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THE *MASSIAH* RIGHT TO EXCLUSION: CONSTITUTIONAL PREMISES AND DOCTRINAL IMPLICATIONS

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In this Article Professor Tomkovicz examines the distinctive nature of the Massiah *sixth amendment-based right to counsel and the character of the exclusionary "remedies" that must follow from* Massiah *violations. Arguing that the basic value protected by* Massiah's *right to counsel in pretrial encounters is that of helping to ensure criminal defendants are able to engage with the state on roughly equal footing at trial, the author concludes it is essential to exclude the use at trial of evidence obtained in violation of* Massiah *in order to protect the constitutional* right *of adversarial fair play. Professor Tomkovicz proceeds to evaluate the appropriateness of applying fourth amendment and* Miranda*-based exceptions to exclusion which are grounded not in a constitutional right to exclusion, but rather in a rule-based exclusion regulation designed to deter future violations, to the* Massiah *sixth amendment-based setting. By virtue of the different rationales and natures of the violations, the author concludes that only a selective few of the fourth amendment and* Miranda*-based exclusionary exceptions are proper in* Massiah *situations and that blind application of other exclusionary rule exceptions created for use outside the* Massiah *setting is both inappropriate and harmful to the* Massiah *sixth amendment-based right to counsel.*

I. INTRODUCTION

The study of constitutional criminal procedure involves the examination of two interrelated topics: the substantive constitutional rights we afford criminal suspects and defendants and the exclusionary consequences that flow from violations of those rights. Exclusionary "remedies" are a final, critical chapter in any complete evaluation of constitutional liberties. The advisability of excluding particular evidence and the validity of specific restrictions upon suppression[1] should ordinarily depend upon the underlying rationales for exclusion.[2] Those

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1. The words "exclusion" and "suppression" are used synonymously throughout this Article. Both refer to the refusal to allow items to be admitted into evidence in the courtroom.

2. The Supreme Court has acknowledged the logic and importance of tying exclusionary rule doctrine to the rationales for exclusion. *See* United States v. Calandra, 414 U.S. 338, 348 (1974)

rationales, in turn, must be rooted in the substance of the various constitutional guarantees that govern our criminal processes.[3] Consequently, understanding the content of the rights is a prerequisite to reasoned analysis of exclusionary principles.

Most of the United States Supreme Court's exclusionary rule work has been in the fourth amendment area.[4] Some decisions have involved *Miranda's* fifth amendment-based safeguards.[5] Only one significant exclusionary rule opinion has been predicated on transgression of the sixth amendment right to counsel provision.[6] Consequently, the Court has said relatively little about the premises and limits of sixth amendment exclusion. What it has said has been ambiguous or not well grounded in the right to counsel.[7] More important, the Court has not told us whether the several significant limitations in the fourth and fifth amendment exclusionary rule cases are transferable to the sixth amendment context.

The *Massiah* doctrine's sixth amendment right to counsel against open or surreptitious elicitation of incriminating information by state agents has proven remarkably durable for a quarter of a century.[8] It would seem to be only a matter of time until the exclusionary issues that have arisen in fourth and fifth amendment cases reach the Court in sixth amendment *Massiah* contexts. Resolution of those issues will demand a clear understanding of the character of the sixth amendment entitlement reflected in the *Massiah* doctrine and identification of the basic rationales for suppressing evidence acquired in disregard of that entitlement.[9] The first goal of this Article is to sketch the nature of the sixth amendment right and to derive from that nature the legitimate justifications for sixth amendment exclusion.[10] In light of those justifications, the Article will

("As with any remedial device, the application of the [exclusionary] rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.").

3. *Cf.* Nix v. Williams, 467 U.S. 431, 456 (1984) (Stevens, J., concurring) (observing that the answer to an exclusionary rule issue before the Court "follow[ed] readily" from the proper identification of the constitutional wrong involved).

4. *See, e.g.*, United States v. Leon, 468 U.S. 897 (1984); Rawlings v. Kentucky, 448 U.S. 98 (1980); United States v. Havens, 446 U.S. 620 (1980); Rakas v. Illinois, 439 U.S. 128 (1978); Stone v. Powell, 428 U.S. 465 (1976).

5. *See, e.g.*, Oregon v. Elstad, 470 U.S. 298 (1985); Oregon v. Hass, 420 U.S. 714 (1975); Michigan v. Tucker, 417 U.S. 433 (1974).

6. *See* Nix v. Williams, 467 U.S. 431 (1984). Another sixth amendment opinion should be forthcoming before long. *See* Michigan v. Harvey, 109 S. Ct. 1117 (1989) (granting certiorari in case involving impeachment use of statement taken in violation of sixth amendment doctrine).

7. *See Williams*, 467 U.S. at 456 (Stevens, J., concurring) (suggesting that the majority's exclusionary rule generalizations were not responsive to the primary sixth amendment issue in the case); MCCORMICK ON EVIDENCE, § 449 (E. Cleary 3d ed. 1984) (accusing the Court of not considering or discussing the decisions to extend exclusionary sanctions to fifth and sixth amendment contexts).

8. *See* Tomkovicz, *An Adversary System Defense of the Right to Counsel Against Informants: Truth, Fair Play, and the* Massiah *Doctrine*, 22 U.C. DAVIS L. REV. 1, 4-6 (1988).

9. *See* Wasserstrom & Mertens, *The Exclusionary Rule on the Scaffold: But Was It a Fair Trial?* 22 AM. CRIM. L. REV. 85, 177-78 & n.515 (1984) (suggesting that the Court's treatment of *Massiah* exclusion as identical in nature and purpose to fourth amendment exclusion has made the sixth amendment right, and the evidentiary exclusion that flows from failure to honor the *Massiah* entitlement, "vulnerable to lines of attack that it previously could have withstood.").

10. *See infra* text accompanying notes 16-120.

discuss standing to claim sixth amendment exclusion.[11] It will then consider the fate of evidence derived from sixth amendment violations and the propriety of "independent source," "inevitable discovery," "attenuation," and "good faith" exceptions to sixth amendment exclusion.[12] Finally, the Article will address the use of products derived from *Massiah* violations to impeach defendants,[13] and the availability of sixth amendment-based exclusion in collateral proceedings.[14]

The primary objective of this Article is to provide a theoretical foundation for *Massiah* exclusion.[15] Based on that foundation, the discussion will propose answers to several sixth amendment exclusionary issues that are likely to arise. With the constitutional roots and pragmatic anchors proffered here, the *Massiah* right should be better equipped to withstand the assaults of its opponents and fulfill its important functions in our criminal justice system.

II. THE NATURE AND DEFINITION OF THE *MASSIAH* RIGHT

Evaluation of the foundations and reach of the sixth amendment exclusionary rule requires an understanding of the character of the *Massiah* right to counsel.[16] The sixth amendment right to counsel is the central element of our adversary system. That system contemplates a contest between opposing sides. By nature, one of those sides is significantly more powerful in most, if not all, relevant respects. The grant of counsel to the inherently inferior defendant is designed to promote balanced contests by equalizing the adversaries. Counsel brings legal expertise, knowledge of the system, tactical and strategic savvy, and a commitment to the defense of the accused against state efforts to impose a criminal penalty.

"Rough equality"[17] between the opponents is desirable and necessary not only to promote accurate and truthful results, but also to ensure that those results are the products of adversarial fair play. By guaranteeing an equalizer for the accused, we grant a fair opportunity to contest the state's accusation and

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11. *See infra* text accompanying notes 130-36.

12. *See infra* text accompanying notes 137-96.

13. *See infra* text accompanying notes 197-213.

14. *See infra* text accompanying notes 214-24.

15. Just as the *Massiah* right to counsel has been attacked as lacking constitutionally legitimate premises, *see* Tomkovicz, *supra* note 8, at 25-30, the exclusion of evidence obtained in violation of *Massiah*'s pretrial extension of the sixth amendment has been accused of having "no valid justification." *See* United States v. Henry, 447 U.S. 264, 296-98 (1980) (Rehnquist, J., dissenting).

16. The *Massiah* right to counsel and the doctrine defining that right's purview have been developed in a series of significant Supreme Court decisions in the past ten years. *See* Kuhlmann v. Wilson, 477 U.S. 436 (1986); Michigan v. Jackson, 475 U.S. 625 (1986); Moran v. Burbine, 475 U.S. 412 (1986); Maine v. Moulton, 474 U.S. 159 (1985); United States v. Henry, 447 U.S. 264 (1980); Brewer v. Williams, 430 U.S. 387 (1977).

This Article's textual discussion of the character of the *Massiah* right is based on a much lengthier and more detailed treatment in a previous article. Most specific points in the instant discussion will not be supported by citations to that piece. The reader who desires fuller, supported explanation of the observations and conclusions in this section should see Tomkovicz, *supra* note 8, at 9-22.

17. No one claims that the equalization accomplished by the sixth amendment is "exact" or "perfect." We are content with "rough equality," with eliminating inherent gross disparities between sides. *See* Tomkovicz, *supra* note 8, at 40.

prosecution. Our societal commitment to limited governmental power over individual lives and our reluctance to exploit or take advantage of the weak and inferior are made manifest by the promise of counsel's assistance. Counsel is one means through which we practice and proclaim our system's respect for individual worth, dignity, and autonomy.

Originally, the right to counsel extended to trials alone. However, American criminal processes gradually developed pretrial adversarial stages. If accused individuals were left unassisted, thus unequal in these pretrial encounters, the values promoted by the sixth amendment trial right could have been all too easily undermined. To prevent governmental circumvention of the constitutional ideal of balanced contests, the right to counsel was—as it had to be—extended to pretrial "critical stages"[18] of the prosecution.[19]

One stage that qualifies as critical is a "conversational encounter" between a defendant and a known or undercover government agent who elicits inculpatory disclosures.[20] The equalization of adversaries through the promise of counsel for the defendant includes a guarantee that the state will neither openly nor secretly deal with the accused unless he has the full benefit of counsel's skills, knowledge, and advice. Both above-board and surreptitious approaches to secure pretrial admissions of culpability can deprive the defendant of important input from his champion concerning the critical decision to discuss an accusation with the state. That input, which is clearly a part of the entitlement to *trial* counsel,[21] would be of little value at trial if the government could evade its protective effects by confronting an accused with uncounseled pretrial choices. For that reason, an accused is entitled to counsel during certain pretrial encounters in which the state may acquire revelations of guilt.

The evolved *Massiah* doctrine delineates the encounters that trigger an entitlement to counsel.[22] Current standards require a formal, official initiation of adversary criminal proceedings. Once that threshold is crossed, the defendant is entitled to counsel if the state "deliberately elicits" incriminating disclosures. Deliberate elicitation includes direct, face-to-face encounters with known police officers as well as surreptitious approaches by unknown government informants[23] and requires "active" elicitation of disclosures. Although mere conver-

18. "Critical stages" is the Court's description of those pretrial events at which an accused needs, and is entitled to, the sixth amendment right to counsel. *See* Moran v. Burbine, 475 U.S. 412, 429 (1986); Maine v. Moulton, 474 U.S. 159, 170 (1985); United States v. Ash, 413 U.S. 300, 310-11 (1973).

19. As is noted below, a "formal prosecution"—an actual initiation of adversary judicial criminal proceedings—is an essential prerequisite for attachment of the sixth amendment right. There can be no "critical stage" without a "prosecution." *See Burbine*, 475 U.S. at 432.

20. I use the description "conversational encounter" as a generalization for the stage designated as critical by the *Massiah* doctrine.

21. In my previous discussion of the *Massiah* right, I concluded that the state's pretrial dealings with an accused should be governed by the sixth amendment if the same dealings at trial would demand counsel. I found the *Massiah* extension of counsel to pretrial encounters designed to secure admissions both logical and necessary because the government could not conduct similar uncounseled *trial* dealings with a defendant-adversary. *See* Tomkovicz, *supra* note 8, at 56-60.

22. See generally Tomkovicz, *supra* note 8, at 12-22, for a specific and detailed discussion of *Massiah* doctrine.

23. The government cannot be held responsible for deliberate elicitations by its informant un-

sation is enough, passive listening to inculpatory revelations will not suffice to trigger sixth amendment protection.[24]

The basic nature of the *Massiah* right is relatively clear. *Massiah* defines a necessary pretrial extension of the original sixth amendment promise of equalization in the adversarial trial contest with the state. That promise is intended to promote truthful outcomes reached by means that accord with our notions of fair and decent treatment and respect for every individual. The object of *trial* counsel is to prevent convictions arrived at through imbalanced, and therefore unfair, battles. The object of pretrial counsel is identical. This object, and the general nature of the *Massiah* right, must be the wellspring of the rationales, principles, and particulars of sixth amendment exclusion.

III. PREMISES OF EXCLUSION: FOURTH, FIFTH, AND SIXTH AMENDMENT DIFFERENCES AND SIMILARITIES

The main objective of this section is to identify the reasons for excluding evidence derived from *Massiah* violations. An initial exploration of fourth and fifth amendment exclusionary reasoning will provide a helpful preface. Thereafter, this section will describe the Supreme Court's apparent views concerning sixth amendment exclusion and will identify potential rationales for *Massiah* exclusion. Finally, this section will provide a constitutional rationalization of such exclusion.

A. *Fourth and Fifth Amendment Rationales*

Constitutional evidentiary exclusion originated in a 1914 fourth amendment decision, *Weeks v. United States*.[25] In *Weeks*, despite the lack of a textual basis for exclusion,[26] a unanimous Court prohibited the use at trial of evidence

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less the circumstances show that its "formal" employees knew that the undercover agent was likely to induce disclosures. *See* United States v. Henry, 447 U.S. 264, 270 (1980). A somewhat objective standard is used to assess the state's knowledge. The question is whether the state " 'must have known' " that its informant was likely to elicit. *See* Maine v. Moulton, 474 U.S. 159, 176 n.12 (1985) (quoting United States v. Henry, 447 U.S. 264, 271 (1980)). For a discussion of the meaning of that standard, see Tomkovicz, *supra* note 8, at 16-20.

24. The specific requirements of the current *Massiah* doctrine ought to be modified in several respects to reflect better the meaning and objectives of the sixth amendment. More specifically, either arrest or the initiation of proceedings ought to mark the threshold of the pretrial sixth amendment right. *See* Tomkovicz, *supra* note 8, at 63-71. Furthermore, in undercover contexts abolition of the requirement that the regular state agents "know" of the likelihood of elicitation by their informant is in order. The relevant inquiry is simply whether the informant was a state "agent." *See* Tomkovicz, *supra* note 8, at 71-77. Finally, "active" elicitation by the state agent in contact with the defendant should not be necessary. In many situations, particularly those involving unknown agents, surreptitious, passive reception of revelations should come within sixth amendment control. *See* Tomkovicz, *supra* note 8, at 77-83.

25. 232 U.S. 383 (1914). Until the explosive growth of constitutional criminal procedure doctrines in the 1960s and the consequent constraints upon law enforcement practices, the fourth amendment was one of only two sources of constitutionally based exclusion. The other did not appear until 1936 in *Brown v. Mississippi*, 297 U.S. 278 (1936). There, the Court held that the due process clause bars states from using coerced confessions at criminal trials.

26. The fourth amendment language makes no mention of the consequences of "unreasonable" searches or seizures. It simply commands the government not to violate the people's right to be secure against such practices. *See* U.S. CONST. amend. IV.

secured in violation of fourth amendment commands.[27] The basis of this original exclusionary rule is a bit obscure. Several statements in *Weeks*, however, read in light of the total absence of references to the goal of deterring improper police conduct, and the ultimate conclusion that the defendant had suffered "a denial of . . . constitutional rights,"[28] strongly suggest that the *Weeks* Court meant to endorse a fourth amendment *right* to suppression.

In 1961 a sharply divided Court issued its most controversial exclusionary rule opinion, *Mapp v. Ohio*.[29] The Court appeared to posit two primary rationales for its holding that the fourteenth amendment due process clause mandates *state* exclusion to the same extent that the fourth amendment commands *federal* exclusion.[30] Several times, the majority opinion cast exclusion as a defendant's right.[31] In addition, the Court observed more than once that exclusion functioned as a necessary deterrent sanction, preventing future deprivations of constitutional privacy interests.[32] Toward the end of the opinion, yet a third reason for suppression appeared: the preservation of judicial integrity.[33]

In the late 1960s and early 1970s the Court began a determined assault on and reorientation of the *Mapp* Court's exclusionary rule premises. The Court focused on deterrence as the primary justification and flatly rejected the notion

27. To be more precise, the Court concluded that such evidence should be returned to a defendant who has requested its return. However, the unavoidable effect of restoring improperly secured evidence to a defendant is the exclusion of that evidence from the prosecution's case. Moreover, the Court stated that "in holding [the letters obtained in violation of the fourth amendment] and permitting their use upon the trial, . . . prejudicial error was committed." *Weeks*, 232 U.S. at 398.

28. *Id.*

29. 367 U.S. 643 (1961).

30. The Court had previously held, in Wolf v. Colorado, 338 U.S. 25 (1949), that the fourteenth amendment due process clause includes a right to be secure against unreasonable searches and seizures similar to that specified in the fourth amendment, and that states could not deprive their citizens of the privacy interest protected by that right. *Id.* at 27-28. In finding that the fourteenth amendment "incorporated" the substance of the fourth amendment promise, the Court had refused to find the federal "remedy" of exclusion to be an essential part of the due process clause right. *Id.* at 27-29. *Mapp* overruled the latter conclusion, finding that due process included not only a right to privacy like that within the fourth amendment, but also a remedy of exclusion comparable to that enunciated in *Weeks*. *See Mapp*, 367 U.S. at 655.

31. *Mapp*, 367 U.S. at 648 (the *Weeks* Court "clearly stated that use of the seized evidence involved 'a denial of the constitutional rights of the accused' " (quoting *Weeks*, 232 U.S. at 398)); *id.* at 655-56 (once the right to privacy was held enforceable against the states under the due process clause, "it was logically and constitutionally necessary that the exclusion doctrine—an essential part of the right to privacy—be also insisted upon as an essential ingredient of th[at] right"); *id.* at 656 (exclusion is "the most important constitutional privilege" of the right to privacy); *id.* at 657 (the holding that the exclusionary rule is an essential part of the rights guaranteed by the fourth and fourteenth amendments is not only logical, it makes good sense); *id.* at 660 ("[o]ur decision" that evidence must be excluded in state courts "gives to the individual no more than that which the Constitution guarantees him").

32. *Id.* at 648 (barring the use of evidence obtained through an illegal search and seizure acts as a "deterrent safeguard"); *id.* at 656 ("[T]he purpose [of the exclusionary rule] 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.' " (quoting Elkins v. United States, 364 U.S. 206, 217 (1960))); *id.* at 657 ("by admitting evidence unlawfully seized, [states] encourage disobedience to the Federal Constitution").

33. In *Weeks* the Court had been concerned that judges participated in law enforcement's constitutional wrongs when they allowed the prosecution to employ judicial processes to secure convictions based upon tainted evidence. *See Weeks*, 232 U.S. at 394. Thus, the *Mapp* Court's reliance on judicial integrity as a reason for exclusion was foreshadowed in the original exclusionary rule opinion.

that an accused possesses a personal right to exclusion.[34] Furthermore, while the Court did not formally abandon the judicial integrity rationale, it did relegate that premise to a clearly secondary status, making it coextensive with deterrence and thereby emptying it of independent force.[35] This modified conception of the foundations of the exclusionary rule has gained force and strength over the past twenty years. According to the standard, oft-recited litany, a defendant has no personal right to fourth amendment exclusion.[36] Suppression is not designed to remedy a wrong or to compensate an accused.[37] Rather, it is a forward-looking deterrent measure aimed at ensuring compliance with fourth amendment commands by removing the incentives for or profit from transgressions and informing law enforcement agents generally of the serious consequences of unconstitutionality.[38] The fourth amendment remedy is designed to discourage violations of privacy, liberty, and property interests[39] that occur at

34. *See, e.g.*, United States v. Peltier, 422 U.S. 531 (1975); United States v. Calandra, 414 U.S. 338 (1974); Alderman v. United States, 394 U.S. 165 (1969); Linkletter v. Walker, 381 U.S. 618 (1965). Although the notion of deterrence had appeared as early as 1939, *see* Wasserstrom & Mertens, *supra* note 9, at 142-43 (observing that Nardone v. United States, 308 U.S. 338 (1939) "introduced" the basic fourth amendment exclusionary rule deterrent rationale), it did not begin to dominate until the late 1960s. *See* Wasserstrom & Mertens, *supra* note 9, at 152-53 (discussing the Court's development of a solely deterrent rationale for fourth amendment exclusion).

35. *See* United States v. Leon, 468 U.S. 897, 921 n.22 (1984).

> [T]he question whether the use of illegally obtained evidence in judicial proceedings represents judicial participation in a Fourth Amendment violation and offends the integrity of the courts 'is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose. . . . The analysis showing that exclusion in this case has no demonstrated deterrent effect and is unlikely to have any significant such effect shows, by the same reasoning, that the admission of the evidence is unlikely to encourage violations of the Fourth Amendment.'

Id. (quoting United States v. Janis, 428 U.S. 433, 458 n.35 (1976)); Stone v. Powell, 428 U.S. 465, 485-86 (1976) (stating that the "imperative of judicial integrity" has "a limited role" and "limited force" as a justification in determining whether to apply the exclusionary rule); *Peltier*, 422 U.S. at 538 (analysis of whether exclusion is necessary to promote judicial integrity "does not differ markedly" from the analysis used in previous cases to determine whether deterrence is furthered by exclusion); *see also Stone*, 428 U.S. at 491 (suggesting that indiscriminate application of the exclusionary rule "may well have the . . . effect of generating disrespect for the law and administration of justice"); *id.* at 499 (Burger, C.J., dissenting) (maintaining that the judicial integrity rationale is a "rhetorical generalization" that is "fatally flawed").

36. *See Leon*, 468 U.S. at 906 (exclusion is not a personal fourth amendment right); *Stone*, 428 U.S. at 486 (same); *Calandra*, 414 U.S. at 348 (same).

37. *See Leon*, 468 U.S. at 906 (exclusionary rule is neither intended nor able to cure invasions of rights suffered due to unconstitutional searches and seizures); *Stone*, 428 U.S. at 486 (suppression is "not calculated to redress the injury to the privacy of the victim of the search or seizure"); *Calandra*, 414 U.S. at 347 (purpose is not to redress the injury to the search victim); *Linkletter*, 381 U.S. at 637 ("[r]eparation comes too late"); *see also* Amsterdam, *Search, Seizure and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 388-89 (1964) (observing that the fourth amendment exclusionary rule cannot be supported as a reparational or compensatory measure for the injured accused criminal).

38. *See Leon*, 468 U.S. at 906 (exclusionary rule operates as a general deterrent safeguard of fourth amendment rights); *Stone*, 428 U.S. at 486 (primary justification is deterrence of police conduct that violates fourth amendment rights); *Peltier*, 422 U.S. at 538-39 (recognizing that exclusionary rule is a deterrent protection of fourth amendment rights generally that works by instilling greater care in officers involved in a given case and their future counterparts); *Calandra*, 414 U.S. at 347 (prime purpose is to deter police conduct that violates fourth amendment by removing the incentive to engage in such conduct); *see also* Amsterdam, *supra* note 37, at 388-89 (fourth amendment exclusion's "sole rational justification" is deterrence).

39. The fourth amendment protection against unreasonable searches and seizures protects "privacy." Katz v. United States, 389 U.S. 347 (1967). It is not confined to privacy protection, however. *Id.* at 350. The regulation of seizures of the person, for example, safeguards physical freedom and

the time of illegal searches or seizures.[40] The Court has answered every modern question concerning the scope and operation of the fourth amendment exclusionary rule by referring to its dominant deterrent purpose.[41]

Fifth amendment cases have also given rise to exclusionary rule issues. The suppression of evidence flows from two separate fifth amendment guarantees—the privilege against compulsory self-incrimination and the due process clause. Such suppression was an important, integral component of the landmark 1966 decision in *Miranda v. Arizona*[42] interpreting the privilege against self-incrimination.[43] The *Miranda* Court prescribed an extensive set of regulations for custodial interrogation,[44] then concluded that failures to comply with those regulations would result in suppression of a suspect's statements.[45] Although the Court did not explain explicitly the rationale for exclusion, the nature and structure of the *Miranda* opinion and holding suggest that exclusion was considered a part of the fifth amendment right. The Court deemed custodial interrogation inherently and presumptively compelling,[46] and considered the *Miranda* procedures necessary to dispel that compulsion.[47] According to the Court's reasoning, absent compliance with the prescriptions of *Miranda*, the inherent pressure of custodial interrogation compels statements, and use of these statements at trial would run afoul of the constitutional command that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."[48] Exclusion was essential to enforce the fifth amendment privilege and to guarantee that defendants would not suffer the harm that the privilege prohibits. The suppression of statements was no mere sanction, but an inseparable part of the defendant's personal fifth amendment right.[49]

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liberty, and the regulation of unreasonable seizures of papers, houses, and effects shelters property interests.

40. *See Leon*, 468 U.S. at 906 (the exclusionary rule is not intended to cure the constitutional wrong that is "fully accomplished" by the unlawful search or seizure itself); *Calandra*, 414 U.S. at 354 (the invasion of privacy "is fully accomplished by the original search without probable cause").

41. *See Leon*, 468 U.S. at 908 ("Close attention to" the exclusionary rule's deterrent, "remedial objectives has characterized our . . . decisions regarding the scope of the . . . rule."); *Stone*, 428 U.S. at 489 n.26 (documenting fact that all modern fourth amendment exclusionary rule issues have been resolved by deterrence-grounded cost-benefit reasoning).

42. 384 U.S. 436 (1966).

43. Although the privilege arrived on the scene later than the due process clause, the similarity of its exclusionary rule to the fourth amendment exclusionary rule makes it more appropriate to discuss the privilege first.

44. *Miranda*, 384 U.S. at 467-73.

45. *Id.* at 479.

46. *Id.* at 467.

47. *Id.* at 478-79.

48. U.S. CONST. amend. V.

49. The *Miranda* opinion never suggested that exclusion was anything but a part of the fifth amendment privilege. The entire structure of the opinion and several of its specific observations confirm the view that the exclusion of statements secured without compliance with the *Miranda* scheme was thought necessary to prevent an actual courtroom violation of the defendant's fifth amendment right. *See, e.g., Miranda*, 384 U.S. at 457-58 (current custodial interrogation practices are "at odds with" the "cherished principle[] . . . that the individual may not be compelled to incriminate himself," and unless "adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice"); *id.* at 466 (suggesting that fifth amendment governance of pretrial settings and *Miranda* protections are necessary to prevent undermining of the trial guarantee against compulsory

The Court's attitudes toward the *Miranda* scheme and *Miranda*-based exclusion have changed considerably since 1966.[50] First, the Court has diminished the stature of all *Miranda* requirements by emphasizing that they are "procedural safeguards," "prophylactic standards," and "so-called rights,"[51] not rights in and of themselves.[52] In addition, the Court has determined that *Miranda*-based exclusion serves primarily deterrent goals. Its objective is to encourage compliance with *Miranda* constraints.[53] Despite the Court's continuing endorsement of the original "presumption of compulsion,"[54] its opinions paint an unmistakeable picture: an accused has no constitutional right to the suppression of evidence secured in violation of *Miranda*.[55] Suppression of the first verbal fruits—the immediate products of violation—is still required, but only to ensure that some sanction will result from a *Miranda* violation, *not* to enforce an individual defendant's fifth amendment entitlement.[56] *Miranda* suppression is meant to encourage future abidance by rules promulgated to prevent compelled

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self-incrimination); *id.* at 476 (*Miranda* warnings and waiver requirement are "prerequisites to the admissibility of any statement made by a defendant," and no distinction between degrees of incrimination can be made *because* the "privilege . . . protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination"); *id.* at 478 (*Miranda* decision does not affect the admissibility of "freely and voluntarily" given or "[v]olunteered statements" because the fifth amendment does not bar use of such statements); *id.* at 479 (responding to government argument that societal need for interrogation "outweighs the privilege" by suggesting that the Constitution struck the balance between society and the individual in the fifth amendment privilege which "cannot be abridged"); *id.* at 490-91 (rejecting the suggestion that the Court should await legislative action regarding custodial interrogation with the observations that courts are entrusted with enforcing "constitutional rights," and that "[w]here rights secured by the Constitution are involved, . . . rule making or legislation [cannot] . . . abrogate them").

50. The development of the Court's thinking in the *Miranda* exclusion area has paralleled the development of its thinking in the fourth amendment area. In both, strong initial indications that exclusion was a right have given way to overriding emphases of purely deterrent theories.

51. *See* Oregon v. Elstad, 470 U.S. 298, 309 (1985) (referring to "errors made . . . in administering the prophylactic *Miranda* procedures"); Rhode Island v. Innis, 446 U.S. 291, 297 (1980) (*Miranda* found certain "procedural safeguards" necessary to protect the fifth amendment privilege); *id.* at 294 (the officer advised defendant of his "so-called" *Miranda* rights); Michigan v. Tucker, 417 U.S. 433, 446 (1974) (police conduct departed from the "prophylactic standards" of *Miranda*).

52. *See Elstad*, 470 U.S. at 305 (*Miranda* Court recognized that its prescriptions were not themselves constitutional rights); New York v. Quarles, 467 U.S. 649, 654 (1984) (same); *Tucker*, 417 U.S. at 444 (same).

53. *See Tucker*, 417 U.S. at 447 ("By refusing to admit evidence gained as a result of [a *Miranda* violation], the [c]ourts hope to instill . . . a greater degree of care towards the rights of the accused" in officers conducting custodial interrogations); *id.* at 448-49 (exclusion of third party's statements will not significantly augment the "deterrent effect" of excluding defendant's own statements).

54. *See, e.g., Elstad*, 470 U.S. at 307 ("failure to administer the Miranda warnings creates a presumption of compulsion" that is "irrebutable for purposes of the prosecution's case in chief"); *id.* at 317 ("Court has carefully adhered to th[e] principle" that "answers received" from custodial interrogation without *Miranda* compliance must "be presumed compelled").

55. *See Elstad*, 470 U.S. at 307 ("*Miranda's* preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm"); *Quarles*, 467 U.S. at 658 n.7 ("absent actual coercion by the officer there is *no constitutional imperative* requiring the exclusion of evidence that results from" unwarned custodial interrogation) (emphasis added).

56. The Court's continuing designation of the first verbal fruits as presumptively compelled is its way of announcing that ordinarily they may not be used at trial. *See Elstad*, 470 U.S. at 307 (as a result of the failure to comply with *Miranda* a "presumption of compulsion" arises, and "unwarned statements that are otherwise voluntary . . . must be excluded from evidence . . . ."). By suppressing the immediate products, the Court provides a certain encouragement for *Miranda* compliance. Without such guaranteed consequences, the incentives for adherence to the *Miranda* scheme would be weak, and an aging *Miranda* could become truly toothless.

self-incrimination. In sum, deterrence of future conduct has come to rule the *Miranda* roost.[57]

The fifth amendment due process clause also yields exclusionary consequences. Though less explicitly explained than the logic of fourth amendment and *Miranda* suppression, the logic of due process suppression is apparent.[58] Since 1936 involuntary or coerced confessions have been constitutionally barred from criminal trials.[59] From *Brown v. Mississippi*[60] to *Colorado v. Connelly*,[61] the Court has held that the guarantee of due process prohibits state and federal authorities from fueling criminal processes with admissions coerced by physical or psychological means.[62]

One undoubted benefit of suppressing involuntary statements is that it creates a strong disincentive for coercive tactics. Exclusion protects the safety and dignity—the life and liberty—of future suspects by its clear, and constitutionally desirable, deterrent message.[63] The primary reason for excluding coerced admissions, however, is that their use against defendants at trial is intrinsically

57. The modern *Miranda* doctrine exclusionary rule opinions bear a resemblance to their fourth amendment cousins. The essentially deterrent focus has yielded decisions that reflect cost-benefit balancing of the gains in deterrent force against the costs of lost evidence and convictions. *See, e.g.*, Michigan v. Tucker, 417 U.S. 433, 448, 450-51 (1974) (relying on lack of significant augmentation of deterrence from exclusion of testimony of witness discovered as a result of suspect's unwarned statements, and "balancing the interests" in "making available to the trier of fact all concededly relevant and trustworthy evidence" and " 'in the effective prosecution of criminals' " against "the need to provide an effective sanction to a constitutional right"); Harris v. New York, 401 U.S. 222, 225 (1971) ("Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief.").

58. Although majority reasoning is clear, the Court has divided over the legitimate constitutional bases of fourth amendment and *Miranda* exclusion. *See, e.g.*, Oregon v. Elstad, 470 U.S. 298, 308 (1985) (*Miranda* suppression is deterrent device); *id.* at 354 (Brennan, J., dissenting) (*Miranda* suppression is part of fifth amendment entitlement); *Leon*, 468 U.S. at 906 (fourth amendment exclusion is solely a deterrent safeguard); *id.* at 938 (Brennan, J., dissenting) (exclusion is part of fourth amendment right). In contrast, the less thoroughly explained coerced confession doctrine has not split the Court.

59. Prior to 1936 a nonconstitutional rule of evidence prohibited coerced confessions. The rationale for the evidentiary bar was the untrustworthiness of such admissions. *See* O. STEPHENS, THE SUPREME COURT AND CONFESSIONS OF GUILT 20 (1973) (" '[A] confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected.' " (quoting King v. Warickshall, 1 Leach 263, 263-64, 168 Eng. Rep. 234, 235 (K.B. 1783))).

60. 297 U.S. 276 (1936).

61. 479 U.S. 157 (1986). Actually, *Brown*, *Connelly*, and the state cases cited below are based upon the fourteenth amendment due process clause. In identical terms, the fifth and fourteenth amendments provide identical protection against coerced confessions to federal and state defendants, respectively.

62. *See, e.g.*, Mincey v. Arizona, 437 U.S. 385 (1978) (reversing conviction where statements were coerced from suspect in hospital); Beecher v. Alabama, 389 U.S. 35 (1967) (statement obtained under gunpoint); Reck v. Pate, 367 U.S. 433 (1961) (statement obtained after four days of interrogation); Blackburn v. Alabama, 361 U.S. 199 (1960) (statement obtained after eight hours of interrogation); Spano v. New York, 360 U.S. 315 (1959) (same; defendant requested counsel repeatedly); Ashcraft v. Tennessee, 322 U.S. 143 (1944) (statement obtained after thirty-six hours of interrogation); *see also* O. STEPHENS, *supra* note 59, at 31-62 (discussing and reviewing the Court's development of the coerced confession-"fair trial" doctrine during the 1930s and 1940s).

63. *Cf. Blackburn*, 361 U.S. at 207 (among the values at stake in claims involving coerced confessions is "preservation of the individual's freedom of will").

antithetical to the "fundamental fairness" promise of due process.[64] Coerced confessions generate unfairness in two basic senses. They threaten to produce unreliable outcomes and thus the conviction of innocents.[65] Moreover, they result from methods that civilized society abhors: inquisitorial techniques that exploit the weak and threaten the dignity and autonomy of the individual.[66] When criminal processes rely on the products of such "unfair play" by law enforcement, the resulting convictions—no matter how "reliable"—are infected with unfairness. They are inconsistent with a system devoted to "due" process.[67]

The rationale for due process suppression is critically different from the deterrent premise of fourth amendment and *Miranda* exclusion. The due process provisions confer a constitutional entitlement to freedom from unfair judicial procedures.[68] The exclusion of involuntary statements cannot be a mere future-oriented deterrent measure, for it is an inherent, inseparable element of fifth and fourteenth amendment rights.[69] The regulatory purposes of the fourth

64. *See Mincey*, 437 U.S. at 398 ("any criminal trial use against a defendant of his *involuntary* statement is a denial of due process of law . . . .") (emphasis by the Court); *Blackburn*, 361 U.S. at 211 ("the use of this evidence to convict . . . transgressed the imperatives of fundamental justice . . . ."); *id.* at 206 ("the Fourteenth Amendment forbids 'fundamental unfairness in the use of evidence, whether true or false.' " (quoting Lisenba v. California, 314 U.S. 219, 236 (1941))); *Spano*, 360 U.S. at 320 ("use of the confession obtained here [is] inconsistent with the Fourteenth Amendment under traditional principles.").

65. *See* Reck v. Pate, 367 U.S. 433, 444 (1961) (coercive conditions made resistance seem useless "whether [the suspect] was guilty or not," and therefore his confession had little "independent significance"); *Blackburn*, 361 U.S. at 207 (convicting defendant affronted the "most basic sense of justice" due to the "unreliability of the confession"); *Spano*, 360 U.S. at 320 ("The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness"); Stone v. Powell, 428 U.S. 465, 496-97 (1976) (Burger, C.J., dissenting) (coerced statements are excluded because they are "inherently dubious" and "lack . . . reliability"); *see also* Colorado v. Connelly, 479 U.S. 157, 182 (1986) (Brennan, J., dissenting) ("No other class of evidence is so profoundly prejudicial" as a defendant's confession.).

66. *See Blackburn*, 361 U.S. at 207 ("As important as it is that persons who have committed crimes be convicted, there are considerations which transcend the question of guilt or innocence. Thus, in cases involving involuntary confessions, this Court enforces the strongly felt attitude of our society that important human values are sacrificed" when the government coerces a confession to secure a conviction.); *Spano*, 360 U.S. at 320.

67. *See Spano*, 360 U.S. at 320-21.

> [W]e find use of the confession obtained here inconsistent with the Fourteenth Amendment under traditional principles.
>
> The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered [by] illegal methods used to convict those thought to be criminals as from the actual criminals themselves.

Id.

68. *See* Mapp v. Ohio, 367 U.S. 643, 685 (1961) (Harlan, J., dissenting) (observing that the due process clause exclusion of coerced confessions reflects a constitutional "*procedural right*").

69. The right not to be deprived of life or liberty without due process of law would seem to include a promise that the government will not subject an individual to coercive out-of-court techniques. *See Blackburn*, 361 U.S. at 206-07 (observing that "important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will[,]" and referring to one of those values as "the preservation of the individual's freedom of will"). If so, an additional reason for due process exclusion would be to discourage future transgressions of that promise. Moreover, whether or not there is an out-of-court deprivation of the right, such deterrence might be desirable to cut down on the risks that coercion

amendment and *Miranda* exclusionary rules have enabled the Court to balance costs against benefits[70] and to define exceptions that often permit the use of improperly obtained information. The Court's due process opinions contain no similar deterrent reliance or cost-benefit balancing, and no exceptions to the basic command of exclusion. Instead, the Court's due process opinions have consistently proscribed *all use* of truly coerced statements.[71] The exclusion of coerced confessions is a personal right, for the use of involuntary statements at trial contravenes the promise of fundamentally fair procedure that is the essence of due process.[72] The Constitution can tolerate no less than suppression.

In sum, the bar to use of coerced confessions, unlike fourth amendment or *Miranda* suppression, is not attributable to a judicially created *exclusionary rule*, but is based on a personal, constitutional *exclusionary right*. This significant distinction between an individual right to suppression and a general, systemic exclusionary sanction is a crucial predicate for discussion of the character of *Massiah*-based exclusion.[73]

B. *Sixth Amendment Exclusion: The Court's View*

The rationale for sixth amendment suppression is not at all clear. The Court has failed to rationalize *Massiah*-based exclusion with clarity or consistency,[74] proffering deficient and potentially contradictory explanations.[75] Ostensibly, only one of the Court's *Massiah* decisions is an "exclusionary rule

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will be used, but not detected at trial. The textual discussion is not meant to deny that deterrence is an objective, but only to deny that it is the sole or primary objective of due process exclusion.

70. *See* Stone v. Powell, 428 U.S. 465, 488 (1976) (noting that exclusionary rule policies are not absolute, but must be evaluated in light of competing policies, and discussing the balancing process at work in the Court's exclusionary rule cases); *see also* Amsterdam, *supra* note 37, at 389 (noting that application of exclusionary rule reaches a point of "diminishing returns").

71. *See* Mincey v. Arizona, 437 U.S. 385, 398 (1978) ("*any* criminal trial use" of a coerced confession is a denial of due process) (emphasis in original); *see also* New Jersey v. Portash, 440 U.S. 450, 459 (1979) ("Balancing . . . is impermissible" when the question is the admission of compelled statements because, like the due process clause, the privilege against self-incrimination prohibits any testimonial use of compelled statements).

72. As noted earlier, although deterrence of out-of-court coercion may also be an ancillary goal, due process exclusion is primarily a *right*, not a device to prevent future constitutional violations that *only* occur in out-of-court contexts.

73. Members of the Court have found comparison and contrast of fourth, fifth, and sixth amendment exclusion to be analytically useful. *See, e.g.*, Brewer v. Williams, 430 U.S. 387, 425 (1977) (Burger, C.J., dissenting); Massiah v. United States, 377 U.S. 201, 208-10 (1964) (White, J., dissenting); Mapp v. Ohio, 367 U.S. 643, 682 (1961) (Harlan, J., dissenting).

74. *See* Comment, *Application of the Impeachment Exception to the Sixth Amendment Exclusionary Rule: Seeking a Resolution Based on the Substance of the Right to Counsel*, 50 ALB. L. REV. 343, 376 n.241 (1986) (Court unthinkingly expanded exclusionary rule under the fourth amendment to other constitutional rights without providing "a clear rationale for doing so"). The continuing failure to provide a thorough and defensible constitutional explanation of the *Massiah* doctrine has left its right to counsel vulnerable to attacks by opponents. *See* Tomkovicz, *supra* note 8, at 22-30 (noting the lack of "an in-depth constitutional justification for the *Massiah* right" and describing the views of opponents of the *Massiah* right). If exclusion is a part of the sixth amendment right then the Court's analytical deficiencies regarding exclusion are really a part of its larger failure to rationalize the *Massiah right* to counsel.

75. The Justices may well be uncertain, even confused, about the true character of sixth amendment exclusion.

opinion."[76] Put otherwise, in only one case has the Court's decision turned on whether an acknowledged transgression of sixth amendment standards should breed exclusionary consequences.

The Court's *Massiah* jurisprudence, however, is not lacking in references to the question of exclusion. Exclusion was the focus of the Court's first announcement of a right to counsel against pretrial government elicitation in *Massiah*. Justice Stewart's brief majority opinion did suggest that post-indictment, pretrial "interrogation," whether secret or overt, could itself violate the accused's right to counsel.[77] His clearly worded bottom line, however, was that Massiah "was denied the basic protections of [the sixth amendment right to counsel] *when there was used against him at his trial* evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel."[78] In fact, the Court did "not question that . . . it was entirely proper to continue an investigation of the suspected criminal activities of the defendant" after indictment, and reiterated that it was only holding "that the defendant's own incriminating statements . . . could not constitutionally be used . . . as evidence against *him* at his trial."[79]

These explicit and unambiguous conclusions indicate that the *Massiah* Court believed that a sixth amendment violation occurred at the time of, and only at the time of, admission at trial of the fruits of an uncounseled pretrial encounter. The original *Massiah* majority apparently viewed sixth amendment exclusion as a personal right, a necessary part of the promise of counsel, and not as a preventive safeguard against future pretrial counsel deprivations.[80]

From the start, dissenting Justices have objected to the exclusion of evidence in *Massiah* cases.[81] They have opposed a right to exclusion and have maintained that the only valid exclusionary reasoning, deterrence-oriented cost-benefit balancing, militates against suppression in *Massiah* cases.[82] Nonetheless, majority opinions have seemed to adhere to the original *Massiah* view that the use of disclosures in court threatens sixth amendment values and, therefore, that

76. *See* Nix v. Williams, 467 U.S. 431, 446-47 (1984). In *Nix*, the accused directed the police to the location of the body of a homicide victim. At the time, the accused did not have the assistance of counsel and had not validly waived his right to counsel. *Id.* There was no question that the actual discovery of the body was the result of a *Massiah* violation. Nonetheless, because the victim's body "would inevitably have been discovered" by a lawful police search that was underway at the time the accused led the officers to the body, the Court concluded that the evidence derived from it did not have to be excluded at trial.

77. *See* Massiah v. United States, 377 U.S. 201, 204 (1964).

78. *Id.* at 206 (emphasis added).

79. *Id.* at 207.

80. *See* Wasserstrom & Mertens, *supra* note 9, at 175 (*Massiah* itself strongly suggested that the sixth amendment violation occurs in court, not out of court).

81. *See Massiah*, 377 U.S. at 211 (White, J., dissenting) ("Applying the new exclusionary rule is peculiarly inappropriate in this case.").

82. *See* Maine v. Moulton, 474 U.S. 159, 191-92 (1985) (Burger, C.J., dissenting); United States v. Henry, 447 U.S. 264, 296 (1980) (Rehnquist, J., dissenting); Brewer v. Williams, 430 U.S. 387, 424-26 (1977) (Burger, C.J., dissenting); *Massiah*, 377 U.S. at 208 (White, J., dissenting). Chief Justice Burger has cast substantial portions of his *Massiah* dissents in exclusionary rule terms. *See, e.g., Moulton*, 474 U.S. at 190-92 (Burger, C.J., dissenting); *Williams*, 430 U.S. at 420-29 (Burger, C.J., dissenting).

exclusion is part of the constitutional right.[83] In general, majority opinions have not framed resolutions of sixth amendment claims in exclusionary rule terms, and the concept of deterrence has been noticeably absent. The one very significant exception is *Nix v. Williams*.[84]

Nix involved evidence derived from police conduct that the Court had previously declared violative of *Massiah* standards.[85] The Court, therefore, was forced to address sixth amendment exclusion directly. The result was an unfortunate blurring of the nature of sixth amendment exclusion. By resorting to deterrent-based, cost-benefit analysis in deciding whether evidence that inevitably would have been discovered should be admissible, the Court contradicted prior suggestions and indicated that *Massiah* suppression, like its fourth amendment and *Miranda* counterparts, is not an individual right, but a general disincentive for uncounseled elicitations.[86] The Court then confused matters by entertaining defendant's contention that sixth amendment exclusion, unlike fourth amendment exclusion, is not a future-oriented deterrent, but a present protection of "the right to a fair trial and the integrity of the factfinding process."[87] It neither endorsed nor rejected a sixth amendment right to exclusion, but simply reasoned that an inevitable discovery exception was wholly consistent with right-based exclusion.[88]

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83. *See Moulton*, 474 U.S. at 161 (phrasing question in case as whether sixth amendment right of defendant was violated by admission at trial of his uncounseled statements); *id.* at 179 (endorsing *Massiah* conclusion that it was proper for government to continue to investigate, but improper to use information gained against the accused at the trial of the charged crime); *see also Williams*, 430 U.S. at 422-23 (Burger, C.J., dissenting) (recognizing that Court majority apparently perceives that the function of exclusion under the sixth amendment is different than its function under the fourth amendment). I say that Court majorities have *seemed* to adhere to the original view because the Court has not been explicit about the reasoning beneath exclusion in its *Massiah* opinions, and because its language has more than once suggested that a constitutional violation occurs at the time of the pretrial elicitation. *See Moulton*, 474 U.S. at 174 (observing that in United States v. Henry, 447 U.S. 264 (1980), the Court held the sixth amendment right to counsel violated by intentional creation of a situation likely to induce incriminating revelations); *id.* at 176 (sixth amendment is violated when the state *obtains incriminating statements* by knowingly circumventing right to counsel); *id* at 177-78 n.13 (Moulton had a *constitutional right not to reveal* information to the state); *id.* at 177 n.14 (sixth amendment protects right not to be confronted and was violated as soon as defendant was engaged in conversation); *id.* at 180 (evidence is inadmissible if the state violated the sixth amendment *in obtaining it*). Still, the majority opinions have never denied that exclusion at trial is a part of the sixth amendment right.

84. 467 U.S. 431 (1984).

85. *See* Brewer v. Williams, 430 U.S. 387, 400-01, 405 (1977) (holding that detective had deliberately elicited admissions absent counsel and that a knowing and voluntary waiver of the sixth amendment right had not been established).

86. *See Nix*, 467 U.S. at 442-43 (core rationale consistently advanced by Court for drastic and societally expensive extensions of exclusionary rule to fruits of violations has been deterrence); *see also* Wasserstrom & Mertens, *supra* note 9, at 179 (*Nix* Court "deprecat[ed] the *Massiah* rule by relegating it to the same low level that *Mapp* and *Weeks* presently occupy in the Court's estimation"). Oddly enough, the strongly pro-*Massiah* majority opinion in *Moulton*, by repeatedly suggesting that the Constitution is offended by the uncounseled pretrial elicitations, furnishes support for the *Nix* conclusion that exclusion is necessary to deter future sixth amendment transgressions. *See Moulton*, 474 U.S. at 174, 176, 177 n.13, 177-78 n.14, 180.

87. *See Nix*, 467 U.S. at 446.

88. *See id.* The Court, which had already endorsed a deterrence rationale, thereby rejecting the claim that deterrence is *not* a sixth amendment goal, seemed to be assuming, *arguendo*, that sixth amendment exclusion was a matter of personal right. It most certainly did not validate the position that exclusion is a right—a position that had not been questioned by a majority since the *Massiah* Court first espoused it. *See* Wasserstrom & Mertens, *supra* note 9, at 177 n.514 (Court's brief atten-

In *Nix* the Court wasted an opportunity to fix firmly and clearly the constitutional rationale for *Massiah* suppression. It could have established a solid foundation for resolving several unaddressed exclusionary issues. Still, the *Nix* Court did bring the central issue into sharp focus: Is the exclusion of evidence acquired in violation of *Massiah* doctrine a personal sixth amendment right of the individual defendant who is denied counsel in the pretrial encounter or a deterrent sanction intended to promote general, systemic compliance with *Massiah* dictates, and to prevent future uncounseled pretrial encounters?[89]

C. *Sixth Amendment Exclusion: The Constitution's View*

There are three possible conceptualizations of sixth amendment exclusion. It may be solely a deterrent measure intended to protect out-of-court rights or to promote compliance with out-of-court regulations.[90] It may simply be part and parcel of the in-court right to the assistance of counsel. Or it may be a combined deterrent safeguard and right.[91] A choice among these alternatives requires a return to the premises of the adversary system underlying the pretrial *Massiah* right.[92]

If the earlier description of the pretrial right to counsel defined by *Massiah* doctrine is correct, it is neither more nor less than a necessary temporal extension of the adversary system guarantee of trial counsel.[93] Trial counsel is a multi-purpose equalizer who zealously conducts the affirmative and defensive maneuvers best designed to assist the accused's cause. Counsel is a legal and pragmatic sword and shield in the battle against all state endeavors to convict her client.

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tion to the right-based argument in *Nix* was only a nod in that direction that "failed to deter [it], in the rest of its opinion, from treating the *Massiah* exclusionary rule as a carbon copy of the [fourth amendment] rule.").

The Court found the inevitable discovery exception consistent with right-based exclusion because in such cases the evidence introduced at trial is thought to be no different than the evidence that would have been introduced without official impropriety. Since the trial is unaffected by the misconduct, there can be no damage to fairness, factfinding, or any other aspect of the trial that counsel is supposed to monitor. *See Nix*, 467 U.S. at 446-47.

89. Or is it, like due process exclusion of coerced confessions, a combination of the two? Unlike another analyst of *Massiah* exclusion, *see* Comment, *supra* note 74, at 376 n.241 (if purpose of sixth amendment exclusion is to ensure a fair trial, it conflicts with the deterrent rationale), I do not believe that the two rationales are incompatible.

90. In that case it would be analogous to fourth amendment or *Miranda* exclusion.

91. It would then resemble due process suppression of coerced confessions. I have previously proffered such a dual purpose conception of due process suppression. *See supra* text accompanying notes 69-72.

It could also be viewed as a compensatory method of paying a defendant back for an out-of-court denial of counsel. But that view seems implausible. There is no reason to think that the Constitution contemplates that an accused who has suffered an out-of-court wrong at the hands of the government should be compensated by an increased chance for acquittal. For a similar rejection of a compensatory rationale in the fourth amendment area, see *supra* note 37 and accompanying text. Moreover, the conclusion below that there is no out-of-court sixth amendment injury further undermines the compensatory argument. *See infra* notes 116-17 and accompanying text.

92. *See supra* notes 16-24 and accompanying text.

93. Again, the discussion that follows is a summary of a lengthier analysis presented in an earlier treatment of the *Massiah* right's character. *See* Tomkovicz, *supra* note 8, at 39-62. Once again, specific citations to that piece will not be provided for each point reiterated here.

If the prosecution sought to speak with the accused at trial, with or without the presence of the jury,[94] the accused would undoubtedly be entitled to his lawyer's input concerning the advisability of disclosures. The state may not approach the defendant in this manner unless it affords him the opportunity for counsel's assistance. It may not deny, restrict, or avoid counsel's protection. Neither may the state conceal the adversarial nature of an encounter by masking its adversarial identity behind the visage of a private party, thereby depriving the defendant of the opportunity for counsel's aid. Rather, the state is constitutionally bound to conduct open dealings with an equalized adversary.

According to *Massiah* doctrine, if the right to courtroom equalization is to be preserved, the state should not have unlimited pretrial opportunities to confront its unequal adversary in quest of incriminating evidence. Sixth amendment substance could be destroyed if conduct barred in the courtroom—attempts to elicit inculpation from an uncounseled adversary—could be engaged in before trial, and the fruits could be carried into the courtroom and served to the trier. *Massiah* prevents the circumvention of the trial guarantee that would be possible if the government could "temporally split" its conduct and thereby accomplish its overall objective: to induce the uncounseled accused to reveal his guilt to the trier. It prevents the state from doing what the sixth amendment forbids, from harming constitutionally sheltered interests by expediently restructuring its course of conduct.

Appropriate resolution of exclusionary issues requires inquiry into what the sixth amendment forbids and what interests trial counsel's equalizing assistance is meant to protect. If my view of sixth amendment values is correct, then counsel protects against the adversarial contest advantages—the substantial boosts toward victory—that the state would secure by dealing with an uncounseled, unadvised, and unwise opponent.[95] By granting an equalizer we declare our commitment to fair play in a contest between roughly balanced opposing sides. The value of adversarial fair play for the defendant and for society, however, is not simply the intrinsic satisfaction derived from adherence to our system's rules and procedures. Counsel's worth lies not simply in her *delivery* of advice or her comforting *presence*. Rather, equalizing counsel bestows real, subtantive benefits and tangible, measurable gains for the accused's defense against a criminal charge. When counsel succeeds with an evidentiary objection, the odds against conviction improve. When counsel prevails on a motion to suppress illegally seized evidence, the risk of conviction diminishes. When counsel advises the accused not to accede to the prosecution's request to reveal incriminating knowledge to the trier of fact, the case for conviction suffers. Clearly, preventing damage to the chances for acquittal is an important and valuable benefit of the fair play counsel ensures.[96] Counsel's advice not to cooperate with the state by di-

94. The same observations and conclusions apply to bench trials in which judges are the triers of fact.

95. *See* Wasserstrom & Mertens, *supra* note 9, at 177 (describing the harm against which counsel protects a defendant as a "litigative advantage" for the prosecution).

96. Those chances for acquittal begin with and are reflected in our presumption of innocence and the imposition of the burden of proof beyond a reasonable doubt upon the government.

vulging inculpatory information in court guarantees that the government will shoulder the entire burden of proving guilt without assistance from its adversary.[97]

The foregoing analysis of trial counsel's assistance suggests that *Massiah* doctrine exclusion is, as the Court originally implied,[98] a constitutional right of the uncounseled defendant who divulges incriminating information before trial. *Massiah* extends the trial right into pretrial adversarial settings to safeguard the most valuable benefit of trial counsel: the prevention of evidentiary damage to the defense. To preserve the primary value of the trial guarantee against pretrial erosion—*Massiah's* mission—the *Massiah* entitlement must include not only the "process" of pretrial assistance, but also the substantive benefits of counsel's aid.[99] The harms that counsel is empowered and commissioned to prevent occur when the trier of fact receives and relies upon the incriminating pretrial disclosures.[100] Consequently, when admissions elicited in violation of *Massiah* are introduced at trial or otherwise used to the defendant's disadvantage in the process of determining guilt or innocence, the defendant suffers an actual deprivation of valuable sixth amendment benefits.[101]

Arguments for a strictly deterrent rationale for sixth amendment exclusion rely on faulty premises. They presume that all rules of exclusion based on pretrial official misconduct share the same nature. They assume that because the fourth amendment and *Miranda* rules rest solely on deterrent policies,[102] sixth

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97. *Cf.* Miranda v. Arizona, 384 U.S. 436, 460 (1966) (goals of privilege against self-incrimination are "[t]o maintain a 'fair state-individual balance,' [and] to require the government 'to shoulder the entire load' " (quoting 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 317 (McNaughton rev. ed. 1961))).

98. *See Massiah*, 377 U.S. at 204, 206-07.

99. The former Chief Justice was simply wrong in concluding that *Massiah* exclusion costs society much while providing "precious little in the way of offsetting 'benefits.' " *See* Maine v. Moulton, 474 U.S. 159, 191 (1985) (Burger, C.J., dissenting). The benefits are those at the core of our right to counsel.

100. *See* Wasserstrom & Mertens, *supra* note 9, at 176 (*Massiah* is "directly concerned with the balance of litigative advantages between the prosecution and the defense at trial."). It has been suggested that we must be cautious about applying "the drastic bar of exclusion" to situations that already involve extension of the trial right to counsel into pretrial realms. *See* Brewer v. Williams, 430 U.S. 387, 426 (1977) (Burger, C.J., dissenting). I disagree. If we have found pretrial extension a necessity to preserve the trial right, it makes little sense to acknowledge an entitlement to assistance, but to allow frequent deprivation of the real benefits of that assistance. Such would be the consequence of a "cautious" approach to the exclusion of evidence secured by taking advantage of uncounseled defendants.

101. *See* Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 889-90 (1981) (the admission of evidence obtained in violation of *Massiah* at trial constitutes a denial of the constitutional right to counsel); Wasserstrom & Mertens, *supra* note 9, at 175 (admission "may well itself violate the defendant's constitutional right" to counsel); Comment, *supra* note 74, at 384-88 (sixth amendment right and remedy of exclusion cannot be separated as in fourth amendment context; violation of right and remedy of exclusion are "intertwined" and "nearly inseparable"; right to fair trial is damaged only when evidence secured in uncounseled encounter is admitted at trial; admission of evidence obtained in violation of *Massiah* effects a "new and separate" constitutional wrong or deprivation).

The point made in the text mirrors the argument forcefully made by the defendant in *Nix*, 467 U.S. at 441, 446 (defendant maintains that exclusion is part of his right to a fair trial guaranteed by sixth amendment).

102. My descriptions of the Court's rationalizations of fourth amendment and *Miranda* exclusion are not meant to indicate agreement with the Court's views. I am not at all sure that those two

amendment exclusion must be similarly grounded.[103] This assumption overlooks the acknowledged distinction between the fourth amendment and *Miranda rules* and the due process *right* to exclude coerced confessions.[104] More to the point, it ignores critical differences in the underlying rights.[105]

The fourth amendment is not tied to the operation of the adversary system.[106] Moreover, pretrial fourth amendment protection is not the result of temporal extension of a trial process right. Rather, the amendment protects privacy, liberty, and property at all times and in all settings.[107] Harm to fourth amendment interests occurs, and is fully accomplished, when an illegal search or

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exclusionary rules ought to be viewed as deterrents only. For purposes of the instant analysis of sixth amendment exclusion, however, I accept the current fourth amendment and *Miranda* explanations, and contrast *Massiah*-based exclusion with those two grounds for exclusion.

103. *See* Maine v. Moulton, 474 U.S. 159, 190-92 (1985) (Burger, C.J., dissenting) (contending, based on fourth amendment precedent and deterrent, cost-benefit analysis borrowed from that realm, that sixth amendment exclusion "makes little sense"); Brewer v. Williams, 430 U.S. 387, 415-26 (1977) (Burger, C.J., dissenting) (lengthy discussion of inappropriateness of application of exclusionary sanction in sixth amendment context that is grounded throughout upon deterrence oriented, cost-benefit reasoning and analogies to fourth amendment and *Miranda* exclusionary analysis); *id.* at 437-38 (White, J., dissenting) (explaining majority outcome as based on deterrence and referring to the "prophylactic rule" of *Massiah*); *Massiah*, 377 U.S. at 208-09, 213 (White, J., dissenting) (analogizing sixth amendment exclusion to fourth amendment exclusion, and complaining about the Court's "newly fashioned exclusionary principle" and the "prophylactic effect of another exclusionary rule").

Proponents of a deterrence basis for *Massiah* exclusion have suggested that there may well be more than one type of sixth amendment violation, and that the pure deterrence rationale may only be applicable to exclusion based on one of those types. *See Moulton*, 474 U.S. at 192 (Burger, C.J., dissenting) (sixth amendment claims in this case seem to " 'closely parallel claims under the Fourth Amendment' " (quoting Brewer v. Williams, 430 U.S. 387, 414 (1977) (Powell, J., concurring))); *Williams*, 430 U.S. at 414 (Powell, J., concurring) (suggesting that some sixth amendment claims resemble fourth amendment exclusionary claims and some do not). Apparently, they would entertain the possibility of a constitutional right to exclusion for those sixth amendment claims that are unlike fourth amendment claims. That right to exclusion would seem to arise only in the exceedingly rare case in which a denial of counsel leads to coerced or unreliable disclosures.

In my view, all sixth amendment deprivations are materially alike for purposes of exclusion. All involve threats to the fairness of a criminal trial whether or not coercion or evidentiary unreliability has resulted from the denial of counsel. Those who would distinguish between different types of sixth amendment deprivations view adversary system "fairness" and the interests and values sheltered by the right to counsel too narrowly. The right to counsel is not simply another safeguard against coercion or a mere assurance of accuracy in the determination of guilt or innocence. *See* Tomkovicz, *supra* note 8, at 49-50. Sixth amendment fairness is jeopardized whenever products of an imbalanced adversarial pretrial encounter are employed at trial— even if those products are trustworthy and have been acquired without coercion. *See* Schulhofer, *supra* note 101, at 889-90 (reliability is beside the point since use of *Massiah*-violative disclosures "taints the judicial proceedings in a fundamental way").

104. *See supra* text accompanying notes 68-73.

105. *See* Comment, *supra* note 74, at 378 (suggesting that the Court's extension of fourth amendment and fifth amendment exclusionary doctrine into the sixth amendment realm has not taken into account differences between the rights); *cf. Nix*, 467 U.S. at 455-56 (Stevens, J., concurring) (stating that the Court's reliance, in a *Massiah* context, upon the "now-familiar plaint that '[t]he criminal is to go free because the constable has blundered,' is entirely beside the point," and that the majority's "[g]eneralizations about the exclusionary rule . . . simply do not address the primary question in the present sixth amendment case before it" (citations omitted)).

106. *See* Kimmelman v. Morrison, 477 U.S. 365, 374 (1986) ("Although it is frequently invoked in criminal trials, the Fourth Amendment is not a trial right; the protection it affords against governmental intrusion into one's home and affairs pertains to all citizens."); United States v. Praetorius, 457 F. Supp. 329, 334 (E.D.N.Y. 1978) ("The Fourth Amendment does not speak of proceedings in court and is not a protection merely to those accused of crime. It protects the interest of every person in their [sic] privacy.").

107. Of course, the fourth amendment's coverage is limited by the terms and intent of the right it

seizure takes place.[108] The fourth amendment does not include an entitlement to evidentiary exclusion because none of its core interests—privacy, liberty, and property—is damaged at the time illegally derived evidence is used in court.[109]

Similarly, if *Miranda's* requirements really are mere "prophylactic rules" rather than actual extensions of the fifth amendment privilege, then no constitutional harm results from the use of *Miranda*-violative admissions at trial. The fifth amendment does grant a process right not to be forced to *incriminate* oneself and the *Miranda* scheme is a pretrial outgrowth and safeguard of that right. However, because the products of *Miranda* violations are not thought to be "actually" compelled, but are only "presumptively" compelled, the accused's interest in preventing conviction by his own compelled testimony is not damaged by the use of those products.[110]

Massiah, on the other hand, defines a pretrial extension of the adversary system right to trial counsel. It is not a mere regulatory scheme designed to avoid the *risks* of deprivation of the trial right,[111] but a temporal extension of sixth amendment control—an extension that is necessary to prevent *actual* deprivations of the trial right. The interests it protects and the harms it prevents are substantive and procedural trial interests and harms. While uncounseled out-of-court elicitation is essential for a sixth amendment *Massiah* violation, the violation is completed, and the deprivation of counsel's benefits is fully realized, when uncounseled pretrial admissions are introduced at trial.[112] To prevent the violation of a defendant's right to counsel, those admissions must be excluded. Exclusion, therefore, is an integral part of the sixth amendment entitlement.[113]

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promises. The point here is that there is no built-in temporal or spatial limitation similar to the sixth amendment's confinement to the adversary process.

108. *See supra* note 40.

109. There are plausible arguments to the contrary. Justice Brennan has contended that exclusion is a necessary part of fourth amendment protection. *See* United States v. Leon, 468 U.S. 897, 933-34 (1984) (Brennan, J., dissenting) (maintaining that the fourth amendment is furthered by the use of evidence at trial, and, therefore, that exclusion is a part of the constitutional right); *see also* Stone v. Powell, 428 U.S. 465, 510 (1976) (Brennan, J., dissenting) (observing that he had previously "rejected . . . the premise that an individual has no constitutional right to have unconstitutionally seized evidence excluded"). Justice Brennan's dissenting view is in accord with the original understanding of fourth amendment exclusion. *See supra* notes 25-28 and accompanying text.

110. *See supra* notes 54-56 and accompanying text.

111. *See* Schulhofer, *supra* note 101, at 889 (*Massiah* exclusion "is not merely a prophylactic device; it is not designed to reduce the *risk* of actual constitutional violations").

112. *But see* Maine v. Moulton, 474 U.S. 159, 191 (1985) (Burger, C.J., dissenting) (sixth amendment wrong was fully accomplished at the time of the elicitation, and exclusion is neither intended nor able to cure the pretrial invasion of rights).

113. *See supra* notes 98-101 and accompanying text.

Proponents of a purely deterrent rationale for *Massiah* exclusion seem to place considerable reliance on the fact that evidence suppressed on sixth amendment grounds, like fourth amendment and *Miranda*-violative evidence, is ordinarily uncoerced, reliable, and probative. *See, e.g.*, Maine v. Moulton, 474 U.S. 159, 186, 191 (1985) (Burger, C.J., dissenting) (chastising the Court for excluding "highly probative and reliable evidence," and suggesting that evidence obtained in *Massiah* contexts is typically reliable and often the most probative evidence); United States v. Henry, 447 U.S. 264, 280 (1980) (Blackmun, J., dissenting) (citing the "high price" of the sixth amendment exclusion of "reliable evidence"); Brewer v. Williams, 430 U.S. 387, 426 (1977) (Burger, C.J., dissenting) (because the disclosures were unquestionably reliable and voluntary, "fairness" does not demand or require their suppression); *id.* at 423 (since risks of "unreliability" and threats to free will or dignity of the individual are not present, suppression is not justified); *Massiah*, 377 U.S. at 208 (White, J., dissenting) (the evidence being suppressed is relevant, reliable, and highly probative, and without it

It is possible that *Massiah* exclusion, like due process exclusion,[114] has two functions: to prevent the present in-court violation of a constitutional right *and* to discourage future out-of-court violations of that right.[115] A deterrent objec-

"the quest for truth may be seriously impeded"); *id.* at 213 (the evidence might be the best possible way of "discharging [the] responsibility for ascertaining the truth").

Apparently, that similarity to the consequences of fourth amendment and *Miranda* suppression leads proponents to conclude that the rationale of most, if not all, sixth amendment suppression should resemble the rationale of those other two varieties of suppression. *See Williams*, 430 U.S. at 423-24 (Burger, C.J., dissenting) (Since we balance costs against benefits in *Miranda* exclusion situations, we should balance in *Massiah* exclusion contexts. In both situations there is no threat of coercion or unreliability). Furthermore, the fact that neither accuracy nor the integrity of the factfinding process would be threatened by the reliable and probative evidence being suppressed in *Massiah* contexts leads proponents to conclude that suppression cannot possibly be a part of a defendant's right to a fair trial. *See Moulton*, 474 U.S. at 191 (Burger, C.J., dissenting) (because of the trustworthy nature of the evidence, its admission will not imperil " 'the fairness of a trial or . . . the integrity of the factfinding process' " (quoting *Williams*, 430 U.S. at 414 (Powell, J., concurring)); *Williams*, 430 U.S. at 437 (White, J., dissenting) (officers did not "jeopardize the fairness of respondent's trial or in any way risk the conviction of an innocent man—the risk against which the Sixth Amendment guarantee of assistance of counsel is designed to protect").

Both of these conclusions are faulty. First, there is no logical reason that the rationale for sixth amendment suppression should be dictated by the alleged similarity of fourth, fifth, and sixth amendment "exclusionary consequences." The "exclusionary consequence" of the right to counsel at trial is often the loss of uncoerced, reliable, probative evidence. That similarity to the consequences of fourth amendment and *Miranda* exclusion, however, does not diminish the stature or content of trial counsel. It should have no greater impact upon the pretrial extension of that same right. As the textual discussion suggests, in deciding whether any variety of exclusion is a present right or a preventive, future-oriented sanction, the determinative factor must be whether the admission of the evidence will damage interests protected by the constitutional provision involved. In the *Massiah* situation, the admission of elicited uncounseled statements does harm to values protected by the sixth amendment trial grant of adversarial equalization.

Second, the right to a fair trial and the right to an accurate determination of guilt or innocence are neither coextensive nor synonymous. *See* Tomkovicz, *supra* note 8, at 39-62. The right to a fair trial encompasses both accuracy *and* the entitlement to fair play according to established rules and procedures. *See* Stone v. Powell, 428 U.S. 465, 523-24 (1976) (Brennan, J., dissenting) (punishment of the guilty is not the highest value in our society; the Constitution's guarantees serve not only the "functional purposes" of ensuring "that the 'guilty' are punished and the 'innocent' freed," they have "independent vitality and value"). Part of the right to a fair trial in our adversary system is an entitlement to an equalizing advocate who advances the defendant's cause and impedes state efforts to convict. *See* Tomkovicz, *supra* note 8, at 40, 49-51. Trial counsel is not restricted to performing functions that prevent coercive treatment or promote truthful outcomes. As defendant's partisan, counsel frequently impedes the search for truth, sometimes by preventing uncoerced, reliable, and probative evidence from reaching the trier. *Id.* at 40-55; *see also Stone*, 428 U.S. at 523 n.16 (Brennan, J., dissenting) ("[E]very constitutional guarantee governing administration of the criminal justice system" can be accused of diverting the attention of the court from the determination of truth and of freeing the guilty.). A right to pretrial counsel designed to preserve the efficacy of the trial guarantee can be expected to have and should have, the same sorts of impacts on the trial process.

The fact that *Massiah* doctrine excludes uncoerced, reliable, and probative evidence should not lead us to conclude that sixth amendment exclusion is merely a remedy, and not a constitutional right. *Cf. Stone*, 428 U.S. at 524 (Brennan, J., dissenting) ("Particular constitutional rights that do not affect the fairness of factfinding procedures cannot for that reason be denied at the trial itself."). If anything, that fact provides assurance that counsel's role is being preserved, that the harms counsel is empowered to shield an accused against are being avoided, and that the interests furthered by a right to counsel are being safeguarded.

114. *See supra* notes 69-72 and accompanying text.

115. The structure and language of Supreme Court opinions can support this dual-natured view of *Massiah* suppression. *See Nix*, 467 U.S. 431, 444-47 (entertaining and responding to both deterrent and fair trial rationales for exclusion); *Moulton*, 474 U.S. at 170-74, 176 (suggesting that pretrial elicitation of incriminating information itself violates the sixth amendment right); *see also* Comment, *supra* note 74, at 384-85 (suggesting that a constitutional violation is effected by the uncounseled pretrial encounter, although it is of no consequence to an accused unless the products are used to his prejudice at trial); *id.* at 385-86 & n.296 (*Massiah* can be interpreted as holding that a sixth amend-

tive, however, presumes the existence of constitutionally injurious out-of-court conduct, and the pretrial activities regulated by *Massiah* doctrine do not effect a complete sixth amendment violation.[116] Uncounseled official elicitation is a part of the governmental action prohibited by adversary system principles, but *only a part*. Without *use* of the uncounseled disclosures in the criminal process, there is no cognizable harm to constitutional interests in adversarial fair play.[117] The accused suffers no real deprivation of the substantive benefits of equalization if his defense is not damaged.[118] Consequently, the suppression of *Massiah*-violative disclosures is not necessary to deter extrajudicial violations of constitutional rights.[119] Exclusion under *Massiah* is a personal right, neither more nor less

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ment violation occurs only when disclosures are admitted at trial, but such an interpretation is neither logical nor accurate; deterrence of improper, unconstitutional conduct is also one of the *Massiah* exclusionary rule's purposes).

116. The Supreme Court's descriptions of the pretrial uncounseled elicitations governed by *Massiah* doctrine as violations of the sixth amendment right to counsel would support a contrary position. *See, e.g.*, Kuhlmann v. Wilson, 477 U.S. 436, 459 (1986) (suggesting that a defendent makes out a "violation" of the right to counsel by showing "that the police and their informant took some action . . . designed deliberately to elicit incriminating remarks"); *Moulton*, 474 U.S. at 176 (noting that "the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present"); *Henry*, 447 U.S. at 274 (Court found Henry's sixth amendment right violated when government "intentionally creat[ed] a situation likely to induce Henry to make incriminating statements without the assistance of counsel"). Still, such statements would seem to be in direct conflict with the Court's acceptance of the legitimacy, indeed the desirability, of continuing investigations of separate crimes even though those investigations may well involve deliberate elicitations concerning charged crimes. *See Moulton*, 474 U.S. at 180 & n.16 (state does not violate a defendant's right to counsel by obtaining incriminating statements pertaining to a separate, uncharged crime and using those statements at the trial of that crime); *Massiah*, 377 U.S. at 207 (noting that "it was entirely proper to continue an investigation of the suspected criminal activities of the defendant . . . even though the defendant had already been indicted"). If the Court really believed that pretrial elicitations were themselves constitutionally injurious, it certainly would not approve of their use to uncover continuing criminality by accused individuals. The most plausible explanation of the Court's apparent self-contradiction is that it has been guilty of imprecise usage in describing pretrial elicitations as deprivations of constitutional rights.

117. *See* Wasserstrom & Mertens, *supra* note 9, at 175 (deliberate elicitation of statements "conceivably violates no rights at all" if subsequent use of those statements is not contemplated).

118. *See* Wasserstrom & Mertens, *supra* note 9, at 177 (if prosecution has secured no "litigative advantage" from its deliberate elicitation, "it is difficult to see how the judicial proceeding has been tainted").

The contrary argument is that there is a "process" right to the assistance of counsel in the pretrial *Massiah* setting. The right to counsel's assistance at trial consists not only of the substantive benefits counsel provides, but also of a "process" component. Part of the enjoyment of the in-court right lies in the receipt of counsel's assistance and the psychological benefits of receiving that assistance. If that "process" component does extend to pretrial settings and is a substantial enough constitutional interest to merit protection, then there would be an out-of-court violation of the sixth amendment at the time of elicitation governed by *Massiah*. The position taken in the text is based on the premise that the sixth amendment "process" entitlement need not be extended outside the courtroom setting. Unlike the substantive benefits of the trial right, it can be confined to the courtroom context without cognizable harm to sixth amendment values.

119. *See* Schulhofer, *supra* note 101, at 889 (*Massiah* exclusionary rule not intended to deter any pretrial behavior whatsoever, but, rather, explicitly permits government efforts to elicit as long as products are not used against defendant at his trial).

The exclusion of evidence is not the only legal option for a person who has suffered a constitutional deprivation. The aggrieved might also seek compensatory damages for the harm to his or her constitutional entitlement. *See, e.g.*, Malley v. Briggs, 475 U.S. 335, 345-46 (1986) (discussing qualified immunity of officer relying upon search warrant in suit for damages for unreasonable search); Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 397 (1971) (holding that claim against federal agent for damages for alleged illegal arrest and search stated "a

than an essential element of the constitutional entitlement to counsel.[120]

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cause of action under the Fourth Amendment"). One consequence of the position that no complete violation of the sixth amendment is accomplished in pretrial *Massiah* contexts is that an accused cannot sue for damages for a deprivation of rights based on an uncounseled deliberate elicitation alone. No compensable constitutional wrong would occur until the state uses disclosures in court.

It is important to determine whether deterrence of uncounseled pretrial elicitations is merely an inevitable *consequence of* right-based sixth amendment exclusion or a secondary *reason for* such exclusion. If the enforcement of present rights is the only rationale for exclusion, then suppression is not called for in any situation where present rights would not be violated by admission. Such is the case, for example, when disclosures elicited from an accused are later used to prove crimes uncharged at the time of the elicitation. *See* Tomkovicz, *supra* note 8, at 83-90. On the other hand, if the prevention of pretrial elicitations is an objective of exclusion, suppression might be justified even in cases where present rights are not offended by admission. For example, in situations where the government seeks to introduce disclosures at the trial of an uncharged crime, a deterrent rationale might well call for suppression in order to remove a substantial incentive for improper and undesirable future elicitations. The costs to law enforcement interests—lost arrests and convictions—would increase from such pursuit of a secondary deterrent rationale.

The point is that there would be significant theoretical, doctrinal, and practical consequences of a determination that sixth amendment exclusion is not only a right, but also a deterrent sanction.

120. Perhaps there are other reasons to seek deterrence. Pretrial acquisition and possession of a defendant's revelations might give the government adversarial advantages other than the obvious gains implicit in evidentiary use of that information and its clear fruits. Those revelations might contribute to the generation of other proof in imperceptible, undiscoverable ways. They might intangibly bolster the prosecution's case for and commitment to conviction. In other words, even if the disclosures themselves are suppressed, the state adversary might still profit from a pretrial encounter with an unprotected adversary. If that is the case, *Massiah*-based exclusion might seek to deter elicitations in order to eliminate the risks of such profit and the resultant harms to adversary system values. Sixth amendment values may not be adequately protected by the exclusion of the uncounseled disclosures and their fruits from trials.

Another reason that deterrence might be desirable is the *appearance* of unfair play engendered by permitting the government to conduct uncounseled elicitations and gain access to its adversary's thoughts. *Massiah*-based suppression might seek to eliminate that appearance by discouraging the uncounseled elicitations that are its source. *Cf.* Wheat v. United States, 108 S. Ct. 1692, 1697 (1988) ("Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them."); Offutt v. United States, 348 U.S. 11, 14 (1954) ("[J]ustice must satisfy the appearance of justice.").

Although such arguments have merit, they are inadequate to support a secondary deterrent rationale for sixth amendment exclusion. The clear message of a deterrent rationale in the *Massiah* realm would be that the state should not deliberately or knowingly elicit disclosures pertinent to a charged offense. Because of the impact of a deterrent message on interests in continuing investigations, its delivery would be illogical unless the constitutional values threatened by *Massiah*-regulated conduct were considered more significant than society's interests in continuing investigations. The determination that we *should seek* to discourage pretrial elicitations by means of *Massiah*-based exclusion would have to be based on the premise that the risks to constitutional values posed by such elicitations outweigh the state investigatory interests promoted by such elicitations. *Cf.* Maine v. Moulton, 474 U.S. 159, 180 (1985) (observing that in cases in which one offense is the subject of a formal charge a sixth amendment restraint upon the government's efforts to obtain incriminating statements pertinent to separate, uncharged offenses "would unnecessarily frustrate the public's interest in the investigation of criminal activities"); *Massiah*, 377 U.S. at 207 (observing that "in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant . . . even though the defendant had already been indicted"). The speculative *risks* to rights and *appearances* of unfairness on which the deterrent arguments described above rest seem too insubstantial to counterbalance the potential concrete harms to society's interests in investigating ongoing and future criminality.

When the admission of evidence involves actual harm to constitutional interests, it is inappropriate to balance societal costs against constitutional gains. We must accept the Framers' balance of interests mandating exclusion. *See Miranda*, 384 U.S. at 479 (the "recurrent argument . . . that society's need for interrogation outweighs the privilege" against compulsory self-incrimination is answered by the constitutional prescription "in the Fifth Amendment that an individual cannot be compelled to be a witness against himself. That right cannot be abridged [in order to further law enforcement ends]."); *see also* United States v. Leon, 468 U.S. 897, 929-30 (1984) (Brennan, J.,

IV. EXCLUSIONARY ISSUES: DOCTRINAL IMPLICATIONS OF A SIXTH AMENDMENT RIGHT TO EXCLUSION

Over the past two decades, the Supreme Court has dramatically qualified the scope of the fourth amendment and *Miranda* exclusionary rules.[121] The cumulative impact of the current limitations on suppression is quite substantial.[122] In the fourth amendment arena, the Court has developed a "standing" restriction,[123] an "independent source" exception,[124] an "attenuation" exception,[125] a limited "good faith" exception,[126] and a strong presumption against exclusion in federal habeas corpus proceedings.[127] In the *Miranda* context, the Court has endorsed a limited "presumptive attenuation" principle, and has hinted that derivative fruits might be immune from exclusion.[128] In both do-

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dissenting) (because fourth amendment exclusion is a constitutional right, balancing of law enforcement costs against deterrent gains is unacceptable). It is perfectly appropriate, however, to consider the law enforcement costs generated by exclusion in cases in which present rights are not harmed and the targets of deterrence are only "risks" of constitutional damage and "appearances" of injustice. In those cases, the undesirable governmental conduct that results from the failure to seek maximum deterrence creates only a possibility of ultimate constitutional damage. *See* New York v. Quarles, 467 U.S. 649, 654, 657 (1984) (endorsing public safety exception to *Miranda* warnings requirement because absence of warnings generates only a risk, and therefore ordinarily a "presumption," of compulsion, but not the "actual" compulsion that would offend fifth amendment principles).

121. For decisions qualifying the fourth amendment exclusionary rule, see, *e.g.*, Massachusetts v. Sheppard, 468 U.S. 981 (1984); United States v. Leon, 468 U.S. 897 (1984); Rawlings v. Kentucky, 448 U.S. 98 (1980); United States v. Salvucci, 448 U.S. 83 (1980); Rakas v. Illinois, 439 U.S. 128 (1978). For decisions restricting the *Miranda* rule of exclusion, see, e.g., Oregon v. Elstad, 470 U.S. 298 (1985); Michigan v. Tucker, 417 U.S. 433 (1974); Harris v. New York, 401 U.S. 222 (1971).

122. When the developments of the last twenty years are added together, then added to previously developed restrictions on the suppression of unconstitutionally obtained evidence, *see, e.g.*, Wong Sun v. United States, 371 U.S. 471 (1963); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), the total diminishment of opportunities for constitutionally based exclusion is substantial.

123. Rawlings v. Kentucky, 448 U.S. 98 (1980); Rakas v. Illinois, 439 U.S. 128 (1978); Alderman v. United States, 394 U.S. 165 (1969).

124. *See* Segura v. United States, 468 U.S. 796 (1984); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

125. *See* United States v. Ceccolini, 435 U.S. 268 (1978); Brown v. Illinois, 422 U.S. 590 (1975); Wong Sun v. United States, 371 U.S. 471 (1963).

126. *See* Massachusetts v. Sheppard, 468 U.S. 981 (1984); United States v. Leon, 468 U.S. 897 (1984).

127. *See* Stone v. Powell, 428 U.S. 465 (1976).

128. *See* Oregon v. Elstad, 470 U.S. 298 (1985). The "presumptive attenuation" language is my characterization of the holding of *Elstad*. I believe it to be an accurate characterization of the Court's conclusion that the mere failure to issue *Miranda* admonitions taints only the statements secured as an immediate result, and, absent actual compulsion or abusive governmental behavior, does not taint or affect the admissibility of any subsequent statement secured following proper *Miranda* compliance. *See id.* at 306 (a "procedural *Miranda* violation differs in significant respects from" a fourth amendment violation, and therefore ought to have narrower exclusionary consequences); *id.* at 313-14 (declaring the "causal connection" between the admission secured in violation of *Miranda* and the "ultimate decision to cooperate" by giving a second statement following *Miranda* compliance "speculative and attenuated at best"). It is true and important that the Court's actual holding in *Elstad* encompasses only second confessions given after officials have satisfied *Miranda*. The *Elstad* majority did not hold that all derivative products of unwarned statements are presumptively attenuated and, therefore, admissible. Still the Court provided sufficient dicta to point toward the latter conclusion, a conclusion that could effectively gut the "fruit of the poisonous tree" doctrine in *Miranda* contexts. *See id.* at 346-47 (Brennan, J., dissenting) (noting that the "Court [did] not limit its analysis to successive confessions, but recurrently refer[red] generally to the 'fruits' of the illegal confession" and that the "potential impact of the Court's reasoning might . . . include

mains, the products of improper conduct may be used to impeach testifying defendants.[129]

All such qualifications and limitations have been derived from the deterrent premises of fourth amendment and *Miranda* suppression. All require fresh evaluation, analysis, and resolution in the sixth amendment context, where exclusion is not a deterrent sanction, but a constitutional right.

A. *Standing to Raise a Sixth Amendment Claim*

A defendant may not raise a fourth amendment claim as a basis for exclusion of evidence unless he was the victim of the contested search or seizure. He must have suffered a cognizable invasion of privacy, property, or liberty.[130] The proffered rationales for the "standing" limitation are: (1) that fourth amendment rights "are personal rights" that "may not be vicariously asserted"; (2) that sufficient deterrence flows from suppression at the behest of the victim; and (3) that any incremental deterrence from the suppression of *illegally acquired* evidence in a nonvictim's case would be too costly to the administration of criminal justice.[131]

The question here is whether, in light of the dramatically different character of sixth amendment exclusion, a similar "standing" limitation should apply. The answer is that the right-based nature of *Massiah* exclusion provides an even stronger basis for a "standing"-type limitation.[132]

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the discovery of physical evidence and other derivative fruits of *Miranda* violations as well") (citations and footnote omitted); State v. Wethered, 110 Wash. 2d 466, 474, 755 P.2d 797, 801-02 (1988) (*Elstad* dictum "strongly suggests" that a *Miranda* violation alone will not taint any kind of derivative evidence, therefore, "hashish derived from [a] non-Mirandized testimonial act needs not be suppressed").

129. *See* United States v. Havens, 446 U.S. 620 (1980); Oregon v. Hass, 420 U.S. 714 (1975); Harris v. New York, 401 U.S. 222 (1971).

130. *See* Rawlings v. Kentucky, 448 U.S. 98, 104 (1980) (to object to illegal search of purse defendant must have had his "legitimate expectation of privacy" violated by the search); Rakas v. Illinois, 439 U.S. 128, 140 (1978) (for a defendant to be entitled to challenge a search or seizure, "the disputed search and seizure has [to have] infringed an interest" protected by the fourth amendment—"a legitimate expectation of privacy"); *id.* at 159, 160 n.5 (White, J., dissenting) (suggesting that because the fourth amendment "protects one's liberty and property interests against unreasonable seizures of self and effects," a defendant has standing to object to the unreasonable *seizure* of his own person or his property whether or not he suffers a privacy deprivation).

131. *See* Alderman v. United States, 394 U.S. 165, 174-75 (1969).

> [W]e are not convinced that the additional benefits of extending the exclusionary rule to other defendants [whose fourth amendment rights have not been violated] would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.

Id. The Supreme Court has not addressed the standing issue in the *Miranda* area. When that issue arises, the Court will undoubtedly conclude, as lower courts have concluded, that its fourth amendment reasoning is equally relevant to the essentially deterrent-grounded domain of *Miranda* exclusion. *See, e.g.*, United States v. Salinas-Calderon, 728 F.2d 1298, 1302 (10th Cir. 1984); United States v. Fredericks, 586 F.2d 470, 480 (5th Cir. 1978).

132. The language of the original *Massiah* opinion provides strong evidence that the Court contemplated such a standing limitation. *See Massiah*, 377 U.S. at 207 ("All that we hold is that the defendant's own incriminating statements . . . could not constitutionally be used by the prosecution as evidence against *him* at his trial.") (emphasis in original); *see also* United States v. Shapiro, 669 F.2d 593, 598 (9th Cir. 1982) (right to counsel extended by *Massiah* doctrine "may not be asserted by a third person"); United States v. Partin, 601 F.2d 1000, 1006 (9th Cir. 1979) (sixth amendment

No violation of the sixth amendment occurs until the fruits of uncounseled elicitation are used in court. When a defendant is deprived of pretrial counsel, and her disclosures are then used to convict her, she sustains the concrete harm that adversarial equalization is designed to prevent. That harm consists of two essential components—a denial of assistance in a critical confrontation with the state and resultant damage to the trial defense. If either is lacking, there is no completed violation of the right to counsel.[133]

It follows that when a defendant seeks to suppress the products of an encounter in which *another* has been deprived of equalizing pretrial assistance, the defendant cannot establish a constitutional violation. Harm to sixth amendment interests occurs only when the trial defense of one who has been deprived of counsel's guidance is damaged as a result of that deprivation. An accused cannot demonstrate that kind of harm by establishing that disclosures to be used against her are the product of uncounseled pretrial elicitation from another accused.[134] Consequently, one defendant should not be entitled to exclude evidence from his trial because it was secured by failing to respect another defendant's *Massiah* entitlement. Whether the deficiency is characterized as a lack of standing, or as a failure to demonstrate a sixth amendment violation,[135] such a claim should be rejected.[136]

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right to counsel "is a personal right and its violation . . . does not give [a third party] standing to challenge his conviction") (citation omitted).

133. For the reasoning behind these conclusions, see *supra* text accompanying notes 95-101.

134. In addition, the individual who has been denied assistance in the *Massiah* encounter is not harmed when his disclosures are used at another's trial. Consequently, he too is unable to prove a completed violation of the sixth amendment right.

Even if the pretrial denial of assistance did constitute a completed constitutional violation, a position I have rejected, *see supra* text accompanying notes 114-19, an accused would lack standing to assert the violation of rights of third party who was injured by the uncounseled pretrial encounter. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 134-45 (2d ed. 1988) (discussing the "prudential" rule against "third-party standing,"—the general requirement that a litigant assert her own legal rights and interests, and not rest her claim on the legal rights or interests of others). Of course, if a reason for sixth amendment exclusion was to deter such pretrial encounters, it would be arguable that the defendant should be allowed to claim suppression in order to promote (or in order not to undermine) the deterrent objective. An analogous fourth amendment argument has been rejected by the Court on the basis of cost-benefit interest balancing. *See* Alderman v. United States, 394 U.S. 165, 174-75 (1969) (recognition of "deterrent aim" of fourth amendment exclusionary rule did not eliminate standing requirement because costs of exclusion must be weighed against deterrent gains, and "additional benefits" of allowing those not harmed by search to exclude evidence do not justify the resultant "encroachment upon the public interest" in convicting criminals).

135. Because no one has suffered a completed deprivation of rights, it seems inaccurate to describe the deficiency as a lack of standing to assert the violation of another's rights. The true character of the deficiency is an inability to establish a sixth amendment violation.

136. The reasoning and result in the due process-coerced confession area should be different. In coerced confession situations there is a substantial constitutional claim that it is unfair to proceed against one with fruits compelled from another. *See* United States v. Fredericks, 586 F.2d 470, 481 (5th Cir. 1978) (prosecution could not use statements "wrung from one . . . suspect[] through torture and unremittting prolonged interrogation in the trial of" another suspect). *But see* United States v. Payner, 447 U.S. 727, 737 n.9 (1980) (even if purposeful violation of one individual's privacy in order to discover information for use against other persons constituted outrageous conduct in violation of due process principles, because person against whom the information was used was not the victim of the outrageous search he lacked standing to raise a due process claim). An analogous claim in the *Massiah* area would require too expansive a view of adversarial system fair play. The right to counsel ensures that the state will not convict an accused by dealing with him as an inferior. To allow one defendant to raise a pretrial counsel deprivation suffered by a third party would require acceptance of the premise that our adversary system considers it unfair for the government to use the

B. *The Sixth Amendment Independent Source and Inevitable Discovery Exceptions*

The independent source exception to the exclusionary rule holds that if evidence has been acquired by illegal means, but that same evidence has also been obtained by wholly legitimate, independent methods, the government may use the legally discovered evidence.[137] The theory beneath this fourth amendment "exception"[138] to exclusion, which originated prior to the modern era of cost-benefit deterrent balancing,[139] has not been developed at length.[140] Still, it seems completely compatible with modern deterrent reasoning. Under the current premises of fourth amendment exclusion, the suppression of independently acquired evidence would be illogical, inconsistent with the rationale for suppression, and unacceptably costly in light of any deterrent gain.[141]

The inevitable discovery exception holds that evidence that was *in fact* ob-

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products of imbalanced encounters with anyone to convict those who themselves received the full assistance of counsel in all dealings with the state. My broad view of adversary system premises does not extend quite that far.

137. *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). Although the independent source exception has not been applied by the Court to a *Miranda* violation, because of the similarity of fourth amendment and *Miranda* exclusionary rationales, it is undoubtedly equally applicable, though possibly less likely to be provable, in the *Miranda* context.

138. Actually, the independent source doctrine is not an "exception" to the exclusionary rule. That terminology seems appropriate for situations in which evidence to be admitted has in fact been illegally acquired but is nonetheless admissible. In those situations, an exception is made to the presumptive rule of exclusion generally applicable to evidence derived from impropriety. The independent source doctrine, on the other hand, is applicable in situations in which *no* causal connection links a governmental illegality and the acquisition of the contested evidence. *See* Segura v. United States, 468 U.S. 796, 815 (1984) (supporting application of independent source doctrine with observation that evidence is not excludable unless there is at least a "but for" causal link between its discovery and the official illegality); Hamilton v. Nix, 809 F.2d 463, 465 (8th Cir. 1987) (in cases involving independent sources, "there is no reason to exclude the challenged evidence since the police misconduct is not even a 'but for' cause of its discovery."). Because the evidence at issue is not the result of illegal conduct, there is no need in the independent source situation for an "exception" to the presumptive rule of exclusion covering derivative products. Still, the convention has been to refer to the doctrine as an "exception" to the exclusionary rule. *See Segura*, 468 U.S. at 806 (referring to " 'independent source' exception").

139. *See* Wasserstrom & Mertens, *supra* note 9, at 157 (independent source exception was not originally based on deterrent reasoning).

140. The belated reconciliation of the independent source doctrine and modern deterrent theory in *Nix*, 467 U.S. at 443-44, at least partially remedied the deficiency in the underlying theory of the doctrine. *Nix* itself did not involve an independent source. The Court explained the doctrine therein, however, to provide a predicate for the inevitable discovery exception that was involved. Its rationalization of the independent source doctrine is helpful, though not wholly satisfactory.

141. The suppression of independently derived evidence would undoubtedly have some deterrent impact. The loss of legitimately acquired evidence would generate a real disincentive for future investigatory misconduct like that which preceded the legal discovery of the evidence suppressed. It would add force to the sanction imposed by suppressing the illegally acquired version of the evidence. Nonetheless, it would do so in an arguably illogical, punitive, and disproportionate way. Suppression would be arguably illogical because the evidence acquired independently is in fact not connected to the illegality. *See* Hamilton v. Nix, 809 F.2d 463, 468 (8th Cir. 1987) ("[i]t would be an ironic rule of law to exclude a critical witness's testimony . . . simply because the police had unlawfully obtained some of the same information during the course of their investigation."). Suppression would deprive the state of the fruits of proper behavior, not the products of—thus "incentives" for future—illegalities. In addition, suppression would be premised on a punitive rationale, that is, on the creation of a disincentive or the imposition of a penalty, rather than on the removal of profit. That rationale conflicts with accepted deterrent theory. *See infra* notes 146-47 and accompanying text. Moreover, insofar as it at least doubles the price of the impropriety, the resulting sanc-

tained improperly is admissible, if it *would have been* inevitably acquired by legal means.[142] The doctrine has been rooted primarily in deterrent reasoning identical to that justifying the independent source exception.[143] According to that reasoning, the government does not "profit" from its wrong when allowed to use the illegally secured evidence because it has not acquired anything by its improper conduct that it would not have acquired without that conduct. Exclusion, therefore, can remove no "incentive" for future illegality.[144] Exclusion would put the government in a "worse" evidentiary position than it would have been in had it not behaved illegally.[145] The deterrent logic beneath the exclusionary rule has traditionally called for the removal of profit incentives,[146] but has rejected the imposition of penalties.[147] Suppression of evidence that would have been discovered and used without the impropriety would penalize the state and clash with that logic.[148]

The Court has also deemed the inevitable discovery exception wholly consistent with the theory that exclusion on behalf of a defendant who has suffered a

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tion might well be considered disproportionate to the governmental wrong and unacceptably costly to society.

The reasoning here is similar to that which, in my view, underlies the conclusion that an improper arrest does not pose a bar to trial or conviction. *See* Frisbie v. Collins, 342 U.S. 519, 522 (1952) (reaffirming the holding that even flagrantly illegal methods of securing a defendant's presence for trial do not bar the trial or void the conviction). Prohibiting trial of the illegally arrested would undoubtedly deter such arrests. Such deterrence, however, seems to be punitive and an excessively costly way of achieving constitutional ends.

142. The Supreme Court has specifically endorsed the inevitable discovery exception only in the *Massiah* context. *See Nix*, 467 U.S. 431. The doctrine is closely related, but not identical, to the independent source doctrine. *See id.* at 443; *id.* at 458 (Brennan, J., dissenting). The clear difference between the inevitable discovery exception and the independent source doctrine is that the evidence to be admitted actually *was* secured illegally; the legal method of acquisition in the inevitable discovery case is "hypothetical," not actual. *Id.* at 443; *id.* at 459 (Brennan, J., dissenting).

The Supreme Court has not applied the independent source doctrine in a sixth amendment case. For cases illustrating the operation of the independent source doctrine in *Massiah* situations, see Hamilton v. Nix, 809 F.2d 463 (8th Cir. 1987); United States v. Massey, 437 F. Supp. 843 (M.D. Fla. 1977).

143. *Nix*, 467 U.S. at 443-46.

144. This reasoning is the Court's. It ignores potentially significant nonevidentiary advantages and profits involved in inevitable discovery contexts. *See infra* note 163.

145. *See Nix*, 467 U.S. at 444 ("exclusion of evidence that would inevitably have been discovered would . . . put the government in a worse position" than if there had been no "error or violation").

146. *See supra* note 38 and accompanying text.

147. *See Nix*, 467 U.S. at 445 (Court's prior holdings do not support the "formalistic, pointless, and punitive approach" involved in putting the government in a worse position than it would have been in had it not acted illegally).

148. These main premises of *Nix* clearly are transferable to the fourth amendment and *Miranda* exclusion contexts. When the time comes, the Court almost certainly will find them applicable in those contexts. *See* United States v. Whitehorn, 829 F.2d 1225 (2d Cir. 1987); United States v. Hernandez-Cano, 808 F.2d 779 (11th Cir. 1987); United States v. Andrade, 784 F.2d 1431 (9th Cir. 1986). *But see* People v. Stith, 69 N.Y.2d 313, 506 N.E.2d 911, 514 N.Y.S.2d 201 (N.Y. 1987). However, at least in those fourth amendment situations involving the claim that evidence searched for and seized in violation of the warrant requirement should be admitted because it inevitably would have been discovered during the execution of the warrant that could have been obtained, the application of inevitable discovery should be approached with extreme caution. Acceptance of the inevitable discovery reasoning in such situations could eviscerate the rule that "warrantless seizures are per se unreasonable." *See* People v. Schoondermark, 717 P.2d 504 (Colo. Ct. App. 1985).

For arguments that the inevitable discovery exception is not wholly consistent with deterrent policies, see Wasserstrom & Mertens, *supra* note 9, at 160-75.

pretrial *Massiah* deprivation is necessary to protect the integrity and fairness of adversary system factfinding processes.[149] According to that analysis, if the government would have had the products of a pretrial denial of counsel for trial use in any event, then it acquires no adversarial advantage when allowed to use those products.[150] The trial is no different—therefore, no more or less fair—than if pretrial counsel had been afforded. Moreover, when the disputed product is undeniably reliable and probative physical evidence, truth is not jeopardized by its use. In that situation, the adversary system's interest in accurate determinations of guilt and innocence—the motivation for granting counsel[151]—cannot be threatened. According to the Court, because it does not alter the course of the trial or inject any risk of inaccuracy, the use of reliable evidence that was secured without counsel's protection, but would have been secured anyway, threatens no adversary system values.[152]

The admission at trial of evidence that actually was acquired by independent legal means does not infringe upon the constitutional right to equalization. The primary reason for *Massiah* exclusion is to prevent the prejudice to the defense generated by imbalanced pretrial dealings.[153] In the case of a truly independent source, because the state does not use the actual products of an adversarial imbalance the accused suffers no harm that the sixth amendment was intended to prevent. Therefore, the independent source doctrine is wholly compatible with a right-based theory of *Massiah* exclusion.[154]

The admission of evidence that actually was acquired improperly but that would have been inevitably acquired by legitimate means raises a somewhat different question and requires different analysis. In that situation, the government does use the actual products of pretrial adversarial imbalance against the accused. The entire course of government conduct proscribed by the sixth amendment does in fact occur. The state secures damaging evidence by not respecting the entitlement to equalization *and* uses that evidence to prosecute. The problem, however, is that the entire course of unconstitutional official conduct does

149. *See Nix*, 467 U.S. at 446-48. In fact, the Court concluded that suppression of evidence that would have been inevitably discovered would "undermine the adversary system by putting the state in a *worse* position than it would have occupied without any police misconduct." *Id.* at 447 (emphasis in original).

150. *Id.* at 447 (adversary system fairness safeguarded and assured if state and accused placed in the same positions they would have been in if no counsel denial had transpired).

151. *Id.* at 446-47. "The Sixth Amendment right to counsel protects against unfairness by preserving the adversary process in which the reliability of proffered evidence may be tested in cross-examination. Suppression in . . . circumstances [involving indisputably reliable evidence] would do nothing to promote the integrity of the trial process." *Id.*

152. The Court has a real affinity for the interest in reliable, accurate guilt-innocence determinations, an affinity that frequently leads it to underestimate the value and significance of the right to counsel. In its inevitable discovery discussion, the Court's reliance on the reliability factor does not diminish the constitutional right to counsel. Such relevance is, however, quite unnecessary. If the *identical* evidence would have appeared at trial whether or not counsel was afforded at the pretrial encounter, admission of that evidence does no damage to any interest that counsel is meant to protect, or could have protected, no matter how unreliable that evidence might be.

153. *See supra* notes 95-101 and accompanying text.

154. The textual conclusions concerning the independent source doctrine are analytically similar to the *Nix* Court's responses to Williams' contention that inevitable discovery is irreconcilable with the right-based character of *Massiah* exclusion. *See supra* notes 149-52 and accompanying text.

not harm or prejudice the defendant in any way that he would not have been harmed or prejudiced had the conduct not transpired. Because the same evidence would have been inevitably discovered and used, the government's unconstitutional behavior is essentially harmless to the accused's ultimate sixth amendment interests.[155] Consequently, an inevitable discovery exception can be compatible with a right-based theory of *Massiah* exclusion. It is not constitutionally acceptable because the actions offensive to sixth amendment values have not come to pass. Rather, it is palatable because even though constitutionally objectionable actions have occurred, those actions have not injured the defendant at trial.[156]

Despite the Supreme Court's contrary conclusions, deterrence might be an appropriate objective of suppression in independent source and inevitable discovery contexts. In both situations, even though the use of the contested evidence itself at trial confers no constitutionally offensive advantage on the government, the uncounseled elicitation of disclosures could yield other benefits that imperil adversary system values. In both situations the state might exploit the improperly acquired information to secure intangible or undiscernable evidentiary or strategic gains that it would not otherwise have had.[157] Moreover,

155. The government gains no advantage and the accused is not prejudiced by the admission of the products of the pretrial counsel deprivation *if the process and outcome of the trial are the same as they would have been without the deprivation.* As observed earlier, for similar reasons the Supreme Court concluded in *Nix* that the admission of evidence that would have been discovered does not endanger the fairness ensured by the sixth amendment. *See Nix*, 467 U.S. at 447; *see also id.* at 456 (Stevens, J., concurring) (if trial not tainted by pretrial misconduct, defendant receives the "type of trial the Sixth Amendment envisions"); Wasserstrom & Mertens, *supra* note 9, at 177 (in inevitable discovery situations state gains no "litigative advantage"; without such advantage it is hard to see how trial is tainted).

Although the conclusions reached in the present discussion are basically consistent with the Court's conclusions, the reasoning is somewhat different. The *Nix* Court did not state that in inevitable discovery cases the official conduct violates sixth amendment commands but is acceptable nonetheless because it is "harmless." This analytical difference between my reasoning and the Court's leads to a significantly different conclusion regarding the appropriate burden of proof. *See infra* note 156.

156. The Court has applied the harmless error doctrine to *Massiah* claims. *See* Milton v. Wainwright, 407 U.S. 371, 378 (1972). Although the reasoning here is not identical to that underlying the typical harmless error situation, it is analytically similar. In the ordinary harmless error case, an acknowledged constitutional transgression does not result in reversal of a conviction because its contribution to the trial was too insubstantial, in light of other evidence, to have affected the outcome. In the case of *Massiah*-violative evidence that would have been inevitably discovered, the constitutional wrong should not lead to exclusion because its evidentiary contribution to the case is identical to evidence that would have appeared at trial by legal means.

The *Nix* Court concluded that the burden on the government is to establish inevitable discovery by a preponderance of the evidence. The traditional harmless error standard holds that a constitutional error must be "harmless beyond a reasonable doubt." *See* Chapman v. California, 386 U.S. 18, 24 (1967). The *Chapman* Court's high standard of harmlessness, designed to ensure that constitutional rights and interests are not compromised, suggests that the preponderance standard in *Nix* is unacceptably low. To ensure that the conduct prohibited by *Massiah* doctrine does not inflict the very harm meant to be prevented by the sixth amendment, the burden should be comparable to that imposed by the *Chapman* harmless error standard. *See Nix*, 467 U.S. at 459 (Brennan, J., dissenting) (contending that government should shoulder the burden of proving inevitable discovery by "clear and convincing evidence").

157. In the independent source situation, the possible exploitation with which we should be concerned would have to occur prior to the actual legitimate discovery. In the inevitable discovery case, the possible exploitation with which we should be concerned would have to occur prior to the *hypothetical* legitimate discovery, a point more difficult to determine.

in the inevitable discovery situation, the illegal acquisition might enable the state to be a more effective adversary by saving time, money, or energy that it would otherwise have had to expend.[158] Insofar as any such gains contribute to an accused's conviction, there would be damage to the substantive protection afforded by sixth amendment equalization. Suppression of the evidence that was or would have been discovered legally would be a means of deterring the counsel deprivations that led to that constitutional damage.[159]

We should not ignore such advantages simply because they are less concrete or obvious than those gained by placing the improperly secured evidence before the trier.[160] Nevertheless, unless such intangible gains are real and substantial,[161] we should probably not base a potentially costly deterrent policy on them. Before putting the state in a considerably and tangibly worse evidentiary position than it would have occupied had it acted properly, we ought to be confident that the threats to sixth amendment interests are cognizable.[162] Therefore, in the absence of a demonstrated need to prevent the state from reaping unacceptable benefits from pretrial denials of counsel, evidence that fits within the independent source or inevitable discovery exceptions should be admissible.[163]

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158. This is not the case in independent source settings. By definition, the government has spent the resources necessary for legal acquisition in those cases.

159. Concededly, the suppression of that evidence might be inconsistent with the Court's insistence that exclusion only be used to remove profits of illegalities, not to impose punitive sanctions upon officials. Nevertheless, if deterrence were deemed desirable such suppression might be the only effective way of achieving it. It might well be impossible to discern, isolate, or remove the actual adversarial profits acquired from exploitation of the illegalities in independent source and inevitable discovery situations. If so, the only way to ensure that the government does not reap those unconstitutional profits in future cases might be to discourage the elicitations that yield them by excluding the evidence that was or would have been discovered.

160. The textual discussion assumes that the advantages and corresponding harms at stake are within the realm of constitutional concern. To confine the realm of concern to purely evidentiary advantages seems unfaithful to the sixth amendment policy against imbalanced adversarial contests.

161. Without some showing to the contrary, I would consider the positive governmental gains vague, speculative, and presumptively negligible.

162. It should be noted that a "worse evidentiary position" for the state in the case in which the evidence is suppressed is not the only cost of a deterrent suppression policy. If we succeed in deterring out-of-court elicitations, we also risk damage to the government interest in legitimate, separate investigations of uncharged crimes. *See supra* note 120 and accompanying text. Granted, the deterrent damage would be no more substantial than that which ordinarily flows from the suppression of *Massiah*-violative evidence that does not come within an exception to exclusionary principles. If the threats to adversary system values are sufficient to justify a deterrent policy, the government's interests must give way. Still, if there is no right to exclusion because evidence would have been inevitably discovered, before we pursue a deterrent policy that will damage not only the present prosecution but also our interests in investigating uncharged crimes, we should be confident that the objects of our protective efforts—the threats to legitimate adversary system interests—justify the costs to be sustained.

163. I have already predicted that the Supreme Court will apply its deterrent analysis of the sixth amendment inevitable discovery doctrine to the fourth amendment and *Miranda* realms. *See supra* note 148. The preceding textual discussion of deterrent possibilities suggests that the Court's analysis in *Nix* not based on a full and fair assessment of the potential state benefits in inevitable discovery (and also independent source) situations. To the extent that the government saves time, money, or effort, or secures other types of investigatory advantage from its unconstitutional conduct, there are profits, albeit nonevidentiary profits, from the illegality. These profits could provide substantial incentive for future illegalities. They might have to be removed to ensure adequate deterrence. In *Nix* the Court seemed blind to other than evidentiary profits in its evaluation of whether the government position was the same, better, or worse.

C. *Evidence Derived From* Massiah *Violations and the Attenuation Exception*

The origin of the independent source doctrine is also the origin of the general principle that evidence derived from the immediate products of official misconduct is subject to exclusion.[164] Not long after the Court recognized a general rule of presumptive inadmissibility[165] for "derivative" evidence,[166] it announced an "attenuation exception" to that rule.[167] If the chain of causation between the illegal conduct and derivative evidence is sufficiently weak or "attenuated," that evidence is not excludable as tainted "fruit of the poisonous tree."[168]

Attenuation has been firmly rooted in contemporary deterrent reasoning.[169] The weaker the connection between the impropriety and the acquisition of evidence, the lesser the incentive it is thought to provide for future illegalities. The lesser the incentive it provides, the lower is the deterrent value of suppression.[170]

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164. *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) ("The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."); *see also* Segura v. United States, 468 U.S. 796, 804 (1984) (reiterating long accepted principle that "the exclusionary rule reaches not only primary evidence . . . but also evidence later discovered and found to be derivative of an illegality," that is, it " 'extends as well to the indirect as the direct products' of unconstitutional conduct" (quoting Wong Sun v. United States, 371 U.S. 471, 484 (1963))).

165. By "presumptive inadmissibility" I mean that the evidence will be suppressed unless the government establishes that it fits within an accepted exception to the general rule. *See* Segura v. United States, 468 U.S. 796, 804 (1984) (exclusionary rule reaches not only "primary evidence obtained as a direct result of an illegal search or seizure, . . . but also evidence later discovered and found to be derivative of an illegality" unless attenuation or independent source established).

166. "Derivative" evidence refers to evidence that the state acquires by pursuing leads revealed by its misconduct. It is "derived" from, and is in fact causally connected to, the original impropriety. Derivative evidence is distinguishable from the "immediate" or "direct" products of the misconduct, that is, the item or items turned up at the time of the misconduct.

167. Attenuation doctrine originated in the fourth amendment area. It is the oldest, most securely established of the true "exceptions" to the fourth amendment exclusionary rule. Recent developments in *Miranda* law make the role of attenuation doctrine there uncertain. The Court has hinted that evidence derived from *Miranda* violations may not be presumptively excludable. *See* Oregon v. Elstad, 470 U.S. 298, 306-07 (1985) (exclusion of fruits of *Miranda* violations should be approached more cautiously than exclusion of fruits of fourth amendment transgressions; *Miranda* presumption of compulsion applicable to confession "does not require that the statements and their fruits be discarded as inherently tainted"); *see also* State v. Wethered, 110 Wash.2d 466, 474, 755 P.2d 797, 801 (1988) (reading *Elstad* majority dictum as "strongly suggest[ing] that a *Miranda* violation without actual coercion will not taint evidence derived from a confession, no matter what form such evidence takes"). As noted earlier, without a rule declaring derivative evidence inadmissible, there is no need for the attenuation "exception," or any other exception.

168. According to the Court's exclusionary rule terminology, "fruits" are those products that must be excluded. *See* Wong Sun v. United States, 371 U.S. 471, 487-88 (1963) (not "all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police").

169. *See* United States v. Ceccolini, 435 U.S. 268, 275-79 (1978) (resolving question of attenuation exception application to illegally derived "live-witness testimony" by balancing amount of incentive such testimony provides for future illegal searches against the high cost of "perpetually disabl[ing] a witness from testifying about relevant and material facts"); Brown v. Illinois, 422 U.S. 590, 602-04 (1975) (decision whether derivative evidence is purged of taint of illegal arrest requires consideration of the deterrent policies that underlie fourth amendment exclusion and an evaluation of all relevant circumstances "in light of the policy served by the exclusionary rule").

170. *See Brown*, 422 U.S. at 609 (Powell, J., concurring in part) ("The notion of the 'dissipation of the taint' attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost."); *see also Ceccolini*, 435 U.S. at 280 (in light of dissipated connection between illegality and testimony, its suppression "could not have the slightest deterrent effect on the behavior of an officer").

At the point where the deterrent value is too low to outweigh the costs of exclusion,[171] cost-benefit balancing yields an exception to the rule barring derivative products—the attenuation exception.

The *Massiah* right to exclusion should encompass derivative products,[172] and should not be qualified by an attenuation exception.[173] Equalizing counsel should stand as a safeguard against both the direct and indirect evidentiary advantages of a failure to respect the *Massiah* entitlement. When either immediate or derivative products of a denial of counsel are used to the defendant's disadvantage at trial, damage is done to his constitutional interest in not being harmed by adversarial imbalance. Because of their destructive effect upon the substantive benefits of adversarial fair play, derivative fruits should fall presumptively within the exclusionary right applicable to *Massiah*-violative disclosures.

As long as there is an actual causal connection between a pretrial deprivation and the evidence to be introduced, the strength of that connection should not matter. Attenuation doctrine presumes a situation wherein the disputed evidence is the "but for" product of the state's transgression.[174] It recognizes, however, that deterrent gains depend on the incentive value of the evidence to be excluded, and the incentive value hinges in part on the strength of the causal connection. That logic is simply inapplicable to right-based *Massiah* exclusion. If actual, "but for" causation exists,[175] admission of the derivative evidence will inflict the type of injury against which the sixth amendment protects.[176] Because that injury is attributable to a deprivation of the assistance that the sixth amendment promises, the evidence should be excluded as a matter of right.[177]

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171. The point at which the deterrent value is too low to justify the costs of exclusion has not been defined with any specificity. In determining whether it is reached in a given case, all factors bearing on the connection of the contested evidence to the original illegality should be considered, particularly the time between the misconduct and discovery of the evidence, whether any significant events have intervened, and the nature and character of the misconduct. *See Brown*, 422 U.S. at 603-04.

172. *See* United States v. Massey, 437 F. Supp 843, 862 (M.D. Fla. 1977) ("the tainted fruit of the poisonous tree doctrine should, and does, apply: all indirect evidence, testimonial and tangible, acquired from . . . admissions [secured in violation of *Massiah*] must be excluded as tainted fruit of the disregard" of the sixth amendment).

173. *But see* Hamilton v. Nix, 781 F.2d 619, 624-26 (8th Cir. 1985), *rev'd en banc*, 809 F.2d 463 (1987) (applying attenuation analysis in case involving violation of due process and of *Massiah* doctrine); *Massey*, 437 F. Supp. at 862 (presumption favors exclusion of derivative products of sixth amendment violation unless government shows indirect evidence qualifies for independent source or attenuation exception).

174. *See* Wong Sun v. United States, 371 U.S. 471, 488 (1963) (observing that attenuation or purging of taint doctrine is applicable to evidence that "would not have come to light but for the illegal actions of the police"). If evidence is *not* causally connected to the impropriety in a "but for" sense, it has an independent source and, therefore, is not subject to the rule of presumptive inadmissibility applicable only to derivative products. *See* United States v. Crews, 445 U.S. 463, 471 (1980) (cases in which attenuation analysis is applicable must "begin with the premise that the challenged evidence is in some sense the product of illegal governmental activity").

175. Unless, of course, the evidence would have been inevitably discovered. *See supra* notes 142-56 and accompanying text.

176. If the evidentiary harm is truly negligible it may not be constitutionally cognizable. In that situation, however, the admission of the evidence would not matter to the government or the defendant. If the government seeks and cares about the admission of the evidence, the harm it causes will not be negligible and, therefore, it should be suppressed.

177. *Cf.* Kastigar v. United States, 406 U.S. 441, 460-62 (1972) (testimony compelled under a grant of immunity and evidence derived from that testimony must be excluded under the privilege

D. *A "Good Faith" or "Legitimate Reason" Exception to Sixth Amendment Exclusion*

Recently the Supreme Court endorsed a limited type of "good faith" exception to the fourth amendment exclusionary rule.[178] In *United States v. Leon*[179] and *Massachusetts v. Sheppard*[180] the Court held that if officers search in *reasonable reliance*[181] on an *invalid* warrant[182] the evidence secured as a result is excepted from exclusion. The Court based the newly formulated exception on deterrent, cost-benefit grounds. The *Leon-Sheppard* exception's main premise is that it is pointless and irrational to seek to discourage "reasonable" law enforcement conduct. There is nothing to deter. Clearly, nonexistent deterrent benefits cannot outweigh the ever-present costs of suppressing probative evidence.[183]

In *Maine v. Moulton*[184] the Court rejected the government's claim that the

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against self-incrimination and the federal immunity statute; same rule applicable to coerced confessions under due process doctrine); Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52, 79 & n.18 (1964) ("constitutional rule" is that a "witness may not be compelled to give testimony which may be incriminating . . . unless the compelled testimony *and its fruits cannot be used in any manner* . . . in connection with a criminal prosecution against him"; evidence is only admissible if "independent, legitimate source" is proven) (emphasis added)).

An attenuation exception is fundamentally incompatible with the sixth amendment *Massiah* right to exclusion, and with any other exclusionary right. Justice Brennan does not seem to believe that the recognition of a right to exclusion necessitates the rejection of attenuation doctrine and the suppression of all derivative evidence. Though he believes that fourth amendment exclusion is a matter of right, *see* United States v. Leon, 468 U.S. 897, 933-34 (1984) (Brennan, J., dissenting); Stone v. Powell, 428 U.S. 465, 509 (1976) (Brennan, J., dissenting), he authored a landmark fourth amendment attenuation opinion. *See* Wong Sun v. United States, 371 U.S. 471 (1963). It is possible that Justice Brennan would find the fourth and sixth amendment rights distinguishable for attenuation purposes.

178. The character of the constitutional violation—the good or bad faith of the government—is one relevant factor in attenuation analysis. *See Brown*, 422 U.S. 590, 604 (1975). In the *Leon-Sheppard* exception it is not just *a* factor, but rather *the* critical factor. In addition, whereas the attenuation exception is not applicable to *primary* products of misconduct, *see Brown*, 422 U.S. at 612 (Powell, J., concurring) (suggesting that accepted exclusionary rule doctrine would require the suppression of confessions secured in the immediate context of an illegal arrest, that is, that they could not be admitted under the attenuation doctrine), the *Leon-Sheppard* exception will render primary products admissible. *See* United States v. Leon, 468 U.S. 897, 929 (1984) (Brennan, J., dissenting) (observing that the reasonable reliance on a warrant exception represents the first opportunity for the government to make use of the direct products of a fourth amendment violation in its case-in-chief).

179. 468 U.S. 897 (1984).

180. 468 U.S. 981 (1984).

181. *Leon-Sheppard* is not a true "good faith" exception because it does not hinge on the subjective state of mind of the officers involved in the illegal search or seizure. In fact, the Court rejected inquiry into the individual officer's mindset. *See Leon*, 468 U.S. at 922 n.23. The only question is whether the officer's reliance on the warrant in the case was "objectively reasonable," that is, "whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization." *Id.* at 922 & n.23.

182. The holding of *Leon-Sheppard* requires reasonable reliance on a *warrant*. Therefore, by its literal terms the exception is confined to situations in which searches have been based on invalid warrants.

183. Although the *Leon-Sheppard* exception is presently limited to warrant contexts and the fourth amendment sphere, the core of its reasoning applies to warrantless situations and its deterrent-based, cost-benefit analysis could easily be extended to the *Miranda* arena. *See* Stone v. Powell, 428 U.S. 465, 538 (1976) (White, J., dissenting) (suggesting that no deterrence is possible, and therefore that an exception to exclusion ought to be applicable, *whenever* an officer violates the fourth amendment in good faith and upon reasonable grounds).

184. 474 U.S. 159 (1985).

Massiah right is inapplicable to good faith investigations of crimes that are separate and independent from the offense with which the accused has already been charged. In essence, the contention was that the entitlement to counsel that normally operates when an accused is subjected to governmental elicitation is inoperative if the elicitation of disclosures regarding the charged offense is part of a good faith, legitimate investigation of an uncharged crime.[185] The *Moulton* majority concluded that the sixth amendment *Massiah* right barred the use of uncounseled, knowingly elicited disclosures to prove a charged offense "notwithstanding the fact that the police were also investigating other [uncharged] crimes."[186] Chief Justice Burger demonstrated that the issue before the Court could be recharacterized and analyzed as one involving the proper scope of sixth amendment exclusion. He maintained in dissent that there was simply no good reason to suppress evidence secured during good faith investigations.[187] The gist of his reasoning was that a "good reason" or "good motivation" exception to *Massiah* exclusion is justifiable.

Leon, *Sheppard*, and *Moulton* suggest two distinct, but related, potential exceptions to sixth amendment exclusion: one based on a "good faith, reasonable" official belief that the accused was not entitled to *Massiah* counsel and another grounded in a "legitimate reason" for failing to afford a defendant the normal *Massiah* entitlement.[188] To the extent that it has any constitutional merit, the first potential exception should be incorporated into the substantive *Massiah* doctrine. The *Massiah* right to counsel's presence should apply not only to intentional or knowing elicitation of disclosures, but also to "negligent elicitation."[189] If the government should know that its encounter with an accused could yield admissions, then the failure to accord counsel should be considered a transgression of the sixth amendment promise. The sixth amendment entitlement should be inapplicable only in situations where the state should not reasonably anticipate that an encounter could yield disclosures.[190]

185. *See Moulton*, 474 U.S. at 189 (Burger, C.J., dissenting) ("the *Massiah* rule is inapplicable to situations where the government is gathering information related to a separate crime"); United States v. Darwin, 757 F.2d 1193, 1200 (11th Cir. 1985) (pre-*Moulton* case rejecting the approach taken ultimately by *Moulton* Court "because we conclude that the right to the presence of counsel simply does not extend to a situation in which the defendant is engaged in the commission of a separate offense").

186. *Moulton*, 474 U.S. at 180.

187. *See id.* at 190-92 (Burger, C.J., dissenting). The Chief Justice had first asserted that the sixth amendment right recognized in *Massiah* should not have any application to legitimate, good faith separate offense investigations. *See id.* at 181, 184-90 (Burger, C.J., dissenting) (*Massiah* counsel requirement "is inapplicable" to separate offense investigations if the officers do not act in bad faith or initiate separate investigation as pretext to avoid *Massiah* requirement).

188. Like the *Leon-Sheppard* fourth amendment exception, the first potential exception would rest on an assertion and evidence that an officer reasonably believed a defendant was not entitled to counsel in a given situation. The second, *Moulton*-like exception would be premised on the claim that a well-motivated deprivation of counsel, that is, a denial that serves some "higher" good, should not result in exclusion.

189. The current doctrine should be modified by including within the category of *Massiah*-regulated conduct not only *negligent* elicitation, but also intentional, knowing, or negligent *listening*. *See* Tomkovicz, *supra* note 8, at 77-83.

190. Accidental acquisitions—encounters in which a defendant unforeseeably reveals information—should not trigger counsel protection, but "negligent elicitation or listening" should. *See* Tomkovicz, *supra* note 8, at 83 n.318. Under current doctrine the *Massiah* right to counsel is opera-

A reformulated *Massiah* doctrine that reflected this position would contain a "good faith exception" of sorts. There would be no right to exclusion in the limited, and probably rare, situation where an uncounseled defendant has made statements that were not reasonably foreseeable. Such statements would not be admissible, however, because of an "exception" to the rule of exclusion that would ordinarily apply to official conduct of the sort involved. Instead, they would be admissible because the official conduct involved does not endanger the right to counsel.[191] Under a properly modified *Massiah* doctrine, there is no reason to recognize a "good faith" or "reasonable belief" exception to the sixth amendment exclusionary right.[192]

The second potential exception, the "legitimate reason" or "good motive" exception, has no legitimate place anywhere in sixth amendment doctrine. In essence, the "legitimate reason" exception holds it permissible to suspend a defendant's constitutional counsel entitlement in order to promote allegedly superior state interests.[193] Such suspension is incompatible with the sixth amendment grant of an unqualified right to assistance. The right to adversarial equalization is not like the qualified interests in privacy, property, and liberty protected by the fourth amendment. It is an absolute part of every defendant's fair play entitlement that cannot be outweighed by or denied because of compelling state needs or admirable state motives.[194] The "legitimate reason" argu-

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tive only if the government acts deliberately or knowingly, and only if the government engages in active elicitation of disclosures. The reformulation suggested here encompasses both negligence and listening. *See* Tomkovicz, *supra* note 8, at 77-83.

The reference to the "government" in the proposed standard includes not only regular, formal state agents, but any informant acting as a state agent. Previously, I have criticized what I perceive to be an effort by the Court, in United States v. Henry, 447 U.S. 264 (1980), to provide some insulation for the government from responsibility for the acts of its "irregular" agents. *See* Tomkovicz, *supra* note 8, at 75-77.

191. As noted before, the right to exclusion that is part of the sixth amendment entitlement presumes a pretrial deprivation of counsel's assistance. Without the denial of a pretrial entitlement, there is no constitutionally cognizable harm when uncounseled disclosures are used to a defendant's disadvantage at trial. Because the "accidental acquisition" of statements triggers no pretrial entitlement to counsel, trial use of those statements does not violate the Constitution.

192. The sixth amendment does not provide that a defendant shall have the right to assistance of counsel *except* when the government reasonably believes that he or she is not entitled. *Cf.* United States v. Londono, 659 F. Supp. 758, 771 (E.D.N.Y. 1987) (despite fact that officers had no "improper motive" or "bad faith" and "simply overlooked the risk that . . . sixth amendment violations might occur" the fruits of their elicitations must be suppressed).

193. *See* United States v. Darwin, 757 F.2d 1193, 1199 (11th Cir. 1985) (recognizing that "the tension between the two views" regarding the propriety of allowing the government to prove charged offenses with disclosures elicited during the investigation of separate offenses "can best be understood as a value choice between . . . the social utility in giving law enforcement officers relatively wide latitude to investigate . . . and . . . the individual's interest in a broadly construed Sixth Amendment right to counsel").

194. In Scott v. Illinois, 440 U.S. 367, 373-74 (1979), the Supreme Court held that the sixth amendment right to trial counsel does not extend to alleged misdemeanants if no actual imprisonment is to be imposed upon conviction. In part, the Court justified its limitation of the sixth amendment by pointing to the costs of appointed counsel for all defendants. *See id.* at 373 (extending the sixth amendment right to all criminal cases, whether involving possible imprisonment or not, would "impose unpredictable, but necessarily substantial, costs on" the states). As the textual discussion implies, I disagree with the Court's conclusion in *Scott* that an unqualified constitutional right can be limited because of its costs. *Cf.* Kimmelman v. Morrison, 477 U.S. 365, 379 (1986) (Although costs can be balanced against utility gains in fourth amendment exclusionary rule situations, "the Constitution constrains our ability to allocate as we see fit the costs of ineffective assistance. The Sixth

ment conceals an insidious form of ends-means reasoning that, if accepted, would pose serious threats to constitutional liberties.[195] To accomodate law enforcement interest it would improperly qualify the sixth amendment entitlement to exclusion.[196]

Amendment mandates that the State bear the risk of constitutionally deficient assistance of counsel.").

195. *See* Tomkovicz, *supra* note 8, at 88 (observing that the ends-means reasoning involved is particularly objectionable because the means sought to be justified (denial of *Massiah's* protection at the trial of a charged offense) are not even necessary for attainment of the ends sought (investigation and proof of an uncharged offense)). The claim that superior governmental interests can outweigh the pretrial right to counsel should be as objectionable as the claim that such interests can counterbalance a defendant's protection against coercion of a confession. While a deprivation of counsel may not be as dramatic a constitutional wrong as the coercion of admissions, both are serious affronts to our constitutional pledge of fair play. At trial, we allow neither coercion nor a denial of counsel, no matter how compelling the putative government interest. Our response should be identical when the prosecution posits superior government interests as bases for trial use of the products of pretrial coercion or a pretrial denial of counsel. *Cf.* Stone v. Powell, 428 U.S. 465, 524 (1976) (Brennan, J., dissenting) (interest in ascertaining truth cannot justify restriction at trial of constitutional rights that impede pursuit of that interest; therefore, it should not count against vindication of those rights in habeas corpus proceedings).

Critics challenge the *Moulton* majority's holding. They contend that the conclusion that evidence gathered during a separate investigation must be excluded from the trial of the charged offense is theoretically and logically erroneous because the government's separate offense investigation is undeniably legitimate and proper conduct. *See* Maine v. Moulton, 474 U.S. 159, 185-86 (1985) (Burger, C.J., dissenting) (referring to the Court's decision to exclude evidence from the trial of the charged offense as an "anomaly," and a "judicial aberration" that confers "a windfall benefit" on defendants in situations where the police have engaged in "no impermissible conduct," but rather "the kind of careful and diligent efforts" that "[c]ourts ought to applaud"); Note, Maine v. Moulton: *Striking the Balance Between the Sixth Amendment Right to Counsel and Society's Interest in Criminal Investigation of the Indicted Defendant*, 35 DEPAUL L. REV. 881, 904 (1986) (suggesting that the Court "properly ignored [the] theoretical problem" and chose not to "maintain theoretical purity" in reaching the "anomalous" conclusion that evidence secured by permissible law enforcement conduct must be excluded from the trial of the charged offense). Their criticism is ill-founded and rooted in an invalid deterrent view of sixth amendment exclusion, *see id.* at 904, and in the erroneous belief that sixth amendment wrongs are fully accomplished by the pretrial elicitation of disclosures without counsel. *See Moulton*, 474 U.S. at 191 (Burger, C.J., dissenting) ("the 'wrong' that the Court condemns was 'fully accomplished' by the elicitation of comments from the defendant and 'the exclusionary rule is neither intended to nor able to cure the invasion of the defendant's rights which he has already suffered' " (quoting United States v. Leon, 468 U.S. 897, 906 (1984))).

The *Moulton* holding is wholly consistent with the right-based conception of sixth amendment exclusion. One may grant that the pretrial conduct in separate investigation situations is not wrongful, as the *Moulton* majority did, see *Moulton*, 474 U.S. at 179-80 & n.16, and still find that the *admission* of a defendant's disclosures at the trial of the charged offense violates the sixth amendment.

196. This may be the major, though not clearly articulated, premise underlying the *Moulton* Court's unequivocal rejection of the "separate investigation" exception. The majority did observe that the proposed exception would "risk[] the evisceration of the Sixth Amendment right recognized in *Massiah*." *Moulton*, 474 U.S. at 180. It is important to note that the sixth amendment's terms accommodate law enforcement interests in investigation by restricting the domain of counsel to "criminal prosecutions." That limitation has led the Court to reject the possibility of any sixth amendment right to counsel protection during the investigatory stage, that is, prior to the formal initiation of proceedings. *See* Moran v. Burbine, 475 U.S. 412, 429 (1986).

My conclusion bears some similarity to Justice Brennan's conclusion in *Leon*. Because he believes fourth amendment exclusion to be a right, Justice Brennan found it constitutionally intolerable to create a "good faith" exception based in part on the law enforcement costs of exclusion. *See* United States v. Leon, 468 U.S. 897, 941 (1984) (Brennan, J., dissenting) (exclusion is a part of the fourth amendment right, a right that "directly contemplates that some reliable and incriminating evidence will be lost to the government").

E. *Impeachment Use of* Massiah-*Violative Disclosures*

The prosecution may use the primary products of both fourth amendment and *Miranda* violations to impeach a testifying defendant.[197] According to the Court, exclusion of the evidence from the government's case-in-chief adequately deters future violations.[198] Moreover, the costs of barring reliable and probative impeachment evidence[199] and allowing a defendant to commit perjury with impunity[200] outweigh the incremental deterrence gained by prohibiting impeachment use.

The prosecution may not, however, use the products of official coercion to impeach a defendant. The due process clause bars *all use* of involuntary confessions.[201] The logic beneath this strict prohibition is evident from the nature and purposes of due process exclusion and the reasoning that permits impeachment use in *Miranda* contexts. The due process clause guarantees fundamental fairness.[202] Trial use of coerced evidence is foreign to the accusatorial foundations of our system,[203] and, therefore, antithetical to the command of "due" process.[204] Whether coerced admissions add substance to the case-in-chief or undermine the defense by impeaching a contradictory defendant, their appearance at a criminal trial threatens both substantive and procedural fairness.[205]

In addition, the out-of-court use of coercive tactics against an individual is itself a deprivation of liberty that contravenes substantive due process. Such practices threaten the well-being, integrity, and dignity of the individual in ways

197. *See* United States v. Havens, 446 U.S. 620 (1980) (allowing impeachment with products of search that violated the fourth amendment); Oregon v. Hass, 420 U.S. 714 (1975) (allowing use of *Miranda*-violative statements to impeach); Harris v. New York, 401 U.S. 222 (1971) (same).

198. *See Havens*, 446 U.S. at 626 ("deterren[ce] function of the rules excluding unconstitutionally obtained evidence is sufficiently served by denying its use to the government on its direct case"); *Harris*, 401 U.S. at 225 ("sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief").

199. *See Havens*, 446 U.S. at 626 ("forbidding the Government to impeach . . . by using contrary and reliable evidence in its possession fails to take account of . . . the importance of arriving at the truth in criminal trials"); *Harris*, 401 U.S. at 225 ("The impeachment process here undoubtedly provided valuable aid . . . and the benefits of this process should not be lost, in our view, because of the speculative possibility that impermissible police conduct will be encouraged thereby.").

200. *See Havens*, 446 U.S. at 626 (rejecting the view that fourth amendment exclusion can be invoked to enable defendants to commit perjury without risk of confrontation); *Harris*, 401 U.S. at 226 ("The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.").

201. Mincey v. Arizona, 437 U.S. 385, 398 (1978). Similarly, the privilege against compulsory self-incrimination bars all use of the products of *actual* compulsion. *See* New Jersey v. Portash, 440 U.S. 450, 459 (1979).

202. *See supra* note 64 and accompanying text.

203. Ours is an accusatorial system that forces the government to prove charges without requiring the accused to assist, not an inquisitorial system that would seek conviction by demanding a defendant's self-accusatory assistance. *See* Moran v. Burbine, 475 U.S. 412, 434 (1986) (Stevens, J., dissenting).

204. *See Mincey*, 437 U.S. at 402 ("Due process of law requires that statements obtained [by coercion] cannot be used in any way against a defendant at his trial.").

205. Substantive fairness is threatened by the potential untrustworthiness of coerced admissions and the consequent threat of convicting the innocent. Procedural fairness is jeopardized by the inquisitorial character of using coerced admissions to secure convictions, a practice in conflict with our devotion to accusatorial premises. *See supra* text accompanying notes 65-67.

society abhors.[206] Because of the serious harms caused by coercion both inside and outside the courtroom and because the costs of exclusion are not as weighty as in fourth amendment and *Miranda* situations,[207] the deterrent balance favors broader suppression. To eliminate all incentives for coercion, all uses of coerced confessions, including impeachment use, should be, and are, proscribed.

The Court has not yet addressed the question of impeachment use of *Massiah*-violative products.[208] The impeachment precedents in other areas and the nature of *Massiah* exclusion, however, point toward the appropriate answer to that question.[209] Like due process exclusion, *Massiah* exclusion is an inherent part of fair play. It ensures that the substantive damage threatened by adversarial inequality does not ripen at trial.[210] Impeachment use of a defendant's disclosures can damage a defense just as seriously as substantive use.[211] And, like substantive use, impeachment use of *Massiah*-violative disclosures inflicts the *type* of injury that counsel combats. When impeachment evidence is the product of a pretrial deprivation of counsel, use of that evidence to undermine the defense at trial damages the defendant's sixth amendment interest in adversarial fair play.[212] Therefore, the sixth amendment right to exclusion should bar

206. *See supra* notes 65 & 67.

207. Because of the possible unreliability and inaccuracy of coerced admissions, the evidence suppressed is not necessarily probative. Consequently, the costs of suppression are lower. Even in those cases where coerced admissions are accurate, the severity of the harm threatened by subjecting an individual to official coercion outweighs the costs and tips the deterrent balance in favor of suppression.

208. Recently, however, the court granted certiorari in a case in which a Michigan court barred impeachment use of statements taken in violation of the *Massiah* doctrine. *See* Michigan v. Harvey, 109 S. Ct. 1117 (1989). Presumably, the Court's decision in *Harvey* will resolve the lower court's split on the issue. *See* Lucas v. New York, 474 U.S. 911, 912 (1985) (White, J., dissenting from denial of cert.) (observing that lower courts have split on propriety of impeachment use in sixth amendment contexts); *compare* United States v. Brown, 699 F.2d 585 (2d Cir. 1983) (rejecting constitutionality of impeachment use) *with* United States v. McManaman, 606 F.2d 919, 925 (10th Cir. 1979) (allowing impeachment of defendant's " 'sweeping' denial of drug dealing" with statements secured in violation of *Massiah* right). Most lower courts that have addressed the issue have found impeachment use permissible. *See* Comment, *supra* note 74, at 377.

209. In United States v. Brown, 699 F.2d 585, 589-90 (2d Cir. 1983), the Second Circuit resolved the issue by reference to the reasoning of the Supreme Court's impeachment precedents in the *Miranda* and privilege against self-incrimination areas. The court found the deterrent reasoning in the *Miranda* context irrelevant. It concluded that cost-benefit balancing is as " 'impermissible' " when the sixth amendment right is at stake as it is when actual compulsion in violation of the fifth amendment privilege is at stake. Consequently, the court condemned impeachment use of *Massiah*-violative statements. *But cf.* People v. Jacobs, 181 Cal. App. 3d 916, 921, 226 Cal. Rptr. 786, 788-89 (1986) (suggesting that because impeachment use will combat perjury, and because there is no police misconduct to be deterred in *Massiah* contexts, there is even less reason to bar impeachment use than in other contexts).

210. *See supra* notes 98-101 and accompanying text.

211. *See* Stone v. Powell, 428 U.S. 465, 485 (1976) (observing that the exclusionary rule of the fourth amendment poses no bar to impeachment use, "even though [the evidence's] introduction is certain to result in conviction in some cases"); United States v. Havens, 446 U.S. 620, 632 n.2 (1980) (Brennan, J., dissenting) (noting that by allowing the government to use illegally obtained evidence to impeach a defendant, "almost anytime an accused takes the stand, the prosecution will have an opportunity to enhance its case in chief" in ways that go beyond the mere undermining of the defendant's credibility); Harris v. New York, 401 U.S. 222, 231 (1971) (Brennan, J., dissenting) (" 'An incriminating statement is as incriminating when used to impeach credibility as it is when used as direct proof of guilt.' " (quoting People v. Kulis, 18 N.Y.2d 318, 324, 221 N.E.2d 541, 543, 274 N.Y.S.2d 873, 876 (1966) (Keating, J., dissenting))).

212. *See* United States v. Brown, 699 F.2d at 590 ("Balancing th[e sixth amendment's] constitu-

all uses of uncounseled disclosures obtained in violation of *Massiah*.[213]

F. *The Applicability of the Doctrine of* Stone v. Powell *to Sixth Amendment Claims*

According to the doctrine of *Stone v. Powell*[214] the remedy of fourth amendment exclusion is generally unavailable in federal habeas corpus proceedings. Specifically, "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial."[215] Like all modern fourth amendment exclusionary rule limitations, the doctrine's roots are in deterrent theory. According to the *Stone* majority's reasoning, the "substantial societal costs" of exclusion, retrial, and possible lost convictions clearly outweigh the "minimal" additional deterrent force gained by suppression in a collateral proceeding, at a time far removed from the constitutional violation.[216] The threat of suppression in a full and fair state proceeding is considered sufficient to educate the police and discourage future violations of fourth amendment commands.[217]

While the Court has not decided whether *Stone* is applicable to sixth amendment claims,[218] some Justices have speculated about the doctrine's rele-

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tional protection is . . . 'impermissible.' " Therefore, disclosures obtained in violation of the *Massiah* entitlement may not be used to impeach regardless of the government interests that are served.).

213. *See* Wasserstrom & Mertens, *supra* note 9, at 178 n.515 ("If *Massiah* is meant to preserve an evenhanded and judicially regulated method of postindictment evidence acquisition, so that the government is not unfairly advantaged, then both direct and impeachment use of the evidence ought to be barred under *Massiah*."); Comment, *supra* note 74, at 380 (maintaining that impeachment exception to *Massiah* exclusion should be rejected).

214. 428 U.S. 465 (1976). Thorough evaluation and critique of the *Stone* doctrine is not an objective of this Article. Rather, the sole end here is to determine whether that doctrine can logically and constitutionally be extended to sixth amendment *Massiah* claims.

215. *Id.* at 494.

216. *See id.* at 489, 493-95.

217. *See id.* at 492-93 (in hope that future violations will be deterred and to encourage incorporation of fourth amendment ideals into law enforcement value systems, the Court continues to adhere to the exclusionary rule at trial and on direct appeal of convictions). The Court has not held the *Stone* doctrine applicable to *Miranda* claims, but recently has evinced a strong bias against expansive interpretation of the *Miranda* exclusionary rule. Moreover, the fourth amendment reasoning in *Stone* seems largely, if not wholly, applicable to *Miranda* exclusion. *See* Richardson v. Stone, 421 F. Supp. 577, 578-79 & n.2 (N.D. Cal. 1976) (*Stone* doctrine is applicable to *Miranda* claims, but not to coerced confession claims). *But see* Jarrell v. Balkcom, 735 F.2d 1242, 1251 (11th Cir. 1984) ("most courts confronting the issue . . . have not extended *Stone* to . . . *Miranda* claims"); White v. Finkbeiner, 687 F.2d 885, 888-94 (7th Cir. 1982) (discussing application of *Stone* doctrine to alleged *Miranda* violations at length and refusing to extend it).

218. *See Nix*, 467 U.S. at 450 n.7 (finding "it unnecessary to decide whether *Stone v. Powell*, 428 U.S. 465 (1976), should be extended to bar federal habeas corpus review of Williams' Sixth Amendment claim, and . . . express[ing] no view on that issue"). *But see Stone*, 428 U.S. at 517-18, 535 (Brennan, J., dissenting) (predicting that "the groundwork is being laid" for preclusion of collateral relief for other constitutional violations and expressing fear that "ultimately . . . state prisoners' claims of violations of other constitutional rights" will be treated like the fourth amendment claims in *Stone*).

Lower courts have rejected claims that *Stone* governs *Massiah* claims. *See, e.g.*, DeAngelo v. Wainwright, 781 F.2d 1516, 1518-19 (11th Cir.) (*Stone* should not be extended to sixth amendment claim), *cert. denied*, 479 U.S. 953 (1986); United States *ex rel.* Sanders v. Rowe, 460 F. Supp. 1128,

vance to *Massiah* violations.[219] They have suggested that sixth amendment deprivations are divisible into two categories, and that *Stone's* reasoning might well govern those violations that neither threaten the accuracy of guilt-innocence determinations nor involve the employment of coercive tactics.[220] If so, exclusion based on certain *Massiah* violations would not be available in collateral proceedings unless the state had denied a full and fair hearing on the sixth amendment claim.[221]

The posited dichotomy of sixth amendment violations is false, and the suggestion that sixth amendment exclusion is sometimes a mere deterrent safeguard is misguided. When the government denies counsel and then exploits that denial at trial by introducing disclosures from an unprotected accused, the accused suffers a real, substantial loss of the benefits of adversarial fair play. Trials fueled by the products of adversarial imbalance are constitutionally *unfair* whether or not those products are potentially untruthful or involuntary.[222] Ex-

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1141-46 (N.D. Ill. 1978) (refusing to apply *Stone* doctrine to *Massiah* claim); *see also* White v. Finkbeiner, 687 F.2d 885, 889 (7th Cir. 1982), *vacated sub nom.* Fairman v. White, 465 U.S. 1075 (1984) ("virtually uniformly lower courts either have refused to, or have stated in dicta that they would not, extend *Stone* beyond Fourth Amendment claims") (footnote omitted); W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE 1033 (1985) ("Lower court rulings dealing with habeas claims based on *Miranda* or *Massiah* generally have been unwilling to extend *Stone* to such claims.").

219. *See* Brewer v. Williams, 430 U.S. 387, 426-28 & nn.8-9 (1977) (Burger, C.J., dissenting); *id.* at 413-14 (Powell, J., concurring).

220. *See Williams*, 430 U.S. at 426-27 & n.9 (Burger, C.J., dissenting) (suggesting that some sixth amendment claims would justify exclusion in collateral proceedings for "deterrent" or "normative purposes," but that other sixth amendment-based claims for exclusion are indistinguishable from fourth amendment claims because of their "irrelevancy" to "factual guilt or innocence" and the "minimal deterrent effect" that exclusion would have); *id.* at 414 (Powell, J., concurring) (distinguishing between sixth amendment claims that "arise in the context of challenges to the fairness of a trial or to the integrity of the factfinding process" and those "that more closely parallel" fourth amendment claims insofar as they involve the suppression of reliable and probative evidence, and leaving open the possibility that *Stone* may be applicable to the latter).

Although these Justices speak of counsel violations that jeopardize "fairness" or implicate "normative" sixth amendment purposes, it is apparent that the *Massiah* violations they would exclude from *Stone's* sphere are those in which law enforcement tactics have cast doubt on the reliability of the defendant's disclosures or have coerced them from the accused. *Cf.* Kimmelman v. Morrison, 477 U.S. 365, 396 (1986) (Powell, J., concurring in the judgment) (suggesting that defense counsel's incompetent failure to raise a meritorious fourth amendment claim at trial cannot form the basis for a successful ineffective assistance of counsel claim under the sixth amendment because the only effect is "the admission of illegally seized but reliable evidence" and such evidence "does not lead to an unjust or fundamentally unfair verdict" or affect "the fundamental fairness of the trial"). In other words, the only type of *Massiah* violations for which they would certainly continue to guarantee relief on habeas are those that also involve fifth amendment due process violations. The availability of sixth amendment relief on habeas would be rendered superfluous by such a limitation.

221. The Justices have also suggested that if *Stone* was found applicable to sixth amendment claims that putatively resemble fourth amendment claims, habeas relief would remain available for many sixth amendment deprivations. *See Williams*, 430 U.S. at 427 n.9 (Burger, C.J., dissenting); *id.* at 414 (Powell, J., concurring). The accuracy of that suggestion is more than questionable. Few sixth amendment claims involve real threats to the reliability of evidence or coercive interrogation methods. Therefore, for most sixth amendment claims habeas relief would be available only in the undoubtedly rare instance in which a state failed to accord a full and fair hearing. All in all, little sixth amendment-based exclusion would occur in federal collateral proceedings.

222. The contary view that underlies most attacks on the *Massiah* entitlement and upon *Massiah* exclusion is that fairness in our criminal justice system demands no more than accurate factfinding and an absence of official coercion. *See supra* note 220. That vision of adversary system fairness suffocates sixth amendment values. *See* Tomkovicz, *supra* note 8, at 39-62.

clusion of the fruits of *Massiah* violations is always part and parcel of an accused's sixth amendment fair play entitlement.

Stone's deterrent-based analysis is irrelevant to the *Massiah* right to exclusion.[223] Since fourth amendment exclusion is a future-oriented device, the

223. It is difficult to predict whether the Court will hold that the *Stone* doctrine poses a bar to *Massiah* claims. The *Stone* majority proffered a variety of reasons for its holding, leaving the decision "open to widely divergent interpretation." *See* United States *ex rel.* Sanders v. Rowe, 460 F. Supp. 1128, 1141-42 (N.D. Ill. 1978). "Some of th[ose reasons] are not logically limited to fourth amendment violations." *Id.* at 1142. For example, the Court observed that habeas corpus relief must remain available to protect "innocent" persons and to remedy "intolerable restraints and grievous wrongs." It warned against the "serious intrusions" on important values that result from the use of habeas corpus for purposes other than to assure "that no innocent person suffers unconstitutional loss of liberty." Stone v. Powell, 428 U.S. 465, 491 n.31. (1976); *see also* Rose v. Mitchell, 443 U.S. 545, 587 n.10 (1979) (Powell, J., concurring in the judgment) (suggesting that a primary rationale of *Stone* was that fourth amendment exclusionary rule claims have "nothing to do with the guilt or innocence of the prisoner"). *Massiah* violations do not typically lead to the conviction of "innocents." And it is doubtful that the Court would conclude that ordinary *Massiah* right deprivations constitute "grievous wrongs" or lead to "intolerable restraints."

In addition, the *Stone* majority relied heavily on the fact that the petitioner sought the benefits of a judicially created deterrent safeguard that is designed to deter future wrongs, not to vindicate a present, personal right of the petitioner. The Court reasoned that any marginal deterrent gain was outweighed by the clear and substantial costs of suppression at the collateral stage. *See Stone*, 428 U.S. at 491-94; *see also* Kimmelman v. Morrison, 477 U.S. 365, 375-76 (1986) (noting that the *Stone* "Court found it critical that" the exclusionary rule is not a personal right, but is a judicially created deterrent remedy); Rose v. Mitchell, 443 U.S. 545, 560 (1979) (*Stone* majority "made it clear that it was confining its ruling to cases involving the judicially created exclusionary rule, which had minimal utility when applied in a habeas corpus proceeding"). The majority opinion in Nix v. Williams, 467 U.S. 431 (1984), suggests that exclusion in *Massiah* cases might be attributable to a similar judicially created rule. While the *Nix* Court did entertain the possibility that *Massiah* exclusion is a right, it placed considerably greater emphasis upon deterrent premises. *See supra* text accompanying notes 85-89. If the Court concludes, as *Nix* intimates, that the only substantial reason for an "exclusionary rule" in all, or some, *Massiah* cases is to discourage future deprivations of pretrial counsel, the primary premise of *Stone* would be relevant to those *Massiah* cases.

Despite such indications that *Stone's* reasoning could well extend to typical *Massiah* claims, there are several bases for hope that, if the occasion arises, the Court will find *Stone* inapplicable to those claims. In the thirteen years since *Stone* the Court has not extended it to a single additional context, but has twice rejected claims for extension of the doctrine. *See* Kimmelman v. Morrison, 477 U.S. 365 (1986) (*Stone* inapplicable to ineffective assistance of counsel claim based on failure to raise fourth amendment violation at trial); Rose v. Mitchell, 443 U.S. 545 (1979) (*Stone* does not govern fourteenth amendment equal protection claim of racial discrimination in selection of grand jury foreman). The Court has described *Stone* as an opinion of "carefully limited . . . reach." *Id.* at 560.

The *Kimmelman* decision is a particular cause for optimism. The petitioner therein claimed that his counsel had been constitutionally ineffective in violation of his sixth amendment right. The basis of the alleged ineffectiveness was the failure to assert a valid fourth amendment claim for suppression of reliable and probative evidence. The Court concluded that *Stone* could not be extended to the petitioner's claim of deprivation of the fundamental right to counsel. *Kimmelman*, 477 U.S. at 382-83. The Court reasoned that a sixth amendment claim, even one based on incompetent failure to assert the fourth amendment exclusionary rule, implicated different constitutional values than a fourth amendment claim, values pertaining to the fairness of the trial. *Id.* at 375-78. Importantly, the Court refused to consider dispositive the fact that the petitioner's argument did not cast doubt on the reliability of the guilt-innocence determination at trial. *Id.* at 379-80. According to the Court, "[c]onstitutional rights of criminal defendants are granted to the innocent and the guilty alike." *Id.* at 380. Vindication of the right to counsel could not be "conditioned upon actual innocence." *See id.* at 380; *see also id.* at 393 (Powell, J., concurring in the judgment) ("the right to effective assistance of counsel ensures that defendants have a fair opportunity to contest the charges against them" and that opportunity includes the raising of meritorious fourth amendment exclusionary rule claims).

In addition, lower courts have rarely found *Stone* applicable outside the fourth amendment realm. *See supra* note 218; *see also* United States *ex rel.* Sanders v. Rowe, 460 F. Supp. 1128, 1146 n.53 (N.D. Ill. 1978) (calling it "unlikely that [the doctrine] will ever be extended to the violation of

Court could properly consider whether its remedial objectives were well served by delayed suppression in a collateral proceeding. It could legitimately consider the costs of pursuing those objectives at that late stage. In the sixth amendment area, where exclusion is a constitutional right, such interest balancing is illegitimate at any stage. In habeas corpus actions the federal courts are obligated to ensure that unvindicated constitutional rights are vindicated.[224] The accused is entitled to more than just a full and fair state court *hearing* on his sixth amendment claim, he is entitled to full and fair protection and enforcement of his right to counsel. When the government introduces *Massiah*-violative evidence at trial, it violates the right to counsel. Exclusion in a collateral proceeding is necessary and proper to remedy the denial of the personal right to assistance.

The Court should confine *Stone* to areas where its analytical underpinnings are relevant. In the *Massiah* domain, the doctrine would undermine our commitment to sixth amendment values and erode the constitutional promise of equalization.

V. CONCLUSION

Courts should resolve issues raised by the exclusion of evidence from criminal trials by reference to the rationales for such exclusion. They should derive the rationales for each different constitutional context from the objectives and character of the constitutional provision at stake. The nature of the sixth amendment promise of defense counsel and the pretrial extension of that promise delineated by the *Massiah* doctrine point toward but one legitimate rationale for suppression. Sixth amendment *Massiah*-based exclusion is a personal, constitutional right, not a judicially created, deterrent safeguard.

Too often judges simply graft fourth amendment and *Miranda* exclusionary rule limitations and qualifications onto the *Massiah* realm. That approach to exclusionary questions is unacceptable. Instead, the right-based character of sixth amendment suppression should prompt different analyses of several ac-

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the sixth amendment right to counsel" defined by *Massiah* doctrine). They have found ample support in the *Stone* opinion for the conclusion that its holding is relevant to the fourth amendment realm alone. *See id.* at 1144-46.

In sum, the extension of *Stone v. Powell* to *Massiah* claims is "a live possibility." W. LAFAVE & J. ISRAEL, *supra* note 218, at 1032-33. The *Stone* opinion itself provides support for application of its holding to the *Massiah* realm. On the other hand, the reasoning of subsequent decisions, althougth not conclusive on the question of *Stone's* relevance to *Massiah* violations, *see* W. LAFAVE & J. ISRAEL, *supra* note 218, at 1032, does provide support for a refusal to extend the doctrine. Moreover, those decisions indicate a reluctance to extend *Stone* beyond its fourth amendment origins.

224. *See* W. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 3-7 (1980) (the function of habeas corpus is to provide a forum to "vindicate substantive rights"); R. HURD, A TREATISE ON THE THE RIGHT OF PERSONAL LIBERTY AND ON THE WRIT OF HABEAS CORPUS 129 (De Capo Press reprint 1972) (2d ed. 1876) (the writ of habeas corpus is for the "vindication of the right of personal liberty when illegally restrained"); *see also* Kuhlmann v. Wilson, 477 U.S. 436, 447 (1986) (observing that "the writ should be available to afford relief to those 'persons whom society has grievously wronged' in light of modern concepts of justice" (quoting Fay v. Noia, 372 U.S. 391, 440-41 (1963))); *Kimmelman*, 477 U.S. at 383 ("Where a State obtains a criminal conviction in a trial in which the accused is deprived of the effective assistance of counsel, the 'State . . . unconstitutionally deprives the defendant of his liberty.' . . . The defendant is thus 'in custody in violation of the Constitution,' 28 U.S.C. § 2254(a), and federal courts have habeas jurisdiction over his claim." (quoting Cuyler v. Sullivan, 446 US. 335, 343 (1980))).

cepted exclusionary rule doctrines that have developed in deterrent milieus. To ensure full enforcement of the right to counsel, sixth amendment reevaluation of those doctrines is essential.

Such reevaluation suggests that a standing limitation, an independent source doctrine, and an inevitable discovery exception make sense as sixth amendment qualifications. On the other hand, the attenuation and "good faith" exceptions, the impeachment qualification, and the doctrine of *Stone v. Powell* prove to be illogical and dangerous to the sixth amendment right. They should not temper *Massiah* suppression. Proper resolution of these and other exclusionary issues in sixth amendment settings requires full awareness that the right to counsel is not violated by out-of-court dealings with uncounseled defendants, but by the use of the products of those dealings at trial. If that awareness serves as a backdrop, the substance of the right to counsel will survive the serious threats posed by facile and uncritical application of "exclusionary rule" doctrines.