

Winter 1977

# Interrogation and the Sixth Amendment: The Case for Restriction of Capacity to Waive the Right to Counsel

Patrick S. Brady  
*Indiana University School of Law*

Follow this and additional works at: <http://www.repository.law.indiana.edu/ilj>



Part of the [Constitutional Law Commons](#), and the [Evidence Commons](#)

## Recommended Citation

Brady, Patrick S. (1977) "Interrogation and the Sixth Amendment: The Case for Restriction of Capacity to Waive the Right to Counsel," *Indiana Law Journal*: Vol. 53: Iss. 2, Article 7.

Available at: <http://www.repository.law.indiana.edu/ilj/vol53/iss2/7>

This Note is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in *Indiana Law Journal* by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact [wattn@indiana.edu](mailto:wattn@indiana.edu).



**JEROME HALL LAW LIBRARY**

INDIANA UNIVERSITY  
Maurer School of Law  
Bloomington

## Interrogation and the Sixth Amendment: The Case for Restriction of Capacity to Waive the Right to Counsel

One of the most troubling practices in modern criminal process is police interrogation of a suspect who has a lawyer, but whose lawyer is not present. Courts have denounced the "practice of talking to a represented defendant behind his attorney's back"<sup>1</sup> as "suspect,"<sup>2</sup> "not commendable,"<sup>3</sup> and a source of "unease"<sup>4</sup> that threatens "erosion" of the "relationship between lawyer and client."<sup>5</sup> Nevertheless, these courts permitted the practice, finding no violation of the sixth amendment right to assistance of counsel. The common rationale for this finding is that the suspect who voluntarily answers police questions waives his right to counsel. Judicial scrutiny usually focuses on whether the suspect waived the right rather than on whether police disrupted the attorney-client relationship. This tendency diverts courts from the touchy question whether that relationship should be secured by a rule restricting the capacity of the suspect to waive the right to counsel. This note argues that the ability to waive that right should be reduced greatly, examines the criteria for a valid waiver, and analyzes the significance of the recent Supreme Court decision of *Brewer v. Williams*<sup>6</sup> for police questioning of a suspect represented by counsel.

### RESTRICTION OF CAPACITY TO WAIVE RIGHT TO COUNSEL

The Supreme Court has addressed only indirectly the question whether a represented suspect should be disabled from waiving the right to counsel, and lower courts have divided on the question. Two paramount Supreme Court decisions, *Massiah v. United States*<sup>7</sup> and *Miranda v. Arizona*,<sup>8</sup> set the framework for discussion of the issue.

*Massiah* concerned incriminating statements obtained from an indicted suspect, represented by counsel, in circumstances precluding waiver. While

---

<sup>1</sup>United States v. Crook, 502 F.2d 1378, 1380 (3d Cir. 1974), cert. denied, 419 U.S. 1123 (1975).

<sup>2</sup>United States v. Massimo, 432 F.2d 324, 325 (2d Cir. 1970), cert. denied, 400 U.S. 1022 (1971).

<sup>3</sup>United States v. Cobbs, 481 F.2d 196, 200 (3d Cir.), cert. denied, 414 U.S. 980 (1973).

<sup>4</sup>United States v. Crook, 502 F.2d 1378, 1380 (3d Cir. 1974), cert. denied, 419 U.S. 1123 (1975).

<sup>5</sup>United States v. Cobbs, 481 F.2d 196, 200 (3d Cir.), cert. denied, 414 U.S. 980 (1973).

<sup>6</sup>430 U.S. 387 (1977).

<sup>7</sup>377 U.S. 201 (1964).

<sup>8</sup>384 U.S. 436 (1966).

the defendant was free on bail, government agents placed a radio transmitter in the car of a codefendant with consent of the codefendant. Over the transmitter agents heard Massiah's incriminating words. The Supreme Court held that Massiah's right to counsel was denied by use against him at trial "of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel."<sup>9</sup> Massiah had no opportunity to waive the right to presence of counsel because he was unaware that the government was acquiring information from him. Since the situation afforded accused no opportunity to waive, the Court had no occasion to discuss whether he had the capacity to waive.<sup>10</sup> Most courts that have confronted the question have concluded that *Massiah* allows waiver;<sup>11</sup> only a handful have found that *Massiah* forbids waiver.<sup>12</sup>

*Miranda* dictated that any suspect in police custody facing interrogation be warned of his rights, including the rights to counsel and to silence. Once given these warnings, accused can forgo the right to counsel and submit to questioning without a lawyer. Unlike *Massiah*, *Miranda* expressly permits waiver.<sup>13</sup> However, *Miranda* dealt broadly with all suspects, whether or not indicted or represented by counsel. The decision left open the possibility that additional protections might be provided a suspect such as the one in *Massiah*, indicted and represented by counsel.<sup>14</sup>

---

<sup>9</sup>377 U.S. at 206. The timing of the *Massiah* right is unclear. Some courts have concluded that indictment is requisite to triggering of the right. See, e.g., *People v. Duck Wong*, 18 Cal. 3d 178, 186-87, 555 P.2d 297, 301, 133 Cal. Rptr. 511, 515 (1976). However, *Brewer* applies the *Massiah* right to a defendant who had not been indicted but had been arraigned. See 430 U.S. at 398-401. Apparently, entry of counsel is not essential to triggering of the right, since the Court has applied *Massiah* to statements made by an indicted suspect who did not yet have a lawyer. See *McLeod v. Ohio*, 381 U.S. 356 (1965), *rev'g per curiam* *State v. McLeod*, 1 Ohio St. 2d 60, 203 N.E.2d 349 (1964).

<sup>10</sup>*United States v. Durham*, 475 F.2d 208, 214 (7th Cir. 1973) (Castle, J., dissenting), construed *Massiah* narrowly as applicable only to situations in which waiver was factually prevented. *Brewer* dispels this notion, applying *Massiah* to a situation in which waiver was factually feasible. See 430 U.S. at 400-01.

<sup>11</sup>See, e.g., *Moore v. Wolff*, 495 F.2d 35 (8th Cir. 1974); *United States v. De Loy*, 421 F.2d 900 (5th Cir. 1970); *State v. Blizzard*, 278 Md. 556, 366 A.2d 1026 (1976); *People v. Patterson*, 39 Mich. App. 467, 198 N.W.2d 175 (1971), *appeal denied*, 387 Mich. 795 (1972); *Commonwealth v. Hoss*, 445 Pa. 98, 283 A.2d 58 (1971).

<sup>12</sup>See, e.g., *Hancock v. White*, 378 F.2d 479 (1st Cir. 1967); *People v. Isby*, 267 Cal. App. 2d 484, 73 Cal. Rptr. 294 (1968).

<sup>13</sup>See 384 U.S. 436, 475 (1966).

<sup>14</sup>Various judges have suggested that extra requirements be imposed after entry of counsel or after indictment. Then Judge Burger once remarked that the "prospective application of *Miranda* . . . plainly will require that . . . interviews" between police and represented defendants "can be conducted only after counsel has been given an opportunity to be present." *Mathies v. United States*, 374 F.2d 312, 316 n.3 (D.C. Cir. 1967). Closer scrutiny of waiver after entry of counsel was urged in *United States v. Smith*, 379 F.2d 628, 631 (7th Cir.) (dictum), *cert. denied*, 389 U.S. 993 (1967). Judge Frankel has maintained that after indictment, the "casual and relatively perfunctory invitation to a *Miranda*-style waiver is insufficient." In addition to the routine *Miranda* warnings, an indicted suspect should be warned of the "likely folly" of forsaking assistance of counsel. See *United States ex rel. Lopez v. Zelker*, 344 F. Supp. 1050, 1054 (S.D.N.Y.), *aff'd*, 465 F.2d 1405 (2d Cir.), *cert. denied*, 409 U.S. 1049 (1972). Judge Frankel's suggestion would not please Justice White, who believes that, "There is absolutely no reason to

Courts differ on the relationship between *Massiah* and *Miranda*. One interpretation is that *Massiah* was modified by the subsequent *Miranda* decision, the *Massiah* right becoming waivable,<sup>15</sup> the opposite interpretation is that the *Massiah* and *Miranda* rights remain distinct, the *Massiah* right being unwaivable.<sup>16</sup> Neither *Massiah* nor *Miranda* expressly compels curtailment of capacity to waive. Nevertheless, a case can be made for fastening a restriction against waiver on a suspect represented by counsel. Such a restriction can be based upon either constitutional or ethical principles.

### *The Constitutional Basis of Restriction*

The argument for limiting waiver of the right to counsel emerges from the sixth amendment. The constitutional right to counsel is meant to counteract the handicaps of a suspect enmeshed in the machinery of criminal process.<sup>17</sup> Once accused has sought the safeguard of counsel, it is unfair to let skilled interrogators lure him from behind the shield into an unequal encounter.<sup>18</sup> To permit officers to question a represented suspect in the absence of counsel encourages them to undermine the suspect's decision to rely upon counsel. Such interrogation subverts the attorney-client relationship.

An additional argument for circumscribing capacity to waive can be found in the concerns that led to the *Miranda* decision. The impetus behind *Miranda* was dissatisfaction with the voluntariness test for confessions. Since lower courts usually accepted questionable police versions of the circumstances of a confession, most confessions were found to be voluntary.<sup>19</sup> The Supreme Court could review only a fraction of these findings, despite misgivings over interrogation techniques that produced confessions. *Miranda*

require an additional question to the already cumbersome *Miranda* litany. . . ." *Brewer v. Williams*, 430 U.S. 387, 436 n.5 (1977) (White, J., dissenting).

<sup>15</sup>See, e.g., *United States v. Crisp*, 435 F.2d 354, 358 (7th Cir. 1970), cert. denied, 402 U.S. 947 (1971); *State v. Melton*, 207 Kan. 700, 709, 486 P.2d 1361, 1368 (1971). Justice White insists there is no meaningful difference between the *Massiah* right and the *Miranda* right. See *Brewer v. Williams*, 430 U.S. 387, 430 n.1, 435 n.5 (1977) (White, J., dissenting).

<sup>16</sup>See *People v. Isby*, 267 Cal. App. 2d 484, 494, 73 Cal. Rptr. 294, 302 (1968). After "criminal charges have been filed and the accused has retained counsel to represent him, the accused acquires an absolute, unwaivable right to counsel's presence at any subsequent police interrogation." *People v. Duck Wong*, 18 Cal. 3d 178, 185, 555 P.2d 297, 300, 133 Cal. Rptr. 511, 514 (1976).

<sup>17</sup>Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He 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.

*Powell v. Alabama*, 287 U.S. 45, 69 (1932).

<sup>18</sup>Chief Justice Burger scorns such notions, contending that they imprison a man in his privileges. *Brewer v. Williams*, 430 U.S. 387, 419 (1977) (Burger, C.J., dissenting). But the right to counsel has more in common with a shield than a prison.

<sup>19</sup>See Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the "Old" Voluntariness Test*, 65 MICH. L. REV. 59, 99-104 (1966).

developed the requirement of warnings to supplant the voluntariness test; if warnings were not given a confession, voluntary or involuntary, would be inadmissible. But far from disappearing, the voluntariness test simply shifted, from the confession to the waiver. It remains as unsatisfactory as ever. Resort to the test could be reduced by restricting waiver.

The case against restriction is not frequently articulated, not even by courts holding that a represented suspect can waive assistance of counsel. One court justified its refusal to restrict waiver merely by referring to the general proposition that a constitutional right can be waived.<sup>20</sup> Another gave no reason at all for declining to restrict, simply asserting that the United States "Supreme Court has not gone so far and we refuse" to do so.<sup>21</sup> Resistance to restriction may reflect a visceral conviction that placing obstacles in the way of waiver accords accused more protection than he deserves.<sup>22</sup> More concretely, resistance may be fueled by fear that if police are permitted to interrogate a represented suspect only in presence of counsel, confessions will become virtually unobtainable. This worry is unwarranted. Confessions would not be eliminated by a restriction applying only to a suspect with a lawyer, for most confessions occur soon after arrest,<sup>23</sup> when a suspect is least likely to have a lawyer. Since the case against restriction consists chiefly of an exaggerated apprehension, a restriction should be established, based on the sixth amendment.<sup>24</sup>

<sup>20</sup>United States v. Springer, 460 F.2d 1344, 1350 (7th Cir.), cert. denied, 409 U.S. 873 (1972).

<sup>21</sup>Lamb v. Commonwealth, 217 Va. 307, \_\_\_, 227 S.E.2d 737, 740 (1976).

<sup>22</sup>To make waiver more difficult is to make conviction more difficult. But "punishment of the guilty is desirable, other things being equal. . . . [T]here is 'a strong public interest in convicting the guilty.'" Kaufman v. United States, 394 U.S. 217, 240-41 (1969) (Black, J., dissenting). "In our concern for criminals, we should not forget that nice people have some rights too." Killough v. United States, 315 F.2d 241, 265 (D.C. Cir. 1962) (Miller, C.J., dissenting).

<sup>23</sup>See Barrett, *Police Practices and the Law—From Arrest to Release or Charge*, 50 CAL. L. REV. 11, 41-44 (1962); Medalie, Zeitz & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347, 1369 (1968).

<sup>24</sup>The arguments for and against a restriction founded upon the right-to-counsel clause of the United States Constitution pertain also to the counterparts of that clause in state constitutions. Even if no restriction is held to be compelled by the federal Constitution, state courts are free to base a restriction upon the adequate and independent state grounds of the state constitution. New York has adopted this approach, extending "constitutional protections of a defendant under the State Constitution beyond those afforded by the Federal Constitution." *People v. Hobson*, 39 N.Y.2d 479, 483-85, 348 N.E.2d 894, 897, 384 N.Y.S.2d 419, 422 (1976). The New York rule and its rationale are as follows:

The rule that once a lawyer has entered the proceedings in connection with the charges under investigation, a person in custody may validly waive the assistance of counsel only in the presence of a lawyer breathes life into the requirement that a waiver of a constitutional right must be competent, intelligent, and voluntary. . . . Indeed, it may be said that a right too easily waived is no right at all.

*Id.* at 484, 348 N.E.2d at 898, 384 N.Y.S.2d at 422. *Hobson* revitalizes a rule earlier promulgated in *People v. Arthur*, 22 N.Y.2d 325, 239 N.E.2d 537, 292 N.Y.S.2d 663 (1968). For discussion of these and intervening cases see 5 FORDHAM URB. L.J. 401 (1977). For opinions explicitly refusing to adopt the New York rule see *Pierce v. State*, 235 Ga. 237, 219 S.E.2d 158 (1975); *Lamb v. Commonwealth*, 217 Va. 307, 227 S.E.2d 737 (1976).

*The Ethical Basis of Restriction*

The ABA Code of Professional Responsibility, DR 7-104(A)(1), directs that while representing a client a lawyer shall not "[c]ommunicate 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. . . ." While a few courts have relied upon it,<sup>25</sup> this provision is a problematical basis at best for a bar on police questioning of a suspect in absence of his counsel. There are several difficulties.

First, since professional ethics are "not of constitutional dimensions,"<sup>26</sup> enforcement of any restriction based on them would be discretionary with the states and with federal courts in their supervisory power over federal law enforcement agencies.<sup>27</sup> Second, an ethical constraint binding prosecutors might not enjoin police interrogators. Justice White has insisted the prohibition should apply only to attorneys because of their advantage over accused in legal acumen.<sup>28</sup> In contrast, Justice Stevens has urged applicability to police as well as prosecutors, since the former are "agents of the prosecutor."<sup>29</sup> As an alternative to the agency rationale, one might contend that the prosecutor himself acts unethically in seeking to introduce into evidence a statement obtained by a police ploy.<sup>30</sup> Third, exclusion of evidence is not necessarily a suitable sanction for an ethical violation.<sup>31</sup> The customary remedy, disciplinary action by the bar, would be unavailable against a policeman and

<sup>25</sup>This provision was an alternative basis for the rule in *People v. Hobson*, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976). It was the ground for restriction of waiver in *United States v. Thomas*, 474 F.2d 110 (10th Cir.), cert. denied, 412 U.S. 932 (1973).

<sup>26</sup>*Massiah v. United States*, 377 U.S. 201, 210 (1964) (White, J., dissenting).

<sup>27</sup>*But see United States v. Springer*, 460 F.2d 1344, 1354-55 (7th Cir.) (Stevens, J., dissenting), cert. denied, 409 U.S. 873 (1972), arguing that breach of this ethical rule violates fifth amendment due process. For a holding that ethically questionable conduct violates constitutional due process, see *State v. Britton*, \_\_\_ W.Va. \_\_\_, 203 S.E.2d 462 (1974). In that case an indicted defendant, although represented by counsel, personally discussed a plea with the prosecutor in absence of his attorney. The prosecutor subsequently participated in the trial of the defendant. The court found that the conduct of the prosecutor "deprived the defendant of due process," although it did not deny him assistance of counsel, which the defendant "intelligently waived . . . during plea negotiations." *Id.* at \_\_\_, 203 S.E.2d at 465.

<sup>28</sup>*Massiah v. United States*, 377 U.S. 201, 211 (1964) (White, J., dissenting).

<sup>29</sup>*United States v. Springer*, 460 F.2d 1344, 1354 (7th Cir.) (Stevens, J., dissenting), cert. denied, 409 U.S. 873 (1972). Cf. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 95 (1957) (Municipal attorney held responsible for police who obtained written statements of claimants in a civil action against the city). The provision in DR 7-104 (A)(1) that an attorney should not "cause another to communicate" is more explicit than its predecessor in ABA CANONS OF PROFESSIONAL ETHICS No. 9, which stated that an attorney should not "in any way communicate" with a party represented by counsel.

<sup>30</sup>This argument appears in a slightly different context in *United States v. Thomas*, 474 F.2d 110, 112 (10th Cir.), cert. denied, 412 U.S. 932 (1973). See also *State v. White*, 494 S.W.2d 687, 692 (Mo. Ct. App. 1973).

<sup>31</sup>See *State v. Nicholson*, 77 Wash. 2d 415, 463 P.2d 633 (1969).

unlikely against a prosecutor;<sup>32</sup> further, disciplinary sanctions would furnish little solace to the defendant whose unethically procured statement was used to convict him. Perhaps the best argument for exclusion is that it is the only remedy of any avail to the defendant.<sup>33</sup> Even if the ethical standard applies to police as well as prosecutors and even if violation of the standard requires exclusion of evidence, there remains the problem that erroneous admission of evidence might not require reversal of conviction.<sup>34</sup> Because of this series of obstacles, ethical grounds appear less inviting than constitutional ones as a basis for restricting waiver.

### *The Form, Timing, and Scope of a Restriction*

Implementation of a restriction would require determination of the form of the rule, of the time when it is invoked, and of the range of statements covered. The most rigid rule would be that only in the presence of his lawyer could a suspect agree to undergo interrogation without the lawyer. However, this standard could prove cumbersome and conducive to delay by the defense attorney.<sup>35</sup> A more workable rule would require police to notify the lawyer of impending interrogation, affording him a reasonable opportunity to attend.<sup>36</sup> Without notice to the attorney, the defendant should be disabled from waiving assistance of counsel and submitting to questioning.

When a restriction should be invoked is as sensitive a question as whether it should be. Typically, the attorney-client relationship might develop in these steps: suspect is arrested; suspect requests counsel; counsel is retained or appointed; police learn of retention; counsel requests police not to question suspect in his absence; police agree to comply with the request. Curbing of waiver could be advocated at any point in this sequence, with the case for restriction becoming compelling at the later points.

Even at the initial stage, arrest, the thesis is tenable that no suspect should be allowed to waive the right to a lawyer until he has seen one.<sup>37</sup> Until

---

<sup>32</sup>Annot., 1 A.L.R.3d 1113 (1965) gathers disciplinary cases concerning attorneys dealing directly with adverse parties represented by counsel; in none of the cases was the disciplined attorney a prosecutor.

<sup>33</sup>See *People v. Patterson*, 39 Mich. App. 467, 482, 198 N.W.2d 175, 183 (1971) (Levin, J., dissenting), *appeal denied*, 387 Mich. 795 (1972).

<sup>34</sup>Despite findings of an ethical violation and improper admission of evidence, conviction was affirmed in *United States v. Thomas*, 474 F.2d 110 (10th Cir.), *cert. denied*, 412 U.S. 932 (1973).

<sup>35</sup>See 1968 DUKE L.J. 816, 822 (1968).

<sup>36</sup>This type of rule is prescribed in *United States v. Durham*, 475 F.2d 208, 211-12 (7th Cir. 1973).

<sup>37</sup>Prohibiting interrogation before a suspect had seen counsel, this extreme restriction might reduce the frequency of confessions. The implications of such a rule are suggested in these reflections on the role of criminal counsel:

To subject one without counsel to questioning which may and is intended to convict him, is a real peril to individual freedom. To bring in a lawyer means a real peril to solution of the crime, because, under our adversary system, he deems that his sole duty is to protect his client—guilty or innocent—and that in such a capacity he owes no du-

he has consulted with a lawyer dedicated to his interests, a suspect is unlikely to grasp the importance of keeping silent<sup>38</sup> and seeking counsel. At the next stage, request for counsel, the argument for a check on waiver is that police should not be permitted to erode<sup>39</sup> the suspect's decision to deal with them only through counsel.<sup>40</sup> After entry of a lawyer into the case, the argument against allowing waiver is that waiver presents a path for police to outflank the lawyer, circumventing an existing attorney-client relationship. Such a maneuver is incompatible with the right to counsel.<sup>41</sup> Once an attorney directs<sup>42</sup> police not to interrogate in his absence, questioning contrary to the

---

ty whatever to help society solve its crime problem. Under this conception of criminal procedure, any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.

Watts v. Indiana, 338 U.S. 49, 59 (1949) (Jackson, J., concurring).

<sup>38</sup>According to one empirical study, most suspects "seemed unable really to understand that the object of the policeman's questions was to gather evidence in order to put them in jail." Further, "a number of suspects seemed to think they could escape blame by talking to the police. . . . In most cases, the suspect succeeded only in supplying enough information to assure his own conviction." Ayres, *Confessions and the Court*, YALE ALUMNI MAGAZINE 18-20 (Dec. 1968), quoted in Y. KAMISAR, W. LAFAVE, & J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 593-94 (4th ed. 1974).

<sup>39</sup>After suspects requested counsel, police in at least one department were observed interrogating during the interval between request for and arrival of counsel. See Medalie, Zeitz & Alexander, *Custodial Police Interrogation in our Nation's Capital: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347, 1365, 1387 (1968).

<sup>40</sup>Justice White has remarked that, the "accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism." Michigan v. Mosley, 423 U.S. 95, 110 n.2 (1975) (White, J., concurring). This view contrasts sharply with the spirit of White's dissent in *Brewer*. White lamely argues that this view is not applicable in *Brewer* because defendant Williams did not himself assert his right to presence of counsel. This interpretation of the facts is questionable. White's implication that invocation of the right to counsel must be an explicit assertion is unduly formalistic in comparison to his insistence that waiver of the right to counsel need not be explicit. See *Brewer v. Williams*, 430 U.S. 387, 435, 436 n.6 (1977) (White, J., dissenting).

<sup>41</sup>"Neglect to notify counsel of a planned interrogation is as effective in preventing consultation as the physical barrier which confronted Escobedo's attorney at the jail house door." Coughlan v. United States, 391 F.2d 371, 375 (9th Cir.) (Hamley, J., dissenting), cert. denied, 393 U.S. 870 (1968). The reference is to *Escobedo v. Illinois*, 378 U.S. 478 (1964).

<sup>42</sup>Unless waiver is restricted, it is not clear that an attorney has authority to direct police not to question in his absence. If police may coax a suspect into waiver when the attorney is not present, they apparently are free to rebuff the attorney's "directions" when given. In one instance, an attorney told detectives neither he nor his client wanted the client questioned. One detective replied that they would question the suspect at headquarters. Apparently believing he must acquiesce, the attorney asked the detectives not to question the suspect too hard or too long. Questioning produced statements that were held admissible. The court found waiver by the suspect, and excused the defiance of the attorney's original instructions by noting that the right to counsel "is the defendant's right and not the right of defendant's counsel." *Lamb v. Commonwealth*, 217 Va. 307, \_\_\_\_ , 227 S.E.2d 737, 739-40 (1976). For a holding that an attorney's phone call requesting police not to interrogate the defendant required exclusion of statements subsequently obtained in the absence of counsel, see *People v. Gunner*, 15 N.Y.2d 226, 205 N.E.2d 852, 257 N.Y.S.2d 924 (1965). *Gunner*, a pre-*Miranda* decision, did not discuss the possibility of waiver, perhaps because a knowing waiver was precluded by failure of police to warn the defendant of his right to counsel. New York later adopted a restriction of waiver triggered by entry of counsel. See note 24 *supra*. The defendant may be protected if not informed of

instructions is so offensive as to constitute overreaching.<sup>43</sup>

It is submitted that waiver should be disallowed after an attorney cautions against questioning. This timing features two advantages over earlier enforcement of a restriction.<sup>44</sup> First, since police defiance of attorney instructions is an affront to the attorney and to fair play, a rule against it should provoke little public outcry; earlier prohibition of waiver might precipitate an outburst of the sort that erupted after *Miranda*.<sup>45</sup> Further, a restriction invoked when counsel enjoins questioning would be more administrable than one invoked sooner, since the earlier stages in the sequence of attorney-client involvement could be difficult to identify. The suspect's request for counsel might be ambiguous or implicit; there could be dispute over when entry of counsel occurred, and over whether and when police learned of entry. In contrast, attorney instructions not to question would likely be explicit, unam-

actions taken by an attorney retained by the defendant's family. One court held that "interrogation was made without an informed waiver" of the right to counsel when officers interrogated the prisoner without informing her "that a lawyer had called, had stated he had been retained to represent her, and had asked that she not be interrogated until her lawyer could confer with her during the next few hours." *State v. Jackson*, \_\_\_ La. \_\_\_, \_\_\_, 303 So. 2d 734, 737 (1974). See also *State v. Weedon*, \_\_\_ La. \_\_\_, 342 So. 2d 642 (1977) and the discussion in 38 LA. L. REV. 239, 248-49 (1977). If it is offensive to permit police to defy attorney instructions, it is even more so to permit them to break an agreement not to question. The state trial court in which *Brewer* originated went so far as to excuse a broken promise: "The Court . . . finds that an agreement was made between defense counsel and the police officials to the effect that the defendant was not to be questioned on the return trip to Des Moines. . . . Even if such agreement were violated, it could not be the foundation for suppression" of suspect's statements. *Iowa v. Williams*, Criminal No. 55805 (Polk County, May 6, 1969) (ruling denying motion to suppress evidence), *aff'd*, *State v. Williams*, \_\_\_ Iowa \_\_\_, 182 N.W.2d 396 (1970).

<sup>43</sup>In such circumstances, it can be argued that "failure of the authorities to call defendant's attorney" is "tantamount to a denial of a request by defendant for his attorney as articulated by the attorney." *United States v. Wedra*, 343 F. Supp. 1183, 1187 (S.D.N.Y. 1972).

<sup>44</sup>A disadvantage of this timing is that it is "a fortuitous standard upon which to build an exclusionary rule. It is dependent upon . . . the swiftness of" the attorney. 51 CORNELL L.Q. 356, 368 (1966).

<sup>45</sup>For the immediate reaction to *Miranda* see F. GRAHAM, *THE SELF-INFLICTED WOUND* 184-85 (1970). *Miranda* still draws an emotional response, as in the brief submitted by the Attorney General of Iowa in *Brewer*, asking the Court to abandon *Miranda*:

If *Miranda* is strictly applied to this case, it will make a mockery of justice.

. . . .

. . . We in the heartland of America ask this Court to reassess the situation and give a little less emphasis to rights and a little more to duty.

. . . .

. . . What is really wrong with tricking a man into telling the truth?

. . . .

. . . [A] degree of trickery or deceit. . . , prior to *Miranda*, might have been allowed. . . . Ordinarily, the innocent cannot be tricked or deceived into confessing a crime they did not commit. Nowadays, people stand up and cheer at certain tactics used by Kojac [sic], McCloud and Columbo, not to mention John Wayne who asked in *True Grit*, "How do you serve a writ on a rat?"

Let's find some substitute for excluding relevant and persuasive evidence. Let's take the handcuffs off the police and put them on the criminals.  
Brief for Petitioner at 28-35, *Brewer v. Williams*, 430 U.S. 387 (1977)

biguous and undeniably known to police.<sup>46</sup> A restriction triggered by this relatively verifiable event should provide the administrability essential to guide lower courts and to control police.<sup>47</sup>

The scope of the restriction should be confined to interrogation or other police attempts to elicit information. Spontaneous statements by accused should not be precluded, even after an attorney instructs against questioning.<sup>48</sup> When communication is initiated by the suspect rather than police, police intrusion into the attorney-client relationship is minimal and passive.<sup>49</sup> An indication of the desirability of this approach is that even state<sup>50</sup> and federal<sup>51</sup> courts and judges supporting restriction of waiver have exempted spontaneous statements.

In summary, a restriction of the recommended form, timing, and scope would operate in the following manner. After the attorney warns them not to question in his absence, police would have to notify the attorney of anticipated

---

<sup>46</sup>Even at this advanced phase, problems of proof would not disappear completely. Oral, informal instructions from the attorney should suffice, despite ensuing problems of proof. It would not be practical to require written or recorded instructions sufficient to alleviate all problems of proof. Even with written instructions, disputes could still arise, as in *United States v. Wedra*, 343 F. Supp. 1183 (S.D.N.Y. 1972). When accused was arrested in his attorney's office, the attorney handed the arresting agent a letter directing that accused not be interrogated in the attorney's absence. The attorney followed agent and accused to the agent's office, leaving only after receiving assurance that the suspect would not be questioned. Accused was subsequently interrogated by a second agent, in the presence of the first agent, who did not tell the second of the written instructions. Despite the good faith of the interrogating officer, the court labeled the interrogation deceptive and excluded the statements obtained. *Id.* at 1188.

<sup>47</sup>Consideration of timing reinforces the earlier conclusion that a restriction based on the Constitution is preferable to one based on ethics. While invocation of a constitutional restriction could be delayed until attorney instructions, invocation of an ethical restriction would be necessary earlier in the sequence of attorney involvement. Since the ethical rule prohibits communication with an opposing party represented by counsel, any restriction based on it would be imposed as soon as defense counsel entered the case. A restriction imposed so soon would be excessive and inflexible.

<sup>48</sup>Yet another drawback of the ethical basis is that it would bar police and prosecutors from receiving even statements spontaneously made by a suspect not under interrogation. Impropriety would exist in a statement initiated by the suspect in absence of his attorney, since a breach of ethics "is obviously not something which the defendant alone can waive." *United States v. Thomas*, 474 F.2d 110, 112 (10th Cir.), *cert. denied*, 412 U.S. 932 (1973). *But see State v. McConnell*, 529 S.W.2d 185, 189 (Mo. Ct. App. 1975).

<sup>49</sup>This approach would occasion factual disputes over the presence of true spontaneity. *See* note 68 *infra*.

<sup>50</sup>The New York restriction, expressed in *People v. Arthur*, 22 N.Y.2d 325, 239 N.E.2d 537, 292 N.Y.S.2d 663 (1968), was held inapplicable to spontaneous statements in *People v. Kaye*, 25 N.Y.2d 139, 144, 250 N.E.2d 329, 331, 303 N.Y.S.2d 41, 45 (1969). Although *People v. Hobson*, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976), overruled some decisions that had weakened the *Arthur* rule, it left *Kaye* intact. *See People v. Hobson*, 39 N.Y.2d at 483, 348 N.E.2d at 897, 384 N.Y.S.2d at 422. The California restriction, expressed in *People v. Isby*, 267 Cal. App. 2d 484, 73 Cal. Rptr. 294 (1968), was held inapplicable to spontaneous statements in *Griffin v. Superior Court*, 26 Cal. App. 3d 672, 701-02, 103 Cal. Rptr. 379, 397 (1972).

<sup>51</sup>*See, e.g., United States v. Durham*, 475 F.2d 208, 211 n.3 (7th Cir. 1973); *United States v. Massimo*, 432 F.2d 324, 327 (2d Cir. 1970) (Friendly, J., dissenting), *cert. denied*, 400 U.S. 1022 (1971). *But see Hancock v. White*, 378 F.2d 479, 482 (1st Cir. 1967).

interrogation, giving him a chance to appear. Should interrogation proceed without the requisite notice, the suspect could not waive. Exclusion would be the remedy for any statements obtained from such interrogation. Accused could speak spontaneously at any time, and could waive before attorney instructions against interrogation. Consequently, even with adoption of the restriction, the question what is a valid waiver would be encountered, although it would no longer be the predominant question that it is now.

#### ELEMENTS OF A VALID WAIVER

Waiver of the right to counsel assumes several forms. The most reassuring is a spontaneous statement, which courts have readily found to be a valid waiver.<sup>52</sup> But interrogation forestalls spontaneity, and in the context of interrogation criteria for a valid waiver are unsettled. A suspect facing questioning may waive by declaring expressly that he does not want a lawyer present, by signing a standard printed form, or by responding to questions.

The express declaration is the least troubling of the three methods;<sup>53</sup> it is the one most likely to indicate actual understanding that a right is being surrendered. The signed form has been treated coldly by some courts, since signing is often perfunctory.<sup>54</sup>

Response to questions is the manner of waiver that is of greatest concern. Although answering questions is a perilously easy way to abandon rights, courts have found waiver by defendants who did nothing more.<sup>55</sup> Yet these courts seemed reluctant to declare baldly that answer is in itself waiver, perhaps because of doubts that a suspect who merely replied meant to dispense with a constitutional right. The view that answer is waiver may be

---

<sup>52</sup>See, e.g., *United States v. Tucker*, 435 F.2d 1017 (9th Cir. 1970), *cert. denied*, 401 U.S. 976 (1971); *Reinke v. United States*, 405 F.2d 228 (9th Cir. 1968); *Olguin v. People*, 179 Colo. 26, 497 P.2d 1254 (1972); *State v. Hatton*, 95 Idaho 856, 522 P.2d 64 (1974); *Watson v. State*, 35 Md. App. 381, 370 A.2d 1149 (1977).

<sup>53</sup>For examples of express declaration found to be an element of a valid waiver, see *United States v. Fellabaum*, 408 F.2d 220 (7th Cir.), *cert. denied*, 396 U.S. 858 (1969); *People v. Patterson*, 39 Mich. App. 467, 198 N.W.2d 175 (1971), *appeal denied*, 387 Mich. 795 (1972).

<sup>54</sup>Speaking of Miranda's signed confession, the Court said, "The mere fact that he signed a statement which contained a typed-in clause stating that he had 'full knowledge' of his 'legal rights' does not approach the knowing and intelligent waiver required to relinquish constitutional rights." *Miranda v. Arizona*, 384 U.S. 436, 492 (1966). A signed form was disregarded in *United States ex rel. Lopez v. Zelker*, 344 F. Supp. 1050 (S.D.N.Y.), *aff'd*, 465 F.2d 1405 (2d Cir.), *cert. denied*, 409 U.S. 1049 (1972). The court relied primarily on evidence other than a signed form to find valid waiver in *United States v. Crook*, 502 F.2d 1378 (3d Cir. 1974), *cert. denied*, 419 U.S. 1123 (1975). But when a suspect signed a form and said he understood it, *United States v. Springer*, 460 F.2d 1344, 1349 (7th Cir.), *cert. denied*, 409 U.S. 873 (1972), held his actions shifted to the defense the burden of producing evidence the waiver was invalid. For discussion of the effect of signing or refusing to sign a written waiver, see ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, Commentary § 140.8, comment C at 368-70 (1975); 26 VAND. L. REV. 1069 (1973).

<sup>55</sup>See, e.g., *Blackmon v. Blackledge*, 541 F.2d 1070 (4th Cir. 1976); *Coughlan v. United States*, 391 F.2d 371 (9th Cir.), *cert. denied*, 393 U.S. 870 (1968).

irreconcilable with *Miranda*, which states that "a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained."<sup>56</sup> If this passage establishes that answer is not waiver, it sets a standard that has not been heeded.<sup>57</sup> But the passage may mean only that response does not create a presumption shifting the burden of proof regarding waiver from prosecution to defense. The ambiguous hint in *Miranda* that answer alone is not waiver is renewed implicitly in *Brewer*.

#### THE MEANING OF *BREWER V. WILLIAMS*

*Brewer* presents the problem of police seeking information from a represented suspect in a sensational setting. The defendant, Robert A. Williams, abducted a ten-year-old girl in Des Moines, Iowa, killed her, and fled 160 miles to Davenport. From there he phoned a Des Moines lawyer who advised him to surrender to Davenport police. Williams did, and was arraigned there.<sup>58</sup> Des Moines Detective Cleatus M. Leaming was sent to bring the suspect back from Davenport. Williams received five warnings of his rights to silence and counsel, from police in Davenport, the judge at the arraignment, the lawyer in Des Moines, another lawyer in Davenport and, finally, from Detective Leaming. Both lawyers told the detective not to question Williams during the drive; he was not to be questioned until he could consult with the attorney in Des Moines. The detective agreed to these terms but denied the request of the Davenport attorney to accompany his client in the police car.<sup>59</sup> During the drive, the detective alluded to an imminent snowstorm, impending darkness, and the desirability of "a Christian burial for a little girl who was snatched away . . . on Christmas [E]ve and murdered."<sup>60</sup> About two hours later<sup>61</sup> Williams, a former mental patient with religious convictions, made incriminating statements and led Leaming to the body. His subsequent murder conviction was affirmed by the Iowa Supreme Court.<sup>62</sup>

In a habeas corpus proceeding, a federal district court ruled that Williams was entitled to a new trial. That ruling was affirmed by a court of

---

<sup>56</sup>384 U.S. 436, 475 (1966). Commentators have cited other passages in *Miranda* to support their view that a valid waiver "must precede questioning." Rothblatt & Pitler, *Police Interrogation: Warnings and Waivers—Where Do We Go From Here?*, 42 NOTRE DAME LAW. 479, 489 (1967). Such a requirement would mean answer could not be waiver, since answer obviously follows question. However, the passages they cited established only that warning of rights, not waiver of them, must precede questioning. See 384 U.S. at 471, 474.

<sup>57</sup>See generally Comment, *Waiver of Rights in Police Interrogations: Miranda in the Lower Courts*, 36 U. CHI. L. REV. 413, 429-30 (1969).

<sup>58</sup>*Brewer v. Williams*, 430 U.S. 387, 390-91 (1977).

<sup>59</sup>*Id.* at 391-92.

<sup>60</sup>*Id.* at 393.

<sup>61</sup>The suspect's statements occurred "at least two hours after" those of the detective. Reply Brief of Petitioner at 7, *Brewer v. Williams*, 430 U.S. 387 (1977).

<sup>62</sup>*State v. Williams*, \_\_\_ Iowa \_\_\_, 182 N.W.2d 396 (1970)

appeals,<sup>65</sup> and by the Supreme Court. The majority found that, "Detective Leaming deliberately and designedly set out to elicit information from Williams just as surely—and perhaps more effectively than—if he had formally interrogated him."<sup>64</sup> This effort to obtain incriminating information "during Williams' isolation from his lawyers"<sup>65</sup> violated the suspect's right to counsel under *Massiah*. Nothing Williams did served to waive that right. The majority stressed that it was holding only that Williams did not waive, not that he could not waive.<sup>66</sup> Explicitly, *Brewer* sidesteps the question whether waiver should be restricted, and does not come to grips with the question whether response can be waiver. Implicitly, however, *Brewer* has significance for both questions.

The holding in *Brewer* is open to three alternative interpretations. First, answer alone can never be waiver. Second, at the later stages in the sequence of attorney-client involvement, a stronger form of waiver is required than at the earlier stages. Third, after an attorney has directed police not to interrogate in his absence and police have agreed, a defendant cannot waive.

The decision must imply something about whether answer can be waiver.<sup>67</sup> If not formal interrogation, the "Christian burial speech" was a deliberate effort to elicit information. It drew a response in that the defendant made statements and led the detective to the body. Response was the only version of waiver found by the majority, since Williams waived neither by express declaration nor by signed form.<sup>68</sup> At its narrowest, the holding is

---

<sup>65</sup>*Williams v. Brewer*, 375 F. Supp. 170 (S.D. Iowa 1974), *aff'd*, 509 F.2d 227 (8th Cir. 1975), *aff'd*, 430 U.S. 387 (1977).

<sup>64</sup>*Brewer v. Williams*, 430 U.S. 387, 399 (1977). Justice Stewart wrote the majority opinion in a 5-4 decision.

<sup>65</sup>*Id.*

<sup>66</sup>*Id.* at 405-06. Williams was convicted on retrial. Evidence of the finding of the body was admitted on the ground that the body would have been discovered inevitably by searchers, "even had the incriminating statements not been elicited from the defendant." *State v. Williams*, quoted in Y. KAMISAR, W. LAFAVE & J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 170-71 (4th ed. supplement 1978).

<sup>67</sup>*Brewer* does not address explicitly the question whether answer can be waiver. Instead, Justice Stewart's majority opinion prescribes criteria of waiver too general to give guidance. The opinion asserts that the test of waiver is not the totality of circumstances, a formula the Iowa courts applied to find defendant had waived. *Brewer* places on the prosecution a heavy burden of showing affirmative evidence of a knowing, intelligent, and intentional abandonment of the right to counsel. 430 U.S. at 402-05. Though this formula sets a high standard of proof, it does not define the elements of waiver that must be proven. 29 U. FLA. L. REV. 778 (1977) summarizes what *Brewer* says about waiver but does not consider the implications of the holding for the question whether answer can be waiver.

<sup>68</sup>For purpose of interpreting the holding, one must accept the majority finding that Williams' statements were elicited rather than spontaneous. See 430 U.S. at 399. The finding is questionable. Since Williams made the statements over an hour after the "Christian burial speech," it is arguable that the initiative of the detective in seeking information had dissipated, and that the statements were at Williams' initiative. If the statements were spontaneous, they constituted waiver. Argument along these lines is suggested in *id.* at 436 n.6 (White, J., dissenting). Justice Powell draws the opposite conclusion from the lapse of time, arguing that the hours

that this response by this defendant was not a valid waiver. Moreover, Justice Stewart's majority opinion may indicate that mere response is never waiver. As Chief Justice Burger observes in dissent, the majority does not identify the defect in the purported waiver;<sup>69</sup> the majority does not designate the waiver as being unknowing, unintelligent, or unintentional. Justice Stewart's opinion may signify that, even without such defects, response is simply insufficient to be a valid waiver. If this is the import of the opinion, it is hardly conveyed with the straightforwardness necessary to guide lower courts.<sup>70</sup>

*Brewer* may indicate not that answer can never be waiver, but rather that answer cannot be waiver in the extreme circumstances found in the case. The manner of waiver, response, was feeble. Attorney assistance, on the other hand, had been vigorous, for the attorney had secured the detective's agreement not to question Williams in the car. Thus strong attorney involvement was followed by weak waiver. The majority may well be applying a sliding scale on which the type of waiver required for validity rises with the level of attorney participation. If so, the combination in *Brewer* is quite lopsided, weighing heavily in the direction of invalidity. If *Brewer* mandates such a sliding scale analysis, lower courts are left to guess what result the Court might reach on facts combining a more convincing waiver with less intense attorney involvement.

Finally, it is possible the majority might not find any conduct of accused to constitute a valid waiver after attorney instructions against questioning and a police promise to comply. If so, there lurks within *Brewer* a restriction of waiver which the Court is unwilling to articulate, either for inability to muster majority support for such a rule or for fear of infuriating police and prosecutors. Though the majority disavows any restriction, the dissenters indignantly attribute the outcome to some sort of restriction. Chief Justice Burger suggests that a "plausible but unarticulated basis for the result reached is that once a suspect has asserted his right not to talk without the presence of an attorney, it becomes legally impossible for him to waive that right until he has seen an attorney."<sup>71</sup> According to Justice White, a "conceivable basis for the majority's holding is the implicit suggestion" that *Massiah* gives the suspect "a right not to be asked any questions in counsel's absence rather than a right not to answer any questions in counsel's absence, and that the right not to be asked questions must be waived before the ques-

in which Williams was "alone in the automobile with two police officers" contributed to the "psychological coercion" that produced the statements. *Id.* at 412 (Powell, J., concurring).

<sup>69</sup>*Id.* at 417-18 (Burger, C.J., dissenting).

<sup>70</sup>Unlike Justice Stewart, Justices Powell and White confront the question squarely. Powell<sup>1</sup> maintains there would have been valid waiver only if "Williams in fact had waived the right before the police interrogated him." *Id.* at 410 (Powell, J., concurring). If waiver must precede interrogation, response cannot be waiver. White endorses the opposite view, that answer is waiver. *See id.* at 435 n.5 (White, J., dissenting).

<sup>71</sup>*Id.* at 418-19 (Burger, C.J., dissenting).

tions are asked."<sup>72</sup> Justice Blackmun contends that the "Court is holding that *Massiah* is violated whenever police engage in any conduct, in the absence of counsel, with the subjective desire to obtain information from a suspect after arraignment."<sup>73</sup> Though these dissenters discern a restriction between the lines of the majority opinion, their perceptions differ as to its content, timing, and scope. Their divergent views of the import of the holding fairly reflect the confusion and evasion that afflict Justice Stewart's opinion. If a restriction really underlies the result in *Brewer*, the refusal to say so leaves lower courts and police to conjecture as to its operation and, indeed, its existence. One must now reckon with the possibility that the Supreme Court includes a restriction among, to use a naval metaphor, its armament. But one can only speculate whether it will be fired again only in a warning shot across the bow, as in *Brewer*, or in a broadside fired for effect.

#### CONCLUSION

The Court should have directed a broadside at the ponderous target presented in *Brewer*. The Court should have issued a forthright ruling that Williams could not have waived, rather than the bland finding that he did not waive. The detective's promise not to question offered a relatively uncontroversial setting for restriction of waiver. At the next opportunity, it should be established that accused cannot waive after counsel instructs police not to question in counsel's absence, whether or not police agree to comply. Such a restriction would set a clear standard for police and lower courts, diminish the need for ad hoc inquiry into validity of waiver, and preserve the right to counsel.

PATRICK S. BRADY

---

<sup>72</sup>*Id.* at 435-36 (White, J., dissenting).

<sup>73</sup>*Id.* at 440 (Blackmun, J., dissenting).