DISENTANGLING *MIRANDA* AND *MASSIAH*: HOW TO REVIVE THE SIXTH AMENDMENT RIGHT TO COUNSEL AS A TOOL FOR REGULATING CONFESSION LAW

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Fifty years after Miranda v. Arizona, many have lamented the ways in which the Burger, Rehnquist, and Roberts Courts have cut back on Miranda's protections. One underappreciated aspect of Miranda's demise is the way it has affected the development of the pretrial Sixth Amendment right to counsel guaranteed by Massiah v. United States. Much of the case law diluting suspects' Fifth Amendment Miranda rights has bled over into the Sixth Amendment right to counsel cases without consideration of whether the animating purposes of the Massiah pretrial right to counsel would support such an importation. This development is unfortunate given that the Fifth Amendment Miranda right and the Sixth Amendment right to counsel have different foci and serve different purposes.

Miranda has always been focused on dispelling the inherent compulsion in the custodial interrogation environment in order to ensure that suspects are not being compelled to give testimony against themselves in violation of the Self-Incrimination Clause. In contrast, the Sixth Amendment pretrial right to counsel is grounded in concepts of fundamental fairness and equality and is designed to

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ensure that criminal defendants have attorneys to help them navigate the procedural and substantive complexities of the law and face the prosecutorial forces of organized society.

It is not too late to disentangle these two constitutional rights. In this Article, I discuss how to achieve such disentanglement at both the federal and state levels. I also highlight a couple of areas—fruits doctrine and warning and waiver principles—where such disentanglement could result in significant doctrinal distinctions that would create more robust Sixth Amendment protection for criminal defendants going forward.

INTRODUCTION

Fifty years after *Miranda v. Arizona*,[1] many have lamented the ways in which the Burger, Rehnquist, and Roberts Courts have cut back on *Miranda*'s protections.[2] *Miranda* warnings are only required when a suspect is in custody and is being interrogated,[3] but the Supreme Court has interpreted custody so narrowly that the police can easily avoid triggering application of the *Miranda* doctrine by simply telling a suspect that he is free to go[4] or suggesting that he "volunteer" to come to the police station for questioning.[5] And police questioning is not always interrogation. There are routine booking questions,[6] questions that do not ask for incriminating information,[7] and questions addressed to public safety concerns,[8] none of which trigger the required *Miranda* warnings.

[1] 384 U.S. 436 (1966).

[2] *See, e.g.*, Charles D. Weisselberg, *Mourning* Miranda, 96 CALIF. L. REV. 1519, 1521 (2008) ("In the more than four decades since *Miranda* was decided, the Supreme Court has effectively encouraged police practices that have gutted *Miranda*'s safeguards. . . . *Miranda* is largely dead."); Jonathan Witmer-Rich, *Interrogation and the Roberts Court*, 63 FLA. L. REV. 1189, 1192 (2011) (noting that there have been "a number of academic-style funerals for *Miranda*").

[3] *Miranda*, 384 U.S. at 478.

[4] Howes v. Fields, 565 U.S. 499, 514-15 (2012) (finding that a prison inmate "was not taken into custody for *Miranda* purposes" when he was escorted to an interview room, because he was told that he may leave whenever he wanted, and he was not physically restrained); Richard A. Leo, *False Confessions and the Constitution: Problems, Possibilities, and Solutions*, *in* JOHN T. PERRY & L. SONG RICHARDSON, THE CONSTITUTION AND THE FUTURE OF CRIMINAL JUSTICE IN AMERICA 169, 169-77 (2013) (emphasizing that police do not have to give the *Miranda* warnings if they "simply tell[] the suspect that he is not under arrest and is free leave").

[5] California v. Beheler, 463 U.S. 1121, 1121-23 (1983); Oregon v. Mathiason, 429 U.S. 492, 495 (1977).

[6] Pennsylvania v. Muniz, 496 U.S. 582, 601-02 (1990).

[7] Hiibel v. Sixth Judicial Dist. Court of Nev., 542 U.S. 177, 190-91 (2004).

[8] New York v. Quarles, 467 U.S. 649, 653 (1984).

Even when the police must give warnings, they need not read the actual *Miranda* warnings. Any words that are close enough to reasonably convey the concepts in the *Miranda* warnings will suffice.[9] Once those words are uttered, waiver will be presumed from the mere fact that the suspect then gives a statement, assuming that the police do not beat the suspect or do something particularly egregious to coerce him into talking.[10]

A person who wants to assert her *Miranda* right to an attorney must do so clearly and unequivocally; saying that she thinks she wants a lawyer is not good enough and will allow the police to keep questioning her.[11] If she wants to invoke her right to remain silent, she cannot do that by remaining silent.[12] She has to actually speak and clearly state that she wants to be quiet or the police can keep questioning her.[13] Even a person who is able to overcome the fear and intimidation of the environment and clearly assert her rights is not entitled to end the questioning; she only gets a brief respite before the police will return to start the inquisition again.[14]

To make matters worse, there are myriad incentives for the police to violate a suspect's rights under *Miranda*. They can use any statements that they get from the suspect to impeach her if she dares to testify at trial,[15] and if they are lucky enough to discover physical fruits as a result of her statements, those will be admissible to prove the State's case at trial.[16] For these reasons, officers are often trained to question "outside *Miranda*."[17] In other words, they are told to ignore the *Miranda* rights and just question suspects until they get a confession or learn about the location of physical fruits of the crime.[18]

Many scholars have mourned this dilution of suspects' *Miranda* rights.[19] Even Yale Kamisar, the father of *Miranda* himself and one of its most fervent

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[9] Florida v. Powell, 559 U.S. 50, 60 (2010); Duckworth v. Eagan, 492 U.S. 195, 203 (1989); California v. Prysock, 453 U.S. 355, 359-60 (1981).

[10] Berghuis v. Thompkins, 560 U.S. 370, 384 (2010).

[11] Davis v. United States, 512 U.S. 452, 459 (1994).

[12] *Thompkins*, 560 U.S. at 381-82.

[13] *Id.*

[14] *See* Maryland v. Shatzer, 559 U.S. 98, 110 (2010) (holding that, when a person invokes her *Miranda* right to counsel to end an interrogation, the police need only wait fourteen days after the suspect is released from custody before they are permitted to reinitiate interrogation).

[15] Oregon v. Hass, 420 U.S. 714, 723 (1975); Harris v. New York, 401 U.S. 222, 225-26 (1971).

[16] United States v. Patane, 542 U.S. 630, 635-42 (2004) (declining to suppress physical evidence that is the "fruit of an unwarned statement").

[17] *See, e.g.*, Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109, 132 (1998) (describing the widespread practice of deliberately disregarding *Miranda*).

[18] *See id.*

[19] *See supra* note 2 and accompanying text; *see also* Yale Kamisar, *The Rise, Decline, and Fall (?) of* Miranda, 87 WASH. L. REV. 965, 966 n.2 (2012) (collecting sources describing the death of *Miranda*).

supporters, has lamented that the *Miranda* doctrine has taken "a bullet in the shoulder"[20] and suffered a "heavy blow"[21] as a result of recent Supreme Court decisions.

One underappreciated aspect of *Miranda*'s demise is the way it has affected the development of the pretrial Sixth Amendment right to counsel. There are three different constitutional provisions that regulate pretrial police interrogation practices—the Due Process Clause's voluntariness test,[22] the Sixth Amendment right to counsel, [23] and the Fifth Amendment privilege against self-incrimination.[24] The Supreme Court's blockbuster *Miranda* decision brought the Self-Incrimination Clause to center stage and relegated the due process and Sixth Amendment right to counsel tests to supporting roles. To accomplish this Fifth Amendment revolution, the *Miranda* Court integrated its Sixth Amendment precedent into the decision and included an admonition of the right to counsel in its famous *Miranda* warnings.[25] As a result of this entanglement, much of the case law diluting suspects' Fifth Amendment *Miranda* rights has bled over into the Sixth Amendment right to counsel cases.[26] This development is unfortunate given that the Fifth Amendment *Miranda* right and the Sixth Amendment right to counsel have different foci and serve different purposes.[27]

It is not too late to disentangle these two constitutional rights. For fifty years, the *Miranda* decision has been the front-runner test for determining the constitutional admissibility of confessions. But now that *Miranda* has been gutted, defendants should turn to the Sixth Amendment right to counsel and the voluntariness test for protection. [28] I have discussed elsewhere how the

[20] Yale Kamisar, *Postscript: Another Look at* Patane *and* Seibert*, the 2004* Miranda *"Poisoned Fruit" Cases*, 2 OHIO ST. J. CRIM. L. 97, 114 (2004).

[21] Kamisar, *supra* note 19, at 1008.

[22] *See* U.S. CONST. amends. V, XIV (providing that no one "shall be . . . deprived of life, liberty, or property, without due process of law"); Colorado v. Connelly, 479 U.S. 157, 167 (1986) ("We hold that coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment.").

[23] U.S. CONST. amend. VI.

[24] *Id.* amend. V.

[25] Miranda v. Arizona, 384 U.S. 436, 444 (1966) ("Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.").

[26] *See infra* Part II.

[27] *See infra* Part I.

[28] *See* James J. Tomkovicz, *Saving* Massiah *from* Elstad*: The Admissibility of Successive Confessions Following a Deprivation of Counsel*, 15 WM. & MARY BILL RTS. J. 711, 711 (2007) ("[S]evere erosion of the protections afforded by the *Miranda* doctrine has made preservation of the Sixth Amendment safeguards against official efforts to secure admissions of guilt all the more critical.").

voluntariness test could develop in the wake of *Miranda*'s demise.[29] Here, I consider how the Sixth Amendment right to counsel might step in to address at least some of the void.[30]

Part I of this Article will discuss the different foci and purposes of the Fifth Amendment *Miranda* right and the Sixth Amendment pretrial right to counsel. *Miranda* has always been focused on dispelling the inherent compulsion in the custodial interrogation environment in order to ensure that suspects are not being "compelled" to give testimony against themselves in violation of the Self-Incrimination Clause.[31] In contrast, the Sixth Amendment pretrial right to counsel is grounded in concepts of fundamental fairness and equality.[32] To "minimize the imbalance in the adversary system,"[33] an indigent defendant must have his lawyer at all critical stages once the machinery of state is started against him so as not to render the trial itself "a mere formality."[34]

Part II of this Article will then discuss how the two rights have become partially entangled, both at the United States Supreme Court level and in lower courts. Although the courts have sometimes recognized that the two rights are distinct and grounded their decisions on the different purposes of the two constitutional provisions, too often courts have imported *Miranda* case law into the Sixth Amendment pretrial right to counsel context without thinking about whether such importation makes sense given the different rationales for the two rules.[35] As a result, some Sixth Amendment right to counsel doctrines appear unmoored from the underlying rationales supporting the right.

Part III of this Article argues that we should disentangle these two rights, discusses how to achieve such disentanglement, and highlights a couple of areas where such disentanglement could result in significant doctrinal distinctions that would create more robust Sixth Amendment protection for criminal

[29] *See* Eve Brensike Primus, *The Future of Confession Law: Toward Rules for the Voluntariness Test*, 114 MICH. L. REV. 1, 56 (2015) (arguing that disentangling the two strands of involuntariness "will help the courts create a workable doctrine going forward").

[30] Given the temporal requirement that a suspect must first be formally charged with an offense or have a first formal hearing in order to trigger application of the Sixth Amendment right to counsel, I recognize that the Sixth Amendment applies to a smaller universe of cases than does the privilege against self-incrimination under *Miranda.* However, the Supreme Court's decision to permit the Sixth Amendment to attach at the first formal hearing, *see* Rothgery v. Gillespie Cty., 554 U.S. 191, 213 (2008), greatly expands the number of criminal defendants who have Sixth Amendment protection. Thus, a stronger set of Sixth Amendment protections would have a meaningful impact for a large number of defendants.

[31] *See infra* Section I.B.

[32] *See infra* Section I.A.

[33] United States v. Ash, 413 U.S. 300, 309 (1973).

[34] Maine v. Moulton, 474 U.S. 159, 170 (1985) (quoting United States v. Wade, 388 U.S. 218, 224 (1967)).

[35] *See infra* Part II.

defendants.[36] Specifically, with respect to fruits doctrine and warning and waiver principles, disentangling the Fifth and Sixth Amendment rights would result in greater Sixth Amendment protection for a subset of criminal defendants.[37]

I. DIFFERENT PURPOSES

The pretrial Sixth Amendment right to counsel and the Fifth Amendment *Miranda* right to be free from compelled self-incrimination have different foci and serve different purposes.[38] In the subsections that follow, I will discuss the purposes of these two constitutional doctrines and explain how their different approaches shaped the early contours of the rights in different ways.

A. *The Sixth Amendment Right to Counsel*

The Sixth Amendment right to counsel "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is [re]presented by experienced and learned counsel."[39] This quotation reveals two important animating principles that the Supreme Court has long recognized are at the core of the Sixth Amendment right to counsel: (1) fundamental fairness and (2) equality in an adversarial system.[40]

The Supreme Court in *Gideon v. Wainwright*[41] noted that it was "an obvious truth . . . that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[42] That Court went on to quote from *Powell v. Alabama*:[43]

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself

[36] *See* Eda Katharine Tinto, *Wavering on Waiver:* Montejo v. Louisiana *and the Sixth Amendment Right to Counsel*, 48 AM. CRIM. L. REV. 1335, 1370 (2011) (arguing in the context of warnings and waiver doctrine that lower courts should attend to "the traditional principles of the Sixth Amendment right to counsel and reaffirm the analytical distinction between the rights to counsel of the Fifth and Sixth Amendments").

[37] *See infra* Part III.

[38] *See* Tinto, *supra* note 36, at 1337 ("Historically, the Fifth Amendment right to counsel and the Sixth Amendment right to counsel have distinct underlying goals and purposes.").

[39] Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938).

[40] *Id.*

[41] 372 U.S. 335 (1963).

[42] *Id.* at 344.

[43] 287 U.S. 45 (1932).

> whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one.[44]

This concept of fairness has its roots in the due process concepts of notice and a realistic opportunity to be heard.[45] *Powell* was decided pre-incorporation; it grounded the right to effective assistance of counsel in the Due Process Clause.[46] The *Powell* Court suggested that criminal defendants have no real opportunity to be heard if they do not have counsel, because they do not have the requisite understanding of the law to know what to say to defend themselves and how to say it consistent with the rules of evidence and procedural intricacies of the system.[47]

When the Supreme Court incorporated the Sixth Amendment right to counsel and applied it to the states in *Gideon*, it emphasized this same concept of fundamental fairness.[48] Since *Gideon*, the Supreme Court has repeatedly stated that the right to counsel is necessary "to assure fairness in the adversary criminal process,"[49] where that fairness means a right to be heard through competent counsel who can navigate the procedural system and present legal defenses.

Relatedly, the Sixth Amendment right to counsel is motivated by "a desire to minimize the imbalance in the adversary system that otherwise resulted with the creation of a professional prosecuting official."[50] This "equalizing effect of the Sixth Amendment's counsel guarantee"[51] is also necessary to ensure that trials are fair. After all, the accused is not just confronted with the "intricacies of the

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[44] *Gideon*, 372 U.S. at 344-45 (quoting *Powell*, 287 U.S. at 68-69).

[45] *See* George C. Thomas III, *Separated at Birth but Siblings Nonetheless:* Miranda *and the Due Process Notice Cases*, 99 MICH. L. REV. 1081, 1083 (2001) (recognizing the relationship between *Miranda* and due process concepts).

[46] *See Powell*, 287 U.S. at 68-69 (holding that courts' refusal "to hear a party by counsel" violates due process).

[47] *See id.* ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.").

[48] *See Gideon*, 372 U.S. at 344-45 (quoting *Powell*, 287 U.S. at 68-69).

[49] United States v. Morrison, 449 U.S. 361, 364 (1981) (citing *Gideon*, 372 U.S. at 344); *see also* United States v. Ash, 413 U.S. 300, 307 (1973) ("[A]n unaided layman ha[s] little skill in arguing the law or in coping with an intricate procedural system," so counsel is needed "as a guide through complex legal technicalities."); Hamilton v. Alabama, 368 U.S. 52, 54-55 (1961) ("Only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently.").

[50] *Ash*, 413 U.S. at 309.

[51] *Id.*

law"[52] at trial; he also faces "the advocacy of the public prosecutor,"[53] a person who is "experienced and learned"[54] in the law. Our adversarial system, to be fair, must provide the defendant with an experienced and learned champion of his own.[55]

Once the Supreme Court recognized a constitutional right to counsel *at trial*, it quickly extended that fundamental right pretrial relying on these same principles of fairness and equality in the adversarial system. In *Massiah v. United States*,[56] federal officials used an undercover agent to elicit incriminating statements from Winston Massiah after he had already been indicted for a criminal offense.[57] The Supreme Court held that the undercover interrogation violated Massiah's Sixth Amendment right to counsel, because "[a]ny secret interrogation of the defendant, from and after the finding of the indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime."[58]

Both fairness and equality concerns are implicated at a pretrial interrogation. The defendant is confronted by an agent of the government and therefore needs his lawyer to equalize the imbalance, and he is questioned about the elements of criminal offenses and therefore needs his lawyer to understand the legal elements of the crime, any defenses he might have, and how to navigate the interrogation process. Whether the government agent is overtly questioning a suspect or is acting in an undercover matter is irrelevant; the same fairness and equality concerns require the guiding hand of counsel.[59] The government agent

[52] *Id.*

[53] *Id.*

[54] Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938).

[55] *See* McNeil v. Wisconsin, 501 U.S. 171, 177-78 (1991) ("The purpose of the Sixth Amendment counsel guarantee—and hence the purpose of invoking it—is to 'protec[t] the unaided layman at critical confrontations' with his 'expert adversary,' the government . . . ." (citing United States v. Gouveia, 467 U.S. 180, 189 (1984))). Others have recognized the fairness and equality principles that underscore the Sixth Amendment right to counsel. *See, e.g.*, James J. Tomkovicz, *The* Massiah *Right to Exclusion: Constitutional Premises and Doctrinal Implications*, 67 N.C. L. REV. 751, 753 (1989) (describing the right to counsel as "designed to promote balanced contests by equalizing the adversaries" in order to ensure "fair play"); H. Richard Uviller, *Evidence from the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 COLUM. L. REV. 1137, 1173 (1987) (describing the "preventative assistance" approach to the Sixth Amendment right to counsel, which assumes that the defendant is unevenly matched against the power of the state and needs an attorney to ensure "a fair fight"); Witmer-Rich, *supra* note 2, at 1219-21 (describing a number of different scholars who all describe the Sixth Amendment right to counsel as "equalizing the process (making it fair) by inserting counsel for the defendant").

[56] 377 U.S. 201 (1964).

[57] *See id.* at 201-02.

[58] *Id.* at 205 (quoting People v. Waterman, 175 N.E.2d 445, 448 (N.Y. 1961)).

[59] *See id.* at 206 (finding a Sixth Amendment violation even when the questioning

is still working for the prosecution, thus implicating the equality interest, and the agent is still questioning him about the elements of a criminal offense, for which he needs the legal advice and expertise of his counsel.

Providing the defendant with counsel for the later trial would not equalize the earlier imbalance at the interrogation, nor would it right the unfairness that resulted from that earlier process. When the defendant is denied an attorney at the pretrial interrogation, his legal rights might be forever compromised, because any resulting confession "might well settle the accused's fate and reduce the trial itself to a mere formality."[60] The right to counsel at trial would be "a very hollow thing"[61] if the prosecutor could confront the accused before trial and get all the evidence that she needed to convict without the defendant ever seeing his lawyer.

As the Supreme Court later recognized in *United States v. Ash*,[62] "[t]his extension of the right to counsel to events before trial has resulted from changing patterns of criminal procedure and investigation that have tended to generate pretrial events that might appropriately be considered to be parts of the trial itself."[63] The Court went on to explain: "At these newly emerging and significant events, the accused was confronted, just as at trial, by the procedural system, or by his expert adversary, or both."[64] Pretrial events at which the accused requires "aid in coping with legal problems or assistance in meeting his adversary"[65] are "critical stages," and the defendant's right to the assistance of counsel extends to these critical stages.[66]

Notably, these same principles of fairness and equality were used to limit the scope of the Sixth Amendment pretrial protection. In *Ash*, the Supreme Court considered whether the Sixth Amendment right to counsel extended to pretrial photographic identification procedures—whether showing a photo array to a witness and asking her to identify the criminal was a "critical stage."[67] The Supreme Court had already deemed corporeal identification procedures—where the defendant is himself placed in a line up or show up—critical stages.[68] But the *Ash* Court held that photographic identifications were different. With a photographic identification, "no possibility arises that the accused might be misled by his lack of familiarity with the law or overpowered by his professional

government agent was undercover).

[60] United States v. Wade, 388 U.S. 218, 224 (1967).

[61] Escobedo v. Illinois, 378 U.S. 478, 487 (1964) (quoting *In re* Groban, 352 U.S. 330, 344 (1957) (Black, J., dissenting)).

[62] 413 U.S. 300 (1973).

[63] *Id.* at 310.

[64] *Id.*

[65] *Id.* at 313.

[66] *Id.* at 310-11 (quoting United States v. Wade, 388 U.S. 218, 236-37 (1967)).

[67] *Id.* at 300-01.

[68] *See Wade*, 388 U.S. at 236-39.

adversary."[69] Providing counsel would not "remove any inequality in the adversary process itself."[70] The defendant's attorney could examine the photos later to determine if there were any legal problems and present those at trial. Thus, because the defendant is not physically present at the photo array, there is no need for him to confront the intricacies of the system and no possibility that he will need his champion to face the adversary. If the fairness and equality principles do not suggest a need for counsel, the stage is not critical and the Sixth Amendment is not implicated.

Fairness and equality principles also played an important role in the Supreme Court's jurisprudence on when the Sixth Amendment right to counsel is initially triggered. In 1972, the Court noted that a defendant's Sixth Amendment right to counsel begins, or is triggered, "at or after the time that adversary judicial proceedings have been initiated against him . . . whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."[71] As the Court put it:

> The initiation of judicial criminal proceedings 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 government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.[72]

Stated differently, once the charges are filed or the criminal process begins in a formal way, the prosecutor and the machinery of the government get involved. At that point, the defendant needs his champion to face the intricacies of the law, ensure that he is able to raise defenses, and equalize the imbalance that would result if the prosecution team were to proceed unchallenged by a legal rival. The Sixth Amendment right to counsel starts when the prosecution begins, because that is when the attorney is needed to ensure fairness and equality in the criminal process.[73]

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[69] *Ash*, 413 U.S. at 317.

[70] *Id.* at 319.

[71] Kirby v. Illinois, 406 U.S. 682, 688-89 (1972) (plurality opinion); *see also* Estelle v. Smith, 451 U.S. 454, 469-70 (1981); Moore v. Illinois, 434 U.S. 220, 226-27 (1977).

[72] *Kirby*, 406 U.S. at 689-90; *see also* Rothgery v. Gillespie Cty., 554 U.S. 191, 233-34 (2008) (quoting *Kirby*, 406 U.S. at 689-90); Patterson v. Illinois, 487 U.S. 285, 304 (1988) (quoting *Kirby*, 406 U.S. at 689-90).

[73] When the Supreme Court later added the "first formal hearing" to the list of pretrial events that could trigger a defendant's Sixth Amendment right to counsel, it again emphasized these principles of fairness and equality: "[A]n accusation filed with a judicial officer is sufficiently formal, and the government's commitment to prosecute it sufficiently concrete" that the defendant is "faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." *Rothgery*, 554 U.S. at 207 (quoting *Kirby*, 406 U.S. at 689).

Some will object to my suggestion that the Sixth Amendment right to counsel pretrial is predominantly about ensuring fairness and equality in the criminal process. They may argue that the Sixth Amendment right to counsel's focus on fairness is primarily about ensuring that the *results* of trials are fair, meaning that innocents are not unjustly convicted.[74] After all, they will claim, when the Supreme Court created a legal test for assessing trial counsel's effectiveness in *Strickland v. Washington*,[75] it held that deficient performance by a trial attorney was not sufficient to merit a new trial. Reversal is only required if a lawyer's deficient performance at trial actually prejudiced the defendant and "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[76] But this myopic focus on *Strickland* ignores the Supreme Court's decisions in *Gideon*[77] and *United States v. Cronic*[78] and the difference between pretrial and post-trial assessment of the Sixth Amendment right to counsel.

The Supreme Court has long recognized that the total deprivation of counsel at trial is structural error, which requires automatic reversal without any inquiry into possible prejudice, because "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[79] Even in the post-trial context, complete deprivation of counsel obviates the need for any prejudice inquiry,[80] leaving the court to focus on the fundamental fairness and equality concerns discussed above.

In *Cronic*, decided the same day as *Strickland*, the Supreme Court recognized that a prejudice inquiry would be inappropriate "if the accused is denied counsel at a critical stage," because the resulting trial would be inherently unfair.[81] The *Cronic* Court cited *Hamilton v. Alabama*[82]—a case in which the State had unconstitutionally denied the defendant counsel for his pretrial arraignment—as an example of a situation where a prejudice inquiry would be inappropriate.[83]

This aspect of *Cronic* was consistent with the Supreme Court's treatment of the Sixth Amendment right to counsel in other pretrial cases. The Court's inquiry

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[74] *See, e.g.*, Uviller, *supra* note 55, at 1169 (describing one view that the right to counsel exists to prevent "the erroneous conviction of an innocent person"); Witmer-Rich, *supra* note 2, at 1219 (describing this approach as a "just outcome" approach to the Sixth Amendment).

[75] 466 U.S. 668, 700 (1984).

[76] *Id.* at 686.

[77] Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963).

[78] 466 U.S. 648, 666 (1984).

[79] *Gideon*, 372 U.S. at 344.

[80] *See id.* at 344-45.

[81] *Cronic*, 466 U.S. at 659.

[82] 368 U.S. 52 (1961).

[83] *Cronic*, 466 U.S. at 659 n.25 (citing *Hamilton*, 368 U.S. at 55) ("The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding.").

in pretrial cases has always focused on fairness and equality concerns and not on prejudice to the ultimate outcome.[84] In fact, the Court's holding in *Kansas v. Ventris*[85] made it quite clear that pretrial Sixth Amendment inquiries should not focus on the reliability of the ultimate outcome.[86] The issue in *Ventris* was whether the State should be permitted to impeach a defendant who testifies at trial with a statement that was obtained in violation of the defendant's Sixth Amendment *Massiah* right to counsel at a pretrial interrogation.[87] In order to reach its decision, the Court confronted the question of when an individual's pretrial Sixth Amendment right to counsel is violated. The Court held that "the *Massiah* right is a right to be free of uncounseled interrogation, and is infringed at the time of the interrogation."[88] In so holding, the Court stated that "[i]t is illogical to say that the right is not violated until trial counsel's task of opposing conviction has been undermined by the statement's admission into evidence," because "[a] defendant is not denied counsel merely because the prosecution has been permitted to introduce evidence of guilt . . . . The assistance of counsel has been denied, however, at the prior critical stage which produced the inculpatory evidence."[89] The Court decided that the Sixth Amendment violation "occurs when the uncounseled interrogation is conducted."[90] That is when the violation is complete, and the question of its later admissibility is about "the scope of the remedy for a violation that has already occurred."[91]

Thus, the pretrial Sixth Amendment right, as defined in *Ventris*, is not concerned with the ultimate effect on the outcome or the prejudice or lack thereof to the defendant. It only asks whether counsel was denied at a pretrial critical stage where the fairness and equality concerns discussed above would require counsel's presence.

B. *The Fifth Amendment* Miranda *Right*

In *Miranda*, the Supreme Court applied the Fifth Amendment privilege against self-incrimination to the police stationhouse and held that when the police take an individual into custody and interrogate her, the environment is inherently compulsive such that the Fifth Amendment privilege requires the

[84] *See supra* notes 56-73 and accompanying text.

[85] 556 U.S. 586 (2009).

[86] *Id.* at 594; *see also* James J. Tomkovicz, *Sacrificing* Massiah*: Confusion over Exclusion and Erosion of the Right to Counsel*, 16 LEWIS & CLARK L. REV. 1, 39 (2012) (noting that "[t]he details of *Strickland*'s 'actual ineffectiveness' doctrine and its underlying premises are wholly incompatible with *Ventris*'s conception of *Massiah*"); Witmer-Rich, *supra* note 2, at 1222 (noting that "the *Ventris* opinion rejected the 'just outcome' model").

[87] *Ventris*, 556 U.S. at 588.

[88] *Id.* at 592.

[89] *Id.*

[90] *Id.*

[91] *Id.* at 593.

police to take some steps to dispel that inherent compulsion.[92] The famous *Miranda* warnings were the Court's suggested means of advising the suspect of her rights and dispelling the compulsion in the atmosphere.[93] Without warnings or some other equally effective means of dispelling the compulsion, any resulting statements would be deemed compelled in violation of the Fifth Amendment.[94]

The primary purpose of the *Miranda* ruling was to prevent criminal suspects from being compelled to give testimony that would be used against them at trial.[95] This focus on compelled trial testimony stands in stark contrast to the Sixth Amendment right to counsel's focus on fairness and equality throughout the trial process.[96] Although both doctrines make some reference to fairness, the concepts are quite different. As the *Miranda* Court itself recognized, the Self-Incrimination Clause serves particular purposes:

> To maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load,' to respect the inviolability of the human personality . . . [by] demand[ing] that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth.[97]

There is a sense in which it is unfair to force a person to incriminate himself, but it is a different kind of unfairness. The fairness that the Court spoke of in *Miranda* is not about preventing the criminal defendant from having an opportunity to adequately defend himself. It is about individual dignity and autonomy and preventing the government from compelling a suspect to admit his own guilt.

These different foci affect both the timing of the two rights as well as their scope. First, with respect to timing, the two rights have different triggering points tied to their respective animating principles. As discussed above, the Sixth Amendment right to counsel is triggered at the first formal hearing or when formal charges are filed in some way, because that is when the machinery of the state begins and the government has committed itself to prosecute.[98] At that

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[92] Miranda v. Arizona, 384 U.S. 436, 444 (1966).

[93] *Id.*

[94] *Id.* at 457-58.

[95] *Id.* at 442 (explaining that its decision was grounded in the Fifth Amendment privilege against compelled self-incrimination).

[96] *See* Bidish J. Sarma, Robert J. Smith & G. Ben Cohen, *Interrogations and the Guiding Hand of Counsel:* Montejo, Ventris, *and the Sixth Amendment's Continued Vitality*, 103 NW. U. L. REV. COLLOQUY 456, 461 (2009) (describing the Fifth Amendment *Miranda* right "as the right to 'counsel as protector,'" against compulsion and the Sixth Amendment right to counsel "as the right to 'counsel as strategist'" who weighs the pros and cons of defendant's moves and manages the flow of information between the defendant and the state).

[97] *Miranda*, 384 U.S. at 460 (citations omitted).

[98] *See* Rothgery v. Gillespie Cty., 554 U.S. 191, 198 (2008).

point, the defendant needs her attorney to address the legal complexities of the system and to face off against her adversary.[99] In contrast, *Miranda* is focused on compulsion and so has a different triggering point. Anytime a person is placed in custody and is about to be interrogated, there is inherent compulsion and the *Miranda* protections kick in regardless of whether some official criminal process has started.[100] The combination of custody and interrogation is what gives rise to a presumption of compulsion so that is the triggering moment for *Miranda*.

These different triggering points correspond to an important difference in the scope of protection under the two doctrines. Because the triggering date of the Sixth Amendment right to counsel is tied to the moment when the government commits itself to prosecute, the scope of the right is limited to those charges that the government has formally pursued. Stated differently, the Sixth Amendment is offense specific.[101] If the government has charged a defendant with a criminal offense, the machinery of the state has begun on *that* charge and the defendant is entitled to his lawyer on *that* charge, but there is no Sixth Amendment right to counsel on other uncharged offenses, because the machinery of the state has not started on those uncharged offenses yet. Thus, the fairness and equality principles have not yet been implicated with respect to other offenses. In contrast, the mere fact of custodial interrogation is what triggers the *Miranda* concern with compulsion, so it does not matter what the charges are—the compulsive environment exists with respect to whatever subject the police are questioning a suspect about.[102]

The timing of a constitutional violation is also different under *Miranda* and *Massiah*. *Miranda* is grounded in the Fifth Amendment privilege against self-incrimination, which indicates that *witnesses* shall not be compelled to give *testimony* against themselves.[103] The Supreme Court has interpreted the words "witness" and "testimony" to mean that the privilege against self-incrimination is a trial right focused on preventing statements from being used against the speaker when the speaker becomes a witness at a trial.[104] There is no *Miranda* violation pretrial; the violation occurs when the person becomes a witness at a trial and his statement is used as testimony against him.[105] In contrast, the Sixth

[99] *See id.*

[100] *Miranda*, 384 U.S. at 444.

[101] *See* Texas v. Cobb, 532 U.S. 162, 164 (2001); McNeil v. Wisconsin, 501 U.S. 171, 175 (1991).

[102] *See Miranda*, 384 U.S. at 444 ("[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.").

[103] U.S. CONST. amend V.

[104] *See, e.g.*, United States v. Patane, 542 U.S. 630, 638 (2004); Chavez v. Martinez, 538 U.S. 760, 773-74 (2003).

[105] *See Martinez*, 538 U.S. at 770. The *Martinez* Court would have found a constitutional violation pretrial if the police had extracted a confession through torture, but the Justices

Amendment *Massiah* violation happens pretrial when the uncounseled interrogation is conducted, because that is when the suspect is unfairly faced with the intricacies of the system and in need of his champion to help him confront his adversary.[106] Thus, there can be pretrial Sixth Amendment violations.

The scope of the two rights is also quite different as a result of their differing underlying rationales. Consider how the doctrines address questioning by undercover agents. In the Sixth Amendment context, it does not matter if the government agent wears police blue or prison gray—whether the person doing the questioning is known to be a police officer or is an undercover agent.[107] The agent who questioned Massiah was an undercover agent.[108] The Court still found a Sixth Amendment violation, because the questioning implicated the fairness and equality concerns at the heart of the doctrine.[109] But in the *Miranda* context, the degree of compulsion is quite different when the agent is undercover. There is inherent compulsion when a suspect is placed into a room and knows that he is being confronted by the police. But there is no compulsion if the suspect does not even know that the person to whom he is speaking is an agent of the state, so there is no need for *Miranda* warnings when an undercover officer questions a suspect.[110]

Miranda is a doctrine that is solely concerned with confessions whereas the Sixth Amendment right to counsel applies to all critical stages pretrial. Pretrial interrogation is just one example of a critical stage. Other pretrial stages that have been deemed critical include corporeal identification procedures, preliminary hearings, psychiatric examinations, and certain kinds of arraignments.[111] Sixth Amendment doctrine is broader in this respect than *Miranda*, because the principles that trigger the need for counsel pretrial are fundamentally different and apply in other contexts as well.[112]

differed on whether that violation would sound in Due Process or would be a Self-Incrimination Clause problem. *Compare Martinez*, 538 U.S. at 773 (arguing that torture would constitute a due process violation), *with Martinez*, 538 U.S. at 789-90 (Kennedy, J., concurring in part and dissenting in part) (arguing that torture would violate the Fifth Amendment Self-Incrimination Clause).

[106] *See* Kansas v. Ventris, 556 U.S. 586, 594 (2009).

[107] *See* Massiah v. United States, 377 U.S. 201, 206 (1964).

[108] *Id.* at 202.

[109] *Id.* at 204-05.

[110] Illinois v. Perkins, 496 U.S. 292, 294 (1990).

[111] Rothgery v. Gillespie Cty., 554 U.S. 191, 217 (2008) (Alito, J., concurring) (collecting case law on critical stages).

[112] *See* Tinto, *supra* note 36, at 1341 ("The Sixth Amendment's focus on the fairness and integrity of the entire adversarial process explains why the Sixth Amendment's right to counsel protects the defendant in stages of the proceedings . . . that the Fifth Amendment does not.").

II. ENTANGLEMENT

Despite the different purposes and foci of the pretrial Sixth Amendment right to counsel and the *Miranda* right, the Supreme Court and many lower courts have been conflating *Miranda* and *Massiah* in recent years.[113] More specifically, courts have imported limitations on the scope of the *Miranda* right into the *Massiah* context without considering whether the underlying purposes of the Sixth Amendment right to counsel would support such limits.[114]

Arguably, the fault for the entanglement of these two doctrines lies at the feet of the *Miranda* decision itself.[115] In the years leading up to *Miranda*, the Supreme Court was struggling to find a suitable way to regulate confession law.[116] The due process voluntariness test had proven too mushy and unpredictable to effectuate any uniform change.[117] In the heyday of incorporation, the Court began to look to more specific amendments to regulate police practices. The Self-Incrimination Clause was not its first choice. Two years before *Miranda*, the Supreme Court brought the Sixth Amendment right to counsel into the stationhouse to regulate police interrogation practices.

In *Escobedo v. Illinois*,[118] the Court held:

> [W]here, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment.'[119]

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[113] *See* Sarma, Smith & Cohen, *supra* note 96, at 456 (noting that the Supreme Court "has conflated the Fifth Amendment prophylactic rule with the Sixth Amendment right to counsel").

[114] *Id.* at 458.

[115] Jeremy M. Miller, *Law and Disorder: The High Court's Hasty Decision in* Miranda *Leaves a Tangled Mess*, 10 CHAP. L. REV. 713, 714-16 (2007) (noting that the *Miranda* decision itself confused the two doctrines).

[116] *See* YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 512-15 (14th ed. 2015) (describing the shortcomings of the voluntariness test and the inevitability of the Court's decision to move away from it).

[117] *See id.* at 512 ("Moreover, as the rationales for the Court's coerced confession cases evolved, it became increasingly doubtful that terms such a 'voluntariness.' 'coercion,' and 'breaking the will' were very helpful in resolving the issue."); Primus, *supra* note 29, at 11-12 (describing the voluntariness test).

[118] 378 U.S. 478 (1964).

[119] *Id.* at 490-91.

In so holding, the Court looked to the fairness and equality concerns that animated its other Sixth Amendment cases. Citing *Massiah*, *Hamilton*, and other pretrial Sixth Amendment right to counsel cases, the Court emphasized that Danny Escobedo, like those defendants, was at a "'stage when legal aid and advice' were most critical."[120] He was "a layman" who "was undoubtedly unaware that under Illinois law an admission of 'mere' complicity in the murder plot was legally as damaging as an admission of firing the fatal shots."[121] He needed "[t]he 'guiding hand of counsel'" to help him navigate the intricacies of the system.[122] The fact that Escobedo had not yet been formally charged or had any formal process was unimportant to the majority.[123] Once Escobedo had become the "focus" of the investigation, the State's commitment to prosecute was sufficiently strong that the Court felt the Sixth Amendment protections should apply.[124]

The Supreme Court's expansion of Sixth Amendment protection in *Escobedo* to include those who have been arrested and were the "focus" of police investigation left many lower courts and commentators confused.[125] When was someone the "focus" of an investigation and how much of the *Escobedo* fact-specific holding was required to trigger application of the Sixth Amendment? Was it enough if a suspect was arrested for a crime or did he also have to request counsel for the Sixth Amendment to apply? What warnings would the police have to give and what effect would they have? Many thought the Court would clear up the scope of the pretrial Sixth Amendment doctrine in *Miranda*,[126] but the Court took an entirely different approach.

In *Miranda*, the Court pivoted away from the Sixth Amendment and turned instead to the Fifth Amendment privilege against self-incrimination to regulate confession law.[127] It reinterpreted *Escobedo* as a Fifth Amendment case (thus destroying *Escobedo*'s precedential value for Sixth Amendment purposes) and noted that its newfound custodial interrogation test was really what it had meant all along with the *Escobedo* focus test.[128] As part of its attempt to integrate this

[120] *Id.* at 486.

[121] *Id.*

[122] *Id.*

[123] *Id.* at 485.

[124] *Id.* at 490-91.

[125] *See* Yale Kamisar, Miranda*: The Case, the Man, and the Players*, 82 MICH. L. REV. 1074, 1076 (1984) (reviewing LIVA BAKER, *MIRANDA*: CRIME, LAW AND POLITICS (1983)) (describing the confusion).

[126] *See, e.g.*, John J. Flynn, *Panel Discussion on the Exclusionary Rule*, 61 F.R.D. 259, 278 (1972) (noting that the attorneys in the *Miranda* case thought the Court would focus on the Sixth Amendment "because that is where the court was headed after Escobedo").

[127] Miranda v. Arizona, 384 U.S. 436, 439 (1966).

[128] *Id.* at 442, 444 n.4 (discussing that the Court has "undertaken a thorough re-examination of the *Escobedo* decision and the principles it announced" and "[t]his is what we meant in *Escobedo* when we spoke of an investigation which had focused on an accused");

Sixth Amendment precedent into the decision, the *Miranda* Court included an admonition of the right to counsel in its famous *Miranda* warnings.[129] The seeds of entanglement were planted.

Despite *Miranda*'s conflation of the right to counsel and the privilege against self-incrimination, the two rights developed relatively independently for a time. Their triggering conditions were different[130] and the Court recognized differences in the scope of their protection tied to their different animating rationales.[131] Even when the Court chose to have their doctrines converge, it did so only after deciding that their different purposes supported the same doctrinal result.

For example, in *Edwards v. Arizona*,[132] the Court held that police may not return later to reinitiate questioning once a suspect affirmatively invokes his *Miranda* right to counsel.[133] The Court's rationale for this additional layer of protection was grounded in the Fifth Amendment focus on compulsion:

> [I]f a suspect believes that he is not capable of undergoing such questioning without advice of counsel, then it is presumed that any subsequent waiver that has come at the authorities' behest, and not at the suspect's own instigation, is itself the product of the "inherently compelling pressures" and not the purely voluntary choice of the suspect.[134]

In *Michigan v. Jackson*,[135] the Court adopted the same rule in the Sixth Amendment context and held that police may not return to question a suspect

see also Moran v. Burbine, 475 U.S. 412, 429 (1986) ("Although *Escobedo* was originally decided as a Sixth Amendment case, 'the Court in retrospect perceived that the "prime purpose" of Escobedo was not to vindicate the constitutional right to counsel as such, but, like *Miranda*, "to guarantee full effectuation of the privilege against self-incrimination . . . ."'").

[129] *Miranda*, 384 U.S. at 473 ("In order fully to apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him.").

[130] *Compare* Rothgery v. Gillespie Cty., 554 U.S. 191, 194 (2008) (holding that Sixth Amendment is triggered at first formal hearing), *with Miranda*, 384 U.S. at 444 (noting that custodial interrogation is what triggers protection).

[131] *See, e.g.*, Rhode Island v. Innis, 446 U.S. 291, 300 n.4 (1980) (noting that the Sixth Amendment is violated if the police deliberately elicit incriminating information from a suspect post-indictment without warnings, but that there is a *Miranda* violation if the police interrogate an individual who is in custody without warnings, and further noting that the deliberate elicitation and interrogation standards in the two contexts are not interchangeable); *see also* Fellers v. United States, 540 U.S. 519, 524-25 (2004) (noting that the Sixth Amendment standard is "deliberate-elicitation" and not "interrogation").

[132] 451 U.S. 477 (1981).

[133] *Id.* at 485.

[134] Arizona v. Roberson, 486 U.S. 675, 681 (1988) (extending *Edwards* and discussing its rationale).

[135] 475 U.S. 625 (1986).

who had been formally charged and had affirmatively invoked his *Massiah* right to counsel.[136] Justice Stevens, writing for the Court in *Jackson*, noted that the animating purposes of the Sixth Amendment right to counsel independently supported this additional level of protection for *Massiah* rights.[137] He emphasized the defendant's need to be able "to rely on counsel as a 'medium' between him and the State" once he is charged and "face[s] . . . the prosecutorial forces of organized society . . . [and] the intricacies of substantive and procedural criminal law."[138] After discussing the relevant Sixth Amendment precedents, the Court noted that "the *difference* between the legal basis for the rule applied in *Edwards* and the Sixth Amendment claim asserted in these cases actually provides additional support for the application of the rule in these circumstances."[139] Even though the same rule would apply in both contexts, it was supported in each by the underlying purposes of the constitutional provisions at stake.

As the Rehnquist and Roberts Courts began to cut back on criminal defendants' criminal procedure rights, the distinctions between the two rights sometimes got lost. In *Patterson v. Illinois*,[140] for example, the Supreme Court held that reading the *Miranda* warnings is generally sufficient to advise a suspect of both his Fifth and Sixth Amendment rights.[141] Harkening back to the *Miranda* decision itself, the Court noted that "this Court has recognized that the waiver inquiry focuses more on the lawyer's role during . . . questioning, rather than the particular constitutional guarantee that gives rise to the right to counsel at that proceeding."[142] Because the *Miranda* warnings indicate that a statement can be used against the suspect, the Court reasoned, the suspect knows "what benefit could be obtained by having the aid of counsel while making such statements" and therefore is "aware of the consequences of" waiving his rights (under both Amendments).[143]

This conflation of the two amendments, however, fails to consider the different purposes that they serve. Advising a suspect of his rights, the consequences of speaking, and giving him the option to ask for help may be sufficient to dissipate the compulsion and prevent a Fifth Amendment violation, but the concerns are quite different under the Sixth Amendment. Saying that a confession will be used against him does not advise the suspect of how a lawyer could help him; it merely tells him what the state wants to do with his statement. The suspect may not understand the nature of the charges, that complicity can be just as damning as actual perpetration of the offense, or that a lawyer could

[136] *Id.* at 636.

[137] *Id.* at 632.

[138] *Id.* at 631-32 (quoting United States v. Gouveia, 467 U.S. 180, 189 (1984)).

[139] *Id.* at 632 (emphasis added).

[140] 487 U.S. 285 (1988).

[141] *Id.* at 296.

[142] *Id.* at 299 n.12.

[143] *Id.* at 293-94.

explain the legal elements to him.[144] It is not always intuitive to a suspect that a lawyer might examine the indictment for legal sufficiency before permitting him to talk or that the lawyer might be better at negotiating a plea for him if he does not give an incriminating statement.[145] In the world of sentencing guidelines with downward departures, an attorney might be able to negotiate a deal for a client who is inclined to cooperate with authorities.[146] All of these are "intricacies of [the] substantive and procedural criminal law" that an attorney could help the defendant understand and that a defendant might not understand are part of the attorney's job.[147]

The *Miranda* warnings also do nothing to inform suspects of the equalizing role that attorneys are supposed to play in the adversarial system. The suspect might not understand what it means to be indicted[148]—that the prosecution has enough evidence in its possession to have formally charged him with an offense and that the prosecution has officially assumed an adversarial position. He might think he can talk his way out of things, wholly unaware that there is no talking his way out at that point. An attorney could explain what an indictment is and what it means about the government's posture toward him and give him the champion to which he is constitutionally entitled. By failing to consider the underlying rationales for the Sixth Amendment right to counsel, the *Patterson* Court imported a waiver regime that is ill suited to the purposes of that right.

Whereas the Rehnquist Court failed fully to consider the different rationales animating the *Miranda* and *Massiah* rights, the Roberts Court actively distorted *Massiah* precedent to support a conflation of *Miranda* and *Massiah* law. In *Montejo v. Louisiana*,[149] the Roberts Court overruled *Jackson*, which had held that once a suspect invokes his *Massiah* right to counsel, the police may not approach him again to try and get a waiver from him unless his counsel is present.[150] Recall that *Jackson* had imported the Fifth Amendment *Miranda*-based doctrine from *Edwards* into the Sixth Amendment context, but it had done so by noting that the different rationales supporting the two constitutional

[144] *Id.* at 308 (Brennan, J., dissenting).

[145] *Id.* ("The *Miranda* warnings do not, for example, inform the accused that a lawyer might examine the indictment for legal sufficiency before submitting his or her client to interrogation or that a lawyer is likely to be considerably more skillful at negotiating a plea bargain and that such negotiations may be most fruitful if initiated prior to any interrogation.").

[146] *See* Tinto, *supra* note 36, at 1350 (noting the incentives that defendants often have to cooperate).

[147] Kirby v. Illinois, 406 U.S. 682, 689 (1972).

[148] *See* United States v. Mohabir, 624 F.2d 1140, 1150 (2d Cir. 1980) ("[I]n the absence of adequate explanation of the significance of an indictment, it would not be proper to hold that defendant understood the import of the right he was giving up."), *abrogated by* Patterson v. Illinois, 487 U.S. 285 (1988).

[149] 556 U.S. 778 (2009).

[150] *Id.* at 780-81.

provisions independently supported the same rule in both contexts.[151] Justice Scalia, writing for the Court in *Montejo*, refused to acknowledge the Sixth Amendment underpinnings of the *Jackson* decision and recast the *Jackson* case as a case about compulsion.[152]

Instead of recognizing the fairness and equality principles that *Jackson* itself had relied on, the *Montejo* Court said that "*Jackson* represented a 'wholesale importation of the *Edwards* rule into the Sixth Amendment.'" [153] More specifically, the *Montejo* majority indicated that the *Jackson* decision, like its Fifth Amendment counterpart, was premised on an "antibadgering rationale,"[154] because it was "meant to prevent police from badgering defendants into changing their minds about their rights."[155] This "wholesale importation" of the Fifth Amendment anticompulsion rationale into the Sixth Amendment pretrial right to counsel context is an unfair reading of the *Jackson* decision that is problematic and fails to understand the important differences between these two rights.[156]

The *Montejo* Court's distortion of *Jackson* and its overt conflation of the Fifth and Sixth Amendment rationales have had important repercussions. Lower courts are now stating that "[o]nce formal adversary proceedings begin, the Sixth Amendment right to counsel applies in exactly the same way as the Fifth Amendment right applies to custodial interrogation."[157] Others are relying on

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[151] *See supra* notes 132-39 and accompanying text.

[152] *Montejo*, 556 U.S. at 787.

[153] *Id.* (quoting Texas v. Cobb, 532 U.S. 162, 175 (2001)).

[154] *Id.* at 788.

[155] *Id.* at 789.

[156] *See id.* at 805 (Stevens, J., dissenting) ("The majority's analysis flagrantly misrepresents *Jackson*'s underlying rationale and the constitutional interests the decision sought to protect."); Craig Bradley, *What's Left of* Massiah*?*, 45 TEX. TECH L. REV. 247, 252-53 (2012) ("[T]he Sixth Amendment cases generally, were never anti-badgering cases, contrary to the *Montejo* majority's claim. In fact, *Jackson* never mentions badgering as a concern." (footnote omitted)); Emily Bretz, *Don't Answer the Door:* Montejo v. Louisiana *Relaxes Police Restrictions for Questioning Non-Custodial Defendants*, 109 MICH. L. REV. 221, 226 (2010) (describing how *Montejo* "conflates constitutional doctrine and blurs the protections of the Fifth and Sixth Amendments"); Michael C. Mims, *A Trap for the Unwary: The Sixth Amendment Right to Counsel After* Montejo v. Louisiana, 71 LA. L. REV. 345, 369 (2010) ("The most unsettling element of the Court's ruling in *Montejo* is its complete disregard for the traditional rationale behind the Sixth Amendment."); Tinto, *supra* note 36, at 1337 ("The *Montejo* Court, however, failed to recognize the fundamental principles of the Sixth Amendment right to counsel and instead collapsed a Fifth Amendment analysis into its evaluation of a Sixth Amendment question.").

[157] Pecina v. State, 361 S.W.3d 68, 76-77 (Tex. Crim. App. 2012); *see also* United States v. Paulino, No. 10-00062, 2011 WL 2292303, at *4 (D. Guam June 7, 2011) ("[T]he court's analysis and findings regarding an alleged Fifth Amendment violation simultaneously addresses an alleged Sixth Amendment violation."); Paris v. Carlton, No. 1:07-cv-65, 2010 WL 1257970, at *4 (E.D. Tenn. Mar. 26, 2010) ("[T]he overruling of *Michigan v. Jackson*

Montejo to diminish Sixth Amendment protections in related contexts without considering whether the underlying rationales of the Sixth Amendment right would support such extensions. For example, *Montejo* was a case involving a defendant who had been automatically appointed an attorney and the question was whether that appointment should count as an invocation.[158] Iowa has extended *Montejo* to situations in which the accused actually retains an attorney himself.[159] Texas has gone further and held that even if a suspect affirmatively invokes his right to counsel, *Montejo* allows the police to reinitiate interrogation without counsel present.[160] None of these courts are considering the underlying rationales for the Sixth Amendment right to counsel when making their decisions.

The entanglement of *Miranda* and *Massiah* goes far beyond lower court interpretations of *Montejo*'s scope. Following the trend set in *Patterson* and *Montejo*, lower courts have been borrowing a number of the Supreme Court's doctrinal limitations in the *Miranda* context and importing them wholesale into the Sixth Amendment context without addressing the different doctrinal underpinnings of the two rights.[161] For example, in *North Carolina v. Butler*[162] and *Berghuis v. Thompkins*,[163] the Supreme Court recognized the validity of implied waivers of suspects' *Miranda* rights.[164] In *Butler*, the Court noted that a *Miranda* "waiver can be clearly inferred from the actions and words of the person interrogated" even without an explicit oral or written assertion of the intention to waive.[165] The Court went further in *Thompkins* and held that "an

appears to have effectively eliminated any distinction between the Fifth Amendment and Sixth Amendment waiver of the right to counsel." (citation omitted)). Many courts simply cite the *Montejo* Court's language that "doctrines ensuring voluntariness of the Fifth Amendment waiver simultaneously ensure the voluntariness of the Sixth Amendment waiver," *Montejo*, 556 U.S. at 795, and deny defendants' Sixth Amendment claims, *see, e.g.*, Kemp v. Ryan, 638 F.3d 1245, 1256 n.5 (9th Cir. 2011); United States v. Stile, No. 1:11-CR-00185-JAW, 2013 WL 945419, at *15 (D. Me. Jan. 16, 2013), *aff'd*, 845 F.3d 425 (1st Cir. 2017).

[158] *Montejo*, 556 U.S. at 802-03 (Stevens, J., dissenting).

[159] State v. Camacho, No. 13-0903, 2014 WL 4628984, at *5-6 (Iowa Ct. App. Sept. 17, 2014) (extending *Montejo* and holding that *Jackson* does not apply even when a suspect elects to retain counsel himself); *see also* United States v. Rojas, 553 F. App'x 891, 893 (11th Cir. 2014).

[160] Hughen v. State, 297 S.W.3d 330, 335 (Tex. Crim. App. 2009) ("After *Montejo*, the Sixth Amendment does not bar police-initiated interrogation of an accused who has previously asserted his right to counsel.").

[161] *See generally* Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 471-82 (2010) (discussing how prevalent borrowing is in constitutional interpretation).

[162] 441 U.S. 369 (1979).

[163] 560 U.S. 370 (2010).

[164] *Thompkins*, 560 U.S. at 384; *Butler*, 441 U.S. at 376.

[165] *Butler*, 441 U.S. at 373.

individual who, with a full understanding of his or her [*Miranda*] rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford."[166] Thus, according to *Thompkins*, as long as "a *Miranda* warning was given and . . . it was understood by the accused, an accused's uncoerced statement establishes an implied waiver. . . ."[167] Even though *Butler* and *Thompkins* were cases discussing waiver of the Fifth Amendment *Miranda* rights, some lower courts and commentators have imported this implied waiver doctrine into the Sixth Amendment context without considering whether implying a waiver makes sense given the equalizing and fairness rationales that underlie the Sixth Amendment guarantee.[168]

Similarly, in the *Miranda* context, the Supreme Court has held that the physical fruits of a *Miranda* violation are admissible[169] and that second statements obtained as part of a question-first-and-warn-later procedure are sometimes admissible.[170] The Court of Appeals for the Eighth Circuit has already imported this line of cases into the Sixth Amendment *Massiah* context, citing *Patterson* and noting that the Supreme Court "has emphasized the similarity between pre-indictment suspects subjected to custodial interrogation and post-indictment defendants subjected to questioning."[171]

The conflation of these two rights, though problematic, is not yet fully complete. Even at the Supreme Court level, the Justices continue to sometimes recognize distinctions between *Miranda* and *Massiah*.[172] But the doctrine is

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[166] *Thompkins*, 560 U.S. at 385.

[167] *Id.* at 384.

[168] *See, e.g.*, United States v. Smalls, 134 F. App'x 609, 615 (4th Cir. 2005) (citing *Butler*, 441 U.S. at 373) (noting that the defendant "never expressed any desire to have his counsel present" and citing *Butler* for the proposition that "implied waiver of Sixth Amendment rights [is] permissible"); United States v. Sepulveda-Sandoval, 729 F. Supp. 2d 1078, 1102-03 (D.S.D. 2010) (suggesting that Sixth Amendment waivers can be implied); *see also* Witmer-Rich, *supra* note 2, at 1233 ("[T]here is every reason to think the Court will apply the *Thompkins* rule equally in the Sixth Amendment context."). *But see In re* Darryl P., 63 A.3d 1142, 1179-91 (Md. Ct. Sp. App. 2013) (refusing to extend the implied waiver doctrine to the Sixth Amendment context).

[169] *See* United States v. Patane, 542 U.S. 630, 643 (2004).

[170] *See* Missouri v. Seibert, 542 U.S. 600, 604 (2004); Oregon v. Elstad, 470 U.S. 298, 318 (1985).

[171] United States v. Fellers, 397 F.3d 1090, 1096 (8th Cir. 2005). As a result of the conflation of *Miranda* and *Massiah*, some scholars have begun trying to find one overarching rationale for the Court's interrogation decisions that spans both Amendments. *See, e.g.*, Witmer-Rich, *supra* note 2, at 1193 (arguing that the Supreme Court is adopting a theory of "fair play" in the interrogation context under which suspects are given notice of their rights and are then assumed to be "autonomous, empowered individuals who possess the knowledge and wherewithal to assert and protect their rights and interests").

[172] *See, e.g.*, Kansas v. Ventris, 556 U.S. 586, 591-94 (2009) (recognizing that a Sixth Amendment violation can happen pretrial even though a *Miranda* violation does not); Fellers

messy, and lower courts are rightly confused. As one Texas court recently put it, "[o]ver the past four decades, the jurisprudence concerning the Fifth Amendment right to counsel during police interrogation and the Sixth Amendment right to counsel at all 'critical' stages of criminal proceedings had become intertwined in complex and confusing ways."[173]

III. DISENTANGLEMENT

It is not too late to disentangle the Sixth Amendment right to counsel from the *Miranda* rights under the Fifth Amendment. Because the Supreme Court has been focused on *Miranda* as the primary test for determining the admissibility of confessions, there have been very few Sixth Amendment pretrial right to counsel cases on the Supreme Court's docket.[174] As a result, there is still room in a number of areas to create a vibrant Sixth Amendment jurisprudence that is grounded in the fairness and equality principles that animate the right. In those few areas where the Supreme Court's doctrine appears to preempt separate consideration of *Massiah* and *Miranda*, some states have found ways to limit the scope of the Supreme Court entanglement or have turned to their state constitutions to get back to the original purposes of the right to counsel and provide more robust protections for criminal defendants.[175]

In the subsections that follow, I will illustrate each of these possible ways to disentangle these two rights. First, I will discuss fruits doctrine—an area where Supreme Court doctrine has not yet entangled *Miranda* and *Massiah* and explain why consideration of the underlying purposes of these different rights should result in different doctrinal developments going forward. Second, I will consider the doctrine on warnings and waiver—an area where there has already been Supreme Court conflation and talk about how lower courts can and should limit the conflation and use other tools (like state constitutional law) to disentangle these two rights going forward.

v. United States, 540 U.S. 519, 523-25 (2004) (recognizing that the Sixth Amendment's deliberate elicitation standard is different from the Fifth Amendment *Miranda* standard).

[173] Pecina v. State, 361 S.W.3d 68, 74 (Tex. Crim. App. 2012). Interestingly, the *Pecina* court thought that *Montejo* "disentangled the two right-to-counsel constitutional provisions and clarified their separate purposes and applications." *Id.* Given the direct conflation of the two rights in the *Montejo* opinion, *see supra* note 156 and accompanying text, this suggestion demonstrates the depth of the doctrinal confusion in lower courts, *see Darryl P.*, 63 A.3d at 1147 ("Litigants too often confront us with a constitutional kaleidoscope, and constitutional overlap can quickly degenerate into constitutional chaos.").

[174] *See* Tomkovicz, *supra* note 86, at 5 ("For the 45 years that followed [*Massiah*], the Court devoted astoundingly little attention to the rationales or justifications for *Massiah*'s suppression mandate.").

[175] *See infra* Section III.B.2.

A. *Preventing Future Entanglement: Fruits Doctrine*

Although the Supreme Court has held that statements obtained in violation of the Sixth Amendment *Massiah* right are inadmissible in the prosecution's case in chief at trial,[176] it remains a somewhat open question when derivative evidence obtained as a result of a *Massiah* violation (second statements or physical evidence) is admissible in the prosecution's case in chief. Some believe that the "fruit of the poisonous tree doctrine," most famously applied to exclude the derivative products of Fourth Amendment violations,[177] should apply to derivative evidence obtained as a result of *Massiah* violations.[178] But the rejection of fruits doctrine for *Miranda* violations has led others to suggest that *Massiah* should suffer a similar fate.[179]

The Supreme Court has not yet imported its rejection of fruits doctrine for *Miranda* violations into the *Massiah* context, but it has also not decided a case about the admissibility of derivative fruits of *Massiah* violations in over thirty years. Before explaining why lower courts (and ultimately the Supreme Court) should reject the conflation of *Miranda* and *Massiah* with respect to the admissibility of derivative evidence, it is first important to explain the current contours of the Supreme Court doctrine in this area.

When *Miranda* and *Massiah* were decided, the "fruit of the poisonous tree" doctrine governed the admissibility of derivative evidence obtained as a result of constitutional criminal procedure violations.[180] Under "fruits" doctrine, anything that the government discovered as a result of its illegal action was suppressed as a fruit of that poisonous tree unless the evidence was discovered from an independent legal source, would inevitably have been discovered from

[176] Massiah v. United States, 377 U.S. 201, 206 (1964); *see also* Michigan v. Harvey, 494 U.S. 344, 348 (1990) ("[T]he Court has held that once formal criminal proceedings begin, the Sixth Amendment renders inadmissible in the prosecution's case in chief statements 'deliberately elicited' from a defendant without an express waiver of the right to counsel."). The Supreme Court has held that statements obtained in violation of *Massiah* are admissible for impeachment purposes. *See Ventris*, 556 U.S. at 594.

[177] *See* Wong Sun v. United States, 371 U.S. 471, 484 (1963).

[178] *See, e.g.*, Jennifer Diana, *Apples and Oranges and Olives? Oh My!* Fellers, *the Sixth Amendment, and the Fruit of the Poisonous Tree Doctrine*, 71 BROOK. L. REV. 985, 1025-26 (2005) (arguing for application of fruits doctrine to *Massiah* violations); Justin Bishop Grewell, *A Walk in the Constitutional Orchard: Distinguishing Fruits of Fifth Amendment Right to Counsel from Sixth Amendment Right to Counsel in* Fellers v. United States, 95 J. CRIM. L. & CRIMINOLOGY 725, 742 (2005) (arguing that fruits doctrine applies to Sixth Amendment violations); Tomkovicz, *supra* note 86, at 57 (arguing that the Supreme Court "might conclude that a fruit of the poisonous tree doctrine is essential to adequately discourage deprivations of *Massiah*'s pretrial guarantee").

[179] *See* United States v. Fellers, 397 F.3d 1090, 1095 (8th Cir. 2005) (rejecting fruits doctrine for *Massiah* violations).

[180] *See generally* Yale Kamisar, *On the "Fruits" of* Miranda *Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 929 (1995) (explaining how fruits doctrine has been applied to Fourth, Fifth, and Sixth Amendment violations).

an independent legal source, or was too attenuated in time, place, and circumstances to be causally linked to the initial violation.[181]

Early Supreme Court case law suggested that fruits doctrine would apply to exclude derivative evidence obtained as a result of a *Massiah* violation. In *United States v. Wade*,[182] for example, the Supreme Court held that when a suspect is denied counsel at a post-indictment, corporeal line-up, any later attempt by the eyewitness to identify the suspect at trial will be suppressed unless the government can establish by clear and convincing evidence that the in-court identification is based on observations of the suspect other than the tainted and unconstitutional pretrial line up.[183] Stated differently, the Supreme Court applied a fruit of the poisonous tree doctrine to exclude derivative in-court identifications tainted by pretrial identification procedures that violated the suspect's Sixth Amendment right to counsel.

Perhaps more on point, in *Nix v. Williams*,[184] the Supreme Court applied one aspect of fruits doctrine—the inevitable discovery exception—to a violation of a defendant's *Massiah* rights.[185] In *Nix v. Williams*, the Court held that evidence that the police inevitably would have discovered through independent investigation would not be suppressed merely because it was discovered more quickly through statements obtained in violation of the defendant's *Massiah* rights.[186] Noting that "the 'fruit of the poisonous tree' doctrine has not been limited to cases in which there has been a Fourth Amendment violation" and that fruits doctrine was used to address Sixth Amendment violations in the context of pretrial identification procedures, the Court adopted the same analysis in the context of *Massiah* violations.[187]

After *Wade* and *Nix v. Williams*, many thought that fruits doctrine governed the admissibility of derivative evidence obtained as a result of a *Massiah* violation. But the Supreme Court has rejected the application of fruits doctrine in the *Miranda* context in a trilogy of cases.[188] The Court's retreat from fruits doctrine in the *Miranda* context has led lower courts and commentators to question whether fruits doctrine should continue to apply to *Massiah* violations.[189]

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[181] *See* 1 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE 374-81 (6th ed. 2013); KAMISAR ET AL., *supra* note 116, at 842-61.

[182] 388 U.S. 218 (1967).

[183] *Id.* at 239-40.

[184] 467 U.S. 431 (1984).

[185] *Id.* at 442, 446-48.

[186] *Id.* at 446-48.

[187] *Id.* at 442, 446-48.

[188] *See* United States v. Patane, 542 U.S. 630, 636-37 (2004); Missouri v. Seibert, 542 U.S. 600, 615-16 (2004); Oregon v. Elstad, 470 U.S. 298, 309 (1985).

[189] *See supra* notes 178-79 and accompanying text.

Oregon v. Elstad[190] was the first decision in the *Miranda* trilogy. In *Elstad*, the Supreme Court rejected the argument that fruits doctrine applies to *Miranda* violations. Noting that "[t]he prophylactic *Miranda* warnings" are "not themselves rights protected by the Constitution," but are only overly broad protections put in place to protect a constitutional privilege, the Court did not believe that there was any constitutionally poisonous tree when the violation was a mere *Miranda* violation.[191] Thus, there was no reason to suppress voluntarily given fruits, including the second statement that Elstad gave after the police had impermissibly questioned him earlier without first administering *Miranda* warnings.[192] If the original statement had been involuntarily given under the Due Process Clause or actually compelled under the Fifth Amendment, the Court would have suppressed the derivative statement unless it was too attenuated in time, place, or circumstances.[193] But a mere *Miranda* violation did not merit such treatment.

The Court qualified its *Elstad* approach in *Missouri v. Seibert*,[194] a case involving a deliberate police department practice of questioning a suspect first without *Miranda* warnings and then coming back, giving *Miranda* warnings, obtaining a waiver, and getting the suspect to repeat the incriminating statements. The Court suppressed the second statement that was obtained as a result of this deliberate question-first-and-warn-later strategy, but without a unified approach.[195]

A four-Justice plurality thought courts addressing the admissibility of the second statement should analyze the circumstances of the two interrogations to determine if the *Miranda* warnings could reasonably function effectively to dispel the inherent compulsion for the second statement.[196] Justice Kennedy provided the fifth vote and would have applied *Elstad* in these situations (meaning that the second statement would only be suppressed if it was involuntarily given or if it was the fruit of a truly involuntary or actually compelled first statement) unless the two-step interrogation strategy was a deliberate attempt to circumvent *Miranda*.[197] If part of a deliberate strategy, then he would suppress the second statement unless the police took specific, curative

[190] 470 U.S. 298 (1985).

[191] *Id.* at 305 (quoting New York v. Quarles, 467 U.S. 649, 654 (1984)).

[192] *See id.* at 318.

[193] *Id.* at 309.

[194] 542 U.S. 600 (2004).

[195] *Id.* at 604 (plurality opinion).

[196] *Id.* at 615 (discussing factors that would be relevant to whether the *Miranda* warnings could function effectively including, "the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and second statements, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first").

[197] *Id.* at 620.

steps to ensure that a reasonable suspect in the circumstances would understand the import and effect of the *Miranda* warnings.[198] The four-Justice dissent would have applied *Elstad* and admitted the statements.[199] Thus, five Justices wanted to apply *Elstad* whenever the two-part questioning was not deliberate. And five Justices wanted to consider the circumstances to determine whether the second set of *Miranda* warnings could be effective and understood by the suspect when the police strategy was deliberately designed to circumvent *Miranda.*[200] Only one Justice thought fruits doctrine should govern.[201] Although *Seibert* modified the *Elstad* approach, a majority of the Court continued to reject the application of fruits doctrine to *Miranda* violations.[202]

Finally, in *United States v. Patane*,[203] the Supreme Court refused to apply fruits doctrine to suppress physical evidence obtained as a result of a *Miranda* violation.[204] Justice Thomas, writing for the plurality, noted that the failure to read *Miranda* warnings is not a constitutional violation; no constitutional violation of the self-incrimination privilege can occur until there is a trial and testimony is admitted against a witness; and physical evidence is not testimony.[205] Thus, "there is, with respect to mere failures to warn, nothing to deter" and "no reason to apply the 'fruit of the poisonous tree' doctrine."[206] After *Elstad*, *Seibert*, and *Patane*, it is clear that fruits doctrine is no longer the governing test for determining the admissibility of derivative fruits of *Miranda* violations.

With this change in the legal landscape, one circuit has already imported the *Elstad-Seibert* line of cases into the Sixth Amendment context. In *United States*

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[198] *Id.* at 621-22 (Kennedy, J., concurring) (describing curative measures as including "a substantial break in time and circumstance between the prewarning statement and the *Miranda* warning" or "an additional warning that explains the likely inadmissibility of the prewarning custodial statement").

[199] *Id.* at 622-23 (O'Connor, J., dissenting).

[200] In reality, it is a bit more complicated than even that suggests because Justice Kennedy was the only Justice who thought it was a good idea to consider whether the police action was deliberate or not. As a result, lower courts remained quite confused about what part of the *Seibert* decision constitutes the binding holding. *See* Lee Ross Crain, *The Legality of Deliberate* Miranda *Violations: How Two-Step National Security Interrogations Undermine* Miranda *and Destabilize Fifth Amendment Protections*, 112 MICH. L. REV. 453, 455 n.14 (2013) (describing the confusion in lower courts about the holding in *Seibert*).

[201] *See Seibert*, 542 U.S. at 617-18 (Breyer, J., concurring).

[202] In some respects, the plurality's consideration of whether the *Miranda* warnings could operate effectively to dispel the compulsion will operate like a fruits test—a fact that Justice Breyer relied on to join the plurality decision. *See id.* at 618. However, the foci of the tests will be somewhat different.

[203] 542 U.S. 630 (2004).

[204] *See id.* at 633-34.

[205] *Id*. at 636-37; *see also id.* at 645 (Kennedy, J., concurring) (agreeing that the Fifth Amendment is not implicated).

[206] *Id.* at 642 (majority opinion).

v. Fellers,[207] the Eighth Circuit brought the *Elstad* regime into the *Massiah* context citing *Patterson* and noting that the Supreme Court "has emphasized the similarity between pre-indictment suspects subjected to custodial interrogation and post-indictment defendants subjected to questioning."[208] This importation is misguided if one considers the differences between the *Miranda* and *Massiah* doctrines.

The *Elstad-Seibert-Patane* line of cases is predicated on the Court's belief that a failure to read *Miranda* warnings is not a constitutional violation in its own right and thus there is no poisonous tree that can bear suppressible fruits.[209] In contrast, *Ventris* makes it clear that a pretrial *Massiah* violation is itself a constitutional violation.[210] As a result, there is a constitutionally poisonous tree that can bear fruit, which is a reason to refuse to apply the *Elstad* line of cases to Sixth-Amendment violations.[211]

The underlying purposes of the pretrial right to counsel also suggest that derivative evidence should be excluded under a fruits analysis. The Court extended the right to counsel to critical pretrial stages in recognition of the fact that there are important times when defendants need expert assistance to address the legal complexities of the system and to match a professional adversary.[212] The Court also recognized that depriving defendants of legal counsel at these stages could reduce the resulting trial to a mere formality, because trial counsel would be unable to challenge effectively the confessions, identifications, and other evidence obtained from these pretrial events.[213] Thus, inherent in the recognition of the need for counsel at critical pretrial stages was an understanding that the evidence obtained at these stages should not be admitted unless an attorney was present pretrial to ensure it was lawfully obtained or to document unlawful practices for later challenge. To permit the admission of derivative evidence would exacerbate the unfairness and sanction the inequality that the state created by violating the pretrial right to counsel.[214]

Courts faced with questions about the admissibility of derivative evidence obtained as a result of *Massiah* violations have an opportunity to prevent additional conflation of the *Miranda* and *Massiah* rights. Lower courts should reject the Eighth Circuit's attempt to conflate the *Miranda* and *Massiah*

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[207] 397 F.3d 1090 (8th Cir. 2005).

[208] *Id.* at 1096.

[209] *See supra* notes 191-92, 205-06 and accompanying text.

[210] Kansas v. Ventris, 556 U.S. 586, 592 (2009).

[211] *See* Tomkovicz, *supra* note 86, at 57 (arguing that this point "militate[s] in favor of a presumptive derivative-evidence bar like that which governs under the Fourth Amendment").

[212] *See supra* Section I.A.

[213] *See, e.g.*, Maine v. Moulton, 474 U.S. 159, 170 (1985).

[214] *See* Tomkovicz, *supra* note 28, at 759 ("Physical or other evidence that is derived in fact from—that has *any* causal connection to—failures to honor the entitlement to an equalizing assistant cannot be admitted into evidence without inflicting constitutional damage.").

doctrines and should rely on the underlying purposes of the Sixth Amendment right to counsel to adopt a fruits analysis for determining the admissibility of evidence derived from pretrial Sixth Amendment violations.

B. *Responding to Entanglement: Warnings and Waiver*

Unlike with fruits doctrine, the Supreme Court has already conflated Fifth and Sixth Amendment doctrine in the context of warnings and waiver. As discussed above, in *Patterson* and *Montejo* the Supreme Court suggested that *Miranda* warnings will generally suffice to warn suspects of both of these rights and that the doctrines surrounding waiver of the rights will be similar. Still, there is room within these decisions to limit the scope of the federal entanglement and create some Sixth Amendment doctrine going forward that is more consistent with the underlying purposes of the pretrial right to counsel. Additionally, states can (and some already do[215]) rely on their own state constitutional provisions to disentangle the right to counsel from the privilege against self-incrimination and to provide their citizens with counsel protections that are more consistent with the underlying rationale of the right to counsel.

1. Limiting Federal Entanglement

Scholars, advocates, and courts can limit federal entanglement of these two rights in Sixth Amendment cases by arguing for a narrow reading of *Patterson* and *Montejo* and relying on the right to counsel's underlying rationales to argue that those cases should not be extended to other related contexts.

a. *Narrowly Reading* Patterson *and* Montejo

After *Patterson* and *Montejo*, many courts have stated that *Miranda* warnings suffice to advise a suspect of his Sixth Amendment rights and that a valid *Miranda* waiver will be a valid *Massiah* waiver.[216] But this is an overly broad reading of *Patterson* and *Montejo* and one that only encourages additional entanglement of the two rights. Carefully read, *Patterson* and *Montejo* leave many open questions about both the adequacy of *Miranda* warnings and about waiver doctrine in the *Massiah* context.

In *Patterson* itself, the Court held that "[a]s a general matter, then, an accused who is admonished with the warnings prescribed by this Court in *Miranda*, has been sufficiently apprised of the nature of his Sixth Amendment rights, and of the consequences of abandoning those rights, so that his waiver on this basis will be considered a knowing and intelligent one."[217] In *Montejo*, the Court reiterated

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[215] *See infra* Section III.B.2.

[216] *See* Tinto, *supra* note 36, at 1358 n.127 (collecting cases); *see also* MCCORMICK ON EVIDENCE § 154, at 314 (7th ed. 2014) ("Generally, then, a waiver of the Sixth Amendment right to counsel requires no more than an effective waiver of *Miranda* rights.").

[217] Patterson v. Illinois, 487 U.S. 285, 296 (1988) (citation omitted).

this line and noted that *Miranda* warnings "typically do[] the trick."[218] But the *Patterson* Court noted a number of situations where that "general matter" might not be true and where the *Miranda* warnings alone might not suffice, including cases involving (1) police deception about defense counsel's presence and role; (2) police failure to inform the defendant that he has been formally charged with a crime; and (3) police questioning of represented defendants without counsel present.

Police deception about defense counsel's presence and role. The *Patterson* Court recognized that "we have permitted a *Miranda* waiver to stand where a suspect was not told that his lawyer was trying to reach him during questioning; in the Sixth Amendment context, this waiver would not be valid. See *Moran v. Burbine*."[219] In *Moran v. Burbine*,[220] the Supreme Court held that police failure to tell a suspect that an attorney hired by his sister was trying to reach him did not affect the validity of his Fifth Amendment *Miranda* waiver. Because the *Miranda* warnings themselves were sufficient to dissipate the inherent compulsion in the environment, the Court believed that Brian Burbine's waiver was constitutionally valid.[221] In so holding, however, the *Moran* Court noted that, had Burbine's Sixth Amendment right to counsel attached, the analysis would have been different: "[T]he police may not interfere with the efforts of a defendant's attorney to act as a '"medium" between [the suspect] and the State' during the interrogation."[222] Thus, if an attorney is trying to reach her client, and the client's Sixth Amendment rights have been triggered, the client must be so informed. *Miranda* warnings that do not include information about the suspect's attorney trying to reach him would be insufficient.

The *Montejo* majority cited *Moran* with approval, noting that Jesse Montejo "may also seek on remand to press any claim he might have that his Sixth Amendment waiver was not knowing and voluntary, e.g., his argument that the waiver was invalid because it was based on a misrepresentation by police as to whether he had been appointed a lawyer, cf. *Moran*, 475 U.S., at 428-29."[223] Thus, contrary to the suggestion of some, *Montejo* does not mean that "*Moran*-type deception . . . does not affect the validity of a Sixth Amendment waiver."[224] The Supreme Court in *Moran* and subsequently in *Patterson* and *Montejo* has suggested that, when police fail to inform a defendant that his attorney is trying to reach him, actively mislead him about whether he has a lawyer, or both, it

[218] Montejo v. Louisiana, 556 U.S. 778, 786-87 (2009).

[219] *Patterson*, 487 U.S. at 296 n.9.

[220] 475 U.S. 412, 424 (1986).

[221] *See id.*

[222] *Id.* at 428 (alterations in original) (quoting Maine v. Moulton, 474 U.S. 159, 176 (1985)).

[223] *Montejo*, 556 U.S. at 798 (citing *Burbine*, 475 U.S. at 428-29).

[224] Mims, *supra* note 156, at 376.

poses a Sixth Amendment problem once the right to counsel has been triggered.[225]

The language in these cases is admittedly dicta, but this is a potential opening in *Patterson* and *Montejo* where relying on the underlying rationales of the pretrial right to counsel supports additional Sixth Amendment protections that would not exist in the Fifth Amendment context. If the right to counsel is about ensuring that a defendant has an attorney to equalize the playing field and to give him expert assistance to navigate the intricacies of the substantive and procedural law, then permitting the police to deny him access to his attorney (either by refusing to tell him that the attorney is there or by lying to him about the existence of the attorney) would undermine those goals. Instead of equalizing his position vis-à-vis the government, it would permit the government to gain an unfair advantage in contravention of the underlying purpose of the right to counsel. Thus, it should pose a Sixth Amendment problem if the government fails to inform the defendant that his attorney is trying to reach him or if the government lies to him about whether counsel has been appointed for him.

In fact, the Sixth Amendment right to counsel is violated not just when police lie about whether counsel has been appointed, but also when they lie or deceive a suspect about the potential scope of an attorney's representation or an attorney's abilities to represent the suspect as a ploy to get a suspect to waive his rights.[226] Consider, for example, what the police did in *Michigan v. Harvey*.[227] When Tyris Harvey indicated that he did not know if he should talk to his lawyer, the police told him "that he did not need to speak with his attorney, because 'his lawyer was going to get a copy of the statement anyway.'"[228] The police message to Harvey was clear: there is nothing that the lawyer can do for you here other than get the information that you provide to us, and we will provide that information to the lawyer later. Any police efforts to belittle the attorney's role undermine the fairness and equality principles at the heart of the right to counsel doctrine and should negate the validity of any Sixth Amendment waiver. The *Patterson* Court held that the *Miranda* warnings will generally suffice for Sixth Amendment purposes, because it believed that suspects would intuitively understand "what benefit could be obtained by having the aid of counsel while making such statements."[229] But when the police incorrectly minimize the role that a lawyer can play, it destroys the suspect's understanding of the benefits of the attorney's presence and makes any subsequent waiver unknowing.

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[225] *See* Bradley, *supra* note 156, at 256 ("*Montejo* and *Moran* suggest that if the police mislead the defendant about the fact that he has counsel, that might render the waiver invalid.").

[226] *See* Tinto, *supra* note 36, at 1363-65 (arguing that deception should not be permitted).

[227] 494 U.S. 344 (1990).

[228] *Id.* at 346. The State conceded the Sixth Amendment violation in *Harvey*, and the only issue before the Court was whether the statements were admissible for impeachment purposes. *See id.*

[229] Patterson v. Illinois, 487 U.S. 285, 294 (1988).

Along these same lines, the *Miranda* warning indicating that a lawyer will be appointed for the suspect if he cannot afford one might be affirmatively misleading for some defendants who have already retained or been appointed counsel. Questions of waiver are fact-intensive and suspect-specific.[230] The *Miranda* warning that "if you cannot afford an attorney, one will be provided for you"[231] may suggest to some suspects that they do not already have an attorney or that the attorney they have been appointed is no longer working with them. Although many scholars have noted that this warning is confusing to those who already have counsel,[232] I would argue that it also might be problematic under the Sixth Amendment given the language in *Moran*, *Patterson*, and *Montejo* about police deception. If the warning effectively communicates (falsely) to the suspect that he either does not already have an attorney or that his attorney has abandoned him, that deception undermines his understanding of his Sixth Amendment rights in a way that should make any resulting waiver unknowing.[233]

Police failure to inform the defendant that he has been formally charged with a crime. Some lower courts had suggested before *Patterson* that, in addition to the *Miranda* warnings, defendants need to be told that they have been indicted or formally charged and what the charges are before the police can ask them to waive their Sixth Amendment rights.[234] Patterson himself had been informed that he was indicted for murder before police sought the post-indictment waiver.[235] For that reason, the Court noted "we do not address the question whether or not an accused must be told that he has been indicted before a postindictment Sixth Amendment waiver will be valid."[236] At least one lower court has recognized that *Miranda* warnings alone might not be sufficient to advise a suspect of his Sixth Amendment rights if the suspect is not told that he

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[230] *See* Tinto, *supra* note 36, at 1359-60 (noting that the determination of whether a waiver is "knowing and intelligent is a fact-specific question").

[231] *See* Miranda v. Arizona, 384 U.S. 436, 479 (1966).

[232] *See, e.g.*, Bradley, *supra* note 156, at 253.

[233] This kind of confusing warning might be particularly problematic for certain vulnerable defendants who are at a greater risk of misunderstanding the warnings because of a mental disability, language barrier, lack of education, or youth.

[234] *See, e.g.*, United States v. Mohabir, 624 F.2d 1140, 1150 (2d Cir. 1980) (holding that "in the absence of adequate explanation of the significance of an indictment, it would not be proper to hold that defendant understood the import of the right was giving up"); United States v. Payton, 615 F.2d 922, 924-25 (1st Cir. 1980) (citing precedent that requires an individual to be informed of the charges against her before waiver can be effected).

[235] Patterson v. Illinois, 487 U.S. 285, 288 (1988).

[236] *Id.* at 295 n.8; *see also* MCCORMICK, *supra* note 216, § 154 ("The Court has left open the possibility that a waiver of the Sixth Amendment right to counsel may require that the defendant be informed, or perhaps that the suspect know from some source, that the matter has progressed beyond general police investigation to adversary judicial proceedings.").

has been formally charged with specific crimes.[237] The principles of fairness and equality at the heart of the right to counsel suggest that a defendant who is not told that he has been formally charged with a specific crime cannot knowingly and intelligently waive his Sixth Amendment rights.

The reason why the Sixth Amendment right to counsel attaches at the first formal hearing or charge is because that marks a crucial turning point for the defendant. The machinery of the state is now being focused against the defendant, and the state now has enough evidence to proceed with charges. "[A]ny questioning of the defendant by the government [after that point] can only be 'for the purpose of buttressing . . . a prima facie case.'"[238] The role of the state shifts from investigatory to adversarial and the defendant has a right to know that his Sixth Amendment rights have been implicated—that the situation is now different and that he is being formally charged with a crime. To withhold that information from him is a form of deception just as unfair as withholding information that an attorney is trying to reach him.[239] A defendant who has not been informed that his Sixth Amendment right has attached cannot knowingly and intelligently waive that right: you can't waive a right that you don't even know that you have.

In order for a Sixth Amendment waiver to be knowing and intelligent, a suspect should be told not only that he has been "indicted" for a specific crime, but also what it means to be indicted. Many suspects don't know what it means to be "indicted" so using that word has little value in communicating the suspect's change in circumstances.[240] Suspects should be told that they have been formally charged with a specific crime, which means that the state has concluded that there is enough evidence to officially accuse them of having committed that crime and put them on trial for the offense. That language communicates the change in circumstances in a way that suspects can understand.

Once again, this is an example of a situation in which the underlying purposes of the *Miranda* and *Massiah* rights lead to different outcomes. The Supreme Court has held in the *Miranda* context that the suspect need not be aware of the crimes about which he could be questioned, because knowledge of the substantive offenses is irrelevant to the question of compulsion.[241] In the Sixth

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[237] *See* State v. Sanchez, 609 A.2d 400, 406 (N.J. 1992). The *Sanchez* court ultimately did not issue a holding on this point, however, because it decided the case on state constitutional grounds. *See id.* at 406-07.

[238] *Mohabir*, 624 F.2d at 1148 (quoting People v. Settles, 385 N.E.2d 612, 616 (N.Y. 1978)); *see also Patterson*, 487 U.S. at 306 (Brennan, J., dissenting).

[239] *See supra* Section III.B.1.a and accompanying text.

[240] *See, e.g.*, *Mohabir*, 624 F.2d at 1150 ("[I]n the absence of adequate explanation of the significance of an indictment, it would not be proper to hold that defendant understood the import of the right he was giving up.").

[241] Colorado v. Spring, 479 U.S. 564, 574 (1987) ("The Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth

Amendment context, however, knowledge of the substantive offense is relevant to the kind of assistance that counsel might be able to provide. A suspect facing a misdemeanor jaywalking offense will understand the role that an attorney could play for him and his need for expert assistance differently from a suspect who is facing prosecution for a complex conspiracy. In order to knowingly and intelligently waive his Sixth Amendment right to counsel, the suspect must know that the right has attached and for what offense.

Police questioning of represented defendants without counsel present. The *Patterson* Court limited its holding to unrepresented defendants, stating:

> We note as a matter of some significance that petitioner had not retained, or accepted by appointment, a lawyer to represent him at the time he was questioned by authorities. Once an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect.[242]

After *Patterson*, a few lower courts relied on the different rationales animating the right to counsel under *Miranda* and the right to counsel under *Massiah* to limit *Patterson*'s holding to cases involving unrepresented defendants.[243]

For example, the Texas Court of Criminal Appeals recognized that "the *promise* of legal assistance [under *Miranda*] is intended to counter compulsion," and "information concerning the opportunity to consult with counsel protects against compulsion."[244] Counsel is waivable in that context, because "counsel's role is nothing more than an assurance that if the suspect wants counsel, counsel will be made available."[245] In contrast, the Sixth Amendment right to counsel is "[d]esigned to remedy any imbalance in this adversary system" and is "essential to fairness."[246] The attorney is there to aid the defendant with "rational decisionmaking"[247] and the Sixth Amendment is concerned with "'preserving' the attorney-client relationship,"[248] which is very different from the *Miranda* context. As a result, the Texas court held that "[o]nly through notice to defense

Amendment privilege.").

[242] *Patterson*, 487 U.S. at 290 n.3 (citing Maine v. Moulton, 474 U.S. 159, 176 (1985)); *see also id.* at 296 n.9 ("[B]ecause the Sixth Amendment's protection of the attorney-client relationship—'the right to rely on counsel as a "medium" between [the accused] and the State'—extends beyond *Miranda*'s protection of the Fifth Amendment right to counsel, there will be cases where a waiver which would be valid under *Miranda* will not suffice for Sixth Amendment purposes." (quoting *Moulto*n, 474 U.S. at 176)).

[243] *See, e.g.*, Holloway v. State, 780 S.W.2d 787, 795-96 (Tex. Crim. App. 1989); State v. Dagnall, 612 N.W.2d 680, 695-97 (Wis. 2000).

[244] *Holloway*, 780 S.W.2d at 792.

[245] *Id.*

[246] *Id.* at 793.

[247] *Id.* at 792.

[248] *Id.* at 795.

counsel may authorities initiate the interrogation of an indicted and represented defendant."[249]

Lower courts and commentators have begun retreating from this distinction after *Montejo* because of the following language in the majority opinion:

> In determining whether a Sixth Amendment waiver was knowing and voluntary, there is no reason categorically to distinguish an unrepresented defendant from a represented one. It is equally true for each that, as we held in *Patterson*, the *Miranda* warnings adequately inform him "of his right to have counsel present during the questioning," and make him "aware of the consequences of a decision by him to waive his Sixth Amendment rights."[250]

But that language in *Montejo* is dicta. The *Montejo* Court originally granted certiorari to decide when the *Jackson* protections apply in a jurisdiction like Louisiana, where suspects are assigned counsel by the court rather than affirmatively invoking counsel (as defendants in Michigan do).[251] The Court then sua sponte asked the parties whether *Jackson* should be overruled. The briefing and argument before the Court was about what triggers invocation of *Massiah* rights under *Jackson* and whether *Jackson* should remain good law. It was not about the adequacy of warning and waiver doctrine for represented versus unrepresented defendants. With respect to waiver, the *Montejo* majority explicitly noted that it was remanding the case for Montejo "to press any claim he might have that his Sixth Amendment waiver was not knowing and voluntary."[252] Noting that waiver matters "have heightened importance in light our opinion today," the majority stated "[w]e do not venture to resolve these issues ourselves."[253] The above-quoted language about represented versus unrepresented defendants was inserted in response to language in the dissent.[254] It was not the focus of briefing and argument by the parties and was not essential to the holding in the case and is therefore nonbinding dicta.

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[249] *Id.*; *see also* State v. Dagnall, 612 N.W.2d 680, 694 (Wis. 2000) ("After an attorney represents the defendant on particular charges, the accused may not be questioned about the crimes charged in the absence of an attorney.").

[250] Montejo v. Louisiana, 556 U.S. 778, 798-99 (2009) (quoting Patterson v. Illinois, 487 U.S. 285, 293 (1988)); *see also, e.g.*, Vasquez v. State, No. 14-15-00380-CR, 2016 WL 4483462, at *8 n.1 (Tex. Crim. App. Apr. 25, 2016) (noting that "[b]ased on our research, Holloway may no longer be good law" (citing *Montejo*, 556 U.S. at 789)); State v. Delebreau, 864 N.W.2d 852, 855 (Wis. 2015) (noting that "*Montejo* effectively overruled *Dagnall* by establishing that a waiver of *Miranda* rights is sufficient to waive the Sixth Amendment right to counsel and that such a waiver is not presumed invalid simply because the defendant is already represented by counsel").

[251] *Montejo*, 556 U.S. at 780-83; *see also* Petition for Writ of Certiorari at 2, Montejo v. Louisiana, 556 U.S. 778 (2009) (No. 07-1529).

[252] *Montejo*, 556 U.S. at 798.

[253] *Id.*

[254] *Id.* ("[R]eject[ing] the dissent's revisionist legal analysis.").

Lower courts should disregard this dicta because it is "contrary to a long line of precedent, stretching through the Warren, Burger, and Rehnquist Courts"[255] and is contrary to the underlying rationale supporting the right to counsel. In *Moulton*, *Patterson*, and *Harvey*, the Supreme Court has drawn a distinction between represented and unrepresented defendants under the Sixth Amendment and for good reason. Once a suspect is represented by counsel, the Sixth Amendment guarantees him the right to rely on that counsel as a "medium" between him and the state to minimize the system's imbalance and ensure that the proceedings are fair.[256] Yes, the Sixth Amendment is waivable. Nothing prevents a suspect from approaching the police and sharing information without government questioning. A suspect can also affirmatively waive the right to counsel after having been advised of the right by the court with fact-specific questioning designed to ensure that the defendant understands the consequences of waiver.[257] But once the defendant has retained or been appointed counsel, the principles of fairness and equality require the government to go through that counsel in order to obtain a waiver of any of his rights, including his right to counsel.[258]

b. *Refusing to Extend* Patterson *and* Montejo

Too many people have fallen down the slippery slope and are suggesting that *Montejo*'s importation of an antibadgering rationale into the Sixth Amendment right to counsel context means a wholesale collapse of *Miranda* and *Massiah*.[259] This overreading fails to recognize that the *Montejo* majority itself described only the prophylactic protection in *Jackson* as primarily concerned with antibadgering.[260] *Montejo* explicitly noted that *Massiah* was still good law.[261]

[255] Bradley, *supra* note 156, at 255.

[256] Maine v. Moulton, 474 U.S. 159, 176 (1985).

[257] *See* Faretta v. California, 422 U.S. 806, 807 (1975).

[258] *Cf.* Bradley, *supra* note 156, at 258 (noting that England, France, and Italy have rules that prohibit post-indictment questioning unless it is done in court or with counsel present). I would go so far as to say that a defendant whose Sixth Amendment right has attached must speak with defense counsel before being permitted to waive. *See* Sarma, Smith & Cohen, *supra* note 96, at 462 (noting that automatic attachment of the right is necessary, because "requiring the defendant to affirmatively request counsel undermines core Sixth Amendment values" by "undercut[ting] [the suspect's] right to depend on counsel to guide him through every decision important to his defense"). But that would require overruling *Patterson*.

[259] *See, e.g.*, Mims, *supra* note 156, at 374-83 (describing a parade of horribles under which the antibadgering rationale of *Montejo* would upend all of Sixth Amendment law).

[260] *See* Montejo v. Louisiana, 556 U.S. 778, 787-88 (2009) (noting that the *Edwards* rule was about preventing police badgering, that *Jackson* imported *Edwards* into the Sixth Amendment, and that the only way to make sense of *Jackson* is to look at the antibadgering rationale).

[261] *See id.* at 786 (citing Massiah v. United States, 377 U.S. 201, 204-05 (1964)).

Given that *Massiah* involved undercover questioning[262]—a situation that does not involve compulsion or badgering—there is no reason to begin importing antibadgering rationales into other Sixth Amendment areas. We should limit this entanglement of *Miranda* and *Massiah* to the now-overruled *Jackson* regime and rely on the actual animating purposes of the right to counsel to define its scope in related contexts. I will briefly examine three such related contexts below: (1) actual invocation in noncustodial situations; (2) warnings in noncustodial situations; and (3) implied waiver.

Actual invocation in noncustodial situations. After *Montejo* it is now an open question what protections, if any, a suspect has if she actually invokes her Sixth Amendment right to counsel when the police approach and read her the *Miranda* warnings. There was no express invocation in *Montejo*,[263] and the prophylactic protection in *Jackson* is now gone. Does this mean that police can ignore a suspect's post-indictment request for counsel in noncustodial situations where *Edwards* offers no protection?[264] To deny such a request would seem to exacerbate the imbalance in the system by giving the government an unfair advantage. The government would have the power to keep asking the suspect to waive his Sixth Amendment rights while denying the defendant an opportunity to have expert assistance. In fact, the government's continued pressure to get the suspect to waive could undermine the earlier *Miranda* warning that the suspect has a right to an attorney. After all, if a suspect is told that he has a right to counsel, he invokes that right, and the government then ignores the invocation, the suspect might reasonably believe that he had no right to counsel in the first place.[265] Any resulting waiver in that circumstance would be unknowing for reasons similar to those discussed above regarding police deception about an attorney's existence. For this reason, some have argued that the courts will need to develop some *Edwards*-like protections for noncustodial suspects in this situation.[266]

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[262] *Massiah*, 377 U.S. at 202-03.

[263] Instead, counsel was automatically appointed for Montejo pursuant to Louisiana procedures. *See Montejo*, 556 U.S. at 781-82.

[264] Some lower courts have suggested as much. *See, e.g.*, Hughen v. State, 297 S.W.3d 330, 335 (Tex. Crim. App. 2009) ("After *Montejo*, the Sixth Amendment does not bar police-initiated interrogation of an accused who has previously asserted his right to counsel.").

[265] *Cf.* Maryland v. Shatzer, 559 U.S. 98, 121 (2010) (Stevens, J., concurring) (noting in a *Miranda* context that if the police tell a suspect that he has a right to counsel and the suspect then asks to speak with counsel but no counsel is provided before the police return again, "the suspect is likely to feel that the police lied to him and that he really does not have any right to a lawyer").

[266] *See, e.g.*, Bretz, *supra* note 156, at 251; Witmer-Rich, *supra* note 2, at 1236. Although Jonathan Witmer-Rich would continue to apply an *Edwards* rule in the Sixth Amendment context, he would not impose the fourteen-day time limitation from *Shatzer*. *See* Witmer-Rich, *supra* note 2, at 1236-37 (giving reasons why the *Shatzer* rule is both "unnecessary" and "undesirable" in the Sixth Amendment setting).

Warnings in noncustodial situations. Factually, both *Patterson* and *Montejo* were cases involving custodial interrogations wherein the defendants were approached post-indictment and were asked to waive their rights. Neither of these cases discussed what waiver standards would apply outside of the custodial-interrogation setting.[267] Police are not required to administer *Miranda* warnings when a suspect is not in custody, and they may not want to read the full *Miranda* warnings for a number of reasons, including the fact that it is not clear that noncustodial suspects even have a right to remain silent.[268] Given the Supreme Court's recent decision in *Howes v. Fields*[269] that many prison inmates are not in custody,[270] there are likely to be more instances of police questioning suspects whose Sixth Amendment rights to counsel have been triggered but whose *Miranda* rights have not.[271] As a result, courts will have to address whether police-modified *Miranda* warnings are sufficient to apprise a defendant of his Sixth Amendment *Massiah* rights.

In the *Miranda* context, the Court has held that the *Miranda* warnings are not to be construed "as if construing a will or defining the terms of an easement;" rather, "[t]he inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.'"[272] As Katie Tinto has argued, however, "[s]ome modifications to the language of the *Miranda* warnings, although sanctioned under Fifth Amendment law, are not acceptable from the standpoint of a Sixth Amendment analysis."[273] In *Duckworth* itself, for example, the Court approved a warning in which the suspect was told that he had the right to a lawyer "if and when you go to court."[274] As Tinto suggests, such language is misleading with respect to the Sixth Amendment, because it suggests that

[267] *See* Patterson v. Illinois, 487 U.S. 285, 296 n.9 (1988) (recognizing that the waiver standards might be different between the Fifth and Sixth Amendments in situations that do not involve custodial interrogation); *see also In re* Darryl P., 63 A.3d 1142, 1186 (Md. Ct. Spec. App. 2013) ("When *Patterson* equated a waiver of the *Miranda*-based prophylactic right with a waiver of the Sixth Amendment right, it clearly did so in the limited context of custodial interrogation where the two rights were coterminous . . . .").

[268] *See* Salinas v. Texas, 133 S. Ct. 2174, 2184 (2013).

[269] 565 U.S. 499 (2012).

[270] *See id.* at 516-17.

[271] *See* Bretz, *supra* note 156, at 238 ("A significant body of evidence, including multiple studies of police departments, the comments of academic scholars and even recommendations from a widely accepted officer interrogation manual, suggest that since *Miranda*, police have intentionally focused their efforts on securing inculpatory statements from defendants in non-custodial interrogations." (footnotes omitted)).

[272] Florida v. Powell, 559 U.S. 50, 60 (2010) (quoting Duckworth v. Eagan, 492 U.S. 195, 203 (1989)).

[273] Tinto, *supra* note 36, at 1360-61.

[274] *Duckworth*, 492 U.S. at 197.

defendants do not have the right to have an attorney present during post-indictment police questioning, in direct violation of *Massiah*.[275]

Implied waiver. Recall that, in *Butler*, the Supreme Court held that a suspect's waiver of her Fifth Amendment *Miranda* rights can be implied,[276] and in *Thompkins*, the Court held that waiver will be implied as long as a *Miranda* warning was given and understood by the accused, and the accused gave an uncoerced statement.[277] That implied waiver doctrine should not be extended to the Sixth Amendment context. *Butler* and *Thompkins* make sense as Fifth Amendment cases if one believes, as the Court does, that the warnings themselves can dispel the inherent compulsion in the custodial interrogation environment.[278] But implied waiver does not make sense in the Sixth Amendment context. The right to counsel at pretrial critical stages is a substantive right designed to ensure that defendants have expert assistance to help them face the accusatorial forces of the government and understand the intricacies of the system. Counsel is supposed to serve as a "medium" between the suspect and the government.[279] Advising suspects of their *Miranda* rights does not give them that substantive assistance. If they don't want to have the assistance of counsel, they should affirmatively and expressly waive it.[280]

The Supreme Court has repeatedly described the *Miranda* right to counsel as a prophylactic protection designed to secure the underlying right to be free of compelled self-incrimination.[281] For that reason, the Court's focus in *Thompkins* on whether the waiver is coerced speaks directly to the compulsion at issue under the Fifth Amendment. In contrast, the Sixth Amendment is not about coercion

[275] Tinto, *supra* note 36, at 1361.

[276] North Carolina v. Butler, 441 U.S. 369, 375-76 (1979) ("[A]n explicit statement of waiver is not invariably necessary to support a finding that the defendant waived the right to remain silent or the right to counsel guaranteed by the *Miranda* case.").

[277] Berghuis v. Thompkins, 560 U.S. 370, 371 (2010).

[278] I am doubtful that the warnings have this effect. *See* Kamisar, *supra* note 19, at 1008-21 (discussing how the Court erred in *Thompkins*). For a persuasive argument that *Thompkins* rests on the faulty premise that suspects in the interrogation room are "autonomous, empowered individuals who possess the knowledge and wherewithal to assert and protect their rights and interests," see Witmer-Rich, *supra* note 2, at 1237-43.

[279] *See* Maine v. Moulton, 474 U.S. 159, 176 (1985).

[280] *See* Bradley, *supra* note 156, at 263 (arguing for an express waiver requirement). Craig Bradley seems to believe that, "because Montejo's waiver was not express, it would seem that the holding in this case has foreclosed that option." *Id.* at 262. Given that the *Montejo* Court remanded for a determination about the validity of Montejo's waiver, however, I do not believe that the option is foreclosed. *See In re* Darryl P., 63 A.3d 1142, 1190 (Md. Ct. Spec. App. 2013) (rejecting the importation of the *Thompkins* implied waiver doctrine into the *Massiah* context).

[281] *See, e.g.*, J.D.B. v. North Carolina, 564 U.S. 261, 269 (2011); Maryland v. Shatzer, 559 U.S. 98, 103 (2010); United States v. Patane, 542 U.S. 630, 636-37 (2004); Chavez v. Martinez, 538 U.S. 760, 772 (2003); Oregon v. Elstad, 470 U.S. 298, 305 (1985); New York v. Quarles, 467 U.S. 649, 654 (1984); Michigan v. Tucker, 417 U.S. 433, 444 (1974).

or compulsion. Denying a person an attorney at a critical pretrial stage is a completed constitutional violation because the suspect has been deprived of the attorney's assistance at that critical point.[282] Implying waiver because there was no coercion makes no sense when the constitutional right at issue is not animated by a concern about coercion.

Consider also the broader scope of the Sixth Amendment pretrial right to counsel. If waiver can be implied at pretrial interrogations under the Sixth Amendment, courts would likely imply waiver at other pretrial critical stages. But courts have rightly found that a defendant's mere participation in a post-indictment lineup cannot waive his right to counsel at that critical stage.[283] To hold otherwise would effectively mean that police could put defendants in lineups post-indictment and they would be able to create an end run around their Sixth Amendment protections.

These are just three examples of situations not directly governed by *Patterson* and *Montejo* but that touch on related areas where resistance to entanglement could generate significant differences between the *Miranda* and *Massiah* doctrines going forward.

2. Using State Law to Disentangle

When the Supreme Court has entangled the *Miranda* and *Massiah* doctrines in ways that undermine the purposes of the right to counsel, states are free to use their state law to provide additional right to counsel protections. Justice Brennan famously implored states to rely on their state constitutions to provide additional protections for civil liberties and criminal defendants' rights: "[S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretations of federal law."[284] Many have noted that the Constitution "merely sets the floor for individual rights" whereas the states "are free to prescribe the ceiling."[285] All of the states have a right to counsel as part of their state law and should disentangle the meaning of that state right to counsel from its federal and state Self-Incrimination Clause counterparts.

Some states have already rejected *Patterson* and/or *Montejo* and have adopted rules more consistent with the tradition and purposes of the right to counsel in their state constitutions and statutes.[286] With respect to *Patterson*, some

[282] *See* Kansas v. Ventris, 556 U.S. 586, 592 (2009).

[283] *See, e.g.*, People v. McCrimmon, 142 A.D.2d 606, 606 (N.Y. 1988) (noting that "the fact that the defendant voluntarily participated in the lineup" does not constitute a valid waiver).

[284] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

[285] Stanley Mosk, *Beyond the Constitution*, 7 CAL. LAW., Aug. 1987, at 100.

[286] *See, e.g.*, State v. Liulama, 845 P.2d 1194, 1203 (Haw. Ct. App. 1993); State v. Lawson, 297 P.3d 1164, 1171-74 (Kan. 2013); Keysor v. Kentucky, 486 S.W.3d 273, 281-82 (Ky.

jurisdictions have held that a criminal defendant who has been indicted or formally charged may not waive his right to counsel unless he does so in the presence of his attorney.[287] Others have suggested that a waiver of the right to counsel may also be valid if the defendant is advised before a judicial officer "that he has been indicted, the significance of an indictment, that he has a right to counsel, and the seriousness of his situation in the event he should decide to answer questions of any law enforcement officers in the absence of counsel."[288] Either of these conclusions would disentangle *Massiah* from *Miranda* and provide more robust protection for the Sixth Amendment pretrial right to counsel predicated on its underlying rationale.

With respect to *Montejo*, the *Montejo* Court itself recognized that its decision to overrule *Jackson* was at odds with how a number of states had been interpreting the right to counsel.[289] As a result, it emphasized states' abilities to continue to provide additional protection to criminal defendants under state law: "If a State *wishes* to abstain from requesting interviews with represented defendants when counsel is not present, it obviously may continue to do so."[290]

Some states have already responded to that invitation and rejected *Montejo* as a matter of state law.[291] In West Virginia, for example, police may not initiate interrogation "after a defendant asserts his right to counsel at an arraignment or similar proceeding."[292] In Kentucky, an assertion is not required under state law; rather, "once the right to counsel has attached by the commencement of formal criminal charges, any subsequent waiver of that right during a police-initiated custodial interview is ineffective."[293] And in Kansas, "after the statutory right to

2016); State v. Sanchez, 609 A.2d 400, 408 (N.J. 1992); People v. Grice, 794 N.E.2d 9, 10 (N.Y. 2003); State v. Bevel, 745 S.E.2d 237, 247 (W. Va. 2013).

[287] *E.g.*, *Grice*, 794 N.E.2d at 10 (describing the "indelible right to counsel" under the New York Constitution under which "interrogation is prohibited unless the right is waived in the presence of counsel"); *see also* Bradley, *supra* note 156, at 252 (arguing that "[o]nce formal proceedings have begun, police-initiated interrogations [should be] forbidden, absent permission of counsel"); Bretz, *supra* note 156, at 241-42; Tinto, *supra* note 36, at 1367.

[288] *Sanchez*, 609 A.2d at 408 (quoting United States v. Mohabir, 624 F.2d 1140, 1153 (2d Cir. 1980)); *see also Liulama*, 845 P.2d at 1203 ("[W]e do not believe the government should be allowed to conduct a postindictment interrogation until the accused has been specifically advised of such right by a court or by his own counsel."); Mims, *supra* note 156, at 369-70 (arguing for more stringent waiver requirements for post-indictment interrogations that would parallel the waiver requirements for waiving the right to counsel at trial).

[289] Montejo v. Louisiana, 556 U.S. 778, 793 (2009).

[290] *Id.* at 793 (footnote omitted).

[291] *E.g.*, *Lawson*, 297 P.3d at 1171-74; *Keysor*, 486 S.W.3d at 281-82; *Bevel*, 745 S.E.2d at 247; *see also* Bretz, *supra* note 156, at 251 (arguing that states should "adopt an approach that would, following the initiation of formal charges, prohibit police-initiated questioning of all defendants who have invoked their right to an attorney").

[292] *Bevel*, 745 S.E.2d at 247.

[293] *Keysor*, 486 S.W.3d at 282.

counsel has attached, the defendant's uncounseled waiver of that right will not be valid unless it is made in writing and on the record in open court."[294]

These more protective state regimes tend to better align with the underlying purposes of a pretrial right to counsel. More states should look to the history and traditions surrounding their state statutory and constitutional right-to-counsel provisions and find that "*Montejo*'s degradation of the right to counsel is antithetical to [the state's] perception of the right to counsel."[295]

CONCLUSION

Looking back on the five decades since the *Miranda* decision, it is easy to focus solely on the ways that the Burger, Rehnquist, and Roberts Courts have denigrated criminal suspects' *Miranda* rights. But the damage is now extending beyond the *Miranda* context. Both the Supreme Court and lower courts have begun using *Miranda* precedent to chip away at protections guaranteed by the Sixth Amendment pretrial right to counsel. The entanglement of *Miranda* and *Massiah*, however, is not complete and should be stopped from going further. Litigants and courts should not confuse the *Miranda* Fifth Amendment regime, which is designed to protect the privilege against compelled self-incrimination, with the *Massiah* Sixth Amendment right to counsel. Instead, courts should focus on the underlying purposes of the Sixth Amendment right to counsel—ensuring fairness and equality in the adversarial system—when considering the scope of criminal suspects' Sixth Amendment protections going forward. Perhaps then the Sixth Amendment right to counsel can perform its intended function.

[294] *Lawson*, 297 P.3d at 1173.

[295] *Keysor*, 486 S.W.3d at 281; *see also* Bretz, *supra* note 156, at 225 (arguing that lower courts should provide greater protection through the interpretation of state constitutional provisions); Mims, *supra* note 156, at 347 (arguing that *Montejo* "should be limited by state constitutions").