *Revitalized*, *supra* note 72, at 604 (stating that *Henry* changed *Massiah* into objective standard); Note, *Inanimate Devices*, *supra* note 40, at 381-82 (stating that *Henry* changed *Massiah* into objective standard). That interpretation is consistent with the Court's recent adoptions of objective standards in other doctrinal areas involving the rights of suspected and accused persons. *See, e.g.*, United States v. Leon, 468 U.S. 897, 919 n.20 (1984) (establishing objective standard for "good faith" exception to fourth amendment exclusionary rule); Berkemer v. McCarty, 468 U.S. 420, 442 (1984) (prescribing objective standard for custody in *Miranda* doctrine); New York v. Quarles, 467 U.S. 649, 656 (1984) (announcing objective standard for public safety exception to *Miranda* doctrine). It is possible, however, that the *Massiah-Henry-Moulton* inquiry is concerned with ascertaining the government's actual, subjective knowledge. The "must have known" language in *Henry* and *Moulton* could reflect a recognition that objective indicia will ordinarily provide the only reliable evidence of actual knowledge, rather than a decision to impose a controlling "negligence" standard. For further discussion of the *Henry-Moulton* doctrine, see *infra* notes 279-97 and accompanying text.

[82] *Moulton*, 474 U.S. at 176.

[83] It is entirely possible, especially in a separate crime investigation, for example, for the government to support a claim that it did not know that the informant was likely to elicit information pertinent to a charged crime.

[84] 477 U.S. 436 (1986).

[85] *See Moulton*, 474 U.S. at 177 n.13; *Henry*, 447 U.S. at 271 n.9.

informant trigger sixth amendment protection? Predictably, the Court concluded that *Massiah-Henry-Moulton* doctrine requires some active elicitation by the informant.[86] According to the *Wilson* Court, an accused "must demonstrate that the police and *their informant took some action, beyond merely listening*, that was designed deliberately to elicit incriminating remarks."[87]

The *Wilson* opinion both refined the first prong of, and again confirmed the independence of, *Henry*'s dual requirements: an informant's elicitation *and* a basis to attribute that elicitation to the government. In *Moulton*, active elicitation by the informant was not a sufficient predicate for a *Massiah* violation. "Knowing exploitation" by the state was also essential. In *Wilson*, the state's "knowing exploitation" of its informant's opportunity to elicit information proved inadequate. Active elicitation was an additional, and independent, prerequisite. Together, *Henry*, *Moulton*, and *Wilson* leave no doubt that both "active informant elicitation" and "knowing state exploitation" are requisites for the critical *Massiah* stage.

Because of the Court's recent attention to *Massiah* doctrine,[88] the lower courts have Supreme Court guidance on most issues raised in the *Massiah* context. Lower courts frequently encountered the good faith, separate crime investigation problem prior to *Moulton*'s relatively definitive resolution.[89] The only recurrent lower court question the Court

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[86] Because the Court had already concluded that Wilson should lose on procedural grounds, its *Massiah* discussion is dictum. Still, it is clear in meaning and will have an unavoidable and powerful impact on *Massiah* doctrine.

[87] *Wilson*, 477 U.S. at 459 (emphasis added). The Court's precise conclusion in Wilson's case was that the state trial court had found that the informant was passive, and that the court of appeals had erred in failing to accord that finding the presumption of correctness to which it was entitled. *Id.* at 459-61. When accorded that requisite presumption of correctness, the trial court's finding became, under the Court's *Wilson* dictum, a sufficient basis to declare the defendant's claim outside *Massiah*'s ambit.

[88] In recent years, the Court has decided two additional significant *Massiah* cases. Michigan v. Jackson, 475 U.S. 625 (1986), dealt with issues of invocation and waiver. In *Jackson*, the Court held that: (1) a request for counsel at an arraignment is an effective invocation of the *Massiah* right; and (2) like the *Miranda* counsel entitlement, once the *Massiah* right is invoked it cannot be waived unless the accused "initiates" further communications. *Id.* at 629, 636. In Patterson v. Illinois, 108 S. Ct. 2389 (1988), the Court held that waivers of the *Massiah* right ordinarily are governed by no more demanding standards than waivers of the *Miranda* entitlement to counsel. Because of the surreptitious nature of undercover informant elicitation, waiver questions do not arise.

[89] *See, e.g.*, United States v. Harris, 738 F.2d 1068 (9th Cir. 1984); United States v. Lisenby, 716 F.2d 1355 (11th Cir. 1983); Schwimmer v. Coughlin, 543 F. Supp. 411 (S.D.N.Y. 1982); Toliver v. Wyrick, 469 F. Supp. 583 (W.D. Mo. 1979); People v.

still has not addressed is government agency,[90] *i.e.*, whether an informant is a private citizen or an arm of the state.[91] In general, lower court *Massiah* cases involve the application of settled doctrine to varying fact patterns.[92]

In sum, the sixth amendment right to counsel extends to both surreptitious informant elicitations and overt official interrogations.[93] The

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Walker, 145 Cal. App. 3d 886, 193 Cal. Rptr. 812 (1983); People v. Mealer, 57 N.Y.2d 214, 441 N.E.2d 1080, 455 N.Y.S.2d 562 (1982), *cert. denied*, 460 U.S. 1024 (1983).

[90] *See* Thomas v. Cox, 708 F.2d 132, 135 n.2 (4th Cir.), *cert. denied*, 464 U.S. 918 (1983).

[91] For the most part, courts have tried to discern whether informants acted at the government's behest or on their own in the capacity of good citizens. *See, e.g.*, *Thomas*, 708 F.2d at 135-36; United States v. Malik, 680 F.2d 1162, 1164-65 (7th Cir. 1982); People v. Kinder, 75 A.D.2d 34, 44, 428 N.Y.S.2d 375, 381 (App. Div. 1980). The question whether the informant is a state agent at all is a threshold determinant of constitutional protection. It is related to, but doctrinally distinct from, the issue of government responsibility for an informant's conduct that was a focal concern in both *Henry* and *Moulton*. *See supra* notes 65-83 and accompanying text.

Some lower court opinions have failed to distinguish the two inquiries, treating them instead as one. *See, e.g.*, United States v. Taylor, 800 F.2d 1012, 1015-16 (10th Cir. 1986) (informant was not a government agent because no agreement between government and informant, no benefits accrued to informant upon successful elicitation, and government gave no instructions); People v. Odierno, 121 Misc. 2d 330, 333-34, 467 N.Y.S.2d 968, 970-71 (Sup. Ct. 1983) (informant was not agent since government did not request that he obtain information, did not place him in proximity to defendant, and informant did not use information to obtain benefit).

However, because current doctrine demands satisfaction of the "government responsibility" standard, and because agency must necessarily exist whenever that standard is met, there is no practical harm from such analytical confusion. Confusion would disappear if this Article's recommendation to abrogate the "government responsibility" inquiry were adopted. *See infra* notes 279-97 and accompanying text (discussing more fully the "agency" and "government responsibility" inquiries and proposing elimination of the latter).

Another issue that has arisen, although infrequently, is whether the government violates *Massiah* if it is unaware that charges are pending against the defendant when it elicits admissions. *See, e.g.*, United States v. Petty, 602 F. Supp. 996, 1000-01 (D. Wyo. 1984) (seeming to hold *Massiah* not violated when officer unaware of prior pending charges); United States v. Shipp, 578 F. Supp. 980, 995 (S.D.N.Y. 1984) (concluding that *Massiah* was not violated when federal agent was unaware of state charges), *aff'd sub nom.* United States v. Wilkinson, 754 F.2d 1427 (2d Cir.), *cert. denied*, 472 U.S. 1019 (1985). For further discussion of this issue, see *infra* note 270.

[92] *See, e.g.*, United States v. Panza, 750 F.2d 1141 (2d Cir. 1984); United States v. Medina-Medina, 617 F. Supp. 1163 (S.D. Cal. 1985); Dier v. Indiana, 442 N.E.2d 1043 (Ind. 1982); Farruggia v. Hedrick, 322 S.E.2d 42 (W. Va. 1984).

[93] *See* People v. Brooks, 103 Misc. 2d 294, 299-300, 302 n.3, 425 N.Y.S.2d 951, 955, 956 n.3 (Sup. Ct. 1980) (stating that Court has not distinguished between police

three conditions essential for a "critical stage" in surreptitious investigation situations are: (1) the initiation of formal proceedings; (2) a government informant's active, deliberate elicitation; and (3) government knowledge that it is exploiting a situation in which its informant is likely to elicit inculpatory statements from a defendant. When these conditions exist, *Massiah* bars government use at trial of an accused's incriminating statements given without counsel's assistance.

II. Rationales for and Critiques of the *Massiah* Right

While sketching *Massiah* law, I have refrained from presenting the Court's justifications for the right to counsel against informants, the nature of opponents' assaults upon it, and scholarly assessments of its significance. A discussion of these subjects provides a necessary foundation for analysis of the character and validity of the *Massiah* right and doctrine.

A. Majority Explanations of the Right

The Court has alluded to a variety of rationales for, and functions served by, counsel during surreptitious investigations. However, its discussions have invariably remained on the surface of the sixth amendment. The Court has yet to proffer an in-depth constitutional justification for the *Massiah* right.[94] The original *Massiah* opinion provides a good example of the analytical shallowness.

The lawyer who appeared in 1964 in the role of protector against noncoercive undercover informants[95] had originated in *Spano* as a shield against coercive interrogation.[96] In resolving Massiah's sixth amendment claim, Justice Stewart effortlessly equated two distinct law enforcement practices: overt official interrogation and surreptitious, "deliberate elicitation" or "secret interrogation."[97] He offered little to supplement *Spano*'s anti-coercion rationale, a premise that could not explain counsel's presence in the *Massiah* context. He simply referred

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interrogation and surreptitious elicitation, treating both as one kind of constitutional violation), *rev'd*, 83 A.D.2d 349, 444 N.Y.S.2d 615 (App. Div. 1981).

[94] *See* Uviller, *supra* note 10, at 1164 (stating that Court majority has insufficiently explained *Massiah*'s rationales).

[95] *See supra* note 49 and accompanying text.

[96] *See* Kamisar, *supra* note 3, at 34-40 (stating that *Massiah* Court, in promulgating the "deliberate elicitation" standard, adopted a view advanced by the concurring Justices in *Spano*).

[97] *Massiah*, 377 U.S. 201, 205-06 (1964).

to the "basic dictates of fairness"[98] and to the "basic constitutional principle"[99] entitling every person to postarraignment aid of counsel, then concluded that the government had "more seriously imposed upon" Massiah because he did not know that he was speaking to a government agent.[100]

Since 1964 the Court has apprised us that *Massiah* doctrine prevents "impermissible interference" with the right to counsel[101] and provides shelter against official "overreaching."[102] It has been suggested that the *Massiah* right safeguards the opportunity to prepare a defense[103] and compensates for a defendant's lack of legal knowledge and skill.[104] The

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[98] *Id.* at 205.

[99] *Id.*

[100] *Id.* at 206. Justice Stewart's opinions reveal a propensity for this sort of overbroad, sketchy, ipse dixit rationalization of constitutional conclusions. *See, e.g.*, Brewer v. Williams, 430 U.S. 387, 398 (1977) ("Whatever else it may mean, the right to counsel . . . means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings [are] initiated . . . ."); Kirby v. Illinois, 406 U.S. 682, 689 (1972):

> The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of the government and defendant have solidified.

Id.; Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not attempt further to define [obscenity] . . . . But I know it when I see it, and the motion picture involved in this case is not that."); Spano v. New York, 360 U.S. 315, 327 (1959) (Stewart, J., concurring) ("Surely a Constitution which promises that much can vouchsafe no less to the same man under midnight inquisition in the squad room of a police station.").

[101] *See* United States v. Henry, 447 U.S. 264, 275 (1980); *id.* at 276 (Powell, J., concurring).

[102] *See* United States v. Ash, 413 U.S. 300, 312 (1973) (adding that *Massiah* counsel could advise her client of "the benefits of the fifth amendment"); *see also* Cluchey, *supra* note 27, at 54 (asserting that role of counsel involves advising client of fifth amendment rights and protecting client against prosecutorial overreaching).

[103] *See* Milton v. Wainwright, 407 U.S. 371, 381-82 (1972) (Stewart, J., dissenting) (observing that "the most rudimentary constitutional principles require that" following indictment an individual "be afforded the full effective assistance of counsel" and that the rule of *Massiah* "has been settled law ever since Powell v. Alabama" — a case that afforded counsel for preparatory purposes); *Spano* 360 U.S. at 325 (Douglas, J., concurring) (concluding that defendant was denied "effective representation . . . in flagrant violation of the principle . . . that the right to counsel extends to preparation for trial").

[104] *See* Maine v. Moulton, 474 U.S. 159, 169-70 (1986). Two sixth amendment landmarks, Gideon v. Wainwright, 372 U.S. 335, 344 (1963), and Powell v. Alabama, 287 U.S. 45, 69 (1932), strongly endorse the function of counsel as compensating for a layperson's legal deficiencies.

Court has frequently stated that informant-defendant encounters without counsel could dramatically impair the ability to defend at trial.[105] Without counsel against informants, courtroom events would become "mere formalities"[106] in which assistance would be an "empty right,"[107] because all meaningful defenses would have been irretrievably lost in advance.[108] Similarly, the Court has declared that trial counsel is "circumvented," "diluted," even rendered "ineffective," by the denial of counsel in *Massiah* situations.[109] It has described counsel as a "medium" between sovereign and citizen.[110] Perhaps most helpful are the Court's recent suggestions that *Massiah* safeguards the "right not to reveal"[111] inculpatory information, the "opportunity to consult with counsel,"[112] and the "right of the accused not to be confronted by an agent of the state . . . without counsel being present."[113] In sum, the Court has proffered a variety of reasons for sixth amendment protection against informants.

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[105] *See* United States v. Wade, 388 U.S. 218, 225-26 (1967) (observing that *Massiah* applied the principle that pretrial counsel was essential because events during that period " 'may affect the whole trial,' " and that "the rationale of . . . Massiah" was that counsel was necessary "if the accused was to have a fair opportunity to present a defense at the trial itself").

[106] *Moulton*, 474 U.S. at 170.

[107] *Wade*, 388 U.S. at 225.

[108] *Id.* at 225-26.

[109] *Moulton*, 474 U.S. at 171 (stating that government has obligation not to act in manner that circumvents and dilutes the right to counsel protections); Spano v. New York, 360 U.S. 315, 325 (1959) (Douglas, J., concurring) (stating that secret interrogations in absence of counsel "in effect deny [an accused] effective representation").

[110] Michigan v. Jackson, 475 U.S. 625, 632 (1986); *Moulton*, 474 U.S. at 176; Brewer v. Williams, 430 U.S. 387, 415 (1977) (Stevens, J., concurring). In the lower court *Massiah* opinion, the court had reasoned that "officers must deal through and not around" counsel. United States v. Massiah, 307 F.2d 62, 72 (2d Cir. 1962).

[111] *Moulton*, 474 U.S. at 177 n.13; *see also* United States v. Henry, 447 U.S. 264, 273 (1980); People v. Dufour, 495 So. 2d 154, 158 (Fla. 1986) (stating that government uses informants to uncover evidence beyond legitimate reach), *cert. denied*, 479 U.S. 1101 (1987).

[112] *Moulton*, 474 U.S. at 177.

[113] *Id.* at 177-78 n.14. Related to these latter suggestions is the assertion that *Massiah* counsel preserves fairness and adversarial system principles. *See* Nix v. Williams, 467 U.S. 431, 453, 455 (1984) (Stevens, J., concurring); *Henry*, 447 U.S. at 272-73; Escobedo v. Illinois, 378 U.S. 478, 490 n.13 (1964).

B. Dissenting Opposition to the Right

From its inception, *Massiah*'s right to counsel has had Supreme Court opponents.[114] Three members vigorously dissented from the initial recognition of the right,[115] and at least one current member would abolish it.[116] For all of its almost twenty-five year life, some Court member has challenged the insinuation of counsel into the informant-defendant encounter as unprincipled — lacking any foundation in constitutional language, history, or the objectives of our accusatorial system.[117] These dissenters have chastised the majority for unjustifiably converting the sixth amendment into " 'a magic cloak' " for the guilty criminal.[118]

Justice White's pointed *Massiah* dissent introduced some of the enduring anti-*Massiah* themes. He could find no constitutional danger or impropriety in the government's conduct[119] and expressed fear that the majority was treating a necessary investigatory process as a "game."[120] He saw no imbalance of legal skill or acumen between defendant and informant that called for the remedy of counsel.[121] He could perceive no unconstitutional interference with the right to counsel.[122] Furthermore, because the *Massiah* situation entailed no coercion, counsel could reflect not a justifiable concern with voluntariness, but only a "thinly disguised constitutional policy of minimizing or entirely prohibiting the

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[114] It also has had congressional opponents, who managed in 1968 to enact a provision purporting to repeal *Massiah*. *See* W. LAFAVE & J. ISRAEL, *supra* note 42, at 283 ("This legislation has been largely ignored, and properly so, for to the extent it purports to nullify the Sixth Amendment right to counsel as recognized in *Massiah* and subsequent Supreme Court decisions it is most certainly unconstitutional.").

[115] *See Massiah*, 377 U.S. at 207-13 (White, Clark, & Harlan, JJ., dissenting).

[116] *See Henry*, 447 U.S. at 289-90 (Rehnquist, J., dissenting). The government had asked the Court to reconsider *Massiah*'s vitality in *Henry*. *See id.* at 269 n.6.

[117] *See Henry*, 447 U.S. at 295-96, 300-01 (Rehnquist, J., dissenting); Escobedo v. Illinois, 378 U.S. 478, 496-97 (1964) (White, J., dissenting).

[118] *See* Maine v. Moulton, 474 U.S. 159, 186 (1986) (Burger, C.J., dissenting) (quoting United States v. DeWolf, 696 F.2d 1, 3 (1982)).

[119] *Massiah*, 377 U.S. at 211-13 (1964) (White, J., dissenting). Justice White maintained that it was "peculiarly inappropriate" to exclude admissions made to undercover agents and that the Court should not discourage citizens "from reporting" crime and "lending . . . aid to secure evidence . . . ." *Id.* at 211-12. He also questioned whether the practice involved was the "kind of conduct which should be forbidden to those charged with law enforcement." *Id.* at 213.

[120] *Id.* at 213 ("Law enforcement . . . is not a game."); *see also id.* at 212 (suggesting that Court's interpretation of the Constitution "guarantees sporting treatment for sporting peddlers of narcotics").

[121] *Id.* at 211.

[122] *Id.* at 209.

use in evidence of voluntary out-of-court admissions made by the accused."[123] Justice White castigated the Court for reliance upon a "sterile syllogism" and for failure to articulate "further explanation" for extending the right to counsel.[124]

Massiah's current opponents have raised several challenges. Some are rooted in, while others go beyond, Justice White's initial objections. One major argument rests upon the premise that the "theoretical foundation"[125] and "core purpose"[126] of the sixth amendment right are reflected in the "traditional role of an attorney as a legal expert and strategist."[127] Sixth amendment counsel is thought to serve but two purposes: to compensate for a lack of legal expertise and to protect against the professional prosecutor's greater strength.[128] Because a defendant's encounter with an unknown government agent involves no legal problems or prosecutorial power, the argument continues, counsel has no function to serve. Therefore, there is no justification for a right to assistance.[129]

Massiah's opponents further contend that the surreptitious elicitation of confessions threatens neither voluntariness nor reliability.[130] If that is

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[123] *Id.*

[124] *Id.*

[125] United States v. Henry, 447 U.S. 264, 293 (1980) (Rehnquist, J., dissenting).

[126] *Id.* at 293 n.3 (quoting United States v. Ash, 413 U.S. 300, 309 (1973)).

[127] *Id.* at 293 (footnote omitted); *see also* United States v. Ash, 413 U.S. 300, 309 (1973) (sixth amendment's historical background suggests that counsel's purpose is to assure assistance to accused when accused is confronted with intricacies of law).

[128] *See* Moran v. Burbine, 475 U.S. 412, 430 (1986); *Henry*, 447 U.S. at 281-82 (Blackmun, J., dissenting); *id.* at 292-93 (Rehnquist, J., dissenting); Brewer v. Williams, 430 U.S. 387, 424-25 (1977) (Burger, C.J., dissenting); *Ash*, 413 U.S. at 307, 309.

[129] *See Henry*, 447 U.S. at 293-94 (Rehnquist, J., dissenting) (maintaining that accused has no right to counsel if counsel can lend no special knowledge or skill). The current Chief Justice captured the essence of this "no proper role to serve" challenge to the legitimacy of *Massiah* counsel in his memorable, expressive declaration that:

> [T]here 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 295-96. Apparently, the notion that counsel is granted to assist with legal intricacies, and is not justified absent those intricacies, dates back at least to Crooker v. California, 357 U.S. 433 (1958). *See* Note, *Historical Argument*, *supra* note 40, at 1016 (discussing Court's rationale that defendant (Crooker) did not need counsel at police station because legal questions were simple, not complex, and there was no opportunity to formulate a defense).

[130] *See Henry*, 447 U.S. at 296, 299 (Rehnquist, J., dissenting).

so, they argue, then the use of statements elicited without counsel poses no danger of convicting innocents or of otherwise undermining trial fairness. Because surreptitious elicitation does not threaten voluntariness or accuracy, the presence of counsel is not necessary to ensure fairness. Counsel's only conceivable purpose would be an indefensible one — to defeat truth and "thwart justice."[131]

Opponents have also directly responded to the Court majority's ostensible *Massiah* justifications. They point out that in undercover settings, informants do not interfere with attorney-client relationships,[132] nor do they obstruct the preparation and presentation of a defense.[133] Furthermore, trial counsel remains fully capable of lending legal expertise and of challenging the prosecution in the courtroom. According to anti-*Massiah* justices, if counsel is to be kept within reasonable bounds, a right to assistance cannot be recognized simply because counsel can help prevent damage to defendant's cause.[134]

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[131] Maine v. Moulton, 474 U.S. 159, 188-89 (1986) (Burger, C.J., dissenting) (stating that right to counsel, "designed to preserve the integrity of the trial," should not "thwart" justice, but should "let the truth be told").

In *Henry*, Chief Justice Rehnquist declared *Massiah* counsel "fundamentally inconsistent with traditional notions of the role of the attorney that underlie the Sixth Amendment right to counsel." *Henry*, 447 U.S. at 294 (Rehnquist, J., dissenting). Adherents to this view apparently believe that "traditional notions" accord counsel for only two legitimate purposes: to prevent coercion and to promote reliability. "Fairness," in their view, is defined by those two concerns alone. If the defendant's will remains free, and the search for truth is unimpaired, then counsel is not necessary to ensure fairness. *See id.* (stating that if accused's will is not overborne, there is no "unfair advantage"); *see also Williams*, 430 U.S. at 426 (Burger, C.J., dissenting) (observing that fairness of trial and integrity of fact-finding process are fundamental sixth amendment purposes); *id.* at 437 (White, J., dissenting) (noting that sixth amendment is designed to protect against risk of convicting innocent); *id.* at 440 (Blackmun, J., dissenting) (stating that there is no sixth amendment violation without involuntariness).

Although these premises have not carried the day in the *Massiah* realm, they have formed the bedrock for the Court's narrow reading of sixth amendment scope in the area of ineffective assistance of trial counsel. The restrictive notion that counsel is the guardian and guarantor of truth has been especially influential. *See* Strickland v. Washington, 466 U.S. 668, 684-85, 691-92 (1984) (observing that counsel is necessary to ensure fair trial (*i.e.*, trial whose result is reliable), and that courts' concern should be whether result is reliable); United States v. Cronic, 466 U.S. 648, 658 (1984) (explaining that right to counsel is not recognized for its own sake, but to ensure defendant receives fair trial; without effect on "reliability," sixth amendment is not implicated). Given the opportunity, those same premises would be quite capable of demolishing the weakly-grounded tower of *Massiah* cases.

[132] *See Henry*, 447 U.S. at 290, 293 (Rehnquist, J., dissenting).

[133] *See id.* at 290.

[134] *See* Moran v. Burbine, 475 U.S. 412, 431-32 (1986) (stating that possibility of

C. The Scholarly Split Over Massiah

Scholarly commentary upon the *Massiah* right is divided. Some accept the doctrine as a legitimate sixth amendment interpretation.[135] Others brand the right a wholly unjustifiable judicial creation.[136]

Supporters contend that the *Massiah* right is essential to fairness, justice, preservation of the adversary system, and the effectiveness of

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encounter's important consequences at trial is not enough by itself to trigger sixth amendment); Escobedo v. Illinois, 378 U.S. 478, 494 (1964) (Stewart, J., dissenting) (stating that only an "incompetent, unsuccessful, or corrupt investigation" would not "affect" a trial); *id.* at 496 (White, J., dissenting) (asserting that counsel should not be constitutionally required whenever she could be helpful). The constitutionally unnecessary assistance that results from extending counsel based solely upon an ability to help in some way is seen as an impediment to legitimate law enforcement efforts. *See Henry*, 447 U.S. at 298-99 (Rehnquist, J., dissenting) (contending that use of informant is within lawful authority to employ covert operations to investigate crime).

[135] *See, e.g.*, Cluchey, *supra* note 27, at 58 (discussing values of *Massiah* and *Henry*, significance of counsel, and inherent unfairness of prosecuting accused with his own words); White, *Police Trickery*, *supra* note 7, at 603 (asserting that government deception violated sixth amendment by rendering right to counsel useless); Note, *supra* note 23, at 373-77 (contending that *Massiah*, unlike *Miranda*, is a constitutional rule, justified by deterrence rationale, critical stage analysis, and our system of law enforcement); Note, *Criminal Procedure — Eliciting New Meaning from "Deliberately Eliciting"* — Maine v. Moulton, 21 WAKE FOREST L. REV. 1093, 1113 (1986) (maintaining that *Massiah* and its progeny are founded upon profound respect for sixth amendment values).

[136] *See, e.g.*, Dix, *supra* note 3, at 226 (asserting that *Massiah*'s prohibition is "supported by rationale grossly inappropriate to the task"); Uviller, *supra* note 10, at 1147 (arguing that Supreme Court has imposed an "ill-suited additional constraint [on government action] derived from the counsel clause of the sixth amendment").

Although Professor Grano attempts a defense of *Massiah*, *see* Grano, *supra* note 6, at 18, his is a half-hearted effort. Grano opens by declaring: "To the extent . . . that I fail to connect the right to counsel's shield function to the sixth amendment, I am prepared to concede that *Massiah* . . . should be overruled." *Id.* He then proceeds to cast several aspersions upon, and betray much doubt about, the basic validity of the doctrine. *Id.* at 18, 24-25, 27 n.161. He states that the "sixth amendment's shield function, posited almost cavalierly in *Massiah* . . . is not easy to defend." *Id.* at 18. In addition, he continues, the rational support for the *Massiah* right "necessarily requires an enormous leap . . . [and i]f the leap is too great, *Massiah* . . . simply ha[s] no constitutional moorings." *Id.* at 24-25. Ultimately, Grano concludes, there is no evidence that the right to counsel was meant to remedy the imbalance that "makes it more difficult for the guilty to avoid conviction." *Id.* at 27 n.161.

The real motive for his attempted rationalization seems to be to justify the constrictive "initiation of proceedings" threshold, and, thereby, to ensure that the spurious *Massiah* doctrine is kept within narrow bounds. *See id.* at 18 ("I attempt . . . to defend *Massiah* . . . , while at the same time arguing that [its] reasoning should be limited to 'confrontations' that occur after the start of formal judicial proceedings.").

defense counsel at trial.[137] However, they often proffer little more than conclusions devoid of specific explanation regarding why or how allegedly "impermissible" government methods threaten fairness, justice, the adversarial process, or the integrity of the attorney-client relationship.[138]

Prominent scholars have joined the anti-*Massiah* camp.[139] They accuse the Court of stretching sixth amendment boundaries by adding to counsel's role as "sword," a novel, controversial role as "shield."[140] One commentator has described the Court's journey from sixth amendment trial right to pretrial *Massiah* right as an "enormous leap" rooted in a "tenuous" constitutional argument and lacking historical support.[141]

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[137] *See, e.g.*, Cluchey, *supra* note 27, at 64 (*Massiah* counsel prevents frustration of the adversary process, undermining of the value of trial assistance, and taking advantage of the defendant); White, *Police Trickery*, *supra* note 7, at 593, 603 (counsel is given to protect right to fair trial and to prevent effective defeat of trial counsel right); Note, *supra* note 23, at 366, 392-93 (ultimate sixth amendment purpose is to assure fair trial; *Massiah* counsel is granted to prevent adverse affects on trial counsel's effectiveness); Note, *supra* note 135, at 1114 (*Massiah*'s premise is to protect suspect from self-incrimination that would impair chance for fair trial); Note, *Further Expansion*, *supra* note 69, at 464 (*Massiah* counsel prevents "unfair advantage," thus "unfair trial").

[138] *See, e.g.*, Cluchey, *supra* note 27, at 58 (*Massiah* doctrine protects the "significance of the attorney-client relationship" and responds to "sense of unfairness"); Note, *supra* note 23, at 397 (*Massiah* reflects a "pronouncement of how the American adversarial system . . . is supposed to operate"); Note, *supra* note 135, at 1115, 1116 (doctrine affirms "vital role of counsel in guaranteeing the highest quality of justice"; counsel ensures "a higher quality of justice by avoiding prejudice"); Note, *Inanimate Devices*, *supra* note 40, at 367 (*Massiah* attorney is shield against unrestricted exercise of government power and maintains fundamental fairness of criminal process).

Professor Grano, no fan of *Massiah*, has suggested that insofar as it prohibits the government from "taking advantage of an uncounseled defendant," the Court's doctrine may be rooted in the nature of the "accusatorial" system. Grano, *supra* note 6, at 35. Oddly enough, his attempted constitutional rationalization of the *Massiah* doctrine proves more complete and satisfying than many of those proffered by supporters. *See id.* at 22-23 (noting that more than truth determination is involved in accusatorial system which limits governmental authority and minimizes appearances of unfairness); *see also* Note, *supra* note 23, at 373-75, 389-90 (*Massiah* adherent endorsing Professor Grano's accusatorial system rationalization of the doctrine).

[139] *See supra* note 136.

[140] *See* Grano, *supra* note 6, at 9-10, 18. Professor Grano contends that the imbalance that led to a sword-type right to counsel was one that jeopardized the liberty of innocents, whereas the imbalance that the *Massiah* "shield" seeks to remedy is one that makes it more difficult for the guilty to avoid conviction. *Id.* at 27 n.161.

[141] *See id.* at 24-26. Professor Dix adds that *Massiah*'s right to counsel rationale for protection against informants "preclude[s] rational discussion" and is "absurd," "ill-suited," and "grossly inappropriate to the task" of regulating government informants.

Recently, another author has exhorted opponents to hasten *Massiah*'s deserved demise by "articulat[ion of] a more principled position."[142] The scholarly community has lent forceful voices to the chorus contesting *Massiah*'s very right to exist.

III. Critical Evaluation of the Right to Counsel Against Informants

A. *An Assessment of the Opposing Perspectives on* Massiah

The *Massiah* branch of the sixth amendment has been built upon shifting, elusive, and rationally unsatisfactory sands. Neither the Court nor the scholarly community has adequately confronted or defended the right's constitutional legitimacy.[143] "Fairness," "serious imposition," and "government overreaching"[144] are patently deficient justifications for extending the right to counsel into new arenas. While such phrases are descriptively accurate, unless they are rooted in constitutional text, history, or objectives, such vague and conclusional labels amount to little more than judicial say-so. Constitutional interpretation erected upon such foundations is fair game for criticism.[145]

The Court's more specific rationales are almost as unsatisfying. The use of unknown agents to elicit is said to "interfere" with the right to counsel.[146] It is difficult to see what sort of "interference" the Court

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Dix, *supra* note 3, at 224-29. He finds the fifth amendment privilege against self-incrimination a preferable source of constitutional protection against informants' elicitations. *See id.* at 229. The difficulty with his preference is an absence of the compulsion that is essential for fifth amendment harm. *See supra* notes 95-100 and accompanying text (suggesting that *Massiah* Court failed to provide an adequate constitutional rationale for counsel to supplement the plainly inapplicable anti-coercion rationale relevant in *Spano*'s police interrogation context).

[142] Uviller, *supra* note 10, at 1162. In his recent all-out assault on *Massiah*, probably the most scathing indictment yet, Professor Uviller calls *Massiah* the reflection of an "arbitrary" desire to limit inquisition and "judicial discomfort" with inquisitorial facets of our system. *Id.* at 1183.

[143] *See supra* notes 94-142 and accompanying text.

[144] *See supra* notes 98-102 & 137-38 and accompanying text.

[145] This Article will not provide a constitutional exposition of *Massiah* rooted in painstakingly precise historical or linguistic interpretation. Nor will it proffer a detailed, unassailable specification of the constitutional purposes furthered by *Massiah* counsel. This Article will, however, furnish a constitutional foundation that improves dramatically upon the generalities of the past. The conclusionary and facile explanations provided by the Court have not provided the *Massiah* right with the kind of constitutional groundwork essential to avoid the appearance of inappropriate judicial lawmaking.

[146] *See supra* note 101 and accompanying text.

perceives. The government neither intrudes upon the attorney-client relationship nor in any way hinders counsel's efforts to defend. The Court has said that surreptitious elicitation impairs counsel's ability to prepare a defense,[147] but an eliciting informant does not impede or constrain counsel's preparation for trial.[148] Moreover, the notion that an accused lacks the "legal skill and expertise" needed in *Massiah* situations[149] borders on the ludicrous. Undercover informant elicitation simply does not raise legal questions or demand legal skills.[150]

Massiah proponents rely heavily upon the claim that an accused's pretrial admissions destroy or dilute counsel's courtroom effectiveness, rendering trials "mere formalities."[151] Regardless of its accuracy, as currently formulated this contention posits much too broad a standard for granting pretrial counsel.[152] Many pretrial events, even many involving the defendant, render the trial a "formality" and counsel "ineffective" in the sense that they yield important, damaging evidence of guilt. If this alone were a sufficient basis for sixth amendment entitle-

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[147] *See supra* note 145 and accompanying text. The harm generated and the interests threatened in *Massiah* contexts are thus analogized to those involved in Powell v. Alabama, 287 U.S. 45 (1932), a case in which counsel's late appointment meant that preparation was virtually nonexistent.

[148] Of course, insofar as the government gathers damning evidence, it does make defense more difficult. Such damage to the defense, however, is inherent in the prosecutorial task. The guiding principle of Powell v. Alabama, 287 U.S. 45 (1932), does not prohibit the state from prejudicing the defense, but only from doing so by denial or infringement of a fair opportunity to prepare a defense. *See* United States v. Henry, 447 U.S. 264, 294 (1980) (Rehnquist, J., dissenting) (observing that the constitutional offense in *Powell* was the wholesale deprivation of any opportunity for pretrial consultation, investigation, and preparation).

[149] *See supra* note 104 and accompanying text.

[150] Because of the informal nature and simple objective of the defendant-informant encounter, no substantive or procedural legal questions arise. Furthermore, because of the usual form assumed by the government opponent — lay informant, as opposed to regular police officer or prosecutor — there is little, if any, difference between the parties in legal expertise, technical skill, or strength. *See supra* notes 125-29 and accompanying text; *see also* Dix, *supra* note 3, at 228 (suggestion that *Massiah* is rooted in danger of unfair prosecutorial advantage is belied by absence of any indication that right bears relationship to prosecutor's involvement); Kamisar, *supra* note 3, at 37-38 (suggesting that defendant in *Massiah* was not even dealing with someone able to use standard techniques of persuasion or inducement); Note, *supra* note 23, at 395 (concluding that informant and defendant are relative equals; former has no advantage in legal skill). *But see* Note, *Further Expansion*, *supra* note 69, at 464 (contending that in every post-indictment encounter defendant is confronted with legal questions and with adversary).

[151] *See supra* notes 105-09 & 137 and accompanying text.

[152] *See supra* note 134.

ment, the right to counsel could become too potent an obstruction to investigation, evidence-gathering, and conviction.[153] Neither the right to counsel nor any other right can be meant to prevent all pretrial harm to a defendant's trial cause.[154]

Finally, the Court's characterization of counsel as a "medium," and its suggestions that *Massiah* involves the rights "not to reveal," "not to be confronted," and "to consult with counsel"[155] provide descriptive satisfaction but make scant progress toward substantive constitutional justification.[156] They evince a contentment to remain on *Massiah*'s surface and an inability or unwillingness to explore its constitutional depths.

Opponents' criticisms of the deficiency of *Massiah*'s constitutional support have been on target. Their affirmative challenges to the right's legitimacy, however, have been less than persuasive. Their sense that informant surveillance is not objectionable or improper[157] is as conclusional as the Court majority's proclamations regarding fairness, justice, and overreaching. More substantively, the anti-*Massiah* forces assert that because informant elicitation jeopardizes neither voluntariness nor

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[153] *See* Maine v. Moulton, 474 U.S. 159, 180 (1985) (asserting that *Massiah* doctrine does not exclude evidence pertaining to uncharged offenses even though other charges were pending at the time the evidence was obtained because to do so "would unnecessarily frustrate the public's interest in the investigation of criminal activities").

Some past Justices apparently have believed that whenever a defendant is involved in a situation that can produce significant evidence of guilt, that stage is critical and requires counsel. *See* United States v. Wade, 388 U.S. 218, 243 (1967) (Clark, J., concurring) (concluding that lineup is a "critical stage" because "[i]dentification of the suspect — a prerequisite to establishment of guilt — occurs at this stage"); *id.* at 246 (Black, J., concurring and dissenting) (stating that "lineup is a critical stage . . . because it is a stage at which the Government makes use of [the accused's] custody to obtain crucial evidence against him"). Such an approach would hamper investigation and evidence-gathering, but it would not enable counsel to prevent all convictions since it limits "critical stages" to those events involving the defendant himself.

[154] The *Massiah* situation may be distinguishable from other contexts in which trial is, in this broad sense, rendered a formality. Undercover elicitation may undermine counsel's effectiveness in some more fundamentally objectionable way. If so, the Court should explain more fully. The constitutional reasoning that declares counsel necessary because and whenever an accused's chances for acquittal could be harmed is overbroad and theoretically deficient.

[155] *See supra* notes 110-13 and accompanying text.

[156] We need to know more about the nature of counsel as "medium," about the constitutional sources of and justifications for that role, and about the functions counsel as "medium" serves. The sixth amendment roots of a "right not to reveal or [to] be confronted" in the absence of counsel need to be traced in greater detail. The discussion that follows traces those roots.

[157] *See supra* note 119 and accompanying text.

reliability, counsel is not needed.[158] Their argument would be formidable if sixth amendment counsel's sole objectives were to prevent coercion and to guarantee reliability. However, because counsel's objectives are not so limited, their argument is undermined by its narrow constitutional vision.[159] It cannot topple *Massiah*.

Perhaps *Massiah*'s adversaries' most serious challenge is that the typical *Massiah* situation does not involve confrontation with the system or prosecutor. Consequently, a defendant does not require legal skill, knowledge, or expertise.[160] From that premise, opponents reason that counsel — legal expert and prosecutor's equal — is unnecessary, having no occasion to furnish the only assistance she is constitutionally commissioned to furnish.[161] Once again, however, their conception of counsel renders their argument vulnerable. That counsel exists only to provide strictly legal expertise is certainly not as self-evident as *Massiah*'s opponents suggest.[162] Neither past traditions[163] nor current

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[158] *See supra* notes 123 & 130-31 and accompanying text.

[159] Other ends promoted by the right to counsel's assistance are discussed later. *See infra* notes 183-224 and accompanying text.

[160] *See supra* notes 125-29 and accompanying text.

[161] *See id.*

[162] Other than allusions to historical traditions concerning the roles of counsel, those who espouse the anti-*Massiah* argument described in the text do not support their contention. *See infra* note 163. One can infer from the tones and character of their discussions a sense that counsel's role as legal expert is self-evident. While it is obvious that counsel should play that part, it is by no means obvious that counsel should be confined to playing that part and no other.

The terminology "legal expertise" and "legal expert" are shorthand expressions meant to encompass the training and skill essential to deal with both the legal system and the knowledgeable prosecutorial adversary. The proponents of the narrow vision include both facets. Thus, any description of their position that included less would not be a fair characterization of their perspective on counsel's functions.

[163] The proponents of the conception of counsel as no more than legal expert seem to believe that the history of counsel supports their perspective. *See* United States v. Ash, 413 U.S. 300, 306-13 (1973) (noting that the "historical background" of counsel leads to the view that counsel's purposes are to aid with legal problems and intricacies and to assist in meeting the advocacy of the public prosecutor; expansion of right to counsel over time has been guided by those historically-dictated purposes); Grano, *supra* note 66, at 943 (contending that nothing in British or colonial history supports the view that counsel was intended to apply to police interrogation). A major difficulty with their position is that the original historical intent of those who framed the sixth amendment is simply not clear. The sixth amendment "emerged in an atmosphere of silence concerning the intentions which produced it." W. BEANEY, *supra* note 22, at 24-27. One cannot know with certainty, and should not purport to know, the precise dimensions the Framers envisioned for counsel.

The task of fleshing out the scope of the counsel guarantee was left to the judiciary.

conceptions of our adversary system lead ineluctably to so limited a perspective upon counsel's functions. If a vision of counsel as legal expert alone is to prevail, it should rest on more than just historical similitude or force of repetition. Such a vision can properly dictate constitutional outcomes only if it is consistent with sixth amendment purposes and aspirations in light of present-day practices and attitudes.[164] Conse-

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See id. at 24. The incompatibility between the English common-law conception of counsel and American visions and aspirations, *see id.* at 1, has prompted the Court to ignore historical evidence and to pursue a "more enlightened" approach to interpretation of the counsel clause, an approach that better comports with "modern conditions and attitudes." *Id.* at 42-44. The Court could never have arrived at many sixth amendment landmarks, *e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963), by strict adherence to the historical ambit of the counsel right. Its commitment to look beyond history and to interpret the promise of counsel in light of evolving conditions and attitudes has been well-justified. *See infra* note 164.

[164] Even if the Framers' precise conception of counsel's characteristics could be confidently ascertained, constitutional interpretation tied solely to those historical attributes would be seriously flawed. Modern conditions and attitudes are dramatically different than those extant at the adoption of the sixth amendment. Evolution of the criminal justice system and police practices, and a distinct transformation in societal and legal attitudes toward defense counsel, call for re-evaluation of the roles of counsel. Failure to construe the guarantee of counsel in light of modern conditions, practices, and attitudes might result in fidelity to the original model but disservice to the fundamental reasons for granting assistance.

Justice Cardozo said that "the great generalities of the Constitution have a content and significance that vary from age to age." F. HELLER, *supra* note 33, at 109; *see also id.* at 139 (observing that the "written language of the Constitution takes varying interpretations under changing conditions"). Contemporary interpretation of the right to counsel, one of those "great generalities," must accord with the fact that when the right to counsel was included in the Constitution a defendant's confrontations with the government were confined to the courtroom. *See* United States v. Wade, 388 U.S. 218, 224 (1967); Note, *Historical Argument*, *supra* note 40, at 1041. The government did not use undercover agents to elicit inculpatory disclosures. *Cf. id.* at 1017 (noting that police interrogation was not extant at the time). Moreover, attitudes toward defense counsel differed markedly from those that prevail today. *See* F. AUMANN, THE CHANGING AMERICAN LEGAL SYSTEM 29 (1969) (noting that Georgia was said to be "a happy flourishing colony free from the *pest and scourge of mankind* called lawyers" (emphasis added)); *see also* F. HELLER, *supra* note 33, at 151 ("[The] adjustment of individual and state interests in the control of crime presents today a challenge in terms hardly anticipated by the [F]ramers of the Sixth Amendment.").

In sum, protection of the interests enshrined in the sixth amendment requires that the right to counsel expand to fit today's conditions. *See* Oliver v. United States, 466 U.S. 170, 186-87 (1984) (Marshall, J., dissenting) (when interpreting Bill of Rights, Court strives to "ensure that the liberties the Framers sought to protect are not undermined by the changing activities of government officials"); Payton v. New York, 445 U.S. 573, 591 n.33 (1980) (Court interprets fourth amendment "in light of contemporary norms and conditions" and "has not simply frozen into constitutional law" prac-

quently, before *Massiah* is "brought down"[165] by a confining vision of counsel solely as legal expert, opponents need greater constitutional justification for that vision.[166]

The anti-*Massiah* contingent has attacked on two fronts. Refutation of their "affirmative arguments" against the doctrine leaves their "negative case" — the accusation that *Massiah* lacks a principled foundation — unanswered. Responding to this accusation and determining whether *Massiah*'s roots are truly illusory, or have been merely elusive, is critical if the right is going to survive.

B. Is Massiah *Constitutionally Misplaced?*

One might suspect that the Court's failure to trace and to explain *Massiah*'s sixth amendment roots adequately is attributable to the fact that the right's true source is elsewhere in the Constitution.[167] The fact that the sixth amendment right's impact on undercover operations is distinctly different than its effects in other settings only bolsters such a suspicion. The extension of counsel to an informant-defendant encounter does not merely modify the event by injecting counsel's input. Rather, it effectively cancels the government's show by revealing the surreptitious enterprise.[168] As a result, *Massiah*'s essence might seem to be a right against governmental deception and trickery awkwardly en-

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tices existing at time of its passage); *see also* United States v. Salerno, 107 S. Ct. 2095, 2112 (1987) (Marshall, J., dissenting) ("Our Constitution, . . . [o]ver two hundred years [,] . . . has slowly, through our efforts, grown more durable, more expansive, and more just."). Although history can assist interpretation, there is no good reason to demand that the sixth amendment lawyer of today be cast from the original mold.

[165] *See* Uviller, *supra* note 10, at 1162.

[166] As will be seen, another constitutional vision of counsel, one that is broader and potentially more consonant with current practices, attitudes, and the accepted operation of our adversarial system of criminal justice is quite conceivable. *See infra* notes 183-247 and accompanying text.

[167] Some who reject *Massiah*'s sixth amendment rationale as wholly illegitimate and irrational have found sources for protection against government informant surveillance in other provisions of the Constitution. *See* Dix, *supra* note 3, at 226, 229 (suggesting that *Massiah* protection may be rooted in the fifth amendment privilege against compulsory self-incrimination); Uviller, *supra* note 10, at 1194-95 (maintaining that the fourth amendment ought to regulate informant surveillance).

[168] The *Massiah* entitlement must include a right to know of the government's presence. Enforcement of that right is necessarily inconsistent with the continuation of an undercover operation. *See* Dix, *supra* note 3, at 225 (observing that because respecting right to representation in *Massiah* context requires disclosure of informant's activity, extension of right actually amounts to prohibition of activity); Uviller, *supra* note 10, at 1160-61 (stating that *Massiah* must mean that the undercover surveillance session should not be conducted at all).

forced through sixth amendment counsel.[169]

What alternative constitutional sources of protection might one find against informants? Because informants' elicitations arguably invade privacy, protection against them could spring from the fourth amendment.[170] But if that provision were the real basis for protection against government informants, the resulting doctrine would have to be considerably different than the current *Massiah* doctrine. For example, fourth amendment protection would not depend either on the initiation of adversarial proceedings[171] or on active elicitation.[172]

More important, *Massiah*'s substantive sixth amendment protection 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.*[173]

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[169] The Court's generalized references to unfairness, injustice, and government overreaching only serve to promote the image of a safeguard against unsavory official conduct. If that is the fundamental character of the *Massiah* entitlement, it is not at all apparent that the sixth amendment is its proper source.

[170] I have previously argued at length that the fourth amendment's privacy entitlement ought to preclude unregulated surveillance by undercover agents of the government. *See* Tomkovicz, *Beyond Secrecy for Secrecy's Sake: Toward an Expanded Vision of the Fourth Amendment Privacy Province*, 36 HASTINGS L.J. 645, 727-30 (1985); *cf.* People v. Margolies, 125 Misc. 2d 1033, 1042, 480 N.Y.S.2d 842, 849 (Sup. Ct. 1984) ("To permit authorities to interrogate an incarcerated individual . . . by means of agents cloaked as his intimates is to afford the suspect all the protections of a fish in a fish bowl."). For another argument in support of fourth amendment control, see Uviller, *supra* note 10, at 1194-95. The Court, however, has consistently rejected claims that the fourth amendment regulates the acquisition of information by informants. *See* United States v. White, 401 U.S. 745 (1971); Hoffa v. United States, 385 U.S. 293 (1966); On Lee v. United States, 343 U.S. 747 (1952).

[171] The sixth amendment's linguistic restriction to "criminal prosecutions," as well as the perceived purpose of the right to counsel's assistance, have led the Court to impose an "initiation of proceedings" limitation upon the *Massiah* right. *See infra* notes 253-56 and accompanying text. Neither the language nor the privacy protection goal of the fourth amendment regulation of searches suggests a similar limitation.

[172] Active elicitation by an informant may pose greater risks to privacy than passive listening. Nevertheless, if the interests sheltered by the fourth amendment were properly defined and given the protection they are due, both active and passive elicitation would be regulated. Whether they actively elicit or passively receive information, unknown government informants threaten legitimate needs for privacy. *See* Tomkovicz, *supra* note 170, at 727-30.

[173] The fourth amendment regulation of government searches primarily protects privacy interests. *See* Katz v. United States, 389 U.S. 347 (1967); *see also* Tomkovicz, *supra* note 170, at 650-52. Any constitutional harm caused by informant activity — any privacy breach — would occur at the time of the surveillance. *See* United States v. Calandra, 414 U.S. 338, 354 (1974) (concluding that violation is "fully accomplished" by illegal search; use of product of past unlawful search "work[s] no new Fourth

The *Massiah* right, on the other hand, raises an *absolute* barrier not to the surveillance, but *to the use of its products at trial.*[174] Consequently,

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Amendment wrong"); *see also* Stone v. Powell, 428 U.S. 465, 540 (1976) (White, J., dissenting) (contending that exclusion of evidence "does not cure the [privacy] invasion"). Consequently, the fourth amendment would be concerned with the regulation of surveillance activity and the prevention of the privacy losses such surveillance would threaten. *See Calandra*, 414 U.S. at 354 (stating that amendment's purpose is "to *prevent* unreasonable government intrusions into . . . privacy" (emphasis added)). Any exclusion of evidence at trial would not be a part of the substantive fourth amendment guarantee, but would be a mechanism for ensuring such extrajudicial regulation and prevention. *See Stone*, 428 U.S. at 486; *Calandra*, 414 U.S. at 347-48. *But see* United States v. Leon, 468 U.S. 897, 935 (1984) (Brennan, J., dissenting) (asserting that fourth amendment includes a *right* to exclusion at trial of evidence obtained in violation of its regulation of searches and seizures).

Because the fourth amendment proscribes only "unreasonable" searches, its application would not prohibit informant surveillance. As it does for all government searches, the amendment would simply demand that the government show adequate substantive justification and comply with necessary procedural requirements prior to undertaking the intended surveillance. Thus, fourth amendment privacy protection is limited, not absolute. Deprivation of the core privacy interest is permitted when the government shows sufficient reason to search. Fourth amendment regulation of informants would simply restrain surveillance.

[174] The sixth amendment entitlement to counsel's assistance protects an interest in fair adversarial play within our criminal justice system. *See infra* notes 210-21 & 229-30 and accompanying text. Any constitutional harm caused by informant elicitation in the absence of counsel does not come to fruition until the products of the elicitation are used at trial. Consequently, the concern of *Massiah* doctrine has been, and continues to be, the use of these products. Without counsel, the use, not the surveillance, is barred. *See* Maine v. Moulton, 474 U.S. 159, 179 (1985) (holding that only use of statements is prohibited by sixth amendment, and that further undercover investigation is not proscribed); Massiah v. United States, 377 U.S. 201, 205-07 (1964) (original holding that only use, not elicitation, is proscribed); *see also* Dix, *supra* note 3, at 226-27 (noting the "possibility that the *Massiah* rule condemns only the use" of statements, not surveillance).

In addition, the adversarial equality interest safeguarded by the sixth amendment, unlike the privacy interest sheltered by the fourth amendment, receives "absolute" protection. The government may not deny assistance by making a countervailing showing of a substantial interest in doing so. *See Moulton*, 474 U.S. at 180 (refusing to recognize independent investigation of uncharged crime as basis for exception to *Massiah* right regarding charged crime). The inevitable discovery exception recognized in Nix v. Williams, 467 U.S. 431 (1984), is not to the contrary. *Nix* simply holds that if the evidence presented at trial is the same evidence that would have been introduced even if the defendant had been assisted by counsel, then the harm threatened by a defendant's inequality in a pretrial encounter has not been accomplished. Therefore, the sixth amendment is not violated by the use of that evidence. *Nix* does not hold that "reasonable" deprivations of an accused's interest in adversarial equality are permissible. It does not allow the government to inflict injuries that the sixth amendment is meant to prevent.

one cannot rationalize the current *Massiah* entitlement upon a fourth amendment foundation. Both the doctrine and the right belie any fourth amendment roots.[175]

The source of *Massiah* could be the due process promise of "fundamental fairness."[176] Due process demands procedures "necessary to an Anglo-American regime of ordered liberty."[177] It prohibits government conduct that undermines that regime and "shocks the conscience" of civilized society.[178] The Court has properly limited that clause's ambit to egregious and patently objectionable government conduct.[179] The costs, unpredictability, appearance of arbitrariness, and constitutionally suspect nature of liberal judicial use of due process to regulate investigative methods all militate strongly against such use. The "fundamental fairness" guarantee certainly should control undercover agents' flagrant misbehavior.[180] But the simple use of informants to elicit admissions from charged individuals is well outside an appropriately defined category of egregiousness.[181] Consequently, *Massiah* doctrine should not be

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[175] This statement is not meant to imply that the Court's unease with its repeated refusals to accord any fourth amendment protection against informant surveillance, *see supra* note 170, has not contributed to the birth and perpetuation of the *Massiah* doctrine. Although not a principled basis, the Court's discomfort cannot be discounted entirely as an actual influence upon the law in this area.

In addition, the textual discussion is not meant to imply that the fourth amendment should not have a role in informant contexts. As noted earlier, I have previously espoused fourth amendment regulation. *See* Tomkovicz, *supra* note 170. Rather, the point here is that the *Massiah* doctrine is not fourth amendment law in disguise.

[176] *See* Moran v. Burbine, 475 U.S. 412, 432 (1986).

[177] Duncan v. Louisiana, 391 U.S. 145, 150 n.14 (1968).

[178] Rochin v. California, 342 U.S. 165, 172 (1952).

[179] *See Moran*, 475 U.S. at 423, 424, 433-34 (refusing to include government deception of a suspect's attorney within that category because, although "highly inappropriate" and "distaste[ful]," the "conduct [fell] short of the kind of misbehavior that . . . shocks the sensibilities of civilized society" to the extent required for due process disapproval).

[180] *See* Uviller, *supra* note 10, at 1147 (concluding that due process clause should be available for "highly offensive" informant conduct not governed by specific Bill of Rights provision); *see also* Hoffa v. United States, 385 U.S. 293, 320-21 (1966) (Warren, C. J., dissenting) (advocating use of federal supervisory power to check overzealous use of unsavory informant). Of course, due process control would not depend on any one factor (such as "initiation of proceedings" or "deliberate elicitation"), but would hinge upon the totality of the circumstances surrounding the informant's use and conduct. Also, there would ordinarily be no transgression (*i.e.*, no cognizable deprivation of life, liberty, or property) until the products of the informant's efforts were employed to convict.

[181] To conclude that the *Massiah* right is actually a due process entitlement mislocated in the sixth amendment counsel clause would require the declaration that accord-

viewed as mischaracterized due process protection.[182]

The *Massiah* right must stand or fall on its home turf, the sixth amendment right to counsel. Its fate should depend upon the answer to one straightforward, but by no means simple, question: Does governmental use of undercover informants to elicit incriminating disclosures from defendants imperil the values inherent in the counsel guarantee?

C. Massiah *and the Adversary System: Truth, Equality, and Fair Play*

The American criminal justice system is adversarial.[183] Its essence is a contest between opposing sides.[184] The Framers prescribed several

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ing to our history and traditions — and without reliance on any specific condemnation or guarantee in the Bill of Rights — the employment of informants to elicit inculpatory disclosures from charged individuals is a shocking and fundamentally unfair way of fueling our criminal justice processes. Absent a more specific constitutional basis, the conclusion that such a declaration is an accurate reflection of legal-social consensus is more than a little discomfiting.

[182] *Massiah* originated in the Court's concern with coercion. *See supra* notes 41-49 and accompanying text. Nevertheless, it cannot properly be grounded upon the privilege against compulsory self-incrimination. *But see* Dix, *supra* note 3, at 229 (suggesting fifth amendment privilege as possible *Massiah* doctrine source). The *Massiah* doctrine has never hinged upon a showing of compulsion, an essential for the privilege's operation. Moreover, the Court has declared that the concerns and policies beneath the *Massiah* doctrine are distinct from those underlying the privilege. *See* Rhode Island v. Innis, 446 U.S. 291, 300 n.4 (1980). It has endeavored to shape *Massiah* doctrine to reflect that distinctness. *See* United States v. Henry, 447 U.S. 264, 271, 273 & n.11 (1980) (preserving sixth amendment "deliberate elicitation" standard as separate, more encompassing category than fifth amendment interrogation, repudiating government argument that sought "to infuse Fifth Amendment concerns . . . into the Sixth Amendment," and cautioning that custody, a fifth amendment doctrinal prerequisite, is relevant but not essential for sixth amendment violation). *Miranda* doctrine, designed to identify compulsion, has fixed the boundaries of pretrial self-incrimination protection. If the true roots of *Massiah* were relocated in the privilege, *Massiah* would be encompassed by *Miranda.* Either the *Massiah* right is independent of the fifth amendment privilege or its control of noncoercive settings must entirely disappear.

[183] *See* United States v. Wade, 388 U.S. 218, 227 (1967) (referring to "our adversary theory of criminal prosecution"); Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 442 (1980) (observing that the "criminal adversary system has long had a peculiar hold on the American imagination, and that it has frequently provided the stage on which conflicts between our most deeply felt values are played out"). In an earlier article, I briefly sketched some foundational themes and premises concerning the character of the adversary system and the nature and role of the counsel guarantee within that system. *See* Tomkovicz, *supra* note 66, at 980-81.

[184] *See* United States v. Nixon, 418 U.S. 683, 709 (1974) ("We have elected to em-

rules to govern the contest[185] and topped them off with a grant of counsel's assistance. Counsel is the central component of the system,[186] the glue that holds it together, and the protector of other guarantees.[187] Counsel embodies the realization that an adversarial system without "rough equality" would be an empty promise — a disguised method of sacrifice rather than a fair contest.[188] Counsel, the equalizer, gives a defendant necessary parity in the battle with the state.[189]

The Supreme Court has suggested that the equalization provided by counsel consists mainly, if not exclusively, of counsel's substantive and procedural legal skill and expertise. Counsel's professional abilities enable the defendant to cope with the intricacies of the legal system and the legal strength of the public prosecutor.[190] A defendant's inferiorities and needs, however, are not confined to the realm of legal knowledge

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ploy an adversary system of criminal justice in which the parties contest all issues before a court of law."); ABA, STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, Compilation 56 (1974) [hereafter ABA STANDARDS] ("The atmosphere of contention . . . is . . . the hallmark of our way of arriving at justice . . . .").

[185] By the sixth amendment's terms the Framers mandated that the accused shall enjoy the rights to confront witnesses, to compulsory process, to a speedy and public trial, and to a jury. These entitlements establish some of the most fundamental rules of the adversarial battle, but are not an exhaustive list of the applicable regulations. *See* S. LANDSMAN, THE ADVERSARY SYSTEM 47 (1984). According to Landsman, although the Constitution does not specifically mandate an adversarial system of criminal procedure, the sixth amendment guarantees of jury trial, confrontation, compulsory process, and counsel ensure adherence to some of the most basic elements of such a system. *Id.* He concludes that "taken together these requirements go a long way toward establishing adversary procedure in criminal cases." *Id.*

[186] *See* M. SCHWARTZ, LAWYERS AND THE LEGAL PROFESSION 35 (2d ed. 1985) (asserting that lawyer is "central element" of adversary system).

[187] *See* W. BEANEY, *supra* note 22, at 1 (stating that counsel might be considered crucial because it is the right by which all others are protected); *see also* ABA STANDARDS, *supra* note 184, at 109.

[188] *See* Grano, *supra* note 6, at 27 (observing that adversary process demands "rough equality"); Note, *Inanimate Devices*, *supra* note 40, at 389 (maintaining that objective of counsel is for state and accused to come into adversarial process on equal terms to ensure balance).

[189] *See* People v. Rogers, 48 N.Y.2d 167, 173, 397 N.E.2d 709, 713, 422 N.Y.S.2d 18, 22 (1979) (asserting that counsel confers no undue advantage on defendant, but equalizes positions of accused and sovereign); Uviller, *supra* note 10, at 1169 (acknowledging claim that purpose of counsel in adversary system is to even out inherent imbalance between contending parties).

[190] *See* United States v. Gouveia, 467 U.S. 180, 189 (1984); United States v. Ash, 413 U.S. 300, 313 (1973); *see also* Strickland v. Washington, 466 U.S. 668, 685 (1984) (observing that access to skill and knowledge is necessary to safeguard defendant's entitlement to meet prosecution's case).

and expertise.[191] Our modern criminal justice system requires more than technical legal abilities. The system demands tactical and strategic smarts, persuasive abilities, and bargaining skills. Moreover, the modern prosecutor is equipped with more than strictly legal talents and "physical" or intellectual power. To convict the accused, a prosecutor can also draw upon an array of personal skills and common sense tactics.[192]

Because the system demands and the government employs more than strictly legal expertise, the equalization premise requires defense counsel to serve as more than a mere "legal" expert. Not to commission counsel as a multipurpose advocate is to invite adversarial imbalance, to tip the scales considerably in the state's favor. In a balanced contest the sixth amendment lawyer must be not only a "legal" expert but a champion[193] of the defendant's cause in every respect. She must be a defender against whatever assaults the government launches.[194] Counsel must be a strategist, tactician, spokesperson, advisor, guide, advocate, and defender.[195] In sum, to remedy the adversarial contest's inherent imbal-

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[191] *Cf.* Note, *Historical Argument*, *supra* note 40, at 1033 (stating that reason for abolition of British fact-law distinction that limited defendant's entitlement to counsel to legal matters was not only defendant's "technical incompetence" to conduct defense, but also defendant's incompetence to conduct *any* defense due to pressure of trial); *id.* at 1042 (stating that interrogation is "passive process" in which defendant ordinarily does not need counsel's active assistance, but rather, exercise of counsel's "traditional, protective" function).

[192] The avenues available to the prosecutor are, of course, limited by constitutional guarantees and principles of fair play. *See* United States v. Bagley, 473 U.S. 667, 675-76 (1985) (holding that due process requires government to disclose material exculpatory evidence to defense); *Ash*, 413 U.S. at 320 (stating that prosecutor has obligation to strike hard, but not foul, blows). Still, as long as she abides by the constraints of fair play, the prosecutor may call upon all types of techniques and skills. Her position in our adversarial system — her duty to "strike hard blows" — should prompt her to rely upon all available legitimate means of performing her societal function. This is especially true after the state has formalized its commitment to prosecute and its adversarial stance by initiating judicial proceedings. *See infra* notes 253-69 and accompanying text.

[193] *See* ABA STANDARDS, *supra* note 184, at 109 ("The primary role of counsel is to act as champion for his client."); S. LANDSMAN, *supra* note 185, at 45 ("The adversary process assigns each participant a single function. Counsel is to act as a zealous advocate."). Landsman also asserts that "[t]o ensure zeal, attorneys are required to give their undivided loyalty to their clients." *Id.* at 5.

[194] *See* Note, *Historical Argument*, *supra* note 40, at 1034, 1048 (stating that counsel traditionally has functioned not just as technical aid, but also as "buffer" to prevent unfairness due to imbalance in individual's confrontation with state); Note, *Inanimate Devices*, *supra* note 40, at 362 (noting that colonists recognized that counsel served not only as "source of technical aid," but also as "buffer" against state forces).

[195] *See* Polk County v. Dodson, 454 U.S. 312, 318-19 (1981) (stating that within our

ance, counsel should be free to protect against all facets of the government's effort to convict and to supply any needed assistance.[196]

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legal system defense lawyer's duties are as "personal counselor and advocate," and counsel best serves the public "by advancing 'the undivided interests of his client' " (quoting Ferri v. Ackerman, 444 U.S. 193, 204 (1979))); Fare v. Michael C., 442 U.S. 707, 719 (1979) (observing that lawyer is the one person to whom all of society looks to protect defendant's interests); *Ash*, 413 U.S. at 312-13 (recognizing that counsel is "spokesman" and "advisor," "remove[s] disabilities of the accused," and "compensate[s] for . . . deficiencies" such as dimming of memory due to emotional tension and loss of credibility due to accused status — not strictly legal deficiencies); Anders v. California, 386 U.S. 738, 743-44 (1967) (noting "necessity" for "counsel['s] act[ing] in the role of an active advocate" who "support[s] his client's [cause] to the best of his ability"); ABA STANDARDS, *supra* note 184, at 112 (asserting that counsel is " 'learned friend,' . . . counsel in the literal sense," "the only person to whom the defendant can turn in total confidence," the one who assesses "the risks and advantages of alternative courses of action," and the one who supplies "a broad and comprehensive approach to [the defendant's] predicament"); S. LANDSMAN, *supra* note 185, at 22 (observing that "doctrine of single-minded zeal" on behalf of client's cause "became a fundamental tenet of the adversary lawyer's code"); Schwartz, *The Zeal of the Civil Advocate*, 1983 AM. B. FOUND. RES. J. 543, 547 (stating that counsel provides "roughly equal . . . dedication" to the client's cause and "opposition to the cause" of the opponent).

[196] The language in several Supreme Court cases suggests a more comprehensive vision of counsel. *See supra* note 195. Still, the failure of majorities to address the subject at length, coupled with more than one member's advocacy of the "lawyer as legal technician and expert" perspective, *see supra* notes 121 & 125-29 and accompanying text, leaves room for doubt concerning the position of the current Court. The Court claims that it has "not given [the right to counsel] a narrowly literalistic construction," but has "understood [it] to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with [adversarial] traditions." Herring v. New York, 422 U.S. 853, 857 (1975) (holding that counsel must be allowed to make closing argument even in bench trial). Nevertheless, there is reason to suspect that the Court's vision of counsel is, at least at times, limited in breadth. *See Ash*, 413 U.S. at 339 (Brennan, J., dissenting) (challenging "Court's assumption" that the entire function of counsel is to provide professional legal skill to assist the accused in coping with the system and the prosecutor); *see also* Berger, *supra* note 1, at 11 (contending that Court's conception of right to counsel is "increasingly incoherent, narrow-gauged, and . . . either overly or insufficiently respectful of the lawyer's professional identity").

There is strong opposition to the broad view of counsel developed in the text. Professor Uviller has been particularly critical of the perspective that views counsel as more than a strictly "legal" assistant. *See* Uviller, *supra* note 10, at 1169. He has branded the more comprehensive counsel "a loyal and energetic guerilla warrior" and "an all-purpose partisan, . . . not merely the legal superman who prevents injustice," but a protector of the guilty. *Id.* He has also suggested that "this heroic conception of the lawyer's role" is the product of "mythology." *Id.* While Professor Uviller's indictment has a superficial appeal, engendered in part by his forceful, colorful language, he provides little substantive support for his apparent belief that counsel should serve as no more than a "legal sword." *See id.* at 1159 (observing that the *Massiah* opinion, which

Perhaps there are reasons not to follow the equalization premise to these "logical" conclusions. Those who would confine counsel's roles contend that "incomplete equality" is in fact more consistent with the sixth amendment's dominant objective of reliable, truthful fact-finding.[197] According to their view, defense counsel should equalize the defendant only as needed to ensure accurate outcomes. Roles that tend to thwart the search for truth are not part of the constitutional lawyer's makeup. "Rough equality" that undermines truth, the primary value the sixth amendment was designed to promote, cannot be included within the Constitution's counsel guarantee. When counsel deals with legal aspects of the system or with the inherently smarter and stronger prosecutor, she promotes truth. But when counsel "shields" the accused against other "nonlegal" threats — perils that allegedly do not threaten to corrupt the fact-finding process — she disserves sixth amendment values. This disservice should not find constitutional sanction.

While its appeal is undeniable, the premises of this simple argument are far from unassailable.[198] Truth is a principal objective of our adver-

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he finds unsupportable, extended the assistance of counsel outside the courtroom domain "where lawyers have special training and competence").

Our history and traditions do not mandate that narrow conception of counsel. *See supra* notes 162-64 and accompanying text; *see also* Note, *Historical Argument*, *supra* note 40, at 1033-34 (asserting that legal complexities did not lead to grant of counsel, but rather, counsel grant precipitated development of legal complexities). Moreover, as will become clearer in this discussion, a view of counsel as an "all-purpose partisan" might well be more consistent with important values and objectives inherent in our constitutional, adversarial system. In any event, no vision of counsel ought to prevail simply upon the say-so of its adherents — no matter how clever or well-phrased. Opponents of a more encompassing vision of counsel's role have stated their conclusions clearly and pointedly. *See, e.g.*, United States v. Henry, 447 U.S. 264, 295 (1980) (Rehnquist, J., dissenting) (stating that accused has no right "to have his attorney serve as a sort of guru"); Uviller, *supra* note 10, at 1169 (discussed *supra*). They have failed, however, to explain why a defendant should not have assistance for any kind of hurdle raised by the system and against all manifestations of prosecutorial strength. Moreover, their narrow definition of counsel's role has not been persuasively grounded in sixth amendment interests.

[197] *See* Uviller, *supra* note 10, at 1169-73 (contending that counsel's role as "preparatory assistan[t]" is to promote search for truth, but in obstructive *Massiah* role, counsel's function is to "hinder conviction"); *see also* S. LANDSMAN, *supra* note 185, at 36 (stating that "zealous and single-minded representation . . . by [an] attorney" is among the "facets of the adversary system most strongly condemned as inhibitors of the discovery of truth").

[198] The Court has not always resisted the appeal. Recent developments regarding ineffective assistance of counsel rely heavily upon the premise that counsel exists to assure truthful, accurate outcomes and to protect the innocent from wrongful conviction. *See* Strickland v. Washington, 466 U.S. 668, 687, 691-92 (1984) (asserting that

sarial criminal justice system.[199] The hope and expectation are that all sixth amendment guarantees promote accurate adjudication.[200] Counsel, the equalizer, enhances the reliability of outcomes by putting the government to test.[201] She challenges the state to prove guilt beyond a reasonable doubt within the constitutional rules of the game. The American commitment to adversarial adjudication rests upon a certain

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purposes of counsel are "to ensure that the adversarial testing process works to produce a just result" and "to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding"); United States v. Cronic, 466 U.S. 648, 658 (1984) (stating that sixth amendment right to effective assistance is not implicated "[a]bsent some effect of [counsel's] conduct on the reliability of the trial process"); *see also* Berger, *supra* note 1, at 12, 101 (observing that the Court, in ineffective assistance cases, has defined right to counsel "as a protection for innocents only" and as "a shield for the guiltless").

[199] *See* Mathews v. United States, 108 S. Ct. 883, 891 (1988) (White, J., dissenting) (" '[T]he very nature of a trial [i]s a search for truth.' This observation is particularly applicable to criminal trials . . . ." (quoting Nix v. Whiteside, 475 U.S. 157, 166 (1986))); Oregon v. Hass, 420 U.S. 714, 722 (1975) ("We are always engaged in a search for truth in a criminal case . . . .").

[200] *See* F. HELLER, *supra* note 33, at 140 (contending that guarantees written into sixth amendment assure to accused elements found to enhance probability of fair trial). Such guarantees as the right to trial by jury and the right to a speedy and public trial are believed to serve the cause of accurate outcomes. *See* Waller v. Georgia, 467 U.S. 39, 46 (1984) (stating that "a public trial encourages witnesses to come forward and discourages perjury"); United States v. Marion, 404 U.S. 307, 320 (1971) (noting that one reason for speedy trial guarantee is that "[i]nordinate delay between arrest, indictment, and trial may impair a defendant's ability to present an effective defense"); Duncan v. Louisiana, 391 U.S. 145, 157, 158 (1968) (maintaining that "juries do understand the evidence and come to sound conclusions in most . . . cases"; right to trial by jury is "essential for preventing miscarriages of justice"). Those same guarantees are also designed to promote other important constitutional interests. *See Waller*, 467 U.S. at 46-47 (stating that right to public trial ensures "that judge and prosecutor carry out their duties responsibly" and protects general public's "interest in exposing substantial allegations of police misconduct to the salutary effects of public scrutiny"); Apodaca v. Oregon, 406 U.S. 404, 410-11 (1972) (explaining that purpose of jury trial "is to prevent oppression by the Government" and does so by protecting "the interest of the defendant in having the judgment of his peers interposed between himself and the officers of the State who prosecute and judge him"); *Marion*, 404 U.S. at 320 (noting that speedy trial right safeguards a variety of interests other than accurate outcomes). According to the *Marion* Court, the speedy trial guarantee protects against "interfere[nce] with the defendant's liberty, . . . disrupt[ion of] his employment, drain[ing of] his financial resources, curtail[ment of] his associations, subject[ion of] him to public obloquy, and creat[ion of] anxiety in him, his family and his friends." *Id.*

[201] *See* Herring v. New York, 422 U.S. 853, 862 (1975) ("The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the *ultimate objective* that the guilty be convicted and the innocent go free." (emphasis added)); M. SCHWARTZ, *supra* note 186, at 14.

amount of faith (rather than proof)[202] that truth generally emerges from a balanced contest governed by rules and controlled by a neutral arbiter.[203] We choose to trust the adversary system over alternative dispute resolution methods.

The call to restrict counsel's assistance in the interest of truth is in tension with this faith. While all faith should be challenged, we should be skeptical about claims to know a better path to truth. Those who claim to know how to improve the search for truth by hedging adversarial equality are more than a little presumptuous.[204] We should demand evidence that faith in adversarial equality is irrational and unwise before restricting counsel to certain truth-promoting functions.[205]

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[202] *See* S. LANDSMAN, *supra* note 185, at 36 (noting that although the adversary system "places somewhat more emphasis on the resolution of disputes than on the discovery of material truth, it need not be conceded that the process is inept at finding truth"). Landsman maintains that "it is debatable whether the adversary approach is any less effective at uncovering truth than a judge-centered alternative." *Id.*; *see also* Luban, *The Adversary System Excuse*, in THE GOOD LAWYER 97 (D. Luban ed. 1983) (stating that although the adversary system "is as good as its rivals" at accurately ascertaining facts, "nobody knows how good that is").

[203] *Cf.* Oregon v. Hass, 420 U.S. 714, 722 (1975) ("We are . . . always engaged in a search for truth in a criminal case so long as the search is surrounded with the safeguards provided by our Constitution.").

[204] *See* S. LANDSMAN, *supra* note 185, at 36. In the opinion of Landsman:

> [O]ne must keep human limitations in mind when defining judicial objectives. The weakness of human perception, memory, and expression will often render the discovery of material truth impossible. To become preoccupied with truth may be both naive and futile. It is to the advantage of the adversary system that it does not define its objectives in such an absolute and unrealistic fashion.

Id.

[205] *Cf.* S. LANDSMAN, *supra* note 185, at 44. According to Landsman, the "fundamental lesson of Anglo-American legal history [is] that traditional methods of resolving disputes have served as a rampart against government tyranny . . . ." *Id.* In his view, while we should not flatly refuse to change, we should be cautious when contemplating significant departures from these traditional methods. *Id.* Therefore, "those who argue for change [should] face a significant burden of persuasion." *Id.*

It should not go unnoticed that assistance in the form of legal expertise does not always serve as a "sword of truth" as opposed to an obstructive "shield against conviction." Many legal rules and tactics are undoubtedly used by counsel to frustrate the quest for truth. On the other hand, some forms of nonlegal assistance probably assist the search for accuracy. Consequently, even if our goal was to ensure that lawyers serve only as truth promoters, it would not make sense to rely upon the distinction between legal and nonlegal assistance in defining their proper functions. In any event, the primary point here is that our fundamental faith in balanced adversarial contests ought to make us seriously question any claim that truth is best served by restricting counsel's equalizing functions.

Presumption alone does not justify distrust of the central equality tenet.

One might wonder, however, if this skepticism about the pro-truth argument is really a mask for timidity. After all, defense counsel often does obstruct truth.[206] A lack of equality and free government rein could enhance accuracy.[207] Skepticism might be more appropriately directed toward the adversary system and the benefits of total equality. A serious commitment to truth might overcome the hurdle of skepticism and the fear of change. Still, there would be compelling reasons to reject the claim that equalization should be limited to attain truthful results. The ascertainment of truth is a systemic goal and one benefit of equality. Truth, however, is not a sacred, exclusive, and inviolable sixth amendment objective. The premise that it is the sole or dominant goal of counsel does not reflect a full or fair understanding of constitutional values.[208] Moreover, that premise is incompatible with the trial counsel guarantee that our system has long recognized and respected.[209]

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[206] *See* S. LANDSMAN, *supra* note 185, at 38. Landsman asserts:

> Attorneys have, from the earliest times, been viewed as obstructors of truth. . . . [I]t is not hard to understand why onlookers might consider him the enemy of veracity. The ethical rule that compels the attorney zealously to represent his client officially reinforces loyalty at the expense of commitment to the search for truth.

Id.

[207] Undoubtedly, if counsel would advise a defendant not to make truthful inculpatory statements, *see* Uviller, *supra* note 10, at 1170-71, or otherwise provide reliable, tangible proof of guilt, then the denial of counsel could substantially further the quest for accurate outcomes.

[208] *See* S. LANDSMAN, *supra* note 185, at 37. Landsman concludes that

> a preoccupation with material truth may be not only futile but dangerous to society as well. If the objective of the judicial process were the disclosure of facts, then any technique that increases the prospect of gathering facts would be permissible. . . . Truth is nothing more than a means of achieving the end — justice. The disclosure of material facts is not the only means of achieving justice, and to treat it as the end is to open the way to unsavory abuses.

Id.; *see also* Williams v. Florida, 399 U.S. 78, 113 (1970) (Black, J., concurring and dissenting) ("A criminal trial is *in part* a search for truth. But *it is also a system designed to protect 'freedom'* by insuring that no one is criminally punished unless the State has first succeeded in the admittedly difficult task of convincing a jury that the defendant is guilty." (emphasis added)).

[209] *See* Strickland v. Washington, 466 U.S. 668, 711 (1984) (Marshall, J., dissenting) (maintaining that counsel is not granted, as Court assumes, only to prevent convictions of innocent, but also to guarantee that fundamentally fair procedures are used in securing convictions); *cf.* Stone v. Powell, 428 U.S. 465, 524 (1976) (Brennan, J., dissenting) (contending that constitutional "safeguards . . . are not admonitions to be tolerated only to the extent they . . . ensure" that the guilty are convicted and the innocent

It is often said that a criminal trial is not, and should not be regarded as, "a sporting contest."[210] Like many generalizations that go unchallenged, that assertion is neither a categorically accurate reflection of reality nor an indisputably valid normative pronouncement. Insofar as the notion of sport connotes a lack of seriousness or a randomness of outcome, it is appropriate to deny similarities. In other important respects, however, trials and sporting events are, and should be, alike. Both have refined structures, detailed schemes of rules, and neutral arbiters designed to ensure that the "right" or "best" prevails.[211] Both are premised upon the belief that all participants ought to have the opportunity to compete on a "level playing field."[212] Both are intrinsically dedicated to "fair play" according to the rules, to not suspending the rules on behalf of any player and to not allowing anyone to gain an

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are freed); Schulhofer, *supra* note 20, at 890 (asserting that reliability of evidence is "beside the point" if other constitutional norms are disregarded).

Lawyers are expected to raise legal claims that might prevent conviction of the guilty, such as claims that double jeopardy or speedy trial principles have been violated, because truth is not the only objective of our system or of counsel. *See* Berger, *supra* note 1, at 101 (to view counsel as only defending innocents "trivializes a noble calling as well as the amendment that enshrines it").

[210] *See* Mathews v. United States, 108 S. Ct. 883, 891 (1988) (White, J., dissenting) ("After all, a criminal trial is not a game, or a sport."); Brewer v. Williams, 430 U.S. 387, 416-17 (1977) (Burger, C. J., dissenting) (accusing Court of "playing a grisly game of 'hide and seek' " and "exalting the sporting theory of criminal justice"); Grano, *Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confessions Law*, 84 MICH. L. REV. 662, 677 (1986) ("No reasonable person who accepts the basic legitimacy of society and its laws can endorse the view that a guilty suspect, like a fox during a hunt, must be given a sporting chance to escape conviction and punishment." (footnote omitted)); Uviller, *supra* note 10, at 1174 (observing that while it is "surprisingly difficult to escape the sporting analogy . . . handicapping has no place in the determination of criminality by trial"); *see also* United States v. Cronic, 466 U.S. 648, 657 (1984) (noting that while trial is not game, neither is it sacrifice of unarmed prisoner to gladiators).

[211] *See* S. LANDSMAN, *supra* note 185, at 2. According to Landsman:

> The central precept of the adversary process is that out of the sharp clash of proofs presented by adversaries in a highly structured forensic setting is most likely to come the information upon which a neutral and passive decision maker can base the resolution of a litigated dispute acceptable to both the parties and society.

Id.

[212] *See* Herring v. New York, 422 U.S. 853, 858 (1975) (stating that right to counsel has "been given a meaning that ensures to the defense . . . the opportunity to participate fully and fairly in the adversary factfinding process"); Uviller, *supra* note 10, at 1173 (describing putative "preventive assistance" role of counsel as a means of combatting the "inherent disadvantage" and of giving the defendant a "fair fighting chance").

unwarranted advantage even if the result would be victory by the "superior" or "right" opponent. The fairness of neither can be judged solely by whether "truth" or the "best" competitor prevails, for fairness consists not only of accurate or truthful outcomes, but also of fair play according to established rules.[213] While these rules often promote the quest for truth, they sometimes impede or defeat it.[214] Because there is value in both sporting event and criminal trial processes, not just in their conclusions,[215] we compromise the search for the "right" outcome.

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[213] *See* W. BEANEY, *supra* note 22, at 3 (stating that essence of Anglo-American system is to determine guilt or innocence in a fair proceeding); White, *Suspect's Assertion*, *supra* note 7, at 60 (noting Professor Kamisar's view that *Massiah* is a " 'symbolic response' to visible violations of fair play"). A need for fair play rules is inherent in the notion of an adversary "system."

[214] *See* S. LANDSMAN, *supra* note 185, at 39 (observing that our "rules of evidence prohibit a wide range of information from being presented to the fact finder" and impose "a substantial barrier to the disclosure of important facts," thereby creating "an impediment to the discovery of truth"); Kamisar, *supra* note 1, at 79 (describing the operational premise that social interests in preserving respect for the individual and in securing equal treatment in law enforcement outweigh social interest in punishing criminals); White, *Police Trickery*, *supra* note 7, at 584 (asserting that voluntariness cases establish that even reliable confessions must be rejected when produced by trickery "inconsistent with basic notions of fairness"); *cf.* Seidman, *supra* note 183, at 442 ("Individualized truth is often the first casualty in large-scale struggles over the meaning of social justice.").

The double jeopardy clause of the fifth amendment is a good example of an impediment to truth posed by our commitment to fair play. The belief that multiple trials for the same offense are intolerably injurious to the accused leads us to foreclose repeated quests for "truthful" convictions. One of several reasons that we do so is that the government might have learned probative information at the first trial that will ease its burden and render conviction at the second proceeding more likely. *See* United States v. DiFrancesco, 449 U.S. 117, 128 (1980). In essence, our sense of fair play is offended *because the government has gained an advantage at the first trial that promotes the quest for a "truthful" conviction.*

[215] *See* Strickland v. Washington, 466 U.S. 668, 711 (1984) (Marshall, J., dissenting) (stating that right to counsel ensures "fundamentally fair procedures" because it affords defendants vigorous and conscientious advocacy and "meaningful assistance in meeting the forces of the State"); Uviller, *supra* note 10, at 1173 (observing that as a "preventive assistant," lawyer's supposed role is to promote a "fair fight," not simply a "just result").

Professor Grano is among those who disagree with the contention that the "sporting theory" is in any way appropriate. He challenges the premise of liberal equalization, concluding that "[e]quality between contestants makes for good sports, but in a criminal investigation we should be seeking truth rather than entertainment." Grano, *supra* note 210, at 677 (footnote omitted). His rhetoric is powerful, but deceptive, because it deflects attention from the fact that other constitutional values, not entertainment, compete with truth and the call for fair play. *See infra* notes 216-23 and accompanying text. The debate over the proper scope of the counsel guarantee cannot be settled —

Put simply, our notions of fairness go beyond the interest in "correct" results and include a dedication to "fair play."[216]

The difficult task in the criminal trial context is to prescribe the rules of fair play. From necessarily general constitutional pronouncements and their underlying assumptions, we must derive more detailed regulations. For present purposes, the specific task is to discern the rules and principles that give substance to the sixth amendment counsel guarantee.

Counsel serves to equalize and to prevent imbalance.[217] The balance provided by counsel promotes not just reliable outcomes, but several other equally important values. Our system demonstrates respect for individual worth, dignity, independence, and autonomy by according defendants opportunities to construct defenses and to protect themselves against state power and authority.[218] We 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 accusations.[219] Equalization of the ac-

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and is not advanced — by simplistic reduction of the clash to "truth versus entertainment." The choices faced in construing the counsel grant are considerably more difficult and less stark.

[216] *See* Taylor v. Illinois, 108 S. Ct. 646, 657 (1988) (Brennan, J., dissenting) ("Criminal discovery is . . . integral to the quest for truth *and the fair adjudication of guilt or innocence.*" (emphasis added)); Polk County v. Dodson, 454 U.S. 312, 318 (1981) (stating that system assumes adversarial testing will ultimately advance "public interest in truth *and fairness*" (emphasis added)); Chambers v. Mississippi, 410 U.S. 284, 302 (1973) (referring to "established rules of procedure and evidence designed to assure *both fairness and reliability* in the ascertainment of guilt and innocence" (emphasis added)).

[217] *See supra* notes 183-96 and accompanying text; *see also* F. HELLER, *supra* note 33, at 27 (asserting that clamor for Bill of Rights indicated public demand for maintenance of fair balance in criminal trials); *id.* at 120 (observing that grant of defense counsel brings about a "closer approximation of that balance of contesting forces" that is the "ultimate desideratum" of the system).

[218] *See* W. BEANEY, *supra* note 22, at 208 (observing that whether guilty or not, a person found guilty after trial without counsel "will inevitably feel society has done him a great wrong"); S. LANDSMAN, *supra* note 185, at 44. Landsman states:

> Adversary theory holds that if a party is intimately involved in the adjudicatory process and feels that he has been given a fair opportunity to present his case, he is likely to accept the results whether favorable or not. Assuming this theory is correct, the adversary process will serve to reduce post-litigation friction and to increase compliance with judicial mandates.

Id.; *see also* M. SCHWARTZ, *supra* note 186, at 14 (asserting that adversary system is "best way of preserving human dignity in the dispute-resolution context").

[219] The adversary system is the institution devised by our legal order for the proper reconciliation of public and private interests in the crucial area of penal regulation. As

cused 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.[220] Counsel gives content to the belief that all deserve treatment as worthwhile members of society and that no individual should be exploited.[221]

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such, it makes essential and invaluable contributions to the maintenance of a free society. *See* Kamisar, *supra* note 1, at 76. Kamisar cites:

> The essence of the adversary system is challenge. The survival of our system of criminal justice and the values which it advances depends upon a constant, searching, and creative questioning of official decisions and assertions of authority at all stages of the process. The proper performance of the defense function is thus as vital to the health of the system as the performance of the prosecuting and adjudicatory functions. . . . [T]he loss in vitality of the adversary system . . . significantly endangers the basic interests of a free community.

Id. (footnote omitted) (quoting REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 9-11 (1963); *see* S. LANDSMAN, *supra* note 185, at 45 (supporting argument that "adversary procedures are perceived as fairest and are more likely to satisfy litigants and onlookers than nonadversary alternatives").

Truth may be a bit more tangible and less nebulous an interest than others promoted by adversarial equality. Those attributes, however, do not make it any more valuable or desirable. While the proponents of truth seem reluctant to acknowledge other interests served by counsel, they are not averse to similarly intangible interests that suit their ends. Professor Uviller, for example, contends that confession "satisfies deeply rooted needs in our social consciousness." Uviller, *supra* note 10, at 1141. He also relies upon beliefs that society "crave[s] a full and creditable acknowledgement of culpability" and that "confession provides welcome reassurance that the machinery works." *Id.*

[220] *See* S. LANDSMAN, *supra* note 185, at 44 (observing that our traditional adversary methods "have served as a rampart against government tyranny"). Landsman also asserts that, especially in an era of expanding government power, the adversary system is capable of preserving individual rights against the "keen threat" of government pressure on citizens to cooperate. *Id.* at 46. Such pressure is generated by the "urgency of social problems" and is designed to ensure "the efficient operation of society as a whole." *Id.*

[221] *Cf.* Culombe v. Connecticut, 367 U.S. 568, 581 (1961) (due process case observing that one "cardinal" conviction is that "men are not to be exploited for the information necessary to condemn them before the law"); *see also* Watts v. Indiana, 338 U.S. 49, 54 (1949) (due process case opining that ours is an "accusatorial" not an "inquisitorial" system in which "society carries the burden of proving its charge against the accused not out of his own mouth").

Those who believe that counsel's equalizing functions have been excessively expanded have unleashed potent verbal assaults. Professor Grano has challenged us to find the "courage to rebut" the "moral claims" that it is wrong to manipulate a defendant's choice. Grano, *supra* note 210, at 679. He has declared that "it simply is not morally offensive to 'take advantage of the psychological vulnerabilities of a citizen.' "

These "fair play" values require counsel to be an active, powerful assistant, not just a warm presence.[222] Moreover, these values militate against responding to the call for "limited" or "partial" equalization by arbitrarily restraining counsel's functions. Important constitutional values are sacrificed unless counsel is empowered and permitted to assist fully, to respond to all offensive and defensive needs, to provide both strictly legal aid and all manner of strategic, pragmatic help. Counsel must function as both sword and shield against the state's efforts to convict.[223]

Id. at 679 (footnote omitted) (quoting Schulhofer, *supra* note 20, at 872). Professor Uviller has joined the attack, concluding that prosecutorial access to the defendant's mind without the protection of counsel "sits well with our present notions of fairness." Uviller, *supra* note 10, at 1184. He has challenged the "moral principle" that declares direct inquiry of the defendant or use of his free responses to be "shameful" or "inimical to our judicial or ethical heritage." *Id.* at 1183. He has contended that "ex parte inquiry" is not a "barely tolerable evil within our precious adversary design" and would put the "burden . . . [on] those who claim" otherwise. *Id.* at 1183-84.

Once again, adherents to a narrow view of counsel rely more upon disdainful language and antagonistic tones than upon temperate consideration of the competing interests. They seem content to rest upon dismissive declarations concerning "notions of fairness," "moral offensiveness," and "ethical heritage." Their descriptions of opposing concerns do not do justice to the fundamental adversary system values and constitutional interests that underlie those concerns. In sum, they do not construct persuasive analytical cases against fair play values.

My discussion of fair play, the premise of equality, and the constitutional values arguably furthered by sixth amendment counsel does not include a claim of constitutional certainty. One should be wary of all such claims. The prime objective here has been to shed light upon a debate that has often been conducted in darkness. In suggesting preferences, I too may be guilty of rhetorical excess. For the most part, however, I have tried to provide insights into the values and interests that have been unfairly characterized and underestimated. Based on those insights, the reader can make informed choices regarding proper interpretation of the sixth amendment.

[222] *See* Mitchell v. Kemp, 107 S. Ct. 3248, 3249 (1987) (Marshall, J., dissenting from denial of certiorari) (Court should avoid creating the impression "that the Sixth Amendment guarantees" no more than that " 'a person who happens to be a lawyer is present at trial alongside the accused' " (quoting Strickland v. Washington, 466 U.S. 668, 685 (1984))).

[223] In White v. Maryland, 373 U.S. 59 (1963) (per curiam), an uncounseled defendant pleaded guilty at a preliminary hearing. *Id.* He later changed his plea, but was convicted after a trial at which the guilty plea was introduced into evidence. *Id.* at 60. The Supreme Court found a sixth amendment violation in the use of the fruit of the denial of counsel at the preliminary hearing. *Id.* The Court's rationale was that counsel " 'could have enabled th[e] accused to know all the defenses available to him and to plead intelligently.' " *Id.* (quoting Hamilton v. Alabama, 368 U.S. 52, 55 (1961)).

White has been called the source of the broader view of counsel as protective shield against government efforts to secure information from the defendant. *See* W. LAFAVE

The traditional functioning of trial counsel comports with the premise that counsel must serve as a multifaceted, complete assistant in the adversarial battle. Trial counsel is certainly a sword who proffers the accused's best offense and furnishes whatever technical legal expertise and assistance a situation requires. None of our principles or traditions, however, prohibit trial counsel from also acting as a shield or from providing "nonlegal" assistance. We do not confine trial lawyers to active, affirmative legal maneuvers or bar them from guarding the defendant against ill-advised decisions, unwise actions, or unnecessary cooperation with the prosecution. No preconceived notion of counsel as a mere sword of legal expertise delimits the nature of allowable assistance and advice. Trial counsel promotes defendant's cause and protects it against harm with whatever legal or common sense assistance the situation warrants. She is a complete offensive and defensive equalizer.[224]

& J. ISRAEL, *supra* note 42, at 282; Kamisar, *supra* note 1, at 46; Uviller, *supra* note 10, at 1174 n.129. Professor Uviller concludes that *White* can fairly be read as "authority for the notion that the right to counsel may serve to repair the imbalance of advantage" by shielding a defendant against the peril of voluntary disclosures to the government. *Id.* Nonetheless, he believes that that notion was "hardly the primary intent" of the *White* holding. *Id.* According to him, a view of counsel as guardian of access to the defendant's mind has a "lack of inherent authenticity," and the "burden" must be placed upon proponents of the view to demonstrate that "such access . . . is inconsistent with fundamental tenets of the adversary system." *Id.* at 1182-83. The discussion in the text, while not conceding that his allocation of the burden is proper, points to values, interests, and a perspective on the adversary system that could sustain that burden.

[224] *See* Kamisar, *supra* note 1, at 13, 16 (asserting that in courtroom, lawyer is at defendant's side "to shield him" and "to guide him"; "to prevent a defendant's lawyer from guiding him" is fundamentally unfair).

The Supreme Court has recognized a "right" to "a meaningful opportunity to present a complete defense." *See* California v. Trombetta, 467 U.S. 479, 485 (1984); *see also* Ake v. Oklahoma, 470 U.S. 68, 76 (1985) (stating that defendant is entitled to "fair opportunity to present his defense"); Herring v. New York, 422 U.S. 853, 859 (1975) (recognizing counsel's involvement in effectuating "basic right of the accused to make his defense"). The Court has never suggested that this right, and counsel's role in ensuring it, are confined to sword-like presentation of an "offensive" case. Nor has it limited that "basic right" to the exercise of legal expertise. It would be surprising, to say the least, for the Court to suggest that trial counsel either should not function as a protective shield or should rigidly confine herself to the employment of strictly legal talents and capacities. If we are serious about the right to present a defense and counsel's role in ensuring that right, the sixth amendment must afford an all-purpose, offensive and defensive assistant.

The "ineffective assistance of counsel" context provides further support for this contention. Suppose, for example, that a lawyer was incompetent in some nonlegal, defensive manner. Assume that at trial the government suggested that the defendant reveal

If the Constitution entitles a defendant to full equalization, the state must not deprive an accused of that entitlement through either direct or indirect means. The government transgresses the promise of equality if it prevents the accused from obtaining assistance or fails to provide assistance to one unable to secure counsel. The state dishonors that promise when it restricts or constrains the performance of counsel's legitimate duties. Though the transgression is different in nature, the government also breaches its constitutional promise of equality by dealing secretly with an accused. By avoiding counsel, the state deprives the defendant of the benefits of equalization as effectively as when it denies or constrains assistance. A defendant is entitled to open dealings through counsel so that counsel can furnish the tools, talents, and strategies necessary for a defense.

Again, the trial and counsel's accepted functions therein support a common sense rule barring both direct and indirect deprivations of equalization. The sixth amendment does not allow the government to approach the defendant at trial in pursuit of inculpatory disclosures while denying counsel or preventing physically present counsel from advising her client. Such direct, imbalanced dealings with the accused would violate the adversary system's premises and undermine the fair play values served by trial counsel.

Indirect and stealthy approaches must be equally intolerable. Suppose, for example, that during a trial the prosecutor enlisted an informant to approach and speak with the defendant in the courtroom while the jury watched from a nearby room. Alternatively, imagine that an undercover agent with a transmitter broadcasted a lunch break conversation with the accused into the courtroom while a judge or jury listened. In either situation, whether counsel was absent, present at the encounter, or listening with the factfinder, the government's conduct would violate the sixth amendment. It would deprive the defendant of counsel's advice concerning a vital decision — whether to divulge unique knowledge regarding guilt or innocence to the authorities and to the trier of fact.

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information which would appear exculpatory, but which would implicate the defendant as an accomplice. Assume further that counsel, knowing that without the disclosure the government would have trouble sustaining its burden of proof, and knowing further that the testimony would be damning, ordered his client to "cooperate because we both know you are guilty, and you ought to face the consequences of your actions and purge your soul in the process." Surely counsel's advice could be challenged as unreasonable and constitutionally ineffective even though it is neither technically "legal" nor "offensive" in nature. Such advice would breach the lawyer's duty to "defend" with all skills and talents against all government threats.

If a defendant is entitled to full equalization, then it should not matter that the absence of counsel's input is due to secret avoidance and clever circumvention rather than prevention or limitation. Surreptitious trial approaches effectively deny the right to counsel by passively deceiving the defendant concerning the nature of the encounter and the need for assistance.[225] Even in the quest for truth, deceptive trial ploys are unacceptable.[226] If the prosecution wants to discuss the case, it must deal with the accused as an equalized, "arm's length" adversary.[227] In sum, the sixth amendment entitles the accused to full, unfettered trial assistance. The government may not deny, restrict, or avoid that entitlement.[228]

The preceding analysis posits trial counsel as a multifunctional assistant who constructs an affirmative case and defends against all prosecutorial efforts to convict. Trial counsel is supposed to exercise a

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[225] It is important to note that the sixth amendment is not being cast as an anti-trickery guarantee — a role more suitable for the general due process clause. The point is that the sixth amendment guarantees the opportunity for counsel's assistance and input in the adversarial battle. Whether counsel is physically present or not, covert approaches can deprive the accused of a full, realistic opportunity to enjoy the benefits of assistance. Thus, the safeguard is not an anti-deception protection in nature, but deception is prohibited because it is just as certain a means of depriving a defendant of counsel's contributions as direct denials of or restrictions upon counsel.

It should also be noted that even though such a trial approach by the government does not involve either strictly or technically legal questions or decisions, counsel would certainly have a role to play.

[226] *See* Patterson v. Illinois, 108 S. Ct. 2389, 2405 (1988) (Stevens, J., dissenting) (suggesting that if benefits to effective law enforcement do not lead to conclusion that government questioning of defendants without counsel is tolerable *during trials*, those same benefits should not prompt conclusion that such questioning is acceptable between the commencement of adversary proceedings and trial); Stone v. Powell, 428 U.S. 465, 524 (1976) (Brennan, J., dissenting) ("Particular constitutional rights that do not affect the fairness of the factfinding procedures cannot for that reason be denied *at the trial itself*." (emphasis added)).

[227] United States v. Henry, 447 U.S. 264, 273 (1980).

[228] Those who assert that an attorney is not a "shield" or a "guru," but a "sword" whose functions are confined to the "legal" realm, *see supra* notes 129, 136 & 140, have directly and indirectly suggested that proponents of a broader, more protective role must bear the burden of justifying their novel conception of counsel and their attempt to expand counsel beyond accustomed or traditional boundaries. However, as this Article suggests, the broader vision is quite consistent with the actual, accepted functioning of trial counsel. Consequently, it seems logical to require opponents to justify their campaign to *narrow* the proper adversarial functions of defense counsel. Proponents of the broader view need not concede that their vision of counsel as more than merely a legal expert who fashions an affirmative defense is a novel expansion in need of a uniquely compelling justification.

full array of skills and talents. One particular commission is to advise and shield against surreptitious efforts to secure a defendant's admissions. From this vision of trial counsel, the transition to pretrial counsel cast from the same mold is relatively simple.

The right to trial counsel reflects our adversary system's premise that "rough equalization" is essential to fair play within a scheme that resolves disputes by contest.[229] That fundamental premise promotes several societal interests, including respect for individual dignity, accordance of a realistic opportunity to contest the serious threat of criminal sanctions, preference for limited governmental power, and a commitment not to take advantage of or to exploit inferiors.[230] One of counsel's equalizing functions is to shield the accused from all government efforts to convict — including deceptions designed to secure incriminating "testimony."

The demand for equalization is tied by its nature to the existence of an adversary relationship and the commencement of conflict. At the time of the Bill of Rights' framing, trial was the sole adversarial battleground.[231] In today's system of criminal justice, real adversarial relationships arise and actual conflicts occur before trial.[232] The government opponent approaches and encounters the inferior accused before trial formally commences.[233] The trial is an undeniably important stage of the battle. Nonetheless, it is almost always the denouement of a contest that began well before the opponents arrived at the courtroom.[234]

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[229] *See supra* notes 183-96 and accompanying text.

[230] *See supra* notes 210-21 and accompanying text.

[231] *See* Note, *Historical Argument*, *supra* note 40, at 1041. This Note observes that eighteenth century America had no police and that private parties prosecuted. *Id.* Trial was the "critical point of confrontation" when "defendant's liberty was won or lost." *Id.* In the past, the accused was not confronted with the "full adversary force of the state until trial." *Id.*; *see also supra* notes 39-41 and accompanying text.

[232] *See* United States v. Ash, 413 U.S. 300, 309-10 (1973) (stating that counsel's assistance would be less than meaningful if limited to trial because accused is confronted today by state at significant pretrial events); Note, *Historical Argument*, *supra* note 40, at 1045 (observing that today state enters battle during police process and that is the only meaningful point of confrontation for large majority of those convicted).

[233] These approaches include not only attempts to secure incriminating disclosures, but also attempts to obtain other types of evidence. *See, e.g.*, Gilbert v. California, 388 U.S. 263 (1967) (handwriting exemplars); United States v. Wade, 388 U.S. 218 (1967) (identification at lineup). The government also encounters its opponent in more formal pretrial contexts. *See* White v. Maryland, 373 U.S. 59 (1963) (preliminary hearing); Hamilton v. Alabama, 368 U.S. 52 (1961) (arraignment).

[234] The recognition that the adversarial battle begins before trial is a cornerstone of important Supreme Court decisions concerning the right to pretrial counsel. *See, e.g.*, Kirby v. Illinois, 406 U.S. 682, 689-90 (1972) (government commences adversarial con-

The government cannot surreptitiously seek admissions from an uncounseled defendant at trial. But if it can engage in the same conduct during pretrial skirmishes and then bring the products into the courtroom, it can exploit the temporal expansion of the battle to regain the advantages of adversarial imbalance.[235] In terms of both the gains to the government and the losses to the accused, that combination of pretrial and trial activity is the "functional equivalent" of constitutionally proscribed trial conduct.[236]

Unequal pretrial conflicts jeopardize the same interests as imbalanced trial battles. To deny counsel in *Massiah* situations would be to declare that the values safeguarded by equalization during trial are not worthy of shelter before the trial begins. Such a severe limitation of

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test when it initiates judicial proceedings); *Wade*, 388 U.S. at 235 (defendant's fate might be determined in pretrial confrontation with "[s]tate aligned against" him); *see also* Powell v. Alabama, 287 U.S. 45, 57 (1932) (defendant is entitled to counsel between arraignment and trial as much as at trial itself).

[235] *See* Patterson v. Illinois, 108 S. Ct. 2389, 2399 (1988) (Blackmun, J., dissenting) (asserting that sixth amendment does not allow prosecution to take advantage of gap between commencement of adversary process and appointment of counsel). Without the *Massiah* pretrial grant of counsel, the government could employ undercover informants to secure any accused individual's thoughts regarding guilt or innocence. Whether in jail or on bail, on the street or in private homes, weeks or months prior to trial or the day or hour before, the state could secretly encounter defendants and acquire disclosures. The government would then be free to place the fruits of these imbalanced dealings before the trier of fact, thereby effectively accomplishing what counsel could prevent if the entire encounter occurred at trial. The advantage supposedly removed by the sixth amendment shield would, for all intents and purposes, be restored to the state.

[236] *See id.* at 2400-02 (Stevens, J., dissenting) (suggesting that government dealings with the accused that would be unacceptable at trial should be considered equally unacceptable during the period between the commencement of formal proceedings and the commencement of trial); Hamilton v. Alabama, 368 U.S. 52, 54-55 (1961) (granting right to counsel at arraignment because pitfalls are same as or similar to those faced at trial); Grano, *supra* note 6, at 33 (suggesting that goal in pretrial contexts has been "to surround defendant with [sixth amendment] protections he would have in the courtroom"); *cf.* Ashcraft v. Tennessee, 322 U.S. 143, 154 (1944) (asserting that if due process is offended by forcing defendants to take stand at trial and to testify against themselves, it must likewise be offended by forcing incriminating revelations beforehand and then introducing them at trial); Lisenba v. California, 314 U.S. 219, 237 (1941) (suggesting same as *Ashcraft supra*), *reh'g denied*, 315 U.S. 826 (1942).

The "functional equivalent" language is borrowed from a Court that has, in other contexts, been unwilling to allow the government to avoid constitutional strictures by disguising the same substance in a different form. *See, e.g.*, Berkemer v. McCarty, 468 U.S. 420, 442 (1984) (both formal arrest and functional equivalent of arrest are included within "custody" for *Miranda* purposes); Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980) (express questioning and functionally equivalent conduct constitute "interrogation" within meaning of *Miranda*).

our commitment to substantial constitutional interests would be arbitrary and out of touch with reality. It would betray a willingness to confine sixth amendment interests to a small portion of the adversary process, and would deprive them of virtually all substance.[237] The refusal to extend counsel to pretrial proceedings would turn our commitment to fair adversarial play into an insubstantial symbolic gesture,[238] for the trial shield can do little good if the superior state adversary has an unlimited pretrial opportunity to battle an unprotected opponent.[239]

One matter must be clarified. There is nothing wrong or unconstitutional about all preliminary conduct that seals a defendant's fate or that makes defense counsel's trial task all but impossible.[240] The problem

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[237] The rules of fair play would be "severely" limited in operation insofar as they would function only during the brief, concluding phase of the adversarial conflict. Such severe limitation would be "arbitrarily out of touch with reality" because adversariness is evident and undeniable at an earlier stage. If the values promoted by equalization are not safeguarded during pretrial clashes, the government gains exactly what those values should preclude, and the defendant loses precisely what they should shelter. Later adherence to fair play rules at trial neither removes those gains nor restores those losses.

It would be unthinkably unfair to allow a baseball pitcher to throw one or two pitches to each opposing, but absent, batter in pregame warmups, and to count those "strikes" against each during the game. Likewise, we would not permit one offensive football team to run the first two downs per set against only six or seven defensive players. While imperfect, such analogies illustrate the risk to fair play interests generated by the refusal to apply accepted rules to the entire contest.

[238] I have previously gone on record as believing that constitutional decisions have considerable symbolic significance. *See* Tomkovicz, *No Court Appointee Can Curb Crime in America*, Des Moines Reg., Nov. 13, 1987 at 13A, col. 3; *supra* note 20. Constitutional symbols can have powerful educative impacts — for good or for ill. The lesson of a decision to confine the counsel guarantee to trial could well be that while our commitment to fair play is hollow, our tolerance for subterfuge is substantial. Such an empty promise would teach all that we lack real dedication to important constitutional values. *See* Kamisar, *supra* note 1, at 19-20 (suggesting that if confession methods before trial are not constitutionally regulated, trial is "a stirring ceremony in honor of individual freedom" that lacks real substance).

[239] *See* United States v. Ash, 413 U.S. 300, 340 (1973) (Brennan, J., dissenting) (stating that exclusion of counsel in pretrial phase could "render the Sixth Amendment guarantee virtually meaningless, for it would 'deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him' " (quoting *Massiah*, 377 U.S. at 204)); Escobedo v. Illinois, 378 U.S. 478, 487 (1964) (asserting that trial would be an "appeal from the interrogation," and right to trial counsel would be hollow if pretrial government conduct without counsel ensured conviction).

[240] The Court's suggestion in United States v. Wade, 388 U.S. 218, 224, 235 (1967), that a pretrial stage is critical simply because it might seriously affect the outcome of trial or settle the accused's fate goes too far. On this point, Professor Uviller is on target. *See* Uviller, *supra* note 10, at 1157-58 (criticizing *Wade* standard because "many things important" that damage a defendant's cause occur before trial). The case

with pretrial undercover elicitations by a government adversary is that they can effectively cancel the benefits of trial counsel's advice regarding disclosure to the government and the factfinder. The adversary not only undermines the defendant's cause but does so by methods that are impermissible at trial. Such approaches by the prosecution render an important facet of the defendant's trial protection insignificant.[241] Serious dedication to the adversary system, its equalization premise, and its underlying values cannot tolerate pretrial adversarial conduct that drains the substance from that system, that premise, and those values.[242]

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made here for recognizing a *Massiah*-type right, and the doctrinal suggestions in Part IV, *see infra* notes 249-346 and accompanying text, rest upon a sounder foundation than the simple fact that the accused stands to suffer some harm that counsel could prevent.

[241] The idea that pretrial counsel must be afforded to prevent the undermining and defeat of trial protections has appeared in many opinions. In *Ash*, 413 U.S. at 324 note on *Wade* (Stewart, J., concurring), Justice Stewart observed that *Wade*'s reasoning was that "counsel is essentially a protection for the defendant at trial, and that counsel is necessary at a [pretrial] lineup in order to ensure a meaningful confrontation and the effective assistance of counsel at trial." In *Wade*, 388 U.S. at 227, the Court had stated:

> [W]e scrutinize *any* pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself.

Id. (emphasis in original). In *Escobedo*, 378 U.S. at 486 (quoting Hamilton v. Alabama, 368 U.S. 52, 54 (1961)), the Court declared: "What happened at this interrogation could certainly 'affect the whole trial,' 'since rights may be as irretrievably lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic purposes.' " In Spano v. New York, 360 U.S. 315, 326 (1959) (Stewart, J., concurring), Justice Stewart concluded that if an indicted defendant can be interrogated without counsel until he confesses, "the secret trial in the police precincts effectively supplants the public trial guaranteed by the Bill of Rights." Finally, in Crooker v. California, 357 U.S. 433, 443 (1958) (Douglas, J. dissenting), Justice Douglas asserted that "[t]he right to have counsel at the pretrial stage is often necessary to give meaning and protection to the right to be heard at the trial itself."

These opinions do not specifically explain how the benefits and values of trial counsel are undermined in pretrial contexts. This Article has tried to provide fuller explanation, giving content to Justice Stewart's conclusional declaration that "a Constitution which promises [counsel at trial] can vouchsafe no less to [a] man under midnight inquisition in the squad room of a police station." *Spano*, 360 U.S. at 327 (Stewart, J., concurring).

[242] *See* Moss & Kilbreth, *supra* note 53, at 64 (stating that Court has recognized pretrial counsel to prevent government frustration and undermining of adversary process, and of the traditional right to trial counsel); Note, *supra* note 23, at 369 (asserting that pretrial counsel is necessary to ensure that the fair trial right is not eviscerated outside of courtroom); *see also* Miranda v. Arizona, 384 U.S. 436, 466 (1966) (stating

In sum, because hostilities begin before trial, pretrial maneuvers can eviscerate the values furthered by equalization. Fidelity to those values and dedication to preserving the substance of trial counsel's protection require that the sixth amendment guarantee be extended to pretrial phases of the adversarial conflict.[243] Because protection against surreptitious approaches to secure inculpatory disclosures is part of that promise at trial, a pretrial *Massiah* right of some sort is justifiable.

The precise configuration of the boundaries of the right to pretrial counsel is a matter of some uncertainty. I have not attempted to provide closure on that subject by furnishing a definitive, foolproof "critical stage" test. Such an ambitious endeavor would require discussion and analysis beyond this Article's scope.[244] The ultimate object here has been to evaluate *Massiah*'s constitutional defensibility.

To achieve that objective, I described and assessed the significance and functioning of our adversary system's guarantee of counsel. That assessment led to a vision of counsel as a multifunctional equalizer. That vision suggested a plausible minimum sphere of pretrial operation for sixth amendment counsel, a sphere that includes a *Massiah*-type right against undercover informants.[245] In general, the sixth amendment

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that without *Miranda* protections " 'all the careful safeguards erected around the giving of testimony . . . would become empty formalities' " due to freedom of police in pretrial settings (quoting Mapp v. Ohio, 367 U.S. 643, 685, *reh'g denied*, 368 U.S. 871 (1961))).

[243] Pretrial counsel — *Massiah* counsel, in particular — can and does hinder conviction of the guilty. That undeniable fact of constitutional life might be a prime impetus for the calls to overthrow *Massiah*. Those calls have a powerful emotional force, for not many favor the defeat of truth or cheer the release of the guilty. Nevertheless, the need to nurture other values weightier than truth, accuracy, and reliability have led us to grant trial counsel even though she often obstructs "just conviction." *See* Kamisar, *supra* note 1, at 77-79. On balance, we accept such hindrance of the search for truth. Similar constitutional balancing should prompt us to preserve those same weighty values in pretrial clashes despite the deceptive allure of truth and the resentment it can breed toward the costs inherent in our constitutional scheme.

[244] The minimal sphere for pretrial counsel suggested here may turn out to be the entire appropriate area of operation. However, before concluding that the critical stage criteria described in this Article will identify *all* pretrial events to which the sixth amendment should extend, further analysis is required. On the basis of the present discussion, one should not, for example, rule out all events that do not entail a personal encounter between defendant and government agent (*e.g.*, photographic identifications and witness interviews). Nor should one conclude that counsel is never justified unless the pretrial event is a "functionally equivalent" substitute for a trial event. Analysis of such matters is left for another day. However, there probably are not many events that ought to be considered critical but that do not satisfy the proposed criteria.

[245] Although a definitive critical stage standard is not the present objective, the "min-

requires counsel in any pretrial adversarial encounter between government and accused if the encounter is essentially equivalent to, and an effective substitute for, a trial encounter at which such assistance would be required. In other words, if an encounter between a defendant and the government adversary at trial would trigger the right to counsel's equalizing assistance, the same kind of encounter between adversaries before trial must trigger an identical constitutional right to assistance.[246]

The bottom line of the entire preceding discussion is quite simple: A *Massiah* right to counsel can be constitutionally justified.[247] The re-

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imum sphere" described probably encompasses most, if not all, events for which counsel is required.

[246] In the application of this standard, one relevant criterion is whether the event involves an actual personal encounter with an agent of the state adversary. Another is whether the government conduct is essentially the same as trial conduct which would require counsel. A third criterion is whether the gains to the government and harms to the defendant from allowing the uncounseled encounter and the admission of its products at trial are essentially the same as those that would result from an uncounseled trial encounter.

Under the prescribed standard, the taking of physical evidence from the accused (*e.g.*, handwriting, voice, or blood samples) would constitute a critical stage. *See* Gilbert v. California, 388 U.S. 263, 280 (1967) (Black, J., concurring and dissenting) (suggesting that taking of handwriting exemplars must be a critical stage because accused is "forced to supply evidence for the [g]overnment to use against him at his trial").

[247] This Article has already responded to some of the more prominent criticisms of the *Massiah* right. A few additional anti-*Massiah* arguments (some of which may simply be variant forms of contentions addressed earlier) merit consideration. All of these arguments seem to founder upon the balance struck by a constitutional grant of equalizing trial assistance.

The government is obliged not to convict the innocent, and therefore, must disclose material exculpatory evidence to the defense. *See* United States v. Bagley, 473 U.S. 667 (1985); United States v. Agurs, 427 U.S. 97 (1976); Brady v. Maryland, 373 U.S. 83 (1963). Real equality would seem to require a reciprocal defense duty to disclose inculpatory evidence to the state. While surreptitious surveillance does not "require" such disclosure (in violation of the fifth amendment), it at least allows the government to "discover" the evidence. In that respect, it furthers "equality."

A fundamental problem with such reasoning is that it misreads the equalization premise of the adversary system. That premise holds that the inherently inferior defendant should be granted rough parity in coping with the criminal justice system. It does not demand that every facet of the system be equal, or that neither side possess any advantage. More specifically, the equalization premise does not suggest that the system be readjusted to remedy "imbalances" created by the specific Bill of Rights entitlements of individuals accused of crime. The due process clause intentionally accords undeniable and valuable advantages to defendants by imposing upon the government a primary duty to seek just, accurate results. The same is true of the privilege against compulsory self-incrimination, a guarantee that every defendant may remain silent. Those constitutional commands are not well-served by attempts to restrict the protection of defense

maining task is to describe that sixth amendment right more precisely

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counsel in order to remove the "advantages" they give to defendants. We do not limit *trial* counsel's protective functions to offset the benefits of other constitutional rights. More specifically, we do not permit uncounseled adversarial "trial" discovery because of a defendant's right to remain silent and the due process entitlement to exculpatory information. If preferred value choices prevent such "readjustments" at trial, they should bar similar pretrial readjustments.

The right to counsel in *Massiah* contexts prevents state acquisition and use of probative evidence. As a result, convictions of some guilty persons are impeded or precluded. *See* Maine v. Moulton, 474 U.S. 159, 191 (1985) (Burger, C.J., dissenting); Massiah v. United States, 377 U.S. 201, 208 (1964) (White, J., dissenting). Such social costs are inherent in the adversary system, in the grant of counsel, and in our commitment to values beyond truth. We pay a similar price for every "criminal" protection in the Bill of Rights. To restrict the ambit of the right to counsel because of its price is to risk tampering with the Framers' balance.

In one of the earliest right to counsel landmarks, Johnson v. Zerbst, 304 U.S. 458 (1938), the Court refused to be swayed by an "argument ad horrendum" regarding the costly dangers of broad interpretation of the right. *See* W. BEANEY, *supra* note 22, at 41. Similar invitations to balance away the *Massiah* right ought to be similarly treated. *See* Grano, *supra* note 6, at 14-15 (suggesting that a balancing approach to deciding scope of right to counsel is inappropriate).

In addition, the actual costs of lost convictions due to the *Massiah* right would not seem to be very substantial. Certain components of the *Massiah* doctrine severely cabin its sphere of control. *See supra* notes 17 & 66, *infra* notes 253-56 and accompanying text (requirement that sixth amendment right attach); *supra* note 91; *infra* notes 279-87 and accompanying text (requirement of government agency). Moreover, within that limited sphere of operation the opportunities for surreptitious surveillance that would otherwise be available are, as a practical matter, relatively limited. Consequently, *Massiah*'s current costs must be quite low.

Furthermore, any "pragmatic" social costs must be discounted by the risks of "symbolic" social harm involved in permitting the government to vitiate trial rights by pretrial deception. *See supra* note 238 and accompanying text. The reality and appearance of unfair adversarial play, and an erosion of our commitment to important values, would be unavoidable. Moreover, the potential damage to national ideals and self-esteem would be heightened by the likelihood that the less fortunate, the ignorant, and the impoverished members of society would be most disadvantaged by the elimination of *Massiah*. *See* W. BEANEY, *supra* note 22, at 207 (noting that underprivileged, less powerful members of society are hurt by failure to advise of right to, or to appoint, counsel, whereas the most dangerous, "professional" criminals are aware of and rely on their rights); Kamisar, *supra* note 1, at 93 n.267 (observing that no matter what the law is regarding the attachment of the right to counsel, in practice the individual who can afford a lawyer enjoys assistance much earlier); *id.* at 10 (noting that insofar as possible, the state should ensure that the choice of the weak, ignorant, and poor to speak or not to speak is as free and informed as that of the more fortunate).

The Court has taken account of, and should be ever attentive to, such threats to our constitutional and social fabric. *See* Rose v. Mitchell, 443 U.S. 545, 555-56 (1979). The *Rose* Court stated that racial discrimination is "especially pernicious in the administration of justice" because it "destroys the appearance of justice and thereby casts doubt on

and to evaluate the appropriateness of *Massiah*'s current doctrinal standards.

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the integrity of the judicial process." *Id.* (citing Ballard v. United States, 329 U.S. 187, 195 (1946)). The Court added that such discrimination causes "harm . . . not only to the accused" but to "society as a whole, . . . 'to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.' " *Id.*

Some might question why an accused individual cannot be expected to be smart enough not to discuss his or her guilt with untrustworthy others, or to call upon counsel before doing so, and to assume the risks of unwise disclosure. *See* United States v. Henry, 447 U.S. 264, 294, 297-98 (1980) (Rehnquist, J., dissenting) (contending that the accused is free to choose to consult with an attorney and should not be "constitutionally protected from his inability to keep quiet"; when an accused "voluntarily chooses to make an incriminating remark . . ., he knowingly assumes the risk that his confidant may be untrustworthy"); State v. Currington, 113 Idaho 538, 547, 746 P.2d 997, 1006 (Ct. App. 1987) (Swanstrom, J., dissenting) (relying on defendant's risk-taking and trust in informant as grounds for finding *Massiah* right inapplicable).

The simple answer is that the same expectations and risks could just as easily be imposed upon the accused once trial begins, yet we refuse to do so. Accused individuals need to discuss defense matters with others without the deterrent fear that any listener could be the adversary. To require defendants to remain silent or bear the risks of speech is not realistic, and could damage the opportunity to defend. Moreover, the premise of the adversary system and its mandate of arm's length dealings with an equalized opponent is that a defendant does not have the requisite capacities to deal with the state. To expect an accused to be smart, wise, or circumspect in encounters with unknown opponents is to undercut that premise. To impose such risks upon an accused is to ignore adversarial principles and to contradict basic value commitments. *See supra* notes 197-223 and accompanying text.

Finally, and inevitably, the *Massiah* doctrine might be accused of leading us onto a dangerously slippery slope in which future line-drawing will be difficult, if not impossible. Criminal defendants are harmed, often severely, by much (if not all) pretrial conduct of the state. Much of what the government does before trial is designed to prove guilt (*i.e.*, to damage the defense at trial). Opponents might suggest that the *Massiah* slope will lead to the recognition of a "defense watchdog" who engages in wholesale obstruction of legitimate criminal investigation and proof.

Slippery slopes should not be ignored, but they can be avoided without suffocating legitimate constitutional development. Neither the twenty-four-year-old *Massiah* doctrine, nor the theoretical analyses and doctrinal suggestions proffered throughout this piece, open the floodgates of plausible counsel claims. They do not suggest a role for counsel as ubiquitous, obstructive watchdog. The lines drawn in the preceding and subsequent discussions describe a relatively clear and confined, and far from revolutionary, category of "critical stage" in which counsel's assistance should be available.

IV. *Massiah* Doctrine: Observations, Critiques, and Suggestions

This Article has provided a sixth amendment-adversary system rationalization for the right to counsel against pretrial approaches by unknown government agents — a *Massiah*-type right.[248] So far, I have been intentionally vague in depicting this right.[249] Still, its general nature is evident. The *Massiah* right entitles accused persons to unrestricted advice and counsel regarding the decision to divulge their thoughts to the government.[250] It necessarily includes the right to know of the government adversary's presence.[251] While essential, such general description provides little guidance for the police, the prosecution, the defense, and the courts.[252] An operational *Massiah* right demands refined doctrine detailing the character of the "encounters" within counsel's reach. This final Part suggests how current doctrinal standards might be more appropriately shaped to reflect sixth amendment values and to guide the players in the criminal justice system.

A. *The Initiation of Proceedings Requirement: When Should the* Massiah *Right Begin?*

The initial question regarding any pretrial right to counsel is when that right begins to operate. Unless it operates at all times before trial, the threshold attachment point must be identified. According to the Court's current threshold doctrine, a sixth amendment counsel right can attach *only* at or after the initiation of adversarial judicial proceedings.[253] The Court has rooted the "initiation" criterion in the sixth

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[248] The rationalization proffered also provides ample support for the operation of the *Massiah* right in face-to-face encounters with known law enforcement officers. That more easily justified entitlement to counsel is not, however, the focus of this Article.

[249] This Article, for example, has referred to "encounters" with, "approaches" by, and "dealings" with the government in order to avoid, as much as possible, prejudging any specific doctrinal issue.

[250] *See supra* notes 225-47 and accompanying text.

[251] *See supra* note 168 and accompanying text.

[252] *See supra* note 28 and accompanying text; *see also* W. Beaney, *supra* note 22, at 199 (opining that trial courts' tasks have been made "more difficult" by the "lack of easily applied rules" in the Supreme Court's right to counsel decisions).

[253] *See supra* note 66. The initiation of proceedings standard has roots in *Massiah*'s predecessors. *See* Spano v. New York, 360 U.S. 315, 320, 323-24 (1959); Crooker v. California, 357 U.S. 433, 439 (1958). In fact, the roots of the criterion can be traced back as far as an 1892 Supreme Court opinion. *See* F. Heller, *supra* note 33, at 36 (citing Counselman v. Hitchcock, 142 U.S. 547 (1892)).

amendment's text.[254] More important, the Court has reasoned that because no adversarial relationship exists prior to the initiation of proceedings, no adversarial risks arise. A defendant, therefore, does not need counsel's equalizing assistance.[255] Opponents view the initiation threshold as a somewhat absurd formalism because the reality of adversarial status can, and often does, arise and pose dangers before formal proceedings commence.[256]

One possible answer to the threshold inquiry is that the *Massiah* right should "always" be operative — that it should attach whenever a government agent approaches a defendant before trial.[257] That standard is certainly clear and easy to apply. It might also be the best and only truly effective way to prevent pretrial government actions that render trial protections nugatory. Proponents might accuse all rival standards of tolerating, if not encouraging, advance nullification of trial benefits.[258]

The "always" standard is defensible, but not irrefutable. It is grounded in debatable assumptions about the character of fair play in our constitutional system.[259] Specifically, the contention that counsel should function at all times is premised upon the belief that fair play in the adversary system *always* mandates balanced, arm's length dealings

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[254] *See* United States v. Gouveia, 467 U.S. 180, 188 (1984) (stating that initiation criterion "is consistent . . . with the literal language of the Amendment").

[255] *See id.* at 187-88; Kirby v. Illinois, 406 U.S. 682, 689-90 (1972).

[256] *See Gouveia*, 467 U.S. at 199 (Marshall, J., dissenting) (stating that government can transform person into accused without formal commencement of proceedings); *Kirby*, 406 U.S. at 698-99 (Brennan, J., dissenting) (branding the initiation doctrine a " 'mere formalism' "). For scholarly criticisms of the initiation of proceedings doctrine, see Kamisar, *supra* note 1, at 45; Kamisar, *supra* note 3, at 80, 101; Uviller, *supra* note 10, at 1166-67; White, *Suspect's Assertion, supra* note 7, at 58 n.44, 59; Note, *Historical Argument, supra* note 40, at 1050-51.

Professor Grano has thoroughly reviewed and analyzed alternative placements of the attachment line. *See* Grano, *supra* note 6, at 11-18, 25-31. He has fashioned arguments in support of the Court's choice of initiation. *See id.* at 25-28.

[257] According to this view, as long as an encounter is of a type which calls for counsel's assistance, no distinction would be made based on when, in the pretrial period, the encounter transpires.

[258] The accusation referred to is simply an extension of that leveled against the notion that counsel should never operate before trial. *See supra* note 235 and accompanying text.

[259] Even the dissenters from the majority Supreme Court position have not endorsed the "always" position for the attachment line. *See, e.g.*, Kirby v. Illinois, 406 U.S. 682, 698-99 (1972) (Brennan, J., dissenting) (suggesting "arrest" as a sufficient basis for attachment); Crooker v. California, 357 U.S. 433, 448 (1958) (Douglas, J., dissenting) (concluding that defendant is entitled to counsel after arrest).

between the state and the individual.[260] Constitutional notions of fair play need not be so expansive. A conception of fair play as mandating equalization only after the government has become committed to conviction is reconcilable with the adversary system and its values.[261] In other words, fair play might only demand rough equalization in dealings between *adversaries*.

Acceptance of this limited fair play notion does not require abandonment of the values underlying equalization, but does call for a more conservative understanding of those values than that supporting the "always" approach to attachment. The limited view rests on the judgment that constitutionally objectionable affronts to human dignity, misuses of governmental power, and deprivations of the opportunity to defend occur only when a state that has decided to convict approaches the unequal target of its commitment.[262] The limited fair play view also reflects the judgment that it is constitutionally tolerable for the government to take advantage of individual weaknesses and to deal with an inferior prior to its assumption of an adversarial posture toward that person.[263] According to this view, fair play values demand equalization only after the battle begins, not during the preliminary, investigatory stage prior to the commencement of a contest between defined opponents. *Massiah*'s promise of rough adversarial equality ensures only that the state's *opponent* will be given a "fighting chance" in the *battle*.[264]

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[260] Of course, this view is limited to instances in which the individual ultimately becomes an accused and the government endeavors to use the fruits of a pretrial encounter to convict.

[261] Although I oppose excessive reliance on literal language in interpreting constitutional guarantees, it is noteworthy that the more limited view of the scope of fair play principles posited here is consonant with our description of our system as "adversarial."

[262] For a discussion of the "fair play values and interests" arguably inherent in our adversary system of criminal prosecution and its central pillar, the defense lawyer, see *supra* notes 210-23 and accompanying text. Those who would adopt the limited vision of fair adversarial play believe that when agents of the government are truly involved in investigating and solving crime, the lack of balance in encounters with individuals does not undermine human dignity, defeat the assurance of a meaningful opportunity to defend against criminal charges, or amount to an abuse of governmental power over the citizen. Those interests are imperiled in a constitutionally cognizable way only when battle lines have been drawn.

[263] Of course, in "taking advantage of" its superiority the state is bound by other constitutional provisions that do not depend upon adversarial status, such as the fifth amendment privilege against compulsory self-incrimination and pledge of due process.

[264] The notion that an accused individual is entitled to a "fair fight" or a "fighting chance" has been harshly criticized. *See* Uviller, *supra* note 10, at 1174. This Article responds by explaining the virtues of a vision of sixth amendment counsel as guarantor of a "fighting chance" by means of comprehensive equalization. *See supra* notes 183-

Those judgments, and the consequent restriction of the equalization premise, are plausible sixth amendment interpretations. The resulting sixth amendment threshold accommodates both dedication to fair play and legitimate needs to investigate and prove crimes.[265] It affords the state opportunities to take advantage of its superior strength and resources to identify criminal "opponents" and to gather evidence from them.[266] It restricts those opportunities, however, when official conduct begins to imperil the constitutional values furthered by equality.[267]

If sixth amendment notions of adversarial fair play prohibit only imbalanced encounters between actual opponents, then there is reason for

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223 and accompanying text. Notwithstanding the contrary suggestions of some participants in the debate over the scope of counsel and the merits of *Massiah*, every position is rooted in normative decisions regarding the intended and appropriate objectives of the constitutional pledge of counsel. This Article has attempted to specify the sixth amendment choices necessary to justify *Massiah*. In the process, it has revealed some of the implicit value choices that underlie the rhetorical surfaces of the opponents' positions.

[265] In support of the initiation criterion, the Supreme Court has adverted to the state's need for investigative operating room. *See* Kirby v. Illinois, 406 U.S. 682, 690-91 (1972); *see also* People v. Wong, 18 Cal. 3d 178, 186-87, 555 P.2d 297, 301, 133 Cal. Rptr. 511, 515 (1976) (noting that after proceedings are initiated, the government has "a lessened necessity" for investigation, but before initiation, compelling needs for "[un]hampered" and expeditious investigation militate against extension of the right to counsel).

I do not mean to suggest that clear right to counsel entitlements can be denied or restricted because of government need. In resolving uncertain claims at the borders of the sixth amendment, however, it is necessary to ascertain as precisely as possible the content of the fair play commitment. In ascertaining that content, it seems appropriate to take into account the practical impacts of varying conceptions of fair adversarial play. The high cost of a particular vision of fair play is reason to be circumspect and to demand a compelling constitutional reason to choose that vision.

[266] Although the "always" approach would not preclude investigation and proof, it would much more severely impede them. Prior to assuming an adversarial posture, the state would either have to avoid contact with individuals who might turn out to be defendants or afford those individuals the opportunity to have counsel. If the government failed to do either, it would be barred from using information gained from those individuals. Such serious impediments to criminal law enforcement should be avoided unless we are confident that adversary system values require them.

[267] As indicated earlier, history provides no clear answers to debatable sixth amendment questions. *See supra* note 163. While the Framers did provide counsel for the entire battle with the state, they did so in a world that did not include pretrial encounters with either an investigative or an adversarial government. *See supra* notes 38-41 and accompanying text. If they had confronted the question, it is entirely possible that they would not have chosen a point of attachment that would severely impair investigative efficacy. They might well have allowed the government to deal with and to use the products of dealings with individuals not yet determined to be adversaries. I make no claim, however, to "know" such an unknowable matter.

a temporal limit upon *Massiah* counsel's pretrial reach. The right to counsel should attach only when the government becomes an actual adversary. Certainly, that point of attachment must be *no later than* upon the formal initiation of proceedings — a step that distinctly, officially, and publicly proclaims that the state has sufficient reason to pursue conviction.[268] By initiating the processes leading to trial, the people's representative becomes an open opponent determined to exact a serious penalty. Fair play interests furthered by the right to counsel require the elimination of imbalance *no later than* upon the government's formal "declaration of war."[269]

This analysis establishes only that the right to counsel must begin no later than upon the initiation of formal proceedings.[270] The unanswered

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[268] *See* People v. Wong, 18 Cal. 3d 178, 186, 555 P.2d 297, 301, 133 Cal. Rptr. 511, 515 (1976) (stating that mere initiation of proceedings suggests that state has legally sufficient evidence of guilt).

In the Supreme Court's current scheme, initiation is significant because thereafter legal complexities arise and the committed government adversary might overpower the inferior defendant with its superior legal skills and resources. *See* Moran v. Burbine, 475 U.S. 412, 430 (1986); United States v. Gouveia, 467 U.S. 180, 187-88 (1984); United States v. Cronic, 466 U.S. 648, 656 (1984); Kirby v. Illinois, 406 U.S. 682, 689-90 (1972). Even when counsel is freed of confinement in the mold of "legal expert and technician," the initiation criterion remains significant as a clear demarcation of the beginning of an adversarial relationship.

[269] Professor Grano has suggested that the initiation doctrine might seem arbitrary and unsatisfactory because it reflects an attempt to reconcile the tension between adversarial and inquisitorial elements inherent in our system of justice. *See* Grano, *supra* note 6, at 9-10. I would suggest that any arbitrariness and unsatisfactoriness may be because the point of initiation often seems to be a poor approximation of the actual commencement of an adversarial relationship between government and individual. *See infra* notes 274-78 and accompanying text. Thus, initiation leads to tolerance of inquisitorial attributes during times when competing adversary system values should have more influence.

[270] The issue of whether *Massiah* doctrine prevents the use of post-initiation statements secured by agents who honestly did not know of the initiation has arisen in the lower courts. *See, e.g.*, United States v. Harris, 738 F.2d 1068, 1070-71 (9th Cir. 1984) (finding no constitutional violation when state undercover agent was unaware of pending federal indictment, even though state authorities were aware of the federal indictment); United States v. Garcia, 377 F.2d 321, 324 (2d Cir.) (holding that undercover agent who was unaware of pending indictment did not violate defendant's right to counsel by asking defendant whether he had ever been in trouble with the police), *cert. denied*, 389 U.S. 991 (1967); United States v. Shipp, 578 F. Supp. 980, 995 (S.D.N.Y. 1984) (finding no violation of constitutional rights, even though statements procured while state indictment pending, because federal officials were unaware of state indictment and did not have affirmative duty to determine status of pending prosecutions), *cert. denied*, 472 U.S. 1019 (1985). The fact that the government agents involved in post-initiation conduct were unaware of the initiation at the time should not prevent a

question is whether it should attach at an earlier point.[271] Is initiation a fully satisfactory threshold criterion for the sixth amendment *Massiah* right? The only other reliable potential indicator of adversariness is arrest. No event prior to arrest or initiation provides clear and consistent evidence of the commencement of an adversarial relationship.[272]

An arrest does indicate that the criminal process has progressed beyond mere investigation and has targeted at least one individual. However, on its face an arrest does not convey a commitment to convict. For that reason, arrest might be an insufficient basis to impose the rules of adversarial fair play. Arrest can be seen as a preliminary indication of potential state opposition rather than a decisive proclamation of intent to prosecute. Insofar as an arrest does precede the actual decision to

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sixth amendment violation. *Cf.* Arizona v. Roberson, 108 S. Ct. 2093, 2101 (1988) (holding that police officer seeking to interrogate suspect regarding an offense is responsible for finding out if suspect has previously asserted entitlement to *Miranda* counsel for any offense); Michigan v. Jackson, 475 U.S. 625, 632 (1986) (concluding that all government agents are responsible for knowing that a defendant has invoked sixth amendment right to counsel at arraignment).

Whether or not the investigating agents are aware of the attachment of sixth amendment rights, the defendant suffers the same harm when the fruits of an uncounseled encounter are used to prove guilt. Because the state is *in fact* a declared adversary, and one or more of its agents *are* aware of that fact, all of its agents should be bound by the rules of fair play. In addition, sixth amendment exclusion ought to be treated as a part of the counsel entitlement, and not simply a deterrent measure. *See* Nix v. Williams, 467 U.S. 431, 446-47 (1984) (entertaining the possibility that sixth amendment exclusion is an individual right, not just a deterrent sanction). As a consequence, there would seem to be no room for a "good faith" exception to exclusion based upon an agent's unawareness of initiation or arrest.

[271] The following discussion, insofar as it considers arrest as an alternative to initiation, presumes that arrest precedes initiation. If a defendant is charged *before* arrest, the adversarial relationship obviously begins prior to arrest.

[272] Attempts to ascertain the precise point when the state makes an actual, substantive decision to pursue conviction would be impractical. They would require assessments of subjective mental processes and the inner workings of the law enforcement establishment. Often, the only evidence would be the potentially self-serving reports of state agents. Even if those agents were entirely sincere and forthright, they might be unable to pinpoint accurately the time an adversarial relationship commenced. It is best to follow the lead of the Court in other areas of criminal procedure and to rely upon objective criteria to decide when the right to counsel attaches. *See* United States v. Leon, 468 U.S. 897, 922-23 n.23 (1984) (selecting objective standard for "good faith" exception to exclusionary rule because subjective inquiry would be a " 'grave and fruitless misallocation of resources' " (quoting Massachusetts v. Painten, 389 U.S. 560, 565 (1968) (White, J., dissenting))); Berkemer v. McCarty, 468 U.S. 420, 441-42 (1984) (formulating objective, reasonable person standard for *Miranda* "custody" determination because of the difficulties with subjective standards). Arrest and initiation are objectively verifiable events that seem closely related to the onset of adversariness.

pursue conviction, reliance upon it as a threshold criterion triggers the right to counsel before fair play requires attachment.[273]

Unlike arrest, initiation provides unmistakable evidence of a governmental decision to prosecute. Still, in the majority of cases, the actual official commitment to prosecute undoubtedly develops sometime before such a formal declaration. By ignoring that reality, an inflexible initiation criterion renders equalization inoperative at times when fair play requires balance. In sum, both doctrinally feasible options, arrest and initiation, harbor risks of error.

The choice of a sixth amendment threshold should reflect our beliefs about when the government typically becomes an actual adversary.[274] If the government ordinarily is a real opponent at or very near the time of arrest, then arrest should suffice. If, however, the government does not actually assume adversarial status until a time near formal initiation, then initiation provides a better approximation of the trigger for equalization and should continue to serve as our sole criterion.

In the real world of criminal investigation and prosecution, the authorities typically are, and appear to be, sufficiently committed to seeking conviction at the time of arrest. The government probably is as committed, or nearly as committed, then as when it later initiates for-

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[273] An arrest reflects the judgment that there is probable cause to believe that the arrestee has committed a crime. According to the Supreme Court's most recent word, a "fair probability" will suffice. *See* Illinois v. Gates, 462 U.S. 213, 246 (1983). One might plausibly contend that that determination by the government establishes a sufficiently adversarial relationship to trigger operation of the rules of fair play. If, however, a more committed attitude should be a prerequisite for applying the rule of equality, and if arrest often predates the development of such an attitude by a considerable period of time, then reliance on arrest will overextend the right to counsel.

[274] The endeavor is to locate a workable line that best corresponds to the state's actual assumption of an adversarial posture. Because an individualized search for adversariness in each case is impractical, reliance upon objective generalizations such as arrest or initiation is preferable. *See* New York v. Belton, 453 U.S. 454, 460 (1981) (allowing warrantless search of entire passenger compartment incident to arrest of a recent occupant because that area reflects a sound generalization concerning the area within the occupant's immediate control and because recognition of such a blanket authority to search constitutes a much more workable approach than individualized determinations of the area of control for every automobile arrest).

Obviously, neither initiation nor arrest is an infallible indicator of the onset of adversariness. Nonetheless, we accept imperfections and errors caused by such generalizations because of their offsetting advantages. They are, quite simply, the best we can do. When choosing such a doctrinal generalization, relevant considerations should include the *nature* of the generalization's errors, the *beneficiaries* of those errors, and the likely *frequency* and *size* of those errors.

mal processes.[275] Therefore, arrest adequately signifies the adversarial relationship upon which the right to counsel should depend. It should be the doctrinal attachment point for *Massiah*'s sixth amendment right.[276] Unless the reality of adversarial status more closely corresponds to formal initiation, exclusive reliance upon that criterion is vulnerable to the charge of "formalism."[277] Moreover, by ignoring reality,

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[275] *See* White, *Police Trickery*, *supra* note 7, at 591-92 (asserting that police are as likely to be committed at arrest as at initiation). As noted, reliance on arrest will (if more adversariness than a probable cause determination is the desideratum) lead to some errors. Those errors will favor individuals accused of crime insofar as they guarantee counsel before assistance would be granted in a "perfect" world. I favor the arrest generalization, however, not because it favors the defense, but because the errors it makes would seem to be fewer in number and smaller in size than those made by the formal initiation benchmark.

[276] The choice of arrest is not original. *See* Kamisar, *supra* note 3, at 80 (questioning why arrest is not a better choice than initiation); Uviller, *supra* note 10, at 1167 (asking why arrest is not preferable to initiation); White, *Police Trickery*, *supra* note 7, at 591-92 (stating that arrest criterion would seem to be correct, or at least better than initiation); *see also* Oregon v. Spencer, 750 P.2d 147, 156 (1988) (maintaining that state constitutional guarantee of counsel in all criminal prosecutions attaches once defendant is taken into formal custody). Other factors have also been suggested as triggers for the right to counsel. *See* Kamisar, *supra* note 3, at 83 (asserting that right to counsel should materialize " 'whenever the accused was not, but should have been, brought before a judicial officer' ") (quoting Traynor, *The Devils of Due Process in Criminal Detection, Detention, and Trial*, 33 U. CHI. L. REV. 657, 673); White, *Suspect's Assertion*, *supra* note 7, at 57-58 (arguing in favor of attachment of sixth amendment rights upon assertion of right to counsel by individual after reading of *Miranda* warnings).

The threshold determinant of sixth amendment attachment should be arrest or initiation, whichever occurs first. Normally, no rights would attach before one of those events. However, in the unlikely event that the accused could demonstrate a government commitment to prosecute and a delay or concealment of that commitment to avoid the rules of adversarial fair play, it would be consistent with the principles of our system to find attachment when the concealed commitment first developed. *Cf.* United States v. Yunis, 681 F. Supp. 909, 928 (D.D.C. 1988) (reading controlling Supreme Court doctrine — albeit erroneously — as not requiring initiation if, in fact, government is committed to prosecute). The *Yunis* court found a clear commitment to bring defendant to trial based on two year investigation, six month planning of defendant's abduction, and involvement of several government agencies, considerable personnel, and substantial physical and financial resources. *Id.*

[277] *See supra* note 256 and accompanying text. Another problem with the initiation criterion is its sizeable potential for bad faith manipulation of the attachment time by deliberate delay of formal commencement. *See* Uviller, *supra* note 10, at 1167 n.115; *see also* Grano, *supra* note 6, at 13 (recognizing police ability to control attachment by delaying first appearance); Kamisar, *supra* note 3, at 81 (noting that beginning of judicial proceedings may easily be manipulated). Of course, arrests also can sometimes be delayed. Nevertheless, the pressure of events and/or the practical costs of allowing a

rigid adherence to initiation betrays a weakness in the commitment to fair play values.[278]

B. Attribution to the Government: When Should the State Be Held Responsible for Informant Conduct?

Under current doctrine, the sixth amendment threshold is crossed by an initiation of proceedings. Still, the sixth amendment does not regulate all surreptitious elicitation after an initiation. Before the Constitution controls the acquisition and use of disclosures, the eliciting informant must qualify as a state actor.[279] Also, considering all the surrounding circumstances, the state must be chargeable with "intentionally creating" or "knowingly exploiting" a situation "likely to induce" the defendant to make inculpatory statements.[280] While the first requirement is simply the normal constitutional demand for state action,[281] the second erects an atypical barrier to governmental responsibility.[282]

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potential arrestee to remain free are more likely to deter manipulation of an arrest's timing.

[278] *See* Kamisar, *supra* note 3, at 83 (suggesting that initiation criterion provides "symbolic reassurance" and satisfies "the appearance of justice," but does not provide enough shelter for sixth amendment rights). I am not even persuaded that adherence to initiation even satisfies the appearance of justice for any but those content with a glance at the mere surface of the criminal justice system. Nonetheless, initiation does preserve some level of commitment to the principles and values of fair adversarial play, considerably more than would be preserved if counsel were restricted to the trial alone. *See supra* notes 235-39 and accompanying text.

[279] *See supra* notes 90-91 and accompanying text.

[280] *See supra* notes 68-83 and accompanying text.

[281] *See, e.g.*, United States v. Jacobsen, 466 U.S. 109, 113 (1984) (fourth amendment not implicated by private party search (citing Walter v. United States, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting))); Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 152-53 (1978) (private warehouseman's proposed sale of goods entrusted to him for storage, as permitted by state law, not state action violative of fourteenth amendment); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 354 (1974) (action by utility company heavily regulated by state not state action for fourteenth amendment purposes); Thomas v. Cox, 708 F.2d 132, 136-37 (4th Cir.) (sixth amendment not violated unless informant is state agent whose actions can be attributed to government), *cert. denied*, 464 U.S. 918 (1983). For a discussion of the state action doctrine, see generally L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 18-1 to -7 (2d. ed. 1988).

[282] *See supra* notes 69-71 & 77-83 and accompanying text. The requirement is "atypical" because it raises a secondary barrier to state responsibility. Ordinarily, once the relevant actor is found to be sufficiently associated with the state to be considered its operative, the state is responsible for that individual's acts to the same extent that it would be responsible for the acts of its "regular employees."

The first limitation, "agency per se," is consistent with sixth amendment principles of adversarial fair play.[283] Private citizens cannot break

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[283] The "agency per se" demand has not been an issue in any *Massiah* case to reach the Supreme Court. The Court's closest brush with the issue came in a footnote in United States v. Henry, 447 U.S. 264, 267 n.3 (1980). Therein, the Court observed that the defendant had divulged his guilt to a second cellmate who had no involvement with the government. The clear implication was that the man's report, unlike that of the cellmate enlisted by the FBI, was immune from *Massiah*'s prohibition. *See id.* The Court has observed that fourth amendment agency inquiries should hinge upon the totality of the circumstances. *See* Coolidge v. New Hampshire, 403 U.S. 443, 487, *reh'g denied*, 404 U.S. 874 (1971).

Lower courts have struggled to discern standards for determining when private citizens become state agents for *Massiah* purposes. They have relied upon several interrelated criteria. One criterion is the existence of an explicit agreement or prearrangement between law enforcement and an informant. *See, e.g.*, Thomas v. Cox, 708 F.2d 132, 136-37 (4th Cir.) (without prearrangement, informant is not a state actor and his actions cannot be attributed to the government), *cert. denied*, 464 U.S. 918 (1983); State v. McCorgary, 218 Kan. 358, 363, 543 P.2d 952, 958 (1975) (informant is state agent for purposes of *Massiah* only when state makes prior arrangement with informant), *cert. denied*, 429 U.S. 867 (1976).

Another criterion is the source of an informant's motivation. *See, e.g.*, Lightbourne v. Dugger, 829 F.2d 1012, 1021 (11th Cir.) (fact that informant's motives are self-serving does not alone create agency relationship; officials must promise informant reward and encourage elicitation of incriminating statements), *reh'g denied*, 835 F.2d 291 (1987); Muehleman v. Florida, 503 So. 2d 310, 314 (Fla.) (jailhouse informant who approached authorities on own initiative was not motivated by promises of compensation), *cert. denied*, 108 S. Ct. 39 (1987); State v. Nations, 319 N.C. 318, 325, 354 S.E.2d 510, 514 (1987) (visit of informant motivated by performance of statutory duty to protect welfare of children under his agency's care, not by desire to secure incriminating information).

Courts also rely upon the benefits accruing to the informant. *See, e.g.*, McCall v. Alabama, 501 So.2d 496, 498 (Ala. Crim. App. 1986) (prior to informant's encounter with accused, informant's bond was reduced; nevertheless, he was held *not* to be agent because fact of agency was merely speculative); Commonwealth v. Paradiso, 24 Mass. App. Ct. 142, 145, 507 N.E.2d 258, 261 (1987) (any subsequent benefits informant receives are irrelevant to question of whether informant was government agent); South Dakota v. Swallow, 405 N.W.2d 29, 41 (S.D. 1987) (reward that informant received was not contingent upon informant providing information to authorities; informant "simply was not an agent of the government").

Another relevant variable is governmental involvement in placing the informant near the defendant. *See, e.g.*, McCall v. Alabama, 501 So. 2d 496, 498 (Ala. Crim. App. 1986) (no agency finding because no evidence that informant had been deliberately placed in same cell as accused); Colorado v. Freeman, 739 P.2d 856, 859 (Colo. Ct. App. 1987) (no agency relationship because cellmate was not placed in cell as informant to elicit information); State v. Nations, 319 N.C. 318, 325, 354 S.E.2d 510, 514 (1987) (no agency conclusion because visit of social worker-informant was *not* at direction of law enforcement officials, but rather, in course of social worker's own duties).

No definitive test for sixth amendment agency per se has been developed. *See* United

the Constitution's promise of *balance between government and defendant.* Only state actors are limited by the constitutional mandate of equal, arm's length dealings between sovereign and individual.[284] It is not easy, however, to pinpoint the line between private party and state actor.[285] While lower courts have identified several relevant variables,

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States v. Taylor, 800 F.2d 1012, 1015 (10th Cir. 1986) ("We have been unable to find any bright line test for determining whether an individual is a Government agent for purposes of the Sixth Amendment right to counsel."), *cert. denied*, 108 S. Ct. 123 (1987); People v. Cardona, 41 N.Y.2d 333, 335-36, 360 N.E.2d 1306, 1307, 392 N.Y.S.2d 606, 607 (Ct. App. 1977) (declining "to subscribe to any ironclad rules as to when [sixth amendment] agency exists").

[284] *See* Lightbourne v. Dugger, 829 F.2d 1012, 1020-21 (11th Cir.) (noting that the sixth amendment is not violated when government fortuitously receives information but can be violated only by *government agent*), *reh'g denied*, 835 F.2d 291 (1987); United States v. Panza, 750 F.2d 1141, 1152 (2d Cir. 1984) (observing that sixth amendment is violated *only* if *government* deliberately elicits information; thus, if informant is utilized, informant must act on behalf of government); *Thomas*, 708 F.2d at 136 (stating that for sixth amendment violation to occur through private citizen informant, there must be deliberate elicitation on the part of *government*); *cf.* United States v. Jacobsen, 466 U.S. 109, 113 (1984) (stating that private citizens cannot break fourth amendment promise of shelter against unreasonable government searches); Katz v. United States, 389 U.S. 347, 350-51 (1967) (observing that privacy invasions by fellow citizens are not fourth amendment concern, but are concern of state law).

Some have suggested that government informants should not trigger the right to counsel because they harm a defendant no more than private citizen informants who decide to turn inculpatory disclosures over to the state. *See* United States v. Henry, 447 U.S. 264, 297-98 (1980) (Rehnquist, J., dissenting) (arguing that result in *Massiah* situations should not differ from result when private citizen elicits information merely because government has encouraged informant to report the incriminating information; when accused individual voluntarily chooses to speak, that person "knowingly assumes the risk that his confidant may be untrustworthy"); *Massiah*, 377 U.S. at 211-21 (White, J., dissenting) (noting that reporting criminal behavior is expected of citizens and "hazard" for accused who chooses to speak of criminal activities remains unchanged whether informant is working with the government or not). Even apart from the possibility that a government-encouraged informant might potentially harm a defendant more than a private informant, such suggestions are misguided. The critical difference between the two informants is that one harms a defendant on behalf of the state, while the other does so as an individual. Our Bill of Rights was adopted to protect citizens from deprivations and injuries by the government. It is perverse to rely on the basic fact that the Constitution *does not* regulate private interactions as a basis for concluding that it *should not* regulate the very government-citizen interactions for which it was designed.

[285] Not all determinations of state agency are difficult. In all of the Supreme Court's *Massiah* cases the agency per se of the informant has been too clear for discussion. The difficult distinctions, as always, are near the boundary between state and private action. The challenge is to locate and give workable doctrinal content to the line that divides the two.

they have sometimes been too indulgent toward the prosecution in deciding agency questions.[286]

An informant should probably become a state actor whenever law enforcement actions provide any encouragement to secure information for state use. Regardless of informants' other motivations, courts should consider them state representatives when one objective is to obtain information that the government has affirmatively indicated some interest in receiving. The sixth amendment ought to govern an informant's conduct if a reasonable person would conclude that the informant has secured and reported inculpatory remarks at least in part because of affirmative governmental encouragement.[287]

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[286] *See, e.g.*, McCall v. Alabama, 501 So. 2d 496, 498, 500 (Ala. Crim. App. 1986) (no agency relationship because state did not deliberately place informant in defendant's cell, even though officers had twice spoken to informant about defendant's crime and had reduced informant's bond in exchange for information concerning the crime); Colorado v. Chastain, 733 P.2d 1206, 1214 (Colo. 1987) (security guard informant was not state agent even though he had past law enforcement experience and ongoing relationship with police department); State v. Nations, 319 N.C. 318, 320-25, 354 S.E.2d 510, 512-14 (1987) (social worker-informant not agent even though sent by jail personnel to speak with accused; informant assumed false identity of "mental health" worker after accused requested to speak to someone from mental health).

[287] The proposed standard for "agency per se" incorporates an objective, reasonable person perspective. This perspective limits the opportunity for disingenuous, self-serving testimony regarding the relationship between informant and state. It also avoids costly, difficult, and potentially fruitless litigation regarding an informant's actual state of mind. *See supra* note 272 and accompanying text; *see also* Tomkovicz, *supra* note 66, at 1013 n.148, 1052 n.286 (discussing the advantages of objective doctrinal inquiries and Supreme Court's adoption of such standards in other doctrinal areas).

The standard also requires that the government take some affirmative action to encourage the informant to seek information on its behalf. Law enforcement should not be responsible for an informant's conduct simply because it generally receives information willingly, or because it has previously accepted information from a given informant. Moreover, an informant's hope or belief about advantages that might be gained by supplying information should not lead to state responsibility unless regular agents have done something to engender that hope or belief.

The proposed standard only requires that the informant act "in part because of" the government's encouragement. Once the state supplies encouragement that does motivate the informant, the amount of encouragement supplied, and how that encouragement interacted with other motivations to affect the informant, will not matter. This formulation is designed to foreclose opportunities for the state to escape responsibility for the consequences of its acts *and* to avoid extremely difficult questions of degree regarding informant motivations. As long as the government's affirmative action had a more than "de minimis" impact, the informant should be considered an agent of the state. The informant should not be considered a state agent if the impact was truly negligible.

The proposed standard does not explicitly prescribe the requisite government mental attitude regarding encouragement of the informant. At a minimum, the government

The current second stage inquiry, the "attribution" element, is an unwarranted doctrinal excrescence.[288] Insofar as it requires more than "agency per se,"[289] this second hurdle enables the government to insulate itself from its agents' conduct. The state effectively can enlist a battalion of secret operatives, yet avoid responsibility for their actions.[290] Moreover, because the attribution inquiry involves many of the same variables as the "agency per se" question, it might lead to "double counting" in the state's favor.[291] Granted, the current doctrine bars

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should be held responsible for knowing encouragement. The question is whether to hold the state responsible when it is not, but reasonably should be, aware that its actions will encourage information seeking on its behalf. My preference is to hold the state liable for the reasonably foreseeable impacts of its actions. If it is not held responsible for consequences of which it should be aware, the state will be allowed to reap benefits from its own carelessness. For additional discussion of subjective versus objective mental state requirements, see *supra* note 81; *infra* note 303.

Finally, the suggested standard does not require that the state's encouragement be specific as to either the kind of information gathering in which the informant should engage or the target of information gathering efforts. There is simply a demand for the government to encourage (*i.e.*, to supply part of the motivation for) the informant to seek information. The current *Henry-Moulton* standard for "attribution," *see supra* notes 66-83; *infra* notes 288-97, requires that the regular government know that its informant is likely to elicit inculpatory statements from a particular defendant before the government is held responsible. The proposed test for agency, however, only requires that the government should reasonably foresee that its conduct could encourage the informant generally to seek information on its behalf. In this respect, the "agency per se" standard proposed is different, and much less demanding, than the *Henry-Moulton* "attribution" inquiry. The suggested standard reflects an attempt to define a reasonable sixth amendment test for the basic constitutional requirement of state action.

[288] For discussion of the "attribution" component and the nature of that component, see *supra* notes 66-83 and accompanying text.

That the current doctrinal inquiry into government responsibility involves two separable stages is further illustrated by a recent lower court case. *See* State v. Currington, 113 Idaho 538, 541-45, 746 P.2d 997, 1000-04 (Ct. App. 1987) (addressing "attribution" issue first, *then* turning to and rejecting government's claim that because informant first approached state and was not paid, he was not "state agent").

[289] *See supra* notes 91 & 282 and accompanying text. In the Supreme Court cases that have developed the "attribution" doctrine, it has been evident that the informants were sufficiently associated with law enforcement to consider them state actors ("agents per se"). However, the Court has required more before holding a state responsible for the actions of an informant.

[290] *See supra* note 71 and accompanying text.

[291] Those variables include the nature of the state-informant arrangement, the prospect of compensation, the instructions given by the government to the informant, and the government's involvement in placing the informant near the accused. If courts first consider such factors in resolving the "agency per se" question and then refer to the very same elements during the "attribution" inquiry, double counting could result. So far, however, lower courts seem to blend and merge analyses of the two issues.

"knowing exploitation" of opportunities for informant elicitation and measures government conduct against an objective, "must have known" standard.[292] Nevertheless, if an informant behaves contrary to reasonable expectations and unforeseeably seeks to elicit disclosures, the state is not responsible for that elicitation and may use the fruits to convict.[293]

If the government is liable for "regular" law enforcement officers' undercover conduct, it ought to be equally liable for "irregular" agents' surreptitious conduct.[294] There is no good reason to absolve the state of responsibility for the fortuitous or irresponsible actions of one type of agent. Both state agent informants and regular law enforcement employees should be treated alike for "attribution" purposes.[295] To allow the government to take advantage of imbalanced approaches by careless, unpredictable, or rogue informant-agents is to dilute, if not to be-

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[292] *See supra* notes 73-83 and accompanying text.

[293] To be insulated from responsibility the state must not know of the likelihood of inducement by its informant. If a court concludes that the government either knew or "must have known" that the informant was likely to induce incriminating revelations, the state will be held responsible. *Id.*

[294] When used in this Article, the term "regular" agents refers to the formal employees of a law enforcement agency. "Irregular" agents are individuals enlisted to assist the regulars by securing inculpatory information. The former are law enforcement officers who engage in many activities, including surreptitious surveillance. The latter are limited purpose adjuncts — tools employed by law enforcement to carry out its information gathering objectives. The textual discussion assumes that the "irregular" is sufficiently aligned with the "regular" government enterprise to satisfy the "agency per se" requirement.

[295] *See* Thomas v. Cox, 708 F.2d 132, 136 (4th Cir.), *cert. denied*, 464 U.S. 918 (1983) (footnote omitted). *Thomas* stated that when a citizen elicits information, the only remaining question is whether that citizen was also a "creature — an agent — of the state." *Id.* If so, any conduct "is necessarily attributable to the state as would be that of a state official." *Id.*

By employing irregular undercover informants to secure information from defendants, the government gains a number of advantages in the war on crime. It hardly seems evenhanded or justifiable to allow the state to reap the benefits of this sort of part-time or temporary employee without paying the price of responsibility for his or her information gathering efforts — both foreseeable and unforeseeable, responsible and irresponsible, wise and unwise. Government responsibility for securing information ought to follow from encouragement to secure information on its behalf.

Moreover, not to treat regulars and irregulars alike could encourage the state to enlist and to rely upon irresponsible informants as sources of inculpatory information. Such differential treatment could also encourage the state to learn as little as is practicable about undercover situations. Unless the state was held to a truly objective attribution standard, *see infra* note 303, or bound by a "duty to inquire," there would be a premium upon ignorance and irresponsibility.

tray, our commitment to adversarial fair play.[296] Both "regular" agents and informants can transgress the rule requiring open, arm's length dealings. Both types of investigator can harm a defendant and benefit the state in equivalent ways.

Consequently, the only impediment to official responsibility for *Massiah*-barred conduct should be "agency per se." The vague, variable, and unjustified "attribution" inquiry should be abandoned.[297]

C. *The Active, Deliberate Elicitation Demand: What Informant Actions Are Within* Massiah*'s Scope?*

Massiah doctrine must specify the informant conduct that implicates the sixth amendment. Since the *Massiah* right's inception, the Court has described the regulated activity as "deliberate elicitation."[298] Without ever precisely defining those terms,[299] the Court has observed that they include more than interrogation or direct questioning.[300] Mere en-

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[296] Although the government's opportunity for exemption from the rules of fair play is limited by inquiry into what its regular agents "must have known," even such a limited opportunity is not constitutionally justified. Moreover, permitting the government to disavow responsibility for the conduct of those it has encouraged to obtain information offends the "appearance of justice," an integral component of justice itself. *See* Offutt v. United States, 348 U.S. 11, 14 (1954) (observing that "justice must satisfy the appearance of justice"); *see also* Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) ("Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. . . . Our [G]overnment is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example."). The symbolic messages delivered when we not only tolerate, but invite state evasion of responsibility are not good. *See supra* notes 20 & 238 (discussing the importance of symbols in constitutional law). Our top constitutional educator owes us a better lesson. *See supra* note 1.

[297] I have not discovered any direct attacks upon, or calls for the abolition of, the *Henry* attribution branch of the basic *Massiah* doctrine. As noted earlier, astonishment over Chief Justice Burger's seemingly liberal interpretation of the right to counsel obscured much of the significance of the doctrinal development that occurred in *Henry*. A couple of *Massiah* commentaries do contain hints that no more ought to be required for attribution than a sufficient basis to hold the informant to be a state agent. *See* Cluchey, *supra* note 27, at 58 (proposed standards to govern legitimate separate crime investigations would apparently hold government responsible for what its informant-agent does by way of elicitation regarding a pending charge, even though the government did not contemplate that elicitation); *see* Note, *Recruited Informants*, *supra* note 69, at 808 (suggesting that *Henry*'s flaw may be in failing to hold informant's elicitation to be sufficient, *i.e.*, in looking for something more simply because the informant, who "was an agent of the government," was not a regular FBI agent).

[298] *See supra* notes 51-53 and accompanying text.

[299] *See* Cluchey, *supra* note 27, at 49; Tomkovicz, *supra* note 66, at 985 n.43.

[300] *See* United States v. Henry, 447 U.S. 264, 271 (1980) ("While affirmative inter-

gagement in conversation is enough.[301] On the other hand, some amount of *active elicitation* by an informant is necessary; passive reception will not suffice.[302] Although the word "deliberate" appears to require a subjective intent to elicit, an informant's requisite mental disposition is not clear.[303] The task here is to identify both the informant

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rogation, absent waiver, would certainly satisfy *Massiah*, we are not persuaded . . . that *Brewer v. Williams* . . . modified *Massiah*'s 'deliberately elicited' test.").

[301] *See id.* at 271-72 (noting that informant "had 'some conversations with Mr. Henry' while he was in jail, and Henry's incriminatory statements were 'the product of this conversation.' . . . In *Massiah*, no inquiry was made as to whether Massiah or his codefendant first raised the subject of the crime under investigation").

[302] *See supra* notes 84-87 and accompanying text. In Kuhlmann v. Wilson, 447 U.S. 436 (1986), the Court provided very little analysis and no explicit substantive justification for its decision that active informant elicitation (*i.e.*, "some action, beyond merely listening," *id.* at 459) is essential. Presumably, the premises undergirding *Wilson*'s conclusions are that: (1) without some activity by the informant, there is no adversarial contest, therefore, no need for equalization; and (2) without such activity, any harm suffered by a defendant results from a lack of wisdom and misplaced trust, the consequences of which the accused deserves to suffer. *See* Wilson v. Henderson, 584 F.2d 1185, 1191 (2d. Cir.) (stating that defendant who makes statements to undercover informant assumes risk of untrustworthiness and has no sixth amendment shield), *reh'g denied*, 590 F.2d 408 (1978), *cert. denied*, 442 U.S. 945 (1979). This Article addressed the latter premise in Part III. *See supra* note 247.

[303] Whether the standard for the requisite *Massiah* mental state is and should be subjective or objective has been the topic of considerable attention and debate. *See* Tomkovicz, *supra* note 66, at 985 n.43 (noting the dispute and reviewing the positions). A few observations concerning that topic are in order here.

The Court's terminology, requiring "deliberate" elicitation, strongly suggests a demand for "subjective intent to elicit." *See Henry*, 447 U.S. at 280 (Blackmun, J., dissenting) ("The unifying theme of *Massiah* cases . . . is the presence of deliberate, designed, and purposeful tactics, that is, the agent's use of an investigatory tool with the specific intent of extracting information in the absence of counsel."). The majority opinions in *Henry*, 447 U.S. at 274, and Maine v. Moulton, 474 U.S. 159, 180 (1985), concluded that the "deliberate elicitation" standard is satisfied if the government "must have known" that elicitation was likely. *See supra* note 81. By endorsing this "must have known" language, these opinions seemed to temper the demand for actual subjective intent and to recast the *Massiah* inquiry in somewhat objective form. *See* Comment, Massiah *Revitalized*, *supra* note 72, at 604; Note, *Inanimate Devices*, *supra* note 40, at 381-82. How "objective" the actual standard is unclear. *See supra* note 81. Consequently, the Court's actual position in the "subjective versus objective" debate is difficult to pinpoint.

Moreover, when the "regular" government enlists undercover informants to secure information, there are two potentially relevant mental states — the regular agent's and the informant's. The Court's suggestions that an objective inquiry may be appropriate have pertained only to the state of mind of the "regular" government agents who did not engage in elicitation. *See* Tomkovicz, *supra* note 66, at 985 n.43. The impact of those suggestions upon the question of the state of mind required of the actual elicitor

conduct and *mindset* that should fall within sixth amendment territory.

Identification of the informant conduct governed by the sixth amendment necessitates decisions about the content of adversarial fair play.[304] Currently, it is constitutionally unobjectionable for a government adversary to establish an unknown ear, whether human or electronic, within listening distance of an uncounseled defendant, to capture that defendant's disclosures, and to use those disclosures to convict. The government adversary may approach and remain in its opponent's presence as long as it does not actively prompt disclosures. The only approaches thought to generate a need for equalizing assistance are those involving governmental "offensives."[305] Passive, surreptitious listening is not thought to threaten constitutional interests to a cognizable extent.

While the sense of fair play implicit in the Court's position has surface plausibility, it is not as unchallengeable as the majority has suggested.[306] *Massiah*'s essence is an entitlement to equalizing advice regarding the decision to disclose information to the government opponent. Arguably, a secret adversarial presence who simply awaits disclosures endangers that entitlement as much as one who prompts such disclosures. When the government surreptitiously enters a defendant's presence and remains there as listener, it is not a wholly passive

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(or listener) is anyone's guess. The only word we have from the Court on that question is that the elicitation must be "deliberate." *See Wilson*, 477 U.S. at 459.

This Article has already discussed the mental disposition that should be demanded of "regular" agents, subsuming that question within the "agency per se" inquiry. In this Part, the separable issue of the minimum mental state that should be demanded of the informant or other elicitor is treated. *See infra* notes 311-18 and accompanying text.

[304] *See Henry*, 447 U.S. 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" secured as a result of an accused's misplaced trust in a cellmate (emphasis added)).

[305] The Court seems to operate on the premise that when a government agent actively elicits, the state is engaged in adversarial combat with the accused, but when the agent merely listens passively, there is no engagement of opponents. While there is a factual distinction between the two situations, the distinction is not as clear or substantial as the Court would have it. In the passive listening situation, the government is not a wholly inactive adversary awaiting approaches and volunteered disclosures by a surrendering foe. Rather, the state is involved in insinuating one of its secret agents into the presence of the accused and in conducting ongoing surveillance of its opponent's conversations and activities. Such enterprises are not the work of a wholly inactive noncombatant. They are simply a different type or subtler form of active engagement.

[306] The cursory character of the Court's opinion in *Wilson*, 477 U.S. 436, its dearth of analysis, and the apparent ease with which it reached the seemingly obvious conclusion that "active elicitation" is necessary, conveys an impression of constitutional unassailability.

opponent fortuitously receiving the volunteered admissions of a repentant accused. Rather, it is engaged in active surveillance, in dealings designed to take advantage of an accused's ignorance of the adversarial presence.[307] By remaining unknown, the government deceives the defendant out of choosing to receive counsel's input on a critical decision. To preserve a defendant's right to advice and the constitutional values implicated, principles of fair play might well bar authorities from engaging in such deception.[308]

In my view, the *Massiah* entitlement should regulate passive reception.[309] Covert government approaches jeopardize the sixth amendment

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[307] To take advantage of the accused's ignorance is the *object* of "surreptitious, undercover" surveillance by informants. The current doctrine, by excluding passive listening from the category of encounters governed by counsel, limits the kind of adversarial encounter for which an accused is entitled to equalizing counsel. The doctrine limits counsel's functions, allowing counsel to shield their clients against provocative state tactics, but not against subtler deception involved in remaining in the inferiors' presence, gaining their trust, and waiting patiently until they divulge their guilt to someone. If counsel is to be a multifunction equalizer, we should guard against unwarranted restrictions upon the proper scope of her protective functions. To impose such restrictions without good reason is to allow the state a domain of unregulated dealing with its unprotected opponent. *See supra* notes 157-66 & 197-223 and accompanying text (regarding the inadvisability of arbitrarily limiting the appropriate types of assistance counsel can afford).

[308] For a discussion of the values promoted by the right to counsel, see *supra* notes 210-21 and accompanying text.

I have restricted the discussion to passive informants. Nevertheless, the reasoning set forth in the text would also lead to regulation of inanimate listening devices that are the functional equivalent of a secret personal presence. Because they are even more deceptive (an informant can be seen), inanimate devices might be even more destructive of the opportunity to consult with counsel. *See Henry*, 447 U.S. at 281-82 n.5 (Blackmun, J., dissenting) (opposing sixth amendment regulation of elicitation, *but* suggesting that a stronger case could be made in support of regulating inanimate listening devices).

My object has been to treat most of the major doctrinal topics, not to address every possible scenario and every necessary refinement of the *Massiah* doctrine. In light of the suggestion that passive governmental listening should be regulated, one question that merits discussion is how to treat a "known" governmental presence, such as a jailhouse guard, who does not engage in any elicitation, but who receives voluntary disclosures from an accused. It would seem that if the government makes no attempt to conceal its presence, there would ordinarily be no infringement upon the defendant's opportunity to elect to consult with counsel before speaking to the state. There may be reason to include listening by a known agent, however, if that agent remains within earshot for prolonged periods for no good reason, or if an accused is given virtually no opportunity to discuss matters with other individuals outside the presence of a known government officer. Even without deception, those situations might sufficiently endanger an accused's opportunity to consult with counsel before talking to the state.

[309] *See* Dix, *supra* note 3, at 235-36 (proposing a nonconstitutional rule covering

right to advice whether or not the approaching agent actively provokes disclosures.[310] In both active and passive encounters, the adversary's deception substantially diminishes the opportunity to elect to consult counsel. In the trial context our system would not tolerate deceptive passive listening and transmission of the information received to the factfinder. The requirement of arm's length dealings would bar uncounseled surreptitious trial confrontations. *Massiah*'s right to counsel is a logical and necessary extension of the trial right. It prevents pretrial evisceration of trial counsel's benefits. To fulfill its ends, the *Massiah* right must govern pretrial confrontations similar to those it would govern at trial. Before trial, the accused deserves constitutional shelter against not only surreptitious elicitation, but also covert listening.

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passive listening); Kamisar, *supra* note 3, at 42, 61, 68 (suggesting that government can "deal around" attorney without saying anything, that mere presence of undercover agent is an inducement to speak, and that "government may not be permitted to approach" defendant); White, *Police Trickery*, *supra* note 7, at 608 (advocating coverage of listening by electronic bugging); *see also* Note, *Inanimate Devices*, *supra* note 40, at 382-83 (reading *Henry* to cover inanimate listening devices).

Two additional arguments favor inclusion of passive informants within *Massiah*'s scope. First, even though an informant in prolonged proximity to a defendant is likely to have engaged in some sort of provocative conversation, determining whether sufficient active inducement has transpired can be a difficult exercise in hindsight. *See* Comment, Kuhlmann v. Wilson: *"Passive" and "Active" Government Informants — A Problematic Test*, 72 IOWA L. REV. 1423, 1435-36 (1987) ("[D]etermining whether the informant was active or passive involves an evidentiary problem."); *see also Wilson*, 477 U.S. at 472 (Brennan, J., dissenting) (disagreeing with majority's endorsement of lower court's characterization of informant behavior as passive). That difficult determination can be avoided by declaring the passive listening-active elicitation distinction irrelevant. Even if only active elicitation should be covered as a matter of principle, abolition of the distinction would not lead to many errors, for it effectively presumes a situation that is likely to comport with actual events.

In addition, by their very presence and availability as listeners, passive informants provide some inducement for or provocation of the vulnerable and unsuspecting accused to divulge his private thoughts. *See* Kamisar, *supra* note 3, at 42, 44, 61. In terms of its impact upon the accused, passive listening is simply not sufficiently different than active conversation to merit constitutionally distinct treatment.

[310] Although their ultimate positions on *Massiah* are at the opposite end of the spectrum from that taken herein, Justice Blackmun and Chief Justice Rehnquist have suggested that both passive listening and active eliciting are equivalent and should be treated alike. *See Henry*, 447 U.S. at 281 n.5 (Blackmun, J., dissenting) (stating that inanimate electronic listening "might be said to present an even stronger case for" constitutional coverage); *id.* at 301-02 (Rehnquist, J., dissenting) (concluding that there is no difference between passive listening by informant in adjacent cell and initiation of conversation by cellmate).

From *Massiah*'s inception, the Court has described its concern as *deliberate* elicitation. The Court has only addressed the significance of the modifier "deliberate" insofar as it pertains to the mental attitude required of "regular" government agents.[311] The Court has not discussed the eliciting or listening informant's requisite mindset.[312] That subject does not merit lengthy attention. By definition, authorities have encouraged and motivated informants who qualify as state agents to secure information for official use.[313] When questioning, conversing with, or listening to others, one general objective of such agents will almost inevitably be to secure disclosures. Consequently, their officially sponsored, *Massiah*-regulated conduct will be sufficiently "deliberate."[314]

It is possible that informants could encounter defendants without intent to, or without knowledge that they could, elicit or receive disclosures.[315] In that unlikely event,[316] the issue of minimum informant mental disposition would arise. The *Massiah* right probably should govern merely "negligent" elicitation or listening.[317] Adversarial fair play principles promise balanced encounters between government and accused. Constitutional doctrine should encourage officials to respect, and not allow them to neglect, that promise. The surest way to sap the

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[311] *See* Maine v. Moulton, 474 U.S. 159, 176-77 (1985); *Henry*, 447 U.S. at 274; *supra* note 303.

[312] The Court has simply said that the informant must engage in actions "designed deliberately to elicit" information. Kuhlmann v. Wilson, 477 U.S. 436, 459 (1986).

[313] *See supra* notes 285-87 and accompanying text.

[314] A specific intent to elicit or to listen to incriminating disclosures from a particular defendant does not seem to be a justifiable prerequisite for sixth amendment operation. If intent to elicit or to listen to information for government use is required, the general, ongoing intent to do so on any occasion should suffice.

[315] Actual knowledge of the possible consequences of elicitation should be treated the same as intent to accomplish those consequences. However, because an agent-informant will *desire* disclosure in virtually all cases, there is little need for concern about the distinction between intent and knowledge.

[316] If the doctrine demands active elicitation, the event is not as unlikely. It is much more conceivable that informants would not actually intend to *induce*, or be aware of the possibility that their actions could *induce*, disclosures than that informants would not actually intend to or be aware that they could *hear* disclosures.

[317] *See* Grano, *supra* note 6, at 33 (observing that it makes sense to protect defendant against not only intentional, but also reckless or negligent subversion of his rights); *see also* White, *Suspect's Assertion*, *supra* note 7, at 66-67 (maintaining that exclusive focus on subjective intent would be troubling for a number of reasons). Professor White asserts that because the sixth amendment is meant to insure that a suspect will not be induced to make incriminating statements absent counsel, the primary focus should be on the perspective of the suspect, not the officer. *Id.*

constitutional vitality of the adversarial equality guarantee is to prohibit intentional, but to tolerate careless, deprivations. The most effective way to encourage respect for fair play values and to proclaim the seriousness of the adversary system's commitment to them is to include all reasonably avoidable imbalanced encounters within *Massiah*'s scope. Counsel ought to govern any encounter that informants should know could yield disclosures from accused persons.[318]

In sum, the Court should modify the requirement that informants engage in "deliberate active elicitation." If secret government representatives intend to secure, or should know that they could secure, admissions from unaware, unequalized defendants, the sixth amendment should bar use of the information acquired.

D. The Separate Crime Question: Should There Be a Good Faith Independent Investigation Exception to Massiah*?*

One scenario that has tested *Massiah*'s reach involves undercover investigation of an individual's role in an uncharged crime while a formal charge is pending for another offense.[319] The situation poses two basic questions: (1) whether there is any possible sixth amendment impediment to the use of inculpatory statements pertaining to the uncharged crime; and (2) whether disclosures relevant to the formally charged

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[318] *But see* United States v. Henry, 447 U.S. 264, 282 n.6 (1980) (Blackmun, J., dissenting) (concluding that only truly "deliberate" conduct should be within *Massiah* ambit because that conduct is the "most culpable, [the] most likely to frustrate the purpose of having counsel, and [the] most susceptible to being checked by a deterrent," and, therefore, the only conduct which should result in the sanction of exclusion); Moss & Kilbreth, *supra* note 53, at 65 (noting that sixth amendment's concern is with intentional and purposeful, not negligent or accidental, frustration of the adversarial process).

A case might be made for including even "accidental" acquisitions within *Massiah*'s ambit, *i.e.*, encounters in which elicitation or hearing of disclosures was not even reasonably foreseeable. According to that view of fair play, the state would be "absolutely liable" for any transgression of the equalization command, and the products of *all* imbalanced encounters would be banned from the courtroom. Although I am all for a liberal construction of the rules of the adversarial system, it seems consistent with fair play to be concerned only with imbalanced encounters for which the state has some level of responsibility and which it could have reasonably avoided. It does not seem unfair to allow use of the fruits of true "accidents." In any case, such accidental acquisitions are also quite unlikely.

[319] *See, e.g.*, Maine v. Moulton, 474 U.S. 159 (1985); United States v. Lisenby, 716 F.2d 1355 (11th Cir. 1983); Toliver v. Wyrick, 469 F. Supp. 583 (W.D. Mo. 1979); People v. Walker, 145 Cal. App. 3d 886, 193 Cal. Rptr. 812 (1983); State v. Lale, 141 Wis. 2d 480, 415 N.W.2d 847 (Ct. App. 1987).

crime might be admissible at the trial of that crime under an "independent investigation" exception to *Massiah*. In *Maine v. Moulton*[320] the Court addressed both basic questions.[321] Although one can dispute the details of the Court's responses, the general answers are clear.

Even though the government has charged an accused with one offense, the sixth amendment does not regulate deliberate elicitation of inculpatory statements pertaining to a different uncharged crime.[322] The prosecution may use such statements to prove the uncharged offense. As already noted, the formal initiation of proceedings marks the threshold of *Massiah* control.[323] According to the Court, each separate offense must independently cross that threshold before the right to counsel can attach for that offense. The ordinary reasons for demanding initiation are thought to be applicable whether or not the government has charged an individual with another offense. The sixth amendment threshold is presumptively independent for each crime.

If a particular crime is truly independent, and no right to counsel has attached for that specific offense, then the mere circumstance of another pending charge probably should not trigger a right to counsel for the independent crime. In that situation, the government has not assumed the role of opponent for the separate offense.[324] Consequently,

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[320] 474 U.S. 159 (1985). For a discussion of *Moulton's* place in the development of *Massiah* doctrine, see *supra* notes 72-83 and accompanying text.

[321] Prior to the Supreme Court's *Moulton* decision, the lower courts had confronted the two basic questions. They had consistently held that there is no sixth amendment impediment to using statements to prove uncharged offenses. *See, e.g.*, *Lisenby*, 716 F.2d at 1359; United States v. Calhoun, 669 F.2d 923, 925 (4th Cir.), *cert. denied*, 456 U.S. 946 (1982); People v. Walker, 145 Cal. App. 3d 886, 895, 193 Cal. Rptr. 812, 816-17 (1983). They had split, however, over the validity of a good faith, separate investigation exception to exclusion of disclosures pertinent to a charged crime from the trial of that crime. *Compare* United States v. DeWolf, 696 F.2d 1, 2-3 (1st Cir. 1982) (allowing use of fruits of separate crime investigation at trial of charged crime); Schwimmer v. Coughlin, 543 F. Supp. 411, 413-14 (S.D.N.Y. 1982) (same) *and* People v. Brooks, 103 Misc. 2d 294, 425 N.Y.S.2d 951, 958 (Sup. Ct. 1980) (same) *with* Mealer v. Jones, 741 F.2d 1451, 1454-55 (2d Cir. 1984) (denying admissibility of fruits of separate investigation at trial of charged offense), *cert. denied*, 471 U.S. 1006 (1985) *and* State v. Ortiz, 131 Ariz. 195, 202, 639 P.2d 1020, 1028 (1981) (same), *cert. denied*, 456 U.S. 984 (1982).

[322] *Moulton*, 474 U.S. at 180 & n.16. The *Moulton* Court concluded that although incriminating statements pertaining to pending charges are inadmissible at the trial of those charges, "[i]ncriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses." *Id.*

[323] *See supra* note 66 & 253-56 and accompanying text.

[324] In making this determination, the dispositive event should be arrest or the formal

there is inadequate basis to impose rules and principles that are inseparably tied to adversariness.[325] The issue is whether the pendency of a separate, unrelated charge imperils values promoted by equalization.[326] It does not seem to contradict our commitment to adversarial fair play to conclude that whatever peril exists is insufficient.[327]

The issue is more complicated if the putative separate crime is related to the charged offense.[328] Insofar as the offenses are similar in nature and are based upon the same events, an adversarial relationship as to one might necessarily involve an adversarial posture as to the other. If so, sixth amendment rules should apply. On the other hand, the government might honestly need to investigate further before deciding to take a truly adversarial position regarding a related offense. In

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initiation of proceedings, whichever comes first. *See supra* notes 268-78 and accompanying text.

[325] One important premise of the instant discussion is that, from the standpoint of adversary system principles and values, a government approach regarding an unrelated, uncharged crime is essentially the same as a government approach regarding an uncharged crime when no separate charge is pending. In accepting that premise, I have rejected the plausible contrary argument that once a particular government is an adversary for one purpose, it is an adversary for all purposes. In my view, a fair play rule of equalization that hinges upon the state's decision to pursue a defendant need not operate until the state has made such a decision regarding the subject matter of a particular encounter. The state can and does make separate decisions regarding separate offenses. There is no need to presume one encompassing contest when the reality consists of multiple, separable contests.

Proponents of the opposing view legitimately fear concealments of adversarial postures and circumventions of the sixth amendment promise. I have taken that hazard into account by presuming adversariness for related offenses, *see infra* notes 328-34 and accompanying text, and by affording defendants the opportunity to prove actual state adversariness regarding an offense when normal threshold criteria are not met. *See supra* note 276 and accompanying text; *infra* note 327.

[326] More specifically, the question is whether those values are imperiled to a cognizably greater extent than they are when no other charge is pending.

[327] Of course, defendants in this situation should be afforded the same opportunity to prove actual adversary postures as that proposed for defendants who fail to meet the threshold when no separate charge is pending. *See* State v. Lale, 141 Wis. 2d 480, 489, 415 N.W.2d 847, 851 (Ct. App. 1987) (discussing possible exception to normal rule requiring initiation of proceedings for each crime if the state delays filing of proceedings on separate charge as a "pretext," and is acting in "bad faith" to avoid constitutional constraints).

[328] For cases discussing matters raised by uncharged offenses "related" to charged offenses, see United States v. Lisenby, 716 F.2d 1355, 1360-61 (11th Cir. 1983) (Godbold, C.J., dissenting) (noting that substantial factual overlap somewhat obscures the separateness of the offenses); Toliver v. Wyrick, 469 F. Supp. 583, 595 (W.D. Mo. 1979) (observing that questioning about related crimes necessarily involves questioning about pending charges).

that case, the sixth amendment should not operate. A simple, categorical rule at either extreme could resolve this tension. Once the right to counsel attaches for one offense, we could irrebuttably presume attachment for all related offenses.[329] Alternatively, we could require each specific crime to cross the ordinary sixth amendment threshold on its own no matter what the status of related offenses.[330] A less clear, but more principled, middle ground seems the best solution.

Because the adversary relationship probably carries over to related offenses, the sixth amendment right should presumptively attach for all sufficiently related offenses.[331] The government could rebut that presumption by explaining its failure to charge or to arrest for the related crime.[332] The authorities could establish that they had not yet assumed an adversarial posture and had refrained from declaring a commitment to prosecute for investigatory or other good reasons.[333] In that case, no right to counsel would attach. Without such a showing, the presumption arising from the adversarial relationship regarding one crime would entitle the individual to counsel for related offenses.[334]

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[329] This approach, its antithesis, and all other endeavors to deal with the issue of "related" crimes require a definition of "relatedness." This Article defines that concept below. *See infra* note 331.

[330] If directly confronted with the "related offenses" question, the Court would probably endorse this extreme. This prediction is grounded in the Court's inflexible devotion and adherence to the initiation of proceedings threshold. *See* Moran v. Burbine, 475 U.S. 412, 428-30 (1986) (reinforcing the importance and rigidity of the initiation demand and firmly rejecting the possibility of extension of sixth amendment rights into earlier period based on formation of attorney-client relationship). It is also grounded in the *Moulton* majority's total silence regarding the possibility of a distinction based on the relationship between charged and uncharged crimes.

[331] For two crimes to be sufficiently related, there would have to be substantial overlap in their factual bases. They should not have to be similar in abstract definition or in type. Nor should one have to be a "lesser included offense" of the other. Shared factual premises would adequately suggest adversariness regarding the uncharged crime. *See* Dix, *supra* note 3, at 232 (concluding that it is clear that charges regarding one offense trigger right regarding other offenses based on the same activities).

[332] *Cf.* Batson v. Kentucky, 476 U.S. 79, 97 (1986) (concluding that after defendant establishes factors giving rise to prima facie case of racial discrimination in the use of peremptory jury challenges, government may rebut with evidence of nondiscriminatory motivation).

[333] This Article does not attempt to catalogue all acceptable and unacceptable reasons. Suffice it to say that the burden should be upon the government to show a "good, affirmative" reason not to initiate proceedings or to arrest for the "related" offense. Failure to furnish any reason, or reliance upon explanations such as neglect or oversight, will fare as poorly as "bad faith" reasons for the omission.

[334] If there is no charge pending for a related crime (*i.e.*, no charge pending at all or a charge pending on a clearly separate crime), there is no reason to presume adversari-

The *Moulton* Court held that even though officials obtain incriminating admissions about a charged crime during a good faith, legitimate investigation of a separate crime they may not use those admissions to prove the charged crime if *Massiah* would otherwise bar such use.[335] The majority rejected a "good faith" exception to *Massiah* on several grounds.[336] First, it would pose a serious risk of "fabricated investigations" that could undermine the sixth amendment right.[337] Second, official motives often are multiple and difficult to ascertain.[338] Third, and most significant, the use of deliberately elicited disclosures harms constitutional interests in adversarial fair play whether or not authorities were involved in a good faith, independent investigation.[339]

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ness. It is fair to put the burden upon the defendant to show that, despite the absence of the normal threshold indicia, the actual situation is adversarial. *See supra* note 276 and accompanying text. The reason for changing the rules in situations in which a related charge is pending is that the message conveyed by the absence of threshold criteria (arrest or initiation) is in tension with the message conveyed by the state's declaration of opposition regarding an offense arising from the same events. When objective criteria point in different directions, rules ought to reflect the most likely reality and appearances. The presumption proposed in the text is justified because it reflects the quite likely reality and appearance in "related offense" situations — that the government is in fact in an adversarial posture regarding the sufficiently related crime. If the true state of affairs is otherwise, the government may prove it. Not to shift the burden of proof regarding adversariness to the state in this situation would invite circumvention of the substance and spirit of the *Massiah* right. *See* Dix, *supra* note 3, at 231 (suggesting that selective charging should not be permitted to frustrate the *Massiah* rule).

[335] *See* Maine v. Moulton, 474 U.S. 159, 179-80 (1985).

[336] *See* Note, *supra* note 135, at 1113 (*Moulton* rejected attempt to create good faith exception to *Massiah*). A good faith exception had been accepted by some lower courts. *See supra* note 321. Apparently, the "prevailing view" was that such an exception was consistent with *Massiah* and with the sixth amendment. *See Moulton*, 474 U.S. at 189 & n.4 (Burger, C.J., dissenting).

[337] *See Moulton*, 474 U.S. at 180. The *Moulton* Court stated:

> To allow the admission of evidence obtained from the accused in violation of his Sixth Amendment rights whenever the police assert an alternative, legitimate reason for their surveillance invites abuse by law enforcement personnel in the form of fabricated investigations and risks evisceration of the Sixth Amendment right recognized in *Massiah*.

Id.

[338] *See id.* at 179-80 n.15 (recognizing "likelihood of *post hoc* rationalizing" and concluding "that dual purposes may exist whenever police have more than one reason to investigate someone").

[339] *See id.* at 179-80 (including among reasons for rejecting the claimed exception that "the Government's investigative powers are limited by the Sixth Amendment").

Four dissenters concluded that sixth amendment values are not threatened when inculpatory disclosures regarding a charged offense are the fruits of a legitimate, good faith investigation of a separate, uncharged offense. *See id.* at 184-85 (Burger, C.J.,

The Court was correct in rejecting the "good faith exception" to *Massiah*.[340] In the ordinary *Massiah* situation, unequal encounters offend sixth amendment principles and fair play values after the right to counsel has attached.[341] To prevent constitutional injury, controlling doctrine bars the products of those encounters from trial. The proposed independent investigation exception to the *Massiah* right[342] is essentially a claim that commendable motives justify suspension of the normal rules of fair play. It would permit the infliction of harms that would be constitutionally offensive in the absence of such motives. The exception is rooted in "ends justify means" reasoning. It would grant a dispensation from the ordinarily required "means" of conviction — equalized encounters between adversaries — because of the admirable, separate "end" of investigating a separate crime. In fact, the independent investigation exception exemplifies a virulent strain of the "ends-means" argument. Acceptance of the objectionable means is not even necessary to achieve the worthy end.[343]

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dissenting, joined by Justices White, Rehnquist, & O'Connor) (accusing majority of turning sixth amendment "on its head," and contending that no constitutional violation occurs if " 'alternative, legitimate reasons' motivated surveillance").

[340] *See* Cluchey, *supra* note 27, at 57 (maintaining that legitimate investigation of new crime should not be basis for exception to *Massiah* doctrine).

[341] *See supra* notes 183-247 and accompanying text.

[342] A claim that legitimate, independent investigation justifies otherwise prohibited use of the products of uncounseled adversarial encounters is essentially a plea for an exception to the *right* to counsel — an assertion that the accused can be denied the benefits of that right. The entire line of *Massiah* cases would seem to establish that there is no offense to the right to counsel in the actual encounter between informant and defendant. The explicit holding of *Massiah* was that the sixth amendment only bars the *use* of the products of such an encounter. The reasoning is that events outside the courtroom cause no harm that our adversary system seeks to prevent. Cognizable harm occurs only when the government employs the fruits of the adversarial imbalance in the criminal processes leading to conviction. Therefore, the *Massiah* exclusionary rule is an essential, integral component of an accused's personal right to counsel. *See* Nix v. Williams, 467 U.S. 431, 446-47 (1984) (entertaining defense claim that sixth amendment exclusion is a right, not just a prophylactic). *But see Moulton*, 474 U.S. at 191 (Burger, C.J., dissenting) (asserting that sixth amendment harm is fully accomplished at the time of elicitation).

The *Massiah* exclusionary rule is dramatically unlike the fourth amendment exclusionary rule. The Court considers the latter rule purely a future-oriented deterrent remedy, not a part of the defendant's personal fourth amendment entitlement. *See* United States v. Leon, 468 U.S. 897, 906 (1984). *But see id.* at 931-34 (Brennan, J., dissenting) (contending that Court should return to original rationale of fourth amendment exclusionary rule as personal fourth amendment right).

[343] Typical "ends-means" reasoning maintains that a particular "good end" justifies otherwise "bad means" without which the end would be difficult or impossible to at-

If officials satisfy ordinary conduct and mental state standards, we should not suspend normal fair play rules or tolerate ordinarily intolerable injuries simply because their "motives" are good or because they may use the chosen methods to accomplish other goals.[344] Commendable

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tain. If the choice here were between the prevention of investigation and proof of uncharged crimes and the adherence to constitutional principles, we would be faced with a difficult choice, but would still reject the compromise of our principled means in order to achieve a worthy end. *Cf.* Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) ("To declare that in the administration of criminal law the end justifies the means . . . would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face."). The contention of the government here, however, does not even pose so difficult a choice and is based upon a much more objectionable "ends-means" premise. We do not have to decide between the "good end" of proving the separate crime by ordinarily unacceptable means and by adhering to principled methods at the cost of uncaptured criminals and unproven crimes. The *Massiah* doctrine has always allowed the investigation and proof of separate, uncharged crimes. *See Massiah*, 377 U.S. at 207. Suggestions that an exception to the doctrine is necessary to prevent constitutional immunization from liability for continuing criminality are simply inaccurate. *See Moulton*, 474 U.S. at 186 (Burger, C.J., dissenting) (citation omitted) (suggesting that majority confers "windfall benefit" upon those both accused and under further investigation, and asserting that sixth amendment is not " 'magic cloak' to protect criminals who engage in multiple offenses"); *Massiah*, 377 U.S. at 212 (White, J., dissenting) (observing that criminals out on bail continue crime and that their statements should not be "constitutionally immunize[d]" by the attachment of the right to counsel).

In sum, we can achieve the "good end" *and* remain faithful to principled means of criminal justice. The gist of *Massiah-Moulton* is that methods which are acceptable in achieving one goal might be constitutionally offensive when employed to accomplish other objectives. That conclusion is rationally and constitutionally persuasive.

[344] The argument for a good faith exception advanced by the *Moulton* dissenters is really a contention that good motives or purposes prevent what would otherwise be a violation of the right to counsel. *See Moulton*, 474 U.S. at 186 (Burger, C.J., dissenting) ("In using the phrase 'deliberate elicitation,' we surely must have intended to denote elicitation *for the purpose of using* such statements against the defendant in connection with charges for which the Sixth Amendment right to counsel had attached." (emphasis added)); *id.* at 188 (noting that government does not engage in "deliberate circumvention" when it gathers evidence for alternative, legitimate purposes "wholly apart from the pending charges").

The substantive criminal law has long included an important distinction between "motive" and "intent." Only the latter is important to culpability determinations; motives are generally irrelevant. *See* S. KADISH, S. SCHULHOFER & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 276-77 (4th ed. 1983) (noting legal relevance and importance of mens rea or intent, and distinguishing it from motive — a " 'legally irrelevant' " concept (quoting G. WILLIAMS, THE MENTAL ELEMENT IN CRIME 10, 14 (1965))); W. LAFAVE & A. SCOTT, CRIMINAL LAW §§ 3.5(a), 3.6(a) (2d ed. 1986) (recognizing necessity of intent in determinations of guilt and immateriality of motive). We ought to recognize a similar distinction here, rejecting an exemption based on mo-

motives do not eliminate or mitigate the adversarial imbalance or the resultant constitutional harm to the accused.[345] A legitimate, independent investigatory purpose does not justify restoration to the government of the advantages of adversarial inequality that the sixth amendment seeks to eliminate.[346]

Thus, the *Massiah* right should attach presumptively for all crimes that are "sufficiently related" to other offenses that have satisfied threshold sixth amendment criteria. Furthermore, once the right to counsel is operative for a crime, there should be no "good motive" exception to that right.

CONCLUSION

This Article has documented *Massiah*'s history and the controversy over its much-maligned right to counsel in pretrial encounters with undercover government agents. It has rooted the right both in the sixth amendment promise of defense counsel and in the adversary system. It has also discussed the doctrinal implications of a thorough understanding of *Massiah*'s constitutional premises, and has suggested principled modifications of the current standards based on those premises.

The sixth amendment guarantee and the adversary system exemplify our societal dedication to values beyond the ascertainment of "truth"

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tive when the required government intent (or other minimum mental disposition toward the encounter) is present. The *Moulton* majority did exactly that. *See Moulton*, 474 U.S. at 180 ("[I]ncriminating statements pertaining to pending charges are inadmissible at trial of those charges, ***notwithstanding the fact that the police were also investigating other crimes***, if, in obtaining this evidence, the State . . . ***knowingly*** circumvent[ed] the accused's right to the assistance of counsel." (emphasis added)).

An analogy to trial is once again helpful. Our system certainly would not tolerate a cognizable infringement of the right to the assistance of trial counsel because of the "good motives" of the government. To allow such infringement of the pretrial right can only undermine that trial guarantee.

[345] The *Moulton* dissenters' opinion does not respond to these fundamental flaws in the good faith exception. As in many *Massiah*-line cases, the dissenters' views rest upon conclusional say-so. *See* text accompanying notes 143-45. Their opinion also echoes some of the familiar refrains often aimed at *Massiah* itself. *See Moulton*, 474 U.S. at 184-86 (Burger, C.J., dissenting) (stating that when legitimate investigation of separate crime is object, there is no "impermissible conduct," and "highly probative and reliable evidence" will be excluded from the trial of the charged offense).

[346] The damage caused to sixth amendment values by acceptance of a "good faith" exception to *Massiah* is the primary reason I concur with the Court's resolution. Still, the majority's fear of fabricated investigations, and its premise that actual motives in independent investigation situations are difficult to isolate and are often "dual," *see Moulton*, 474 U.S. at 179-80 n.15, provide persuasive additional reasons to reject the exception.

and our commitment to adversarial fair play. Among our fair play principles is a central requirement that inferior individuals receive equalizing assistance in the battle with the government. A relatively expansive, but far from revolutionary, vision of that equalizing assistance casts counsel as a multifunctional assistant. Counsel empowers the defendant both to make an "affirmative defense" and to erect a "defensive shield" against whatever techniques, resources, and talents the government employs to secure conviction. The sixth amendment interpretation espoused here accepts that vision and eschews arbitrary limitations based on the notion that counsel is and must only be a legal expert and technical assistant.

The sixth amendment vision posited here rests upon two additional and basic premises. First, the rules of adversarial fair play must operate as soon as the government commits itself to pursuing conviction. Second, those rules must govern any pretrial encounter that would be governed were it to occur at trial. Put otherwise, adversary system rules must control encounters between adversaries both at and before trial.

The counsel guarantee includes among its equalizing benefits an entitlement to advice concerning disclosures to the government. By deceiving the accused, surreptitious approaches by undercover government agents can vitiate the opportunity for counsel's advice. Because accused persons are unaware of the character of the persons with whom they are dealing, they cannot know of the need for counsel's advice. Law enforcement officials may not undermine the benefits of equality by such deceptive approaches at trial. They should not be permitted to undermine the advantages of equalization at an earlier phase of the adversarial contest. A *Massiah*-type right preserves the entitlement to advice and prevents sixth amendment damage. That right requires the government either to reveal its presence and afford the opportunity to consult with counsel, or to suffer the exclusion of the products of its adversarial encounter with the accused.

I have endeavored to be clear about the value choices involved in accepting a sixth amendment right to counsel against approaches by government informants and in defining that right in various ways. This endeavor revealed the assumptions about counsel's functions underlying the strident objections raised by *Massiah*'s critics. While I have advanced certain preferred viewpoints and have explained the reasoning underlying those viewpoints, I have also outlined the countervailing reasons that could lead to different approaches. I have tried to avoid the dogmatic sort of declaration of right and wrong, or good and evil, that has often characterized and obscured the *Massiah* debate. The result is

at least a clarification of the values and interests involved in choosing any particular course.

The past, present, and inevitable future indictments of *Massiah* rest on narrow premises about the adversarial system and counsel's role therein. History does not mandate those premises. Nor do the sixth amendment text or purposes require their acceptance. Other premises, equally justifiable in terms of constitutional history and text, and arguably more consistent with sixth amendment values, can lead to a *Massiah* right of greater scope than that currently recognized. Those premises, which have now received an overdue airing, can defend *Massiah* against the future attacks of its adversaries.