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The Truth About Massiah

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Truth is a cherished value, an effective weapon, and a potent symbol. In early childhood most of us are taught the importance of telling the truth. Our leaders seek support by accusing opponents of falsehood and promising always to tell the truth. In one popular turn of phrase, truth is a coequal with "justice" and "the American way," and, in a well known maxim, it is the force that "shall make you free." In ancient and modern times, many have sung the praises of truth.

1. The lesson was brought home to me by the pointed tale of honest young George Washington and his "I cannot tell a lie" response to an inquiry about the chopping down of his father's cherry tree. See M. Weems, The Life of Washington 12 (M. Cunliffe ed. 1962) (9th ed. 1809). I presume the story is still used to illustrate the importance of truth telling.


5. John 8:32 (King James).

joining that chorus with its *Truth in Criminal Justice Series*, the Department of Justice (DOJ) has all at once assumed the defense of a revered value, availed itself of a mighty weapon, and fortified itself with a powerful symbol. At the same time, it has cast those who disagree in the uncomfortable roles of opponents of truth. For those accomplishments, the authors of the Series deserve credit.

I give that credit somewhat grudgingly, for, as one whose views of the *Massiah* right to counsel diametrically oppose those expressed in the DOJ’s Report on *Massiah*, I am among those cast as enemies of truth. All else being equal, I would rather have truth on my side.

("Truth is the most valuable thing we have. Let us economize it. —Pudd’nhead Wilson’s New Calendar."); Address by Martin Luther King, Jr., Nobel Peace Prize Ceremony (Dec. 10, 1964), *reprinted in Martin Luther King, Jr. 219* (F. Schulke ed. 1976) ("I believe that unarm’d truth and unconditional love will have the final word in reality."). *But see W. Blake*, *Auguries of Innocence*, lines 53-54, in *Selected Poems* 133 (P. Butter ed. 1982) ("A truth that’s told with bad intent [b]eats all the [l]ies you can invent."); G. Greene, *The Heart of the Matter* 59 (1948) ("The truth has never been of any real value to any human being. . . . In human relations kindness and lies are worth a thousand truths."); W. Shakespeare, *Macbeth*, act I, scene iii, lines 123-24 (MacMillan Co. ed. 1890) ("And oftentimes, to win us to our harm, the instruments of darkness tell us truths . . . .") ; 1 Terence (Publius Terentius Afer), *The Lady of Andros*, act I, lines 67-69, in *Terence* 11 (J. Sargeaunt trans. 1912) ("[C]omplaisance . . . makes friends and truthfulness is the mother of unpopularity.").

Moreover, truth is not the only “ideal” that those who disagree with the Series must oppose. The “author” of the Series and proponent of truth is, after all, the Department of Justice, and the doctrines that are the targets of their reports are branded “obstructions of justice.” *See Office of Legal Policy, U.S. Dep’t of Justice, Truth in Criminal Justice Series, Report No. 3, Report to the Attorney General on the Sixth Amendment Right to Counsel Under the Massiah Line of Cases, reprinted in 22 U. Mich. J.L. Ref. 661, 706 (1989)* [hereinafter Report No. 3, *Massiah*].

The position in which those who reach different conclusions find themselves seems distinctly like the position of those whose first amendment understanding has led to accusations of antipathy toward the American flag. *See, e.g.*, Bishop, *U.S. Judge Strikes Down New Flag Law*, N.Y. Times, Feb. 23, 1990, at A10, col. 1; Crane, *Flag-burning Bills Draw Support*, Washington Times, Jan. 31, 1990, at B4, col. 3; Veterans Attend Rally in Protest of Flag Burning, N.Y. Times, Dec. 3, 1989, § 1, pt. 2, at 67, col. 2. In part, the appropriate response is the same whether the accusation is hostility to truth, to justice, or to the flag. It is fidelity to higher values, with no animosity toward revered ideals and symbols, that has led to the controversial conclusions.


10. *In general terms, truth commands a very high respect in our society. No one
As a result, in responding to the Massiah Report my first task was to decide how to deal with the "anti-truth" label. The Report's skillful depiction of the Massiah right and exclusionary rule as unsavory, indefensible characters made the task a worthy challenge. One simple alternative would have been to renounce my prior views, and join the DOJ's cause. I could not bring myself to do so, however, not only

can be heard to challenge judges when they pay homage to truth." Rifkind, The Lawyer's Role and Responsibility in Modern Society, 30 Rec. A.B. City N.Y. 534, 543 (1975). Although I am in general agreement with Judge Rifkind, as I have said before, I am somewhat skeptical of those who claim sole possession of truth. See Tomkovicz, Defense of Massiah, supra note 9, at 45; see also 5 G. Berkeley, Siris, § 368, in The Works of George Berkeley 164 (T. Jessop ed. 1953) ("Truth is the cry of all, but the game of a few."); G. Byron, Don Juan, canto xi, stanza 37, at 406 (T. Steffan, E. Steffan & W. Pratt rev. ed. 1982) ("And after all what is a lie? 'Tis but [t]he truth in masquerade . . . ."); J. Joubert, Pensees of Joubert No. 164, at 46 (H. Attwell trans. 1896) ("It is even easier to be mistaken about the true than the beautiful.").

11. In deciding how to respond, I was not without guidance from on high. It is not uncommon in criminal cases to find Justices of the Supreme Court doing battle over the issue of truth and its significance in constitutional adjudication. Compare James v. Illinois, 110 S. Ct. 648, 655-56 (1990) (noting that the truth-seeking rationale that supports the use of illegally acquired evidence to impeach defendants does not apply with equal force to the impeachment of other witnesses) with id. at 658 (Kennedy, J., dissenting) (arguing that the interest in truth seeking promoted by impeachment of defendants is as strong in cases of impeachment of other witnesses) and Perry v. Leeke, 109 S. Ct. 594, 600-01 (1989) (allowing the trial judge to bar defendant and attorney from consulting during a brief recess promotes the search for truth) with id. at 605 (Marshall, J., dissenting) ("The most troubling aspect of the majority's opinion . . . is its assertion that allowing a defendant to speak with his attorney during a 'short' recess . . . will retard the truth-seeking function of the trial . . . . Central to our Sixth Amendment doctrine is the understanding that legal representation . . . enhances the discovery of truth . . . .").


13. Professor Grano confesses that he once defended the constitutionality of Massiah, but has since been persuaded that it is constitutionally indefensible. See Grano, supra note 12, at 410 n.70 (1989). Indeed, Professor Grano has become a most enthusiastic convert, explicitly adopting the tactic of accusing opponents of opposition
because of the investment of self in two recent articles, but because I remain persuaded—not certain, but persuaded—that the positions I espoused are valid. Two other extreme alternatives would have been to accept the "opponent of truth" label without resistance or to deny categorically that I harbor any hostility to truth. Neither alternative, however, would have been honest, for I am a "qualified" opponent of truth.\footnote{1} Although I sometimes espouse positions that impede the pursuit of truth, I often advocate truth in criminal justice and ardently defend other kinds of truth.

Ultimately, it seemed that the best policy would be to face, not run from, the truth. I intend to disclose fully my views concerning the importance of truth in criminal justice, and to explain how my views differ from those of the Justice Department. I also intend to wield the sword of truth myself. In a discussion that, I hope, will be at least as honest and accurate as it is clever, I will suggest that insofar as I am against truth in criminal justice, that opposition is the unavoidable product of a reasoned search for another truth—what I will call "truth in constitutional law." I am an enemy of one truth only because I aspire to be an ally of the other.\footnote{15}

Initially, the analysis will focus on the ramifications of the Department of Justice's determined reliance upon truth in criminal justice. The Department's emphasis upon truth,\footnote{16} the tone and nature of the Report, and some of Professor Grano's comments on the rhetoric of "liberal" scholarship\footnote{17} to the truth. See \textit{id.} at 405 ("Apparently, however, a view has taken hold that facilitating the discovery of truth is itself an evil . . . . Purging the influence of such misguided thinking from our system is a necessary first step to accomplishing serious reform."). Although I am more than a little wary of converts who call for purges, I am hopeful that Professor Grano's previous conversion and confession of error indicates that he is open-minded and receptive to further persuasion.

\footnote{14} Moreover, to accept completely the adversary's label would have been unpalatable to my lawyerly soul.

\footnote{15} Undoubtedly, those who disagree with my reading of the sixth amendment right to counsel and my consequent defense of the \textit{Massiah} right also can legitimately claim to be in pursuit of constitutional truth. I would neither dispute their claim, nor claim a monopoly on truth. My suggestion at this point is only that those of us who disagree with the views expressed in the Truth in Criminal Justice Series can honestly avow that our resistance to truth in criminal justice is engendered by our search for other truths. I will develop this point at greater length later. See \textit{infra} notes 129-142 and accompanying text.

\footnote{16} The emphasis is evident in the title chosen for the entire Series, a most accurate reflection of its theme.

\footnote{17} \textit{E.g.}, Grano, \textit{supra} note 12, at 398 n.12, 401 n.26.
have prompted me to reflect on the character of legal scholarship. I will then pursue two additional goals: (1) formulating and presenting plausible responses to the substantive attack on *Massiah* in the Report, and (2) explaining the alternative constitutional vision that has persuaded me to defend the *Massiah* right. Those objectives will necessitate some exploration of the meaning of the right to counsel and its role in *Massiah* contexts.\(^{18}\) The simple aims of the discussion are to clarify the opposing views of *Massiah*, to illuminate the values underlying those views, and thereby to promote informed decisions regarding the legitimacy of *Massiah*.\(^{19}\)

First, the Article will summarize the Justice Department’s discussion of the *Massiah* right to counsel and the exclusion of evidence under *Massiah*.\(^{20}\) Next, it will evaluate the nature of the Report and the character of legal scholarship.\(^{21}\) Finally, it will explore the substantive debate over *Massiah*.\(^{22}\) In that section, the Article will point out the matters on which the DOJ and I agree, will attempt to frame the fundamental questions raised by the *Massiah* doctrine, and will investigate potential sources of answers to those constitutional questions. Ultimately, it will provide the answers that I prefer, explaining the premises that lead to those answers and how they differ from the premises underlying the Report.\(^{23}\)

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18. However, because I have discussed the same issues at length in my previous works, *supra* note 9, my responses to the Justice Department’s arguments and my explanations of the constitutional premises that can support the *Massiah* right will not be exhaustive.

19. At the end of his Introduction to the Series, Professor Grano observes that the Department of Justice has “rendered a significant contribution . . . by showing us that we do have a rather clear choice.” Grano, *supra* note 12, at 424. Although I agree that the DOJ does describe the alternatives to *Massiah*, and, in that sense, clarifies the choices, the Report is anything but a rational, neutral piece of scholarship that gives contrary views their due. The advocative tone of the Report—its one-sided and rhetorical character—obscures, rather than clarifies, the real value choices that underlie the debate over *Massiah*.

One reason that those choices need clarification is that the Supreme Court has done an abominable job of explaining the premises of *Massiah*. See Tomkovicz, *Defense of Massiah, supra* note 9, at 8-9, 22, 30. My objective is to illuminate all of the significant choices that underlie the ultimate decision to accept or reject *Massiah*.

20. See infra Part I.

21. See infra Part II.A.

22. See infra Part II.B.

23. Although the specific discussions in this piece are addressed to the issues raised by the Report, my reflections upon the character of the Report and the general premises upon which the DOJ grounds its reasoning undoubtedly are pertinent to the
I. A SUMMARY OF THE TRUTH IN CRIMINAL JUSTICE SERIES’ MASSIAH REPORT

The Massiah Report discusses both the right to counsel\(^{24}\) accorded by the Massiah doctrine and the exclusion of evidence\(^{25}\) by virtue of failures to respect that right.\(^{26}\) The DOJ concedes that, unlike the Miranda\(^{27}\) protections, the Supreme Court’s Massiah entitlement to counsel is not thought to be a mere prophylactic device designed to safeguard constitutional rights.\(^{28}\) Rather, it is an integral part of the sixth amendment right.\(^{29}\) The DOJ maintains, however, that the Court has failed to justify Massiah or to respond to the criticisms leveled against it.\(^{30}\) The essence of the DOJ’s evaluation of Massiah is reflected in the declarations that the right has “no support in history, logic, or considerations of sound public policy,”\(^{31}\) and that there is “no basis for Massiah’s automatic exclusionary rule.”\(^{32}\) According to the

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24. REPORT NO. 3, MASSIAH, supra note 7, at 684-91.
25. Id. at 691-96.
26. Unless a contrary intent appears from the language, references to Massiah or the Massiah right are meant to include both the entitlement to the pretrial assistance of counsel and the exclusion of evidence that results from the denial of that assistance.
28. See REPORT NO. 3, MASSIAH, supra note 7, at 696-97 (arguing that although Miranda created a “remedial . . . measure[,]” Massiah created a constitutional right).
29. See Maine v. Moulton, 474 U.S. 159, 176 (1985) (holding that the sixth amendment is violated when the state obtains incriminating statements in knowing circumvention of right to counsel); id. at 177 n.13 (stating that the accused had a constitutional right not to reveal information to the state). Nevertheless, according to Professor Grano it is “as indefensible as Miranda.” Grano, supra note 12, at 409.
30. See REPORT NO. 3, MASSIAH, supra note 7, at 684, 691, and 706. In these respects, the DOJ and I agree. See supra note 19.
31. REPORT NO. 3, MASSIAH, supra note 7, at 664. This refrain is similar to the suggestions of Supreme Court dissents that Massiah has no foundation in the language, history, or objectives of the sixth amendment. See, e.g., Henry, 447 U.S. at 295-96, 300-01 (Rehnquist, J., dissenting); Escobedo v. Illinois, 378 U.S. 478, 496-97 (1964) (White, J., dissenting); see also Tomkovicz, Defense of Massiah, supra note 9, at 25-27.
32. REPORT NO. 3, MASSIAH, supra note 7, at 665. Supreme Court dissents also oppose the exclusion of evidence under Massiah and agree with the DOJ that it is a judicially created enforcement mechanism, not a constitutional right. See, e.g.,
DOJ, Massiah reflects not a legitimate interpretation of the sixth amendment right to the assistance of counsel, but a “new constitutional right” created by the liberal Warren Court, a “right not to be questioned in the absence of counsel” that aborts the search for truth and obstructs justice.

A. The History of the Right to Counsel

The Report asserts that the history of the right to counsel that was incorporated into the sixth amendment provides no support for the pretrial right against deliberate elicitation of incriminating statements recognized by the Massiah doctrine. According to the DOJ, the debates over the Bill of Rights “shed no light” on the specific congressional understanding of the meaning of the right to counsel. The logical assumption, therefore, is that the intent was to provide a right to counsel with the same substance as the right recognized at common law and by the individual states. A “critical aspect” of the “original understanding” of that right is that it was restricted to an entitlement to “counsel for the purpose of assisting in presenting a defense at trial.” No historical evidence suggests that the framers intended to provide a pretrial right to counsel of any kind, much less one that would operate outside of formal judicial contexts. Consequently, the clear message of history is that the pretrial Massiah right is not a part of the sixth amendment guarantee.

33. REPORT NO. 3, MASSIAH, supra note 7, at 663.
34. Id. at 671; see also id. at 665, 705.
35. Id. at 663, 706.
36. Id. at 706.
37. Id. at 684-85.
38. Id. at 673.
39. Id.
40. Id.
41. Id. at 673-74, 684-85. According to the DOJ, “[t]he Founders simply did not contemplate a right to counsel prior to trial, perhaps because they saw no need for such a right.” Id. at 684-85.
42. According to the DOJ, the “lack of historical basis” is the Massiah doctrine’s “most obvious flaw.” Id. at 684.
B. The Logic of the Sixth Amendment

The Report also alleges that Massiah can find no support in "logic." The fundamental logical deficiency of the Massiah doctrine is that the right it recognizes is neither necessitated by, nor consistent with, the sixth amendment's purposes or the roles and functions of counsel in ensuring that those purposes are achieved. The sixth amendment's core historical purposes are to ensure "the fairness of trials and the integrity of the truth-finding process." In part, the sixth amendment aims to promote those goals by "equalizing the strength of the adversaries" in the criminal trial. Traditionally, counsel's equalizing assistance has consisted of "prepar[ing] the accused's defense and . . . act[ing] as his advocate in encounters with the government at which the case is advanced toward disposition or at which the reliability of the truth-finding process might be unfairly undermined." According to the Justice Department, counsel provides the expertise essential to handling legal questions and to coping with the advocacy of the professionally trained government prosecutor.

The Report acknowledges that the sixth amendment's historical purposes and the traditional role of defense counsel explain the extension of the right to counsel to formal pretrial proceedings, such as preliminary hearings, and to informal pretrial proceedings, such as lineups. The Court's decisions extending sixth amendment protection to these contexts are premised on the belief that the assistance of counsel is logically important to ensure that the right to counsel at trial is not impaired or undermined before the trial.

43. Id. at 685-88.
44. Id. at 685.
45. Id. at 664.
46. Id. at 685.
47. Id.
48. Id. at 664. This same conception of the roles and functions of counsel has found expression in majority opinions of the Supreme Court. See Moran v. Burbine, 475 U.S. 412, 430 (1986); United States v. Ash, 413 U.S. 300, 309, 313 (1973). Like the DOJ, Massiah dissenters have invoked this conception of counsel as a basis for attacks on the doctrine. See Tomkovicz, Defense of Massiah, supra note 9, at 26.
49. See REPORT NO. 3, MASSIAH, supra note 7, at 685.
51. See REPORT NO. 3, MASSIAH, supra note 7, at 674.
phase is reached.\textsuperscript{53} The Report concludes that the sixth amendment's purposes and counsel's traditional functions, however, cannot explain the Massiah doctrine's extension of counsel to informal contexts involving no perceptible threats of unfairness or unreliability.\textsuperscript{54} Typical Massiah situations involve government informants surreptitiously and deliberately eliciting voluntary inculpatory statements from defendants.\textsuperscript{55} According to the Report, those situations are wholly devoid of legal complexities, the expert advocacy of a prosecutor, and any factors that might produce unreliable evidence.\textsuperscript{56} Consequently, there are no legitimate functions to be served by counsel in Massiah contexts. The core purposes of the sixth amendment—fairness and the integrity of the truth-finding processes—are not imperiled and need no protector.\textsuperscript{57}

According to the DOJ, the Massiah decision created, and its progeny have perpetuated, novel sixth amendment entitlements. Those entitlements include protection against "being questioned—overtly or covertly—by government agents in the absence of counsel concerning an offense that has led to . . . indictment,"\textsuperscript{58} and insulation "from the consequences of uncounseled but voluntary statements whether or not their admission would impair the fairness of the trial or the

\textsuperscript{53} See REPORT NO. 3, MASSIAH, supra note 7, at 674-76. Although the Report acknowledges the Court's reasoning, it is far from clear that the DOJ agrees with any pretrial extensions of counsel. The Report states that Supreme Court decisions have transformed the sixth amendment's "Assistance of Counsel" clause from a simple guarantee of the aid of retained counsel at trial into a requirement that counsel be available to protect the defendant's interests in a variety of pretrial contexts. The decisions have generally attempted to justify this metamorphosis on the theory that representation by counsel during pretrial confrontations between the accused and his accusers is necessary to ensure the fairness and integrity of the trial itself.

\textsuperscript{54} Id. at 674-75 (emphasis added). Perhaps I am guilty of misinterpretation, but from the language chosen, coupled with the earlier emphasis that the sixth amendment right was originally conceived of and intended solely as a trial right, id. at 673-74, I sense a preference for restricting counsel to the trial phase alone.

\textsuperscript{55} Id. at 685-86. These arguments also track those made by Massiah opponents on the Court. See, e.g., United States v. Henry, 447 U.S. 264, 296, 299 (1980) (Rehnquist, J., dissenting); see also Tomkovicz, Defense of Massiah, supra note 9, at 26-27.


\textsuperscript{57} See REPORT NO. 3, MASSIAH, supra note 7, at 685-87.

\textsuperscript{58} Id. at 685-86; Tomkovicz, Defense of Massiah, supra note 9, at 26.

\textsuperscript{58} REPORT NO. 3, MASSIAH, supra note 7, at 683.
integrity of the truth-finding process." Those entitlements are not logical extensions necessary to safeguard the right to trial counsel. Rather, they are constitutional excrescences the abrogation of which would not threaten the trial right at the sixth amendment's core.

According to the DOJ, it is not logical to reason that *Massiah* guards against unfairness by protecting against "deception" that "prevent[s] a defendant . . . from recognizing his possible need to avail himself of" the right to counsel. That reasoning "begs the question" by assuming "a right not to have the government attempt to obtain incriminating information from [an accused] except with the consent, or in the presence, of his attorney." The Report concludes that because there is no such right, "there is no 'unfairness' in . . . impair[ing] its exercise."

C. The Public Policy Ramifications of *Massiah*

The Report argues that the lack of support in the history or the logic of the sixth amendment demonstrates that *Massiah* is "merely a cover for a judicially-imposed policy," and an

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59. *Id.* The DOJ maintains that because compulsion is lacking in *Massiah* situations, counsel is not necessary to safeguard the values of the fifth amendment privilege against compulsory self-incrimination. *Id.* at 686. I agree with that assertion. See Tomkovicz, Defense of Massiah, *supra* note 9, at 39 n.182.

60. *See Report No. 3, Massiah, supra* note 7, at 666, 668, 696, 705.

61. *Id.* at 687.

62. *Id.* at 688.

63. *Id.* The Justice Department believes that certain holdings of the Supreme Court undermine the contention that *Massiah* is rooted in the need for protection against governmental "deception." Both Kuhlmann v. Wilson, 477 U.S. 436, 459 (1986) (stating that *Massiah* requires active elicitation and does not govern passive listening), and Maine v. Moulton, 474 U.S. 159, 180 n.16 (1985) (noting that, despite pending charges, *Massiah* permits the government to elicit and use information pertaining to separate, uncharged offenses), are said to belie the notion that *Massiah* protects against deception. See *Report No. 3, Massiah, supra* note 7, at 688 n.75.

I have discussed elsewhere whether *Wilson* and *Moulton* can be reconciled with a constitutionally defensible rationalization of the *Massiah* right to counsel. See Tomkovicz, Defense of Massiah, *supra* note 9, at 77-90. For present purposes, suffice it to say that the fact that a specific Supreme Court holding is not consistent with a potential explanation of *Massiah*'s constitutional roots is not a necessarily persuasive reason for rejecting that explanation. It is entirely possible that a Supreme Court that has failed to proffer an adequate justification for the *Massiah* right, see *supra* note 19, has made mistakes in defining the boundaries of that right.
"unwise" one at that.\textsuperscript{64} The policy choices reflected in \textit{Massiah} are allegedly unsound for four basic reasons.\textsuperscript{65} First, \textit{Massiah} prevents conviction of the guilty by foreclosing efforts to gather evidence that may be essential to proving the government's case beyond a reasonable doubt.\textsuperscript{66} In some cases, charges are filed on the basis of probable cause, but with insufficient proof to convict.\textsuperscript{67} After such charges are filed, \textit{Massiah} cuts off access to highly probative information concerning guilt.

Second, \textit{Massiah} poses threats to public safety.\textsuperscript{68} In response to \textit{Massiah}'s prohibition, authorities may attempt to ensure sufficient opportunity to elicit evidence from suspects by delaying the initiation of proceedings against them. When government investigators conclude that it is a "reasonable course" to postpone charges and leave a suspect at large, there is always some risk that he will cause further societal harm.\textsuperscript{69} In sum, \textit{Massiah} may well induce investigators to take certain risks with the public safety, risks that should not be taken and are not constitutionally required.

Third, \textit{Massiah} runs contrary to "society's strong interest in . . . the swift and effective operation of the criminal justice system."\textsuperscript{70} Voluntary inculpatory statements by accused individuals are desirable and promote the expeditious and efficient processing of criminal cases.\textsuperscript{71} The demands of \textit{Massiah} are "virtually certain to ensure the making of no statements at all," and, therefore, to deprive the system of fuel needed to function well.\textsuperscript{72}

\begin{itemize}
  \item \textsuperscript{64} \textsc{Report} No. 3, \textit{Massiah}, supra note 7, at 665.
  \item \textsuperscript{65} \textsc{See} id. at 688-90.
  \item \textsuperscript{66} \textsc{See} id. at 688-89.
  \item \textsuperscript{67} \textsc{See} id. at 689.
  \item \textsuperscript{68} \textsc{See} id.
  \item \textsuperscript{69} \textsc{Id.}
  \item \textsuperscript{70} \textsc{Id.}
  \item \textsuperscript{71} \textsc{Id.}
  \item \textsuperscript{72} \textsc{Id.} (footnote omitted). The DOJ claims that \textit{Massiah} protection "may also be harmful to some defendants, either because they will be subjected to trial on the basis of marginal evidence of guilt, or because further investigation would have exonerated them or at least persuaded the prosecutor not to bring them to trial." \textsc{Id.} at 689 n.79. The argument is reminiscent of the \textit{Miranda} dissenters' complaint that innocent suspects can be seriously harmed by the protections afforded by the \textit{Miranda} doctrine. \textsc{See} \textit{Miranda v. Arizona}, 384 U.S. 436, 543-44 (1966) (White, J., dissenting). I must admit that my typical reaction to the argument that "we're taking away your rights for your own good" is extreme skepticism. I sense that the rights afforded by \textit{Massiah} and \textit{Miranda} are rarely harmful to defendants in the ways suggested by the DOJ. More importantly, I am not the first to conclude that
Finally, the ethical tenet prohibiting lawyers from talking to uncounseled opposing parties does not provide a foundation for Massiah. The terms of and reasons for that rule dictate that it is applicable only to lawyers, not to investigators or informants.\textsuperscript{73}

\section*{D. The Massiah Exclusionary Rule}

The Report recognizes that certain language in the original Massiah opinion suggests that the sixth amendment is violated only at trial when inculpatory statements are used as evidence.\textsuperscript{74} This Massiah language clearly implies that exclusion is an integral part of the right to counsel that is the foundation of the Massiah doctrine.\textsuperscript{75} Certain later decisions, however, reflect what the DOJ believes to be the undoubtedly correct view that the sixth amendment is only concerned with pretrial evidence gathering, not with what later happens in court.\textsuperscript{76} That view leads to the critical, and sensible, conclu-
sion that the *Massiah* exclusionary rule is not constitutionally required. Rather, just like the fourth amendment and *Miranda* exclusionary rules, it is no more than a “judicially-created device for enforcing a constitutional right.”

The Report contends that, as such a device, the *Massiah* exclusionary rule is not justifiable on policy grounds. Its “unquestionably substantial” costs are the “impairment of the truth-finding process,” the “release or lenient treatment of obviously guilty defendants,” and the “generation of public disrespect for [our] system.” Moreover, it yields minimal benefits other than undesirable “windfalls” for guilty defendants. In terms of deterring official illegality, “the gain to society” from *Massiah*-based exclusion “is insubstantial, if it exists at all.” According to the DOJ, the possible minimal gains to society are not worth the “excessive costs of the *Massiah* exclusionary rule approach.” The judicially fashioned remedy of exclusion is every bit as indefensible as, and even more vulnerable to attack than, the pretrial right to counsel it is supposed to serve. It ought to be abolished.

In sum, the Report accuses the Supreme Court of creating an “irrational” and “subversive” constitutional right that has resulted in an “anomalous situation” calling for radical

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77. REPORT NO. 3, *MASSIAH*, supra note 7, at 693.
78. See id. at 693-96.
79. Id. at 693.
80. Id.
81. Id. at 694.
82. Id. at 696. Former Chief Justice Burger also believed that the *Massiah* exclusionary rule’s costs far outweighed its marginal benefits. See Maine v. Moulton, 474 U.S. 159, 191 (1985) (Burger, C.J., dissenting).
83. The DOJ is not at all sanguine about the likelihood that its arguments against the *Massiah* right to counsel will prevail. See REPORT NO. 3, *MASSIAH*, supra note 7, at 696-98, 702. It does believe, however, that the Court could be persuaded by its arguments for eliminating or modifying the *Massiah* exclusionary rule. Id. at 698-702. Its optimism in this respect seems partly based on the belief that the rule is “not constitutionally required.” Id. at 698. Professor Grano characterizes the DOJ’s “suggestion that the *Massiah* exclusionary rule, unlike the underlying substantive right, may not be constitutionally based” as “provocative” and “deserving[ing] of consideration.” Grano, supra note 12, at 410. Nonetheless, unlike the authors of Report Number Three, Professor Grano concludes that the DOJ’s arguments against the “substantive” *Massiah* right “may be more persuasive” than its arguments against the exclusionary “remedy.” Id. at 411.
84. The DOJ also believes that the strong case against *Massiah* exclusion is fortified by the fact that there are equally effective alternatives to ensure protection of the *Massiah* right to counsel. See REPORT NO. 3, *MASSIAH*, supra note 7, at 695-96.
According to the Justice Department, Massiah is an enigmatic doctrine that thwarts the search for truth and obstructs justice.  

II. A CRITIQUE OF AND RESPONSE TO THE MASSIAH REPORT

This Part first addresses the character of the Report and the nature of legal scholarship. It then reflects upon the hazards and unspoken ramifications of the Justice Department's campaign for truth in criminal justice. Finally, it describes the premises underlying the DOJ's opposition to Massiah and the distinct premises that provide constitutional support for Massiah.

A. The Massiah Report, Legal Scholarship, and the Campaign for Truth in Criminal Justice

Three aspects of Professor Grano's powerful Introduction to the Truth in Criminal Justice Series inspired the present discussion. First, Professor Grano generously praises the Series as "vital," and as a "new, energetic, and serious voice [that] should help provoke a more balanced and vigorous competition of ideas . . . essential for the testing of truth and good in a free society." Second, he pointedly criticizes the "one-sided," liberal bent of most academic literature in the criminal procedure area, suggesting that academia is beset by a "philosophical imbalance." That imbalance has made "conservatives . . . a discrete and insular minority," and has infected the scholarship with a severe case of "inflated rhetoric." Finally, in defending his own position on Massiah and the other doctrines targeted by the Series, Professor Grano himself sanctions and indulges in the same

85. Id. at 696, 706.  
86. See id. at 706.  
87. See Grano, supra note 12.  
88. Id. at 408.  
89. Id. at 401; see also id. at 402, 424.  
90. Id. at 398 n.12.  
91. Id.; see also id. at 401 & n.26, 402.
sorts of rhetorical excesses for which he chastises others.\textsuperscript{92}

1. The Report as legal scholarship — Professor Grano recognizes that the source, the intended audience, and the immediate purpose of the Truth in Criminal Justice Series could prompt readers (particularly the unsympathetic) to dismiss it as legal advocacy that contributes little of a scholarly nature to the Massiah debate.\textsuperscript{93} He suggests that such a dismissal would be a mistake because the Series contains "careful and complete legal analysis" that deserves serious consideration.\textsuperscript{94} Moreover, according to Professor Grano, the advocative character of the Series hardly distinguishes it from "much academic scholarship."\textsuperscript{95} For the most part, Professor Grano's assessments are on target. The potential merits of the Justice Department's analyses should not be ignored simply because of their source or their objectives. And the Series does have a lot in common with much traditional legal scholarship.\textsuperscript{96}

\textsuperscript{92} See, e.g., id. at 404 ("Apparently ... a view has taken hold that facilitating the discovery of truth is itself an evil ... . Purging the influence of such misguided thinking from our system is a necessary first step ... ."); id. at 408 ("Miranda may be a decision with a future ... far more frightening than its past."); id. at 413 ("I find it difficult to believe that we are so intellectually impoverished ... that we lack the capability of devising an effective, alternative approach. ... [M]any who have grown accustomed to the existing world, irrational as it may be, simply are incapable of conceiving the reality of an American criminal justice system without an exclusionary rule."); id. at 420 (referring to "the low regard our existing system has for truth, finality, and rationality"); id. at 423 ("Those who can see only the existing world are bound to decry the Office of Legal Policy proposals as frightening, extreme, and out of the mainstream."); id. at 424 n.144 ("The risk of serious mistake always is great when the Supreme Court bases its decisions not on what the law actually requires but on its idea of progress.").

\textsuperscript{93} See id. at 411 n.76 (acknowledging that readers might have "legitimate concern ... that the legal analysis may be in the nature more of a brief than an objective inquiry").

\textsuperscript{94} Id.

\textsuperscript{95} Id.

\textsuperscript{96} There are many varieties of legal scholarship. Throughout this discussion, my focus and basis of comparison is the traditional, often doctrinal, variety with which I am most familiar. See, e.g., Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV. 349 (1974); Kamisar, Brewer v. Williams, Massiah, and Miranda: What is "Interrogation"? When Does it Matter?, 67 GEO. L.J. 1 (1978); LaFave, The Fourth Amendment in an Imperfect World: On Drawing Bright Lines and Good Faith, 43 U. PITT. L. REV. 307 (1982); White, Rhode Island v. Innis: The Significance of a Suspect's Assertion of His Right to Counsel, 17 AM. CRIM. L. REV. 53 (1979). That is the form of scholarship with which the Truth in Criminal Justice Series shares substantial common ground. The Reports probably have considerably less in common with less traditional, contemporary strains of academic legal writing. See, e.g., Kahn, Community in Contemporary Constitutional Theory, 99 YALE L.J. 1 (1989); Unger, The Critical Legal Studies Movement, 96 HARV. L. REV. 561 (1983);
The *Massiah* Report is unlike typical legal scholarship insofar as its author is an active party in interest in criminal cases, and it is apparently addressed directly to the "leader" of that party.\(^7\) As a result, in tone and design, the Report is a highly and consistently argumentative call to action.\(^8\) In part, it has the structure of a battle plan, complete with "litigative," "legislative," "educational," "investigative," and "administrative" strategies\(^9\) and suggestions of pragmatic compromises that are most likely to be effective in eliminating or restricting *Massiah* and its rule of exclusion.\(^10\) Moreover, the Report is characterized by extreme rhetoric\(^10\) and by a

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\(^7\) The Office of Legal Policy of the Department of Justice authored the Report, and the DOJ is the federal prosecutor. As Professor Grano observes, the Reports are "addressed to the Attorney General ultimately for the purpose of recommending policy options for the Department of Justice." Grano, *supra* note 12, at 411 n.76.\(^8\) See, e.g., REPORT NO. 3, *MASSIAH*, *supra* note 7, at 666 ("The Department of Justice should seek reform of the *Massiah* doctrine on the grounds that it is irrational and harmful to effective law enforcement, as well as subversive of the search for truth in criminal trials."); *id.* at 702 ("[T]he Department should continue to avail itself of litigative opportunities to express its fundamental disagreement [with *Massiah*.]"); *id.* at 705 ("It would be desirable for the Department, therefore, to undertake a 'consciousness raising' program aimed at making the *Massiah* doctrine a more visible public issue."); *id.* (advising the Department to undercut *Massiah* by referring to it as a "right not to be questioned" rather than as a "right to counsel"); *id.* at 706 ("The Department should intensify its efforts to correct th[e] anomalous situation [that *Massiah* has produced].").\(^9\) There are by and large remained relatively traditional.

\(^10\) E.g., *id.* at 697 (suggesting "[t]wo alternative arguments [that] might provide the Court with an attractive middle ground between complete repudiation of *Massiah* and continued adherence to its irrational view of the right to counsel"); *id.* at 698 (maintaining that attacks on the *Massiah* right are not likely to be "fruitful at present," but that arguments that "the exclusionary rule should not be applied to evidence obtained by means of a *Massiah* violation or, alternatively, that the evidence should be suppressed only when the police have not acted in good faith [hold] greater promise for more immediate success").
lack of balance that is not typical of legal scholarship—even the "advocacy scholarship" bemoaned by Professor Grano. In all these respects, the Report is much more a work of legal advocacy than a work of legal scholarship.

On the other hand, the Report resembles traditional scholarship in significant ways. It recounts a history of the development of the right to counsel, summarizes the development and state of Massiah doctrine, and then presents several thought-provoking criticisms of that doctrine. In these respects, it possesses considerably greater analytical depth than the vast majority of briefs. The "arguments" proffered—rooted in history, the core purposes of the sixth amendment, and public policy considerations—resemble those found in conventional scholarship. In addition, specific proposals for legal reform are not at all foreign to legal scholarship. Although some legal scholarship may be aimed purely at academics, much of it aspires, like the Report, to have tangible and pragmatic impact on the development or reform of the law by arming litigants or influencing courts or legislatures. Finally, although scholars typically avoid the sustained, intemperate rhetoric and extreme one-sidedness not

102. See Grano, supra note 12, at 398 n.12. Professor Grano would apparently disagree with my assessment of the Report. He describes the Series as "a new, energetic, and serious voice—one grounded in coherent and careful argument, not in inflated rhetoric." Id. at 401.

103. But see id. at 411 n.76 (discussing the analytical and advocative aspects of the Report).

104. See REPORT NO. 3, MASSIAH, supra note 7, at 672-76.

105. See id. at 677-84.

106. See id. at 684-96.

107. The greater depth is no surprise, for the Report is not merely a litigant's advocacy on the limited issues raised by a concrete case. Rather, it is a comprehensive blueprint aimed at providing the foundation for opposition to the Massiah doctrine in all future cases. Its ultimate aim is not merely victory in some Massiah cases, but triumph over Massiah itself. In that respect, it is much more than the typical brief.

uncommon in legal advocacy;\textsuperscript{109} scholarly authors are not immune to rhetorical excess and do not always give opposing views fair credit.\textsuperscript{110}

In sum, the \textit{Massiah} Report is a hybrid. It contains some elements characteristic of legal scholarship and others associated with legal advocacy. It provides valuable reflections upon the character of legal scholarship in the area of criminal procedure.\textsuperscript{111}

2. \textit{Lessons for legal scholarship} — Arguably, traditional legal scholarship should emphasize the attributes it shares with the Report and seek to become more advocative in character. A contest of “scholarly adversaries” could be the best way to test ideas and ensure constructive law reform.\textsuperscript{112}

\begin{footnotes}
\textsuperscript{109} Legal scholarship that possessed such characteristics would risk its credibility and might well be dismissed as a “brief.”

\textsuperscript{110} Professor Grano accuses the “liberals” of such failings. \textit{See supra} note 91 and accompanying text. He is undoubtedly correct. Although I have made some effort in the past to be temperate and balanced, my previous writings probably render me vulnerable to such criticism. Nevertheless, the members of Professor Grano’s “discrete and insular” conservative minority, Grano, \textit{supra} note 12, at 398 n.12, lack standing to cast the first stone, for they have been guilty of the very same failings. \textit{See supra} note 92 and accompanying text; \textit{see also infra} note 113 and accompanying text.

“Unconventional” scholars have also evinced proclivities for excessive rhetoric or one-sidedness. \textit{See} Schlegel, \textit{Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies}, 36 STAN. L. REV. 391, 408 (1984) (noting the Law and Society Association’s “bitter denunciations” of critical legal studies (CLS) scholars as “the ‘new doctrinal barbarians’” and referring to Professor Tushnet’s “wonderfully, or awfully . . . foul-tempered review of Lawrence Friedman’s \textit{History}”); Schwartz, \textit{With Gun and Camera Through Darkest CLS-Land}, 36 STAN. L. REV. 413, 419-20 (1984) (observing that one extreme in CLS literature includes “polemical essays notable for turgidity, invective, and irresponsibility”); \textit{id.} at 440 (charging that CLS scholarship is often “moralistic, censorious, and preachy,” that it claims a “monopoly of virtue” and that it is characterized by “vanity and lack of sophistication”); \textit{id.} at 446 (stating that CLS writing engages in “misrepresentation” by “false attribution to ideological opponents of a ridiculous position that can then serve as a straw man to be demolished”); \textit{id.} at 455 (suggesting that CLS could be exposed as a “fountain of confusion,” is characterized not by “reason but . . . volcanic sub-rational emotion,” and offers “surrealistic pictures for our minds”); West, \textit{supra} note 96, at 757-59 (1988) (observing that the “tone of scholarly discussion has become decidedly negative” and bemoaning “hostile gut reactions,” “passionate political and cultural evaluations,” “mean-spirited academic putdowns,” and “dismissive approach(es)”) \textit{id.} at 759 (accusing another scholar not only of “fan[ning] and fuel[ling] an immobilizing ideological polarization, but also [of] hid[ding] the basic issues at stake,” and urging an effort “to present the most subtle and sympathetic interpretations of an opponent's viewpoints before we uncharitably ‘trash’ them”).

\textsuperscript{111} The lessons for legal scholarship that follow might well apply outside the criminal procedure area, but, for purposes of the present discussion, I have focused upon the area I know best.

\textsuperscript{112} Professor Grano’s language, \textit{see} Grano, \textit{supra} note 12, at 401 (observing that
In my view, however, legal scholarship ought to eschew the adversarial andadvocative characteristics that pervade the Massiah Report. In tone, form, and approach it should emphasize its scholarly, not its legal, heritage. The objective should not be to win, but to explore and explain issues fully. Scholars should inquire into and search for, but not battle over, "truth and good."

More specifically, serious scholarship should shun misleading rhetoric and one-sided discussion of significant legal questions. Its language should not be inflammatory, intolerant, or dismissive. It should not employ words as tools to mischaracterize opponents' voices or obscure in ambiguity the assumptions and weaknesses of preferred views. Nor should its quest for the best legal order be characterized by accusation, unfair representation of others' views, the construction and demolition of straw men, or the deceptive repetition

the Department of Justice has "joined the fray"); id. (noting that the Series may bring about a "more balanced and vigorous competition of ideas ... essential for the testing of truth and good in a free society"); his approval of the advocacy scholarship of a fellow "conservative," see id. at 408 (quoting the hyperbolic rhetoric of Professor Uviller), and his own indulgence in one-sided rhetoric and accusation, see supra note 92, suggest that he may endorse the view that scholarship ought to be adversarial. These aspects of his Introduction might, however, reflect a perceived need to answer the advocacy scholarship of the left in kind. See Grano, supra note 12, at 402 (suggesting that the Warren Court was "sustained and emboldened by a plethora of advocacy scholarship," that the Burger and Rehnquist Courts have regrettably been without such support, and that the Truth in Criminal Justice Series might fill that void). If given the choice, Professor Grano might well prefer a truce in which both sides set aside the potentially destructive tools of the advocate's trade.

113. I cannot emphasize enough that these are my (potentially idle) reflections inspired by the Series and Professor Grano's Introduction. I offer them as part of my response to the Report and to prompt others to reflect upon the enterprise of legal scholarship. I make no claim to the truth about scholarship, and hasten to concede that mine is but one, quite conservative, view of the enterprise.

114. Grano, supra note 12, at 401; cf. 3 H. GEORGE, THE COMPLETE WORKS OF HENRY GEORGE: THE LAND QUESTION 23 (1881) ("He who seeks the truth, let him proclaim it, without asking who is for it or who is against it."); W. PENN, SOME FRUITS OF SOLOITUDE No. 142, at 36 (1900) (rev. ed. 1718) ("Truth often suffers more by the Heat of its Defenders, than from the Arguments of its Opposers.").

115. Cf. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 589 (1980) (Brennan, J., concurring) ("Analysis is not advanced by rhetorical statements ... .").

116. See, e.g., West, supra note 96, at 758-59 (disapproving of Ewald's critique of Unger as a "mean-spirited academic putdown" and a "dismissive approach"). It would appear that some scholars involved in and opposed to the critical legal studies movement do not share my concerns or biases in these respects. See supra note 110.

117. E.g. Schwartz, supra note 110, at 446 (chastising critical legal studies scholars who falsely attribute to their "ideological opponents ... a ridiculous position that can then serve as a straw man to be demolished").
of appealing emotional themes. Instead, the scholarly enterprise should be rooted in honest, temperate, and logical discourse.

Frank and fair discussion entails acknowledgment of the vulnerabilities of preferred positions, a dose of self-doubt, and the recognition of potential merits in opposing viewpoints. In the scholarly realm, there is nothing wrong with colorful language or the well-turned phrase that advances analysis. There is a lot wrong, however, with the dishonest abuse of words to achieve ulterior, political motives. If legal scholarship aspires to a place among other scholarly pursuits, it ought to avoid the temptations of legal and political advocacy and the rhetorical devices often employed in the service of such advocacy.

118. The title of the Series itself—"Truth in Criminal Justice"—is one such emotional theme. Other illustrations of such themes include: "probative, reliable, and voluntary admissions of guilt," REPORT NO. 3, MASSIAN, supra note 7, at 663; "the integrity of the truth-finding process," id. at 664; and "the low regard our existing system has for truth, finality, and rationality," Grano, supra note 12, at 420. The point is not that all such phrases are inappropriate—though some seem excessive. Rather, the point is that scholarly discussion should not be rooted in or dependent upon accusation, emotion, and the consistent repetition of unexplored, superficially appealing phrases.

119. See West, supra note 96, at 757-59 (complaining about the "decidedly negative" tone of "scholarly discussion," the "hostile gut reactions [that] have replaced guarded, respectful responses," the "passionate political and cultural evaluations [that] have supplanted balanced intellectual assessments," and urging "subtle and sympathetic interpretations of an opponent's viewpoints").

120. Just as I am a supporter of "fair play in criminal justice," see Tomkovicz, Defense of Massiah, supra note 9, at 47-51, I am a supporter of "fair play in legal scholarship." In my view, fair play in both spheres promotes the best results.

121. On this point, I doubt that Professor Grano disagrees.

122. I suppose some might argue that legal scholarship should not aspire to such a place, that it is so distinct that it need not adopt any of the conventions of other scholarly endeavors. Obviously, I disagree. It should be made clear, however, that I am not suggesting that legal scholarship must be like other scholarly pursuits in all respects. My suggestions are strictly limited to those made in the text.

123. I only mean to suggest that traditional scholarship should avoid these temptations, not that other strains of legal scholarship should necessarily eschew them or that there is anything wrong with legal, political, or social advocacy. I suppose that CLS adherents might well respond that the traditional scholarship I describe and endorse, despite its outward appearance and declared neutrality, is engaged in an unavoidably "political" campaign to legitimate and maintain the legal and social status quo and its inherent inequities. See Schlegel, supra note 110, at 406 ("[T]raditional legal scholarship [has been made to] appear more and more bankrupt in its attempt to maintain the appearance of neutral disinterestedness . . . ."); id. at 411 (according to CLS "LAW IS POLITICS, pure and simple"); Schwartz, supra note 110, at 426 (stating that CLS believes liberalism and law mask and legitimate capitalist exploitation and disarm the oppressed); id. at 433 ("CLS writers see law as simply an expression of politics."); West, supra note 96, at 766
I may be in error in thinking that "advocacy scholarship" is an undesirable pursuit for scholars. Legal knowledge might be best furthered by highly charged, strident, one-sided "debates." I sense, however, that the quest for legal knowledge is more likely to be advanced by even-handed, rational analyses, and that extreme advocacy scholarship tends to deceive, obscure, and confuse.124

This discussion of the attributes of good scholarship and the dangers of excessive advocacy is not intended as an indictment of the Report or the entire Truth in Criminal Justice Series. The DOJ intended its Reports to be partisan efforts designed "to persuade,"125 to "allay apprehensions,"126 and to win the battle against foes that, in its view, unjustifiably handicap criminal law enforcement. The Massiah Report is more like "a brief than an objective inquiry"127 or an impartial search for legal knowledge because it was so designed. Nevertheless, reflection upon the attributes of the Report can furnish specific and valuable lessons about the perils of "advocacy scholarship."128 The discussion that follows will center on a topic raised in my introduction,129 the DOJ's employment of "truth" as a weapon against Massiah. That "campaign for truth" highlights the dangers of rhetorical, imbalanced scholarship.

3. The use, abuse, and one-sided pursuit of truth130 — Early on, Report Number Three introduces its focal theme by

("[CLS tries] to show the complex ways in which partiality and partisanship are at work in the dispassionate styles and forms of liberal discourse.").

124. It might be suggested that such fears are groundless because readers are undoubtedly smart enough not to be deceived or confused by "advocacy scholarship." Although I would like to believe that such is the case, I doubt that the entire audience of legal scholarship—other scholars, students, lawyers, judges, and legislators—are immune to the perils of "advocacy in scholarship's clothing."

125. REPORT No. 3, MASSIAH, supra note 7, at 705.

126. Id.

127. Grano, supra note 12, at 411 n.76.

128. It does not seem unfair to target the Report as an example of what legal scholarship should not be like. It has been published in a law journal. Moreover, Professor Grano has praised the Series in terms that suggest that it is—or is the equivalent of—a serious work of legal scholarship. See supra note 96. In addition, although the advocative traits of the Report are more pervasive and obvious, "advocacy scholarship" shares those traits. Put otherwise, "advocacy scholarship" suffers from a less severe case of the very same symptoms.

129. See supra notes 1-14 and accompanying text.

130. For a discussion on the limits of truth, see M. DE MONTAIGNE, THE COMPLETE ESSAYS OF MONTAIGNE, bk. III, ch. 13, at 826 (D. Frame trans. 1958) ("For truth itself does not have the privilege to be employed at any time and in any way; its use, noble as it is, has its circumscriptions and limits.").
accusing Massiah of “thwart[ing]” the “search for truth.”  

It proceeds by contending that Massiah “impair[s] . . . the truth-finding process,” is “subversive of the search for truth in criminal trials,” “impedes the search for truth,” “insulates the accused from the consequences of . . . voluntary statements whether or not [they] would impair . . . the integrity of the truth-finding process,” is an “impediment to the search for truth,” “thwart[s] the search for truth,” and “obstruct[s] . . . justice.” In the course of its discussion, the Justice Department converts Massiah into a “straw man,” a virtually insubstantial “right not to be questioned.” Then, using “truth” as a bludgeon, it destroys that defenseless right.

It is neither inappropriate nor unfair to suggest that truth is a valued systemic objective and that Massiah can undermine its pursuit. In a scholarly work, however, it does seem both inappropriate and unfair to use truth and a variety of other words and phrases to exaggerate, obfuscate, and appeal to emotions. At some point, the rhetoric of “truth in criminal justice” impedes the scholarly pursuit of knowledge, justice, and other truths.

The truth campaign in the Massiah Report also suffers from serious imbalance in at least two important respects. First, although not asserting that truth is the only value in our constitutional system, it gives minimal recognition to other

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131. REPORT NO. 3, MASSIAH, supra note 7, at 663.
132. Id. at 665.
133. Id. at 666.
134. Id. at 671.
135. Id. at 683.
136. Id. at 690.
137. Id. at 706.
138. Id.
139. See, e.g., id. at 696, 706; see also id. at 705 (urging the Department not to refer to Massiah as a “right to counsel,” but to “speak[] instead of ‘the Massiah “right” not to be questioned’ ”).
140. But see Rifkind, supra note 10, at 545 (“[O]ver the years . . . I have freed myself of the necessity of uttering the litany that the object of trials is to ascertain the truth and I have come to embrace the perhaps less exalted but more viable proposition that the office of a trial is to resolve a controversy.”)
141. If those suggestions are unfair and inappropriate, then I too have been guilty of unfair and inappropriate suggestion. See Tomkovicz, Defense of Massiah, supra note 9, at 43-48.
142. See, e.g., T. MIDDLETON, The Family of Love, act V, scene iii, line 2078 (S. Shepherd ed. 1979) (“[T]ruth needs not the foil of rhetoric.”); W. PENN, supra note 114, at 36 (“Truth often suffers more by the Heat of its Defenders, than from the Arguments of its Opposers.”).
potentially legitimate sixth amendment values and neglects entirely some of the arguable underpinnings of the Massiah doctrine. A scholarly study of Massiah would not have to concede the validity of other values. Nor would it have to agree that those values should take priority over truth. It should, however, give those values a fair description and acknowledgement. In fairness to readers and to the quest for knowledge at the heart of the scholarly enterprise, complete and balanced discussion would seem highly preferable.

Perhaps of greater importance is the DOJ's one-sided claim that truth is its ally. Admittedly, the Justice Department does have truth in criminal justice on its side of the Massiah debate. However, there is another truth at stake in the

143. See infra notes 179-92 and accompanying text.
144. Although giving fair acknowledgement to the opposing side would strengthen the scholarly undertaking, it could well undermine the advocate's goals. It is understandable, therefore, that the DOJ has not done so.
145. It should not go unnoticed that the "truth in criminal justice" that is central to the DOJ's case against Massiah is not the same truth in criminal justice that is among the sixth amendment's core values. The DOJ contests Massiah because it thwarts truth by impeding conviction of the guilty. Counsel's constitutional truth-promoting function, however, is to guard against conviction of the innocent. See Gideon v. Wainwright, 372 U.S. 335, 345 (1963) (quoting Powell v. Alabama, 287 U.S. 45, 68-69 (1932)) ("[An accused] 'requires the guiding hand of counsel at 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.' "). Thus, although the DOJ's argument against Massiah is rooted in the pursuit of a primary objective of the criminal justice system, the DOJ's goal is not to further the same face of truth sought by the constitutional guarantee at issue.

It is arguable that in some cases Massiah counsel can promote truth by guarding against unreliable evidence and inaccurate convictions. Much of the deliberate elicitation regulated by Massiah doctrine is conducted by undercover government informants whose characters and motivations are subject to question. It is entirely possible for those informants to create risks of convicting the innocent by fabricating or distorting inculpatory revelations. See Rohrlich, Informant-Aided Convictions Going Unchallenged, L.A. Times, Oct. 20, 1989, at B1, col. 2; Use of Jailhouse Informers Reviewed in Los Angeles, N.Y. Times, Jan. 3, 1989, at A14, col. 1. The Massiah right to counsel does diminish the risk that an accused could be convicted on the basis of such informant-generated untruths. Either counsel is present when his client reveals information and is later able to contradict the false report of an informant, or counsel is not present and the Massiah exclusionary rule prevents the admission of the fabricated or distorted statement.

I do not mean to suggest that dishonest informants pose a major threat to our system's quest for accurate outcomes. I am not sure how extensive the danger is. Nor do I mean to hold Massiah counsel up as a cure-all for the perils of false informant reports. Because the current doctrine limits the circumstances in which the defendant is entitled to counsel, see Tomkovicz, Defense of Massiah, supra note 9, at 15-22, Massiah provides only partial protection against the threats to truth posed by ill-motivated or incompetent government informants. Instead, my point is that in some circumstances the Massiah right can and does promote the search for
debate—the "truth" about the meaning and scope of the sixth amendment right to counsel. The truth about the right to counsel may be that it frequently serves values that impede the search for truth in criminal justice. Alternatively, the constitutional truth may be that counsel seldom or never seeks interests that defeat truth. In either case, ascertaining the constitutional truth is a "higher" goal than ensuring truth in criminal justice. Despite different perspectives and conclusions, all involved in scholarly research concerning the Massiah doctrine purport to be, and should be, engaged in a search for that "higher" truth. Yet, the Massiah Report fails to acknowledge the importance, much less the superiority, of that truth. By relying so heavily upon and suggesting the superiority of truth in criminal justice, the Report is deceptive. Moreover, it does not fairly represent its opponents' positions. Thoughtful legal scholarship would recognize that no one has sole possession of the truth and that many can legitimately claim its pursuit.

In the following discussion of the substantive debate over Massiah, I plan to take the preceding lessons seriously. I hope to avoid rhetoric that fails to advance the analysis and to recognize that my preferred constitutional interpretation is not necessarily the truth. The main objective will be to present the basic arguments in defense of Massiah fairly and rationally so that those concerned with the truth about the truth. Consequently, even truth in criminal justice does not belong entirely to one side of the Massiah debate.

In any event, for purposes of the present discussion I am willing to concede that the DOJ is correct in contending that Massiah counsel is more likely to impede than to promote the search for truth.

146. I have previously referred to this more generally as "truth in constitutional law." See supra note 15 and accompanying text.

147. The government's obligation to pursue constitutional truth is probably more compelling than the mere scholar's obligation. The sovereign is duty-bound to preserve and protect the Constitution's guarantees. U.S. CONST. art. II, § 1, cl. 7 (prescribing that the President "shall take the following Oath or Affirmation: 'I do solemnly swear (or affirm) that I will ... preserve, protect and defend the Constitution of the United States'"); see also Aptheker v. Secretary of State, 378 U.S. 500, 513 n.12 (1964) (noting the Assistant Attorney General's observation "that it is the duty of the Attorney General to protect the rights of individuals guaranteed by the Constitution").

148. It could be that the truth about the sixth amendment is that it rarely seeks objectives that defeat truth in criminal justice. In that case, "truth in constitutional law" and "truth in criminal justice" would be highly compatible goals. Still, the constitutional truth would be "higher" or superior in the sense that it, not truth in criminal justice, must be the guiding light of the Massiah scholar.

149. I cannot promise that I will succeed completely. Old habits die hard.
constitutional right to counsel can make informed choices.

B. The Substantive Debate Over Massiah

The objects here are to strip away the rhetoric and accusations that have characterized and obscured discussions of Massiah and to isolate the substance that ought to be the focus of debate.

1. Points of agreement — In order to identify the basic choices and disagreements that have led me to different conclusions regarding Massiah than those reached by the DOJ, it might be helpful to describe first our significant points of agreement. First, I concur that promoting the "truth-seeking" goal of the criminal justice system is one vital rationale for the sixth amendment right to counsel. Counsel protects the accused against perils that risk convicting the innocent. Second, I agree that another reason for granting the assistance of counsel is to ensure "fairness" or "fair treatment" for the criminally accused. Moreover, the fairness goal is neither synonymous nor coextensive with the truth-seeking rationale. Third, the Massiah grant of counsel impedes the search for truth. When exercised by a

150. It bears repeating that the DOJ is far from alone in its criticism of the Massiah doctrine as constitutionally indefensible. See Grano, supra note 12, at 410 n.70; Uviller, Evidence From the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint, 87 COLUM. L. REV. 1137, 1138, 1162 (1987); see also Tomkovicz, Defense of Massiah, supra note 9, at 25-30 (discussing the judicial and scholarly arguments against Massiah).

151. See REPORT No. 3, MASSIAH, supra note 7, at 664, 683; Tomkovicz, Defense of Massiah, supra note 9, at 44. It bears repeating that counsel's primary role in protecting the integrity of the truth-seeking process lies in preventing conviction of the innocent. Although defense counsel has an obligation not to proffer false exculpatory testimony, see Nix v. Whiteside, 475 U.S. 157, 166-67 (1986), counsel does not have a duty to ensure that inculpatory evidence is presented at trial or to promote the conviction of a guilty client. Indeed, a defense attorney who sought to do so would seem to be chargeable with ineffective assistance. See, e.g., Tomkovicz, Defense of Massiah, supra note 9, at 52 n.224.

152. See REPORT No. 3, MASSIAH, supra note 7, at 664, 687; Tomkovicz, Defense of Massiah, supra note 9, at 47-49.

153. The DOJ appears to agree that they are not synonymous or coextensive. See REPORT No. 3, MASSIAH, supra note 7, at 664 ("[T]he core purpose of the sixth amendment [is] ensuring the fairness of trials and the integrity of the truth-finding process."); id. at 697 (arguing that the Massiah right is not justifiable because the presence of counsel in Massiah contexts "affects neither the fairness of the process . . . nor the reliability of the evidence").
defendant it tends to prevent the accused from revealing probative, reliable, inculpatory evidence that would assist the government in convicting the factually guilty. When it is violated and its exclusionary rule operates, such evidence is suppressed. As a result, Massiah is costly in the ways described by the DOJ; it reduces the number of convictions and allows some offenders to remain free to commit further crimes. Fourth, Massiah situations typically involve neither actual nor potential coercion. Consequently, Massiah is not necessary to prevent governmental coercion, coerced confessions, or the use of coerced confessions to convict. Finally, perhaps the most significant point of agreement is that Massiah's legitimacy should depend upon whether it provides important protection for the values that the sixth amendment is meant to shelter.

This last point raises the issue upon which rational Massiah

154. See REPORT No. 3, MASSIAH, supra note 7, at 689; Tomkovicz, Defense of Massiah, supra note 9, at 46-48.
155. See Maine v. Moulton, 474 U.S. 159, 180 (1985) (rejecting the claim that statements pertinent to the charged crime should not be suppressed because government agents were conducting good faith investigation of a separate, uncharged offense); see also REPORT No. 3, MASSIAH, supra note 7, at 693.
156. The magnitude of Massiah's costs, however, is unknown. I would not agree with the suggestion that it results in large numbers of lost convictions or frees numerous dangerous criminals to prey upon society. See Tomkovicz, Defense of Massiah, supra note 9, at 61 n.247 (explaining why "actual costs of lost convictions due to the Massiah right would not seem to be very substantial").
157. See REPORT No. 3, MASSIAH, supra note 7, at 686-87; Tomkovicz, Defense of Massiah, supra note 9, at 39 n.182. Moreover, there is little need for sixth amendment counsel in situations involving actual or threatened compulsion or coercion. The Miranda doctrine, based on the explicit privilege against compulsory self-incrimination, and the "coerced confession" doctrine, based on the due process clauses, combat those constitutional evils. See Miranda v. Arizona, 384 U.S. 436, 478-79 (1966) (prescribing procedures to dispel the inherent compulsion in custodial interrogation settings); see also Spano v. New York, 360 U.S. 315, 320-21 (1959) (concluding that the use of an involuntary confession is inconsistent with due process and discussing the reasons for that conclusion).
158. REPORT No. 3, MASSIAH, supra note 7, at 665 (criticizing Massiah's regulation of surreptitious questioning because such law enforcement activity "does not expose the defendant to any danger against which the sixth amendment was intended to protect"); id. at 685 (arguing that the Court has extended the right to counsel when there is a "need . . . to protect the values that the sixth amendment is designed to safeguard," and that Massiah counsel is unwarranted because surreptitious investigation does not implicate "the core purposes of the sixth amendment"); id. at 696 ("[A] successful attack on Massiah would not impair the value of the right to counsel [in situations in which counsel] serves the purposes of the sixth amendment."); Tomkovicz, Defense of Massiah, supra note 9, at 46-60 (defending Massiah on the basis of sixth amendment values protected by counsel in surreptitious surveillance contexts).
debate ultimately must focus: Does the Massiah right safeguard values at the core of the sixth amendment right to the assistance of counsel? Answering that question requires identification of those sixth amendment values and of the roles and functions of counsel in safeguarding them.\textsuperscript{159}

2. \textit{The search for core sixth amendment values} — Theoretically, the task is not to decide what values we want counsel to serve today. Few would suggest that the Constitution is ours to modify—except through the amending process.\textsuperscript{160} Nor is the task to determine precisely what counsel did at the time of the sixth amendment’s adoption and to ensure that counsel does no more and no less today. Few, if any, believe that the Constitution was meant to be a specific code of conduct, rather than a charter of enduring values.\textsuperscript{161} Instead, our objects should be to discern what values and ends the framers sought and to ensure that they are protected against all threats, including novel perils of the modern age.\textsuperscript{162}

\textsuperscript{159} See Grano, supra note 12, at 396 n.5 (“It is appropriate in constitutional interpretation to ask what ends or purposes the framers and ratifiers were trying to achieve.”); see also Tomkovicz, Beyond Secrecy for Secrecy’s Sake: Toward an Expanded Vision of the Fourth Amendment Privacy Province, 36 Hastings L.J. 645, 650 n.28 (1985) (“Maintaining the vitality of principles worthy of constitutionalization demands an approach based ultimately upon the animating spirits of such guarantees.”).

\textsuperscript{160} Professor Grano criticizes “the philosophy, reflected in much of what passes as constitutional law today, that permits courts to add to the Constitution values and principles never ratified by the people.” Grano, supra note 12, at 397 n.5. Although I agree with Professor Grano, I would add that his criticism is equally applicable to those along the entire political spectrum—particularly to those at each extreme. Neither liberals bent upon the expansion of rights, nor conservatives committed to the expansion of law enforcement authority, are entitled to modify the Constitution’s commands. I make this observation because both Professor Grano and the Justice Department place some reliance upon the tenor of public opinion. \textit{Id.} at 424 (noting that “the public [thinks] that the American criminal justice system has gone seriously and fundamentally awry”); \textit{REPORT No. 3, MASSIAH, supra} note 7, at 668 (recommending as part of the “educational strategy” a “consciousness raising” campaign aimed at making the Massiah doctrine a more visible public issue”). The views of the majority are at least as threatening to the integrity and stability of constitutional guarantees as the preferences of the civil liberties advocates feared by Professor Grano. See Tomkovicz, supra note 159, at 689 n.178 (recognizing that the Bill of Rights was intended to protect minorities’ rights against majority oppression).

\textsuperscript{161} See Oliver v. United States, 466 U.S. 170, 186 (1984) (Marshall, J., dissenting) (“[T]he Bill of Rights was . . . designed, not to prescribe with ‘precision’ permissible and impermissible activities, but to identify . . . fundamental human libert[ies].”).

\textsuperscript{162} Times change and new threats to constitutional values arise. If the values are to endure, the legal devices used to shield those values must evolve. See Payton v. New York, 445 U.S. 573, 591 n.33 (1980) (observing that search and seizure rules “have evolved through the process of interpreting the Fourth Amendment in light of contemporary norms and conditions” and that the “Court has not simply frozen into
If history spoke clearly and explicitly about the framers' purposes in adopting a constitutional counsel guarantee, there would be little room for debate. However, as the DOJ admits, the historical record regarding the framers' intent is exceedingly sparse. Consequently, no one can be doubt-free concerning the original reasons for constitutionalizing a right to counsel. We must draw inferences about the core sixth amendment values from the specific historical functions of counsel and the basic philosophy of the framers—particularly in matters of criminal procedure. To some extent, the task can also be guided by the assumptions and choices reflected in past precedents concerning the right to counsel.

In my view, constitutional interpretation should not be informed equally by history, logic, and public policy. Rather, the values and purposes underlying the right to counsel—what the DOJ refers to as "logic"—should be the primary source of our guidance. History and public policy are but aids to understanding the logic of the sixth amendment guarantee. Naked history cannot dictate precise answers, but historical practices can provide insights into, and reflections upon, the framers' understanding and objectives. Public policies deemed desirable today cannot supplant policies constitutionalized by the framers. Policy implications, however, are a guide to the values at stake in given situations,
and can aid the detection of threats to constitutional values. 166

My analysis of the sixth amendment's "logic" leads me to different conclusions regarding Massiah primarily because of a different understanding of the entitlement to "fairness" implicit in the grant of counsel. 167 I find a more expansive entitlement to "adversarial fair play" 168 embodied in the right to counsel, an entitlement that can conflict with and outweigh society's interest in "truthful" conviction of the guilty. 169 As a result, my conclusions that the Massiah right to counsel is defensible 170 and that the Massiah exclusionary rule is constitutionally required 171 are antithetical to those in the Report.

According to the Justice Department, the overarching goal of the constitutional right to counsel is to promote the "fairness of trials." 172 Counsel ensures "fairness" by (1) "equaliz-

166. For example, the kinds of law enforcement activity hampered by Massiah counsel and the number of potential lost convictions help us to pinpoint the balance of values struck by recognition of the Massiah right. Conversely, the consequences for counsel's defense of an accused at trial are indicators of the values that would be sacrificed by abolishing the Massiah right. See Tomkovicz, Defense of Massiah, supra note 9, at 56-59 (discussing the impact on trial counsel's efficacy if assistance was denied in Massiah contexts).

167. Both the DOJ and I recognize that "fairness"—a typically ill-defined, nebulous value—is a sixth amendment objective. A close examination of the DOJ's analysis reveals, however, that its conception of fairness is much less generous than mine. See infra notes 172-174 and accompanying text.

168. See Tomkovicz, Defense of Massiah, supra note 9, at 47-51.

169. Professor Grano suggests that truth must be the primary objective of our system, and that constitutional interpretation, in recognition of that primacy, should sacrifice the pursuit of truth only when "compelling" ends or "other goals of overriding importance" justify that sacrifice. See Grano, supra note 12, at 403. He also suggests the need for "an evaluation of the importance of truth discovery relative to other goals the system might have." Id. at 402. I assume that Professor Grano does not mean to suggest that contemporary interpreters are wholly free to decide what values are sufficiently compelling and how important the pursuit of truth should be in our system. If that were the case, some "unpopular" constitutional guarantees (such as the fourth amendment) might be effectively abrogated. Difficult issues and close cases necessarily afford some room for the influence of modern preferences and judgments. Nonetheless, it is not our task to substitute present preferences for the constitutional balances struck by the framers. To the extent that we can, we should try to ascertain and implement their choices. See, e.g., Zurcher v. Stanford Daily, 436 U.S. 547, 559-60 (1978) (suggesting that the Court does not have the power to require more than probable cause and a warrant to search because to do so would ignore the balance struck by the framers).

170. I have explained that conclusion at length previously. See generally Tomkovicz, Defense of Massiah, supra note 9.

171. I have also explained this conclusion at length in an earlier article. See generally Tomkovicz, Massiah Exclusion, supra note 9.

172. REPORT No. 3, MASSIAH, supra note 7, at 685; see also id. at 664 (recognizing that sixth amendment "core purpose" is "ensuring the fairness of trials and the
ing the strength of the adversaries,” and (2) “protecting the 
integrity of the truth-finding process.” Counsel’s specific 
“role . . . in achieving those goals is to prepare the accused’s 
defense and to act as his advocate in encounters with the 
government at which the case is advanced toward disposition 
or at which the reliability of the truth-finding process might 
be unfairly undermined.” There is little reason to dis-
agree with those premises.

The DOJ believes that counsel is not warranted in Massiah 
situations because those situations implicate neither the core 
purposes of the sixth amendment nor the roles of counsel in 
effectuating those purposes. In Massiah contexts, a defen-
dant is “not confronted with complex legal procedures or by 
an expert adversary.” As a result, “the absence of counsel . . . will [not] result in unfairness to the defendant at trial, either by rendering him less able to deal with the 
intricacies of the law and the advocacy of an expert opponent, 
or by subjecting him to the risk of conviction on the basis of 
unreliable evidence.” The premise of these views is that 
the sixth amendment “right to fair treatment at trial” is 
comprised of but two guarantees: (1) an assurance against 
potentially inaccurate convictions based on unreliable evi-
dence, and (2) an assurance against conviction due to “legal 
incompetence.” Because those are the sole components of

integrity of the truth-finding process”); id. at 683 (criticizing Massiah’s insulation of 
the accused in situations that neither “impair the fairness of the trial [n]or the 
integrity of the truth-finding process”).

In much constitutional discourse the word “fairness” is bandied about as if it had 
one commonly accepted, indisputable, and specific meaning. In teaching constitution-
al rights and the opinions of the Supreme Court construing those rights, I usually 
alert students to the fact that fairness has multiple faces. I urge students to attempt 
to discern how different authors use the term in different contexts to mean quite 
different things. When unexplained, “fairness” is just another rhetorical weapon used 
to obscure and gain argumentative advantage. See, e.g., id. at 687 (“This is simply 
not ‘unfairness’ of the kind with which the sixth amendment right to counsel is 
concerned.”).

173. Id. at 685.
174. Id.
175. Id. at 685-86. Moreover, according to the DOJ, there is no interference with 
the right to consult with counsel or the right to prepare a defense. Id. at 686. By 
this, the Justice Department means that informants in Massiah settings neither spy 
on nor impede an accused’s discussions with counsel, nor do they hinder the defense’s 
efforts to construct an “affirmative” case against the government’s charges. Of 
course, by eliciting incrimination from the mind of the accused, those informants do 
diminish the likelihood that efforts to construct a successful defense will succeed.

176. Id. at 686.
177. I use the phrase “legal incompetence” as a shorthand description of a
the fairness sought by the sixth amendment, counsel is only required to combat unreliability or to provide equalizing "legal" expertise or advocacy.\textsuperscript{178}

The Justice Department's limiting constitutional premises are neither self-evident nor indisputable.\textsuperscript{179} A competing view that supports \textit{Massiah} holds that the sixth amendment includes a more substantial entitlement to "adversarial fair play."\textsuperscript{180} According to this view, counsel is supposed to "equalize" the accused in all respects in the contest with the state.\textsuperscript{181} If a situation calls for strictly "legal" knowledge or expert advocacy against a trained foe, then counsel should assist a defendant in those respects. However, if the state attempts to prevail by confronting an accused in ways that demand other defensive resources, then counsel ought to provide the type of assistance called for by the situation. The pro-\textit{Massiah} view agrees that it is unfair to require a defendant to fend for himself when confronted with legal questions or the advocacy of a legally trained opponent. That view also finds it unfair to require a defendant to stand alone in any defendant's inability to cope with technical legal procedures, substantive legal questions, or expert legal advocacy.

178. In fairness to the DOJ, the Report also suggests that the right to fair treatment includes an assurance against conviction based on evidence yielded by government compulsion. \textit{See} \textit{REPORT No. 3, MASSIAH, supra} note 7, at 686. Of course, to some extent this facet of fairness overlaps with the concern for unreliable evidence. More important, the concession that sixth amendment fairness includes shelter against governmental compulsion amounts to little more than a recognition of superfluous or redundant constitutional protection. The due process and self-incrimination clauses of the fifth and fourteenth amendments already provide dual protections against coercion and compulsion. \textit{See supra} note 157.

179. The Justice Department, Professor Grano, and I all make declarations regarding our conceptions of the sixth amendment's "core purposes." None of our conceptions can claim uncontestable historical support. Each is based on inferences and some amount of conjecture. Those interested in the study of the \textit{Massiah} right should approach the subject with a healthy dose of skepticism, and should demand an explanation of the inferential process that supports any particular conception of core constitutional purposes and values. Nothing so critical to construction of the sixth amendment should be able to rest on mere say-so.

180. \textit{See} Tomkovicz, \textit{Defense of Massiah, supra} note 9, at 46-51; \textit{see also} Loewy, \textit{Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence From Unconstitutionally Used Evidence}, 87 MICH. L. REV. 907, 928 (1989) (arguing that the right to counsel protects "the integrity of the adversarial process").

181. \textit{See} Perry v. Leeke, 109 S. Ct. 594, 609 (1989) (Marshall, J., dissenting) (quoting United States v. Ash, 413 U.S. 300, 309 (1973)) ("By ensuring that a defendant's right to have counsel, which includes the concomitant right to communicate with counsel at every critical stage of the proceedings . . . the Constitution seeks 'to minimize the imbalance in the adversary system.'").
other confrontation with the state adversary that could undermine his defense or promote the government's case. At a minimum, the adversary system fair play envisioned by the sixth amendment requires that an accused have the support, wisdom, and advice of counsel in all personal encounters with the state opponent that have potentially significant consequences for the defense of his case. The DOJ's inappropriately narrow vision of counsel as a strictly "legal" expert and advocate grows out of a constrictive understanding of "fair treatment" in an adversarial scheme of conflict resolution.

When a government operative endeavors to elicit statements, a defendant is effectively confronted by his adversary with a very significant decision—whether to provide the adversary with his probative, inculpatory knowledge. In making that decision, the advice of counsel committed to the accused's best interests is arguably critical. If the state deprives a defendant of that advice either by concealing the fact that the adversary is present and that a critical decision is involved or by openly confronting a defendant and not permitting him to have counsel,\(^\text{182}\) it arguably denies an integral and vital part of the equalization essential to adversarial fair play.\(^\text{183}\)

The DOJ's view of the sixth amendment recognizes that it is unfair to risk conviction of the innocent upon unreliable evidence. It also acknowledges that it is unfair to risk conviction of an accused because, as a layperson, she was unequipped to deal with "legal" matters or "expert" advocacy.\(^\text{184}\) A more expansive understanding of the sixth amend-

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183. See Michigan v. Harvey, 110 S. Ct. 1176, 1186 (1990) (Stevens, J., dissenting) ("After the right to counsel has been implemented, the State may not shortcircuit the adversarial system by confronting the defendant behind counsel's back.").

184. The Justice Department seems to acknowledge the unfairness of convictions based on a lack of legal expertise even though the lack of expertise poses no threat to accuracy and truth seeking. See REPORT No. 3 MASSIAH, supra note 7, at 686 (positing that the absence of counsel in Massiah contexts will not result in unfairness to defendant "either by rendering him less able to deal with the intricacies of the law and the advocacy of an expert opponent, or by subjecting him to the risk of conviction on the basis of unreliable evidence") (emphasis added). I am not certain, however, that the DOJ's concern with "unfairness" due to an accused's legal deficiencies is wholly independent of its primary devotion to truth seeking. It is possible that the recognition of an entitlement to "equal legal competence" is based on an assumption that the quest for truth is likely to be undermined when a layperson is required to
ment posits that "imbalanced" contests are inherently unfair—that convictions based on the products of any dealings between the committed government adversary and an unequalized accused are inconsistent with accusatorial, adversarial principles.\(^{185}\) According to that sixth amendment understanding, the framers intended to promote respect for individual worth, dignity, independence, and autonomy by according defendants opportunities to construct defenses and to protect themselves against state power and authority. [The right to counsel enables us to] derive satisfaction, strength and self-respect from staunch refusal to take advantage of a lesser opponent and from the willingness to grant to all the chance to contest charges and to defend against accusation. Equalization of the accused represents, and gives content to, several of our societal commitments. Counsel ensures that the state will carry the burden in a balanced fight played according to neutral rules. Counsel imposes limits on the government's power over citizens. Counsel gives content to the belief that all deserve treatment as worthwhile members of society and that no individual should be exploited.\(^{186}\)

Those core values would be undermined if the government adversary could elicit incriminating information without affording the accused an opportunity to consult with counsel. Consequently, Massiah counsel is necessary to safeguard the

deal with legal complexities or the advocacy of the legal expert. If so, then the Justice Department's conception of fairness is virtually entirely linked to the pursuit of truth. By "fair treatment" the DOJ simply means treatment that limits the risk that the factually innocent will be convicted.

185. Of course, neither view finds an imbalanced confrontation to be unfair if the accused has waived the right to equalization.

186. Tomkovicz, Defense of Massiah, supra note 9, at 49-50 (footnotes omitted). Our allowance of "unequal contests" if the accused waives the protection of counsel does not undermine these values. As long as we ensure that defendants make informed and willing choices to forego counsel, our commitments to respect individuals, not to take advantage of inferiors, to abide by neutral rules, and to conduct balanced contests are not compromised. In fact, not to allow a defendant to relinquish counsel and represent himself would threaten certain of those sixth amendment values. Arguably, to force counsel upon an unwilling accused and to deny him the opportunity to defend himself shows disrespect for his worth, dignity, and autonomy, and runs contrary to notions of limited governmental power over the individual. See Faretta v. California, 422 U.S. 806, 819-21 (1975) (holding that an accused has a sixth amendment right to self-representation, in part because of the importance of respect for free choice and individual autonomy).
core values of the sixth amendment.\textsuperscript{187}

This constitutional rationalization of Massiah counsel suggests that Massiah-based exclusion is not, as the DOJ insists,\textsuperscript{188} a judicially developed deterrent device. Rather, it is an inseparable part of the sixth amendment right.\textsuperscript{189} Massiah counsel’s function is to advise an accused when the government seeks disclosures for use at trial. For a defendant, the benefits of counsel consist of advice about whether to talk \textit{and} the resultant protection against disclosures that would be used to convict him. An accused suffers complete deprivation of the tangible benefits afforded by Massiah only when the government uses statements elicited without counsel’s advice to diminish the opportunity for acquittal. Consequently, exclusion of the products of a Massiah violation is constitutionally necessary to prevent the government from fully accomplishing the sixth amendment wrong.\textsuperscript{190} The

187. One might wonder whether the sixth amendment would be satisfied if a government informant, without otherwise intruding on consultations between attorney and client, deliberately elicited information from an accused \textit{in the presence of counsel}. It is arguable that counsel should be wise and experienced (and wary) enough to decide whether the accused should talk to an individual who could be working for the government. If counsel, the equalizer, does not advise the client against talking, any disclosures made are not the result of the state’s failure to respect the constitutional mandate of equalization. Rather, they are the product of a counseled choice.

My understanding of the constitutional values and the significance of adversarial fair play leads me to reject that argument and to conclude that the sixth amendment would be offended by surreptitious elicitation in the presence of counsel. The balanced contest inherent in the notion of adversarial fair play requires not just that counsel be present, but that she be apprised of the facts relevant to the wisdom and implications of the accused’s decision to divulge information. A critical fact is the presence of the adversary. Deceptive silence by the state that diminishes the quality of the advice afforded by counsel tends to dishonor the values that underlie the sixth amendment right to such advice.

In any case, the answer to this hypothetical question is unlikely to have much practical impact. Governmental efforts to elicit in the presence of counsel are highly improbable. Moreover, an attorney who failed to guard against efforts to elicit information from his client might well be chargeable with ineffective assistance—a deprivation of the benefits of the sixth amendment.

188. \textit{See supra} notes 74-84 and accompanying text.

189. \textit{See Loewy, supra} note 180, at 908, 931 (suggesting that exclusion is part of the sixth amendment "procedural right"); Tomkovicz, Massiah Exclusion, \textit{supra} note 9, at 771-72 ("Exclusion under Massiah is a personal right, neither more nor less than an essential element of the constitutional entitlement to counsel."); \textit{see also} Grano, \textit{supra} note 12, at 410-11 (suggesting that it is difficult to accept the DOJ’s view that the sixth amendment violation is fully accomplished without use of the elicited disclosures at trial).

190. Indeed, without the use there would seem to be no constitutional wrong. \textit{See} Loewy, \textit{supra} note 180, at 929-31 (noting that, contrary to its language in Maine v.
admission of Massiah-violative evidence is not simply objectionable because it encourages the government to deprive other defendants of counsel's assistance.\(^{191}\) Rather, the admission of such evidence is forbidden because it would constitute the culmination of the sixth amendment violation. The exclusion of such evidence is essential to preserve for the defendant the substantive benefits of adversarial fair play.\(^{192}\)

In sum, there are plausible sixth amendment value choices furthered by a recognition of the right to counsel's assistance

\(^{191}\) See Loewy, supra note 180, at 932 (arguing that in Massiah contexts, the concept of deterrence of unconstitutional conduct is meaningless because there is no unconstitutionality until the evidence is used at trial); Tomkovicz, Massiah Exclusion, supra note 9, at 770-71 (entertaining the possibility that Massiah exclusion is both a right and a deterrent sanction, but rejecting the deterrent rationale because there is no "constitutionally injurious out-of-court conduct" to be deterred).

\(^{192}\) See Loewy, supra note 180, at 931 ("The justification for disallowing [deliberately elicited] evidence [is] not . . . the 'exclusionary rule,' but the sixth amendment's rules governing fair trials."). For a fuller exploration of the thoughts sketched in the text, see Tomkovicz, Massiah Exclusion, supra note 9, at 753-73.

The Supreme Court recently decided a case that had presented the opportunity to explain whether Massiah exclusion is part and parcel of the constitutional right to counsel. The Court, however, forewent the opportunity and limited its reasoning to the special nature of the Massiah violation in the case before it. In Michigan v. Harvey, 110 S. Ct. 1176 (1990), a bare majority held that statements obtained in violation of the sixth-amendment-based rule of Michigan v. Jackson, 475 U.S. 625 (1986), are admissible to impeach a defendant's testimony. In the majority's view, because the Jackson rule is a mere "prophylactic" safeguard against involuntary waivers of counsel, a violation of the Jackson rule does not constitute a deprivation of any sixth amendment entitlement. Harvey, 110 S. Ct. at 1177-82. The majority's conclusion that the exclusionary consequences of a Jackson violation should be confined to the prosecution's case-in-chief, like the exclusionary consequences of analogous violations of Miranda's prophylactic rules, was based wholly on the "prophylactic" character of the Jackson rule. Id. at 1180-81.

As a result of its focus upon the special character of the Jackson rule, the majority revealed nothing about the breadth of the exclusion that follows from violations of Massiah requirements that are integral parts of the core sixth amendment entitlement. More significantly, the majority did not discuss whether exclusion based on the latter kind of Massiah violation is itself a right, as I have suggested. Four dissenting Justices did conclude that Massiah-based exclusion, including the exclusion of evidence obtained in violation of the Jackson rule, is part of the right to counsel:

\begin{quote}
The exclusion of statements made by a represented and indicted defendant outside the presence of counsel follows not as a remedy for a violation that has preceded trial but as a necessary incident of the constitutional right itself . . . .

It is thus the use of the evidence for trial, not the method of its collection prior to trial, that is the gravamen of the Sixth Amendment claim.
\end{quote}

Harvey, 110 S. Ct. at 1187 (Stevens, J., dissenting) (footnote omitted) (emphasis added).
in *Massiah* situations. Moreover, if the right to assistance is constitutionally legitimate, an entitlement to the exclusion of evidence obtained by denying that assistance is an essential part of the sixth amendment right.

3. Challenges to and reasons to prefer the fair play rationalization of *Massiah* — Beneath its obscuring rhetoric, the Report does contain the primary challenge to the rationalization of *Massiah* proffered above. According to that challenge, even if respect for individual worth and dignity and an unwillingness to take advantage of an unequal accused are sixth amendment values, if properly defined those values are not expansive enough to support a *Massiah* right to counsel. Understood more narrowly, those fair play values are imperiled only when the government threatens to exploit an accused's lack of legal knowledge or skill.

*Massiah*'s critics might plausibly maintain that a defendant needs a lawyer to compensate for his inferiority vis-a-vis the state adversary only when faced with legal complexities or expert advocacy. In other situations, where the questions confronting an accused are not technical legal questions or the opponent is not a skilled legal advocate, a defendant is not inferior and a lawyer can make none of the special contributions that she is trained to make. An accused is adequately equipped to deal with the questions and decisions involved in those situations, and ought to be able to rely upon his own resources, knowledge, skills, and talent. Put otherwise, a defendant ought to be smart enough to cope with the confronting adversary who poses no legal questions and employs no advocacy skills; he is entitled to the equalizing legal talents of a lawyer, not the supplementing wisdom of "a guru." Therefore, the government dishonors the sixth amendment's pledge of fair play only when it confuses an unaided defendant with legal complexities or overpowers an unassisted defendant with expert legal advocacy.

More specifically, critics contend that *Massiah* contexts do not imperil sixth amendment values because deliberate elicitation by an undercover informant does not threaten

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193. See *United States v. Henry*, 447 U.S. 264, 295-96 (1980) (Rehnquist, J., dissenting) ("[T]here is no constitutional or historical support for concluding that an accused has a right to have his attorney serve as a sort of guru who must be present whenever an accused has an inclination to reveal incriminating information to anyone who acts to elicit such information at the behest of the prosecution.").
194. While much of the debate over *Massiah* focuses on the most frequent type of
to exploit any of the accused's cognizable "legal" vulnera-
ibilities. The government may be confronting an accused
with a choice to disclose or withhold knowledge concerning her
guilt, but that decision does not call for the special abilities of
a lawyer. A competent accused is able to decide whether it is
wise to talk to a known government agent or to disclose
inculpatory evidence to any other individual who could
presently be working for or might later decide to report
information to the government. There is no reason to pre-
sume that the state is exploiting some inequality in those
situations. As a result, a system that allows and even
requires a defendant to deal with her adversary in those
settings without assistance cannot legitimately be accused of
disrespect for the individual, of exploitation of an inferior, or
of conducting an imbalanced contest that deprives its opponent
of a fighting chance.

According to Massiah opponents, when an accused needs
equalization to be a worthy adversary, the sixth amendment
grants it. When an accused does not need such equalization,
a grant of counsel would bestow more protection than fair play
values demand. The compelling reason not to accord a
defendant such "surplus" constitutional protection is that it
impedes the search for truth—that is, the legitimate and

elicitor—the undercover informant—it must be remembered that the right to counsel
recognized by Massiah doctrine also applies when the elicitor is a known police
officer. See, e.g., Brewer v. Williams, 430 U.S. 387 (1977). The reasoning in the
text—and throughout my discussion of the Massiah right—applies not only to
undercover agents, but to known police officers. According to the anti-Massiah
argument, if officers do no more than elicit disclosures from an accused, there is no
reason to believe that the disclosures will be either unreliable or the product of
exploitation of cognizable inferiorities.

195. Of course, the DOJ would recognize a right to counsel if the deliberate
elicitation governed by Massiah doctrine, despite the lack of legal questions or expert
advocacy, jeopardized the integrity of the truth-seeking process. As noted before,
however, the DOJ has concluded that the governmental conduct regulated by
Massiah does not yield unreliable or inaccurate evidence that threatens to convict the
innocent. See supra notes 54-57 and accompanying text.

dissenting):

If the accused voluntarily . . . decides to disclose incriminating information to
someone whom he mistakenly believes will not report it to the authorities . . .
he is normally accountable for his actions and must bear any adverse conse-
quences that result . . . . [T]he accused is free to keep quiet and to consult with
his attorney if he so chooses.

See also Tomkovicz, Defense of Massiah, supra note 9, at 62 n.247 (responding to the
claim that an accused ought to be smart enough to fend for herself in Massiah
situations).
desirable effort to convict the guilty—in ways the framers did not intend. When a defendant's inequality might be exploited, the pursuit of truth must give way, but when there is no real risk that the state might take unfair advantage of an inferior opponent, there is nothing to outweigh the preferred value of truth.  

When cast in such temperate terms, the case against Massiah cannot be dismissed. It reflects a potentially legitimate interpretation of the sixth amendment, a worthy competitor for the fair play defense of Massiah that I have proffered. The differences between this rational critique of Massiah and my defense of it are due to fundamentally different perceptions of the needs of accused individuals and of the values implicated when the government seeks to elicit incriminating information. The defense of Massiah perceives inferiority, inequality, and legitimate needs for counsel in Massiah situations. As a result, it views the failure to accord counsel as a threat to fair play and to the core values underlying our systemic commitment to fair play. The opposing view sees no cognizable weakness or inequality, no need for counsel's assistance, and, consequently, no unfairness or betrayal of constitutional values when counsel is denied. Having described and discussed the competing interpretations of the sixth amendment that underlie the Massiah debate, I will conclude by sketching the reasons I remain persuaded that Massiah should survive.

197. The same sort of reasoning seems to underlie Professor Grano's conclusion that Massiah is not constitutionally defensible:
To say that discovery of truth must be primary is not to say that it must be the only desideratum.... If discovery of truth is the primary goal, however, the rules of procedure will sacrifice truth only when necessary to accomplish other goals of overriding importance. Too often, though, the American system... seems willing to sacrifice truth for ends that are not compelling and when the necessity of sacrificing truth to accomplish such ends is little more than speculative.

... I would have thought that proving the defendant's guilt was precisely the goal, at least absent a serious concern about convicting the innocent, condoning or encouraging official misconduct, countenancing violations of the defendant's dignity, or encouraging some other evil of comparable gravity.
Grano, supra note 12, at 403-04 (footnotes omitted); see also id. at 410 (mentioning the DOJ Report's argument that "Massiah and its progeny inhibit the discovery of truth for reasons that [are not] compelling").

198. The objects of this Article do not require an exploration of the appropriate doctrinal definition and boundaries of the Massiah right. I have proffered my views concerning the appropriate doctrine at some length in two earlier works. See Tomkovicz, Defense of Massiah, supra note 9, at 63-90 (examining doctrinal issues
A pretrial Massiah-type right must find roots in the trial right originally granted by the framers. It can be justified only as a necessary temporal extension of that right. Therefore, in deciding whether the value choices underlying Massiah are constitutionally defensible, it is critical to determine whether they parallel those underlying trial counsel. In my view, the right to equalizing trial counsel afforded by our system supports the Massiah right and undermines the position of Massiah's opponents.  

To my knowledge, our system never has confined, and does not now confine the role of trial counsel strictly to preventing unreliability and providing solely legal knowledge and skill. Trial counsel functions as a multipurpose equalizer who provides whatever assistance and guidance the system requires for a competent defense. The system permits, indeed, encourages counsel to be a zealous advocate who furnishes whatever types of strategic, tactical, practical, and legal aid the situation demands. We do not, and would not, allow the state to deny the assistance of counsel in a trial situation that threatens to harm a defendant's chances to prevail simply because the situation does not jeopardize reliability or call for strictly legal skills. Apparently, we view the accused at trial as ill-equipped to cope with all aspects of his defense. He needs and deserves assistance in making all choices posed by the system and in conducting all dealings with his adversary. Our conception of fair play at trial allows a defendant who is confronted with an opponent determined to deprive him of freedom and with a system designed to decide whether the deprivation is warranted to receive whatever assistance he needs to defend himself. To withhold assistance for any

surrounding the scope of the right to counsel); Tomkovicz, Massiah Exclusion, supra note 9, at 773-92 (examining doctrinal issues pertaining to the operation of the Massiah exclusion).

199. I have developed this analogical analysis in more detail previously. See Tomkovicz, Defense of Massiah, supra note 9, at 52-62.

200. One reason for our unwillingness to do so could be the sense that the distinction between legal and nonlegal assistance is artificial or fallacious. It is true that not all phases of the criminal justice process call for technical "legal" skills or esoteric "legal" knowledge. On the other hand, because every phase of the adversarial contest has potential impact upon the outcome of the trial, the ability to cope effectively with every phase does call for wisdom or skill or savvy or experience that is "legal" in a more general sense. The distinction upon which the anti-Massiah argument rests reflects an exceptionally stingy understanding of the nature of "legal" assistance. Whether a defense decision is complex or simple, it is a legal decision in the sense that it is integral to the resolution of a legal contest.
important "nonlegal" decision would erode our commitment to fair play and our underlying respect for the individual. It would run contrary to our systemic unwillingness to take advantage of the individual subjected to the awesome exercise of governmental power that criminal accusation embodies.\textsuperscript{201}

I have suggested before that our system would not permit

\textsuperscript{201} The holding of Perry v. Leeke, 109 S. Ct. 594 (1989), does not suggest a contrary understanding of the legitimacy of restrictions upon counsel's freedom to assist the defendant. In fact, its reasoning suggests a view wholly supportive of that explained in the text. In \textit{Perry}, the majority held that a trial judge's order barring consultation between an attorney and the defendant during a 15 minute recess at the end of the defendant's direct testimony did not violate the sixth amendment. The Court was careful to ensure that the authority to deny consultation between lawyer and client was narrowly cabined. It indicated that the power to bar consultation was limited to cases involving "brief recess(es) in which there is a virtual certainty that any conversation between the witness [-defendant] and the lawyer would relate exclusively to [the] ongoing testimony," \textit{id.} at 596, and that the only time that a "testifying defendant does not have a constitutional right to advice" is during "a short recess in which it is appropriate to presume that nothing but the testimony will be discussed," \textit{id.} at 602.

The \textit{Perry} Court's rationale for recognizing a limited authority to prohibit consultation between an accused and his lawyer was that such consultation could defeat the truth-seeking efficacy of cross-examination without protecting any cognizable constitutional entitlement of the accused. The reason for limiting the exception so strictly, however, was that consultation during longer recesses might encompass matters that go beyond the content of the defendant's own testimony—matters that the defendant does have a constitutional right to discuss with his lawyer, such as the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain. It is the defendant's right to unrestricted access to his lawyer for advice on a variety of trial-related matters that is controlling in the context of a long recess. \textit{Id.} at 602.

The \textit{Perry} Court did not permit the denial of access to counsel because the situation at issue posed no risk of unreliability and confronted the accused with no "legal" questions. The basis for permitting a bar to access was that an accused has no "constitutional right to advice" regarding his "ongoing testimony." \textit{Id.} at 596, 602. The expansive language used by the Court in explaining why access must be unimpeded during longer recesses bears repeating. The \textit{Perry} majority recognized a "right to unrestricted access to his lawyer for advice on a variety of trial-related matters," and "a constitutional right to discuss with his lawyer . . . trial tactics." \textit{Id.} at 602 (emphasis added). That language suggests that the Court would not be receptive to a claim that trial counsel's assistance can be denied in situations that lack both threats to reliability and "legal" complexities. \textit{See id.} at 606 (Marshall, J., dissenting) ("Nowhere have we suggested that the Sixth Amendment right to counsel turns on what the defendant and his attorney discuss or at what point during a trial their discussion takes place."); \textit{id.} (suggesting that counsel might provide "a few soothing words . . . to the agitated or nervous defendant facing the awesome power of the State"); Herring v. New York, 422 U.S. 853, 857 (1975) ("[T]he right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process that has been constitutionalized in the Sixth and Fourteenth Amendments.").
the government to engage in unguided elicitation of an accused's thoughts during the trial phase. In other words, we would not tolerate unmonitored prosecutorial trial maneuvers equivalent to those pretrial actions governed by Massiah.202
If I am correct, it must be because the values underlying Massiah are considered deserving of protection at trial.203
The remaining question, therefore, is whether it is appropriate to confine the pursuit of those values to the trial.

The case against such confinement is relatively simple.204
If the framers, who lived in a world without pretrial confrontations between adversaries,205 thought that certain ends were worthy of pursuit at trial, it is difficult to believe that they would tolerate state actions that jeopardize those same values just prior to trial.206 Restriction of counsel to the trial would permit the government, with a modicum of pretrial effort and ingenuity, to circumvent the protection and eviscerate the values that are sacred at trial.207 It requires no legal sophistication to conclude that if the framers did constitutionalize

202. See Tomkovicz, Defense of Massiah, supra note 9, at 53-54. Nor would our system accept the argument that even though the government has deprived the accused of the entitlement to trial counsel's assistance in a situation analogous to Massiah contexts, the trier should be allowed to hear and rely upon disclosures that are the fruits of that deprivation. The right to trial counsel must include an integral entitlement to exclude evidence yielded by depriving a defendant of assistance. Without that exclusionary entitlement, the right to counsel would be hollow, for an accused could be stripped of the substantive benefit of having counsel's assistance—i.e., protection against the enhanced risks of conviction that are the result of unadvised decisions.

203. I see no reason to believe that the protection afforded for those "Massiah values" at trial is an unavoidable by-product of excess caution regarding the restraint of trial counsel, rather than the intended product of conscious constitutional choices regarding the purposes and functions of trial counsel.

204. I have made the case before. See Tomkovicz, Defense of Massiah, supra note 9, at 55-60.

205. See Note, An Historical Argument for the Right to Counsel During Police Interrogation, 73 YALE L.J. 1000, 1041 (1964); see also United States v. Ash, 413 U.S. 300, 309-10 (1973) (recognizing that when the Bill of Rights was drafted the state did not confront the accused until trial, whereas today the state confronts the accused with significant pretrial events).

206. See Patterson v. Illinois, 487 U.S. 285, 301-02 (1988) (Stevens, J., dissenting) (suggesting that the obvious impropriety of the prosecution's private interview of a defendant once trial is in progress supports the conclusion that a similar pretrial interview is improper).

207. See Michigan v. Harvey, 110 S. Ct. 1176, 1184 (1990) (Stevens, J., dissenting) (recognizing that the right to counsel must be accorded in pretrial Massiah contexts because "[a]ny lesser guarantee would provide insufficient protection against any attempt by the State to supplant 'the public trial guaranteed by the Bill of Rights' with a 'secret trial in the police precincts. '") (quoting Spano v. New York, 360 U.S. 315, 326 (1959) (Douglas, J., concurring)).
the fair play values described earlier, they would not have been favorably disposed toward expedient restructuring of the criminal process to undermine those values. If adversary system fair play requires trial counsel to be a multipurpose equalizer, then a modern criminal justice system that has expanded the adversary contest into pretrial realms must expand the entitlement to assistance into those realms to ensure the preservation of fair play values.

Allow me to summarize. The *Massiah* doctrine reflects a certain vision of fair play and the conclusion that the constitutional interest in adversarial fair play must sometimes outweigh—and defeat—the quest for truth in criminal justice. The constitutional value choices implicit in *Massiah*'s vision of fair play seem to be reflected in the roles of trial counsel and the kinds of assistance to which an accused is entitled.

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208. See, e.g., United States v. Wade, 388 U.S. 218, 227 (1967) (observing that pretrial confrontations are scrutinized to determine whether counsel is necessary to preserve right to fair trial and to the effective assistance of trial counsel); Spano v. New York, 360 U.S. 315, 326 (1959) (Douglas, J., concurring) (arguing that if interrogation of accused without counsel is permissible, trial in police station supplants the trial guaranteed by the Bill of Rights); Crooker v. California, 357 U.S. 433, 443 (1958) (Douglas, J., dissenting) (stating that the right to have pretrial counsel is often necessary to protect the right to be heard at trial).

In keeping with the premises in the text, I have proposed a minimum standard for determining whether to recognize a pretrial right to counsel:

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

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209. As Justice Brennan, for a majority of the Court, recently observed: "There is no gainsaying that arriving at the truth is a fundamental goal of our legal system." United States v. Havens, 446 U.S. 620, 626 (1980). But various constitutional rules limit the means by which the government may conduct this search for truth in order to promote other values embraced by the Framers and cherished throughout our Nation's history.

James v. Illinois, 110 S. Ct. 648, 651 (1990); see also Williams v. Florida, 399 U.S. 78, 113-14 (1970) (Black, J., concurring in part, dissenting in part) ("A criminal trial is in part a search for truth. But it is also a system designed to protect 'freedom' . . . . [Although the] task of convincing a jury that the defendant is guilty . . . . is made more difficult by the Bill of Rights . . . . [that is so because the Framers decided that the benefits to be derived from the kind of trial required by the Bill of Rights were well worth any loss in 'efficiency' that resulted."); Rifkind, supra note 10, at 543 ("With some trepidation I should like to tender the suggestion that in actual practice the ascertainment of the truth is not necessarily the target of the trial, that values other than truth frequently take precedence . . . .").
entitled at trial. If the same kinds of assistance are not available beyond the strict confines of the trial, those constitutional value choices can be effectively frustrated. Because the denial of assistance in *Massiah* contexts does threaten the values at the core of the sixth amendment, a *Massiah* right to counsel is constitutionally legitimate and necessary.210

III. CONCLUSION

The *Massiah* Report in the Truth in Criminal Justice Series is a skillful advocate’s indictment of one of the Warren Court’s less-noticed offenders.211 In responding to the Report, I have commented upon both its form and content. I have suggested that the Report’s rhetorical approach to the debate over *Massiah*, in particular its excessive, one-sided reliance upon “truth,” contains lessons for serious legal scholarship. I have also observed that the substance beneath the Report’s rhetoric reflects sixth amendment value preferences that pose a serious challenge to *Massiah*. In reflecting upon the character of the Report, I hope to have contributed something to the way we think about legal scholarship. In discussing its substance, I hope to have accurately described the character of the *Massiah* debate, and to have clarified the essence of the constitutional choice posed by the opposing sides.

There is a plausible conception of sixth amendment values

210. Clearly, I disagree with the DOJ’s view that “[s]uccess” against *Massiah’s* right to counsel and exclusionary mandate “would not impair the value of the sixth amendment right to counsel at trial.” REPORT No. 3, *Massiah*, supra note 7, at 666. In the preceding discussion, I have indicated why I believe that a successful attack on either the entitlement to counsel or the rule of exclusion would diminish the value and erode the substance of the trial right upon which they are based.

211. See id. at 705 (“*Massiah* and its progeny seem to have received very little public attention, and have not generated much controversy.”). One reason *Massiah* has always been a relatively unknown Warren Court offender (in contrast to such doctrines as the fourth amendment exclusionary rule and *Miranda*) is that the Court decided *Miranda* v. Arizona, 384 U.S. 436 (1966), shortly after *Massiah*. *Massiah* receded into *Miranda*’s very large shadow for a number of years. See Tomkovicz, *Defense of Massiah*, supra note 9, at 3, 14-15. Another probable reason is that, despite the DOJ’s contrary protestations, see supra notes 68-69 and accompanying text, *Massiah* does not pose substantial problems for effective law enforcement. See supra note 156. In any event, if the Justice Department has its way, *Massiah*’s offenses will become well-publicized. See REPORT No. 3, *Massiah*, supra note 7, at 705 (noting the desirability of “making the *Massiah* doctrine a more visible public issue”).
that can lead to rejection of the *Massiah* right. I reject that conception, and its ultimate conclusion regarding *Massiah*, because they rest upon premises about the abilities and needs of defendants and upon a distinction between “legal” and other types of assistance that I cannot accept. Moreover, they contain implications for trial counsel that I find inconsistent with the right that our system does and should recognize. Nevertheless, the rational opposition to *Massiah* merits serious consideration, for reasonable minds can disagree over the constitutional legitimacy of the *Massiah* doctrine. Perhaps the best hope for the preceding discussion is that it will encourage and enable debate that is more temperate, more honest, and more informed.