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Eugene L. Shapiro

WAIVER OF A STATE CONSTITUTIONAL RIGHT TO COUNSEL DURING POST-ATTACHMENT INTERROGATION

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I. INTRODUCTION

When the editors of this symposium requested a discussion of decisions which were likely to be influential in the development of state constitutional law, few cases touching upon a state right to counsel seemed to rival *People v. Samuels*[1] and those pursuing the approach of *State v. Wiegers*.[2] These opinions, in their respective procedural contexts, address the issue of waiver of a state right to counsel during post-attachment interrogation. The questions posed in *Samuels* and *Wiegers* parallel some of the issues discussed in *Patterson v. Illinois*,[3] a controversial opinion in which the U.S. Supreme Court noted that an unrepresented defendant's Sixth Amendment right to counsel during interrogation required no more for a valid waiver than did the Fifth Amendment doctrine of *Miranda v. Arizona*[4] and its progeny.[5]

Despite criticism of *Patterson* by some commentators, *Samuels* and *Wiegers* are not result-oriented, reactive responses to the Court's analysis there. Both preceded *Patterson*, and *Wiegers* and similar cases addressed the rights of the represented defendant—an issue distinguished and addressed only fleetingly by the *Patterson* Court.[6] These decisions are noteworthy because, while examining the requirements of the right to counsel under their respective state constitutions, they bring to bear considerations which are especially appropriate to a discussion of state constitutional doctrine. Both *Samuels* and *Wiegers* involve regard for ethical standards which, in the view of each court, are bound up with the scope of the constitutional right to counsel afforded by the state. In *Samuels*, the New York Court of Appeals went so far as to conclude that the presence of counsel

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1. 400 N.E.2d 1344 (N.Y. 1980).
2. 373 N.W.2d 1 (S.D. 1985).
3. 487 U.S. 285 (1988).
4. 384 U.S. 436 (1966).
5. *Patterson*, 487 U.S. at 292-98.
6. *Id.* at 290 n.3.

was necessary before an unrepresented defendant could effectuate a waiver.[7] It is of course quite possible that the conclusions reached in these cases will be found to be inappropriate in other jurisdictions as they consider their constitutional guarantees. Nevertheless, the significance of these decisions will continue to lie in the breadth of their concerns.

II. SOME BACKGROUND

The first American constitutional right to counsel appeared in the New Jersey Constitution of 1776,[8] against the backdrop of English procedures which were viewed by the colonists as inadequate and irrational. At that time, English law denied the full assistance of counsel to those accused of felonies other than treason, but permitted the right to parties in civil cases and those accused of misdemeanors.[9] Blackstone had criticized this anomaly as contrary to the "face of reason,"[10] and a number of colonial laws broadened the protection to extend to capital and other cases.[11] A provision of the Pennsylvania Charter of Privileges of 1701 had required that all criminals "shall have the same Privileges of . . . Council as their Prosecutors,"[12] and it was this phrasing that was reflected in New Jersey's guarantee.[13] By November of 1776, Delaware, Pennsylvania and Maryland had provided for the constitutional right in all

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7. People v. Samuels, 400 N.E.2d 1344, 1347 (N.Y. 1980).

8. N.J. CONST. of 1776, art. XVI, *reprinted in* 6 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 452 (William F. Swindler ed., 1976) [hereinafter SOURCES AND DOCUMENTS].

9. An individual charged with a felony other than treason was permitted the aid of counsel only for debate of a point of law. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *349; Powell v. Alabama, 287 U.S. 45, 60 (1932). Upon a charge of treason, the right of the accused to "make his . . . defence, by counsel learned in the law," was afforded by the Trial of Treasons Act of 1696. The Trial of Treasons Act, 1696, 7 & 8 Will. 3, ch. 3 (Eng.), *reprinted in* E. NEVILLE WILLIAMS, THE EIGHTEENTH CENTURY CONSTITUTION, 1688-1815: DOCUMENTS AND COMMENTARY EX. COMMENTARY 53 (1960). The right to counsel was not granted with respect to all felonies until 1836. The Trials for Felony Act, 1836, 6 & 7 Will. 4, ch. 114 (Eng.).

10. "For upon what face of reason can that assistance be denied to save the life of a man, which yet is allowed him in prosecutions for every petty trespass?" 4 WILLIAM BLACKSTONE, COMMENTARIES *349.

11. *See, e.g.*, Virginia's Act of August, 1734 (chapter 7, § 3, Laws of Va., 8th Geo. II, Hening's Stat. at Large, vol. 4, p. 404); Pennsylvania Statute of May 31, 1718 (Dallas, Laws of Pennsylvania, 1700-1781, vol. 1, p. 134). These provisions and others are discussed in Powell v. Alabama, 287 U.S. 45, 61-62 (1932).

12. Pennsylvania Charter of Privileges of 1701, *reprinted in* 8 SOURCES AND DOCUMENTS, *supra* note 8, at 275.

13. "That all criminals shall be admitted to the same privileges of . . . counsel, as their prosecutors are or shall be entitled to." N.J. CONST of 1776, art. XVI, *reprinted in* 6 SOURCES AND DOCUMENTS, *supra* note 8, at 452.

criminal "prosecutions."[14] A right to counsel was provided by the New York Constitution of 1777, stating that a defendant shall be allowed counsel "in every trial on impeachment, or indictment for crimes or misdemeanors . . . ."[15] The emphasis upon the provision of the right to counsel in all criminal "prosecutions" in many of these early state guarantees was mirrored in the language of the Sixth Amendment.[16]

The determination of whether a criminal proceeding has commenced continues to be significant under both Sixth Amendment and state constitutional doctrine for purposes of ascertaining whether the right to counsel has attached. The Supreme Court has long noted that the federal right attaches upon the initiation of adversary judicial proceedings, "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."[17] While courts have varied in the determination of when a state right to counsel attaches,[18] a post-attachment interrogation is universally regarded as a procedure at which the right must be honored.[19] Constitutional doctrine surrounding the process of post-attachment interrogation has, of course, developed simultaneously with the evolution of separate constitutional principles involving the presence of counsel during custodial interrogation as a protection against infringement upon federal and state constitutional privileges against self-incrimination. In *Miranda v.*

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14. DEL. DECLARATION OF RIGHTS of 1776, § 14 ("That in all Prosecutions for criminal Offenses, every Man hath a Right . . . to be allowed Counsel . . . ."), *reprinted in* 2 SOURCES AND DOCUMENTS, *supra* note 8, at 198; PA. CONST. of 1776, art. IX ("That in all prosecutions for criminal offences, a man hath a right to be heard by himself and his council . . . ."), *reprinted in* 8 SOURCES AND DOCUMENTS, *supra* note 8, at 278; MD. DECLARATION OF RIGHTS of 1776, art. XIX ("That, in all criminal prosecutions, every man hath a right . . . to be allowed counsel . . . ."), *reprinted in* 4 SOURCES AND DOCUMENTS, *supra* note 8, at 373.

15. N.Y. CONST. of 1777, art. XXXIV, *reprinted in* 7 SOURCES AND DOCUMENTS, *supra* note 8, at 177. *See also* MASS. CONST. of 1780, pt. I, art. XII ("No subject shall be held to answer for any crimes or offence, until the same is fully and plainly . . . described to him . . . and every subject shall have a right . . . to be fully heard in his defence by himself, or his counsel, at his election."), *reprinted in* 5 SOURCES AND DOCUMENTS, *supra* note 8, at 94; N.H. CONST. of 1784, pt. 1, art. XV (having similar language as in Massachusetts Constitution of 1780, but omitting phrase "at his election"), *reprinted in* 6 SOURCES AND DOCUMENTS, *supra* note 8, at 346.

16. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

17. United States v. Gouveia, 467 U.S. 180, 188 (1984) (quoting Kirby v. Illinois, 406 U.S. 682, 688-89 (1972) (plurality opinion)).

18. *Compare, e.g.*, Commonwealth v. Richman, 320 A.2d 351 (Pa. 1974) (right to counsel attaches at warrantless arrest) *with* State v. Mitchell, 593 S.W.2d 280 (Tenn. 1980) (right to counsel attaches upon issuance of arrest warrant).

19. In determining whether a post-attachment procedure is one at which the right must be afforded under the Sixth Amendment, the Supreme Court has analyzed the issue in terms of whether the procedure is a "critical stage." United States v. Ash, 413 U.S. 300, 315-16 (1973). While most states employ similar terminology, some have eschewed this framing of the issue. *See* State *ex rel.* Russell v. Jones, 647 P.2d 904 (Or. 1982) (Lent, J., concurring).

Arizona[20] and its state counterparts, a right to the presence of counsel was designed to dispel the inherently coercive atmosphere of custodial interrogation.

III. THE SUPREME COURT'S VIEW UNDER THE SIXTH AMENDMENT

Before *Patterson v. Illinois*,[21] it was widely believed that the standards for the waiver of the Sixth Amendment right to counsel during interrogation would be significantly different from the standard for the waiver of the derivative right to counsel under *Miranda*. Much of the formative Sixth Amendment doctrine had evolved in the context of surreptitious questioning and consequently no issue of waiver was presented.[22] In the well-known case of *Brewer v. Williams*,[23] however, the Court made it clear that waiver would be permissible, but indicated that the standard for such waiver might be higher than that for the Fifth Amendment right.[24] Williams, the defendant, had been interrogated in a police car after an arraignment and consultation with his attorney.[25] He had surrendered in Davenport, Iowa after he had been sought pursuant to an arrest warrant for the abduction of a child in Des Moines.[26] The arraignment had occurred in Davenport, and Williams' lawyer there had been denied permission to accompany him while he was being transported between the two cities.[27] A second lawyer represented Williams in Des Moines, and both attorneys had been assured that no interrogation would occur during the trip.[28] Instead, Williams was subjected in the car to what the Court termed a "Christian burial speech," an interrogation deliberately designed to elicit the location of the victim's body.[29] Rejecting the assertion that Williams had waived his Sixth

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20. 384 U.S. 436 (1966).

21. 487 U.S. 285 (1988).

22. *See* United States v. Henry, 447 U.S. 264 (1980); Massiah v. United States, 377 U.S. 201 (1964).

23. 430 U.S. 387 (1977).

24. *Id.* at 401-06.

25. *Id.* at 390-94.

26. *Id.* at 390.

27. Brewer v. Williams, 430 U.S. 387, 391 (1977).

28. *Id.* at 391-92.

29. *Id.* at 392-93. This interrogation was characterized by the Court as follows:

> Detective Leaming knew that Williams was a former mental patient, and knew also that he was deeply religious. Addressing Williams as "Reverend," the detective said:
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> "I want to give you something to think about while we're traveling down the road . . . . Number one, I want you to observe the weather conditions. . . . They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered. . . ."

Amendment right to counsel, the Court noted that "[a]t no time during the trip did Williams express a willingness to be interrogated in the absence of an attorney."[30] Rather, he had repeatedly expressed his intention to "tell . . . the whole story" after speaking with his attorney in Des Moines.[31] Citing *Johnson v. Zerbst*,[32] the Court stated:

> The [courts below] were also correct in their understanding of the proper standard to be applied in determining the question of waiver as a matter of federal constitutional law—that it was incumbent upon the State to prove "an intentional relinquishment or abandonment of a known right or privilege." That standard has been reiterated in many cases. We have said that the right to counsel does not depend upon a request by the defendant and that courts indulge in every reasonable presumption against waiver. *This strict standard applies equally to an alleged waiver of the right to counsel whether at trial or at a critical stage of pretrial proceedings.*[33]

The standard of *Johnson v. Zerbst* had been a stringent one in assessing the validity of a waiver of the Sixth Amendment right to counsel at trial. This statement in *Brewer* appeared to indicate that, in contrast with the less demanding standard for waiver of *Miranda's* Fifth Amendment right,[34] the standard for judging a relinquishment of the Sixth Amendment right during pretrial interrogation would be as rigorous.

This implication was repudiated by the Court in *Patterson v. Illinois*.[35] In *Patterson*, the defendant, who had been indicted but was not represented by counsel,[36] was twice read his *Miranda* warnings and twice incriminated

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Id.

30. *Id.* at 392.

31. Brewer v. Williams, 430 U.S. 387, 392 (1977).

32. 304 U.S. 458, 464 (1938).

33. *Brewer*, 430 U.S. at 404 (emphasis added) (citations omitted).

34. While the *Miranda* Court had cited *Zerbst* in its discussion of waiver, Miranda v. Arizona, 384 U.S. 436, 475 (1966), it was widely acknowledged by 1977 that Fifth Amendment analysis employed a less stringent standard.

35. 487 U.S. 285 (1988).

36. *Id.* at 288-89. At the outset, the *Patterson* Court expressly noted "as a matter of some significance" that at the time he was questioned, the defendant had neither retained a lawyer nor accepted one by appointment. It briefly added that "[o]nce an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect" and "the analysis changes markedly once an accused even requests the assistance of counsel." *Id.* at 290 n.3 (citations omitted).

Also relevant to a consideration of the prosecution's Sixth Amendment responsibilities towards a represented defendant would be the Court's discussion in Estelle v. Smith, 451 U.S. 454 (1981). In *Estelle*, the Court held that the defendant's Sixth Amendment rights were violated when a

himself.[37] The question of the adequacy of the waivers of his Sixth Amendment rights was presented to the Court. In an opinion by Justice White, the Court stated that since Patterson voluntarily answered questions after the *Miranda* warnings without claiming his rights to silence or counsel and had also executed a written waiver, the issue posed was "whether this waiver was a 'knowing and intelligent' waiver of his Sixth Amendment right."[38] The Court found the *Miranda* warnings to be adequate in conveying the information necessary to satisfy this standard, because Patterson was "made sufficiently aware of his right to have counsel present during the questioning, and of the possible consequences of a decision to forego the aid of counsel . . . ."[39] The warnings communicated the fact that he had a right to consult with an attorney, to have a lawyer present during questioning, and to have one appointed. According to the Court, this constituted "the sum and substance of the rights that the Sixth Amendment provided him."[40] The Court stated that there was "little more petitioner could have possibly been told in an effort to satisfy this portion of the waiver inquiry."[41]

It added that the warnings also made Patterson aware of the consequences of his decision to waive his Sixth Amendment rights.[42] He was informed that his statement could be used against him in subsequent criminal proceedings.[43] "This is the ultimate adverse consequence petitioner could have suffered by virtue of his choice to make uncounseled admissions to the authorities."[44] The Court then observed:

> This warning also sufficed—contrary to petitioner's claim here . . . to let petitioner know what a lawyer could "do for him" during the postindictment questioning: namely, advise petitioner to refrain from making any such statements. By knowing what could be done with any statements he might make, and therefore, what benefit could be obtained by having the aid of counsel while making such statements, petitioner was essentially informed of the possible consequences of

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psychiatric examination encompassing the issue of the future dangerousness of the defendant was performed without notice to his attorney. *Id.* at 469-71. The Court specifically noted, however, that Smith was not precluded from waiving this right. *Id.* at 471 n.16.

37. *Patterson*, 487 U.S. at 288-89.

38. *Id.* at 292 (citing Brewer v. Williams, 430 U.S. 387 (1977); Johnson v. Zerbst, 304 U.S. 458 (1938)).

39. Patterson v. Illinois, 487 U.S. 285, 292-93 (1988).

40. *Id.* at 293.

41. *Id.*

42. *Id.*

43. Patterson v. Illinois, 487 U.S. 285, 293 (1988).

44. *Id.* at 293-94.

going without counsel during questioning.[45] At footnote six, the Court added:

> An important basis for our analysis is our understanding that an attorney's role at postindictment questioning is rather limited, and substantially different from the attorney's role in later phases of the criminal proceedings. At trial, an accused needs an attorney to perform several varied functions—some of which are entirely beyond even the most intelligent layman. Yet during postindictment questioning, a lawyer's role is rather unidimensional: largely limited to advising his client as to what questions to answer and which ones to decline to answer.[46]

The Court found its conclusion concerning the adequacy of the warnings to be supported by the inability of Patterson's counsel to precisely articulate what additional information should have been provided.[47] It then added an observation borrowed from its Fifth Amendment analysis: Once it is established that there was no coercion, that the defendant was aware of his right to remain silent and request a lawyer, and that he knew of the State's intention to use his statements to obtain a conviction, "'the analysis is complete and waiver is valid as a matter of law.'"[48]

Justice White also took the occasion to reject the notion that the Sixth Amendment right to counsel occupies a position "superior" to that of the Fifth Amendment.[49] In the context of this discussion, the Court elaborated upon the distinction drawn in footnote six between the role of counsel at trial and his or her "unidimensional" role at a pretrial interrogation:

> [W]e have taken a . . . pragmatic approach to the waiver question—asking what purposes a lawyer can serve at the particular

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45. *Id.* at 294.

46. *Id.* at 294 n.6.

47. Patterson v. Illinois, 487 U.S. 285, 294 (1988). Since Patterson had been informed of his indictment, the Court did not address the question of whether an accused must be so informed before a valid waiver. *Id.* at 295 n.8.

48. *Id.* at 297 (quoting Moran v. Burbine, 475 U.S. 412, 422-23 (1986)). The Court acknowledged that in some situations a practice which would satisfy *Miranda* would not be permissible in a Sixth Amendment context. For example, contrasting Moran v. Burbine, 475 U.S. 412 (1986), it stated that the Sixth Amendment's protection of the attorney-client relationship would not permit a valid waiver where a defendant was not informed that his lawyer was trying to reach him during questioning. Similarly, citing United States v. Henry, 447 U.S. 264 (1980), the Court observed that while non-custodial conversations do not implicate *Miranda*, they may constitute impermissible interrogations after indictment. *Patterson*, 487 U.S. at 296 n.9.

49. *Id.* at 297-98.

> stage of the proceedings in question, and what assistance he could provide to an accused at that stage—to determine the scope of the Sixth Amendment right to counsel, and the type of warnings and procedures that should be required before a waiver of that right will be recognized.
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> . . . [R]ecognizing the enormous importance and role that an attorney plays at a criminal trial, we have imposed the most rigorous restrictions on the information that must be conveyed to a defendant, and the procedures that must be observed, before permitting him to waive his right to counsel at trial. . . . [W]e have defined the scope of the right to counsel by a pragmatic assessment of the usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel. An accused's waiver of his right to counsel is "knowing" when he is made aware of these basic facts.
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> Applying this approach, it is our view that whatever warnings suffice for *Miranda's* purposes will also be sufficient in the context of postindictment questioning. The State's decision to take an additional step and commence formal adversarial proceedings against the accused does not substantially increase the value of counsel to the accused at questioning, or expand the limited purpose that an attorney serves when the accused is questioned by authorities. With respect to this inquiry, we do not discern a substantial difference between the usefulness of a lawyer to a suspect during custodial interrogation, and his value to an accused at postindictment questioning.
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> . . . Because the role of counsel at questioning is relatively simple and limited, we see no problem in having a waiver procedure at that stage which is likewise simple and limited.[50]

In a vigorous dissent, Justice Stevens framed the issue squarely in terms of whether the Court should countenance unethical behavior by prosecutors and their agents.[51] Citing both Disciplinary Rule 7-104 of the ABA Model Code of Professional Responsibility[52] and Rule 4.2 of the ABA Model Rules of

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50. *Id.* at 298-99 (citations omitted).

51. Patterson v. Illinois, 487 U.S. 285, 301 (1988) (Stevens, J., dissenting). Justices Brennan and Marshall joined in this dissent. Justice Blackmun dissented separately. *Id.* at 300-01 (Blackmun, J., dissenting).

52. Disciplinary Rule 7-104 of the MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1982) [hereinafter MODEL CODE] provides:

> (A) During the course of his representation of a client a lawyer shall not:

Professional Conduct,[53] he stated that in a civil case the canons of ethics would bar a lawyer from communicating with his or her adversary's client without notice to the attorney or the permission of the court.[54] He added that an effort to obtain evidence by thus "going behind the back of one's adversary" would be a breach of ethics and manifestly unfair, and said that in the sphere of criminal practice the same ethical rules and standards "at least as demanding" should be enforced.[55] For Justice Stevens, the issue presented was one of determining the point at which private interviews with the opposing party become impermissible. In his view, even for the as-yet-unrepresented defendant "the Sixth Amendment . . . demands that a firm and unequivocal line be drawn at the point at which adversary proceedings commence."[56]

Justice Stevens criticized the Court for diminishing the significance it had previously attributed to the initiation of formal proceedings. He recalled that in *Kirby v. Illinois*,[57] when denying a defendant the right to counsel at a show-up which had preceded a formal charge, a plurality of the Court had observed that the initiation of criminal proceedings "is far from a mere formalism."[58]

> It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.[59]

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(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

53. Rule 4.2 of the MODEL RULES OF PROFESSIONAL CONDUCT (1984) [hereinafter MODEL RULES] provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

54. *Patterson*, 487 U.S. at 301. Today, the scope of the "authorized by law" provisions of MODEL CODE DR 7-104(A)(1) and Rule 4.2 of the MODEL RULES is a matter of some controversy. *See* the rule of the Justice Department concerning contact with represented parties, at 28 C.F.R. §§ 77.1-77.12 (1995). For a discussion of this issue, see Ernest F. Lidge III, *Government Civil Investigations and the Ethical Ban on Communicating with Represented Parties*, 67 IND. L.J. 549, 569-77 (1992); Jamie S. Gorelick & Geoffrey M. Klineberg, *Justice Department Contacts with Represented Persons: A Sensible Solution*, 78 JUDICATURE 136 (1994); Samuel Dash, *Justice Department Contacts with Represented Persons: An Alarming Assertion of Power*, 78 JUDICATURE 137 (1994).

55. Patterson v. Illinois, 487 U.S. 285, 301 (1988) (Stevens, J., dissenting).

56. *Id.* at 303.

57. 406 U.S. 682 (1972) (plurality opinion).

58. *Id.* at 689.

59. *Id.*

Justice Stevens added that this view was reiterated by the Court in *United States v. Gouveia*[60] and *Moran v. Burbine*.[61]

Justice Stevens believed that the Court had grossly understated the disadvantages of proceeding without a lawyer during post-attachment interrogation. He noted that the warnings approved by the Court did not require that the nature of the charges pending be explained.[62] An attorney might examine an indictment for legal sufficiency before submitting his or her client to questioning.[63] A lawyer is also likely to be more skillful at negotiating a plea bargain, a process which may be most fruitful before interrogation.[64] The functions of an attorney, as well as the information which might be imparted to the accused concerning those functions, will vary with the complexity of a case.[65]

Even more fundamentally, in light of the shift in the relationship between the state and the accused upon the initiation of formal proceedings, Justice Stevens believed that neither *Miranda* warnings "[n]or for that matter, any warnings offered by an adverse party" provided a permissible basis for allowing prejudicial and unfair communication with an unrepresented defendant by prosecutors and their agents.[66] Citing ethical standards which forbid attorneys from giving legal advice to an adverse party who is not represented by a lawyer (specifically, DR 7-104(A)(2))[67] he stated that "even the *Miranda* warnings themselves are a species of legal advice that is improper when given by the prosecutor after indictment."[68] They may lead the accused to misapprehend the authorities' "true adversary posture . . . ."[69] That posture will inevitably tend to color the advice offered, and such statements by a party "with such an

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60. 467 U.S. 189, 189 (1984).

61. 475 U.S. 412, 428 (1986).

62. Patterson v. Illinois, 487 U.S. 285, 308 (1988) (Stevens, J., dissenting). He noted that, pursuant to Henderson v. Morgan, 426 U.S. 637 (1976), a court would insist on such advice before accepting a guilty plea. *Patterson*, 487 U.S. at 308.

63. *Id.*

64. *Id.*

65. *Id.* at 307 n.4.

66. Patterson v. Illinois, 487 U.S. 285, 306-07 (1988) (Stevens, J., dissenting).

67. MODEL CODE DR 7-104(A)(2) provides:

> During the course of his representation of a client a lawyer shall not . . . [g]ive advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

Patterson, 487 U.S. at 309 n.6. *See also* Commentary accompanying Rule 4.3 of the MODEL RULES.

68. *Patterson*, 487 U.S. at 309.

69. *Id.*

evident conflict of interest" create a public perception of unfairness.[70]

The apparent reluctance of the Court in *Patterson* to cast the requirements of the Sixth Amendment in terms of prevailing or acceptable ethical standards was not surprising. It had earlier expressed a hesitancy to do so. In 1986, *Nix v. Whiteside*[71] presented the Court with the issue of whether an attorney's refusal to cooperate with a client's imminent perjury violated the Sixth Amendment right to the effective assistance of counsel.[72] Under the two-pronged standard of *Strickland v. Washington*[73] this involved a determination of whether counsel's conduct was within the range of reasonably effective assistance, as well as an examination of whether prejudice had resulted. *Strickland* had noted that "[p]revailing norms of practice as reflected in American Bar Association Standards and the like . . . are guides to determining what is reasonable, but they are only guides."[74] Rejecting the claim of ineffective assistance in *Nix*, the Court revisited this statement with the observation that:

> Under the *Strickland* standard, breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee . . . . When examining attorney conduct, a court must be careful not to narrow the wide range of attorney conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct and thereby intrude into a state's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts.[75]

Such restraints imposed by the necessities of federalism do not limit the interpretation of state constitutional guarantees.

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70. Patterson v. Illinois, 487 U.S. 285, 310 (1988) (Stevens, J., dissenting). Commentators who are critical of the Court's approach in *Patterson* usually highlight the narrowness of its view of the attorney's role during interrogation. *See generally* CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE 417 (1993); William T. Pizzi, *Waiver of Rights in the Interrogation Room: The Court's Dilemma*, 23 CONN. L. REV. 229, 250 (1991). For a discussion of potential consequences for criminal investigation that constitutionalizing a pre-indictment no-contact rule as a matter of federal constitutional law might present, see Pamela S. Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 HARV. L. REV. 670, 700-03 (1992).

71. 475 U.S. 157 (1986).

72. *Id.* at 159.

73. 466 U.S. 668 (1984).

74. *Id.*

75. Nix v. Whiteside, 475 U.S. 157, 165 (1986).

IV. STATE CONSTITUTIONAL RIGHTS AND THE REPRESENTED DEFENDANT

The constitutionalizing of ethical standards in the interpretation of a state right to counsel is clearly reflected in several cases which address the issue that was expressly reserved in *Patterson*:[76] the issue of the propriety of post-attachment interrogation of a represented defendant. These cases pose fundamental questions concerning the nature of a state constitutional right to counsel: In light of the importance of the constitutional right to the assistance of one's appointed or retained counsel in the context of a pending criminal prosecution, does the initiation of an interrogation by a prosecutor or his agents itself constitute an impermissible interference with that right? If so, is it because it poses a threat to an ongoing attorney-client relationship? Is it because of the need for advice and the adversarial position of the prosecutor? Finally, does permitting a waiver by the accused without notice to the attorney or without his consent so undermine the integrity of the process that it should not be permitted?

Courts which have found it appropriate to constitutionalize Model Rule 4.2 and Disciplinary Rule 7-104(A)(1) have addressed these issues only briefly or implicitly. In *State v. Wiegers*,[77] the defendant had been indicted for murder and conspiracy and interrogated by prosecutors who knew that he had been represented by an attorney on the matter giving rise to the indictment.[78] Examining the scope of South Dakota's right to counsel[79] during post-indictment questioning in the context of evaluating a claim of ineffective assistance at trial,[80] the Supreme Court of South Dakota cited Disciplinary Rule 7-104 of the state's Code of Professional Responsibility.[81] The court found the prosecutors' knowledge of Wiegers' representation to be sufficient to require the imposition of the no-contact rule as a constitutional requirement of the state right to counsel. "The protection afforded a criminal defendant by [the state right to counsel and privilege against self-incrimination] must be held to be at least co-extensive with that provided by the Code of Professional Responsibility to a party in a civil action."[82] Despite references to *Massiah* and other Sixth Amendment cases, the court expressly stated that it was "offer[ing] no opinion" concerning the scope of the defendant's federal rights.[83]

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76. Patterson v. Illinois, 487 U.S. 285, 290 n.3 (1988).

77. 373 N.W.2d 1 (S.D. 1985).

78. *Id.* at 3, 14.

79. The South Dakota Constitution provided that: "In all criminal prosecutions the accused shall have the right to defend in person and by counsel . . . ." S.D. CONST. art. VI, § 7.

80. *Wiegers*, 373 N.W.2d at 12. Counsel had failed to properly move to suppress the defendant's statement.

81. State v. Wiegers, 373 N.W.2d 1, 14 (S.D. 1985). The South Dakota Code of Professional Responsibility incorporated DR 7-104(A)(1) of the MODEL CODE.

82. *Wiegers*, 373 N.W.2d at 14.

83. *Id.*

A similar conclusion constitutionalizing DR 7-104(A)(1) was reached by the Supreme Court of Oregon in *State v. Sparklin*.[84] It stated that implicit in the right "to be heard by . . . counsel"[85] secured by the Oregon Constitution was the requirement that once criminal proceedings have been initiated and an attorney is appointed or retained, "there can be no interrogation of a defendant concerning the events surrounding the crime charged unless the attorney representing the defendant on that charge is notified and afforded a reasonable opportunity to attend."[86] The court cited the need for the "benefit of an attorney's presence, advice and expertise,"[87] and its view that "'it is unfair to let skilled interrogators lure [a defendant] from behind the shield into an unequal encounter. . . . Such interrogation subverts the attorney-client relationship.'"[88] No waiver of that right was therefore permissible until the defendant had consulted with his attorney.[89]

In a more recent decision which arguably falls within this group of cases, *State v. Lefthand*,[90]—a case in which reliance upon a state constitutional right to counsel is less clear—the Minnesota Supreme Court expressed the need for the enforcement of a no-contact rule with exceptional vigor and reflected the dynamics of a judicial decision to implement such a policy. Lefthand, the defendant, had been arrested for murder, and a public defender was appointed to represent him at an initial judicial appearance.[91] Soon afterwards, Lefthand refused to leave his bed to speak with his attorney.[92] Out of concern over the defendant's competence to proceed, counsel moved for a suspension of the proceedings pending a mental health evaluation.[93] While this motion was pending, the police obtained a statement from Lefthand with permission from the prosecutor and without notice to defense counsel.[94] This statement was used as part of the prosecution's case.[95] The Minnesota Supreme Court noted that on three prior occasions it had expressed its disapproval of such a practice "in

84. 672 P.2d 1182 (Or. 1983).

85. *Id.* at 1186 (quoting OR. CONST. art. I, § 2).

86. *Id.* at 1187.

87. *Id.*

88. State v. Sparklin, 672 P.2d 1182, 1187 (Or. 1983) (quoting Note, *Interrogation and the Sixth Amendment: The Case for Restriction of Capacity to Waive the Right to Counsel*, 53 IND. L.J. 313, 315 (1977-1978)).

89. *Id.* The court added that as contact was restricted "in the smallest civil matter," it could "certainly require no less of prosecutors or police in criminal matters." *Id.* As a separate matter, the right did not prevent a defendant from volunteering statements, nor did it foreclose questioning about unrelated criminal episodes. *Id.* at 1187-88.

90. 488 N.W.2d 799 (Minn. 1992).

91. *Id.* at 800.

92. *Id.*

93. *Id.*

94. State v. Lefthand, 488 N.W.2d 799, 800 (Minn. 1992).

95. *Id.*

the strongest of terms,"[96] only to have its statements characterized by counsel for the state as "mere dicta."[97] The court found it "incomprehensible that the attorney-client relationship in the context of a criminal proceeding would be so cavalierly disregarded." Citing the state and federal constitutional rights to counsel,[98] the Minnesota Rules of Professional Conduct,[99] and its "supervisory power,"[100] the court held that the "in-custody interrogation of a formally accused person who is represented by counsel should not proceed prior to notification of counsel or the presence of counsel."[101]

> Of grave concern to us here is what we can only perceive as an emerging pattern of conduct, calculated to subvert the intent of our criminal rules which [are] to "provide for the just, speedy determination of criminal proceedings." In this case, the prosecution allowed the in-custody interrogation . . . with full knowledge that a competency examination had been ordered . . . .[102]

Defendant's statement was subject to exclusion at trial.[103] Despite the ambiguous basis of *Lefthand*,[104] it is instructive in illustrating the policies that can underlie the constitutionalizing of MR 4.2 and DR 7-104(A)(1). While the ethical rules are generally found to be applicable to prosecutors in a criminal proceeding,[105] they do not by themselves necessarily mandate the exclusion of evidence unethically obtained.[106] In contrast, implementation of a constitutional requirement flowing from a personal right of the accused carries with it the appropriateness of an exclusionary remedy at trial. The suppression of evidence will be viewed by some courts as yet another tool for deterring prosecutorial misconduct and promoting the fairness of the process. Conversely,

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96. *Id.* at 801 (quoting State v. Fossen, 255 N.W.2d 357, 362 (1977)).

97. *Id.* at 801.

98. State v. Lefthand, 488 N.W.2d 799, 801 (Minn. 1992).

99. *Id.* at 801 n.6 (citing MINN. RULES OF PROFESSIONAL CONDUCT Rule 4.2).

100. *Id.*

101. *Id.* at 801-02.

102. State v. Lefthand, 488 N.W.2d 799, 802 (Minn. 1992) (citations omitted). At trial, the prosecution also improperly used statements made by the defendant during the course of the competency examination in "plain violation" of the Minnesota Rules of Criminal Procedure. *Id.*

103. *Id.*

104. For a helpful discussion of the ambiguities in the decision, see Edwin J. Butterfoss & Lisa J. Burkett, *Extending the Guiding* Lefthand *of Counsel: The Minnesota Supreme Court Provides Protection Against Uncounseled Waivers of the Right to Counsel During Interrogations*, 17 HAMLINE L. REV. 307 (1993).

105. *See, e.g., In re* Quinlan, 801 P.2d 1337 (Mont. 1990); *In re* Conduct of Burrows, 629 P.2d 820 (Or. 1981).

106. *See, e.g.*, Suarez v. State, 481 So. 2d 1201, 1206-07 (Fla. 1985); Henrich v. State, 694 S.W.2d 341, 342 (Tex. Crim. App. 1985); State v. Morgan, 646 P.2d 1064, 1070 (Kan. 1982); People v. Green, 274 N.W.2d 448, 454-55 (Mich. 1979).

for some the costs involved in suppressing a potentially probative statement may be too great. This may explain the rejection of the approach taken in *Wiegers* and *Sparklin* by the Supreme Courts of Idaho,[107] New Hampshire,[108] and Louisiana.[109] Perhaps significantly, in *State v. Decker*, the Supreme Court of New Hampshire also held that any violation by the prosecutor of Rule 4.2 of the New Hampshire Rules of Professional Conduct (mirroring Model Rule 4.2) would not by itself result in the suppression of a confession.[110]

V. STATE CONSTITUTIONAL RIGHTS AND THE UNREPRESENTED DEFENDANT

New York has approached the rights of the unrepresented defendant against whom criminal proceedings have commenced with the same concern that *Wiegers* and *Sparklin* manifested towards those of a represented party. As noted earlier, *People v. Samuels*[111] preceded Justice Stevens' analysis in *Patterson* by some eight years. For the New York Court of Appeals, the very commencement of formal proceedings involves consequences which, under the New York Constitution, preclude a waiver of the right to counsel during questioning without counsel's presence.[112] In *Samuels*, the court held that the defendant's right had attached upon the filing of a felony complaint and issuance of an arrest warrant, and that the policies of its earlier opinion in *People v. Settles*[113] were applicable to the interrogation process.[114] As the court in *Samuels* considered the matter "in litigation," it had reached a point at which legal advice was crucial.[115] Quoting *Settles*, the court added, "'[o]nce a matter is the subject of a legal controversy any discussions relating thereto should be conducted by counsel: at that point the parties are in no position to safeguard their rights.'"[116]

In *Settles*, the court had implemented a constitutional no-contact policy for an indicted and unrepresented defendant who had been subjected to a corporeal identification procedure. The court stated that "[t]he filing of an indictment

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107. State v. Ruth, 637 P.2d 415, 418 (Idaho 1981).

108. State v. Decker, 641 A.2d 226 (N.H. 1994).

109. State v. Carter, 664 So. 2d 367 (La. 1995) (overruling State v. Hattaway, 621 So. 2d 796 (La. 1993)).

110. *Decker*, 641 A.2d at 230.

111. 400 N.E.2d 1344 (N.Y. 1980).

112. New York has also developed an independent state constitutional policy which entitles some suspects to the presence of counsel when formal proceedings have not commenced. This "*Hobson* line of cases" is distinguished from New York's post-attachment cases and discussed by the New York Court of Appeals in People v. West, 615 N.E.2d 968, 971-72 (N.Y. 1993).

113. 385 N.E.2d 612 (N.Y. 1978).

114. *Samuels*, 400 N.E.2d at 1345-46.

115. *Id.* at 1346.

116. *Id.* at 1346-47 (quoting People v. Settles, 385 N.E.2d 612, 617 (N.Y. 1978)).

constitutes the commencement of a formal judicial action against the defendant and is equated with the entry of an attorney into the proceeding."[117] After discussing the value placed upon the right to counsel under the New York Constitution, the court explained:

> Once an indictment is returned against a particular defendant, the character of the police function shifts from investigatory to accusatory. For this reason, the warnings which are sufficient to comply with the strictures against testimonial compulsion do not satisfy the higher standard with respect to a waiver of the right to counsel. Prior to indictment, there may be valid reasons why an uncounseled suspect might wish to deal with the police. He may nourish the hope, however vain, that he can avoid any legal entanglement by simply clearing up a few loose ends. Alternatively, he may feel that by getting into the good graces of the police as an informer he might be able to avoid indictment and trial.
>
> No such opportunity is afforded him once the Grand Jury has spoken. At that point, there is no longer any inquiry into an unsolved crime and the suspect is now the accused. He cannot make any arrangement with the police which is not subject to the ultimate approval of the court and there ought to be no necessity for further police investigation. In a very real sense, the indictment represents a method of commencing formal judicial proceedings . . . .[118]

Responding to these considerations, the court found that the principle of Disciplinary Rule 7-104(A)(1) of the ABA's Model Code served as an "appropriate analogy."[119] "The fact that defendant did not have an attorney appointed at the time the police sought their waiver [was] a distinction without a difference" as far as New York's constitutional right to counsel was concerned.[120] The court added that, "perhaps in the most exigent circumstances," a waiver without counsel present might be permitted.[121]

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117. People v. Settles, 385 N.E.2d 612, 613-14 (N.Y. 1978).

118. *Id.* at 616 (citations omitted).

119. *Id.* at 617. The court also cited Canon 16 of the Code of Trial Conduct of the American College of Trial Lawyers. *Id.*

120. *Id.* The court added that the right to counsel should be dependent neither "upon the speed with which an attorney can be retained [nor upon delay in arraignment and appointment]. To ground an indicted defendant's right to counsel upon such fortuitous criteria is to debase that right into nothing more than a race for the wary." *Id.*

121. People v. Settles, 385 N.E.2d 612, 617 (N.Y. 1978). This might encompass a situation where the interests of the defendant and his attorney are potentially adverse. *See, e.g.*, State v. Chandler, 605 S.W.2d 100 (Mo. 1980) (defendant wished to implicate his attorney).

In *State v. Sanchez*,[122] the Supreme Court of New Jersey endorsed a similar policy which provided that, "as a general rule, after an indictment and before arraignment," the right to counsel in the New Jersey Constitution[123] restrained a prosecutor and his agents from initiating a conversation with a defendant without the consent of defense counsel.[124] Defendant had been indicted, but was neither informed of that fact nor represented on that matter when he was interrogated.[125] While *Miranda* warnings had been administered, the court found them insufficient to establish a valid waiver.[126] The court viewed the analysis of *Settles* as persuasive:

> Once the indictment is returned, the State is committed to prosecute the defendant . . . . Questioning the accused can only be "for the purpose of buttressing . . . a prima facie case." The spotlight is on the accused. Under those circumstances, the perfunctory recitation of the right to . . . remain silent may not provide the defendant with sufficient information to make a knowing and intelligent waiver.[127]

It added that *Miranda* warnings do not tell the accused the nature of the charges, the dangers of self-representation, or the steps counsel might take to protect his interests: steps including plea negotiations and such pretrial motions as those testing the sufficiency of the indictment or seeking to suppress evidence.[128] "Given the adversarial nature of their relationship, for the State's representatives to communicate adequately that information to an indicted defendant would be difficult, nigh to impossible."[129]

In addressing the matter, the court did not find it necessary to go "so far" as the New York Court of Appeals. While *Settles* mandated that a waiver occur only in the presence of an attorney, the New Jersey Supreme Court stated that a waiver might also be valid if the defendant has been arraigned before a judicial officer who has advised the defendant "that he has been indicted, the significance of an indictment, that he has a right to counsel, and the seriousness of his situation in the event he should decide to answer questions of any law enforcement officers in the absence of counsel."[130]

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122. 609 A.2d 400 (N.J. 1992).

123. "In all criminal prosecutions, the accused shall have . . . the assistance of counsel in his defense." N.J. CONST. art. 1, para. 10.

124. *Sanchez*, 609 A.2d at 408.

125. *Id.* at 401.

126. Sanchez v. State, 609 A.2d 400, 402-07 (N.J. 1992).

127. *Id.* at 408 (quoting People v. Settles, 385 N.E.2d 612, 616 (N.Y. 1978)).

128. *Id.*

129. *Id.*

130. State v. Sanchez, 609 A.2d 400, 408 (N.J. 1992) (quoting United States v. Mohabir, 624 F.2d 1140, 1153 (2d Cir. 1980)).

Despite its discussion of the inadequacies of *Miranda* warnings, the court apparently viewed this information as adequate in the judicial setting. *Sanchez* also noted that ethical considerations supported its constitutional policy against the initiation of a conversation by the prosecution. The court stated that New Jersey's Rules of Professional Conduct specifically prohibited a prosecutor from seeking "to obtain from an unrepresented accused a waiver of important pretrial rights . . . ."[131] It also cited New Jersey's version of Model Rule 4.2,[132] and stated that the implication of these two rules was that prosecutors and their representatives should not initiate post-indictment conversations with an uncounselled defendant.[133]

The policy of *Sanchez* was reflected in the interpretation of the Hawaii Constitution by an intermediate appellate court in *State v. Liulama*.[134] Finding it appropriate to adopt *Sanchez's* post-indictment and pre-arraignment no-contact rule for the unrepresented defendant,[135] the court emphasized the stringent requirements for waiver of counsel that had been implemented under the Hawaii Constitution.[136] It added that, in its view, a defendant's decision to waive counsel and answer questions during post-indictment interrogation "is tantamount to a decision to proceed *pro se*."[137]

> It follows that, since our law requires the courts to carefully assure itself of the accused's awareness of the circumstances of his situation, his right to counsel, the value of counsel, and the dangers of proceeding . . . *pro se* in the courts, the courts should also be required to ensure that an accused had that same level of awareness at the time he allegedly waived his right to counsel prior to a postindictment interrogation. . . .[138]

The court also stated that a defendant must be specifically advised by a court or his own attorney "that he has a constitutional right to counsel at every stage of the proceeding" before a waiver may be deemed valid.[139]

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131. *Id.* at 408 (quoting NEW JERSEY RULES OF PROFESSIONAL CONDUCT Rule 3.8).
132. *Id.*
133. *Id.*
134. 845 P.2d 1194 (Haw. Ct. App. 1992).
135. "[W]e adopt the general rule announced in *Sanchez* that after a person has been indicted, and before he or she has been arraigned, the government should not initiate a conversation with the defendant concerning the charges against him without the consent of defense counsel." *Id.* at 1204.
136. *Id.* at 1202.
137. *Id.* at 1203.
138. State v. Liulama, 845 P.2d 1194, 1203 (Haw. Ct. App. 1992).
139. *Id.* at 1204.

In contrast, the approach of *Samuels* has been rejected under the Maine Constitution. In *State v. Carter*,[140] the Supreme Court of Maine regarded a no-contact rule as interfering with a defendant's right to self-representation.

> If the accused may choose to undergo the ultimate determination of his guilt or innocence having waived his right to the assistance of counsel, he should not be denied that same freedom of choice to deal with the government according to an intelligent assessment of his own best interest at some other stage of the proceedings.[141]

It also stated that such a rule "would serve to exclude otherwise reliable confessions, while adding nothing to the objective of deterring unlawful police behavior."[142] The court added that it had traditionally been reluctant to extend rules of exclusion which detract from the truth-seeking function of the criminal process.[143]

VI. CONCLUSION

It may well be that, in practice, the decision of whether to constitutionalize the restraints of a no-contact rule will be determined by balancing the costs of excluding potentially valuable evidence against the benefits of deterring prosecutorial misconduct and furthering judicial integrity. This process, so familiar under federal doctrine in assessing the appropriateness of judicially-created remedies,[144] is hardly a satisfactory one for addressing so basic an issue as the waiver of the substantive state constitutional right to counsel. Ultimately, the question should be resolved by a careful examination of the principles that underlay a state's guarantee of the assistance of counsel. How exactly *does* the state constitution regard the needs of a defendant against whom proceedings have commenced? Which of the many views expressed above commend themselves in light of the state's own history, tradition and values? (State constitutional principles are not, after all, fungible.) Are any differences in treatment between the represented and the unrepresented defendant truly justified by considerations presented by an ongoing attorney-client relationship, or are they just the accidental by-product of current ethical rules? Finally, one

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140. 412 A.2d 56 (Me. 1980).

141. *Id.* at 60-61.

142. *Id.* at 60.

143. *Id.* at 61.

144. Thus, for example, in determining the appropriateness of the exclusionary sanction when there has been a violation of the Fourth Amendment, the Supreme Court has stated that the question "must be resolved by weighing the costs and benefits of preventing the use in the prosecution's case-in-chief of inherently trustworthy tangible evidence. . . ." United States v. Leon, 468 U.S. 897, 906-07 (1984). *See also* Stone v. Powell, 428 U.S. 465, 486-90 (1976); Oregon v. Elstad, 470 U.S. 298, 308-09 (1985) (determining the consequences of a failure to administer *Miranda* warnings).

cannot help but wonder about the validity of any gulf between acknowledged ethical standards in this area and the parameters of a fundamental constitutional right possessed by the individual for whose benefit, at least in part, those standards have been promulgated. These issues are sure to be examined by an increasing number of courts as they explore the dimensions of the state right to counsel.