

Winter 2000

## The Sixth Amendment Right to Counsel and its Underlying Values: Defining the Scope of Privacy Protection

Martin R. Gardner

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

---

### Recommended Citation

Martin R. Gardner, The Sixth Amendment Right to Counsel and its Underlying Values: Defining the Scope of Privacy Protection, 90 J. Crim. L. & Criminology 397 (1999-2000)

This Criminal Law is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

# CRIMINAL LAW

## THE SIXTH AMENDMENT RIGHT TO COUNSEL AND ITS UNDERLYING VALUES: DEFINING THE SCOPE OF PRIVACY PROTECTION

MARTIN R. GARDNER\*

### I. INTRODUCTION

The Sixth Amendment<sup>1</sup> has been described by leading commentators as the central feature of our adversarial system,<sup>2</sup> nevertheless “scholars, lawyers, and judges have often lost their way” in their attempts to understand the Amendment’s scope and underlying values.<sup>3</sup> Such observations are particularly fitting in the context of the right to counsel provision. A search of

---

\* Steinhart Foundation Professor of Law, University of Nebraska College of Law. The author expresses his gratitude to Tammy Mahl-Bodlak and Josh Gardner for their research assistance. The author also appreciates the support provided by the Ross McCollum Faculty Research Fund at the University of Nebraska College of Law.

<sup>1</sup> The Sixth Amendment provides in full:

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

U.S. CONST. amend. VI

<sup>2</sup> See, e.g., Akhil R. Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 641 (1996) (“The Sixth Amendment is the heartland of constitutional criminal procedure.”); James J. Tomkovicz, *The Messiah Right to Exclusion: Constitutional Premises and Doctrinal Implications*, 67 N.C. L. REV. 751, 753 (1989) (“The sixth amendment right to counsel is the central element of our adversary system.”).

<sup>3</sup> See Amar, *supra* note 2.

the scholarly literature reveals a variety of viewpoints regarding the interests embraced by the Sixth Amendment's promise that "[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense."<sup>4</sup> Moreover, the reported cases bespeak a body of law lacking theoretical cohesion.<sup>5</sup>

This Article will examine the doctrinal confusion at the heart of right to counsel jurisprudence. The Article will identify three values underlying the Sixth Amendment Right to Counsel Clause by examining several leading Supreme Court cases, paying particular attention to the possible role played by privacy protection as a basis for the Court's decisions. The discussion will then review lower court opinions and document the substantial disagreement by those courts as to the role of privacy protection as a Sixth Amendment value. Building on an opinion of Chief Judge Richard A. Posner of the Seventh Circuit Court of Appeals, the Article will then derive principles recommended as useful vehicles for defining the proper scope of Sixth Amendment privacy. Those principles will then be applied to the relevant body of Supreme Court case law illustrating that privacy protection is not a relevant value in those cases. Finally, the Article will urge judicial clarification of the function of attorney-client privacy in right to counsel cases and offer the principles herein as aids to that clarification.

---

<sup>4</sup> See *supra* note 1; *infra* Part V.B. In interpreting the Sixth Amendment, the Supreme Court has read the limitation to "criminal prosecutions" as generating a right to counsel only "at or after the time that adversary judicial proceedings have been initiated." *Kirby v. Illinois*, 406 U.S. 682, 688, 690 (1972); see also *Brewer v. Williams*, 430 U.S. 387, 398 (1977) (holding that a person's Sixth Amendment counsel rights attach when "judicial proceedings have been initiated against him 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment'"). Moreover, when the trial process is completed, the "prosecution" ends and the Sixth Amendment counsel provision becomes inapplicable. JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL PROCEDURE* 518 (2d ed. 1997). Despite the fact that the Sixth Amendment right to counsel terminates at the completion of trial, claims that counsel rights were denied at trial may be raised in postconviction proceedings. See, e.g., CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE* 760-61, 888-97 (3rd ed. 1993).

<sup>5</sup> See *infra* Part III.

## II. SUPREME COURT CASES AND SIXTH AMENDMENT VALUES

Since its first major discussion in the 1932 decision *Powell v. Alabama*,<sup>6</sup> the United States Supreme Court has decided numerous cases raising a variety of issues under the Right to Counsel Clause of the Sixth Amendment.<sup>7</sup> These cases, in turn, articulate several disparate interests sought to be protected by the right to counsel provision.

No attempt will here be made to chronicle the whole of the Court's performance. Rather, several representative cases will be highlighted in order to illustrate the relevant values at the foundation of the Right to Counsel Clause.

### A. FAIRNESS

The most prominent value bottoming the Sixth Amendment right to counsel provision is the concern for providing fair trials for criminal defendants.<sup>8</sup> The cases seek to protect the fairness value not only during the actual trial<sup>9</sup> but also under certain circumstances during the pretrial phase.<sup>10</sup>

In *Gideon v. Wainwright*,<sup>11</sup> the Court addressed the unfairness inherent when defendants are financially unable to obtain counsel during trial. In *Gideon*, the Court recognized the applicability of the Sixth Amendment counsel right to the States<sup>12</sup>

---

<sup>6</sup> 287 U.S. 45 (1932) (upholding right to counsel for indigent defendants in capital punishment case); 3 WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE 459 (2d ed. 1992) ("The first major Supreme Court discussion of the constitutional right to counsel came in *Powell*.").

<sup>7</sup> See 3 LAFAYE ET AL., *supra* note 6, at 304-14, 458-68.

<sup>8</sup> "The purpose of the sixth amendment right to counsel is to protect the integrity of the adversary system of criminal justice." Note, *Government Intrusions Into the Defense Camp: Undermining the Right to Counsel*, 97 HARV. L. REV. 1143, 1144 (1984). See *infra* notes 11-29 and accompanying text.

<sup>9</sup> See *infra* notes 11-17 and accompanying text.

<sup>10</sup> See *infra* notes 18-29 and accompanying text.

<sup>11</sup> 372 U.S. 335, 341-45 (1963).

<sup>12</sup> *Id.* at 342. The Court had earlier held in *Betts v. Brady* that denying state appointed counsel to indigent defendants did not necessarily constitute "fundamental unfairness" under the Due Process Clause of the Fourteenth Amendment. Therefore, the *Betts* Court found that the Right to Counsel Clause of the Sixth Amendment did not apply to the States. 316 U.S. 455, 461-62 (1942), *overruled by* *Gideon v. Wainwright*, 372 U.S. 335 (1963).

and held that indigent defendants were entitled to counsel at state expense.<sup>13</sup> The court noted:

[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries . . . . From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.<sup>14</sup>

The *Gideon* Court recognized the unfairness of forcing a defendant untrained in the law to defend himself against the power and legal acumen of the State.<sup>15</sup> Fairness requires rough equality between adversarial opponents.<sup>16</sup>

---

<sup>13</sup> *Gideon*, 372 U.S. at 344. In *Gideon* the defendant, Gideon, was charged with a felony, was refused state funded counsel, and, consequently, was forced to defend himself at trial. Gideon was eventually convicted and sentenced to prison from which he petitioned the courts for habeas corpus relief. *Id.* at 336-37.

Subsequent to *Gideon*, the Supreme Court held that indigent defendants do not enjoy a right to counsel at state expense if they are not sentenced to a term of imprisonment upon conviction after having defended themselves *pro se* at trial. See *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979).

<sup>14</sup> *Gideon*, 372 U.S. at 344.

<sup>15</sup> *Id.*

<sup>16</sup> Professor Tomkovicz has expressed the role of the right to counsel as follows:

[O]ur adversary 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.

Tomkovicz, *supra* note 2, at 753.

While the right to counsel originally extended to trials alone,<sup>17</sup> the Court eventually extended the right to certain pre-trial contexts. Thus, in *Massiah v. United States*<sup>18</sup> the Government made evidentiary use of incriminating statements made by a defendant while he was free on bail after having been indicted for a federal narcotics offense. The Government obtained the statements by surreptitiously monitoring conversations between the defendant and a co-defendant who had agreed to cooperate with the government and to permit the installation of a radio transmitter under the seat of his car.<sup>19</sup> While the defendant had retained a lawyer prior to being released on bail, the lawyer was not present at the time of the conversations with the co-defendant.<sup>20</sup> The Supreme Court eventually held that the Government had violated the defendant's Sixth Amendment rights by "deliberately elicit[ing]" the statements from him after he had been indicted and in the absence of counsel.<sup>21</sup> As a consequence, the Court reversed the defendant's conviction and suppressed the use of the tainted statements in any subsequent trial.<sup>22</sup>

The *Massiah* Court offered little explanation for the basis of its holding.<sup>23</sup> Indeed, sixteen years after its decision, Chief Jus-

---

<sup>17</sup> *Id.* at 754.

<sup>18</sup> 377 U.S. 201 (1964).

<sup>19</sup> *Id.* at 202-03.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 204, 206.

<sup>22</sup> *Id.* at 207.

<sup>23</sup> The *Massiah* Court did appeal to two prior cases, *Spano v. New York*, 360 U.S. 315 (1959) and *Powell v. Alabama*, 287 U.S. 45 (1932), for authoritative support. In *Spano*, the Court reversed a state criminal conviction because a confession obtained by direct police interrogation had wrongly been admitted against the defendant at his trial. The *Massiah* Court focused on the theory of the concurring Justices in *Spano* that "the Constitution required reversal of the conviction upon the sole and specific ground that the confession had been deliberately elicited by the police after the defendant had been indicted, and therefore at a time when he was clearly entitled to a lawyer's help." 377 U.S. at 204 (citing *Spano*, 360 U.S. at 327 (Stewart, J., concurring)). The *Massiah* Court noted that our system contemplates that "an indictment be followed by a trial in an orderly courtroom, presided over by a judge, open to the public, and protected by all the procedural safeguards of the law." *Id.* The Court further noted that, "a Constitution which guarantees a defendant the aid of counsel at such a trial could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extrajudicial proceeding." *Id.* The Court apparently saw little

tice Rehnquist would lament that "[t]he doctrinal underpinnings of *Massiah* have been largely left unexplained."<sup>24</sup> In light of this, the Chief Justice offered the following rationale, noting however that the *Massiah* decision was "difficult to reconcile with the traditional notions of the role of an attorney."<sup>25</sup>

Historically and in practice, in our country at least, [a hearing] has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.<sup>26</sup>

With *Massiah*'s realization that the Sixth Amendment right to counsel was not limited alone to the actual trial phase, the Supreme Court subsequently recognized the applicability of the

---

relevance in the fact that the defendant in *Spano* was aware that he was being interrogated by the police at the time he confessed while the defendant in *Massiah* was oblivious to the fact that he was being "interrogated" by the police, or at least by one working with the police.

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

<sup>24</sup> *United States v. Henry*, 447 U.S. 264, 290 (1980) (Rehnquist, J., dissenting). Commentators agree. A careful observer of the Court's work has observed: "The Court has yet to proffer an in-depth constitutional justification for the *Massiah* right." James J. Tomkovicz, *An Adversary System Defense of the Right to Counsel Against Informants: Truth, Fair Play, and the Massiah Doctrine*, 22 U.C. DAVIS L. REV. 1, 22 (1988).

<sup>25</sup> *Henry*, 447 U.S. at 290 (Rehnquist, J., dissenting). Justice Rehnquist saw those "traditional notions" specifically as the ability to hold private unencumbered lawyer client consultations as often as desired, interests in no way offended in *Massiah*. *Id.*

<sup>26</sup> *Id.* at 291-92 (Rehnquist, J., dissenting) (quoting *Powell*, 287 U.S. at 68-69).

counsel right to a variety of pretrial contexts.<sup>27</sup> In each instance the Court's concern was to protect against governmental circumvention of the ideal of maintaining a fair balance between adversarial opponents while "the core purpose of the counsel guarantee [is] to assure 'Assistance' at trial, when the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor."<sup>28</sup> *Massiah* and its progeny thus embrace the view that cherished trial protections may become irrelevant if the accused is already "convicted" through pretrial governmental activities.

The trial fairness interest articulated by cases such as *Gideon* and *Massiah* vindicates rights personal to the accused. The interest is aimed at sparing the accused the harm inherent in being forced to face the power of government prosecution without the ability to deal effectively with the complexities of the criminal justice process. As such, the fairness interest speaks to protecting procedural rights of the accused rather than to punishing the government for violation of a protected substantive interest.<sup>29</sup>

---

<sup>27</sup> As noted above, the Sixth Amendment right applies after the "initiation of adversary judicial proceedings," ordinarily requiring a formal commitment of the government to prosecute as evidenced by the filing of charges. See *supra* note 4. See also 3 LAFAYE ET AL., *supra* note 6, at 497. Once a "criminal prosecution" is triggered the Supreme Court has held that the right to counsel applies only to "critical stages" of the prosecution. *Id.* at 496-97. Applying this test, the Court has found that an accused has the right to counsel at first judicial appearances where non-binding pleas are entered, see *White v. Maryland*, 373 U.S. 59, 60 (1963); at arraignments where defenses not there raised are abandoned by law, see *Hamilton v. Alabama*, 368 U.S. 52, 53-54 (1961); at post-indictment lineups, see *United States v. Wade*, 388 U.S. 218, 237 (1967); at preliminary hearings, see *Coleman v. Alabama*, 399 U.S. 1, 9-10 (1970); and, as discussed above, in situations where the government seeks to elicit inculpatory statements, see *supra* notes 17-26 and accompanying text. But see *United States v. Ash*, 413 U.S. 300, 321 (1973) (no right to counsel at police initiated photo identification).

<sup>28</sup> *Ash*, 413 U.S. at 309. In a subsequent case, the Court noted:

[T]he assistance of counsel cannot be limited to participation in a trial . . . Recognizing that the right to the assistance of counsel is shaped by the need for the assistance of counsel, we have found that the right attaches at earlier, "critical" stages in the criminal justice process "where the results might well . . . reduce the trial itself to a mere formality."

*Maine v. Moulton*, 474 U.S. 159, 170 (1985) (quoting *Wade*, 388 U.S. at 224).

<sup>29</sup> Within the bill of rights protections relating to the criminal justice system, the exclusion of illegally obtained evidence sometimes operates to deter governmental infringements of protected substantive interests. In Fourth Amendment jurispru-



## B. SUBSTANTIVE INTERESTS IN ATTORNEY-CLIENT PRIVACY

Along different lines, Supreme Court case law has obliquely suggested that Sixth Amendment interests are violated when the government acts in ways perceived as interfering with the counsel rights of an accused even though no unfairness to the accused actually results. In such cases, the Court implies that the Sixth Amendment speaks not simply to protecting the accused from actual unfairness but also to deterring the government from certain conduct deemed inimical to the right to counsel. This view appears to recognize that the Sixth Amendment protects substantive interests in addition to promoting the procedural goal of trial fairness.

For example, in *United States v. Morrison*<sup>30</sup> the Supreme Court assumed a Sixth Amendment violation in a case in which the accused suffered no actual interference with her right to counsel and thus incurred no unfairness as a result of the violation. In *Morrison*, two federal drug enforcement officials confronted the accused, who had been indicted and had retained counsel, and outside counsel's presence and without his knowledge or permission urged the accused to cooperate in a related investigation, promising benefits for cooperation and threatening a jail term if the accused failed to cooperate.<sup>31</sup> During the course of their conversations, the federal officials, aware that

---

dence, for example, evidence obtained through illegal searches and seizures is suppressed in order to discourage governmental violations of protected privacy. See, e.g., Martin R. Gardner, *The Emerging Good Faith Exception to the Miranda Rule—A Critique*, 35 HASTINGS L.J. 429, 432-39 (1984). On the other hand, in the context of the Fifth Amendment privilege against self-incrimination, coerced confessions and other incriminating evidence are excluded to protect the procedural rights of the accused rather than as a vehicle for shaping governmental conduct. *Id.* at 441-68; Martin R. Gardner, *Section 1983 Actions Under Miranda: A Critical View of the Right to Avoid Interrogation*, 30 AM. CRIM. L. REV. 1277 (1993).

For an extensive discussion of the complex of values contained within the general concept of trial fairness, see Tomkovicz, *supra* note 24, at 39-62. For a discussion of Sixth Amendment fairness interests as "instrumental" (i.e., meant to avoid "actual adversary prejudice to the accused") rather than "intrinsic" (i.e., meant to vindicate "respect for intrinsic integrity of the accused") see Philip Halpern, *Government Intrusion into the Attorney-Client Relationship: An Interest Analysis of Rights and Remedies*, 32 BUFF. L. REV. 127, 133-36 (1983).

<sup>30</sup> 449 U.S. 361, 364 (1981). The Court "assume[d], without deciding, that the Sixth Amendment was violated in the circumstances of [*Morrison*]." *Id.*

<sup>31</sup> *Id.* at 362.

the accused had been indicted and had retained counsel, disparaged her counsel and suggested that better and less costly representation could be obtained from the public defender.<sup>32</sup> The accused declined to cooperate, made no statement in any way pertinent to her case, and immediately notified her attorney of the confrontation.<sup>33</sup> The accused continued to rely on her retained counsel and eventually sought to have her indictment dismissed on the ground that the federal officials had violated her Sixth Amendment right to counsel.<sup>34</sup> The trial court denied the motion to dismiss.<sup>35</sup> The accused was subsequently convicted and appealed.<sup>36</sup>

The case eventually reached the Supreme Court which granted certiorari to consider whether the extraordinary remedy of dismissal was appropriate in the absence of some adverse consequence to the representation the accused received or to the fairness of the proceedings brought against her.<sup>37</sup> The Court assumed that a Sixth Amendment violation had occurred<sup>38</sup> but found that in the absence of "demonstrable prejudice, or substantial threat thereof, dismissal of the indictment [was] plainly inappropriate, even though the violation may have been deliberate."<sup>39</sup> While denying the drastic remedy of dismissal, the Court nevertheless condemned the "egregious behavior of the Government agents" in the case and allowed that "in cases such as this, a Sixth Amendment violation may . . . be remedied in other proceedings."<sup>40</sup>

---

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 362-63.

<sup>34</sup> *Id.* at 363.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* On appeal, the Court of Appeals for the Third Circuit reversed the trial court and concluded that the action against the accused (Morrison) should be dismissed. *Id.*

<sup>37</sup> *Id.* at 363-64.

<sup>38</sup> While early in its opinion the *Morrison* Court specifically assumed a Sixth Amendment violation, see *supra* note 30, the Court expressed a more tentative view later in the opinion by noting that "[t]he Sixth Amendment violation, if any, accordingly provides no justification for interfering with the criminal proceedings . . . against Morrison, much less the drastic relief [dismissal] granted by the Court of Appeals." *Id.* (emphasis added).

<sup>39</sup> *Id.* at 365.

<sup>40</sup> *Id.* at 367.

The Court did not elaborate on the nature of the Sixth Amendment interest offended in *Morrison* nor on what it was about the Governmental conduct that it found "egregious." Indeed, given the absence of any semblance of unfairness to the accused resulting from the government's actions, it is difficult to identify the nature of the constitutional evil inherent in *Morrison*. In any event, the Court clearly intimated that the initiation of adversarial proceedings against the accused insulated her from the kind of governmental intrusions at stake in the case, intrusions that would be perfectly permissible under Fourth and Fifth Amendment principles.<sup>41</sup> Moreover, because the government obtained no unfair advantage through its intrusion, the intrusion itself appears to be the evil. As such, the Court seems to have envisioned a Sixth Amendment right to be free from the kind of intrusion at issue in *Morrison*. Such a view suggests recognition of a Sixth Amendment right to privacy, a substantive right<sup>42</sup> totally distinct from the more traditional Sixth Amend-

---

<sup>41</sup> From the facts of *Morrison*, it does not appear that the police confrontation of the accused constituted a "seizure" of her person so as to trigger the Fourth Amendment proscription against "unreasonable searches and seizures." See, e.g., *United States v. Mendenhall*, 446 U.S. 544, 544 (1980) (holding that a person is "seized" only if under the circumstances a "reasonable person would have believed that he was not free to leave"). Moreover, because the accused made no statement that was used against her, neither the Fifth Amendment privilege against self-incrimination nor the *Miranda* doctrine, see *Miranda v. Arizona*, 384 U.S. 436 (1966), would find anything constitutionally offensive in *Morrison*. See Arnold H. Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907, 916-28, 933-36 (1989). The police confrontation in *Morrison* does not appear to constitute "custodial interrogation" so as to trigger *Miranda*. See, e.g., *Berkemer v. McCarty*, 468 U.S. 420 (1984). Even if the accused in *Morrison* was subjected to "custodial interrogation" by the federal officials in that case, the officials did no more than have discussions with the accused in an apparently non-coercive context. Such conversations, even if interrogative in nature, do not per se offend *Miranda*. See Gardner, *Section 1983 Actions Under Miranda*, *supra* note 29.

<sup>42</sup> In language reminiscent of the "sacred" right of marital privacy, see *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965), the Court has described the nature of Sixth Amendment counsel rights as follows: "Once an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect." *Patterson v. Illinois*, 487 U.S. 285, 290 n.3 (1988) (holding that indicted defendant's Sixth Amendment rights to counsel were not violated where police questioned defendant outside presence of counsel where defendant waived counsel rights after being given *Miranda* warnings and choosing to speak to police). Indeed, some members of the Court apparently see attorney-client privacy as the cen-

ment right to be free from procedural unfairness inherent in defending oneself without the aid of counsel.

### C. AUTONOMY

In addition to trial fairness and attorney-client privacy concerns, the Court has focused on autonomy interests of the accused as an underlying value of the Sixth Amendment right to counsel. For example, in *Faretta v. California*<sup>43</sup> the Supreme Court held that an accused who “competently and intelligently” decides to forego his right to be represented by counsel is entitled to conduct his own defense without having a lawyer forced

---

trial value underlying the right to counsel. “[T]he essence of the Sixth Amendment right is . . . privacy of communication with counsel.” *Weatherford v. Bursey*, 429 U.S. 545, 563 (Marshall, J., dissenting). *Weatherford* is discussed in detail *infra* Part III.A.

The Sixth Amendment “right to private communication” with one’s lawyer derives, in part at least, from the policies and principles underlying the attorney-client privilege.

[B]y protecting the privacy of attorney-client communications, the privilege is said to encourage full and frank exchanges between client and counsel. If clients fear that their opponents may gain access to these conversations, open communication with counsel will inevitably be chilled. As a result, an attorney may lack a full understanding of his client’s case and may thus be unable to represent his client’s interests as effectively as possible.

*Government Intrusion Into the Defense Camp*, *supra* note 8, at 1145 (citations omitted).

As the above quote explains, rights to attorney-client privacy are closely related to fair trial rights. Indeed, they may usefully be seen as prophylactic rights assuring trial fairness. They are thus, in a sense, “instrumental” rather than “intrinsic” rights. See Halpern, *supra* note 29.

On the other hand, attorney-client privacy rights are “substantive” rather than “procedural” in the sense that they protect attorney-client privacy per se and require no showing of prejudice or unfairness as prerequisites to their violation. These privacy rights thus have “a life of their own” and are violated at the time of governmental intrusion into the attorney-client relationship rather than when the government makes unfair use of the intrusion against the accused. See *infra* Part IV.A.

While the *Morrison* Court alluded to a Sixth Amendment right to privacy, clearly the Court has not recognized that an accused has an absolute right to be “let alone” by the government once adversarial proceedings have been initiated against him. Indeed, the Court has permitted “passive” efforts by the government to obtain incriminating evidence from an officially charged accused while counsel is not present. See, e.g., *Kuhlmann v. Wilson*, 477 U.S. 436, 456-60 (1986) (police placed jailed informant in same cell as accused hoping to obtain evidence against accused; incriminating statements by accused to informant cellmate held admissible because informant had followed instructions not to question accused but to merely listen for information). See also *infra* Part III.A. (discussing *Weatherford v. Bursey*).

<sup>43</sup> 422 U.S. 806 (1975).

upon him against his will.<sup>44</sup> The Court grounded its recognition of the right to proceed *pro se* on the "inestimable worth of free choice" entailed as an inherent Sixth Amendment value.<sup>45</sup> The Court explained the rationale for its holding as follows:

The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the lifeblood of the law."<sup>46</sup>

The Court's acknowledgment that exercise of one's right to defend oneself might redound to his detriment is a clear realization that the underlying constitutional value identified in *Faretta* is different from, and perhaps at odds with, the trial fairness value espoused in *Gideon* and *Massiah*.<sup>47</sup>

---

<sup>44</sup> *Id.* at 835.

<sup>45</sup> *Id.* at 834. The Court stated:

The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be "informed of the nature and cause of the accusation," who must be "confronted with the witnesses against him," and who must be accorded "compulsory process for obtaining witnesses in his favor." Although not stated in the Amendment in so many words, the right to self-representation—to make one's own defense personally—is thus necessarily implied by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.

The counsel provision supplements this design. It speaks of the "assistance" of counsel, and an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists.

*Id.* at 819-20 (footnotes omitted).

In addition to this "structural" analysis, the *Faretta* Court also relied on historical sources indicating that at the time of the drafting of the Sixth Amendment, the right of self-representation was widely recognized and has remained so as evidenced by its inclusion in the constitutions of many states. *Id.* at 813-17.

<sup>46</sup> *Id.* at 834 (quoting *Illinois v. Allen*, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring)).

<sup>47</sup> See *supra* notes 11-29 and accompanying text. Arguably, the autonomy interest identified in *Faretta* was grounded on an earlier line of cases in which the Supreme Court held that the right to counsel is violated where courts denied an accused access to retained counsel during various stages of the process of prosecution. See, e.g.,

The Court further elaborated on the autonomy value in *McKaskle v. Wiggins*<sup>48</sup> which addressed the problem of reconciling the defendant's right to proceed *pro se* in situations where standby counsel has been appointed to assist the defendant without his consent.<sup>49</sup> The *McKaskle* Court reaffirmed the right to proceed *pro se* as an affirmation of "the dignity and autonomy of the accused."<sup>50</sup> Allowing that "occasionally" an accused proceeding *pro se* might actually present his "best possible defense,"<sup>51</sup> the Court nevertheless acknowledged that in most cases "the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant."<sup>52</sup> Thus, while vindicating the defendant's autonomy, employment of the right to proceed *pro se* often compromises the defendant's interest in obtaining a fair trial.

The *McKaskle* Court found that the presence of standby counsel does not infringe on the *pro se* defendant's rights so long as the defendant retains "actual control over the case he chooses to present to the jury."<sup>53</sup> Moreover, "participation by standby counsel without the defendant's consent should not be allowed to destroy the jury's perception that the defendant is representing himself."<sup>54</sup> The Court explained: "The defen-

---

Chandler v. Fretag, 348 U.S. 3, 10 (1954) (accused denied right to counsel when he was made to answer state habitual criminal charge without affording him an opportunity to retain counsel); Glasser v. United States, 315 U.S. 60, 75-76 (1942), *superseded by statute*; Bourjaily v. United States, 483 U.S. 171 (1987) (accused has Sixth Amendment right to exclusive services of lawyer he retains, thus accused denied right to counsel when court ordered his retained counsel also to represent a co-defendant). Note that *Fretag*, a state case, was decided before the Sixth Amendment was held applicable to the states. The Court appealed to the Due Process Clause of the Fourteenth Amendment in finding that defendants "must be given a reasonable opportunity to employ and consult with counsel." *Fretag*, 348 U.S. at 10.

<sup>48</sup> 465 U.S. 168 (1984).

<sup>49</sup> In *McKaskle*, the trial court appointed standby counsel to assist the *pro se* defendant. The defendant at times voiced objection to the appointment, while at other times he cooperated with the standby. During the trial the defendant and standby often expressed disagreements, sometimes in the presence of the jury. In every instance of disagreement calling for a ruling from the bench, the court ruled in favor of defendant rather than the standby. *Id.*

<sup>50</sup> *Id.* at 176-77.

<sup>51</sup> *Id.* at 177.

<sup>52</sup> *Id.* at 177 n.8.

<sup>53</sup> *Id.* at 178.

<sup>54</sup> *Id.*

dant's appearance in the status of one conducting his own defense is important in a criminal trial since the right to appear *pro se* exists to affirm the accused's individual dignity and autonomy."<sup>55</sup> Given these provisions, the *McKaskle* Court saw no need to categorically bar the participation of standby counsel.<sup>56</sup>

### III. THE NEBULOUS RIGHT TO ATTORNEY-CLIENT PRIVACY IN SUPREME COURT CASE LAW

While the Court has alluded to three values—trial fairness, substantive privacy interests, and respecting the autonomy of the accused—as reflected in the Sixth Amendment right to counsel, close consideration of the Court's work makes clear that the fairness and autonomy interests are the primary, and perhaps the only, values presently bottoming the right to counsel. As this section of the Article will demonstrate, *Morrison's* nod towards the existence of a substantive right to attorney-client privacy as a value distinct from those of procedural fairness and personal autonomy has rarely been explicitly embraced by the Court, and when it has, it has been met with intense criticism.

Several Supreme Court cases raise the question of the existence of a substantive interest in attorney-client privacy as a distinct value underlying the Sixth Amendment right to counsel. The cases fall into two categories: situations where the government infiltrates an actual attorney-client conference, and where, as in *Massiah* and its progeny, the government engages an accused outside the presence of counsel at a time when the right to counsel has been triggered by the initiation of adversary proceedings.

---

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 182. While the autonomy interest is clearly recognized by the Court as an independent underlying value supporting the Right to Counsel Clause, this Article will pay little further attention to autonomy interests but will instead focus on the interplay between the fairness and privacy values.

## A. INFILTRATION OF ATTORNEY-CLIENT CONFERENCES

In *Weatherford v. Bursey*,<sup>57</sup> a case where an undercover Governmental agent participated in conferences between an accused and his counsel, the Court was presented with an opportunity to recognize a substantive Sixth Amendment interest in attorney-client privacy. Over the strong dissent of Justices Marshall and Brennan,<sup>58</sup> the Court found no violation of the accused's right to counsel.<sup>59</sup>

*Weatherford* arose through a civil rights action under 42 U.S.C. § 1983<sup>60</sup> brought by the accused, Bursey, against the undercover agent, Weatherford, who had feigned participation with Bursey in vandalizing a Selective Service office.<sup>61</sup> Weatherford immediately reported the incident to the police who, in order to maintain Weatherford's undercover status and retain his ability to work on other current matters, arrested Weatherford and ostensibly charged him along with Bursey with the offense. Bursey and Weatherford were both released on bond and Bursey retained counsel.<sup>62</sup> In spite of the fact that they suspected the presence of an undercover informant, on two occasions Bursey and his counsel invited Weatherford to participate in attorney-client meetings in an effort to obtain information, ideas, or suggestions relative to Bursey's defense.<sup>63</sup> Again in order not to divulge his undercover status, Weatherford met with Bursey and his counsel in pre-trial conferences but did not pass on any information regarding Bursey's trial plans or strategy.<sup>64</sup> By the time of Bursey's trial, Weatherford's effectiveness as an

---

<sup>57</sup> 429 U.S. 545 (1977).

<sup>58</sup> *Id.* at 561 (Marshall and Brennan, J.J., dissenting).

<sup>59</sup> *Id.* at 556.

<sup>60</sup> 42 U.S.C. § 1983 (1999) provides:

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

<sup>61</sup> *Weatherford*, 429 U.S. at 547.

<sup>62</sup> *Id.* In order to protect his cover, Weatherford also retained counsel. *Id.*

<sup>63</sup> *Id.* at 547-48.

<sup>64</sup> *Id.* at 548.



undercover agent had deteriorated.<sup>65</sup> As a consequence, Weatherford testified against Bursey detailing his undercover activities and giving an eyewitness account of Bursey's acts of vandalism.<sup>66</sup> Bursey was convicted and subsequently brought his § 1983 action against Weatherford, alleging that he had communicated defense strategies to the government thus depriving Bursey of the effective assistance of counsel under the Sixth Amendment.<sup>67</sup>

The district court found that no information relative to Bursey's defense had been passed on to the government and therefore denied Bursey's claim.<sup>68</sup> Bursey appealed to the Fourth Circuit Court of Appeals, which reversed, finding that even though the government learned nothing from Weatherford's meetings with Bursey and his counsel "whenever the prosecution knowingly arranges and permits intrusion into the attorney-client relationship the right to counsel is sufficiently endangered to require reversal and a new trial."<sup>69</sup> The Supreme Court granted Weatherford's petition for certiorari and reversed, finding no violation of Bursey's Sixth Amendment rights.<sup>70</sup>

In denying Bursey's Sixth Amendment claim, the Court noted the protection of attorney-client privacy as an important Sixth Amendment consideration<sup>71</sup> but paid particular attention to the fact that Bursey's fairness interests had not been offended by Weatherford's access to Bursey's meetings with his lawyer.<sup>72</sup> The Court explained:

Had Weatherford testified at Bursey's trial as to the conversation between Bursey and Wise [Bursey's counsel]; had any of the State's evidence originated in these conversations; had those overheard

---

<sup>65</sup> *Id.* at 549. Weatherford had been seen publicly in the presence of police officers. *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Bursey v. Weatherford*, 528 F.2d 483, 486 (4th Cir. 1975). The Fourth Circuit found that Bursey was entitled to have his conviction reversed even though he had merely claimed money damages under § 1983.

<sup>70</sup> *Weatherford*, 429 U.S. at 550.

<sup>71</sup> See *infra* text accompanying note 80.

<sup>72</sup> *Weatherford*, 429 U.S. at 554.

conversations been used in any other way to the substantial detriment of Bursey; or even had the prosecution learned from Weatherford, an undercover agent, the details of the Bursey-Wise conversations about trial preparations, Bursey would have a much stronger case.<sup>73</sup>

Such a view suggests that Bursey would have a "strong" Sixth Amendment case only if he could show that the government used against him information obtained by Weatherford. Such use would raise fairness issues actionable under the right to counsel. Mere invasions of attorney-client privacy, on the other hand, would thus appear to be constitutionally permissible.

The matter is not so simple, however, in light of the fact that the invasion of attorney-client privacy in *Weatherford* was not made in bad faith. Moreover, the Court attended to the practical realities of undercover police work in noting that

this is not a situation where the State's purpose was to learn what it could about the defendant's defense plans and the informant was instructed to intrude on the lawyer-client relationship or where the informant has assumed for himself that task and acted accordingly. Weatherford, the District Court found, did not intrude at all; he was invited to the meeting, apparently not for his benefit but for the benefit of Bursey and his lawyer. Weatherford went, not to spy, but because he was asked and because the State was interested in retaining his undercover services on other matters and it was therefore necessary to avoid raising the suspicion that he was in fact the informant whose existence Bursey and Wise already suspected.

That the per se rule adopted by the Court of Appeals would operate prophylactically and effectively is very likely true; but it would require the informant to refuse to participate in attorney-client meetings, even though invited, and thus for all practical purposes to unmask himself. Our cases, however, have recognized the unfortunate necessity of undercover work and the value it often is to effective law enforcement.<sup>74</sup>

It is thus unclear whether Bursey's Sixth Amendment rights would have been violated if Weatherford had purposely injected himself into Bursey's attorney-client conferences *in order to* obtain information relating to Bursey's defense strategy even if no such information was obtained. The relevance of Weatherford's motivations raises interesting questions not explored in detail by

---

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 557.

the *Weatherford* Court.<sup>75</sup> Why should it matter if Weatherford had invaded Bursey's conferences with his counsel *in order to* unfairly disadvantage Bursey so long as no information was gleaned to prejudice Bursey? Assuming that such bad faith conduct by Weatherford would violate Bursey's right to counsel rights, what underlying Sixth Amendment value would be offended? Two explanations appear possible, one finding an offense to the fairness value, the other recognizing a violation of the value of attorney-client privacy.

### 1. *Bad Faith Intrusions and Unfairness*

Purposeful but unsuccessful attempts by governmental agents to obtain an unfair advantage over an officially accused adversary might be viewed as Sixth Amendment violations because they create an undue risk of actually obtaining an unfair violation. Similar to the substantive crime of attempt,<sup>76</sup> governmental intrusions into an accused's conferences with his counsel in order to obtain an unfair advantage over the accused which result in no actual unfair advantage in the particular case may be viewed as inchoate violations of the accused's Sixth Amendment interest in a fair balance *vis a vis* his adversarial opponent. Proof that an informer reported to the prosecution on defense strategy is a difficult matter depending upon the willingness of the informer or the prosecutor to admit his own wrongdoing, thus opening the door to damages suits and attacks on convictions.<sup>77</sup> Thus, to protect the fairness interest, any

<sup>75</sup> Proof of the informant's motivations would always be problematic. "Establishing that a desire to intercept confidential communications was a factor in a State's decision to keep an agent under cover will seldom be possible, since the State always can argue plausibly that its sole purpose was to continue to enjoy the legitimate services of the undercover agent." *Id.* at 565 (Marshall, J., dissenting).

<sup>76</sup> While most crimes require a showing of actual harm, attempt and other inchoate crimes punish conduct intended to cause, but not actually causing, harm. See RICHARD G. SINGER & MARTIN R. GARDNER, *CRIMES AND PUNISHMENT: CASES, MATERIALS, AND READINGS IN CRIMINAL LAW* 525-69 (2d ed. 1996). Attempt may be understood as a crime punishing culpable conduct that risks, but does not cause, harm. *Id.*

<sup>77</sup> The point was made by the *Weatherford* dissenters. *Weatherford*, 429 U.S. at 565 (Marshall, J., dissenting). The majority saw the matter differently, however:

[W]e do [not] believe that federal or state prosecutors will be so prone to lie or the difficulties of proof will be so great that we must always assume not only that an informant communicates what he learns from an encounter with the defendant and his counsel but

purposeful intrusion of the attorney-client privacy of the accused in order to gain an unfair advantage might itself be viewed as a violation of the right to counsel.

Because of the problems inherent in proving unfair advantage, any intrusion by the government into an accused's conferences with his attorney places at risk the accused's interest in adversarial fairness regardless of the motivations of the governmental intruder. Where the intruder is in bad faith, as in the situation where he intrudes in order to gain an unfair advantage over the accused, his actions are improper and thus could, on this view, constitute a violation of the Sixth Amendment, redressed by a § 1983 action aimed at compensating the accused and deterring future violations.<sup>78</sup> On the other hand, where the governmental intruder is acting in good faith, as in *Weatherford*, the conduct of the government is not in obvious need of deterrence (because engaged in in good faith, the conduct may not be deterrable in any event)<sup>79</sup> and whatever risk of unfairness to the accused is outweighed by the perceived law enforcement benefits obtained through the use of undercover informants.

## 2. *Bad Faith Intrusions and Attorney-Client Privacy*

If the Sixth Amendment is violated when the government infiltrates the attorney-client conferences of an accused adversary in an unsuccessful attempt to obtain an unfair adversarial advantage, the Sixth Amendment violation suggested therein by the *Weatherford* Court might be grounded in attorney-client privacy as a value independent of concerns for adversarial fairness. The *Weatherford* Court noted that "the Sixth Amendment's assistance-of-counsel guarantee can be meaningfully implemented

---

also that what he communicates has the potential for detriment to the defendant or benefit to the prosecutor's case.

*Id.* at 556-57.

<sup>78</sup> For discussion of deterrence theory in the context of § 1983 actions, see generally, Gardner, *Section 1983 Actions Under Miranda*, *supra* note 29. Deterrence could theoretically be achieved by a damage judgment against the government, or, in extreme cases, by dismissing the charges against the accused.

<sup>79</sup> For discussion of deterrence theory in the context of good faith governmental conduct and the Fourth Amendment, see 1 WAYNE R. LAFAYE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* 51-101 (3d ed. 1996).

only if a criminal defendant knows that his communications with his attorney are private and that his lawful preparations are secure against intrusion by the government, his adversary in the criminal proceeding."<sup>80</sup>

Unjustified invasions of attorney-client privacy might thus be viewed as violations of the Sixth Amendment even where no unfair advantage is obtained by the government if the invasion threatens free communication between attorney and client in much the same way that unjustified invasions of a person's privacy outside the attorney-client context constitute violations of the Fourth Amendment even if the invasion yields no evidence to be used against the person.<sup>81</sup> Where the government invades attorney-client privacy for the purpose of obtaining an adversarial advantage, its action is in bad faith and therefore unjustified. On the other hand, where in *Weatherford* the intrusion was made in good faith and, as with certain good faith privacy intrusions in the Fourth Amendment context,<sup>82</sup> appears not be of a kind appropriate for application of the deterrence function underlying a § 1983 action under the Sixth Amendment,<sup>83</sup> especially because there was no evidence that the intrusion negatively impacted the free communication of Bursey and his attorney.

### 3. *Fairness as the Predominant Value?*

Dicta in the *Weatherford* opinion suggests that a violation of Bursey's Sixth Amendment rights would have occurred had *Weatherford* invaded Bursey's meetings with his counsel for the purpose of gaining access to trial strategy or other matters pertinent to Bursey's defense.<sup>84</sup> As the above discussion illustrates, such a violation can be understood in terms of an offense against either the fairness or attorney-client privacy value.

---

<sup>80</sup> *Weatherford*, 429 U.S. at 554 n.4 (quoting Brief for United States at 71, *Hoffa v. United States*, 385 U.S. 293 (1966) (No. 32)). See *supra* note 42 for a discussion of interrelationship of substantive rules of Sixth Amendment privacy with procedural rules protecting Sixth Amendment fairness.

<sup>81</sup> See *supra* note 79.

<sup>82</sup> See *supra* note 79.

<sup>83</sup> See *supra* text accompanying note 79.

<sup>84</sup> *Weatherford*, 429 U.S. at 554.

Whatever the theoretical implications of its dicta, the *Weatherford* Court focuses much more heavily on fairness rather than attorney-client privacy as the relevant Sixth Amendment value. While paying lip service to the privacy value<sup>85</sup> the Court repeatedly appeals to the absence of unfairness to Bursey as the basis for denying his Sixth Amendment claim.

As long as the information possessed by Weatherford remained uncommunicated, he posed no substantial threat to Bursey's Sixth Amendment rights. . . . We may disapprove an investigatory practice only if it violates the Constitution; and judged in this light, the Court of Appeals' per se rule cuts much too broadly. *If, for example, Weatherford at Bursey's invitation had attended a meeting between Bursey and Wise but Wise had become suspicious and the conversation was confined to the weather or other harmless subjects,* the Court of Appeals' rule, literally read, would cloud Bursey's subsequent conviction, although *there would have been no constitutional violation. The same would have been true if Wise had merely asked whether Weatherford was an informant, Weatherford had denied it, and the meeting then had ended;* likewise if the entire conversation had consisted of Wise's questions and Weatherford's answers about Weatherford's own defense plans. Also, and more cogently for present purposes, unless Weatherford communicated the substance of the Bursey-Wise conversations and thereby created at least a realistic possibility of injury to Bursey or benefit to the State, there can be no Sixth Amendment violation. Yet under the Court of Appeals' rule, Bursey's conviction would have been set aside on appeal.

There being no tainted evidence in this case, no communication of defense strategy to the prosecution, and no purposeful intrusion<sup>86</sup> by Weatherford, there was no violation of the Sixth Amendment. . . .

By seeing "no constitutional violation" if Weatherford's presence had actually chilled Bursey's open communication with his lawyer by "ending" communication or inducing mere talk of "harmless subjects," the Court implies that protecting attorney-client privacy is not, after all, an independent Sixth Amendment value. Moreover, the Court of Appeals ruling that the Sixth Amendment is violated "whenever the prosecution knowingly arranges or permits intrusion into the attorney-client

---

<sup>85</sup> See *supra* text accompanying note 80 for the Court's only reference to attorney-client privacy.

<sup>86</sup> *Weatherford*, 429 U.S. at 556-58 (emphasis added); see also *supra* text accompanying note 73.

relationship" of an accused<sup>87</sup> appears to be a recognition of a per se right to attorney-client privacy.<sup>88</sup> In rejecting the Court of Appeals rule and focusing on the value of adversarial fairness, the Court appears to have minimized, if not rejected altogether, attorney-client privacy as an independent Sixth Amendment value.

#### B. ENGAGING AN ACCUSED OUTSIDE THE PRESENCE OF COUNSEL

As noted above, *Massiah* and its progeny recognize violations of the Sixth Amendment right to counsel if the government "deliberately elicits" incriminating information from an officially charged accused at a time when counsel is not present and counsel rights have not been waived.<sup>89</sup> Some of the cases examine situations where the accused is in custody and encounters an undercover governmental informer.<sup>90</sup> Other cases deal with custodial encounters with known governmental agents,<sup>91</sup> while some cases, like *Massiah* itself, treat issues of undercover informants in non-custodial contexts.<sup>92</sup>

While the *Massiah* line of cases does not address situations where the accused is in direct communication with his lawyer, as in *Weatherford*, the cases do, nevertheless, provide a vehicle for examining the extent to which attorney-client privacy is a distinct Sixth Amendment value. The cases concern accused per-

---

<sup>87</sup> *Bursey v. Weatherford*, 528 F.2d 483, 486 (4th Cir. 1975); see also *supra* text accompanying note 69.

<sup>88</sup> The Courts of Appeals rule does speak in terms of the Sixth Amendment being "endangered" "whenever the prosecution knowingly arranges and permits intrusion into the attorney-client relationship." *Bursey*, 528 F.2d at 486. While such language might suggest that the privacy invasion itself may not constitute the violation, the *Weatherford* dissenters appeared to see the Court of Appeals rule as embracing attorney-client privacy as an independent Sixth Amendment value. In their discussion advocating "a per se rule of [the] sort" espoused by the Court of Appeals the dissenters stated: "[T]he only way to assure that defendants will feel free to communicate candidly with their lawyers is to prohibit the government from intercepting such confidential communications." *Weatherford*, 429 U.S. at 565-66 (Marshall, J., dissenting). Such an interpretation plausibly accounts for the Court of Appeals rule solely in terms of the attorney-client privacy value.

<sup>89</sup> See *supra* notes 18-23 and accompanying text; *infra* Parts III.B.1-3.

<sup>90</sup> See *infra* Part III.B.2.

<sup>91</sup> See *Brewer v. Williams*, 430 U.S. 387 (1976); see also *infra* Part III.B.1.

<sup>92</sup> See *Maine v. Moulton*, 474 U.S. 159 (1985); see also *infra* Part III.B.3.

sons who are entitled to access to counsel at the time the government engages them. To the extent such accused persons are granted insulation from governmental intrusion under the Sixth Amendment, they appear to be recipients of privacy protection through their right to counsel. An examination of the cases suggests that, while such a theory explains its cases, the Court has explicitly embraced the privacy rationale in only one case<sup>93</sup> late in the *Massiah* line. In the remainder of the cases the Court, as in the *Massiah* case itself, renders its decisions without appealing to any underlying Sixth Amendment value or by reference to the fairness value. As the following discussion will reveal, the Court's failure to develop a consistent view of the values underlying its cases in the *Massiah* line leaves the decisions on an uncertain foundation and subject to considerable controversy.

### 1. *Brewer v. Williams*

The controversial nature of *Massiah's* progeny is most clearly illustrated by *Brewer v. Williams*,<sup>94</sup> a case involving a police officer, Detective Leaming, who obtained incriminating statements from a murder suspect while the two were riding in a police car. At the time of the encounter with Leaming, the suspect, Williams, had been arraigned, had obtained counsel, had been given *Miranda* warnings several times, and had informed Leaming that he did not wish to speak to the police. Leaming, in turn, had promised Williams and his counsel that he would not interrogate Williams while the two were together in a police car transporting Williams from Davenport to Des Moines, Iowa.<sup>95</sup> During the ride of several hours, Leaming, who

---

<sup>93</sup> *Moulton*, 474 U.S. at 159.

<sup>94</sup> 430 U.S. 387 (1977). Professor Uviller has described *Brewer v. Williams* as "perhaps the most notorious of *Massiah's* progeny." H. Richard Uviller, *Evidence from the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 COLUM. L. REV. 1137, 1161 (1987). For a sample of criticism directed at the *Brewer* case see, e.g., Sandra T. Brewer, Note, *Brewer v. Williams: The End of Post-Charging Interrogation?*, 10 SW. U. L. REV. 331 (1978); Linda S. Bueth, Note, *The Right to Counsel and the Strict Waiver Standard*, 57 NEB. L. REV. 543 (1978); Phillip E. Johnson, *The Return of the "Christian Burial Speech" Case*, 32 EMORY L.J. 349 (1983).

<sup>95</sup> Leaming had traveled to Davenport to transport Williams to Des Moines, which was the scene of the murder. *Brewer*, 430 U.S. at 391.



suspected that Williams had murdered a 10-year-old girl several days earlier on Christmas Eve, and Williams engaged in conversation including the subject of religion. During their conversation, Leaming, who knew Williams was a deeply religious man who had recently escaped from a mental institution, made the now famous "Christian burial speech"<sup>96</sup> in which he asked Williams to think about the plight of the family of the dead girl, whose body had not been found, who were unable to see their loved one receive a proper "Christian burial." After the speech, Leaming told Williams not to say anything but to simply think about what he (Leaming) had said.<sup>97</sup> Soon thereafter Williams directed Leaming to the place where the girl's body was hidden.

Williams was convicted of murder and eventually sought a petition for habeas corpus, alleging that his statements directing Leaming to the body were inadmissible because they were obtained in violation of his Sixth Amendment right to counsel. The district court agreed and issued the writ. The United States Supreme Court eventually affirmed, finding that by means of the Christian burial speech Leaming "deliberately . . . elicit[ed]" the incriminating statements from Williams in violation of his Sixth Amendment right to counsel.

---

<sup>96</sup> The briefs and oral arguments referred to Leaming's words as the "Christian burial speech." *Id.* at 397. Addressing Williams as "Reverend," Leaming said:

I want to give you something to think about while we're traveling down the road . . . . Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it all.

*Id.* at 397-98.

For a detailed examination of Leaming's speech and the implications of the *Brewer* case generally, see Yale Kamisar, *Brewer v. Williams, Massiah, and Miranda: What is "Interrogation"? When Does it Matter?* 67 GEO. L.J. 1 (1978).

<sup>97</sup> After making the speech Leaming stated: "I do not want you to answer me. I don't want to discuss it any further. Just think about it as we're riding down the road." *Brewer*, 430 U.S. at 393.

The Court saw the situation as indistinguishable from the "clear rule of *Massiah* that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him."<sup>98</sup> The Court disparaged Leaming's "use of psychology on a person whom he knew to be deeply religious and an escapee from a mental hospital with the specific intent to elicit incriminating statements."<sup>99</sup> In a similar critical vein, the Court noted that "[d]espite Williams' express and implicit assertions of his right to counsel, Detective Leaming proceeded to elicit incriminating statements from Williams."<sup>100</sup> Such considerations led the Court to conclude that "so clear a violation of the Sixth . . . Amendment[] as here occurred cannot be condoned."<sup>101</sup>

Apart from a reference to the Sixth Amendment as "indispensable to the fair administration our adversary system" even at the "pretrial stage,"<sup>102</sup> the Court offered little explanation of what Sixth Amendment value was offended by Leaming's actions. The Court simply cited *Massiah* as determining the *Brewer* result.

Not surprisingly, the Court's opinion in *Brewer* was not unanimous. Four justices dissented, finding, among other things, that the majority's position was unjustified in terms of the fairness value.<sup>103</sup> For three of the four dissenters, "the only

---

<sup>98</sup> *Id.* at 401.

<sup>99</sup> *Id.* at 403.

<sup>100</sup> *Id.* at 405.

<sup>101</sup> *Id.* at 406.

<sup>102</sup> *Id.* at 398.

<sup>103</sup> Chief Justice Burger expressed his disagreement as follows:

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

*Id.* at 426 (Burger, C.J., dissenting).

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

. . . conceivable basis for the majority's holding is the implicit suggestion . . . that the right involved in *Massiah* . . . is a right not to be asked any questions in Counsel's absence."<sup>104</sup> Indeed, such a "right" to privacy from governmental intrusion may well explain *Brewer* and *Massiah*.<sup>105</sup> If so, however, the decisions are on very shaky ground for the *Brewer* dissenters, who explicitly reject such a privacy interest as an underlying Sixth Amendment value.<sup>106</sup>

## 2. Jailhouse Informer Cases

In the jailhouse informer cases, *United States v. Henry*<sup>107</sup> and *Kuhlmann v. Wilson*,<sup>108</sup> the Court addressed situations where officially accused jail inmates made incriminating statements to fellow inmates who were providing undercover information to the government. In *Henry*, the Court found that the government had "deliberately elicited" information from an accused, Henry, by utilizing a paid informer<sup>109</sup> who, while instructed by an FBI agent not to question Henry about his alleged crimes, nevertheless engaged him in conversations in which Henry made in-

---

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

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

<sup>104</sup> *Id.* at 435-36.

<sup>105</sup> Professor Halpern has identified violation of a protected privacy interest as one of the evils condemned by *Massiah*. An "invasion occurred when the informant sought incriminating statements from the accused . . . The interest protected there is being free from certain types of governmental exploitation and deception, regardless of whether inculpatory evidence is obtained and used." Halpern, *supra* note 29, at 143. When in *Massiah* the incriminating statement was obtained in violation of the accused's privacy interest and used at trial, a second Sixth Amendment interest, fairness, was offended. *Id.*

<sup>106</sup> For the dissenters, "[q]uestions, unanswered, have no significance at all." *Brewer*, 430 U.S. at 436 (White, J., dissenting).

<sup>107</sup> 447 U.S. 264 (1980).

<sup>108</sup> 477 U.S. 436 (1986).

<sup>109</sup> The informer worked on a contingent fee arrangement, being paid only if he produced useful information. *Henry*, 447 U.S. at 270-71.

criminating disclosures. While leaving open the question raised by a situation "where an informant is placed in close proximity but makes no effort to stimulate conversations about the crime charged,"<sup>110</sup> the Court found that the informant in *Henry* was not a passive listener. The Court observed that even though the FBI agent had instructed the informant not to take affirmative steps to secure incriminating information, the agent "must have known" that the circumstances would lead to that result.<sup>111</sup> The Court noted that "[w]hen the accused is in the company of a fellow inmate who is acting by prearrangement as a Government agent, the [parties are not 'arms' length] adversaries]. Conversation stimulated in such circumstances may elicit information that an accused would not intentionally reveal to persons known to be Government agents."<sup>112</sup> Moreover, the context of incarceration "imposes pressure on the accused; confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover Government agents."<sup>113</sup> The Court concluded: "By intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry's Sixth Amendment right to counsel."<sup>114</sup> As a consequence, the Court held that the statements obtained from Henry were inadmissible.

The *Henry* Court never explained what Sixth Amendment value was offended by the Government's "impermissible interference with the right to the assistance of counsel."<sup>115</sup> The Court did allude to a rule of professional responsibility forbidding lawyers from communicating with opposing parties outside the presence of their counsel, although the Court noted that the professional conduct rule "does not bear on the constitutional

---

<sup>110</sup> *Id.* at 271 n.9.

<sup>111</sup> *Id.* at 271.

<sup>112</sup> *Id.* at 273.

<sup>113</sup> *Id.* at 274. The Court noted that the informant had managed to gain the confidence of the accused who had requested the informant to assist in his plan to escape incarceration. *Id.* at 266 n.2.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 275.

issue in this case."<sup>116</sup> The Court's nod to attorney-client privacy as the value offended was given more prominent consideration by Justice Powell who noted in his concurring opinion that the "rule of *Massiah* serves the salutary purpose of preventing police interference with the relationship between a suspect and his counsel once formal proceedings have been initiated. But *Massiah* does not prohibit the introduction of spontaneous statements that are not elicited by governmental action."<sup>117</sup>

On the other hand, three dissenting Justices saw no violation of constitutionality protected values in the *Henry* situation. The dissenters assessed the case in terms of the fairness interest and found no unfairness in the Government's obtaining or using evidence obtained in the *Henry* case.<sup>118</sup>

<sup>116</sup> *Id.* at 275 n.14. The Court said:

Although it does not bear on the constitutional question in this case, we note that Disciplinary Rule 7-104(A)(1) of the Code of Professional Responsibility provides: "(A) During the course of his representation of a client a lawyer shall not: (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so." *See also* Ethical Consideration 7-19.

*Id.* Indeed, Professor Uviller has argued that the disciplinary rule alluded to by the *Henry* Court has no relevance at all in criminal cases. *See* Uviller, *supra* note 94, at 1179-83. On the other hand, some members of the Court see the professional conduct rule as not only applicable in criminal cases but also of constitutional relevance. *See* *Patterson v. Illinois*, 487 U.S. 285, 301-02 (1988) (Stevens, J., dissenting) (arguing that an ethical violation rising to the level of an "impairment of the Sixth Amendment right to counsel" occurs where prosecutors conduct "private interviews" with officially charged suspects for the purpose of obtaining evidence to be used at trial).

<sup>117</sup> *Henry*, 447 U.S. at 276 (Powell, J., concurring).

<sup>118</sup> "[A]bsent an active, orchestrated ruse, I have great difficulty perceiving how canons of fairness are violated when the Government uses statements flowing from a 'wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.'" *Id.* at 281 (Blackmun, J., dissenting) (quoting *Hoffa v. United States*, 385 U.S. 293, 302 (1966)).

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

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

In *Kuhlmann v. Wilson*,<sup>119</sup> the Court addressed the “passive listener” situation left open by *Henry*. On facts similar to *Henry*,<sup>120</sup> the Court found that the undercover informer, unlike the informer in *Henry*, did not actively elicit information from the accused but merely listened as the accused revealed incriminating details of his pending crime.<sup>121</sup> Justices Brennan and Marshall dissented, finding that the informer’s observation that the accused’s exculpatory account of his situation did not sound “too good” influenced the accused to give the informer a different and incriminating account which was subsequently relayed to government prosecutors. The dissenters relied on *Maine v. Moulton*,<sup>122</sup> for the proposition that “[t]he Sixth Amendment guarantees an [officially charged] accused . . . the

---

criminating information voluntarily obtained from an accused despite the fact that his counsel may not be present.

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

*Id.* at 293-96.

<sup>119</sup> 477 U.S. 436 (1986).

<sup>120</sup> Wilson was arraigned for robbery and murder and placed in a jail cell awaiting trial with Lee, a fellow inmate who was working as an undercover informer for the police. *Id.* at 439. The police, who had positive eyewitness evidence implicating Wilson, instructed Lee to “keep his ears open” for the names of other participants but not to question Wilson. *Id.* Upon entering the cell, which overlooked the scene of the crimes, Wilson said “someone’s messing with me” and immediately began talking to Lee, narrating the same story he had given to police. *Id.* Lee advised Wilson that his explanation of his situation “didn’t sound too good.” *Id.* at 439-40. Over the next few days, Wilson began to change details of his story and, after a visit from his brother, who expressed to Wilson that his family was upset because they believed that he had committed the murder, eventually described his crimes to Lee who relayed the information to the police. *Id.* at 440. The evidence obtained by Lee was admitted into evidence at Wilson’s trial. *Id.* After the *Henry* case was handed down, Wilson sought habeas corpus relief arguing that his Sixth Amendment rights had been violated under *Henry*. *Id.* at 442.

<sup>121</sup> *Id.* at 460-61.

<sup>122</sup> *Moulton*, 474 U.S. 159 (1985), is discussed in detail at *infra* Part III.B.3.

right to rely on counsel as the 'medium' between himself and the State."<sup>123</sup>

### 3. *Maine v. Moulton: Privacy to the Forefront*

In *Maine v. Moulton*, a case similar on its facts to *Massiah*, the Court made its most direct reference to attorney-client privacy as the value underlying *Massiah* and its progeny.<sup>124</sup> As in *Massiah*, two persons, Moulton and Colson, were indicted and released on bail. Colson, unbeknownst to Moulton, decided to cooperate with the police and was wired with a hidden electronic device which captured incriminating evidence of the pending charges against Moulton.<sup>125</sup> The police argued that they placed the body wire on Colson, and also a recording device on his telephone, not to gather evidence against Moulton for the crimes for which he was under indictment but to protect Colson in case Moulton discovered Colson's cooperation with the police. They argued that an additional purpose was to gather evidence against Moulton for an inchoate plan he allegedly entertained for killing a witness to the indicted crimes.<sup>126</sup> Moreover, the police, who knew that Moulton and Colson would discuss the pending charges in their conversation, instructed Colson not to question Moulton but to simply "be himself" during the conversations. During the conversations Colson feigned memory lapses of details of his criminal activity with Moulton who related numerous incriminating details of their pending case as well as aspects of possible strategy for their upcoming trial. Colson also encouraged Moulton to discuss the idea of eliminating the witness but Moulton discussed the matter only briefly. Over Moulton's Sixth Amendment objection, the State offered into evidence at Moulton's trial the incriminating statements made to Colson.<sup>127</sup> The matter eventually reached the Supreme Court, which held that while the State was

---

<sup>123</sup> *Kuhlman*, 477 U.S. at 473 (Brennan, J., dissenting) (quoting *Moulton*, 474 U.S. at 176).

<sup>124</sup> *Moulton*, 474 U.S. at 177 n.14.

<sup>125</sup> *Id.* at 164.

<sup>126</sup> *Id.* at 165. Colson had informed the police that Moulton planned to kill the witness. *Id.*

<sup>127</sup> *Id.* at 167.

not precluded from investigating Moulton's possible future criminal activity, the Sixth Amendment forbade the use of the evidence obtained for the crimes for which he was indicted at the time of his conversations with Colson.<sup>128</sup>

The *Moulton* Court offered a lengthy discussion of Sixth Amendment case law and underlying values. The Court explained how fairness interests required that counsel rights be applied to certain pretrial proceedings lest the "results [there] might well settle the accused's fate and reduce the trial itself to a mere formality."<sup>129</sup> Once adversarial proceedings have begun the "defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural law."<sup>130</sup> Moreover "the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel."<sup>131</sup>

In addition to such fairness concerns, the *Moulton* Court identified a privacy interest created through the right to counsel, apparently seeing this privacy interest as an independent Sixth Amendment value. With the initiation of formal charges, the accused possesses "the right to rely on counsel as a 'medium' between him and the State."<sup>132</sup> Such a view suggests that the right to this "medium" insulates the accused from certain State contact, thus creating for him a zone of protected privacy. Applying this principle to the case at hand, the *Moulton* Court found that the State violated Moulton's Sixth Amendment right "when it arranged to record conversations between Moulton and its undercover informant, Colson."<sup>133</sup> This "right of the accused not to be confronted by an agent of the State regarding matters as to which the right to counsel has attached without counsel being present"<sup>134</sup> would thus apparently have allowed

---

<sup>128</sup> *Id.* at 179.

<sup>129</sup> *Id.* at 170 (quoting *United States v. Wade*, 388 U.S. 218, 224 (1967)).

<sup>130</sup> *Id.* (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)).

<sup>131</sup> *Id.* at 171.

<sup>132</sup> *Id.* at 176.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 177 n.14.



Moulton to successfully maintain a § 1983 cause of action against the State had he made no incriminating statement in his monitored conversations with Colson or even if he had made exculpatory statements that induced the State to dismiss the charges against him.

*Moulton's* apparent recognition of a right to privacy is doctrinally grounded in the right to counsel and not in ordinary privacy protection enjoyed by all citizens. Indeed, nothing done by the State in *Moulton* would constitute a violation of privacy interests protected under the Fourth Amendment.<sup>135</sup>

If a violation of Moulton's Sixth Amendment rights occurred when his protected privacy was violated by employing the recording devices, a second violation occurred when the incriminating statements were used against him at trial in violation of his independent Sixth Amendment interest in receiving a fair trial.<sup>136</sup> The question of whether two independent Sixth Amendment values were violated in *Moulton* or just one, and if so which one, is not merely a matter of theoretical interest. The

---

<sup>135</sup> As Uviller stated:

Because infiltration is normally accomplished by procuring the unwitting invitation or at least the sufferance of the suspect, it has traditionally been treated as a simple case of consent, obviating any fourth amendment problems. To the claim that the acquiescence was obtained by the willful concealment of a material fact (the true identity and purpose of the spy), and hence that fraud cancels apparent consent, the Supreme Court has consistently replied that so long as the activity of the spy remains within the scope of the invitation, deception does not detract from effective consent to entry. Thus, while the Court has taken a highly skeptical view of apparent consent tendered to the badged officer "requesting permission" to search, the disguised agent may enter on any ruse, so long as he does not abuse the hospitality of his duped host.

Uviller, *supra* note 94, at 1199. See, e.g., *United States v. White*, 401 U.S. 745 (1971) (finding no Fourth Amendment violation where government informer carrying concealed radio transmitter engaged suspect in conversations overheard by federal narcotics agents); *Lewis v. United States*, 385 U.S. 206 (1966) (finding no Fourth Amendment violation where federal drug agent posed as a drug buyer to a seller who invited the undercover agent into the seller's home for a drug transaction); *Hoffa v. United States*, 385 U.S. 293 (1966) (finding no Fourth Amendment violation where governmental agent befriended Hoffa in order to investigate Hoffa's criminal activities and Hoffa made incriminating statements to the agent); *Lopez v. United States*, 373 U.S. 427 (1963) (finding no violation of Fourth Amendment where person made unsolicited bribe to IRS agent who feigned participation in scheme and met with the person and recorded his bribe offers by means of a concealed recorder). None of the above cases involved warrants to justify the intrusions.

<sup>136</sup> See Halpern, *supra* note 29, at 143.

question has direct implications on the issue of the appropriate remedy to be applied when the Sixth Amendment is violated. If, for example, the violation constitutes merely a violation of the privacy value, redress could theoretically be made through a § 1983 action while permitting the State to use the incriminating evidence against Moulton at trial,<sup>137</sup> assuming the evidence is otherwise reliable. If only the privacy value is at stake, the situation is similar to the Fourth Amendment context where excluding evidence obtained as a consequence of a governmental violation of privacy is not necessarily constitutionally mandated.<sup>138</sup> The § 1983 remedy would arguably redress Moulton and deter future violations of attorney-client privacy by the State. On the other hand, if the violation offends Moulton's interests in a fair trial, evidence obtained through the violation could not constitutionally be used against Moulton. Such use would itself render his trial unfair.<sup>139</sup>

---

<sup>137</sup> The situation is similar to that of the exclusionary rule in Fourth Amendment jurisprudence. While the Supreme Court has mandated the exclusionary rule as the remedy for violations of privacy interests under the Fourth Amendment, *see* *Mapp v. Ohio*, 367 U.S. 643 (1961), the rule is required as the product of a "cost benefit" analysis rather than a necessary, constitutionally required, remedy.

[F]reedom from unreasonable searches and seizures is a substantive protection available to all inhabitants of the United States, whether or not charged with crime. The right thus differs from protections under most of the fifth amendment . . . which [refer] to persons charged with crime or the "accused." . . . [Because] the fourth amendment, in language and origin, is clearly substantive [the] Court was correct in holding the exclusionary rule to be simply a remedial device designed to make the substantive right more meaningful, rather than an independent procedural right.

. . . Procedural rights are supposed to exclude evidence. Substantive rights need not. Consequently, fourth amendment rights should be deemed different from, but not less important than, the procedural rights protected by the fifth . . . and fourteenth amendments. By way of comparison, first and third amendment rights are substantive, but nobody would deem them second class.

....  
Whether evidence is unconstitutionally obtained or unconstitutionally used makes a difference. If the only constitutional wrong inheres in using the evidence, the Court has no business considering concepts of deterrence. The Court should prohibit use of such evidence. Conversely, when obtaining evidence is the constitutional wrong, exclusion should be subjected to a cost/benefit analysis.

Loewy, *supra* note 41, at 909-11, 939. *See also* Gardner, *The Emerging Good Faith Exception*, *supra* note 29, at 432-39.

<sup>138</sup> See the Loewy and Gardner cites, *supra* note 137.

<sup>139</sup> See the Loewy quote, *supra* note 137. For a similar argument in the context of the Fifth Amendment privilege against self-incrimination, see generally, Gardner, *Section 1983 Actions Under Miranda*, *supra* note 29.

These doctrinal nuances did not escape the four dissenting Justices in *Moulton*. For the dissenters, the police acted in "good faith" and thus did not violate the Sixth Amendment.<sup>140</sup> But even if, for the sake of argument, Sixth Amendment interests were at stake in *Moulton*, the dissenters would permit the evidence obtained to be used against Moulton. Analogizing to Fourth Amendment privacy violations, the dissenters observed that the majority had identified the violation of Moulton's privacy interest as the sole Sixth Amendment value offended in the case. Therefore, as in the Fourth Amendment, evidence obtained through good faith invasions of privacy need not, indeed should not, be excluded. While the State may have invaded Moulton's attorney-client privacy, its good-faith conduct was permissible, perhaps even praiseworthy, and thus not the kind of undesirable conduct subject to the deterrent purposes of the exclusionary rule.<sup>141</sup>

---

<sup>140</sup> For the dissenters, the police acted in "good faith" in monitoring Moulton's conversations given the danger posed to Colson and the interest in investigating Moulton's possible future criminal activity. Thus, even though the State "deliberately elicited" information from Moulton after he had been indicted, the State's purpose was not to gather evidence for the crimes for which Moulton was indicted and therefore such evidence when received should not be excluded. See *Maine v. Moulton*, 474 U.S. 159, 184-190 (1985) (Burger, C.J., dissenting).

<sup>141</sup> Chief Justice Burger, writing for the dissenters, explained:

Even if I were prepared to join the Court in this enlargement of the protection of the Sixth Amendment, I would have serious doubts about also extending the reach of the exclusionary rule to cover this case. "Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." Application of the exclusionary rule here makes little sense, as demonstrated by "weighing the costs and benefits of preventing the use in the prosecution's case-in-chief of inherently trustworthy tangible evidence."

With respect to the costs, applying the rule to cases where the State deliberately elicits statements from a defendant in the course of investigating a separate crime excludes evidence that is "typically reliable and often the most probative information bearing on the guilt or innocence of the defendant." Moreover because of the trustworthy nature of the evidence its admission will not threaten "the fairness of a trial or . . . the integrity of the factfinding process."

Against these costs, applying the rule here appears to create precious little in the way of offsetting "benefits." Like searches in violation of the Fourth Amendment, the "wrong" that the Court condemns was "fully accomplished" by the elicitation of comments from the defendant and "the exclusionary rule is neither intended nor able to cure the invasion of the defendant's rights which he has already suffered."

The application of the exclusionary rule here must therefore be premised on deterrence of certain types of conduct by the police. We have explained, however, that "[t]he deterrent purpose of the exclusionary rule necessarily assumes that the police have en-

A similar analysis of *Moulton*, also drawing analogies to Fourth Amendment jurisprudence, might admit that a violation of the Sixth Amendment occurred, but require *Moulton* to pursue a remedy other than the exclusionary rule. If the only interest offended is privacy, there is nothing necessarily unconstitutional with permitting the fruits of the privacy violation to be used in evidence and redressing the privacy violation through civil rights actions against the governmental invaders of privacy.<sup>142</sup>

Such interpretations of the role of the exclusionary rule in Sixth Amendment jurisprudence make sense if the sole value underlying the right to counsel is the privacy value. To the extent that Sixth Amendment violations constitute unfair governmental advantage over the accused, however, evidence obtained through such violations must be excluded lest trial fairness is compromised.

#### 4. *Some Implications of the Sixth Amendment Right to Privacy*

*Moulton* appears to recognize a right to privacy with doctrinal underpinnings uniquely grounded in the Sixth Amendment right to counsel. The implications of the *Moulton* view are significant and suggest a possible rethinking of the entire line of "deliberate elicitation" cases. On the *Moulton* view, the Sixth Amendment is violated, at least initially, not when the government "deliberately elicits" an incriminating statement from an officially accused person or, for that matter, when the statement is used against the accused, but when the government seeks the

---

gaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right." Here the trial court found that the State obtained statements from respondent "for legitimate purposes not related to the gathering of evidence concerning the crime for which [respondent] had been indicted." Since the State was not trying to build its theft case against respondent in obtaining the evidence, excluding the evidence from the theft trial will not affect police behavior at all. The exclusion of evidence "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." Indeed, as noted above, it is impossible to identify any police "misconduct" to deter in this case. In fact, if anything, actions by the police of the type at issue here should be encouraged. The diligent investigation of the police in this case may have saved the lives of several potential witnesses and certainly led to the prosecution and conviction of respondent for additional serious crimes.

*Id.* at 190-92 (Burger, C.J., dissenting) (citations omitted).

<sup>142</sup> See *supra* note 137 and accompanying text.

statement by invading the privacy of the accused. Thus in the *Brewer* case, had Detective Leaming's "Christian Burial Speech" elicited no response at all from Williams, William's Sixth Amendment rights would seemingly nevertheless have been violated.<sup>143</sup> Similarly, in *Henry*, if Henry had remained silent in the face of the attempts of his fellow inmate's undercover attempts to gather incriminating information, the accused would apparently have had a cause of action to redress the violation of his Sixth Amendment rights.<sup>144</sup> Governmental *attempts* to elicit incriminating information appear, on this view, to be as inappropriate as actual elicitations or even actual use of incriminating elicitations against an accused.

If this is, indeed, the Court's view, several questions are immediately raised. Why should accused persons like Williams, Henry, and Moulton be granted privacy protection? It is one thing to recognize Sixth Amendment privacy rights in order to promote policies favoring open communication with counsel when an accused is actually conferring with counsel.<sup>145</sup> The governmental invasions of the privacy per se of Williams, Henry, and Moulton, however, posed no threat to the possibilities of open communication between those accused persons and their respective attorneys. If no incriminating information had been obtained, those accused persons could have met with counsel and planned strategy, perhaps denying guilt. Even where, as in the actual *Williams*, *Henry*, and *Moulton* cases, the government did elicit incriminating evidence, the process of eliciting the evidence appears to have had little to do with the policies underlying Sixth Amendment privacy protection. The fact that the government elicited incriminating information surely altered the nature of the defense theories eventually discussed by Williams, Henry, and Moulton with their respective lawyers, but the elicitation of such evidence did not detract from the privacy of such conferences when they occurred.

Rather than grounding Sixth Amendment privacy in policies protecting open communication with counsel, perhaps the

---

<sup>143</sup> See *supra* Part III.B.1.

<sup>144</sup> See *supra* notes 107-18 and accompanying text.

<sup>145</sup> See *supra* note 42.

*Moulton* Court sought to embrace a privacy right to be free from interrogation, similar to that sometimes alluded to in the *Miranda* context of "custodial interrogation" under the Fifth Amendment privilege against self-incrimination.<sup>146</sup> Apart from the fact that under existing *Miranda* case law neither Henry nor Moulton was "interrogated"<sup>147</sup> and Moulton was not in "custody" at the time the State invaded his privacy,<sup>148</sup> the Court has not looked favorably upon privacy protection as a value underlying the Fifth Amendment.<sup>149</sup> It is the *use* of the coerced incriminating statement that constitutes the Fifth Amendment evil, not the means employed by government to obtain the statement.<sup>150</sup>

Moreover, if, as the *Moulton* Court suggests, the right to counsel was violated in *Williams*, *Henry*, *Moulton*, and in *Massiah* itself when the government initially approached the accused persons in those cases prior to any elicitation of information, the Sixth Amendment evil would appear to be invasion of the accused person's privacy *per se*.<sup>151</sup> If so, why does the Court require the initiation of official adversary proceedings to trigger the privacy interest? Why does the Court insist on "deliberate" attempts to elicit information by government as essential to violations of the Sixth Amendment? Why is there no invasion of Sixth Amendment privacy in *Kuhlmann*, the "passive listener"

---

<sup>146</sup> For a discussion rejecting privacy protection as a possible value underlying *Miranda*, see generally Gardner, *Section 1983 Actions Under Miranda*, *supra* note 29.

<sup>147</sup> See *United States v. Henry*, 447 U.S. 264, 279 (1980) and discussion *supra* Part III.B.2; see also *Maine v. Moulton*, 474 U.S. 159, 176 (1985) and discussion *supra* Part III.B.3. See generally *Illinois v. Perkins*, 496 U.S. 292 (1990) (*Miranda* warnings not required when a suspect is unaware that he is speaking to a law enforcement officer and gives an incriminating statement).

<sup>148</sup> See *Moulton*, 474 U.S. at 165; see generally *Berkemer v. McCarty*, 468 U.S. 420 (1984).

<sup>149</sup> See Gardner, *Section 1983 Actions Under Miranda*, *supra* note 29, at 1292-94.

<sup>150</sup> See the Loewy quote, *supra* note 137 and accompanying text.

<sup>151</sup> Professor Uviller has argued that the Court's "deliberate elicitation" cases do not raise Sixth Amendment interests at all and should be dealt with under the privacy protection apparatus of the Fourth Amendment. Uviller, *supra* note 94, at 1154-95. In an early article, Professor Dix wondered whether *Massiah* created "a general right of privacy that is violated by *any* undercover surveillance that occurs after the *Massiah* right becomes applicable[.]" George E. Dix, *Undercover Investigations and Police Rule-making*, 53 TEX. L. REV. 203, 227 (1975).

case?<sup>152</sup> So far as privacy issues per se are concerned, it seems to make little difference if an undercover inmate invades an accused's sphere of privacy by engaging in conversations about the accused's alleged criminal activity, as in *Henry*, or seeks to "elicit" nothing but instead annoys the accused by babbling incessantly about issues not related to anyone's criminal activity.

Such considerations suggest that privacy per se is not a protected interest in the *Massiah* line of cases. At best the cases imply privacy protection—insulation from government attempts to gather incriminating information—after an accused has become the government's official adversary and only then when the government "deliberately" intrudes. In a rare explanation of the requirement for "deliberate" action, Justice Blackmun noted:

*Massiah* . . . is expressly designed to counter "deliberat[e]" interference with an indicted suspect's right to counsel. By focussing on deliberateness, *Massiah* imposes the exclusionary sanction on that conduct that is most culpable, most likely to frustrate the purpose of having counsel, and most susceptible to being checked by a deterrent.<sup>153</sup>

This view implies that the Court's deliberate elicitation cases are aimed at deterring governmental violations of some substantive interest offended through the *process* of attempting to gather evidence rather than merely protecting rights to procedural fairness by suppressing such evidence once it is obtained. Such a view gives credence to the idea that the Sixth Amendment embraces a substantive interest in privacy protection as a value in addition to and independent from the value of procedural fairness.<sup>154</sup>

It is perhaps wise, however, to keep in mind that the Court has never addressed a situation in its deliberate elicitation cases where the Sixth Amendment claim rested solely on an alleged violation of protected privacy under the right to counsel. All the Court's cases finding Sixth Amendment violations in the *Massiah* line involve situations where the government not only

---

<sup>152</sup> See *United States v. Kuhlman*, 477 U.S. 436 (1986) discussed *supra* notes 119-23 and accompanying text.

<sup>153</sup> *United States v. Henry*, 447 U.S. 264, 282 n.6 (1980) (Blackmun, J., dissenting).

<sup>154</sup> See *supra* notes 136-38 and accompanying text.

attempted to, but actually did, elicit incriminating information which it subsequently sought to use against the accused. Exclusion of such evidence may thus be done not to deter violations of privacy, or any other governmental misconduct for that matter, but instead to assure the fair trial rights of the accused.<sup>155</sup> Indeed, some commentators specifically reject the notion that substantive privacy interests are among the values protected by the Sixth Amendment.<sup>156</sup>

It is thus an open question whether the Court would recognize a Sixth Amendment violation in a "pure" privacy case where, for example, the government unsuccessfully attempted to elicit incriminating information from an officially charged

---

<sup>155</sup> See *supra* note 137.

<sup>156</sup> Professor Tomkovicz expressed the matter as follows:

[The] substantive sixth amendment protection [of] *Massiah* [and its progeny] is radically different than the substance of prospective fourth amendment shelter. The prohibition against "unreasonable" searches would provide a *limited* safeguard *against the informant surveillance itself*. The *Massiah* right on the other hand, raises an absolute barrier not to the surveillance, *but to the use of its products at trial*.

Tomkovicz, *supra* note 24, at 36-37. Professor Tomkovicz later observed that "[n]o violation of the sixth amendment occurs until the fruits of uncounseled elicitation are used in court." Tomkovicz, *supra* note 2, at 775.

Professor Loewy sees all Sixth Amendment protections as "procedural" with no "substantive" component. See Loewy, *supra* note 41, at 909-11, 939.

Along similar lines, Professor Schulhofer makes the following observations about Sixth Amendment *Massiah* claims:

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

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

However, some commentators do maintain that Sixth Amendment violations may occur even though the government never utilizes the fruits of uncounseled elicitation against the suspect. In discussing *Brewer v. Williams*, Professor Grano states:

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

Joseph D. Grano, *Rhode Island v. Innis: A Need Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 AM. CRIM. L. REV. 1, 35 (1979).



accused regarding crimes for which he has been charged. The lower court experience suggests similar uncertainty about the status of attorney-client privacy as a Sixth Amendment value distinct from fairness interests. As the next section will illustrate, a review of that case law does, however, offer promising possibilities for developing a coherent theory of Sixth Amendment privacy.

#### IV. LOWER COURT CASES: DEFINING THE ROLE OF SIXTH AMENDMENT PRIVACY

As the above discussion suggests, the Supreme Court cases present an ambiguous view of the role of privacy protection as an independent Sixth Amendment value. Given the Court's mixed signals, it is not surprising that the lower courts have struggled with the matter. Indeed, a sharp split among the Federal Circuit Courts of Appeal as well as between various state appellate courts suggests that further Supreme Court clarification of the role of attorney-client privacy in Sixth Amendment jurisprudence is in order.

##### A. UNJUSTIFIED INFILTRATION OF ATTORNEY-CLIENT CONFERENCES

Several cases address situations left open by *Weatherford*, where governmental agents purposely and for no good reason infiltrate the conferences of an officially-accused and his counsel. As discussed herein, some courts find such unjustified intrusions to constitute violations of the Sixth Amendment rights of the accused without any showing of prejudice to the accused. Such cases can thus be understood as recognizing the invasion of attorney-client privacy per se as violative of the right to counsel. On the other hand, other courts in similar circumstances require a showing of prejudice to the accused, thus seemingly taking the position that attorney-client privacy is not an independent Sixth Amendment value and that the presence of unfairness is a necessary prerequisite to violations of the right to counsel.

1. *Governmental Invasions of Attorney-Client Privacy as "Per Se" Sixth Amendment Violations*

Several courts have found that the Sixth Amendment rights of an accused are violated when government agents without justification or excuse infiltrate the conferences of the accused and his counsel even though the accused is not shown to have been prejudiced by the infiltration. For example, in *Schillenger v. Haworth*, the Tenth Circuit Court of Appeals found that an accused's rights to counsel were violated where a sheriff insisted that one of his deputies be present during several trial preparation sessions between the accused and his counsel held in the trial courtroom.<sup>157</sup> Although the State claimed that the sheriff's actions were justified by the need to maintain security over the accused, who was in custody pending his trial, the court found that the deputy's presence "lacked a legitimate law enforcement purpose."<sup>158</sup> Moreover, upon learning of the deputy's presence at the conferences between the accused and his counsel, the prosecutor inquired of the deputy as to what had transpired at the conferences.<sup>159</sup> The deputy then informed the prosecutor of some matters discussed at the conference.<sup>160</sup> While the court found that the communication of items of the accused's trial strategy to the prosecution and his subsequent use such information at the trial of the accused<sup>161</sup> constituted "some risk of prejudice" to the accused,<sup>162</sup> a showing of prejudice was unnecessary under the circumstances of the case. Where the prosecu-

---

<sup>157</sup> *Schillenger v. Haworth*, 70 F.3d 1132, 1139 (10th Cir. 1995). The attorney of the accused paid the deputy overtime wages for his services and claimed to have instructed the deputy that he was to consider himself an employee of defense counsel during defense preparation and to keep confidential any information the deputy discovered during the trial preparation session. *Id.* at 1134.

<sup>158</sup> *Id.* at 1139.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 1135. The prosecutor learned that accused would use the word "cut" rather than "stab" during his testimony before the jury, that practice testimony by the accused was videotaped and reviewed by defense counsel, and that the accused was instructed how to sit in his seat and look at the jury during testimony. *Id.*

<sup>161</sup> *Id.* The prosecutor when cross-examining the accused commented on the accused's use of the word "cut." In his closing argument, the prosecutor informed the jury that the accused was "the only witness that you heard from who had to practice his presentation to you." *Id.* at 1136.

<sup>162</sup> *Id.* at 1139, 1142.

tor "purposely intrudes" into the attorney-client conferences of his adversary in order to determine the substance of those conferences, a "per se" violation of the Sixth Amendment occurs.<sup>163</sup>

The *Schillenger* court noted that a per se rule was necessary in order to "deter this sort of misconduct."<sup>164</sup> As noted in the above discussion of Supreme Court case law, a rationale of deterring governmental misconduct suggests that substantive interests are at stake which are violated at the time the government "purposely intrudes" regardless of whether any information is obtained or used against the accused.<sup>165</sup> Attorney-client privacy would thus appear to be the relevant substantive interest.<sup>166</sup> However, the *Schillenger* court did not specifically designate attorney-client privacy as the value to be protected from the kind of "misconduct" exhibited by the State.<sup>167</sup> Indeed, to the extent the court discussed underlying Sixth Amendment values, it focused on fairness noting that "prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost."<sup>168</sup> Thus, it is not clear whether *Schillenger's* per se rule is a recognition of substantive attorney-client privacy as an independent value or is a prophylactic measure vindicating procedural fairness values.<sup>169</sup>

---

<sup>163</sup> As the Tenth Circuit stated:

Because we believe that a prosecutor's intentional intrusion into the attorney-client relationship constitutes a direct interference with the Sixth Amendment rights of a defendant, and because a fair adversary proceeding is a fundamental right secured by the Sixth and Fourteenth Amendments, we believe that absent a countervailing state interest, such an intrusion must constitute a per se violation of the Sixth Amendment. In other words, we hold that when the state becomes privy to confidential communications because of its purposeful intrusion into the attorney-client relationship and lacks a legitimate justification for doing so, a prejudicial effect on the reliability of the trial process must be presumed.

*Id.* at 1142.

<sup>164</sup> *Id.*

<sup>165</sup> See *supra* notes 153-54 and accompanying text.

<sup>166</sup> *Schillenger*, 70 F.3d at 1142.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 692 (1984)).

<sup>169</sup> The Third Circuit has adopted a similar per se rule to that embraced by *Schillenger*. See *United States v. Levy*, 577 F.2d 200 (3d Cir. 1978). The court specifically referred to protecting attorney-client privacy as the basis for its rule. *Id.* at 208. However, the court also required that "confidential information be disclosed to the government," thus calling into question whether a mere invasion by the government

## 2. "Prejudice" as Necessary for Sixth Amendment Violation

In contrast to the *Schillenger* court's approach, other courts take the position that without a showing of actual prejudice to an accused, his Sixth Amendment rights are not violated merely through unjustified or unexcused governmental infiltration of meetings between the accused and his attorney. For example in *United States v. Steele*,<sup>170</sup> the Sixth Circuit Court of Appeals found that "[e]ven where there is an intentional intrusion by the government into the attorney-client relationship, prejudice to the defendant must be shown before any remedy is granted."<sup>171</sup> The *Steele* case involved a situation where a government informer made repeated attempts to eavesdrop on conversations with an accused and his counsel conducted in the jail where the accused was held awaiting trial.<sup>172</sup> While the informer had requested to be placed in jail with the accused in order to protect his under-

---

for the purpose of discovering such information would be sufficient to constitute a Sixth Amendment violation if no information were discovered or disclosed. *Id.* at 209. The court fashioned its rule and underlying rationale as follows:

Where there is a knowing invasion of the attorney-client relationship and where confidential information is disclosed to the government, we think that there are overwhelming considerations militating against a standard which tests the sixth amendment violation by weighing how prejudicial to the defense the disclosure is. . . .

The fundamental justification for the sixth amendment right to counsel is the presumed inability of a defendant to make informed choices about the preparation and conduct of his defense. Free two-way communication between client and attorney is essential if the professional assistance guaranteed by the sixth amendment is to be meaningful. The purpose of the attorney-client privilege is inextricably linked to the very integrity and accuracy of the fact finding process itself. Even guilty individuals are entitled to be advised of strategies for their defense. In order for the adversary system to function properly, any advice received as a result of a defendant's disclosure to counsel must be insulated from the government. No severe definition of prejudice, such as the fruit-of-the-poisonous-tree evidentiary test in the fourth amendment area, could accommodate the broader sixth amendment policies. We think that the inquiry into prejudice must stop at the point where attorney-client confidences are actually disclosed to the government enforcement agencies responsible for investigating and prosecuting the case. Any other rule would disturb the balance implicit in the adversary system and thus would jeopardize the very process by which guilt and innocence are determined in our society.

*Id.* at 208-09. See also *Graddick v. State*, 408 So. 2d 533, 541 (Ala. Crim. App. 1981), *cert. denied*, 458 U.S. 1106 (1982) (regardless of extent that accused was actually prejudiced, his Sixth Amendment rights were violated when State investigator, intending to gather evidence against the accused, eavesdropped on discussions of defense strategy between accused and his counsel and investigator transmitted information by means of a body-mike to listening prosecutors).

<sup>170</sup> 727 F.2d 580 (6th Cir. 1984), *cert. denied*, 467 U.S. 1209 (1984).

<sup>171</sup> *Id.* at 586.

<sup>172</sup> *Id.* at 585.

cover status, he was not invited to participate in the attorney-client conversations, as in *Weatherford*, but on his own initiative, and for no legitimate reason, intruded into the conversations.<sup>173</sup> Nevertheless, the *Steele* court found that the government had not intended for the informant to infiltrate the accused's attorney-client conferences and, in any event, the informant had not divulged any evidence obtained from the conferences.<sup>174</sup> Absent a showing of "any prejudice from the alleged invasion of the defense camp," the court found "no basis for [the] assertion that [the accused was] denied effective assistance of counsel."<sup>175</sup>

By requiring showings of actual prejudice, courts embracing the *Steele* approach appear to reject intrusions of attorney-client privacy as themselves violations of the right to counsel.<sup>176</sup> For such courts, a showing of unfairness appears to be a necessary condition for violations of the Sixth Amendment.

---

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 587.

<sup>176</sup> The First Circuit appears to have adopted a rule similar to *Steele* requiring a showing of prejudice as a prerequisite to a Sixth Amendment violation. See *United States v. King*, 753 F.2d 1 (1st Cir. 1985) (finding no Sixth Amendment violation where state police secretly recorded conversations between an accused and his lawyers and federal prosecutors had no knowledge of the tape even though FBI agents did know of the recording after the fact and were privy to its contents). The Second Circuit appears to agree. See *United States v. Dien*, 609 F.2d 1038 (2d Cir. 1979) (where informant, for no legitimate reason, attended meetings between accused and his counsel, no Sixth Amendment violation occurred where no prejudicial information was passed to the government). See also *United States v. Ofshe*, 817 F.2d 1508 (11th Cir. 1987), *cert. denied*, 484 U.S. 963 (1987), (finding no Sixth Amendment violation because accused was not prejudiced where government placed "body bug" on accused's attorney and surreptitiously monitored conversation between accused and the wired attorney); *United States v. Sander*, 615 F.2d 215 (5th Cir. 1980), *cert. denied*, 449 U.S. 835 (1980) (where police officers examined an attorney's confidential file on an accused's case, no Sixth Amendment violation occurred unless evidence obtained used against the accused); *Wiener v. State*, 430 A.2d 588 (Md. 1981) (unjustified infiltration of defense camp by government informer violates Sixth Amendment rights of accused only if accused was prejudiced by the infiltration); *Koester v. Commissioner of Public Safety*, 438 N.W.2d 725 (Minn. Ct. App. 1989) (inadvertent videotaping of conference between accused and his attorney at police station resulted in no prejudice to accused and therefore did not violate his Sixth Amendment rights).

### 3. Defining the Role of Privacy as an Underlying Value

The positions of the *Schillenger* and *Steele* courts suggest considerable disagreement among the lower courts as to whether unjustified or unexcused governmental intrusions into an accused's attorney-client conferences constitute violations of the Sixth Amendment. Compounding the problem, the vast majority of lower court opinions reach their conclusions without specifically attending to the question of whether protection of attorney-client privacy is itself a value sufficient to trigger application of the Sixth Amendment.

A notable exception is Chief Judge Posner's opinion for the Seventh Circuit Court of Appeals in *United States v. DiDomenico*.<sup>177</sup> Judge Posner focused on the privacy value in the context of a hypothetical posed to the government at oral argument.<sup>178</sup> In the eyes of Judge Posner and the *DiDomenico* court, known patterns of systematic and pervasive intrusions into attorney-client privacy of accused persons would appear to constitute violations of the Sixth Amendment even if the intrusions yielded no information to the government or prejudiced any particular ac-

---

<sup>177</sup> 78 F.3d 294 (7th Cir. 1996), *cert. denied*, 519 U.S. 1006 (1996) (holding that absent showing of prejudice, defendants were not entitled to evidentiary hearing to determine whether prosecution had bugged defense attorney meeting room at jail).

<sup>178</sup> Posner wrote:

We put to the government at oral argument the following example. The government adopts and announces a policy of taping all conversations between criminal defendants and their lawyers. It does not turn the tapes over to the prosecutors. It merely stores them in the National Archives. The government's lawyer took the position that none of the defendants could complain about such conduct because none could be harmed by it, provided the prosecutors never got their hands on the tapes. We are inclined to disagree, although for a reason that will become apparent shortly we need not attempt to resolve the issue definitively. The hypothetical practice that we have described would, because of its pervasiveness and publicity, greatly undermine the freedom of communication between defendants and their lawyers and with it the efficacy of the right to counsel, because knowledge that a permanent record was being made of the conversations between the defendants and their lawyers would make the defendants reluctant to make candid disclosures. (Totalitarian-style continuous surveillance must surely be a great inhibitor of communication.) And yet it would be impossible in any given case to show that the outcome had been changed by the practice. . . . At the other extreme are cases of ad hoc governmental intrusion into the relation between a criminal defendant and his lawyer, falling far short of continuous surveillance. In such cases harm to the defense must be shown because the bare fact of the intrusion does not create a high probability that communication between lawyer and client or between client and lawyer was disrupted.

*Id.* at 299-300 (citations omitted).

cused person's case.<sup>179</sup> So long as the intrusions might reasonably pertain to an accused's situation, the intrusions would violate the right to counsel because they would undermine the "freedom of communication" between the accused and his attorney by creating a chilling effect on candid attorney-client disclosures.<sup>180</sup> On the other hand, "ad hoc governmental intrusions" into conferences between an accused person and his counsel would not constitute violations of the right to counsel because the "bare fact of the intrusion does not create a high probability that communication between lawyer and client or between client and lawyer was disrupted."<sup>181</sup> Showings of prejudice are required in cases of "ad hoc" governmental intrusion.<sup>182</sup>

The Posner approach, to its credit, focuses on the value of free communication between accused persons and their attorneys as the sole privacy interest appropriate under the Sixth Amendment.<sup>183</sup> Moreover, the approach wisely attends to the ef-

---

<sup>179</sup> *Id.* at 299.

<sup>180</sup> *Id.* The proviso in the text builds on Judge Posner's insight and assumes that the accused's fears of governmental intrusion into his attorney-client conferences must be reasonable. *Id.* Thus, a pattern of intrusions that pose no reasonable risk of inhibiting the attorney-client communication of a given accused should not constitute a violation of the Sixth Amendment rights of that accused. *Id.* at 300. For example, if the police systematically engage in secret monitoring of conferences only in jailhouses between incarcerated accused persons and their attorneys, accused persons conferring with counsel in counsel's office, or in other contexts outside the jailhouse, would lack standing to claim a violation of rights.

<sup>181</sup> *Id.* See also *State v. Clark*, 570 N.W.2d 195 (N.D. 1997) where the court found no violation of the Sixth Amendment when a jailer monitored a telephone conversation between an accused and his counsel in which defense strategy was briefly discussed. *Id.* at 200. The trial court had denied the accused's request for sanctions finding the monitoring to be a "one time action." *Id.* In affirming the trial court, the North Dakota Supreme Court also noted the ad hoc nature of the intrusion into attorney-client privacy in denying a Sixth Amendment violation:

We conclude the trial court did not abuse its discretion in denying Clark's request for sanctions. However, we denounce the monitoring of telephone conversations between incarcerated defendants and their attorneys. Should such activity be shown to be commonplace, so as to "evidence a deliberate institutional disregard" of an accused's right to privately communicate with counsel, "a judicial response to protect the integrity of our system," may be required. No evidence this is a commonplace activity in this correction center is in this record.

*Id.* at 200 (citations omitted).

<sup>182</sup> *DiDomenico*, 78 F.3d at 300.

<sup>183</sup> See *infra* notes 186, 194, and *supra* note 80 and accompanying text. See also *Government Intrusion Into the Defense Camp*, *supra* note 8, at 1145.

fect of governmental intrusions on attorney-client communication rather than attending to the degree of egregiousness of the government's motives in any given case as a decisive factor in assessing whether Sixth Amendment privacy has been invaded. Arguably, some courts determine Sixth Amendment violations in terms of the court's assessment of the "grossness" of the government's motives that trigger intrusions into the attorney-client relationship of an accused in the particular case at issue.<sup>184</sup> Such an approach fails to recognize that some systematic but "non-egregious" intrusions greatly offend Sixth Amendment privacy while, on the other hand, some highly "egregious" ad hoc intrusions do little damage to protected privacy interests.<sup>185</sup> Defining Sixth Amendment violations in terms of the motives behind governmental action, rather than on denials of genuine Sixth Amendment values, risks punishing the government and the public (where dismissal of charges against a guilty accused is the remedy) for no good Sixth Amendment reason.<sup>186</sup>

---

<sup>184</sup> Compare, e.g., *Morrow v. Superior Court*, 36 Cal. Rptr. 2d 210, 216 (Cal. App. 1995) (court dismissed charges against accused as consequence of violation of accused's Sixth Amendment rights when prosecutor "shocked" the conscience of the court by "egregious[ly]" eavesdropping on an attorney-client conference that took place between accused and his lawyer in the "Temple of Justice," the courtroom), and *State v. Sugar*, 417 A.2d 474, 479-80 (N.J. 1980) (court "outraged" and "dismay[ed]" at the State's "unconscionable" and "unscrupulous" violation of Sixth Amendment by secretly taping two jailhouse conferences between an accused and his counsel), with *United States v. King*, 753 F.2d 1 (1st Cir. 1985) ("no egregious conduct" by prosecution officers where state police secretly taped conferences between accused and his counsel, thus no Sixth Amendment violation), and *United States v. Crow Dog*, 399 F. Supp. 228, 237 (N.D. Iowa 1975), *aff'd*, 532 F.2d 1182 (8th Cir. 1976) (mere presence of informant during strategy sessions of defense attorneys is not per se violative of Sixth Amendment absent a "gross intrusion into the attorney-client relationship").

<sup>185</sup> For example, routine taping of all attorney-client conferences to be stored in archives and not turned over to prosecutors appears relatively "non-egregious" but would nevertheless pose substantial risks to relevant Sixth Amendment privacy, while gross invasions such as those involved in cases like *State v. Sugar* pose few risks of chilling attorney-client exchanges because of the ad hoc nature of the intrusions. See *supra* note 184; see also *People v. Zapien*, 846 P.2d 704 (Cal. 1993), *cert. denied*, 510 U.S. 919 (1993) (egregious behavior of prosecutor posed no risk to the privacy interests of the accused). In *Zapien*, a prosecutor inadvertently found a tape-recording of defense counsel's perceptions and strategy notes in a pending death penalty case. *Id.* at 761. The prosecutor told his investigator to listen to the tape but the investigator refused to do so and destroyed the tape. *Id.*

<sup>186</sup> The relevant Sixth Amendment interests at stake when the government intrudes into attorney-client conferences of accused persons may be stated as follows:



Judge Posner's approach in *DiMone*, with its distinction between systematic and ad hoc governmental intrusions, thus offers a useful vehicle for developing a theory defining the scope of Sixth Amendment privacy. Because systematic governmental intrusion is probably rare, utilization of the Posner approach means that the scope of protected Sixth Amendment privacy will be relatively narrow. It is likely the case that the vast majority of cases of unjustified governmental intrusion into the attorney-client relationships of accused persons are ad hoc intrusions, unknown to the accused or his counsel during their communications, thus raising questions of Sixth Amendment fairness but not privacy.<sup>187</sup>

By clarifying when Sixth Amendment privacy is at issue and when it is not, the doctrinal uncertainty rampant in Sixth Amendment jurisprudence is diminished. While privacy issues are thus not at stake in most cases, more careful attention can be paid to the relevant issue of Sixth Amendment fairness.<sup>188</sup> As an aspect of this attention, courts can fashion rules for structuring the inquiry into whether an accused was prejudiced by a particular government intrusion by adjusting burdens of persuasion. In cases where the effect of the intrusion appears minor, it may be appropriate to require the accused to show that the government made unfair use of information obtained from the intrusion. On the other hand, in cases of substantial governmental intrusions into attorney-client relationships of accused persons which pose substantial risks that the government has obtained and used against an accused information gleaned from the intrusions,<sup>189</sup> the courts should require the government

---

Intrusions into confidential defense preparations threaten the right to effective assistance of counsel in two significant ways. First, the government may gain access to defense strategy preparations. Second, fear of government access to confidential communications tends to discourage frank exchanges between attorney and client and to inhibit the preparation of group defenses in particular.

*Government Intrusions Into the Defense Camp*, *supra* note 8, at 1144.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> One commentator described these risks as follows:

Judges should recognize that, once an intrusion has occurred, several factors will tend to encourage the transfer of information from informant to prosecutor. First, overzealous prosecutors may anticipate judicial amenability to their claims that no infor-

to show that in fact no such use was made of any such information.<sup>190</sup> Where the government fails to meet its burden, the Sixth Amendment rights of the accused are violated, entitling him to an appropriate remedy.<sup>191</sup>

Where the government *systematically* intrudes into the attorney-client conferences of accused persons such persons with knowledge of the systematic intrusion would seemingly be enabled under the Posner/*DiMoneico* approach to seek remedies under § 1983 for violation of their civil rights on the theory that the pervasive risk of governmental invasion of attorney-client privacy inhibited the free flow of communication between client and counsel.<sup>192</sup> Proving actual inhibition in any given case may be virtually impossible, however. In light of this fact, it appears that two approaches are available. Courts could find per se violations of Sixth Amendment privacy whenever the government adopts systematic intrusions into attorney-client privacy of accused persons so long as the particular accused claiming the violation could show that at the time of the alleged violation he

---

mation was disclosed and that the government was motivated by a desire to protect an informant's safety. Second, informants often act for reasons that raise doubts about both their commitment to truthfulness and their respect for defendants' rights. The informant who is himself under indictment has every reason to expect leniency from the prosecutor in return for information damaging to other defendants. Thus, there is a powerful temptation for an informant to reveal defense strategy information in devious ways, even in the face of prosecutorial instructions to the contrary.

*Government Intrusions Into the Defense Camp*, *supra* note 8, at 1153 (footnotes omitted).

<sup>190</sup> One court suggested the following approach:

[T]here are certain circumstances in which the revelation of confidential communications . . . is harmless. . . . [W]e conclude that in order to make a prima facie showing of prejudice the defendant must prove that confidential communications were conveyed as a result of the presence of a government informant at a defense meeting. . . . Upon such proof, the burden shifts to the government to show that there has been and there will be no prejudice to the defendants as a result of these communications.

*United States v. Mastroianni*, 749 F.2d 900, 907-08 (1st Cir. 1984) (citations omitted). *See also* *Morrow v. Superior Court*, 36 Cal. Rptr. 2d 210, 214 (Cal. App. 1995) ("[W]here the state has engaged in misconduct, the burden falls upon the People to prove that sanctions are not warranted because the defendant was not prejudiced by the misconduct and . . . that there was no substantial threat of demonstrable prejudice.").

<sup>191</sup> The possible remedies would include excluding improperly obtained evidence, dismissal of charges, and damages and injunctive relief through civil rights actions under § 1983. *See Halpern*, *supra* note 29, at 144-48 for a discussion of the availability of some of the above remedies for redressing Sixth Amendment violations.

<sup>192</sup> *See supra* notes 187-91 and accompanying text.

knew of the pattern of government intrusions. On the other hand, courts in systematic intrusion cases could presume a violation of privacy and place the burden on the government to prove that attorney-client communication was not inhibited in the particular case.

Whichever approach is adopted in addressing the difficulties inherent in proving inhibition of attorney-client privacy in particular cases, attorney-client privacy plays a legitimate role, albeit a narrow one, as a Sixth Amendment value independent from the more pervasive interest in procedural fairness. Thus for example, under the theory developed here, if the government secretly and routinely electronically monitored attorney-client conferences in jailhouses, accused persons engaging in jailhouse conferences with their attorneys who are aware of the government's practice at the time of the claimed violation would be entitled to a remedy under § 1983 whether or not their particular conferences were actually monitored even if the charges against them were eventually dismissed for whatever reason.<sup>193</sup> By the same token, it would appear that a similar chilling effect on attorney-client privacy would be likely if the government systematically injected human undercover informants into the attorney-client conferences of accused persons.<sup>194</sup> Suppose, for example, that the police behavior in *Schillenger*<sup>195</sup>

---

<sup>193</sup> Because the violation of Sixth Amendment privacy rights is distinct and independent from any concern for fairness, an action for remedies should be available even if the accused person's charges were dismissed at the initiative of the government *because of exculpatory evidence illegally obtained through the privacy invasion*.

<sup>194</sup> Human undercover informants may, however, pose less threat to free communication between accused persons and their attorneys than use of secret, electronic surveillance.

One threat to the effective assistance of counsel posed by government interception of attorney-client communications lies in the inhibition of free exchanges between defendant and counsel because of the fear of being overheard. However, a fear that some third party may turn out to be a government agent will inhibit attorney-client communication to a lesser degree than the fear that the government is monitoring those communications through electronic eavesdropping, because the former intrusion may be avoided by excluding third parties from defense meetings or refraining from divulging defense strategy when third parties are present at those meetings. Of course, in some circumstances the ability to exclude third parties from defense meetings may not eliminate the chilling effect on attorney-client exchanges.

Weatherford v. Bursey, 429 U.S. 545, 554 n.4 (1977).

<sup>195</sup> Schillenger v. Haworth, 70 F.3d 1132 (10th Cir. 1995)

was the routine practice whenever an incarcerated accused met with his counsel outside the jailhouse. Knowledge by the accused or his counsel that the deputy's forced presence may actually represent a government informant rather than a security guard working with the defense would certainly create an atmosphere threatening the free exchange of attorney-client information. Therefore, there appears no reason to limit violations of Sixth Amendment privacy to systematic governmental intrusions conducted secretly or by means of electronic eavesdropping.

Systematic intrusions aside, Judge Posner's approach in *DiMoneico* sensibly precludes claims for violation of Sixth Amendment privacy where the government engages in secret, ad hoc monitoring of attorney-client conferences. But what about situations of non-secretive ad hoc monitoring? Suppose in *Schillenger*<sup>196</sup> that the accused had claimed that the presence of the deputy inhibited his willingness to communicate openly with his lawyer. While it would be virtually impossible to prove that the hypothetical accused actually was inhibited, his situation should arguably be treated in the same manner as situations of systematic secret eavesdropping, given the absence of any compelling reason for the government to require the deputy to be posted within earshot of the accused and his attorney.<sup>197</sup> Similarly, if an accused and his counsel were aware that the government had planted electronic monitoring apparatus allowing possible access to an attorney-client conference, counsel rights would be offended if attorney-client communication was inhibited by the governmental action. Thus, some ad hoc governmental intrusions could constitute invasions of Sixth Amendment privacy if an accused or his counsel were aware

---

<sup>196</sup> See *supra* notes 157-69 and accompanying text.

<sup>197</sup> The courtroom in *Schillenger* could have been secured from the outside or the inmate heavily shackled without necessitating guards inside the room. See *supra* note 194. Courts should structure remedies for violations of Sixth Amendment privacy depending on the degree of damage done to attorney-client privacy by the governmental action in the given case. Money damages would appear to be an appropriate remedy in most cases. See *supra* note 191. However, in cases where the governmental action renders the accused's relationship with his counsel totally ineffective, dismissal of the charges against the accused may be appropriate. *Id.*

that their attorney-client privacy had been invaded during attorney-client communications.

Finally, in situations where ad hoc violations of attorney-client privacy by the government do not offend the Sixth Amendment, statutory sanctions may be available to punish offending government officials. For example, in some jurisdictions criminal charges may be filed against prosecutors and other government officers for eavesdropping upon conversations between accused persons and their attorneys even in single instance, ad hoc situations.<sup>198</sup>

#### B. UNJUSTIFIED ENGAGEMENT OF AN ACCUSED OUTSIDE THE PRESENCE OF COUNSEL

As noted above, Sixth Amendment privacy interests are sometimes thought to be at stake in the *Massiah* line of cases. This idea is controversial in the contexts of both reported decisions of the Supreme Court and lower court case law. Some courts appear to recognize violations of the right to counsel where government agents initiate contacts with accused persons without counsel present even though no unfairness results from the encounters. On the other hand, other courts in similar

---

<sup>198</sup> For example, California has enacted the following statute:

Eavesdropping or recording conversation between prisoner and attorney, religious advisor, or physician; offenses; exceptions:

(a) Every person who, without permission from all parties to the conversation, eavesdrops on or records, by means of an electronic device, a conversation, or any portion thereof, between a person who is in the physical custody of a law enforcement officer or other public officer, or who is on the property of a law enforcement agency or other public agency, and that person's attorney, religious adviser, or licensed physician, is guilty of a felony.

(b) Every person who, intentionally and without permission from all parties to the conversation, nonelectronically eavesdrops upon a conversation, or any portion thereof, that occurs between a person who is in the physical custody of a law enforcement officer or other public officer and that person's attorney, religious adviser, or licensed physician, is guilty of a public offense. This subdivision applies to conversations that occur in a place, and under circumstances, where there exists a reasonable expectation of privacy, including a custody holding area, holding area, or anteroom. This subdivision does not apply to conversations that are inadvertently overheard or that take place in a courtroom or other room used for adjudicatory proceedings. A person who is convicted of violating this subdivision shall be punished by imprisonment in the state prison, or in the county jail for a term not to exceed one year, or by a fine not to exceed two thousand five hundred dollars (\$2,500), or by both that fine and imprisonment.

situations require a showing of unfairness as a necessary condition for a Sixth Amendment violation.

*1. Invasion of Privacy as Sufficient Basis for Violation of Right to Counsel*

While reported cases directly holding on the matter appear rare, several courts strongly imply that government encounters with officially accused persons without their counsel present may offend the Sixth Amendment rights of the accused even though the accused suffers no prejudice or unfairness through the encounter. For example, in *Cinelli v. Rever*,<sup>199</sup> the First Circuit suggested that an accused might be entitled to recover damages under a § 1983 civil rights action if he could show “emotional injury” resulting from an interrogation session conducted by police officers even “if there was no prejudice to the criminal trial.”<sup>200</sup> The accused in *Cinelli*, who had been arraigned and incarcerated awaiting trial, was told that two police officers wished to speak with him.<sup>201</sup> Although he was informed that he need not speak to the officers and that he was entitled to have his lawyer present if he decided to speak to them, the accused elected to speak to the officers without his lawyer.<sup>202</sup> The officers knew that the accused possessed the right to counsel during any interrogation but nevertheless proceeded to converse with the accused, telling him that the case against him looked strong, that no lawyer would be able to help him, that he would spend up to a year in jail awaiting trial, that he could receive a life sentence if convicted, and that he would benefit by cooperating with the police in identifying other participants in the crime.<sup>203</sup> At some point during the conversation, the accused suggested that his lawyer should be present but the offi-

---

<sup>199</sup> 820 F.2d 474 (1st Cir. 1987).

<sup>200</sup> *Id.* at 478.

<sup>201</sup> *Id.* at 475.

<sup>202</sup> The accused read and signed a waiver of counsel form prior to conversing with the officers. The waiver was invalid, however. *Id.* at 476 (citing *Edwards v. Arizona*, 451 U.S. 477 (1981) and *Michigan v. Jackson*, 475 U.S. 625 (1986)).

<sup>203</sup> *Id.*

cers made no attempt to notify the lawyer.<sup>204</sup> The accused made no inculpatory disclosure to the officers.<sup>205</sup>

The accused subsequently sought damages under § 1983 based on the conduct of the police in conversing with him outside the presence of counsel.<sup>206</sup> The court said the following regarding the § 1983 claim:

At one end, an indictment is not to be dismissed when the sixth amendment violation does not benefit the prosecution or prejudice the defense of the criminal action. At the other end, if there was no prejudice to the criminal trial, and the defendant, plaintiff in the section 1983 action, suffered no emotional injury because of the officers' improper behavior, there can be no section 1983 recovery. We leave open the question of whether severe emotional injury, such as may have resulted in this case from the egregious misconduct of the officers, is something that may be remedied in a section 1983 action. See *Morrison*. . . . We need not answer this question as we believe that the record before the district court did not foreclose a finding . . . that the interview resulted in a benefit to the Commonwealth or a detriment to the defendant at the criminal trial.<sup>207</sup>

Other courts have been less tentative in recognizing governmental attempts to elicit incriminating responses from accused persons as sufficient in themselves as violations of the Sixth Amendment. One court expressed the matter as follows: "[I]f [an accused] can establish that [police officers] purposely interfered with his right to counsel [by engaging in plea negotiations] he can recover damages under § 1983 without proving that this conduct prejudiced him at a subsequent criminal trial."<sup>208</sup>

---

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 478.

<sup>207</sup> *Id.* In a later case involving the § 1983 claim in *Cinelli*, the First Circuit denied the claim of the interrogating officers that they should be granted qualified immunity from civil suit. *Cinelli v. Cuttillo*, 896 F.2d 650 (1st Cir. 1990). The court stated: "We hold that a reasonable police officer should have known that it would be a violation of a defendant's constitutional rights to denigrate the role of his lawyer and attempt, in the lawyer's absence, to coerce a defendant into cooperating with the police." *Id.* at 655.

<sup>208</sup> *Chrisco v. Shafran*, 507 F. Supp. 1312, 1318 (D. Del. 1981). See also *Commonwealth v. Manning*, 367 N.E.2d 635 (Mass. 1977) (holding a violation of Sixth Amendment occurred requiring dismissal of charges where FBI agents telephoned accused at his place of employment and attempted to persuade accused to become an

At least one court has clearly held that certain governmental intrusions into the attorney-client relationship of an accused constitute violations of Sixth Amendment rights independent of any trial unfairness that may or may not flow from the intrusion. In a case reminiscent of *Morrison*,<sup>209</sup> a California Court of Appeals found in *Boulas v. Superior Court*<sup>210</sup> that a prosecutor violated the Sixth Amendment rights of an accused by inducing the accused to terminate his relationship with his retained counsel.<sup>211</sup> The prosecutor informed the accused that his attorney was a drug user and that unless the attorney was fired and another lawyer suitable to the prosecutor was retained, no plea bargain could be obtained by the accused.<sup>212</sup> Relying on the prosecutor's representation, the accused fired his counsel and attempted to hire a lawyer recommended by the prosecutor.<sup>213</sup> When that lawyer refused to represent the accused, the accused, assuming that leniency would be forthcoming, proceeded without a lawyer, provided the prosecution with information regarding cocaine distributors, and pursued a possible plea bargain.<sup>214</sup> When the prosecution eventually foreclosed a possible bargain, the accused rehired his original attorney and ultimately sought a dismissal of the charges claiming the prosecutor's actions violated his rights to counsel.<sup>215</sup>

The *Boulas* court agreed that the case should be dismissed in order to "discourage [similar] flagrant and shocking misconduct by overzealous government officials in subsequent cases."<sup>216</sup> Even though there was no evidence that the prosecutor obtained any information harmful to the accused, the court found

---

informer and made disparaging remarks about accused's counsel which had no effect on the quality of accused's relationship with his counsel).

<sup>209</sup> See *supra* notes 30-42 and accompanying text.

<sup>210</sup> 233 Cal. Rptr. 487 (Cal. Ct. App. 1986).

<sup>211</sup> *Id.* at 494.

<sup>212</sup> *Id.* at 488.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 489.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 490. The *Boulas* Court distinguished *Morrison* by noting that in that case the accused kept her attorney. *Id.* at 492. Moreover, the court observed that in *Morrison* it was police officers who made the disparaging remarks about the accused's lawyer while it was the prosecutor himself in *Boulas*. *Id.*



the mere governmental intrusion into the attorney-client relationship sufficient to violate the accused's right to counsel.<sup>217</sup> The court concluded that "as a matter of law [the accused] was seriously prejudiced as a result of the improper governmental intrusion into his . . . Sixth Amendment [rights] . . . in that he lost his attorney of choice."<sup>218</sup>

## 2. *Trial Unfairness as Necessary for Violation of Right to Counsel*

In contrast to the above cases, other courts take the position that governmental encounters with officially charged persons without their counsel present provide insufficient grounds for violations of the Sixth Amendment even where the government deliberately seeks to elicit incriminating information from the accused. For example, the Ninth Circuit found no Sixth Amendment violation in *United States v. Glover*<sup>219</sup> where FBI agents interviewed accused persons in the absence of their counsel. In one situation, the agents promised leniency if the accused, Glover,<sup>220</sup> would reveal the location of stolen goods and testify against a co-defendant. When Glover asked if his attor-

---

<sup>217</sup> *Id.* at 494.

<sup>218</sup> *Id.* The court explained:

The prosecution contends that, absent any proof of Boulas' having been harmed, dismissal of the charges filed against him is an inappropriate sanction for the violation of a criminal defendant's Sixth Amendment rights. . . . They assert that mere governmental intrusion into the attorney-client relationship does not, in every case, in and of itself, necessarily violate an accused's right to counsel. . . . The prosecution argues that Boulas cannot prove prejudice, because he presently has retained a competent attorney to handle his defense and because no information relating to present charges was obtained by the authorities. The prosecution's argument fundamentally misunderstands the scope and breadth of the state's invasion of Boulas' right to be represented by counsel of choice. Criminal defense lawyers are not fungible. The attorney-client relationship ". . . involves not just the casual assistance of a member of the bar, but an intimate process of consultation and planning which culminates in a state of trust and confidence between the client and his attorney. This is particularly essential, of course, when the attorney is defending the client's life or liberty." . . . In order to provide effective assistance of counsel, it is essential that a defendant have full confidence that his attorney is representing the defendant's interests with all due competence.

*Id.* at 490-91 (quoting *Smith v. Superior Ct.*, 68 Cal. Rptr. 1 (Cal. App. 1968) (citations omitted)).

<sup>219</sup> 596 F.2d 857 (9th Cir. 1979).

<sup>220</sup> Although the court never clearly indicated that official adversarial proceedings had been initiated against Glover, it is assumed that such is the case given the fact that the court considered the case under the Sixth Amendment. See *supra* note 4.

ney should be present, the agents falsely told Glover his attorney had consented to the interview.<sup>221</sup> Soon after the interview began, Glover's counsel happened by the holding cell where Glover was being interviewed.<sup>222</sup> The attorney immediately terminated the interview.<sup>223</sup> Although no evidence resulted from the interview, Glover was briefly upset with his attorney until she disabused him of his fear that she had "crossed him."<sup>224</sup>

In the second case before the *Glover* court, FBI agents confronted an accused, Welser, immediately after his arraignment.<sup>225</sup> At this proceeding, the court specifically warned the agents not to discuss the case with Welser without his attorney because he was in drug withdrawal and was possibly not competent to make a voluntary choice to waive counsel and talk to the FBI.<sup>226</sup> Nevertheless, the agents briefly attempted to persuade Welser to discuss his alleged crime with them outside the presence of his counsel. As in the situation with Glover, Welser made no statement to the FBI.<sup>227</sup>

Glover and Welser both sought to have their indictments dismissed, claiming the actions of the FBI agents violated their rights to counsel.<sup>228</sup> In denying the Sixth Amendment claims the court rejected arguments that the intrusions by the FBI were per se violative of the Sixth Amendment.<sup>229</sup> The court specifically noted that it was not the intention of the FBI to "belittle" counsel.<sup>230</sup> Moreover, in neither case was the confidence of the accused in his attorney shaken by the actions of the FBI.<sup>231</sup> While the court "did not condone" the FBI behavior in Glover's case and "deplored" it in Welser's,<sup>232</sup> there was no evidence that

---

<sup>221</sup> *Glover*, 596 F.2d at 859.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 862 n.5.

<sup>225</sup> *Id.* at 860.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 864.

<sup>229</sup> *Id.* at 861, 864.

<sup>230</sup> *Id.* at 861.

<sup>231</sup> *Id.* at 862, 864.

<sup>232</sup> *Id.* at 864.

either accused suffered any prejudice and thus no basis existed for a violation of the Sixth Amendment in either case.

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

From *Weatherford* and *Glover* and the cases they interpret, it is apparent that mere government intrusion into the attorney-client relationship, although not condoned by the court, is not of itself violative of the Sixth Amendment right to counsel. Rather, the right is only violated when the intrusion substantially prejudices the defendant. Prejudice can manifest itself in several ways. It results when evidence gained through the interference is used against the defendant at trial. It also can result from the prosecution's use of confidential information pertaining to the defense plans and strategy, from government influence which destroys the defendant's confidence in his attorney, and from other actions designed to give the prosecution an unfair advantage at trial.<sup>233</sup>

### 3. Clarifying the Role of Privacy as an Underlying Value

Similar to the cases dealing with governmental infiltration of attorney-client conferences, the courts in cases of governmental encounters with accused persons outside the presence of counsel are divided on whether the privacy invasions inherent in such encounters are in themselves sufficient to constitute violations of the right to counsel. The positions of the *Cinelli*<sup>234</sup> and *Glover*<sup>235</sup> courts, for example, appear to be in sharp disagreement. Clarification of the matter is thus clearly in order.

Such clarification can be advanced by again drawing on the insights of Judge Posner for the *DiDomenico* Court.<sup>236</sup> Sixth Amendment privacy is relevant only to the extent that the free exchange of communication between the accused and his attorney is threatened.<sup>237</sup> Therefore, although it may be seriously

---

<sup>233</sup> *United States v. Irwin*, 612 F.2d 1182, 1186-87 (9th Cir. 1980) (footnotes omitted). See also *Willis v. Bell*, 687 F. Supp. 380 (N.D. Ill. 1988) (holding the Sixth Amendment not violated by police questioning of accused outside the presence of counsel because no results of the confrontation were obtained which could possibly prejudice accused's fair trial rights).

<sup>234</sup> See *supra* notes 199-207 and accompanying text.

<sup>235</sup> See *supra* notes 219-33 and accompanying text.

<sup>236</sup> See *supra* notes 177-82 and accompanying text.

<sup>237</sup> See *supra* notes 180-84 and accompanying text.

debated whether dismissal is the proper remedy to redress the violation of attorney-client privacy, the decision in the *Boulas* case<sup>238</sup> is clearly correct.<sup>239</sup> On the other hand, the intimation in *Cinelli* that the rights of the accused in that case might be violated simply through the officers' interrogation<sup>240</sup> appears unsound. The interrogation had no chilling effect on attorney-client communication and thus, even if the accused suffered "emotional injury" through the interrogation, no Sixth Amendment value was offended by the interrogation.<sup>241</sup> Contrary to the court's views, the officers did not act "egregiously" for purposes of the Sixth Amendment by interviewing the accused outside the presence of counsel.<sup>242</sup> Finally, the position of the *Glover* court appears correct, although there appears little Sixth Amendment basis for the court to "deplore" the actions of the police in that case.<sup>243</sup> The court focused on the proper issue, whether the actions of the government detracted from the ability of Glover and Wesler to work, and freely communicate, with their attorneys. Finding no threat to the relevant privacy value and no evidence of infringements of fairness considerations, the *Glover* court properly denied the Sixth Amendment claims.

Under this analysis, attempts by the government to cause the accused to lose confidence in his attorney do not offend the Sixth Amendment unless the accused is actually induced to lose confidence in his attorney through the actions of the government. However, what if the government inadvertently sours the attorney-client relationship of an accused and his attorney? On

---

<sup>238</sup> See *supra* notes 210-18 and accompanying text.

<sup>239</sup> The less drastic remedy of damages and injunctive relief through a civil rights action under § 1983 might sufficiently deter future violations of attorney-client privacy without denying the public interest in punishing guilty offenders. In *Boulas*, there was no evidence that the actions of the prosecutor resulted in any unfairness to the accused.

<sup>240</sup> See *supra* notes 199-207 and accompanying text.

<sup>241</sup> See *supra* notes 199-207 and accompanying text.

<sup>242</sup> Neither was the interrogation per se "egregious" for purposes of *Miranda* doctrine even though the officers violated *Miranda* principles by reinitiating interrogation after the accused had asserted his *Miranda* right to counsel. See *supra* note 169. See generally Gardner, *Section 1983 Actions Under Miranda*, *supra* note 29.

<sup>243</sup> See *supra* notes 219-33 and accompanying text.

the one hand, it might be argued that unless the government intentionally hampers the attorney-client relationship of the accused, it does not act in bad faith and thus should not be penalized by imposition of a Sixth Amendment remedy.<sup>244</sup> On the other hand, one could maintain that the government should assume the risk of its actions hindering the quality of an accused's relationship with his attorney whenever it confronts an officially charged accused outside the presence of his counsel.<sup>245</sup> A preferable middle ground would recognize violations of Sixth Amendment privacy when the government intentionally or negligently induces deterioration of an accused's relationship with his lawyer.<sup>246</sup> Thus, for example, if interrogating officers say things that are reasonably likely to induce a lack of confidence by an accused in his lawyer and if such lack of confidence is actually induced,<sup>247</sup> Sixth Amendment privacy is offended.<sup>248</sup>

In cases like *Boulas*, where the accused fired his lawyer at the behest of the government, proof of the violation of Sixth Amendment privacy is an easy matter. In other cases, however, where attorney-client relationships are not actually terminated, proof of governmentally induced deterioration of attorney-client privacy may be extremely difficult. While it is surely debatable, placing the burden on the accused to show deterioration appears necessary in light of the fact that virtually all the

---

<sup>244</sup> See *supra* notes 140-41 and accompanying text.

<sup>245</sup> Some would argue that the government has no business confronting an accused in such circumstances. See, e.g., the discussion of *Cinelli*, *supra* notes 199-207 and accompanying text.

<sup>246</sup> Such an approach is similar to the gloss put on the "deliberate elicitation" test by the Supreme Court in the *Henry* case. See *supra* text accompanying note 114.

<sup>247</sup> Courts should structure remedies depending on the magnitude of loss of confidence in counsel caused by the governmental actions. Minor or insubstantial losses of confidence could be sanctioned by relatively mild money judgments against the government, while substantial damages could be imposed in cases where the government causes significant deterioration of the accused's attorney-client relationship. See *supra* note 191. In extreme cases, where the government causes such deterioration of the accused's attorney-client relationship that a fair determination of his guilt is jeopardized, dismissal of the charges against the accused may be appropriate. *Id.*

<sup>248</sup> Ironically, many governmental attempts to induce lack of confidence by an accused in his counsel may have the opposite effect. An accused may actually have his confidence in his lawyer renewed through governmental disparagements of the lawyer. An accused may assume that the government would not disparage the lawyer unless it was fearful of the adversarial prowess of the lawyer.

information relevant to the issue is in the possession of the accused and his attorney.<sup>249</sup>

The privacy interest described herein obtains only in cases where the accused has an actual relationship with an attorney and where the relationship with that particular attorney is harmed by the actions of the government. Thus, an officially accused offender who has not yet entered into an attorney-client relationship possesses no Sixth Amendment privacy interests but only interests in being treated fairly. Moreover, this explication of Sixth Amendment privacy reveals that, contrary to the views of some leading commentators,<sup>250</sup> the right to counsel entails a "substantive" component triggering violations of the constitutional rights of accused persons in certain circumstances even if the government never uses the product of the violations against the accused.<sup>251</sup>

### C. THE SCOPE OF SIXTH AMENDMENT PRIVACY: GENERAL PRINCIPLES

From the above discussion, it is possible to derive the following general principles for assessing the scope of privacy protection as an independent value in Sixth Amendment jurisprudence:

---

<sup>249</sup> One could argue that whenever an accused demonstrates that governmental agents have acted in a disparaging manner towards the accused's attorney in the presence of the accused, it should be presumed that the governmental action negatively impacts the attorney-client relationship of the accused. Given such a presumption, one then might argue that the burden should shift to the government to prove that its actions in fact did not cause deterioration of the accused's attorney-client relationship.

On the other hand, it appears that such a presumption is not well founded in light of the seeming unlikelihood in most cases that governmental disparagement of opposing counsel in fact results in serious deterioration of attorney-client relationships. See *supra* note 248. Thus it appears preferable to require the accused to show both that the government culpably intruded into his attorney-client relationship and that such intrusion resulted in erosion of that relationship.

<sup>250</sup> See *supra* note 156.

<sup>251</sup> See *supra* note 191 and accompanying text. See also the discussion of *Boulas*, *supra* notes 210-18 and accompanying text.

*Governmental Intrusions Into Attorney-Client Conferences*<sup>252</sup>

1) Ad hoc governmental intrusions into the attorney-client relationship of an accused do not violate Sixth Amendment privacy if the intrusions were unknown to either the accused or his counsel at the time of attorney-client communications.

2) Systematic governmental intrusions into attorney-client relationships of accused persons violate, or presumably violate, Sixth Amendment privacy if the particular accused claiming a violation shows that at the time of the alleged violation he was aware of the pattern of governmental intrusions and that the intrusions were of a kind that posed a reasonable risk of inhibiting communication with his counsel, whether or not the government actually intruded into attorney-client conferences of the accused and his counsel.<sup>253</sup>

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

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

4) Sixth Amendment privacy is violated only where a governmental confrontation of an accused outside the presence of counsel is intended, or is reasonably likely, to induce deterioration of an existing attorney-client relationship of an accused and his counsel and where the confrontation actually induces a deterioration of the attorney-client relationship.<sup>254</sup>

---

<sup>252</sup> The governmental intrusions into attorney-client conferences described herein assume that the intrusion is purposeful and is neither justified nor excused.

<sup>253</sup> The systematic intrusions may take the form of either electronic listening or human eavesdropping by means of an undercover informant. The monitoring is either a violation or a presumptive violation of the Sixth Amendment depending on whether courts adopt a "per se" or "presumptive" violation approach. See *supra* notes 180, 191-93 and accompanying text.

<sup>254</sup> The position defended here is thus at odds with the *Manning* case, *supra* note 208. That case appears inconsistent with *Morrison*, which holds that mere disparagement of an accused's attorney by government officials is not sufficient basis for dismissing charges against the accused.

## V. RETHINKING THE SUPREME COURT DECISIONS

The above principles defining the scope of Sixth Amendment privacy may be usefully applied in rethinking the Supreme Court's confusing and controversial case law. As the following discussion will show, some of the Court's cases are correctly decided while most are not, at least to the extent that the cases rely, implicitly or explicitly, on protection of Sixth Amendment privacy as their underlying rationale.

The assessment of the Court's output in terms of the principles of Sixth Amendment privacy offered by this Article furthers an evaluation of the Court's work that distinguishes the concerns for privacy and fairness as Sixth Amendment values. This distinction, in turn, permits a rethinking of the case law in terms of the underlying value relevant in each particular case.

## A. THE SUPREME COURT CASES AND SIXTH AMENDMENT PRIVACY

For purposes of this assessment the cases are usefully divided into three categories: (1) direct governmental infiltration of an accused's attorney-client relationship (the *Weatherford* case); (2) governmental confrontation of an accused outside the presence of his counsel where no prejudicial information is obtained (the *Morrison* case); and (3) governmental confrontations of an accused outside the presence of counsel where prejudicial information is obtained (the *Massiah*, "deliberate elicitation," line of cases).

1. *The Weatherford Case*

*Weatherford* constitutes a situation of ad hoc governmental infiltration of the accused's attorney-client relationship justified by the need to protect the safety and undercover identity of the informant.<sup>255</sup> Given that the government obtained no information from the infiltration that was used against the accused, the accused was not unfairly prejudiced by the infiltration. Moreover, no violation of Sixth Amendment privacy occurred given

---

When Sixth Amendment privacy is offended under any of the four principles articulated in the text, courts should impose remedies appropriate to the degree of the privacy violation in the instant case. See *supra* notes 191, 197, and 247.

<sup>255</sup> See *supra* notes 57-75 and accompanying text.



the ad hoc nature of the intrusion and the fact that attorney-client communication was not in fact inhibited.<sup>256</sup> Thus, no relevant Sixth Amendment value was offended in *Weatherford* and the Court correctly found no violation of the right to counsel.

Moreover, even if the intrusion in *Weatherford* had not been justified, it would not have offended Sixth Amendment privacy given its ad hoc nature and the fact that attorney-client communication was not in fact inhibited. While the Court might see punishing the government for bad faith intrusions into the attorney-client relationship of an accused as a per se protection of the accused's fairness interests, such intrusions pose no threat to his interests in attorney-client privacy.<sup>257</sup> In any event, with privacy concerns filtered out, the Court could focus directly on the only relevant Sixth Amendment interest, protecting fairness, raised through unjustified or unexcused ad hoc governmental intrusions into the attorney-client relationships of accused persons.<sup>258</sup>

## 2. *The Morrison Case*

*Morrison* is another situation of an ad hoc confrontation of an accused by the police, this time while the accused was outside the presence of her lawyer.<sup>259</sup> While the police disparaged the accused's lawyer, their comments had no negative effect on the quality of the accused's relationship with her attorney. Therefore, even if the police intended to damage seriously the relationship of the accused with her lawyer, no issue of Sixth Amendment privacy was raised<sup>260</sup> and the Court correctly refused to dismiss the indictment against the accused.

---

<sup>256</sup> See Principle (3), *supra* text accompanying notes 253-54.

<sup>257</sup> Thus, the Court's reference to Sixth Amendment privacy, *supra* text accompanying note 80, appears inapposite. See *supra* notes 177-94 and accompanying text.

<sup>258</sup> See *supra* notes 57-78 and accompanying text. The assessment of *Weatherford* in this Article suggests that the Court in fact focused on fairness issues in discussing bad faith governmental intrusions into attorney-client privacy. See *supra* notes 85-88 and accompanying text.

<sup>259</sup> See *supra* notes 30-42 and accompanying text.

<sup>260</sup> See Principle (4), *supra* text accompanying note 254.

However, the *Morrison* Court also opined that the Sixth Amendment had been violated<sup>261</sup> and that the “egregious behavior” of the police “may be remedied in other proceedings,”<sup>262</sup> presumably through a § 1983 action against the police.<sup>263</sup> As discussed above, such a view appears to presume a violation of Sixth Amendment privacy as the basis for the unconstitutional police action.<sup>264</sup>

Under the principles presented in this Article, there was no violation of the Sixth Amendment in *Morrison*. Because the actions of the police did not offend protected attorney-client privacy and because no unfairness resulted from their actions, there was no infringement of any value relevant to the Right to Counsel Clause. Therefore, not only did the police not act unconstitutionally in *Morrison*, their actions were not “egregious” for purposes of the Sixth Amendment.

### 3. *Deliberate Elicitation, Massiah, and its Progeny*

In the *Massiah* line of cases the police gathered incriminating information from an accused after the initiation of adversarial proceedings against the accused at a time when his lawyer was not present. As the above discussion suggests, the cases, with the exception of *Wilson*,<sup>265</sup> could arguably be viewed as situations where the government breached the Sixth Amendment by invading privacy interests of the various accused persons.<sup>266</sup> Under the principles developed in this Article, however, no invasion of attorney-client privacy occurred in any of the “deliberate elicitation” cases.

None of the cases involved situations where the government induced the accused to lose confidence in his attorney.<sup>267</sup> In-

---

<sup>261</sup> See *supra* note 40 and accompanying text.

<sup>262</sup> See *supra* note 40 and accompanying text.

<sup>263</sup> A civil rights action under § 1983 appears a viable remedy given that the Court specifically rejects dismissal and the remedy of excluding illegally obtained evidence is inapposite given the fact that the police confrontation yielded no information from the accused.

<sup>264</sup> See *supra* notes 40-42 and accompanying text.

<sup>265</sup> See *supra* notes 119-23 and accompanying text.

<sup>266</sup> See *supra* notes 18-28 and accompanying text, and *supra* Part III.B.

<sup>267</sup> See Principle (4), *supra* text accompanying note 254.

deed, in the *Henry* case, and perhaps also in *Wilson*, the accused apparently had not even entered into an attorney-client relationship at the time the government confronted the accused.<sup>268</sup> In *Massiah*, *Williams*, and *Moulton*, the accused had retained counsel at the time of the government confrontation<sup>269</sup> but in none of those cases was the governmental confrontation intended, nor was its likely result, to cause deterioration of the attorney-client relationship of the accused and his lawyer. For example, while in *Williams*<sup>270</sup> it was clear that Detective Leaming knew that Williams was represented by counsel at the time Leaming delivered the "Christian Burial Speech," the speech, whatever one may think of it, was not aimed at, nor did it have the effect of, causing Williams to lose faith in his lawyer. Again, in none of the cases in the *Massiah* line did the actions of the government negatively impact existing attorney-client relationships of the various accused persons.

Thus the *Moulton* Court's recognition of a privacy interest offended when the government confronted the accused without the presence of his counsel<sup>271</sup> is inconsistent with the principles articulated in this Article. Contrary to the *Moulton* Court's view, under these principles Moulton possessed no Sixth Amendment right per se "not to be confronted by an agent of the State regarding matters as to which the right to counsel has attached without counsel being present"<sup>272</sup> so long as the agent did not culpably induce Moulton to lose confidence in his attorney.

In the end, if the argument presented herein is correct, to the extent that *Massiah*, *Williams*, *Brewer*, and *Moulton* are grounded on perceived violations of Sixth Amendment privacy, the cases are incorrectly decided. There remains the possibility, however, that the cases are proper vindications of Sixth

---

<sup>268</sup> In *Henry* the accused was indicted and subsequently subjected to the jailhouse informant on November 21, 1972. Counsel was appointed on November 27, 1972. *United States v. Henry*, 447 U.S. 264, 266 (1980). The *Wilson* case does not specify when the accused began a relationship with an attorney.

<sup>269</sup> See *Massiah v. United States*, 377 U.S. 201, 202-03 (1964); *Brewer v. Williams*, 430 U.S. 387, 390-92 (1977); *Maine v. Moulton*, 474 U.S. 159, 162-63 (1985).

<sup>270</sup> See *supra* Part III.B.1.

<sup>271</sup> See *supra* notes 133-36 and accompanying text.

<sup>272</sup> *Moulton*, 474 U.S. at 178 n.14.

Amendment concerns for maintaining adversarial fairness. The remainder of this Article will briefly speak to that possibility.

#### B. THE MASSIAH LINE AND ISSUES OF SIXTH AMENDMENT FAIRNESS

Once the issue of Sixth Amendment privacy is filtered out of the Court's deliberate elicitation cases, the decisions may be properly evaluated in terms of the fairness interest, the only remaining value that could possibly support *Massiah*, *Williams*, *Henry*, and *Moulton*. The scholarly literature addressing this issue is extensive.<sup>273</sup> Therefore, the attempt here will be merely to summarize the positions of some leading commentators.

Defenders of the *Massiah* doctrine characteristically argue that if the government is permitted free access to an accused prior to trial, the right to counsel protections cherished at trial will be rendered useless because the government will obtain pretrial admissions from the accused that will make his trial a mere formality and counsel ineffective.<sup>274</sup> In perhaps the most elaborate defense of *Massiah* and its progeny, Professor Tomkovicz has argued that the Sixth Amendment requires counsel at "any pretrial adversarial encounter between government and accused if the encounter is essentially equivalent to, and an effective substitute for, a trial encounter at which such assistance would be required."<sup>275</sup> That is to say that "if an encounter between a defendant and the government adversary at trial would trigger the right to counsel's equalizing assistance,<sup>276</sup> the same kind of encounter between adversaries before trial must trigger an identical constitutional right to assistance."<sup>277</sup> Thus, among other things, the "taking of physical evidence"

---

<sup>273</sup> See, e.g., Dix, *supra* note 151; Grano, *supra* note 156, at 18-27; Halpern, *supra* note 29; Kamisar, *supra* note 96; Tomkovicz, *supra* note 2; Tomkovicz, *supra* note 24; Uviller, *supra* note 94.

<sup>274</sup> See, e.g., Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581, 602-04 (1979).

<sup>275</sup> Tomkovicz, *supra* note 24, at 60.

<sup>276</sup> Professor Tomkovicz argues extensively that the right to counsel is necessary to equalize the contest between the prosecution and the accused. *Id.* at 39-49.

<sup>277</sup> *Id.* at 60.

from an accused is a "critical stage" at which counsel must be present.<sup>278</sup>

Critics of the *Massiah* doctrine, on the other hand, see no Sixth Amendment wrong with the "taking of physical evidence" from an accused outside the presence of his lawyer. Professor Uviller, for example, has argued that "the true basis for *Massiah* and its brood probably is judicial discomfort with the anomalous inquisitional component in the adversary design."<sup>279</sup> The "inquisitional component," direct *ex parte* "inquiry of the suspect, or the use against him of his freely tendered response, is [in the eyes of the Court] somehow shameful, or at least inimical to our judicial and ethical heritage."<sup>280</sup> For Uviller and others, however, "at least at a certain level of suspicion, a request for the suspected person's explanation is morally justified."<sup>281</sup> Such noncoercive requests, characteristically yielding truthful information<sup>282</sup> are consistent with "fundamental American ideas of justice."<sup>283</sup> Thus, for critics of the *Massiah* doctrine, "prosecutorial access to the mind of the accused sits well with our present notions of fairness."<sup>284</sup>

This Article will make no attempt to analyze the merits of the debate between *Massiah* defenders and critics. The point here is simply to clarify that the focus of the debate should rest on considerations of Sixth Amendment fairness without clouding matters with privacy considerations.

## VI. CONCLUSION

This Article has explored the doctrinal confusion surrounding certain aspects of the Right to Counsel Clause of the Sixth

<sup>278</sup> *Id.* at 60 n.246.

<sup>279</sup> Uviller, *supra* note 94, at 1183.

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> Professor Tomkovicz admits that such information is generally truthful but argues that "[t]ruth . . . is not a sacred, exclusive, and inviolable sixth amendment objective." Tomkovicz, *supra* note 24, at 46.

<sup>283</sup> Uviller, *supra* note 94, at 1183-84. Presumably Professor Amar, who sees "innocence protection and truth seeking" as the central values underlying the Right to Counsel Clause, would agree with Professor Uviller. See Amar, *supra* note 2, at 642, 705.

<sup>284</sup> Uviller, *supra* note 94, at 1184.

Amendment. This confusion is in large part a function of uncertainty about precisely which values underlie the constitutional text. Particularly problematic is the issue of what role, if any, attorney-client privacy plays, or should play, in Sixth Amendment jurisprudence.

The Article has suggested that the Supreme Court may have relied on a vague and unarticulated notion of privacy in deciding its cases in the *Massiah* line. With its review of lower court cases, the Article has illustrated that uncertainty about the role of privacy considerations is endemic in Sixth Amendment doctrine. Based on insights from Judge Posner, the Article addressed this uncertainty by developing several basic principles offered as guidelines for defining the proper scope of Sixth Amendment privacy. This Article then applied these principles to the relevant Supreme Court case law to evaluate its opinions dealing either directly or indirectly with the issue of attorney-client privacy as a constitutionally protected value. This rethinking of the Court's output illustrated that, to the extent the Court relied on privacy considerations in its opinions, most of its cases were improperly decided. By removing privacy considerations from the analysis, the Article argued that the Court's "deliberate elicitation" cases should be evaluated solely in terms of the relevant underlying principle of adversarial fairness.

As this Article has shown, privacy protection is a genuine value underlying the Right to Counsel Clause, albeit one relatively narrow in scope. Because of the confusion in the case law surrounding the role to be played by attorney-client privacy in Sixth Amendment jurisprudence, judicial clarification is in order. When that clarification occurs, hopefully the principles derived in this Article may be useful guides in resolving issues of Sixth Amendment privacy.

